S. HRG. 109–1034

OVERSIGHT OF THE CIVIL RIGHTS DIVISION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

NOVEMBER 16, 2006

Serial No. J–109–120

Printed for the use of the Committee on the Judiciary

VerDate Nov 24 2008 08:28 Feb 05, 2009 Jkt 045140 PO 00000 Frm 00001 Fmt 6011 Sfmt 6011 S:\GPO\HEARINGS\44236.TXT SJUD1 PsN: CMORC

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VerDate Nov 24 2008 08:28 Feb 05, 2009 Jkt 045140 PO 00000 Frm 00002 Fmt 6019 Sfmt 6019 S:\GPO\HEARINGS\44236.TXT SJUD1 PsN: CMORC

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U.S. GOVERNMENT PRINTING OFFICE

44–236 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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OVERSIGHT OF THE CIVIL RIGHTS DIVISION

THURSDAY, NOVEMBER 16, 2006

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

The Committee met, pursuant to notice, at 9:34 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Grassley, Leahy, Kennedy, Feingold, and Schumer.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. The Judiciary Committee will now proceed with this oversight hearing on the Department of Justice Civil Rights Division. A prime responsibility of the Civil Rights Division is to oversee the Voting Rights Act, to see to it that citizens have a right to vote. We had a very major election 9 days ago where the will of the people was expressed, marking perhaps a significant change in United States policy in a number of directions. And to carry out the will of the people, obviously, the citizenry must be able to vote, and voting rights have been a source of contention and disagreement and violation for decades, going back into the last century. So these are really very, very important issues.

Beyond the voting rights aspect of civil rights are the constitutional rights of citizens in many other contexts, and one context which has been the subject of considerable controversy has been the constitutional rights of detainees at Guantanamo where we have recently had action by the Congress in eliminating habeas corpus, a legislative enactment which, in my opinion, will be overturned by the courts. But there has been a Department of Justice position taken and legal briefs filed that people subject to interrogation may not even say what techniques were used against them out of concern that al Qaeda will find out what those techniques are and train people to be able to respond and to avoid being induced to talk by those techniques. Kind of a curious situation if someone claiming a violation of rights, perhaps claiming a violation of torture, which is against U.S. law, cannot even recite what happened to the individual. When we move through the voting rights issues, which are paramount, as I say, we will be taking up some of those questions.

There has been a consistent pattern of reports in the media which raise questions as to the objectivity of the Civil Rights Divi-

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sion. There have been reports about a significant decrease of civil rights enforcement action from 85 in 1999 to 49 in 2003, and we are trying to get up-to-date statistics as to what happened in 2004 and 2005, which apparently are not available. But the media has reported that, as they put it, the permanent ranks of the Civil Rights Division have been filled with political appointees instead of the people who are career. The reports in the media have contended that Congressional aides and current and former employees familiar with the issue claim that the Department of Justice has barred career staff attorneys from offering recommendations in major voting rights cases, making a significant change in the procedures intended to insulate the career people from political considerations. Further reports in the media that the Justice Department has forced career staff to move to other divisions or to handle cases unconnected to civil rights, that the Department has discarded the established hiring practice which used a commission of career staff members to evaluate and recommend new staffers, and instead has given that responsibility to the political staff.

These are all issues which we have noted raised in the media. We look to you, Mr. Kim, for an authoritative evaluation as to underlying facts on these matters.

The media has further reported that there has been a very substantial loss in staff, about a third of the three dozen lawyers over the past 9 months. We will ask you to respond to that.

Aside from the media reports, which we take as allegations, subject to finding out the detailed facts, there have been three major decisions which suggest that the Civil Rights Division has not been doing everything that it should. There was a case where the Civil Rights Division is said to have delayed for 3 months on granting or denying preclearance to the Mississippi State court's Congressional redistricting plan, and then that plan was superseded by a Federal court's provisional plan. So that the Federal court ought not to have to step in, the Civil Rights Division ought to be making a determination on preclearance without waiting for a judicial determination.

In a second litigated case, there was an issue of granting preclearance to the mid-decennial census of the Congressional redistricting in Texas, which involved an issue of regressive dilution of Hispanic voting strength, and that matter was reversed in part this year by a Supreme Court decision.

And a third case involved the preclearance of Georgia's photo identification requirement in only 7 hours, and that determination was later enjoined on constitutional grounds by a Federal court in Georgia. So these are all matters which we want to take a close look at.

In my home town of Philadelphia, a report issued by the American Center for Voting Rights found that there was violence against Republican volunteers at polling stations by union members, that there were 15 newly registered voters determined to be deceased—a longstanding practice in Philadelphia for graveyard voting—and voter rolls with nearly the same number of voters as there were voting age adults.

I might comment briefly, when I was district attorney in 1968, the State senator physically assaulted a candidate for the State

legislature, resulting in criminal charges. In 1972, a State court judge came to work at 5:30 in the morning, signed in on the City Hall register, and issued an injunction barring poll watchers of Senator McGovern, who was running for President. And on a deal in South Philadelphia—South Philadelphia notorious for such deals—where the politicos gave the top of the ticket, President Nixon, to the Republicans and the rest of the ticket to Democrats, resulting in the prosecution of the State court judge, city councilmen, and quite a number of other people. So that Philadelphia is not alone. Some of the briefing materials relate to Missouri, and then there is always Chicago. So you have a big job, Mr. Kim.

We have been joined by our distinguished Ranking Member, not ranking for very much longer, Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. I am glad we are having this hearing on the Civil Rights Division, and I am glad that you are doing this, and, of course, having Senator Kennedy here as somebody who has had an interest in this long before you and I and Senator Grassley even came to the Senate.

For 50 years, the Civil Rights Division has been at the forefront of America's march toward equality, a march that sometimes stutters and staggers, but should be going forward. Founded in 1957, it vigorously implemented civil rights laws during the civil rights movement. Its attorneys participated in landmark cases to help transform us into what we should call a "more perfect union." These cases included successfully prosecuting the murders of civil rights workers, eliminating voter disenfranchisement laws, battling discrimination in education and government services throughout the Nation.

But there are several reports from former career attorneys that under the current administration the Civil Rights Division is retreating from its historic roots, and I am concerned that President Bush's political appointees have reversed longstanding civil rights policies and may have impeded civil rights progress.

There are disturbing reports that career lawyers have been shut out of the Division's decision making process, that the Division's civil rights enforcement on behalf of racial minorities has sharply declined, and that the Department has packed the Division with attorneys who have no background in civil rights litigation.

Just a few months ago, President Bush signed into the law the reauthorization of the Voting Rights Act, and he proudly declared, "My administration will vigorously enforce the provisions of this law, and we will defend it in court." I applauded the President for saying that, but we need to ensure that he does that. I fear that in this, as in many other instances, the administration may say one thing and do something else.

Press accounts indicate this administration used weak enforcement and partisan manipulation to undermine the Voting Rights Act in connection with last week's election. The Associated Press reports that the FBI is looking into complaints that callers tried to intimidate or confuse Democratic voters in the bitter contest between GOP Senator George Allen and Democratic challenger Jim

Webb in Virginia. In Maryland, a State where Democrats outnumber Republicans by nearly 2 to 1, sample ballots suggesting Republican Governor Robert Ehrlich and Senate candidate Michael Steele were Democrats were handed out by people who were bused in from out of State. And the Associated Press reports that these ballots were paid for by the campaigns of Mr. Ehrlich, Mr. Steele, and the Republican Party. If so, this is the kind of sleazy, sleazy thing that we might have seen a generation ago, but we should not see in America today. Perhaps most disturbing, the Arizona Republic reports in Tucson three vigilantes—one man carrying a camcorder, one holding a clipboard, and one a holstered gun—stopped Hispanic voters and questioned them outside a Tucson polling place.

The manipulation has been most evident in Section 5 preclearance. The Supreme Court repeatedly has held that covered jurisdictions have the burden to prove that voting changes will not harm minority voters, and if the jurisdiction failed to meet that burden, preclearance of the proposed electoral changes must be denied. And press reports indicate that, contrary to the law—contrary to the law—the Bush administration has turned this principle on its head and done it in the Department that is supposed to uphold the law, with no fear or favor from either political party. Political appointees endorsed redistricting plans or restrictions on the franchise in Arizona, Georgia, Texas, and Mississippi, despite the strong objections of career lawyers who expressed concerns about the potential for those plans to discriminate against minority voters.

Career attorneys in the Voting Section recommended that a Georgia law requiring a photo identification to vote not be precleared because it would reduce black voters' access to the polls and, therefore, harm minority voters. But even though the career attorneys—who are neither Republicans nor Democrats and have come in there under both administrations, even though this is what they recommended—the political appointees overruled them and approved the law. The Dallas Morning News broke a story that the Department adopted a new policy banning staff attorneys' opinions in voting rights cases. The career attorneys' "recommendation was stripped out of that document...." Now, this marked a significant change in an institution that once took pride in insulating itself from politics. I have been here with six Presidential administrations. They have always taken pride in being insulated from political pressure, the five before—President Ford, President Carter, President Reagan, former President Bush, President Clinton. Now we find it is changed. And the irony is that a majority of Republican-appointed judges on a Federal appellate court agreed with the career attorneys in the case in Georgia when they later enjoined Georgia from enforcing the law, labeling it a "poll tax." At least the Republicans in the judiciary upheld the law, unlike the political appointees of the administration and the Department of Justice who were willing to have a dark mark put on what has been historically a good record.

There is evidence that the Bush Justice Department exerted undue influence in cases that consistently favored Republicans. In a 2002 Mississippi redistricting case, the Voting Section stalled the

redistricting process for so long that a pro-Republican redistricting plan went into effect by default. In the recent Texas redistricting case, the news noted how "highly unusual" it was for political appointees to overrule career attorneys' unanimous finding that a redistricting plan put the voting rights of minority citizens at risk. And the Supreme Court, again, where seven out of nine members of the Supreme Court are Republicans, they agreed with the career attorney recommendation that the redistricting plan approved by the political appointees of the Bush administration in the Division hurt Hispanic voters in Texas and ordered them to withdraw the plan.

So all of these cases demonstrate the need for oversight at the Civil Rights Division and the restoration of the principle that partisan politics has no place in the administration of justice.

I am concerned that political ideology has harmed the Civil Rights Division's hiring practices and their ability to retain experienced litigators. In the Voting Section alone, more than 20 attorneys, representing about two-thirds of the lawyers in that section, have left in the last few years. Over a dozen have left the section in the last 15 months—the chief of the section, three deputy chiefs, many experienced trial lawyers, almost 150 years of cumulative experience.

We have to assure that the Justice Department at least is upholding its duty to protect the American people, all people, no matter who they are, no matter what their political party, no matter where they live, no matter what their color, no matter what their background, that they are protected from discrimination.

The great civil rights champion Representative John Lewis rightly noted that "American citizens have a right to know whether the Justice Department is ignoring the law and bending to the will of politics." Well, accountability is overdue.

We are glad to have you, Assistant Attorney General, back before this Committee. We also welcome the testimony of several practitioners who have served in the Civil Rights Division. We will hear from Joe Rich, a well-respected civil rights lawyer who worked at the Justice Department for 37 years. He had been the chief of their Voting Section. Ted Shaw, the current Director-Counsel and President of the NAACP Legal Defense Fund, began his career as a trial attorney in the Civil Rights Division.

So, Mr. Chairman, I know I have gone over time, but I think this is extremely important. I am very concerned. I think that we—and I would have the same concern if this were happening under a Democratic administration. We should not have politics in this branch, or in any branch of the Justice Department, especially this one.

Thank you.

Chairman SPECTER. Thank you, Senator Leahy.

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

Senator Grassley, would you care to make an opening statement?

Senator GRASSLEY. No. Thank you.

Chairman SPECTER. Senator Kennedy, thank you for your leadership in this field, and we turn to you for an opening statement.

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

Senator KENNEDY. Thank you, and I will just take a moment.

I want to thank you, Senator Specter, for having this hearing. I remember when we talked after that rather extensive report in the Washington Post. In my own State of Massachusetts the Boston Globe, Charlie Savage did a very extensive and thoughtful analysis also about the direction of the Civil Rights Division of the Justice Department and pointing out a number of these concerns. And I know that you have scheduled this hearing a number of different times, but we are very, very grateful that you have been willing to set this hearing today because it is of great importance.

Mr. Kim, we want to welcome you. I think you have got the sense from these opening statements of our strong belief on this Committee that we need a Justice Department Civil Rights Division that is going to be beyond reproach in terms of its neutrality and its commitment to enforcing the law. This has been, I think, the key and defining aspect of the last really 50 years of our march toward progress in knocking down walls of discrimination, and this particular agency has just been in the forefront of that, and they have done it with career attorneys that have taken great pride, enormous successful, talented individuals that could have gone to the finest firms in America and done exceedingly well. But their strong commitment to this legislation and the concern, as others have pointed out, about how their professional aspirations have been overridden, and the general kind of lack of enforcement that I think that we have seen in Title VII, which is so important. We acknowledge that there has been an expansion in some of the areas of criminal prosecutions, but in the core aspects of this, whether it has been in the hiring, the consideration of political considerations, and the judgments and decisions of the Department, enforcement under Title VII provisions, are all matters of great importance and consequence. We know we have brought these matters to your attention. We are interested in hearing your response, and we would like to work with you on these issues even after this hearing to try and achieve what I am sure you are committed to, and that is, a Department that is going to carry forward what has been debated, discussed, passed in the Congress, signed by the President into law, and is really, hopefully, the birthright of all Americans.

Thank you, Mr. Chairman.

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

Chairman SPECTER. Thank you very much, Senator Kennedy.

We welcome you here, Assistant Attorney General Kim.

Mr. Kim has been in this position for a little more than a year—November 9, of last year, sworn into office. He is a graduate of the University of Chicago Law School with honors, a bachelor's degree from Johns Hopkins University—

Senator FEINGOLD. Mr. Chairman, I wonder if I might have an opportunity to make an opening statement.

Chairman SPECTER. Let me finish the introduction and with your arrival we will turn to you, Senator Feingold.

A bachelor's degree from Johns Hopkins University in economics. Prior to his nomination as Assistant Attorney General for the Civil

Rights Division, he served as Deputy Assistant Attorney General. He has been an Assistant United States Attorney for the District of Columbia, a law clerk to Circuit Court Judge James Buckley, and a rifle platoon leader in the U.S. Army Reserve. Phi Beta Kappa, associate editor of the Law Review at the University of Chicago Law School.

Senator Feingold, do you care to make an opening statement?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Yes, Mr. Chairman, thank you. Thank you for calling this hearing. I understand this is not only the first oversight hearing since Mr. Kim took over the Civil Rights Division about a year ago, but it is also the first oversight hearing of the Division that this Committee has held since May 2002.

For the separation of powers designed by the Framers to work, we in the legislative branch need to take our oversight authority seriously. While this hearing is a good first step, it is just a first step. It is clear that the Civil Rights Division of the Department of Justice requires our attention and that one hearing will not suffice. So I applaud you, Mr. Chairman, for holding this hearing, and I look forward to much more oversight in the next Congress.

The DOJ Civil Rights Division holds a place of special importance in our Federal Government. Created in 1957, it is charged with ensuring that the ideals of freedom and equality that have distinguished our country since its founding are realities for all citizens.

While the structure of our civil rights laws provides for individual citizens to operate as private attorneys general, it, of course, often does fall to the Department of Justice to litigate the most difficult cases. In order to protect the rights of all Americans, the Department of Justice must be open to developing new litigation theories and strategies and to taking on cases that are too complex to rely on private enforcement. We depend on the Department to be the leader in civil rights enforcement. Fulfilling this role means the Department must sometimes pursue cases that are not guaranteed or are not easy victories.

Today, and continuing next year, we will consider whether the Civil Rights Division is living up to this charge. The core responsibilities of the Division lie in its enforcement of the civil rights laws, which prohibit discrimination in education, employment, housing, voting, lending, policing, and institutionalization. It is essential that the Civil Rights Division continue to give these responsibilities priority, even as it finds itself taking on additional areas of enforcement, such as immigration and trafficking.

I am concerned at what seem to be clear signs that the DOJ has not found a way to do this and has instead concentrated too heavily on a few things to the detriment of many others.

I mentioned that voting rights is a core responsibility of the Division. The just completed elections revealed far too many instances of what appear to be intentional efforts to suppress or intimidate voters. This is a serious problem that requires the Department's serious attention. It is not "just politics." If voters lose faith in elec-

tions, they will lose faith in their Government. It is as simple as that. I hope we can all agree that we cannot let that happen.

I just want to say to Mr. Kim that oversight need not be something for the Division to fear or resist. A cooperative relationship between the Congress and the executive branch can make Government more responsive to the people and more trusted as it carries out its work. Particularly in the area of civil rights, we should all be on the same side. If we work together, we can communicate better than we have in the past several years, and Congress can make sure that adequate funding and direction is available for the very important work you are expected to do.

Thank you, Mr. Chairman.

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

Chairman SPECTER. Thank you, Senator Feingold.

Welcome again, Mr. Kim, and we turn to you for your opening statement.

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

Mr. KIM. Thank you, Mr. Chairman, and I appreciate the presence of you, Ranking Member Leahy, and many other distinguished members of the Committee, and certainly I share your appeal and your interest in oversight. The time I spent working on the Senate Judiciary Committee gave me a deep and abiding respect for this Committee and the work that it does in making sure that all branches of Government are operating consistent with the law. It is my pleasure to appear before you today.

I have served as Assistant Attorney General for the Civil Rights Division for almost exactly 1 year now. I am honored to serve President Bush, Attorney General Gonzales, and the professionals of the Civil Rights Division in this capacity. I am pleased to report that the past year was full of outstanding accomplishments in the Civil Rights Division, one in which we obtained many record levels of enforcement. I am proud of the professional attorneys and staff in the Division whose talents, dedication, and hard work made these accomplishments possible. My prepared written statement details the accomplishment of each section of the Division, and I will only address portions of it here. Mr. Chairman, I would ask that the entirety of my prepared statement be placed into the record.

I will take just a brief opportunity to highlight some of the Division's more notable accomplishments during the past year.

The Voting Section has filed 17 new lawsuits this year, more than doubling the average number of lawsuits filed during the preceding 30 years. Just last week, we successfully mounted the largest election-monitoring effort ever conducted by the Department of Justice for a midterm election. Earlier this year, the administration strongly supported passage of the voting rights reauthorization legislation. Last year, we obtained a record number of convictions in the prosecution of human-trafficking crimes—deplorable offenses of fear, force, and violence that disproportionately affect minorities and women.

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

Last year, the Housing and Civil Enforcement Section filed more cases alleging sexual harassment in violation of the Fair Housing Act than in any year in history. Last year, pursuant to the Attorney General's Operation Home Sweet Home Initiative, the Housing and Civil Enforcement Section conducted significantly more tests to ensure compliance with the Fair Housing Act, and we are working to achieve an all-time number of such tests this year.

Last year, the Disability Rights Section obtained the highest success rate to date in mediating complaints brought under the Americans with Disabilities Act. In the past 6 years, the Disability Rights Section has reached more than 80 percent of the agreements obtained with State and local governments under Project Civic Access, a program that has made cities more accessible and made lives better for more than 3 million Americans with disabilities.

In the past 6 years, we have ensured the integrity of law enforcement by more than tripling the number of agreements reached with police departments across the country and convicting 50 percent more law enforcement officials for willful misconduct, such as the use of excessive force, as compared to the previous 6 years.

Before I close, I would like to note that the Division will be celebrating its 50th anniversary next year. And as this milestone draws near, I have reflected upon the work of the Division not only during my short time of service but over the past half-century.

Since our inception in 1957, the Division has accomplished a great deal, and we have much to be proud of—sentiments that were echoed by many of the members of this Committee. While citizens of all colors, from every background, living in all pockets of the country—North and South, rural and urban—have seen gains made on the civil rights front, one need not look back very far to recall a far different landscape. This point was made more vivid for me when I had the opportunity to travel with Attorney General Gonzales to Birmingham, Alabama earlier this year. We were there to attend the dedication of the 16th Street Baptist Church as a National Historic Landmark. In 1963, racists threw a bomb into this historically black church, killing four little girls who were attending Sunday school. Horrific incidents like this sparked the passage of the Civil Rights Act of 1964—the most comprehensive piece of civil rights legislation passed by Congress since Reconstruction. While much has been achieved under that piece of legislation and other civil rights laws passed by Congress since then, the Division's daily work demonstrates that discrimination still exists in our country. And so our work continues.

Thank you, Mr. Chairman, thank you, members of the Committee, for the opportunity to appear here before you today. I look forward to hearing your thoughts and to answering your questions.

Chairman SPECTER. Thank you very much, Mr. Kim. We will now proceed to questions by the Senators with rounds being 5 minutes in duration.

Mr. Kim, last year when you were here, you were asked about the Georgia State voting law requiring identification for a $20 fee,

and at that time you responded that you were not a part of the decision. What has happened with that matter, as you see it?

Mr. KIM. Senator, that preclearance decision was made in August of 2005. Since that preclearance decision was made, the State of Georgia amended that law, and it amended the law in two significant—well, three significant ways. The first way was it made all photo identification cards completely free to the person who needed it. Second, it increased the number of venues by which a person who did not have an identification card could—

Chairman SPECTER. Mr. Kim, come to the point about the Federal court declared the Georgia photo identification—it was enjoined on constitutional grounds. What was the essence of that judicial decision?

Mr. KIM. Sir, it was enjoined several different times by several different courts. The most recent ruling is that it was enjoined by a federal district court on equal protection grounds, I believe, 14th Amendment issues.

Chairman SPECTER. How do you account for the judicial decision striking down the judgment of the Civil Rights Division?

Mr. KIM. It did not strike down the judgment of the Civil Rights Division, with respect, Senator. What it did was it ruled that it was unconstitutional, and it is important to understand—and this is a point that is glossed over by the media—that the Civil Rights Division—

Chairman SPECTER. Hadn't the Civil Rights Division approved the—

Mr. KIM. Yes, sir, but the point that I am trying to make, Mr. Chairman, is that under Section 5 review, as delineated by the Supreme Court of the United States, constitutional considerations may not be measured in a Section 5 retrogression analysis. The Section 5 retrogression analysis, as defined by the Supreme Court, excludes constitutional considerations. So even—

Chairman SPECTER. Has to exclude—

Mr. KIM. Yes, sir.

Chairman SPECTER [CONTINUING]. Constitutional considerations?

Mr. KIM. That is correct. The Section 5—

Chairman SPECTER. So if the Department of Justice thinks it is unconstitutional, they may not consider that but have to grant preclearance in any event?

Mr. KIM. Yes, sir, unless it is retrogressive. If it is retrogressive and unconstitutional, then obviously we would issue an objection. But if it is not—

Chairman SPECTER. If it is not retrogressive but it is unconstitutional, you can approve it?

Mr. KIM. Yes, sir. And, in fact, under—

Chairman SPECTER. That does not make much sense, does it?

Mr. KIM. Senator, that is a decision of the Supreme Court, and we respect that decision.

Chairman SPECTER. Well, we can modify the statute. We have the authority to do that.

Mr. KIM. Yes, sir, you do. In fact, the Supreme Court issued another ruling in the late 1990's—

Chairman SPECTER. Well, we will take a close look at that. It does not sound sensible that the Civil Rights Division would not be

able to consider unconstitutionality in granting preclearance. But let me move on to the issue of staffing.

When you testified last year, you said that you prided yourself on maintaining a cohesive congenial staff. Is it true that there has been a one-third turnover in the staff in the last 9 months?

Mr. KIM. I do not believe that is correct, Senator. I mean, I—

Chairman SPECTER. Well, what is correct?

Mr. KIM. I believe the attrition rate this year and historically has been approximately 13 percent, and that is true of the past 12 years. I have seen many reports of a flood of attorneys leaving and—

Chairman SPECTER. So the reports are incorrect which specify that a third of your—36 lawyers have turned over in the last 9 months?

Mr. KIM. I am not sure which 36 lawyers—the Division has approximately 350 lawyers, Senator, and the Division attrition rate for the past 12 years has been about the same historically over that past 12-year period, and that is, approximately 12 or 13 percent of our attorneys leave each year.

Chairman SPECTER. Mr. Kim, is it accurate that the Civil Rights Division had used a commission of professional career people, to make decisions on hiring and that that has now been changed, that the Department of Justice has discarded the existing hiring procedure which used a commission of career staff members to evaluate and recommend new staffers, and instead that hiring responsibility is now handled by the political staff?

Mr. KIM. That is partially true, Senator, and if I could explain. There are two methods—

Chairman SPECTER. Tell me which part is true.

Mr. KIM. OK. The part is true that our program for hiring attorneys to the Honors Program has changed, and it was changed by order of the Attorney General in 2002 to make it consistent with the rest of the Department. The process for hiring attorneys, as I understand it, was never governed by a central hiring committee. That was always governed by section chiefs working in conjunction with the Assistant Attorney General's office, and that is the way that the bulk of attorneys are hired in the Division. That process has always included the interplay, as I understand it, of career section chiefs and leadership of the office of the Assistant Attorney General, and that is the way it remains today.

Chairman SPECTER. Mr. Kim, is there any substance to these repeated media reports that the career staffers have been transferred and that the career staffers have not had their views taken into account and they have been superseded by political appointees?

Mr. KIM. Well, Senator, I believe that there were well-publicized accounts in the past of some decisions where there were disagreements. I can tell you that the way I manage the Division and my approach has always been one of inclusion. I think that people, if I disagree with them, have a very fair basis for understanding the reasoned basis for my disagreement, and I am not aware of many instances at all where I have disagreed with recommendations, although I have questioned them and I have probed, and I believe that is my job to do so. But the decisions that have been brought to bear are decisions that were made before I came here. And, by

the way, I am not quarreling with the accuracy of the decisions. I have no reason to believe those decisions were incorrect. But I believe in any job where you have a bunch of lawyers who are highly intelligent discussing legal issues, there are going to be disagreements at times. And I think the onus of making the final decision is on the person who has to appear before this Committee, is charged with the responsibility of management, and has to account for the decision made.

Chairman SPECTER. Senator Kennedy. Pardon me. Senator Leahy.

Senator LEAHY. We Irish all look alike.

Mr. Kim, one of the things I have enjoyed the most in being a U.S. Senator, I have been asked by both Republican and Democratic administrations to go and be an election observer in other countries when people are basically given the first chance in an open election. I remember one when I went out at 1:30 in the morning, and I just could not sleep. I was in a very noisy town. I took my camera and thought I would go out and take some night shots. And I came by a couple of polling booths, and there were long lines already there. Some people had walked for a day to get there.

By 10 o'clock that morning, there was nobody there because every single person on the checklist had voted. And I asked several of them through a translator why, and they said they had heard from their grandparents when they had a chance to vote, and now they were getting the chance themselves to vote for the first time in their lives and they wanted to be there. And the vote is such a really—it is the absolute most important thing in democracy.

I hear about so many candidates and political parties trying to interfere or intimidate people so they will not vote. According to press accounts, right-wing radio host Laura Ingraham had urged listeners of her radio show to jam a phone line set up by Democrats to investigate alleged voting irregularities. She told her listeners, "Everybody call that voting line all at the same time," and basically make it inoperative. Is that something that your Division investigates?

Mr. KIM. Senator, that is a very good question, and I share your concern about any sort of dirty trick or scheme to tell people not to vote or have people not vote, because I agree with you that voting is the essence of our society, our democratic society, and everyone who can vote should get out there and vote on election days.

Historically within the Department of Justice, we have divided responsibilities between the Civil Rights Division to enforce voter access and the Criminal Division to police voter fraud and voter fraud schemes like the one you mentioned. For example, it is the Criminal Division that has spearheaded—

Senator LEAHY. Voter access, but if you are jamming the things that enable voter access, does that come under your—

Mr. KIM. No, Senator. An example I might give is the New Hampshire case where there were some phone-jamming schemes that would prevent people from getting to the polls, that is typically policed by the Criminal Division and the Public Integrity Section.

Senator LEAHY. Well, let me ask you about that. Three people have been convicted in that phone-jamming, including two high-ranking Republican officials and a Republican business person who ran a company called GOP Marketplace and another has been indicted. But at the trial, it turned out that 115 outgoing phone calls in connection with this were made from the White House, the office then headed by outgoing Republican National Committee Chairman Ken Mehlman. Is that going to be investigated?

Mr. KIM. Senator, I am not aware of that. It does not fall within my jurisdiction. But I will certainly communicate that question to the head of the Criminal Division.

Senator LEAHY. Well, last week, as I discussed earlier, Republican leaders in Maryland have now admitted that part of the election day strategy was to bus in hundreds of poor African-Americans from Philadelphia to hand out misleading fliers in African-American communities in Maryland. These fliers falsely suggested that prominent African-American Democrats supported the Republican candidates for the U.S. Senate and for Governor.

Does the Justice Department have a role in looking at things like that?

Mr. KIM. Senator, I do believe the Justice Department does have a role in policing the Federal laws that would prohibit that type of behavior, and, again, that type of conduct would fall within the rubric of the Criminal Division and it has historically been so.

Senator LEAHY. Do you know whether they are?

Mr. KIM. Senator, I do not know, but that is something I certainly will take back and follow up on.

Senator LEAHY. We understand the FBI is investigating allegations in Virginia that many voters in heavily Democratic precincts received calls directing them to the wrong polling sites or giving them false information about their eligibility to vote or even encouraging them not to vote on election day. In the 9th precinct in Tucson, Arizona, as I mentioned, the vigilantes, the gun, the clipboard, the camcorder, stopping Latino voters.

Does this come under your jurisdiction?

Mr. KIM. Senator, it does not. It falls within the jurisdiction of the Criminal Division, and it is something that I will personally communicate with the folks in the Criminal Division to make sure that they understand your concerns and they police the criminal laws that prohibit such behavior.

Senator LEAHY. Well, let me ask you another one. Senator Kennedy and I sent the Attorney General a letter on October 20th about the activities of Tan Nguyen, a Republican Congressional candidate. He sent out 73,000 letters, letters to 73,000 households with misinformation about voting requirements. Everybody admitted, both Republicans and Democrats, that this was designed to suppress Latino voter turnout. And he finally admitted his campaign was involved.

The Justice Department, in a rare occurrence of actually responding to one of our letters, stated that it had launched an investigation. Do you have any idea what the status of that investigation is.

Mr. KIM. Senator, I can tell you and I can assure you that that investigation is ongoing and that we are working closely with the California Attorney General's office on that very issue.

Senator LEAHY. And then, last—if I might, Mr. Chairman?

Chairman SPECTER. Of course.

Senator LEAHY. I am worried, as I said earlier, that the Civil Rights Division find their permanent ranks being filled with lawyers with strong political backgrounds but little civil rights experience. Career jobs in the Civil Rights Division have been handled by—in recent administrations, both Democratic and Republican, they have been handled by civil servants, not by political appointees. According to the Boston Globe, in fall 2002 then-Attorney General John Ashcroft changed the procedures. The Civil Rights Division disbanded the hiring committees made up of veteran career lawyers, and since 2003, the administration changed the rules to give political appointees more influence in the hiring process.

Why was the career lawyer hiring Committee done away with? Why are we having now political or ideological considerations overtake career and competent considerations?

Mr. KIM. Senator, I do not hire people based on ideological considerations. I hire people based on their talent, their excellence, and their commitment to the work that we do in the Department of Justice Civil Rights Division.

With respect to the question that you posed directly, there was a career hiring Committee that was formed for some time, I understand, with respect to Honors Program hires, not with respect to every person hired in the Civil Rights Division. There was a distinction between lateral attorney hires, which formed the bulk of the hires in the Civil Rights Division, and Honors Program hires. Honors Program hires are people such as me, when I was hired out of my clerkship, to join the Criminal Division back in the early 1990s.

In a typical year, we will hire eight, nine, or ten people through the Honors Program, and we hire the bulk of our hires through lateral hiring.

Now, it is my understanding that in the Civil Rights Division there was never a centralized committee formed to hire lateral attorneys, the bulk of attorneys hired in the Civil Rights Division. With respect to the Honors Program, Attorney General Ashcroft in 2002, as I understand it, centralized the process for hiring Honors Program attorneys throughout the Department, and he did so in a manner which involved the participation of both political appointees and career attorneys. And we are now in the process of hiring Honors Program attorneys throughout the Department, and I can assure you—

Senator LEAHY. Well, the reason I ask, on July 23rd, the Boston Globe article said that only 19 of the 45 lawyers hired in the Division's Voting, Employment, Litigation, and Appellate Sections since 2003 had any experience in civil rights laws; nine gained their experience by defending employers against discrimination lawsuits or by fighting against race-conscious policies; but that lawyers hired with conservative credentials, membership in the Republican National Lawyers Association, the Federalist Society have risen

sharply. Are you saying ideology is not a factor in the hiring process at the Civil Rights Division?

Mr. KIM. Senator, ideology is not a factor in my hiring process. I will also say that the Boston Globe article only compared people hired during this administration. I mean, the only people that it looked at were people hired throughout this administration, and we have hired people from all ideologies, from all backgrounds in this administration, and I make you that pledge. When I look at a candidate, there are three things that I measure when I evaluate whether he should be hired in the Civil Rights Division or she should be hired in the Civil Rights Division: whether they have a demonstrated record of excellence, whether they are talented lawyers consistent with that excellent record, and whether they share a commitment to the work that we do in the Division. And we hire people from all types of backgrounds, and I hire people from all types of backgrounds, and that is a commitment I make to you today.

Senator LEAHY. Well, Mr. Kim, I will submit my other questions for the record, and I suspect during the coming year I will still be on this Committee, and I suspect we will probably chat some more.

Mr. KIM. Mr. Chairman, I appreciate the opportunity to appear before you.

Senator LEAHY. Thank you.

Chairman SPECTER. It sounds like a well-founded suspicion to me, Senator Leahy.

[Laughter.]

Chairman SPECTER. Just a few more questions, Mr. Kim.

Mr. KIM. Yes, sir.

Chairman SPECTER. The Civil Rights Division, charged with upholding constitutional rights, they have a little different perspective than other branches of the Department of Justice, certainly a different perspective than the Department of Defense. We have had the decision by the Supreme Court of the United States in *Hamdan* that detainees, aliens, noncitizens do have constitutional rights under habeas corpus, and we do have laws against torture, which are firm, and the administration has been explicit in articulating its policies to respect those laws.

Now you have a situation where Congress has stricken the habeas corpus provisions of the law, inexplicable in my legal judgment in the face of the constitutional provision that you can suspend habeas corpus only in the time of an invasion or rebellion. There is a contention, I think a flimsy contention, that the procedures to have the Combatant Status Review Tribunal take a look at what has happened and then an appeal to the Court of Appeals for the District of Columbia as a substitute for habeas corpus seems so transparent as hardly to be worth analysis.

But the Combatant Status Review Tribunal does not look at what has happened to the detainees. The determinations of enemy combatant status have been characterized as being "laughable." In one Federal court decision, which I cited in the floor agreement, an individual was claimed as associating with al Qaeda and asked, "Whom was I supposed to have associated with? What is the name of the person?" And nobody could provide the name. According to the report in Fed. Supp. the Federal judge wrote, it produced

laughter in the courtroom to hear a man was charged with being an al Qaeda associate and nobody could tell him whom he was supposed to have associated with.

Now you have the Department of Justice filing briefs saying that someone who claims that he has been tortured cannot say what has happened to him on the ground that if the interrogation techniques are disclosed, al Qaeda will find out what they are and will be able to precondition their people to withstand those kinds of interrogation techniques.

How can that possibly be a tenable position, Mr. Kim, if somebody cannot raise a claim of torture, if he cannot describe what has happened to him?

Mr. KIM. Senator, Mr. Chairman, as a former prosecutor facing two former prosecutors, I know that ignorance of the law is not a defense. That being said, this is an issue that has been assigned to other component heads at the Department of Justice. It is not one that has been vested within the Civil Rights Division.

I know that you have heard many times from the Attorney General on this issue, from the head of the Office of Legal Counsel on this issue. I also know that the head of the Civil Division has been deeply enmeshed in this issue. It is not an issue that I am familiar with sufficiently to address it today.

Chairman SPECTER. Well, why is that, Mr. Kim? I think by the definition of the Civil Rights Division primary responsibility should fall to you. You have the specialized responsibility to handle civil rights.

Mr. KIM. Senator, I do, and I enforce the laws that have been committed to the jurisdiction of the Civil Rights Division by the Attorney General or especially assigned to the Civil Rights Division by Congress.

Chairman SPECTER. Well, has the Attorney General told you to stay out of that field?

Mr. KIM. No, sir. No, sir.

Chairman SPECTER. Well, then, why don't you get into that field?

Mr. KIM. Senator, if the Attorney General asks my advice on an issue, I certainly will provide it to the best of my ability.

Chairman SPECTER. Well, I am asking you for your advice.

Mr. KIM. Senator, I am not in a position to differ with the position of the administration today. I simply am not well versed enough in the issue. I have not been steeped enough in the issue. I know this—

Chairman SPECTER. Well, how well versed do you have to be if somebody makes an allegation of torture, which is against the law of the United States, and is not permitted to say what happened to him?

Mr. KIM. Senator—

Chairman SPECTER. I think that is a question for an eighth grader.

Mr. KIM. Senator, I know that this has been an issue that has come up before the Committee many times. I know that other members of the Department of Justice have spoken on this issue. And I also understand that this has been a live policy debate.

Chairman SPECTER. Well, that question is really a very, very fundamental one, and unless the men in charge of civil rights, like

you, Assistant Attorney General Kim, are willing to tackle it or at least give some sort of a response to the Judiciary Committee, I do not see how we can tolerate that as an administration position. But we have had a whole series of cases by the Supreme Court where the Court has had to say to the President, "You do not have a blank check." And when you take away habeas corpus in the Detainee Act of 2005, they brushed it aside without even an analysis. The administration ought not to have to wait for the Supreme Court to tell it what is obvious constitutional law, Mr. Kim.

Senator Leahy, do you have further questions?

Senator LEAHY. No. I will submit mine for the record, but I am going to want to follow up on this with you, Mr. Kim. We go back and forth, and I realize the difference between the Criminal Division and Civil Rights Division. But I have found, and I know the Chairman found, when we were prosecutors, if you had something that was being done wrong and suddenly people realized that they may end up in the slammer for it, that was an incentive to change. And if people are being intimidated from voting, whether they are Republicans or Democrats being intimidated, to the extent that people can be prosecuted, have to face criminal charges as well as whatever appropriate civil charges, but certainly criminal charges, I think we have to do that.

It is discouraging enough that in this, the freest country in the world, that we have such a distressingly low number of people who vote. Now, maybe that is part of the problem with those of us who run for office, but I think that then to put barriers in front of people who want to vote is just awful.

So we will continue the discussion because I think some well-placed prosecutions of a few people that might be facing severe penalties in a criminal court, that word gets around pretty quickly.

Thank you.

Chairman SPECTER. Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman, and thank you for having this hearing. And I want to thank you, Mr. Kim, for coming.

Let me just say that I am here to talk about something that Patrick Leahy mentioned as well, which is what happened in these elections, which is happening all too much, and that is, just blatantly despicable practices which discourage people from voting by trickery and other things. And it is unfortunate that we have overlooked this for too long in terms of oversight, and I think we have to get working on it. It is particularly unfortunate because the work of the Civil Rights Division is so important.

So this election, as I said, was marred by many instances of misleading, threatening, and downright criminal behavior that should have no place in our democracy. Things like this get at the well spring of our democracy. And when somebody calls up and says, "Your polling place has been changed," and just one party, the Democratic registered voters were called, the person who does that should go to jail for a long period of time. The person who organized that should go to jail for a long period of time. It just burns me.

And this has happened in several elections, and while maybe there are instances of Democrats doing it, there have been many more instances of Republicans doing it. I do not want to inject that,

except that is the facts. And I am not saying it is the mainstream Republican Party, but it is somebody out there who is doing it. Let me give you some examples.

In Maryland, people from out of State were bused in to distribute sample ballots that suggested that the two Republican candidates are Democrats. This flier, let me show it to you, sir: "The Ehrlich-Steele Democrats Official Voter Guide," and then lists three Democrats, including Kweisi Mfume, and says, "These are our choices."

And this was not just some local group that did it because it was a group of people bused in from Pennsylvania to give these out. That is not just—that is beyond the First Amendment. That would be political libel in the highest sense, and I think it ought to be, if it is not now, there ought to be a criminal penalty.

In Arizona, three men were observed intimidating Hispanic voters by stopping and questioning them outside a polling place.

In Virginia, the FBI is now investigating telephone calls that falsely told voters they were not registered and would face criminal charges for going to their polling place.

The list goes on and on. I mentioned the one where they called up and said, "Your voting place has been moved." There were reports that in the 2004 election Democrats in inner-city Pittsburgh were called and told, "If you are a Democrat"—or voters were called and said, "If you are Democrat, you are going to vote Wednesday; if you are a Republican, vote Tuesday."

So these examples of voter intimidation and voter deception are disgusting. That is how I feel. They turn my stomach, preying on the poorest of people. The one little bit of power that we give them is the right to vote. And they are being trifled with, played with. So here are some points I would like to ask you in reference to this.

First, I hope the Department of Justice is acting speedily to investigate and address all of these incidents. It is my understanding that the Civil Rights Division protects voter access to the ballot and the Criminal Division enforces Federal election fraud statutes. That is correct, isn't it?

Mr. KIM. That is correct, Senator.

Senator SCHUMER. Thank you. The events of this midterm elections and many elections past make me think that the line between voting access and voting integrity can be difficult to draw, but let me find out what you are doing about this decision. So here are my questions.

First, how many attorneys in your Division are addressing the misleading ballots passed out in Maryland? Are any?

Mr. KIM. Senator, I believe that is being investigated by the Criminal Division. I am not 100 percent sure about that. I am certainly aware of—

Senator SCHUMER. No one in the Civil Rights Division?

Mr. KIM. Senator, the Civil Rights Division certainly has knowledge of it, but we, again, have tried to respect the line between the criminal enforcement and the civil access under the Voting Rights Act and the other acts that we enforce.

For example, Senator, just to follow up on that point for a second, we send out some 900 monitors and observers on election day, and they have to be able to work through some of these problems on election day.

Senator SCHUMER. Did they find these?

Mr. KIM. Senator, I am not aware. I have not—

Senator SCHUMER. Well, sir, those answers are not good enough. This was notorious. It was reported in all the newspapers. It affects the well spring of democracy. For you not to be aware of whether something is going on in either your Division or the Criminal Division. Can you find out and call me this afternoon?

Mr. KIM. Yes, sir.

Senator SCHUMER. Thank you. I would like to know how many attorneys in your Division or in the Criminal Division are addressing the misleading ballots passed out in Maryland. As I said, this was not just one person somewhere doing it. This was a large operation.

And, again, the same I would like to know—I guess you do not know—how many attorneys are addressing the Arizona situation? Are you familiar with that?

Mr. KIM. Senator, I know that on election day many of our observers were in Arizona, and they were able to ward off some of those problems by communicating with State and local officials.

Senator SCHUMER. But how about investigating the people who do it? The only way this is going to stop, sir, is when some people get some jail time.

Mr. KIM. Senator, I will followup with you on that.

Senator SCHUMER. OK. Overall, how many Civil Rights Division attorneys are assigned to address these kinds of tactics that occurred during the midterm election?

Mr. KIM. Senator, I will tell you that on election day—

Senator SCHUMER. No, no. I am asking now, followup.

Mr. KIM. Oh, Senator, I—

Senator SCHUMER. Because you did not prevent them all, obviously.

Mr. KIM. That is true, Senator. With respect to followup activities, I know that many Voting Section attorneys are in the process of gathering information of complaints that we received on election day, as well as debriefing the monitors and observers who were out—

Senator SCHUMER. I would just—I am not asking you to come to a conclusion yet. I am asking you how many attorneys—is it one? Is it five? Is it 20? Can you get me an answer this afternoon—in your Division are investigating this right now?

Mr. KIM. Yes, sir.

Senator SCHUMER. OK. Thank you.

Now, are attorneys from your Division communicating with attorneys in the Criminal Division who work on voting problems?

Mr. KIM. Yes, sir, they are.

Senator SCHUMER. OK.

Mr. KIM. There is a constant communication between our attorneys and—

Senator SCHUMER. OK. And who is ultimately responsible to protect the right to vote in America? Is it the Civil Rights Division or the Criminal Division? Where is the line? Because all too often we have had a little bit of Abbott and Costello where each Division sort of points to the other.

Mr. KIM. Senator, it depends on the statute. We do not enforce any criminal statutes with respect to voting.

Senator SCHUMER. Understood. But you can investigate?

Chairman SPECTER. Senator, you are 2 minutes over. How much longer—

Senator SCHUMER. I would say another 5 minutes, sir. This is important to me. I will ask for a second round and wait, if you would like to do that.

Chairman SPECTER. Well, this is the second round. We have already had a second round. All right. Proceed.

Senator SCHUMER. Thank you.

I understand that when it is a criminal case, it is the Criminal Division. I also understand that in all kinds of instances, there is cooperation.

Mr. KIM. Yes.

Senator SCHUMER. If it is a criminal antitrust violation, it may start in the Antitrust Division and then be referred. So I would like to know the line here because it seems to me that when I try to delegate a job even to my much smaller staff than yours, I give the responsibility to one person. And it seems to me that the Civil Rights Division should be the one that is passionate about voting rights. They may make referrals to the Criminal Division, but the Criminal Division is covering everything criminal in every part of America. And the Assistant Attorney for Criminal Affairs may not be interested in this, but the head of the Civil Rights Division should be interested in this almost by definition.

So can you tell me, can you give me some idea? Is the major responsibility for investigating these things yours or theirs?

Mr. KIM. Senator, with respect, I would believe that it would be the Criminal Division's responsibility to investigate these—

Senator SCHUMER. OK. Do you think it would be a good idea to unify the Justice Department's voting-related activities in a coherent and programmatic way so that you would not say to me here, "I believe that there is something going on in the Criminal Division," but you obviously have no specific knowledge of it?

Mr. KIM. Senator, that is something I would be happy to discuss with the leadership of the Department of Justice, but I can tell you the reason why historically the Division exists is because of concerns that Federal prosecutors being involved in voter access issues would lead to intimidation of voters at the polls. And so that is why the Civil Rights Division has focused exclusively on voter access issues and has not followed up with FBI agents.

Senator SCHUMER. Well, let me just tell you—and I am exploring legislation in this regard, and the whole panoply of things. I am doing it, frankly, with my colleague, Congressman Emanuel, because he found the same thing in the House races that we found in the Senate races. And we have heard about them in the past, but we are going to do something about it. And I would tell you—I would ask you as a representative of the Justice Department to give us your ideas to make the enforcement better. I would ask you: Should there be a unified control somewhere? Should there be a separate unit that just does this on both sides? And I would also ask you maybe what we need is much stiffer criminal penalties as

well as new statutes to aid the prosecution of these kinds of despicable acts. And I will ask you in writing to get me back on those.

But I would like by this afternoon answers on the number of attorneys in either your Division or the Criminal Division currently investigating how many incidents.

Mr. KIM. Very good, Senator.

Senator SCHUMER. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Schumer.

Senator Kennedy had to depart to go to a hearing on the FDA. He is the Ranking Member on that Committee. He said he would try to come back.

Senator Feingold was here and raised some concerns that we—does Senator Feingold care to question the witness?

Well, I was commenting about—is Senator Feingold in the rear room?

He had raised a concern that we have not had sufficient hearings on these issues. We had a whole series of hearings on the Voting Rights Act when we reauthorized it. But if Senator Feingold wishes to utilize the presence of the Assistant Attorney General, who is here now available to answer questions, this is a hearing.

One question before Senator Kennedy begins, and I just said, Senator Kennedy, that you had to be over at the FDA hearing where you are Ranking Member and that you intended to come back.

Senator KENNEDY. Yes, thank you.

Chairman SPECTER. Are you aware, Mr. Kim—we had talked about Section 5. You said that the Civil Rights Division could not reject preclearance because it was unconstitutional. Are you aware that we changed that in the reauthorization of the Voting Rights Act?

Mr. KIM. Senator, I have to be a little bit careful here because the terms of Section 5 and the amendments to Section 5 are under litigation right now in the United States District Court for the District of Columbia on a challenge to its constitutionality, among other things.

That being said, my understanding of the changes to Section 5 as enunciated in the purpose provision of the reauthorization is it was intended to overrule *Georgia* v. *Ashcroft* with respect to redistrictings and influence districts. It was intended to overrule *Bossier Parish II* with respect to discriminatory purpose and not *Bossier Parish I*, which was the one which spoke about incorporating Section 2 standards in Section 5 and other standards, such as constitutionality standards.

Chairman SPECTER. I do not understand your reluctance to answer a legal question as to whether the reauthorization cured the problem. I do not understand that at all. I am not asking you about any case. I am asking you about a legal conclusion.

Mr. KIM. Senator, the short answer is I do not believe it did, but I will certainly be happy to go back and check the statute again with my staff.

Chairman SPECTER. You do not believe that it did?

Mr. KIM. That is not my understanding of it.

Chairman SPECTER. Are you familiar with what we did on the reauthorization?

Mr. KIM. Yes, sir. Yes, sir.

Chairman SPECTER. Well, let us have your judgment on that, if you would, please, in the next 7 days.

Mr. KIM. Of course, Senator. I would love to have a chance, again, to talk to my people and re-read the statute, but my understanding is the amendments to Section 5 were limited to *Bossier Parish II* and *Georgia* v. *Ashcroft*, and *Bossier Parish* is the one that made it very clear that other—

Chairman SPECTER. If you need to re-read or talk to, OK, just let us know.

Mr. KIM. Yes, sir. Thank you.

Chairman SPECTER. Senator Kennedy.

Senator KENNEDY. Thank you. Thank you, Mr. Chairman.

We were just having, as the Chairman pointed out, the hearings on the Food and Drug Administration safety issues, which are enormously important.

Mr. Kim, I know that Chairman Specter asked you about the Department's approval of the Georgia voter photo ID law. You acknowledged that a Federal court in Georgia blocked the law as an unconstitutional burden on the right to vote. You explained to the Chairman the Department does not take constitutional concerns into account when reviewing a voting change under Section 5. But under the Voting Rights Act, in deciding whether to preclear a voting change, the Division has to make the determination, as I understand it, of whether the proposed change makes minorities worse off in terms of their ability to elect candidates of their choice, and a disproportionate number of Georgia's minority citizens live in poverty and far fewer minorities than whites have photo IDs.

So given those facts, how could the Division conclude that requiring voters to purchase the photo IDs and pay for the documents needed to obtain them wouldn't make it harder for minorities to elect their chosen candidates?

Mr. KIM. Senator, as I understand the decision, which was rendered in August of 2005, the first decision, the decision was based upon a statistical analysis and other analyses of the actual voters in the State of Georgia and the number of ID cards that would qualify under the law and the number of ID cards currently existing back in August of 2005 was somewhere in the neighborhood, I believe, of 6.5 million; the number of registered voters in Georgia, I believe, was somewhere in the neighborhood of 4.5 million. There was no evidence that there was a disparity in racial terms with regard to the number of IDs that had been issued. There were mechanisms for voters to vote without presenting an ID, such as through absentee balloting mechanisms. And the law was since amended to make the provision of all IDs free and to expand the number of areas in which one could get an ID card that did not already have one.

So I understand that the sum total of all the analyses conducted led people to believe that there was no retrogression with respect to that law.

Senator KENNEDY. Well, I remember—I haven't got the chart right here, but I remember looking at where those locations were

and also where the poverty areas were in Georgia, and also seeing the various statistics on this. Obviously, the courts themselves came to that conclusion later on. The court found the law was acting as the un-constitutional poll tax, and that was certainly—I would have thought just looking at the—as I said, looking at both the—looking at the State, looking where the new registration areas were, looking where poverty was grouped, and also the racial sort of patterns in that, it was pretty obviously discriminatory on the face of it. The courts found that, in conflict with what you have said.

After the Georgia photo ID was precleared, the Washington Post reported that the Division ended a longstanding practice of having career lawyers make recommendations in their memos on Section 5 submissions. Is that true?

Mr. KIM. Senator, I do not believe so. Every memo that I receive that comes from any of my sections has a recommendation, and that is the recommendation of obviously the career attorneys in that section making the recommendation.

Senator KENNEDY. So the answer is, to your knowledge, it is not so.

Mr. KIM. No, sir, and I certainly would never impose such a standard. I actually very much encourage diverse viewpoints, and I very much encourage a healthy, robust exchange of ideas. I think it helps me to make better decisions.

Senator KENNEDY. Well, will you find out whether that is so or not? I mean, that is your understanding, but could you find out if that is so?

Mr. KIM. Yes, sir. Yes, sir. But I will tell you, Senator Kennedy, I have seen a lot of memos. Every single one has a recommendation.

Senator KENNEDY. OK. But if you could be good enough to check.

Mr. KIM. Of course.

Senator KENNEDY. Now, Bob Berman was the long-serving career Deputy Chief of the Voting Section who supervised Section 5 enforcement. He oversaw the career team that recommended objecting to the Georgia photo ID. Shortly after the law was precleared, he was involuntarily transferred. Was Mr. Berman's transfer retaliation for his recommendations on the Georgia and Texas submissions?

Mr. KIM. Senator, the Privacy Act forbids me from going into personnel decisions, but I will tell you, Senator, I do not make decisions based on retaliation or ideology. I make staffing decisions based upon talents and interests and the needs of the Department of Justice Civil Rights Division. And so those are the criteria that I use in making hires—

Senator KENNEDY. The question was: Was he transferred in retaliation? What you are telling me is that you didn't do it, but do you know whether he was transferred?

Mr. KIM. Senator, I would be happy to followup with you on that.

Senator KENNEDY. This is both on the Georgia and the Texas submissions. Information about those submissions has been printed in both the Post and other newspapers. Our own newspaper, I believe, the Boston Globe, had a similar story, so we just want to find out the facts.

Mr. KIM. Just to be clear, Senator, you are asking me whether Mr. Berman was involuntarily transferred as a retaliation for his work on Georgia—

Senator KENNEDY. That is right, on Georgia and the Texas submissions.

Mr. KIM. I will follow up as much as I can, Senator.

Senator KENNEDY. Thank you.

Since 2001, the Division filed only one case to protect African-Americans from racial discrimination in voting under Section 2. How do you explain the fact that in nearly 6 years this administration has brought only one case to protect African-Americans from racial discrimination in voting under Section 2?

Mr. KIM. Senator, when I came before the Committee to be confirmed about a year ago, I made a pledge to take my cases where I find them and to bring any case where I found recognizable violation of the law based upon the facts that would be sufficient for us to prove that violation in court. That is the pledge that I make and that is the pledge that I reiterate today.

Earlier this year, I authorized a case involving Euclid, Ohio, and the at-large scheme of elections there, which I believe under Section 2 of the Voting Rights Act violates the right of African-Americans in that city. I will continue to authorize and bring those kinds of cases where the facts and the law warrant.

I earlier this year authorized two pattern or practice of employment discrimination lawsuits involving African-American victims, applicants for police departments in two Virginia jurisdictions. I will continue to authorize such cases where I find the facts and the law to warrant them.

When I was a young prosecutor, I remember reading a passage from *Berger* v. *United States*, a Supreme Court case which said, "The obligation of the United States as a sovereign to bring cases impartially is as compelling as the obligation to bring cases at all." I took that very seriously when I was a prosecutor. I continue to take it very seriously as the head of the Civil Rights Division, and I will continue to bring cases on an impartial basis.

Senator KENNEDY. Well, that is good. You might bring us up-to-date just with the recent record since you have been there about the cases that you have brought, if you would.

Mr. KIM. Yes, sir. Absolutely.

Senator KENNEDY. You have also said, Mr. Kim, that you do not consider ideology in hiring. I guess my colleague, Senator Leahy, went through this to some extent with you. Mr. Driscoll, who will testify later, has said that under Ralph Boyd, they consciously set out to hire less of what they called liberal career lawyers. Do you repudiate that prior practice? And how can we be sure we will get the kind of selection based upon merit and quality?

Mr. KIM. Senator, my hiring criteria are based on demonstrated talent, excellence, and commitment to the work that we do in the Civil Rights Division, and that is the reason why I hire people.

I will also say, as another point that I think is very important to mention, in every hiring decision that I have made, in every hiring decision that I have been party to when I was a deputy and advising the previous Assistant Attorney General to make, they have come with the concurrence, if not the overwhelming and en-

thusiastic support of the section chiefs for which those people would work. And so I view this as a collaborative process. My management style is not one of exclusion. My management style is not one of division. I think there are plenty of talented attorneys out there, and I believe that we can all agree upon the ones that would do the work of the Civil Rights Division well. And so I cannot recall a single instance where I have hired somebody or recommended someone for hire that has not come with the recommendation and endorsement of the career section chief to whom that person would be working.

Senator KENNEDY. Mr. Chairman, I have just one final one, if I might.

Chairman SPECTER. Proceed, Senator Kennedy.

Senator KENNEDY. This is on the employment cases. As I understand, of the 33 cases the Division has filed under the administration, only four involve race discrimination against African-Americans, an average of less than one each year. Out of almost 400 discrimination charges the Division receives each year from the EEOC, and with its nationwide authority to investigate systemic race discrimination, the Division files less than one case a year alleging race discrimination against African-Americans in employment.

Is that really reflective of what the reality is out there in the work force and what the EEOC is finding out?

Mr. KIM. Senator, I appreciate that question, and I would note that historically 707 pattern or practice of employment discrimination cases have been—we have not brought a great number of them in any year. During the past 3 years of the previous administration, they brought a total of three cases involving a pattern or practice of employment discrimination. This past fiscal year, we brought three cases, and two of those that I authorized were on behalf of African-American applicants in violation of Title VII, 707. And I will continue—again, you have my pledge to continue to bring cases involving a violation of Title VII, involving a violation of the Voting Rights Act, involving violations of CRIPA, of criminal civil rights laws, where I find facts to meet the high legal standard set by Congress, and that is my pledge.

Senator KENNEDY. What is your own sense from looking at those EEOC cases, the numbers that they raise, 400, and you bring one or two or three involving African-Americans? Are you suggesting that those other cases are not substantive or they just don't meet the criteria? Or what should we conclude from that?

Mr. KIM. Well, Senator, I mean, I think it is fair to say that historically the EEOC has made many times the number of cases that the Department of Justice has actually filed, and that has to do with the standards that we have to meet when we prove these cases in law. And I do not believe that the current rate of bringing cases given the number given to us by the EEOC is inconsistent with past practice.

I think I would leave it at that. I think that we try to bring and I try to bring aggressively as many cases as the facts and the law will support.

Senator KENNEDY. Thank you very much.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Mr. Kim. We did not get your testimony until 8 o'clock last night. We have a rule, longstanding, well-known, 24 hours in advance. This hearing has been scheduled a long time ago. Why did you not submit it until 8 o'clock at night? That means these staffers have to work after they find—when your statement comes in, they have to go read it. They have to summarize it. They have to inform the members. Why can't a professional like you, Mr. Kim, heading the department, lots of people to help you, submit your statement on time?

Mr. KIM. Senator, Mr. Chairman, I extend my apologies. There was a clearance process. It was a lengthy statement. I was trying to be exhaustive in covering—

Chairman SPECTER. We know there is a clearance process. You know that in advance, that it takes time. How long does the clearance process take? Whatever it takes, you ought to anticipate that and build it in.

Mr. KIM. You are absolutely right, Mr. Chairman. I take full responsibility for not submitting it on time.

Chairman SPECTER. I am not interested in your full responsibility. I am interested in having your statement on time.

Mr. KIM. Yes, sir.

Chairman SPECTER. I have been waiting for Senator Feingold to return, if he is going to come and question. He raised a complaint about not having enough hearings on civil rights, but here we are having a hearing and we are waiting for him to return.

You have been here for about an hour and half, Mr. Kim. We are not going to keep you any longer. But if you would respond to the open questions, we would appreciate it.

Mr. KIM. Yes, sir.

Chairman SPECTER. And we would appreciate it if you would get your statement in on time.

Mr. KIM. Yes, Mr. Chairman, I will.

Chairman SPECTER. Or if you need an additional appropriation, let us know.

Mr. KIM. Thank you, Mr. Chairman.

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

Chairman SPECTER. I will call the second panel now:

Mr. Shaw, Mr. Driscoll, Mr. Rich, Mr. Carvin. And let me begin with this panel, the statement of Mr. Shaw was submitted at 4:30 yesterday; the statement of Mr. Driscoll was submitted at 4 o'clock yesterday; the statement of Mr. Rich was at 4:30 yesterday; and, Mr. Carvin, your statement was submitted at 8 a.m. this morning. Did you work on it all night, Mr. Carvin?

Mr. CARVIN. When the staff called me at around 6:30—

Chairman SPECTER. Turn your microphone on so I can hear your answer.

Mr. CARVIN. When the staff called me around 6:30 last night, I did bang something out and got it to the Committee.

Chairman SPECTER. Staff called you at 6:30 last night?

Mr. CARVIN. That is correct.

Chairman SPECTER. You did not know you were going to be a witness here today?

Mr. CARVIN. I did. I did not know there was a written statement required. I had talked to a number of your staffers prior, and it had never been mentioned to me before.

Chairman SPECTER. You did not know that there was a requirement that your statement be submitted in advance?

Mr. CARVIN. No. In a number of conversations with your staff—

Chairman SPECTER. I cannot hear you, Mr. Carvin.

Mr. CARVIN. No. In a number of conversations with your staff, Senator Specter, it had not been mentioned to me. I had attended over—

Chairman SPECTER. They do not have to mention it to you. There are rules of the Senate. You have been a witness here before, haven't you?

Mr. CARVIN. Yes, and one time I was here that—

Chairman SPECTER. Well, you know we have rules, don't you?

Mr. CARVIN. There was an oversight hearing involving Brad Reynolds in the 1980's where witnesses were allowed to comment on the Civil Rights Division's performance without submitting prior statements. I thought that that was the practice—

Chairman SPECTER. But now you knew you had to submit a prior statement, a written statement for this hearing?

Mr. CARVIN. Senator Specter, I did not know that. No one on your staff told me that. When I was informed of that, I immediately put in a statement. But it is an incorrect assertion of fact to say that I knew this.

Chairman SPECTER. There has been a request, Mr. Carvin, that you not be permitted to testify because you have not complied with the rules, and I am going to let you testify anyway. But the statements submitted late just put a lot of burden on the staff to come in at 4:30 in the afternoon, Mr. Shaw; 4 o'clock, Mr. Driscoll; 4:30, Mr. Rich. It is pretty hard on the staff to have to work overtime, and then Senators would like to know what you are going to testify to so we can prepare questions.

The floor is yours, Mr. Shaw, for 5 minutes.

Mr. Shaw is a graduate of the Columbia University Law School, bachelor's from Wesleyan. He is the Director-Counsel and President of the NAACP Legal Defense and Educational Fund. Previously, he had been a trial attorney in the Civil Rights Division of the Department of Justice, was a Charles Edward Hughes Fellow at Columbia University Law School, currently serves on the Legal Advisory Network of the European Human Rights Council based in Budapest, Hungary.

Thank you for joining us, Mr. Shaw, and we look forward to your testimony.

STATEMENT OF THEODORE M. SHAW, DIRECTOR-COUNSEL AND PRESIDENT, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. (LDF), NEW YORK, NEW YORK

Mr. SHAW. Thank you, Senator, and I am properly chastised. I apologize to you and to the staff.

Chairman SPECTER. Well, thank you for the characterization of "properly."

Mr. SHAW. I started my legal career in the Civil Rights Division, and it was one of two dream jobs that I wanted as a lawyer. The

second one was the Legal Defense Fund. I have been blessed to have them both.

Chairman SPECTER. How about being on the Judiciary Committee in the Senate?

Mr. SHAW. Well, that is a great job, but there is a lot of work to be done yet in the dream jobs to which I aspired.

Chairman SPECTER. This is a nightmare job, Mr. Shaw?

Mr. SHAW. Oh, I would not say that.

Chairman SPECTER. Especially on the Judiciary Committee.

Mr. SHAW. I respect the Judiciary Committee—

Chairman SPECTER. Especially being Chairman all alone, without any statements, without anybody here to question you.

[Laughter.]

Mr. SHAW. Senator Specter, I have watched you for a long time, and I know you can handle this, and a lot more.

Chairman SPECTER. Restart the clock at 5 minutes for Mr. Shaw.

[Laughter.]

Mr. SHAW. Thank you.

Chairman SPECTER. In light of his last statement, restart the clock at 5 minutes.

Mr. SHAW. We at the Legal Defense Fund have a long history of working closely with the Justice Department under both Democratic and Republican administrations, and, frankly, we have had differences and we have had agreements under both Democratic and Republican administrations.

My concern here is to have the Justice Department as a vital, healthy partner in the protection of civil rights laws on behalf of all Americans. I do have great concern about the personnel issues in the Division, although I will not spend time addressing that. I ask that my statement be entered into the record, and we do mention it there.

Chairman SPECTER. Without objection, your full statement will be made a part of the record, as will all the other statements.

Mr. SHAW. Thank you, Senator.

What I want to focus on, Mr. Chairman, is some of the substantive issues that the Department faces right now, and I particularly want to talk about the differences in the approach by the Justice Department on issues of vast importance to African-Americans, Latinos, and other minorities.

For example, before the Supreme Court currently are two cases involving the question of voluntary integration of public schools. That is all that is left of *Brown* v. *Board of Education*. The days of mandatory school desegregation are all but over. All that is left is voluntary integration, and the constitutionality of voluntary integration methods is under attack in the Supreme Court in cases from Louisville, Kentucky, and Seattle, Washington.

The Department has weighed in against voluntary integration plans in those two cases, which could have the impact of a ruling that ends effectively even those modest integration efforts. That is a reversal of historic proportions. It is consistent with some of the positions that the Justice Department has taken in recent years, for example, in a Michigan case in which it weighed in against voluntary efforts to provide access to higher education for minority students. And we believe that the Department has not only sub-

stantively taken positions against the interest of opportunities for African-Americans, Latinos, and other people of color, but it has also begun to bring cases affirmatively that weigh in against those interests. That is a deep concern that we have.

You have heard testimony about the Georgia voter ID requirements. Suffice it to say that it has been reviewed by a number of courts, and each court, on different grounds, though, has struck down the Georgia ID requirements. That is another reflection of the kind of concern that we have about the positions that the Department is taking through the Civil Rights Division.

I understand that political appointees—that administrations have the prerogative to set policy and direction, but there have been career attorneys whose advise, whose expertise act as a basis for informing those decisions with respect to policy. I am concerned that that no longer operates in the way it has and that the Department has lost a great deal of institutional memory and expertise. So I think these two things interact—the substantive concern and the concern with respect to the way that the Civil Rights Division is staffed.

I also express a general concern about the number of cases that are being brought involving discrimination against African-Americans, particularly systemic discrimination in employment. Some of the questions that Senator Kennedy asked go to exactly that point. Those cases are out there. We are overwhelmed with requests to do those kinds of cases at the Legal Defense Fund, and there is no other entity in this country with respect to resources and with respect to the weight that the Civil Rights Division has that can bring these kinds of cases effectively in spite of the private bar or public interest organizations.

When I stood up in court as a Civil Rights Division lawyer, a Justice Department lawyer, part of a proud tradition, and said I represented the United States of America and did so on behalf of the interests of African-Americans or Latinos or other minorities who were discriminated against, that was a kind of weight that is unique. I want to see by the 50th anniversary of the Civil Rights Division the Department restored to that kind of role. We need the Department and the Civil Rights Division as a partner, not as an adversary, in civil rights litigation on behalf of those who have historically been and continue to be discriminated against.

Mr. Chairman, thank you for your time.

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

Chairman SPECTER. Thank you very much, Mr. Shaw.

We turn now to Mr. Robert Driscoll, partner of Alston & Bird here in Washington, a law degree from Georgetown, cum laude, bachelor's degree from Georgetown in finance, magna cum laude; had been one of the chief clerks for Judge Parker, District of Vermont; and was editor-in-chief of his Law Review.

We appreciate your being here, Mr. Driscoll, and the floor is yours.

STATEMENT OF ROBERT N. DRISCOLL, PARTNER, ALSTON & BIRD, LLP, WASHINGTON, D.C.

Mr. DRISCOLL. Thank you, Mr. Chairman, and, again, accept my apologies for the lateness of my statement.

I was a Deputy Assistant Attorney General in the Civil Rights Division from 2001 to 2003, and I suspect the reason I am here is to answer some questions about things that when on when I was there. But I thought I would take the time in my opening statement to put in a plug for you, Mr. Chairman, and members of the Committee that will read the record, for enforcement of CRIPA, the Civil Rights of Institutionalized Persons Act. I know that Congress had increased funding for some CRIPA positions around the time I was starting, and I saw the effect of that. I think it is something that is not as controversial or maybe as exciting as some other things we will discuss today, but I wanted to compliment the Committee and compliment the Congress for allocating those resources and encourage you to continue to look at that statute. It is a very important statute. It enforces the rights of prisoners, people in juvenile facilities, nursing homes all around the country. It is the type of work I think that benefits all Americans and that all Americans can be proud of.

I know, Mr. Chairman, that you are a student of history and a scholar about the Constitution, and I think that the CRIPA enforcement is something you would really enjoy to learn more about it. So my statement is in the record. I heard you say that earlier. I will be quiet now and await questions, but I just wanted to bring that to your attention.

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

Chairman SPECTER. OK. Thank you very much, Mr. Driscoll.

Our next witness is Mr. Joseph Rich, Director of Fair Housing and Community Development, Lawyers' Committee for Civil Rights Under Law; a law degree from Michigan, cum laude; undergraduate degree from Yale; had been Deputy Chief in the Housing and Civil Enforcement Section of the Civil Rights Division of the Department of Justice; Deputy Chief and trial attorney in the Civil Rights Division Educational Opportunities Section.

Thank you for appearing here today, Mr. Rich, and we look forward to your testimony.

STATEMENT OF JOSEPH RICH, DIRECTOR, HOUSING AND COMMUNITY DEVELOPMENT PROJECT, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, WASHINGTON, D.C.

Mr. RICH. Thank you, Mr. Chairman. I want to thank the Committee very much for the opportunity to testify at this oversight hearing. Enforcement of our civil rights laws is one of the Department of Justice's most important and sensitive responsibilities, and careful oversight of this work is crucial. For too long, there has been virtually no congressional oversight during a time that the Division has strayed seriously from its historic mission and traditions. It is important that careful oversight be restored.

I had the honor and privilege of serving in the Civil Rights Division for almost 37 years, starting in 1968, when I was hired under the Honors Program. It was a dream job for someone like me who

had come out of law school wanting to work in civil rights law. I remained in the Division as long as I did primarily because of a career staff that over the years consistently was of the highest quality, with an unmatched devotion to civil rights enforcement.

Civil rights enforcement historically has been highly sensitive and politically controversial. I served under Republican administrations for over 24 years and under Democratic administrations for over 12 years. During this time I and other career staff in the Division experienced inevitable conflicts with political appointees in both Democratic and Republican administrations. But there was almost always an integrity in the Division which permitted these conflicts to be resolved after vigorous debate between career attorneys and political appointees, with each learning from the other. And, importantly, there was an understanding that partisan politics not be injected in the decisionmaking as well as institutional processes that were designed to protect against this.

But in my last 4 years, and particularly during the period from 2003 to 2005, this changed dramatically. It became apparent that there was a conscious and unprecedented effort to remake the Division's career staff. It was evident in a hostility to career employees who expressed disagreement with political appointees or were perceived as disloyal, and it lead to a serious breakdown in communication and cooperation between political appointees and career section management, something that is crucial to the appropriate enforcement of civil rights laws.

Moreover, there was a wide-scale removal of section chiefs, career section chiefs, and career deputy chiefs, something that had not happened before. The impact of this was not lost on career staff, and morale plummeting, resulting in an alarming exodus of career attorneys, the long-time backbone of the Division that had historically maintained the institutional knowledge of the Division and how to enforce our civil rights laws tracking back to their initial passage.

For example, over 54 percent of the Voting Section attorney staff and 65 percent of the Employment Section staff, as well as a large number of appellate staff, have left the Division or transferred to other sections, and I would add that that number in the Voting Section is just since I left a year and a half ago.

The major exodus of career attorneys was accompanied by a major change in hiring policy instituted in 2002, replacing hiring procedures first started in 1954 that were designed to remove any perception of favoritism and politicization of the process. This change resulted in virtually eliminating career attorney input into hiring decisions and a hiring system that lost all transparency to those in the Division. We simply did not know how hiring was being done.

Not surprisingly, the perception of favoritism and politicization in hiring that the Honors Program had been designed to protect against returned, and recent information from an analysis of Division hired by a Boston Globe reporter indicates a precipitous drop in hires of people with civil rights experience and a pattern of new hires with certain political connections.

The overall impact of this unprecedented effort to change the make-up of the career staff has been a significant loss in civil

rights enforcement experience and institutional memory in the Division. It has damaged the Division's long reputation of excellence and the trust that the public and the courts historically have had in its evenhanded enforcement of the law. And it has been compounded by a series of decisions on voting matters that have sent a message that partisan political factors are now important in the decisionmaking calculus.

For example, the decision to delay completion of the Section 5 review in the Mississippi redistricting plan in 2002 by seeking more information from the State and resulting in a Federal court order, ordering a plan that was designed by the Republican Party, this was all hard to explain other than through partisan political considerations.

In conclusion, the damage done to the tradition and integrity and devotion to evenhanded civil rights enforcement by the Division must be reversed, and the important leadership role that the division has traditionally had in the enforcement of civil rights laws restored. I am hopeful that the new Division leadership will work diligently to repair this damage. Most importantly, careful and continuous oversight now and in the future is required to ensure this happens.

Thank you very much.

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

Chairman SPECTER. Thank you, Mr. Rich.

Our final witness this morning is Mr. Michael Carvin, partner in Jones Day here in Washington; law degree from George Washington University; bachelor's cum laude from Tulane. He had been in the United States Department of Justice from 1982 to 1985, Special Assistant to the Attorney General, Civil Rights Division; Deputy Assistant Attorney General, Civil Rights, from 1985 to 1987; and Deputy Assistant Attorney General in the Office of Legal Counsel in 1987 and 1988.

Thank you for being with us, Mr. Carvin, and the floor is yours.

STATEMENT OF MICHAEL CARVIN, PARTNER, JONES DAY, WASHINGTON, D.C.

Mr. CARVIN. Thank you, Mr. Chairman, and thank you for the opportunity to comment. I would like to direct my remarks, if I could, to the criticisms that Mr. Rich and Mr. Shaw have made of the current administration.

The picture they paint is a group of career civil servants who have neutrally interpreted the law and then a group of political appointees who have disagreed with their interpretation of the law, and from this they infer that the political appointees have engaged in partisan politics or ideology.

The first point I would make is that this is a very familiar tune. This is a criticism that every Republican administration has been subjected to by the career people in the Civil Rights Division. Certainly it was a dominant theme when I was there during the Reagan administration. And I think it is fundamentally unfair for a number of reasons that I would like to briefly touch on.

First of all, the basic premise that the career people are somehow without ideology and are simply neutrally interpreting the law is

not at all true. They have a very definitive view of the law, a very particularized view of the law, which, of course, is perfectly respectable and completely responsible; but the notion that they are somehow neutral or balancing both sides is untrue. Mr. Rich's resume and Mr. Shaw's resume reflect that. When they left the Department, they went to the NAACP and the Lawyers' Committee, which, again, are very respectable organizations, but as far as I know have never taken the side of a defendant in a civil rights case vis-a-vis a minority plaintiff, nor have they ever taken the side of a non-minority victim of discrimination. They have never found any quota or racially preferential scheme to conflict with the law. So they are obviously advocating, if you would, one side of the civil rights debate.

So to infer from their criticism of the Bush administration that the Bush administration is somehow ideological would be comparable to taking my criticisms of the Clinton administration's effort as somehow suggesting that the Clinton administration was not obeying the law. What it reflects is a fundamental disagreement about the best way to enforce the law, but it does not reflect that the administration is not fully devoted.

This is particularly important, I think, in the voting rights context because the efforts of Mr. Rich and other folks in the Voting Rights Section have been consistently rejected by the Supreme Court, particularly over the last 15 years, where they have pursued what the Supreme Court accurately labeled a maximization agenda. And just to briefly tick off the positions taken by the Voting Rights Section that have been conclusively rejected by the Supreme Court in the last 15 years, it is in virtually every major voting rights case: the Shaw cases, *Miller* v. *Johnson*, *Bush* v. *Vera*, *Bossier Parish I, Bossier Parish II, Holder* v. *Hall*, *Johnson* v. *DeGrandy*, *Georgia* v. *Ashcroft*. In all of these seminal and important cases, the Department under prior administrations or even the early part of this administration had advanced a very liberal agenda, so any neutral interpreter of the law would know that the discredited and rejected policies that had been pursued by the prior administration had to be tailored to conform with the Supreme Court's more recent teaching on the proper scope of these laws.

I would like to briefly address the three cases that have been the subject of particularized criticism. I think there is a mistake here which is, if a court has rejected a plan that the Department has precleared under Section 5, this somehow reflects disagreement with the Department's Section 5 judgment. Section 5 is a relatively specific statute, and if a court rejects a change on other grounds, that does not in any way suggest that the Department's Section 5 authority was abused.

The voter ID situation in Georgia is a perfect illustration of this. The Department was supposed to look at whether there was racial retrogression. The court that struck down or enjoined the Georgia voter ID law found no disparate impact and no discriminatory purpose. Indeed, it specifically found that there was insufficient evidence of a racially disparate impact to raise even a likelihood of a Section 2 violation. It went off on an entirely separate 14th Amendment theory that does not reflect any disagreement with the legal or factual analysis of the Division. I would also point out that the

Supreme Court recently endorsed the importance of these voter ID laws to ensure against the kind of voter fraud that Senators Leahy, Schumer, and Feingold correctly noted is a very important effort to ensure voter participation.

Similarly, in Texas, the Supreme Court endorsed the Department's view that there had been no retrogression with respect to African-Americans in Texas, and the Court unanimously agreed that there had been no retrogression with respect to Latino voters. Everyone in the Supreme Court agreed that there were six so-called performing Latino districts under the plan that had been replaced and six performing Latino districts under the new legislative enactment. The difference was a very technical Section 2 argument that there was more—that one of the legislature's districts was not compact, which is an issue under Section 2, but not at all an issue under Section 5. Similarly, the Mississippi case that was criticized, a very complicated issue of who has jurisdiction, and, again, the Supreme Court in *Branch* v. *Smith* ultimately upheld the general thrust of what was going on there.

So these are very complicated issues, and I think it is quite unfair and quite misleading to suggest that the Department has somehow failed in its Section 5 obligations simply because a court might have found—either endorsed their view or found problems under an entirely different species of the law. And it certainly does not suggest, given the case recitation I have given you, that the career attorneys are in any way enforcing the law in a way that complies with the law as interpreted by the Supreme Court. I would think that the political appointees have much more closely hewed to those definitive pronouncements.

Thank you.

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

Chairman SPECTER. Thank you, Mr. Carvin.

I am sorry that there are not more Senators here to have heard this spirited discussion and debate. As Chairman, I have requests from Senators to hold hearings, and I try to accommodate them. We have had a very, very busy schedule. We have done a lot on the Voting Rights Act this year, lots of hearings, and lots of requests for oversight, and people are always saying there is not sufficient oversight. This Committee has been engaged in a lot of it this year, with the PATRIOT Act and the surveillance matters and the Voting Rights Act. And when you have an oversight hearing, it is a little lonely. The Chairman does not have any options. Somebody has got to hold on to the gavel. But I am sorry the spirited debate was not heard by others.

Mr. Rich, you and Mr. Carvin have crossed swords here on this issue, and incisively and eloquently. How is the Committee supposed to make a determination here? I have been concerned about these issues going back to William Bradford Reynolds testimony in 1982, and we got very deeply involved in all of these matters and have had them over the years. And if there are political decisions, it is wrong. There is a statute which puts a flat prohibition on Section 5. U.S.C. 2302(b) says that you cannot discriminate against an employee based on political affiliation, with the inference that politics is out, which is what it should be.

So, Mr. Rich, a two-part question. Comment on what Mr. Carvin has said, and give me some guidance as to how the Committee is supposed to decide whether there is excessive politics in the Bush administration or it is just a matter of political ideology within fair bounds as illustrated by the approach in the Clinton administration.

Mr. RICH. Yes, sir. I worked with Mike in the Reagan administration, and there certainly were disagreements. The big difference between that administration and this administration was vigorous debate, listening to each other, decisions being made, disagreements continuing but there was a professional approach to the process that has not been present in this administration.

Part of the problem—and I think I focused on the part of the problem in which the career staff—there has been a hostility to career staff accompanied with, I think, an alarming change in hiring, with the result that you are changing the make-up of the Civil Rights Division, something that never happened before.

As to the issue of whether these decisions are political, I think if decisions are made in isolation without the type of debate that is needed, it is going to lead to a perception of political judgments. All I can say is that in my seat, it appeared that the political calculus had been inserted into the decisionmaking process, and I would only go back to the example I just mentioned in Mississippi. The Mississippi plan before us, there was never any debate that the plan did not hurt black voters. Meanwhile, in the Federal courts, there were arguments going on, and there was a second plan drawn that was politically favorable to the Republicans. The Federal court said if the Department of Justice has not decided this matter by the end of February, it would go ahead and order into effect its plan.

The Department of Justice then in the middle of February issued a letter seeking more information not about the redistricting plan before it, but about an obscure State law, whether or not the State law which gave the State courts the ability to review redistricting plans, that that hurt black voters, something that had never been suggested by anybody.

Chairman SPECTER. Mr. Rich, you served in the Reagan administration?

Mr. RICH. Yes, sir.

Chairman SPECTER. And you served from, according to the information I have, 1999 to 2005 as the Chief of the Voting Section, so that you were there for a good bit of the current Bush administration.

Mr. RICH. Yes.

Chairman SPECTER. Mr. Carvin, he is complimenting the Reagan administration where you served, so you are in the clear.

[Laughter.]

Chairman SPECTER. How would you advise the Committee to weigh this conflicting testimony? Who is giving a false statement under Section 1001?

Mr. CARVIN. Well, I certainly never reject compliments, particularly about the Reagan administration. And it is quite true that Joe and I worked closely together on these questions, and I think, al-

though we certainly had a different approach to the law, that it was a full and healthy debate.

But I do think there is some revisionist history going on here, Senator. You may remember from your personal experience that the notion that William Bradford Reynolds was upheld as this icon of evenhanded decisionmaking free from politics does not square with the record that was fully developed at the time, particularly when he was seeking promotion to Associate Attorney General. You had very similar testimony, if not more critical testimony, of his approach to the law from both career Civil Rights Division people and people from the civil rights groups.

So I will reiterate what I said before. This is a very recurring theme. Whenever people who have a certain slant in terms of the way they want to approach the law, more of that of civil rights plaintiffs, are confronted with a Republican administration that, in my view, takes a more evenhanded and neutral approach and considers the relative equities involved.

In terms of how the Committee can, you know, sort through this, it is a very good question. It is very difficult for you. I would think the best evidence is not internal conversations or anything like that, but let's look at the track record in the courts. Let's look at, as I said, the Clinton's administration record in front of the Supreme Court on the Voting Rights Act, which was, you know, no better than that of the Washington Redskins, certainly. I mean, they consistently lost on the most important of voting rights cases of the term—

Chairman SPECTER. Didn't the Washington Redskins have some pretty good years, 1993 to 2000?

Mr. CARVIN. That is right.

[Laughter.]

Chairman SPECTER. Clinton was there a long time.

Let's turn to the question of resources. Mr. Shaw, I appreciate what you said, how emphatic it is when the Department of Justice Civil Rights Division comes into court and starts to complain. And, Mr. Driscoll, you commented about the additional resources that were provided during your tenure. We have very tight budgets all around, finding money for NIH, finding money for stem cell research, Title I in education. How much more do we need to do by way of authorization of appropriation, Mr. Shaw, to have a Department of Justice which does what you say no other entity can do?

Mr. SHAW. Well, Mr. Chairman, I cannot give you a dollar figure. I do know that the concern that I have as I have articulated it, both here today and in my testimony, is that the Division has seen a precipitous decline in the number of cases brought on behalf of African-Americans, particularly in employment involving systemic discrimination but also in other areas. And while I applaud the Division's expansion to protect the rights of other Americans without reservation, I say that that should not be done at the cost of abandoning what has been part of its core mission from its very inception, and still stands as work that we know at the Legal Defense Fund needs the Justice Department's involvement on the right side.

The other thing I want to say, Mr. Chairman, if I may, is that I also worked under the Reagan administration. I was hired under

the Carter administration. I know Michael Carvin from way back, and I remember spirited discussions with Brad Reynolds, with whom I disagreed on a number of issues. But I had a very cordial personal relationship with him.

I left the Division understanding as a career lawyer that he made policy and the administration made policy, and I had disagreements, and if somebody was going to go at that time, it was not going to be the Assistant Attorney General. But I am very clear that the fact that we opposed the Assistant Attorney General, many of us, when he was nominated for another position, because of Bob Jones and because of other concerns that we had, in no way means that the discourse that we had with him was not a valuable discourse.

Finally, on this point, I do not want to get into a debate with Mr. Carvin. It is not a good use of time. I do want to correct him on one thing. I do not work for the NAACP or lead the NAACP. The NAACP Legal Defense Fund is a separate organization. But the notion that the fact that I went to the Legal Defense Fund and Mr. Rich went to the Lawyers' Committee, two of the leading litigation organizations involving civil rights in this country, in any way taints the credibility of our judgment with respect to the proper enforcement by the Civil Rights Division is both breathtaking and disturbing in its implications.

While we may disagree, I said earlier and I say now that those disagreements that we have have gone to administrations that are both Democratic and Republican. My concern is a healthy Civil Rights Division that enforces the law in a way that advances the cause of civil rights consistently with the tradition of the greatest moments of the Division, the greatest traditions of the Division. I want to see that restored.

Chairman SPECTER. Mr. Driscoll, let's come back to resources. I appreciate what you say, Mr. Shaw, but focusing again on resources, you had complimented the Congress for providing more resources. Have we done enough? Should we do more?

Mr. DRISCOLL. Mr. Chairman, it is difficult to say, not being in the Division right now. I do think Ted makes a point, that the jobs the Civil Rights Division has had have expanded over time, things like ADA enforcement, things like CRIPA enforcement, religious freedom, RLUPA. Every time Congress does pass a new statute, the pie gets divvied up a little bit more, and that needs to be taken into account.

I also think, frankly, that is in large part the cause for some of the criticism the administration comes under, because you have got roughly 300 or 400 attorneys enforcing all these statutes, and people that want enforcement to focus on one particular area, like the NAACP Legal Defense Fund does, they are not going to be happy. When you sit and run the Division like Mr. Kim has to do, he will have similar meetings with disability rights groups, he will have similar meetings with immigration tracking groups, all of whom are convinced that their particular issue is the most important one.

So I do not know what the answer is. I think that Ted raises a good point, a valid point at least, that the mission of the Division has expanded over time.

If I could, with your indulgence, Mr. Chairman, just briefly respond to Mr. Rich.

Chairman SPECTER. Sure.

Mr. DRISCOLL. Because I was a member of this administration, and it is kind of taking it on the chin a little bit here on a couple of points.

You mentioned how should you figure out what is going on or are things getting too political. I think one way to look at that is to look at the record, as Mr. Carvin said. The appellate record of this administration has been great. The percentage of times decisions the Department has made have been upheld has gone up over time, not down. If you look at the Mississippi case Mr. Rich complained about, that decision largely was upheld by the Supreme Court, and so you would think if an administration was sailing way out beyond the markers on any established area of civil rights laws a court would tell it so at some point. The very arguments that the Division is asking the question and the Mississippi case was some kind of political trick was addressed in the Supreme Court decision on the matter. So I think that is probably the first place you could go to.

With respect to employment cases, for example, I think you have to look at the record and think back to even before this administration started. When we were standing up the Division in 2001, we were looking at an Employment Section that was just coming off a $1.5 million fine for overreaching on an employment case. That was very controversial. You may remember the Torrance, California, case. We were looking at a division that really had some problems with overreaching, and so as lawyers you come in and you look at the situation and you try to look at the law and the facts and do the best you can. But I think the way to settle it or the way the Committee can look at these political questions is to look at the record. And when you have Mr. Kim back, ask him, "What percentage of your cases are upheld on appeal?" Ask him, "What percentage of your preclearance decisions have been reversed?" And I think you will find the record is pretty good.

Chairman SPECTER. Well, we have to call it at this point. There are many, many issues which I would like to go into in greater detail. To repeat, I would like to have had some of my colleagues hear this. But it has been a very good discussion. Five of us here are lawyers, and I know when we have got a panel of strong lawyers, they may be late on statements, but you are heavy on intellectualism. And I guess I would trade a good intellect and some in-depth discussions on the law for an on-time statement. In any event, it has been very spirited, and I compliment our staff for balance. We have had a lot of balance here. Sometimes our hearings are kind of lame, kind of tepid, but this has been very spirited and very balanced, and gives us some insights as to what to look for.

This is a tremendously important area. I would like to get into some of the areas on detainees and habeas corpus, but we cannot do everything in one hearing. So I thank you very much for your participation, and that concludes our hearing.

[Whereupon, at 11:35 a.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 11, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Deputy Attorney General Wan Kim, before the Committee on November 16, 2006, concerning oversight of the Justice Department's Civil Rights Division. We hope that information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Before the
Committee on the Judiciary
United States Senate

Responses to Committee Questions Concerning
Oversight of the Civil Rights Division
November 16, 2006

Written Questions for Wan Kim
Submitted by Senator Patrick Leahy

General Enforcement Efforts

1. Is it correct that the Civil Rights Division has failed to file a single Section 2 Voting Rights Act case during the first five years of the Bush Administration?

Answer: No. The Civil Rights Division has filed the following Section 2 cases during this Administration:

U.S. v. Crockett County	**W.D. Tenn.**	**04/17/01**
U.S. v. Alamosa County	**D. Colo.**	**11/27/01**
U.S. v. Osceola County	**M.D. Fla.**	**06/28/02**
U.S. v. Berks County	**E.D. Pa.**	**02/25/03**
U.S. v. Brown (Noxubee County)	**S.D. Miss.**	**02/17/05**
U.S. v. Osceola County	**M.D. Fla.**	**07/18/05**
U.S. v. City of Boston	**D. Mass.**	**07/29/05**
U.S. v. Long County	**S.D. Ga.**	**02/08/06**
U.S. v. City of Euclid	**N.D. Ohio**	**07/10/06**
U.S. v. City of Port Chester	**S.D.N.Y.**	**12/15/06**

In addition, the Civil Rights Division successfully litigated two other Section 2 cases through appeal and currently is defending the constitutionality of Section 2 in one additional case.

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Voter Suppression in 2006 Elections

2. The Associated Press indicates that homeless people from Philadelphia were recruited to hand out inaccurate sample ballots describing Republican Governor Robert L. Ehrlich Jr. and Senate candidate Michael S. Steele as Democrats at polling sites in Prince George's County, Maryland, a county with a substantial African-American population. The Associated Press also reported that these flyers were paid for by the GOP and the Ehrlich and Steele campaigns.

Your written response to questions from Senator Schumer stated that the Justice Department looked into the inaccurate fliers and concluded that "there is an insufficient legal basis to initiate a formal investigation." The Voting Rights Act, 42 U.S.C. § 1973i(d), specifically provides criminal penalties for making a false document with knowledge that the document contains false or fictitious information.

Given that the flyers misrepresented the party affiliation of Ehrlich and Steele, why is there insufficient basis to initiate a formal investigation into possible criminal violations of the Voting Rights Act? Please provide a thorough explanation for this decision, including whether career staff recommended an investigation and outline the role of political staff at the Department of Justice and the White House.

Answer: The Voting Rights Act, 42 U.S.C. § 1973i(d), made it a crime to make a false statement "on any matter *within the jurisdiction of an examiner or hearing officer.*" 42 U.S.C. § 1973i(d) (emphasis added). Federal examiners were a creation of the 1965 Voting Rights Act and had responsibility to independently register voters in jurisdictions where the voter registration process was not equally open to minority citizens. 42 U.S.C. § 1973e. A hearing officer could determine challenges to voters registered by federal examiners. 42 U.S.C. § 1973g.

Section 1973i(d) would be inapplicable to any election-related matter in Maryland in or about November 2006. First, as no federal examiner was ever appointed to serve within the State of Maryland, this section would not have applied to any situation in Maryland at any time. Second, pursuant to Congress's reauthorization of the Voting Rights Act prior to November 2006, the Voting Rights Act no longer authorizes federal examiners or hearing officers. *See* Section 3 of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.

3. Senator Kennedy and I sent the Attorney General a letter on October 20th requesting a federal investigation into the activities of Tan Nguyen, a Republican congressional candidate. In the weeks leading up to the November 7 elections, an individual from the Nguyen's campaign mailed a letter to thousands of registered Latino voters that was specifically designed to intimidate them and keep them from voting. The letter, written in Spanish, falsely stated that immigrants may not vote. The letter also declared that "there is no benefit to voting" in U.S. elections.

At the oversight hearing, you gave me your "assurances" that an investigation into the Orange County case was ongoing. **Has the Justice Department launched a federal criminal**

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investigation into this matter? Please provide a description and status report on this investigation.

Answer: Upon learning of the Orange County mailing, the Division immediately initiated an investigation. In addition, the Division also dispatched Department personnel to monitor the polls in Orange County for the November 7, 2006, elections. The matter remains the subject of an ongoing investigation. As you are aware, we are not at liberty to discuss the details of any ongoing investigation.

4. The United States Attorney Manual 9-85.200 states that "[w]hen the offense involves voting and race is an issue, prosecutors should contact the Criminal Section of the Civil Rights Division." At the oversight hearing, however, you testified that the allegations of targeting and intimidating Latino voters in Pima County, Arizona were not under the jurisdiction of the Civil Rights Division. In a follow up letter, responding to Senator Schumer, you informed this Committee that this Arizona report of voter intimidation has been delegated to one attorney in the Criminal Division.

Who made the decision to refer the Pima County case to the Criminal Division, as opposed to the Criminal Section of the Civil Rights Division, and why?

Answer: The Criminal and Civil Rights Divisions work together cooperatively on investigations related to voting. At this time, both the Criminal Division and the Civil Rights Division have open investigations of the Pima County allegations. As these are ongoing investigations, we cannot comment further.

5. In your oversight hearing testimony, you indicated that 229 complaints about election procedures were made directly to the Voting Section on election day, November 7, 2006.

> **a. Please provide a description and status report of all election day and pre-election day complaints you are investigating in connection with the 2006 federal election.**
>
> **Answer: In November 2006, the Department opened multiple phone lines in order to handle calls from citizens with election complaints, as well as an internet-based system for reporting problems. On or about November 7, 2006, the Voting Section received approximately 147 calls and 94 e-mail contacts through its website. These 241 election day contacts raised approximately 351 issues, as some contacts raised multiple issues.**
>
> **On election day, we were able to resolve all issues raised by approximately 36 of the 241 election day contacts we received. Of the additional election day contacts, 6 simply provided comments and 7 individuals contacted us seeking only election-related information, such as where they should go to vote.**
>
> **The information provided to us by approximately 150 of these election day contacts did not indicate a possible violation of any of the federal laws the Department**

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enforces. For example, a number of voters called complaining about an isolated mechanical failure of an individual piece of voting equipment.

As a result of pre-election investigation and outreach, the Department assigned more than 800 federal observers and Department monitors to selected polling places across the country. Approximately 470 federal observers from the Office of Personnel Management and 358 Department of Justice staff monitored the general election in 69 jurisdictions in 22 states in areas that we determined warranted scrutiny in order to prevent and document possible violations of voting rights. Election monitoring, among other things, involved receiving numerous calls and contacts within the course of the site monitoring. Consistent with past practice, Department personnel addressed and documented potentially discriminatory practices regardless of whether they were the subject of a formal complaint.

After Election Day, we reviewed all complaints and determined which matters warranted additional action. We have since initiated new investigations of these matters or incorporated them into ongoing investigations in the relevant jurisdiction. Any comment on these current investigations would be inappropriate at this time.

b. Please provide a description and status report of all election day complaints or pre-election complaints involving the November 7, 2006 Election that the Criminal Division is investigating.

Answer: We are aware of at least 25 criminal matters that are currently under investigation around the country by the Criminal Division and various United States Attorneys' Offices. However, because Department procedures do not require United States Attorneys' Offices to consult with Headquarters before requesting a preliminary investigation of an election fraud allegation, the actual figure may be higher. As these criminal investigations are currently open, it would not be appropriate to comment on them.

6. During the November 7 general election, MALDEF attorneys witnessed anti-immigrant activists aggressively intimidating Latino voters in Tucson, Arizona. At least one of these activists wore dark clothing with a badge-like emblem and carried a handgun in a holster, giving the false impression that he was a law enforcement official. The men attempted to ask Latino voters questions, write down their personal information, and videotape them as they went to cast their vote. The *Arizona Republic* reported that Russell Dove, a local anti-immigrant activist, has proudly acknowledged his participation in this effort to intimidate Latino voters.

a. **Has the Justice Department launched a federal investigation into this matter? Please provide a detailed description and update of the Justice Department's federal investigation into this matter, including all Justice Department offices involved in responding to and investigating this incident.**

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Answer: At this time both the Criminal Division and the Civil Rights Division have open investigations of the Pima County allegations. As these are ongoing investigations, we cannot comment further.

b. Reports from MALDEF observers on the ground indicate that no federal observers were present at the 49th precinct in Tucson, Arizona, an area with a heavy percentage of Latino voters. **Why were no federal observers sent to the 49th precinct despite reports from local residents that they were aware that this polling site had a history of intimidation against Latino voters?**

Answer: Pima County, in which Tucson is situated, has never been certified for federal observers, and thus there is no legal authority to assign such personnel to monitor the polls there. However, the Civil Rights Division did send personnel to Pima County on election day as part of its departmental monitoring efforts. The monitors in Pima County on election day were in contact with MALDEF concerning the situation. Because the Department has an ongoing investigation of this matter, it cannot comment further.

c. **Given the history of voter intimidation of Latino Americans, what steps will the Justice Department take in the next 12 months to ensure that voter intimidation based on race or immigration status will not occur in the next election?**

Answer: The Department will continue its vigorous enforcement of federal civil rights laws. This enforcement, particularly under Sections 2, 4(f)(4), 203, and 208 of the Voting Rights Act, protects Latino Americans and others subject to discrimination on the basis of race or membership in a language minority group. Since 2002, the Civil Rights Division has filed approximately three-fourths of all cases in the history of the Act to protect the right of voters needing assistance to vote and approximately 60 percent of all minority language cases in the entire previous history of the Voting Rights Act. As a result of these and other lawsuits, since 2002, the Department has brought a majority of all cases it ever has filed under the substantive provisions of the Voting Rights Act to protect voters of Hispanic and Asian descent, and the first cases ever filed to protect the voting rights of voters of Filipino, Haitian, and Vietnamese descent. During this time period, the Division has filed numerous successful Voting Rights Act lawsuits across the country, including lawsuits in the following states: Arizona, California, Florida, Georgia, Massachusetts, New York, Pennsylvania, Tennessee, Texas, and Washington. The Department also will continue its unprecedented and vigorous outreach to Latino community and advocacy organizations, as well as other groups representing language and other minority citizens. The Department also will continue its unprecedented and vigorous outreach to state and local election officials to advise them of the requirements of federal law and urge their voluntary compliance. Finally, the Department will continue its unprecedented and vigorous program of monitoring elections to protect the rights of all citizens.

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7. On November 3, 2006, a cross-burning incident occurred in Grand Coteau, Louisiana, on the eve of a racially heated and hotly contested mayoral election. The five-foot cross was erected outside of the town hall's parking lot, placed in a wooden frame, doused with oil and lit on fire. Cross-burnings are a clear and unmistakable expression of racial animus and hatred.

Cross burnings have historically been used as a tool to intimidate African-American voters from freely exercising their right to vote. **Has the Justice Department launched a federal investigation into this case? Please provide a detailed description and update of the Justice Department's federal investigation into this matter.**

Answer: Yes. The Criminal Section is investigating the cross burning in Grand Coteau, Louisiana. We also note that the Voting Section dispatched federal observers to monitor the Grand Coteau polls for that election. Because the Department has an ongoing investigation of this matter, it cannot comment further.

Personnel Issues

8. Since 2001 to the present, what role has the Federalist Society played, what role have Federalist Society members played, and what role has Federalist Society membership played in the hiring of career lawyers in the Civil Rights Division of the Justice Department?

Answer: I am not aware of any outside organization that has played any official role in the hiring of career lawyers in the Civil Rights Division of the Justice Department. Some of the attorneys involved in the hiring process have been members of the Federalist Society – including me -- while others have not. During the hiring process, a candidate's stated membership in any group or organization is noted. We are well aware, however, that mere membership in any organization is hardly a reliable method for determining a candidate's legal skills or the personal qualities necessary to being an attorney in the Civil Rights Division.

9. The *Boston Globe* reports that since 2003 "seven hires in the [Voting Rights, Employment Litigation, and Appellate sections] are listed as members of the Republican National Lawyers Association, including two who volunteered for Bush-Chaney campaigns." Additionally, the *Boston Globe* reports that "several new hires worked for prominent conservatives, including former Whitewater prosecutor Kenneth Star, former attorney general Edwin Meese, Mississippi Senator Trent Lott, and Judge Charles Pickering."

Are you concerned that the hiring of such a high number of career lawyers with conservative credentials creates a perception that the Civil Rights Division is no longer a neutral law enforcer? What steps are being taken to alleviate these concerns?

Answer: No. Consistent with my years of service as a career prosecutor in the Department of Justice, I am committed to even-handed law enforcement.

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10. You testified at the oversight hearing that you do not hire people based on ideological considerations but rather you hire "based on their talent, their excellence, and their commitment to the work that we do" at the Civil Rights Division. In contrast to the third criteria – commitment to the work of the Division – the July 23, 2006 *Boston Globe* reported that at the Civil Rights Division:

> 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 [the Voting Rights, Employment Litigation, and Appellate 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.

a. **Are you concerned that hiring lawyers without any traditional civil rights background or hiring lawyers with experience in defending *against* discrimination suits may lessen the public confidence in the ability of the Civil Rights Division to vigorously enforce racial discrimination against African Americans?**

Answer: No. I served as a criminal defense attorney before being hired as an Assistant United States Attorney, as did many of my fellow federal prosecutors. I expect all of the attorneys hired by the Civil Rights Division to be able to vigorously enforce the federal laws prohibiting discrimination, including racial discrimination against African Americans. This is why we measure an applicant's talent, excellence, and commitment to the work of the Division. Moreover, we are not aware of the methodology used by the *Boston Globe* in reaching its conclusions.

b. **In the hiring of both Honors Program lawyers and lateral hires, please identify what factors you consider in assessing an applicant's demonstrated commitment to the work of the Civil Rights Division?**

Answer: Every applicant is unique and treated as such. In general, however, a number of factors may be considered in assessing an applicant's commitment to the work of the Division, including an applicant's reasons for wanting to work in the Division; understanding of the work and mission of the Division; personal background and interests; and demonstrated interest in and understanding of the laws enforced by the Division.

c. **Does working for organizations that conduct traditional civil rights enforcement constitute a demonstration of the work of the Civil Rights Division?**

Answer: Yes, prior employment experience with an organization that conducts traditional civil rights enforcement helps to demonstrate an applicant's commitment to the work of the Civil Rights Division. However, as stated in 10(b) above, every applicant is unique and treated as such. In general, as stated above, a number of factors may be considered in assessing an applicant's commitment to the work of

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the Division, including an applicant's reasons for wanting to work in the Division; understanding of the work and mission of the Division; personal background and interests; and demonstrated interest in and understanding of the laws enforced by the Division.

11. You testified that the 2002 change in the Honors Program and lateral hiring process was done "to centralize the process for hiring," and to ensure the "participation of both political and career attorneys."

a. Given that the 2002 change in hiring policy was done to ensure more input – rather than less – in the hiring process, please describe the official policy of the Civil Rights Division with regard to the role of Section Chiefs in the lateral and Honors Program hiring process? If this policy varies among sections, please explain why the policy is allowed to vary?

Answer: I am not aware of a change in the hiring process for lateral attorneys in 2002. In any event, Section Chiefs play a central role in the hiring of attorneys through both the Honors Program and lateral hiring process, including active participation in interviewing both lateral and Honors Program applicants. I take very seriously the recommendations of Section Chiefs in all personnel matters.

b. Please (i) list the names and titles of the individuals currently responsible for operating the hiring of lawyers in the Honors Program, and (ii) explain in detail how the Honors Program operates? Please provide a step-by-step breakdown on the process from recruitment, to receipt of applications, to interviews, and to hires.

Answer: The Attorney General's Honors Program (HP) is one of the most prestigious and competitive hiring programs in the country. It is administered and promoted by the Office of Attorney Recruitment and Management (OARM). This is a career office with administrative oversight of all career attorneys within the Department. OARM manages the applications and conducts the initial screening process to make certain that all applicants are eligible for participation in the HP. Applicants are then referred to components (such as the Civil Rights Division) based on the applicant's stated preference. The applications are reviewed by each component, which typically includes the input of both career and political appointees, and which results in applicants being selected for interviews. Applicants are then interviewed by both career employees and political appointees and recommendations are made to the respective Assistant Attorney General. The attorneys most recently involved in the Honors Program hiring process within the Civil Rights Division included attorneys in the Office of the Assistant Attorney General, both career and political appointees, as well as nearly all of the Section Chiefs.

Desegregation & Access to Education

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12. During your confirmation hearings, you testified that the landmark Supreme Court decision *Brown v. Board of Education*, which desegregated public educational facilities, was "settled law." This term, the Supreme Court will hear two cases from Louisville (*Meredith v. Jefferson County Public Schools*) and Seattle (*Parents Involved in Community Schools v. Seattle School District No. 1)* posing the question whether, in the absence of court-ordered desegregation, race can be considered in assigning students to public schools.

The Justice Department filed an amicus brief arguing that voluntary desegregation plans violate the Equal Protection Clause. **How does the Justice Department's position support (a) the 52 years of desegregation efforts by the Civil Rights Division; and (b) the ability of school districts to enforce the promise of *Brown*?**

Answer:

(a) The position taken by the United States in *Meredith v. Jefferson County Public Schools* and *Parents Involved in Community Schools v. Seattle School District No. 1* is fully consistent with our historical position that the use of race must satisfy constitutional standards. Copies of the United States' amicus briefs in both cases, which set forth fully its position in these cases, may be found at: http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2005-0908.mer.ami.html (*Parents Involved*) and http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2005-0915.mer.ami.html (*Meredith*).

(b) The briefs of the United States strongly reaffirm the *Brown v. Board of Education* ruling that the state's ultimate objective in crafting public school programs must be to "achieve a system of determining admission to the public schools on a nonracial basis." 349 U.S. 294, 300-01 (1955). The Department recognizes that school districts across the country have a strong interest in providing a high-quality education to all students, and supports their efforts to seek innovative, race-neutral solutions, including open enrollment plans, that will improve educational opportunities for all children.

Voting Cases

13. Joe Rich, the former head of the Voting Rights Section, submitted written testimony to this committee that the Justice Department's decision to request additional information in *Branch v. Smith* was overtly political. In that case, a pro-Republican plan was tentatively approved by a federal court as a backup in case a previously approved state court redistricting plan was approved by the Justice Department in a timely manner. The Voting Section extended the Section 5 review period by requesting additional information on a novel procedural issue. Because of the Justice Department's delay, the federal court ordered into effect the backup plan that favored the Republican Party.

> **Was the decision to delay reviewing the state plan one made by the Division without any evidence that such a request would aid in determining if the state plan had a potential negative impact on minority voters? Why or Why not?**

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Answer: In December 2001 and early 2002, the Department received Mississippi's preclearance submission for a redistricting plan that was not drawn by the state legislature, but rather created by a state court. The plan was submitted for Section 5 review on December 26, 2001. The Department requested additional information on February 14, 2002. During the pendency of our review, the plan submitted for preclearance was enjoined by a three-judge federal court, which subsequently ordered a separate plan into effect.

On March 31, 2003, the United States Supreme Court unanimously ruled that the Department's request for additional information was appropriate. *Branch v. Smith,* 528 U.S. 254 (2003). The Mississippi Supreme Court later held that the state trial court did not have judicial power to devise the congressional redistricting plan that had been submitted for preclearance. *Mauldlin v. Branch*, 866 So. 2d 429 (2003).

14. In August 2005, the Justice Department precleared a Georgia law requiring voters to present government issued photo identification in order to vote at the polls on election day. On August 25, the Voting Section career lawyers prepared a memorandum recommending an objection that the Georgia law would harm minority voters. The next day, on August 26, the present Section Chief approved preclearance even though new information had just been received from the State and even though there was an additional 35 days before the September 30th deadline.

a. **Within the 24 hour period of the career lawyers submitting their recommendation and the section chief granting preclearance, was the negative recommendation of the career lawyers actually transmitted and communicated to Brad Schlozman, the acting Assistant Attorney General?**

Answer: It is my understanding that the Acting Assistant Attorney General was aware of the analysis of the career staff, including the views of the career Section Chief.

b. In your hearing testimony, you stated that your personal belief that the Justice Department could not prevent preclearance of an unconstitutional law. **What is the position of the Justice Department regarding whether the Voting Section can consider unconstitutionality in granting Section 5 preclearance? How does that official position comport with Congress's changes to Section 5 during the recent reauthorization of the Voting Rights Act?**

Answer: Consistent with the language of Section 5, the Attorney General's Section 5 procedures have long provided that the "preclearance by the Attorney General of a voting change does not constitute the certification that the voting change satisfies any other requirement of the law beyond that of Section 5." 28 C.F.R. § 51.49. According to the U.S. Supreme Court, Section 5 itself provided that the Attorney General's decision not to object to a voting change did not "bar a subsequent action to enjoin enforcement" of such a change, 42 U.S.C. § 1973c, such as in "traditional constitutional litigation." *Morris v. Gressette*, 432 U.S. 491, 507 (1977). The Court further found in 1997 that Section 5 preclearance cannot be denied solely because

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the voting change violates Section 2 of the Voting Rights Act. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 485 (1997) ("*Bossier I*"). Under *Bossier I*, the Department can interpose an objection to a voting change only where the change resulted in a discriminatory retrogression in minority political opportunities. A change that violated other substantive statutory or constitutional provisions, but was not retrogressive, was entitled to preclearance.

After the decision in *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) ("*Bossier II*"), and prior to the enactment of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("VRARA"), the inquiry turned solely on whether the voting change was retrogressive in purpose or effect. Under *Bossier II*, an objection could be interposed only under the "purpose" prong of Section 5 where the change was motivated by an intent to effect such a discriminatory retrogression. A change that was motivated by a discriminatory, but non-retrogressive purpose, would have been entitled to preclearance.

In enacting the VRARA, Congress found that the "effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decisions in Reno v. Bossier Parish II and Georgia v. Ashcroft, which have misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act." Public Law 109-246, Sec. 2(b)(6). Although no court has yet interpreted the provisions of the VRARA and the Department has not yet had occasion to take a position on them, legislative history suggests that the VRARA amended the Act to undo *Bossier II* by providing that the term "purpose" applies to "any discriminatory purpose." Accordingly, after reauthorization of the Act, under Section 5, it appears that the Attorney General may object to any voting change based on either a discriminatory purpose or effect. Congress did not express in this finding an intent to undo *Bossier I*.

After enactment of the VRARA, a challenge to the constitutionality of Section 5 of the Voting Rights Act was filed in the District Court for the District of Columbia, which the Division is currently defending.

15. Recent news reports have brought to light the degree to which the Civil Rights Division has cut career attorneys out of the decision-making process and disregarded their recommendations, driving away many veteran attorneys.

How will you ensure that political considerations do not trump enforcement of the Voting Rights Act?

Answer: Having served at the Department of Justice for more than a decade, I am always concerned with inaccurate perceptions that any of our decisions are not based solely on the facts and the applicable law. The Department is committed to the vigorous and even-handed enforcement of the Voting Rights Act on behalf of all

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Americans and has brought lawsuits on behalf of African-American voters, Hispanic-American voters, Asian-American voters, Native-American voters, and white voters. This Administration also has brought the first lawsuits in history to protect the voting rights of citizens of Vietnamese, Filipino, and Haitian heritage.

Our record of even-handedly enforcing federal law best demonstrates that the Division makes litigation decisions that do not turn on partisan considerations. Career staff continues to be involved in the recommendation and decision-making process of every enforcement action brought by the Division under the Voting Rights Act, including the review of every Section 5 submission. Voting Section (and other Civil Rights Division) attorneys are in fact required to prepare detailed memoranda in enforcement actions, including Section 5 preclearance decisions, setting forth the facts and law on each proposed matter. Every legal analysis, including recommendations under Section 5, must be balanced and include all relevant information. When the decisions come to me as Assistant Attorney General for the Civil Rights Division, I also welcome opposing views and am available for responsible, productive discussion.

Having said that our record speaks best, let me remind you of that record. Voting Section attorneys have set a number of records in terms of litigation. During the period between the 2004 and 2006 general elections, the Department filed far more actions to protect voters against discrimination at the polls than in any time in its history. These lawsuits included key cases to (1) protect the rights of minority voters against race-based challenges to the eligibility of minority voters; (2) ensure appropriate treatment of minority voters; (3) prevent improperly influencing, coercing, or ignoring the ballot choices of minority voters; (4) ensure that voters, including minority voters, are provided with provisional ballots; (5) ensure that voters, including minority voters, are provided the assistance in voting that they are legally entitled to receive; (6) ensure that minority language voters are provided the bilingual assistance in voting that they need and are legally entitled to receive; and (7) ensure that localities provide voters, including minority voters, with the information Congress determined necessary in all polling places, including the posting of information on voters' rights. *See, e.g., United States v. Long County*; *United States v. City of Boston*; *United States v. Hale County, TX; United States v. Brazos County, TX; United States v. City of Springfield, MA*; *United States v. Westchester County, NY; United States v. City of Azusa, CA; United States v. City of Paramount, CA; United States v. City of Rosemead, CA; United States v. Ector County, TX; United States v. Cochise County, AZ; United States v. San Benito County, CA.* These cases accelerated enforcement of the rights of voters to participate free from barriers at the polls during the 2002-2004 period.

In fact, since my confirmation in November 2005, the Voting Section has been remarkably productive, with record-setting activity in many areas of enforcement. Since November 2005, the Voting Section has brought lawsuits under Sections 2, 4(f)(4), 5, 203, and 208 of the Voting Rights Act; the 1960 Civil Rights Act; the National Voter Registration Act; the Help America Vote Act; and the Uniformed

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and Overseas Citizens Absentee Voting Act. The 18 new lawsuits we filed in CY 2006 is more than twice the average number of lawsuits filed by the Division annually over the preceding 30 years.

During CY 2006, the Division's Voting Section has continued to aggressively enforce all provisions of the Voting Rights Act, filing nine lawsuits to enforce various provisions of the Act. These cases included a lawsuit under Section 2 against Long County, Georgia, for improper challenges to Hispanic voters, at least three of whom were United States citizens on active duty with the United States Army, based entirely on their perceived race and ethnicity, and challenges to election systems that discriminate against African American voters in Euclid, Ohio, and Hispanic citizens of Port Chester, New York. We also recently won a major Section 2 lawsuit against Osceola County, Florida, overturning that county's discriminatory at-large election system. The Civil Rights Division also currently is defending the constitutionality of the VRARA.

In FY 2006, the Voting Section processed the largest number of Section 5 submissions in its history, and interposed important objections to protect minority voters in Texas and Georgia. With over 7,100 submissions, the Division handled roughly 40 percent more submissions in FY 2006 than in a normal year. The Voting Section also brought the first Section 5 enforcement action since 1998. The Voting Section also has begun a major enhancement of the Section 5 review process; jurisdictions will soon be able to submit voting changes online, making the process easier, more efficient, and more cost effective for covered jurisdictions and for the Department.

Our commitment to enforcing the language minority requirements of the Voting Rights Act, reauthorized by Congress this summer, remains strong. We filed five such lawsuits in 2006, which was only one short of the all-time record set in 2005.

The Division also had a record-breaking year with regard to enforcement of Section 208 of the Voting Rights Act. In FY 2006, the Division's Voting Section obtained 37.5%, or three out of eight, of the judgments ever obtained under Section 208 in its twenty-four year history.

In CY 2006, the Voting Section filed the largest number of cases under UOCAVA in any year since 1992. We filed successful UOCAVA suits in Alabama, Connecticut, and North Carolina. In addition, we reached a voluntary legislative solution without the need for litigation in South Carolina and worked with some additional states and localities to forestall or mitigate late ballot transmissions.

In CY 2006, the Voting Section also filed the largest number of suits under the National Voter Registration Act since immediately following the passage of the Act in 1995. We filed and successfully resolved lawsuits in Indiana, Maine, and New Jersey and are litigating a fourth suit filed in Missouri.

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As of January 1, 2006, virtually all of HAVA's requirements became fully enforceable. In advance of this first year of nationwide implementation of the database and accessible voting machine requirements of HAVA and into this year, the Division worked hard to help states achieve timely voluntary compliance. Where that did not appear possible, the Division brought enforcement actions, filing five lawsuits under HAVA in 2006. Four suits were filed against states for failure to complete the database requirements of HAVA; two of those suits also were for violations of the accessible voting requirements. Moreover, one suit was filed against a locality for its failure to meet the election day informational posting requirements of HAVA. We also successfully defended three additional lawsuits challenging the congressional mandates of HAVA. In addition, in Pennsylvania, where a state court had enjoined compliance with HAVA, our formal notice to the state of our intended lawsuit assisted state officials in overturning an erroneous lower court decision, so that we did not ultimately need to file to ensure compliance in Pennsylvania.

During CY 2006, the Division also deployed a record number of monitors and observers to jurisdictions across the country for a mid-term election. On November 7, 2006, more than 800 federal personnel monitored the polls in 69 political subdivisions in 22 states. In CY 2006, we sent over 1,500 federal personnel to monitor elections, double the number sent in CY 2000, a presidential election year.

16. A December 8, 2005 article in the *Dallas Morning News*, entitled "Voting Rights friction building inside Justice," reported that political appointees at the Justice Department have adopted a new policy barring career lawyers in the Voting Section from making recommendations in voting rights cases. At the oversight hearing, Senator Kennedy asked you a similar question and you responded "I do not believe so."

Now that you have had a time to look into this matter, please provide an answer to the following questions.

a. **Is it true that Voting Section lawyers, in reviewing preclearance requests, have been told to send their analysis memorandums forward minus the recommendations that have historically been part of the Section 5 preclearance process? If so, please explain in detail the motivation and justification for this change in policy.**

Answer: Career staff continue to be involved in the review and decision-making process of every Section 5 submission. As with every legal analysis, recommendations under Section 5 must be balanced and include all relevant information. It is my understanding that each person involved in the Section 5 analysis shares his or her assessment and recommendation with senior career management, and the ultimate recommendation of the Section is made with the full awareness of the views of each staff member involved in the matter. For those Section 5 recommendations that are forwarded to the Assistant Attorney General, *see* 28 CFR § 51.3, it is my understanding that I am informed whenever a difference of opinion may exist.

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b. **Are you concerned that the public perception may be that the Section 5 preclearance process is merely a political judgment?**

Answer: Having worked at the Department of Justice for more than a decade, I am always concerned with inaccurate perceptions that any of our decisions are not based solely on the facts and the applicable law.

Voting & Jurisdictional Divide

17. In the oversight hearing, you testified that the Civil Rights Division does "not enforce any criminal statutes with respect to voting."

a. Under section 9-85.200 of the U.S. Attorney Manual, when a federal offense "involves voting and race is an issue, prosecutors should contact the Criminal Section of the Civil Rights Division." **How does your current position (that the Civil Rights Division does not enforce criminal violations with respect to voting) comport with the U.S. Attorney Manual's directive that cases involving voting and race should be directed to the Criminal Section of the Civil Rights Division?**

Answer: I appreciate the opportunity to clarify this issue. The vast majority of all voting rights related criminal investigations are assigned to, and handled by, the Criminal Division. However, a small percentage of voting related offenses are principally assigned to the Civil Rights Division to handle or supervise. The Civil Rights and Criminal Divisions cooperate in examining possible violations of federal voting laws. The determination of which office takes the lead in a case will, in the ordinary course, depend on the nature of the various allegations involved, the evidence available at the outset of a case (when initial assignment is made), the likely availability of additional evidence, the legal elements that need to be proved under relevant statutes, and the penalties available. For example, depending on the evidence developed, multiple criminal statutes may be implicated by the conduct. Subsequent investigation that materially alters the balance of factors may be a basis for reassignment of the investigation.

The Criminal Section's jurisdiction for voting and election matters is provided for in 28 C.F.R. §§ 0.50 and 0.55. Under the C.F.R., the Criminal Section handles voting or election matters involving the use of force or the threat of force, pursuant 18 U.S.C. § 245, when there is discrimination based on race, color, religion, or national origin. Misleading or deceptive conduct would not ordinarily constitute a use of force. Under 18 U.S.C. §§ 241 and 242, the Civil Rights Division also handles criminal voting or election matters that relate to discrimination based on race or color.

The Criminal Section is also responsible for investigating vote buying schemes that may be federally prosecuted under 18 U.S.C. § 594 and 42 U.S.C. §§ 1973i and 1973j that involve racial discrimination. Section 594 relates to intimidating voters

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to vote for or against a candidate for national office. Section 1973i prohibits, in pertinent part and under certain conditions, a person from paying, offering to pay, or accepting payment for registering to vote or for voting. Section 1973j is available to prosecute racially discriminatory vote-buying schemes that involve election officials.

While the Criminal Division prosecutes the bulk of voting and election related matters, the Civil Rights Division has been involved in the prosecution of the following election-related cases:

- ***U.S. v. Salyer* (E.D. Ky. 1982);**
- ***U.S. v. Dorman*, (N.D. Miss. 1984);**
- **U.*S. v. Limehouse* (D.S.C. 1987); and**
- ***U.S. v. Rosario* (D.N.J. 2001).**

b. It is my understanding that the Civil Rights Division has exclusive jurisdiction to enforce the provisions of the Voting Rights Act (VRA). The VRA has two provisions, sections 11 and 12, 42 U.S.C. § 1973i and 1973j, that authorize criminal sanctions on those who, among other things, interfere with the right to vote. **Since the Civil Rights Division has exclusive jurisdiction over the Voting Rights Act, why does the Criminal Division prosecute violations of the criminal provisions of the Voting Rights Act?**

Answer: Pursuant to 28 C.F.R. § 0.55, the Criminal Division historically has been assigned to conduct, handle, or supervise enforcement of 18 U.S.C. §§ 241, 242, and 594 and 42 U.S.C. §§ 1973i and 1973j insofar as they relate to voting and election matters not involving discrimination or intimidation on grounds of race or color.

Employment Discrimination

18. Recent cases show a troubling trend of the Civil Rights Division shifting course from positions advocated by the Justice Department in previous administrations.

In 1992, during the Administration of George H.W. Bush, the Justice Department filed suit against the New York City Board of Education alleging that custodian jobs were awarded within an "old boys" network in violation of Title VII. The suit was settled in 2000 by means of a court approved consent decree but litigation over the consent decree continued. In April 2003, the current Justice Department abruptly abandoned the claims of the female and minority custodians and refused to defend the settlement against a challenge from white male custodians to the seniority rights of female and minority custodians. In another case, the Civil Rights Division spent four years in litigation to overturn discriminatory hiring criteria used by the Southeastern Pennsylvania Transportation Authority. But in late 2001, on the very day an appellate brief in the case was due, the Department abruptly dropped the civil rights suit altogether.

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In a case challenging the Buffalo Police Department, the Civil Rights Division assisted minority plaintiffs who alleged that they were systematically excluded from becoming police officers by means of a discriminatory employment test. As recently as June 2001 — in the early months of the Bush administration — the Justice Department opposed such tests. But one year later the Department adopted a completely different position and insisted that the same career lawyer who had worked for years opposing the tests take the opposite position in court.

How do you explain the Civil Rights Division's abrupt shift in position in the course of ongoing litigation? What do these shifts say about the Bush Civil Rights Division's commitment to equal opportunity for women and racial minorities in the workplace?

Answer: The Civil Rights Division is committed to vigorously enforcing Title VII and combating employment discrimination on behalf of all Americans. Since my confirmation as Assistant Attorney General, the Civil Rights Division has filed three lawsuits alleging a pattern or practice of employment discrimination, including two on behalf of African-American and Hispanic victims. In comparison, the Division filed one such case in FY 1998; one in FY 1999; and one in FY 2000.

Moreover, the Division filed four cases alleging a pattern or practice of employment discrimination in CY 2004, which is the largest number filed in a single year since the mid-1990s, as well as two in CY 2005. All of the pattern or practice complaints filed by the Department since 2004 have resulted in either a decision from the Court in favor of the United States or the entry of a consent decree implementing terms that were favorable to the United States.

We remain fully committed to the vigorous enforcement of federal law. Because various privileges attach to the Department's strategic decisions in ongoing or past litigation, further comment on specific cases would be inappropriate.

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Written Questions for Wan Kim
Submitted by Senator Arlen Specter

1. In your testimony, you frequently cite statistics from the year 2006. What about the rest of the time the Bush Administration has been in office? Would you please provide us with the statistics on the Bush Administration's 5 or 6 year record at the Civil Rights Division?

Answer: The Civil Rights Division has achieved many successes during this Administration. Some of the highlights of this Administration's record in civil rights enforcement are:

During the past 6 years, the Civil Rights Division has litigated more cases on behalf of minority language voters than in all other years combined since 1975, when the minority language provisions were enacted. Specifically, we have successfully litigated almost 60 percent of all language minority cases in the history of the minority language provisions of the Voting Rights Act.

During the past six years, we have brought seven of the nine cases ever filed under Section 208 of the Voting Rights Act in the history of the Act, including the first case ever under the Voting Rights Act to protect the rights of Haitian Americans.

In the past six fiscal years (FY 2001 - 2006), as compared to the previous six years (FY 1995 - FY 2000), the Criminal Section filed 25% more color of law cases, charged 15% more defendants, and obtained the convictions of 50% more defendants.

In Fiscal Year 2004, we brought ninety-six criminal civil rights prosecutions, a record for cases filed in a single year.

From FY 2001 through FY 2006, the Division has brought 39 cross-burning prosecutions, charging a total of 60 defendants. The Division obtained the convictions of 58 defendants during that same period.

From FY 2001 to FY 2006, the Department prosecuted 360 human trafficking defendants, secured almost 240 convictions and guilty pleas, and opened nearly 650 new investigations. That represents a six-fold increase in the number of human trafficking cases filed in court, quadruple the number of defendants charged, and triple the number of defendants convicted in comparison to 1995-2000.

In recent years, the Division has teamed up with local prosecutors in an effort to prosecute historical Civil Rights era murders. On January 25, 2007, the federal district court in Jackson, Mississippi, unsealed an indictment charging James Seale, 71, with two counts of kidnapping resulting in death and one count of conspiracy in connection with the 1964 abductions and murders of 19-year-old African-Americans, Charles Moore and Henry Dee. Seale, a former member of the White Knights of the Ku Klux Klan, is charged with having acted in concert with fellow Klansmen to kidnap Moore and Dee, beat them, transport

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them across state lines, and murder them by attaching heavy weights to them and throwing them, still alive, into the Old Mississippi River. If the defendant is convicted, he will face a maximum sentence of life imprisonment on each count.

We also assisted a Mississippi district attorney's office in reopening the investigation into the 1955 murder of Emmett Till, a 14 year-old African-American teenager, who was kidnapped and killed in rural Mississippi. We reported the results of that investigation to the District Attorney for Greenville, Mississippi, for consideration of whether to pursue state charges. A state grand jury in Mississippi declined to indict the case.

Also, in 2003, the Justice Department convicted Ernest Avants for the 1966 killing of Ben Chester White, an African-American sharecropper, on national forest land. White was murdered as part of a plot by white supremacists to lure Martin Luther King, Jr., to Mississippi so that they could assassinate him.

Since the January 2001 announcement of the President's New Freedom Initiative, the Division's Disability Rights Section has secured positive results for people with disabilities in over 2,000 actions under the Americans with Disabilities Act of 1990 ("ADA"), including lawsuits, settlement agreements, and successful mediations.

During the past 6 years, we have obtained more than 80% of the agreements reached under Project Civic Access since it began in 1999, improving the lives of more than 3 million Americans with disabilities.

We have authorized over 30 percent more investigations under the Civil Rights of Institutionalized Persons Act (CRIPA) in the past five and one-half years than in the previous comparable time frame.

With regard to juvenile justice facilities, this Administration has increased the number of settlement agreements by 60%, has more than doubled the number of investigations, and has more than doubled the number of findings letters issued.

We have worked to ensure the integrity of law enforcement by more than tripling the number of settlements negotiated with police departments across the country since 2001. From 2001 to 2006, we successfully resolved fourteen pattern or practice police misconduct investigations involving eleven law enforcement agencies, compared to only four investigations resolved by settlement during a comparable time period of the previous administration.

From 2001 to 2006, the Division filed more consent decrees (4 vs. 3) than in the preceding relevant time period. We have also issued more than six times the numbers of technical assistance letters to police departments (19 vs. 3).

In 2002, we established a Special Counsel for Religious Discrimination to coordinate the protection of religious liberties. We have won virtually every religious discrimination case in which we have been involved, and have increased the enforcement of religious liberties

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in all areas of our jurisdiction. For example, we reviewed 82 cases of alleged religious discrimination in education from FY 2001 to FY 2006, resulting in 40 investigations. This is compared to one review and one investigation in the prior six-year period.

Under our post 9/11 backlash initiative, the Department has investigated over 750 incidents since 9/11 involving violence, threats, vandalism and arson against Arab-Americans, Muslims, Sikhs, South-Asian Americans and other individuals perceived to be of Middle Eastern origin. We have obtained 32 federal convictions in such cases. We have also assisted local law enforcement in bringing more than 160 such criminal prosecutions.

During this Administration, we have used the Division's housing testing program in new ways. We have tested for the first time to detect discrimination against guide-dog users. We filed and settled the first case developed by the testing program that alleged that a retirement community discriminated against wheelchair users. In addition, we have tested for the first time to detect discrimination against certain minorities.

During this Administration, we have filed forty cases alleging that multi-family housing was not designed and constructed in compliance with the Fair Housing Act's requirements for accessible housing. Our settlements in FY 2005 alone created more than 12,000 new accessible housing opportunities.

2. During your confirmation hearing, Senator Cornyn asked you about your commitment to prosecuting human trafficking. You expressed a deep concern about this crime and noted that the current Administration and the Department of Justice has more than tripled the number of prosecutions associated with human trafficking. Can you discuss from where the resources to focus such an initiative have come (civil rights or criminal) and if this reallocation of resources has impacted the Civil Rights Division's ability to prosecute other, more traditional civil rights cases?

Answer: In the last six fiscal years, the Civil Rights Division has compiled an impressive record in prosecuting criminal civil rights cases, including the ninety-six criminal civil rights prosecutions brought in FY 2004, a record for cases filed in a single year. Indeed, even more recently in FY 2006, the Criminal Section set new records in several areas by charging 200 defendants with civil rights violations, obtaining convictions of 180 defendants, and obtaining an overall conviction rate of 98%, the highest such figures in the history of the Criminal Section.

In the past six fiscal years (FY 2001 - 2006), as compared to the previous six years (FY 1995 - FY 2000), the Criminal Section filed 25% more color of law cases (238 v. 190), charged 15% more defendants (400 v. 349), and obtained convictions of 50% more defendants (327 v. 219). In FY 2006 color of law matters, we filed forty-four cases (up from twenty-nine the previous year) and charged sixty-six defendants (compared to forty-five in the previous year).

Over the same time period (after the October 28, 2000, effective date of the Trafficking Victims Protection Act), the Division's human trafficking efforts resulted in initiating five-

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fold the number of investigations (639 vs. 128), filing more than six times as many human trafficking cases (124 vs. 19), quadrupling the number of defendants charged (360 vs. 89), and tripling the number of defendants convicted (238 vs. 67).

From FY 2001 through FY 2006 we charged 11% more defendants with civil rights violations than defendants charged from FY 1995 through FY 2000 (965 vs. 870). Accordingly, the Section's increase in prosecutor staffing has resulted in increased prosecutions in its overall enforcement program.

Our criminal prosecutions span the full breadth of the Division's jurisdiction, and our prosecutors handle all types of cases within our jurisdiction. As we have increased our staff, so have we increased our investigation and prosecution efforts as demonstrated by the increased activity in our overall enforcement program.

3. During your confirmation hearing, you defended the Department of Justice's record regarding enforcement of the Voting Rights Act. Additionally, you pledged your untiring focus towards improving the litigation statistics for all the sections that would fall under your supervision, including the Voting Rights Section. At the time, however, you were unable, when asked by Senator Kennedy, to comment on exactly what you would do in that area. Now, you have been the Assistant U.S. Attorney for over one year and have overseen one major election. Please comment on what initiatives you have implemented in the Voting Rights Section and how these actions have improved the enforcement the Voting Rights Act.

Answer: Since my confirmation in November 2005, the Voting Section has been remarkably productive, with record-setting activity in many areas of enforcement. Since November 2005, the Voting Section has brought lawsuits under Sections 2, 4(f)(4), 5, 203, and 208 of the Voting Rights Act; the 1960 Civil Rights Act; the National Voter Registration Act; the Help America Vote Act; and the Uniformed and Overseas Citizens Absentee Voting Act. In fact, the 18 new lawsuits we have filed in CY 2006 is more than twice the average number of lawsuits filed by the Division annually over the preceding 30 years.

During CY 2006, the Division's Voting Section has continued to aggressively enforce all provisions of the Voting Rights Act, filing nine lawsuits to enforce various provisions of the Act. These cases included a lawsuit under Section 2 against Long County, Georgia, for improper challenges to Hispanic voters, including at least three United States citizens on active duty with the United States Army, based entirely on their perceived race and ethnicity, and challenges to election systems that discriminate against African-American voters in Euclid, Ohio, and Hispanic citizens of Port Chester, New York. We also recently won a major Section 2 lawsuit against Osceola County, Florida, overturning that county's discriminatory at-large election system.

The Civil Rights Division also currently is defending the constitutionality of the VRARA.

In FY 2006, the Voting Section processed the largest number of Section 5 submissions in its history and interposed important objections to protect minority voters in Texas and

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Georgia. With over 7,100 submissions, the Division handled roughly 40 percent more submissions in FY 2006 than in a normal year. The Voting Section also brought the first Section 5 enforcement action since 1998. And the Voting Section has begun a major enhancement of the Section 5 review; soon jurisdictions will be able to submit voting changes online, making the process easier, more efficient, and more cost effective for covered jurisdictions and for the Department.

Our commitment to enforcing the language minority requirements of the Voting Rights Act, reauthorized by Congress this summer, remains strong. We filed five such lawsuits in 2006, which was only one short of the all-time record set in 2005.

The Division also had a record-breaking year with regard to enforcement of Section 208 of the Voting Rights Act. In Fiscal Year 2006, the Division's Voting Section obtained 37.5%, or three out of eight, of the judgments ever obtained under Section 208 in its twenty-four year history.

In CY 2006, the Voting Section filed the largest number of cases under UOCAVA in any year since 1992. We filed successful UOCAVA suits in Alabama, Connecticut, and North Carolina. In addition, we reached a voluntary legislative solution without the need for litigation in South Carolina, and worked with some additional states and localities to forestall or mitigate late ballot transmissions.

In CY 2006, the Voting Section also filed the largest number of suits under the National Voter Registration Act since immediately following the passage of the Act in 1995. We filed and successfully resolved lawsuits in Indiana, Maine, and New Jersey, and are litigating a fourth suit, filed in Missouri.

As of January 1, 2006, virtually all of HAVA's requirements became fully enforceable. In advance of this first year of nationwide implementation of the database and accessible voting machine requirements of HAVA and into this year, the Division worked hard to help states achieve timely voluntary compliance. Where that did not appear possible, the Division brought enforcement actions, filing five lawsuits under HAVA in 2006. Four suits were filed against states for failure to complete the database requirements of HAVA; two of those suits also were for violations of the accessible voting requirements. In addition, one suit was filed against a locality for its failure to meet the election day informational posting requirements of HAVA. We also successfully defended three additional lawsuits challenging the congressional mandates of HAVA. In addition, in Pennsylvania, where a state court had enjoined compliance with HAVA, our formal notice to the state of our intended lawsuit assisted state officials in overturning an erroneous lower court decision, so that we did not ultimately need to file to ensure compliance in Pennsylvania.

During CY 2006, the Division also deployed a record number of monitors and observers to jurisdictions across the country for a mid-term election. On November 7, 2006, over 800 federal personnel monitored the polls in 69 political subdivisions in 22 states. In CY 2006, we sent over 1,500 federal personnel to monitor elections, double the number sent in CY 2000, a presidential election year.

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I personally met with representatives of a number of civil rights organizations prior to the 2006 general election, including organizations that advocate on behalf of racial and language minorities, as well as groups that focus on rights for voters with disabilities. During these meetings, I encouraged the groups to share with us information about their concerns to help us respond appropriately where needed.

I also personally met with representatives from the National Association of Secretaries of State, the National Association of Attorneys General, and other representatives of state and local governments and election officials before the 2006 general election. This meeting provided a forum to discuss state and local officials' concerns and allowed us to provide information about the Division's election day plans.

4. During your confirmation hearing, Senator Durbin asked you to comment about the Civil Rights Divisions approval of the new Georgia State voting law requiring an ID, available to those without another form of State ID for a $20.00 fee. At the time, you responded that you were not part of the decision, nor had the opportunity to review the "thousands of pages" of factual submissions regarding the subject Now that you are supervise the Voting Rights section and certainly are more familiar with this subject, please comment on whether you support the Department of Justice's decision to approve the Georgia law.

Answer: In August 2005, the Department precleared a Georgia voter identification law, which itself amended an existing voter identification statute that had been precleared by the prior Administration. This preclearance decision followed a careful analysis that lasted several months and considered all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of state photo identification and driver's license cards and the views of minority legislators in Georgia (as well other current and former minority elected officials) . The data showed, among other things, that the number of people in Georgia who already possessed a valid photo identification greatly exceeded the total number of registered voters, and that there was no racial disparity in access to the identification cards. Indiana's voter identification law was upheld by the Seventh Circuit in *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007), in the face of allegations similar to those made against the Georgia law.

Since my tenure as Assistant Attorney General, the State of Georgia adopted, and the Department precleared, a new form of voter identification that would be available to voters for free at one or more locations in each of the 159 Georgia counties. I fully stand by that decision.

5. During your confirmation hearing, Senator Durbin raised the issue of prosecuting "reverse discrimination" cases, such as the Administration filing lawsuits under Section 2 of the Voting Rights Act on behalf of whites, but not African Americans and the Administration's filing of single pattern or practice employment discrimination cases on behalf of whites but not African Americans. You stated that you were not "well attuned to the facts of those sections…" Certainly by now you are. Can you please explain why the Administration's Civil Rights Division is filing lawsuits on behalf of whites and not African Americans?

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Answer: The Division has been active in enforcing the federal civil rights laws on behalf of all Americans, including African Americans. Indeed, during this Administration, the Division has filed scores of cases on behalf of African-American victims. Some examples are:

- **In July 2006, the Division filed a complaint against the City of Euclid, Ohio, alleging that the mixed at-large/ward system of electing the city council diluted the voting strength of African-American citizens in violation of Section 2 of the Voting Rights Act. In its investigation, the Division found that while African-Americans composed nearly 30% of Euclid's electorate, and although there had been eight recent African-American candidacies for the city council, not a single African-American candidate had ever been elected to that body. Further, the Division found that in seven recent city council elections, white voters voted sufficiently as a bloc to defeat the African-American voters' candidates of choice.**

- **In 2002, the Division filed a lawsuit under Section 208 of the Voting Rights Act that was the first ever to protect the voting rights of Haitian Americans.**

- **In November 2006, the Division filed a complaint against Tallahassee Community College (TCC) alleging that TCC failed to select an African American applicant for the position of HomeSafenet Trainer because of the applicant's race in violation of Title VII. Under a court-approved consent decree entered on November 7, 2006, TCC agreed to offer the applicant $34,363 in back pay and accumulated interest.**

- **In July 2006, the Division filed suit against the City of Chesapeake, Virginia, alleging that the City had engaged in a pattern or practice of employment discrimination on the basis of race and national origin in violation of Section 707 of Title VII of the Civil Rights Act of 1964 by using a mathematics test to screen applicants for entry-level police officer positions in a manner that had an unlawful disparate impact against African-American and Hispanic applicants.**

- **In July 2006, the court entered a consent decree resolving our suit against the City of Virginia Beach, Virginia, alleging that the City had engaged in a pattern or practice of employment discrimination in violation of Title VII through its use of a mathematics test that disproportionately excluded African-American and Hispanic applicants for the position of entry-level police officer. The decree alters the City's method for selecting entry-level police officers in a way that will eliminate the disparate impact of the mathematics test. In addition, the decree requires the City to provide remedial relief, including money damages, priority job offers, and retroactive seniority, to identifiable African-American and Hispanic victims of the challenged test.**

- **In 2003, the Division successfully settled a racial discrimination and retaliation lawsuit against the city of Fort Lauderdale, Florida. The lawsuit alleged that the city of Fort Lauderdale violated Title VII by denying an African-American employee promotion because of his race. The lawsuit further alleged that the city retaliated against the**

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employee when he complained that he had been denied promotion for discriminatory reasons.

- In October and November 2006, defendants Joseph Kuzlik and David Fredericy pled guilty to conspiracy, interference with housing rights, and making false statements to federal investigators. In February 2005, these defendants poured mercury on the front porch and driveway of a bi-racial couple in an attempt to force them out of their Ohio home. Fredericy was sentenced to 33 months in prison, and Kuzlik was sentenced to 27 months in prison.

- In August 2006, the Division obtained a verdict against a former apartment manager for discrimination on the basis of race as a result of his refusal to rent to African-Americans in Boaz, Alabama. The Division conducted an investigation of the manager and his employer through the use of fair housing testers. The defendant was ordered to pay a civil penalty of $10,000. Earlier in the year, the defendant's employer agreed to pay a civil penalty of $17,000 and compensatory damages of $32,700 to individuals who were subjected to the alleged discriminatory housing practices.

- In December 2005, the Division filed a complaint alleging that a Wisconsin nightclub violated Title II by discriminating against African-Americans. According to our complaint, nightclub employees falsely told African-Americans they could not enter because a private party was underway or the club was full to capacity, while at the same time admitting whites. On December 29, 2006, the court approved a consent decree settling the case and requiring the nightclub to adopt new entry procedures designed to prevent racial discrimination, to pay for periodic testing to assure that discrimination does not continue, to post a prominent sign at the entries advising that the nightclub does not discriminate on the basis of race or color, to train its managers, to send periodic reports to the Department, and to adopt an objective dress code approved by the Department.

- In 2004, the Division entered into a consent decree resolving allegations that Cracker Barrel Old Country Store, Inc., a nationwide family restaurant chain, accommodated a severe and pervasive pattern of racial discrimination at its restaurants, including allowing its servers to refuse to serve African-American customers and treating such customers differently in terms of seating, service, and responsiveness to complaints. Cracker Barrel agreed to implement far-reaching policy changes and training programs to remedy these violations.

- Since 2001, the Division has obtained four consent decrees involving redlining of predominantly African-American neighborhoods by major banking institutions. The first, filed and resolved in 2002, involved a major bank in Chicago that will invest more than $10 million and open two new branches in minority neighborhoods to settle a lawsuit alleging that it had engaged in mortgage redlining on the basis of race and national origin. In May 2004, the Division obtained a consent decree requiring a bank to invest $3.2 million in small business and residential loan programs and to open three new branches in the City of Detroit. This was the first redlining case the Division has

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ever brought alleging discrimination in business lending. In July 2004, the Justice Department filed and resolved a lawsuit against another bank in Chicago. The suit alleged that the bank intentionally avoided serving the credit needs of residents and small businesses located in minority neighborhoods. The bank has agreed to invest $5.7 million and open new branches in these neighborhoods. On October 13, 2006, the Justice Department filed a complaint alleging that Centier Bank discriminated on the basis of race and national origin by refusing to provide its lending services to residents of minority neighborhoods in the Gary, Indiana, metropolitan area in violation of the Fair Housing Act and the Equal Credit Opportunity Act. The suit was resolved by a consent decree entered on October 16, 2006, which requires the Bank to: invest a minimum of $3.5 million in a special financing program for residential and CRA small business loans; commit at least $375,000 in targeted advertising; invest $500,00 to provide credit counseling, financial literacy, business planning, and other related educational programs targeted at the residents and small businesses of African-American and Hispanic areas and sponsor programs offered by community or governmental organizations engaged in fair lending work; open or acquire at least two full service offices within designated African-American neighborhoods; expand an existing supermarket branch in a majority Hispanic neighborhood to provide full lending services; provide the same services offered at its majority white suburban locations to all branches regardless of their location; train employees on the requirements of the Fair Housing Act and Equal Credit Opportunity Act; as well as other remedial relief.

- On January 25, 2007, the federal district court in Jackson, Mississippi, unsealed an indictment charging James Seale, 71, with two counts of kidnapping resulting in death and one count of conspiracy in connection with the 1964 abductions and murders of 19-year-old African-Americans, Charles Moore and Henry Dee. Seale, a former member of the White Knights of the Ku Klux Klan, is charged with having acted in concert with fellow Klansmen to kidnap Moore and Dee, beat them, transport them across state lines, and murder them by attaching heavy weights to them and throwing them, still alive, into the Old Mississippi River. If the defendant is convicted, he will face a maximum sentence of life imprisonment on each count.

- In 2004, the Division announced that federal assistance would be provided to local officials conducting a renewed investigation into the 1955 murder of Emmett Till, a 14-year old African-American boy from Chicago. Till was brutally murdered while visiting relatives in Mississippi after he purportedly whistled at a white woman. Two defendants were acquitted in state court four weeks after the murder. Subsequent to the trial, the defendants admitted their guilt. Both men are now deceased. The investigation showed that there was no federal jurisdiction. Thus, on March 16, 2006, the Justice Department reported the results of its investigation to the district attorney for Greenville, Mississippi, for her consideration. A state grand jury in Mississippi declined to indict the case.

- In April 2004, five white supremacists pleaded guilty to assaulting two African-American men who were dining with two white women in a Denny's restaurant in

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Springfield, Missouri. One of the victims was stabbed and suffered serious injuries. The defendants were sentenced to terms of incarceration ranging from 24 to 51 months.

- **In February 2003, the Division successfully prosecuted Ernest Henry Avants for the 1966 murder of Ben Chester White, an elderly African-American farm worker in Mississippi who, because of his race and efforts to bring the Reverend Martin Luther King, Jr., to the area, was lured into a national forest and shot multiple times. That conviction was affirmed in April 2004.**

- **For example, in September 2006, two defendants were convicted of conspiring to interfere with the housing rights of a family that included an African American by burning a cross in front of their house. In April 2006, an additional defendant pleaded guilty to the same offense. In a separate case, a defendant pleaded guilty on August 16, 2006, to intimidating and interfering with an African-American family that was negotiating for the purchase of a house by burning a cross on the property adjacent to the house. On April 13, 2004, a defendant in a different case pleaded guilty to building and burning a cross in the front yard of an African-American couple's home; that defendant was sentenced to 18 months of incarceration.**

- **In a case stemming from a series of racially-motivated threats aimed at an African-American family in North Carolina, four adults were convicted and one juvenile was adjudicated delinquent. Two of the adults were convicted at trial for conspiring to interfere with the family's housing rights and, on July 5, 2005, were sentenced to 21 months in prison. A third defendant pleaded guilty to a civil rights conspiracy charge, and the fourth defendant pleaded guilty to obstruction of justice for his role in the offense.**

- **On March 4, 2004, in a case personally argued by the then-Assistant Attorney General for the Civil Rights Division, the United States Court of Appeals for the Fourth Circuit agreed with the Division that the district court should have imposed a stiffer sentence on the perpetrator of a cross burning in Gastonia, North Carolina. On March 28, 2005, the defendant was re-sentenced by another district court judge to one year and one day in prison.**

The Department is committed to enforcing the federal civil rights laws on behalf of all Americans. As the Jackson, Mississippi, Clarion-Ledger editorialized on January 31, 2007, "Discrimination is discrimination – and it's wrong in whatever color it comes. That's the law."

6. In your written responses from questions submitted as part of your confirmation hearing, I asked you about your perception of a breakdown in communication between the career attorneys and the political appointees in the Civil Rights Division. You stated that you have a history of fostering a positive dialogue in sections under your supervision and you intended spread this environment throughout the Division. Can you comment on how you have accomplished this and if, in your opinion, reduced the tension between career attorneys and political appointees?

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Answer: My goal is to create an environment of hard work, mutual respect, open dialogue and professionalism. Having been a career attorney at the Justice Department for most of my professional life, I am sensitive to, and appreciative of, the concerns of career attorneys. Since taking office as Assistant Attorney General, I have worked hard to ensure open access and open lines of communications and to foster a positive relationship between political appointees and career attorneys. To that end, I have made myself and my Deputy Assistant Attorneys General available to career attorneys to hear their concerns. I have established regular meetings with the Division's Section Chiefs, and my deputies meet regularly with career attorneys in the sections under their supervision. Additionally, I created an internal Ombudsman to meet with Division employees on a wide variety of issues and concerns. Through these efforts, I believe I have fostered a positive dialogue between career attorneys and political appointees in the Division.

7. As stated during your confirmation hearing, your hiring recommendations have been and will continue to be based solely on the strength of an applicant's qualifications and that the recommendations of other career attorneys you have recommended to be hired. Can you attest that this is still your hiring policy? Additionally, can you comment on why others may have a perception that career employees have little or no input in hiring?

Answer: Yes. Career employees continue to play a central role in hiring attorneys to work in the Civil Rights Division, and I cannot speculate as to why some may have an erroneous perception of this process.

8. During your conformation hearing, you vowed work hard to improve the morale of all employees at the Civil Rights Division. Can you cite examples of how you have tried to achieve this and what impact is has had on the employees of the Division?

Answer: It is very important to me that the employees at the Civil Rights Division enjoy their work. As a personal matter, I have always greatly enjoyed working for the Justice Department; it is why I have spent more than a decade here. Working as a Justice Department attorney is a unique and rewarding career, and I hope that every attorney shares my level of enthusiasm. As a management matter, I believe that there is a connection between morale and productivity. I have worked hard to foster a positive relationship with the attorneys in the Division. I have made myself and my Deputy Assistant Attorneys General available to career attorneys to hear their concerns. I recently created an internal Ombudsman to meet with Division employees on a wide variety of issues and concerns. During my first week as Assistant Attorney General, I crafted the Division's Professional Development Office, which ensures that the Division's staff, particularly its attorneys, are afforded every opportunity to improve their professional development. The office has devised a week-long orientation program for new Division attorneys and supervises the new attorney mentor program. Its most recent success was a 3-day civil rights seminar for attorneys held at the Department's National Advocacy Center. I believe that these efforts have helped foster a positive work environment at the Division.

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9. Please discuss your policy of inclusion of career attorneys that you promised in your response to Senator Durbin's Questions for the Record. Has part of this policy also been an "open door" to career attorneys to express their opinions and concerns?

Answer: Since taking office as Assistant Attorney General, I have maintained a policy of inclusion. I have always believed that a wide variety of opinions and input is necessary to make an informed decision. To that end, my Deputy Assistant Attorneys General and I regularly meet with and seek the advice of career attorneys, and we make ourselves available to hear their concerns. I hold regular meetings with the Section Chiefs, and my deputies meet regularly with the career management of the sections under their supervision. I routinely rely upon the advice of career management, and I try to manage the career attorneys in a respectful and cooperative manner, such as listening to their legal arguments, making timely decisions and providing clear guidance. Early in my tenure as Assistant Attorney General, I also created an internal Ombudsman to meet with Division employees on a wide variety of issues and concerns.

10. Please discuss what efforts the Justice Department is taking to implement the elements of the Carter-Baker Commission pertaining to investigations of voter fraud (section 5). Do you agree with the Commission's recommendations? What concerns do you have with their suggestions? Are there any requests you have of this committee for assistance in implementing these recommendations?

Answer: The Commission's recommendations primarily involve suggested changes in federal and state law. The Department will enforce or defend such federal laws within our jurisdiction as enacted by Congress.

11. The 2005 report of the Carter-Baker Commission to reestablish the public faith in our electoral process offers a number of recommendations, including issuing standardized ID cards to prevent voter fraud and requiring computerized voting machines to issue paper receipts to ease auditing efforts. Have you had a chance to review the recommendations of the report, and if so, could you comment as to the practicability and efficacy of these recommendations?

Answer: We have reviewed the recommendations but are not in a position to comment regarding their practicability or efficacy. Of course, the Department will enforce or defend such federal laws within our jurisdiction as enacted by Congress.

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Written Questions for Wan Kim
Submitted by Senator Edward M. Kennedy

Voting Rights Enforcement

1. I wrote you a letter dated November 1, 2006 about the Civil Rights Division's plans for the November 7th midterm elections. My letter noted that the Division had filed only one lawsuit alleging discrimination against African-American voters since 2001. The Department's written response of November 9th refers to two Section 5 enforcement actions on behalf of African-American voters – one in Georgia, the other in Texas – and lawsuits under other provisions of the Voting Rights Act on behalf of African Americans in Tennessee, Florida, South Carolina, Texas, and Ohio. The identity of these suits is unclear from the letter.

a. In 2001, the Bush Justice Department inherited two voting rights lawsuits from the Clinton Administration that alleged discrimination against African-American voters in Crockett County, Tennessee and Charleston County, South Carolina. The Crockett County matter was investigated and approved for filing during the Clinton Administration, but negotiations delayed resolution of the case until a few months into the Bush Administration. The Clinton Administration approved and filed the Charleston County case, which was litigated during the Bush presidency. Are the Crockett County and Charleston County cases the cases referred to in the Department's November 9th letter in Tennessee and South Carolina?

Answer: The Section 2 case in Crockett County, Tennessee, was filed on April 17, 2001, and fully litigated during this Administration. The Section 2 case in Charleston County, South Carolina, was filed on January 17, 2001; it was fully litigated for almost four years during this Administration, not only through the trial court, but also on appeals that went to the U.S. Supreme Court. These cases are referenced in the November 9, 2006, letter.

b. After the 2000 election, the Department sued Miami-Dade County for not permitting language assistance Haitian-American voters with limited proficiency in English. The suit involved access to language assistance under Section 208 of the Voting Rights Act, not race discrimination. Is this the Florida suit on behalf of African-American voters mentioned in the Department's November 9th letter?

Answer: Section 208 protects the rights of voters to have assistance in casting a ballot, thereby allowing those voters to effectuate their right to vote. Violations of Section 208 against African Americans involve serious discrimination. This important case is one that was referenced in the November 9, 2006, letter.

c. What's the non-Section 5 enforcement action in Texas on behalf of African-American voters claimed in the Department's November 9th letter?

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Answer: I appreciate the opportunity to clarify this issue. Our letter, dated November 9, 2006, referred to "two enforcement actions under Section 5 of the Voting Rights Act on behalf of African Americans, in Georgia and Texas, and other Voting Rights Act cases on behalf of African American voters in Tennessee, Florida, South Carolina, Texas, and Ohio." The language "two enforcement actions" actually refers to Section 5 *objections* interposed in CY 2006 to block racially discriminatory voting changes on behalf of African-American voters in Georgia and Texas. The language "other Voting Rights Act cases" refers, among other things, to a *lawsuit* the Division filed in Texas in CY 2006 under Section 5 of the Voting Rights Act to vindicate the rights of African-American and other minority voters.

In reality, the Bush Administration did not file a race discrimination lawsuit on behalf of African-American voters until it sued Euclid, Ohio in July 2006 under Section 2 of the Voting Rights Act. That lawsuit came only after numerous press reports about the Department's failure to enforce the voting rights of African Americans and after multiple attempts to schedule this oversight hearing.

d. When did the Department begin its investigation of Euclid, Ohio's method of electing its city council? When did Voting Section personnel first begin contacting the minority community contacts and requesting election returns to determine whether Euclid's method of election violated the Voting Rights Act?

Answer: The Department began to investigate the City of Euclid, Ohio, soon after learning of a potential violation of the Voting Rights Act. On March 20, 2006, the Department sent the City formal notice of our intent to file suit and an invitation to negotiate a settlement of the case that could be filed simultaneously with the complaint. The Department filed suit on July 10, 2006, after negotiation efforts proved futile.

e. Other than against Euclid, Ohio, is the Department actively investigating or pursuing claims of vote dilution involving African-American voters under Section 2 of the Voting Rights Act?

Answer: The Department is committed to the vigorous and even-handed enforcement of the Voting Rights Act and regularly investigates possible violations of Section 2 on behalf of all Americans, including African-American voters.

2. Although the Administration has failed to enforce the voting rights of African Americans, it did file the Department's first-ever lawsuit alleging voting discrimination by African Americans against white voters in a county in Mississippi in 2005.

a. Is it the Department's position that voting discrimination is more prevalent against white voters than African-American voters?

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Answer: The Department is committed to the vigorous and even-handed enforcement of the Voting Rights Act on behalf of all Americans and has brought lawsuits on behalf of African-American voters, Hispanic-American voters, Asian-American voters, Native-American voters, and white voters. This Administration also has brought the first lawsuits in history to protect the voting rights of citizens of Vietnamese, Filipino, and Haitian heritage.

b. Does the Department have any active investigations into voter intimidation or coercion against African Americans in Mississippi or elsewhere, as possible violations of Section 11(b) of the Voting Rights Act?

Answer: Yes.

3. I'm troubled that the Civil Rights Division seems to be playing politics with its enforcement of the Voting Rights Act. Under Section 5 of the Act, the Justice Department has overruled the recommendations of career attorneys and pre-cleared voting changes that improved the election prospects of the Republican Party, but compromised the ability of minority voters to participate in the political process.

The Division pre-cleared the 2003 Texas redistricting plan, even though the career staff who investigated the plan unanimously concluded it would discriminate against minority voters. This summer, in *LULAC v. Perry,* the Supreme Court ruled that the Texas redistricting plan discriminated against Latino voters and violated the Voting Rights Act by redistricting Latinos out of a district just as they were about to elect a candidate of their choice.

a. If Latino voters went from being on the verge of electing a candidate of their choice to not having that opportunity, how could the Department conclude that Latino voters were not left worse off by the redistricting plan, in violation of the Section 5 standard?

Answer: In 2003, the Department conducted a deliberate and careful review of every relevant fact relating to the Texas submission of its congressional redistricting under Section 5 of the Voting Rights Act, concluding that there was no retrogression in the overall plan. The legislature offset one lost opportunity district for Latino voters by creating a new district in that region in which Hispanic voters dependably would be able to elect a representative of their own choice. Indeed, the plan was used during the 2004 elections, which resulted in an increase in the number of minority representatives elected to Congress from Texas.

In *LULAC v. Perry*, the Supreme Court agreed with the Department's principal argument that the state did not violate Section 2 by redrawing former congressional district 24. The Court also found no violation of the Constitution or the Voting Rights Act in 31 of Texas's 32 congressional districts. The Court's decision left the Texas redistricting plan largely intact and left it to the state to determine how to remedy the lone problem identified as to congressional district 23. In this regard, the Supreme Court reversed the decision of the lower court, which found no

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violation in the redistricting plan, including district 23. Moreover, the Supreme Court's 5-4 decision produced six separate opinions from six different Justices in 120 pages of discussion.

The Supreme Court's decision in no way calls into question the Department's decision to preclear the Texas redistricting plan under Section 5 of the Voting Rights Act. Indeed, only one Justice suggested that Section 5 had been violated; no other Justice joined him in that portion of his opinion. The majority's decision as to district 23 was founded on a new principle, under Section 2 of the Voting Rights Act, that the creation of an offsetting majority-minority district may not remedy the loss of a majority-minority district in the same part of the state, if the new district is not compact enough to preserve communities of interest. Indeed, this new compactness inquiry issue was not the subject of briefing and was not addressed by the Department.

During the oversight hearing, you testified about the Department's preclearance of two voter photo identification laws in Georgia. After the Department precleared the laws, courts struck down the first law as the equivalent of a 21st century poll tax because of the cost of obtaining the ID. They blocked the state's second attempt because it imposed an unconstitutional burden on the right to vote.

b. You explained that whether a voting law is unconstitutional is immaterial to the Section 5 determination. But an unconstitutional voting law that diminishes the opportunity of African-American voters to participate in the political process and elect candidates of their choice is retrogressive and warrants a Section 5 objection. I find it hard to understand how the Department concluded that a poll tax was not retrogressive, especially when a significantly greater percentage of African-American voters compared to white Georgians live below the poverty line, and a far lower percentage of African Americans have access to a motor vehicle and transportation to obtain a photo ID. Whether minority legislators supported the law was a factor the Department was required to consider under Section 5, and Georgia's African-American state legislators overwhelmingly opposed the photo ID laws.

Answer: In August 2005, the Department precleared a Georgia voter identification law, which itself amended an existing voter identification statute that had been precleared by the prior Administration. This preclearance decision followed a careful analysis that lasted several months and considered all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of state photo identification and driver's license cards and the views of minority legislators in Georgia (as well other current and former minority elected officials). The data showed, among other things, that the number of people in Georgia who already possessed a valid photo identification greatly exceeded the total number of registered voters, and that there was no racial disparity in access to the identification cards. The state subsequently adopted, and the Department precleared in April 2006, a new form of voter identification that would be available to voters for free at one or more locations in each of the 159 Georgia counties.

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In *Common Cause/Georgia v. Billups*, the district court did not conclude that the identification requirement violated the Voting Rights Act. To the contrary, the court refused to issue a preliminary injunction on that ground. The court instead issued a preliminary injunction on constitutional grounds that the Department cannot lawfully consider in conducting a preclearance review under Section 5 of the Voting Rights Act. Accordingly, the court's preliminary ruling, in a matter that is still being actively litigated, does not call into question the Department's preclearance decision. In addition, the state court decision blocking Georgia's implementation of the identification requirement was issued on state constitutional grounds, and, therefore, also did not call into question the Department's preclearance decision. Indiana's voter identification law was upheld by the Seventh Circuit in *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007), in the face of allegations similar to those made against the Georgia law.

c. You defended pre-clearance of the first photo ID law in part by stating that it was based upon a statistical analysis and the absence of evidence of a disparity between the number of photo IDs issued by the state to African-Americans compared to whites. It has been reported that on the same day the Department pre-cleared Georgia's first voter photo ID law, the Department received new data from Georgia correcting earlier data on driver's licenses and photo IDs issued in the state. Wasn't the corrected data relevant to the Department's Section 5 determination? Did the Department consider the corrected data before concluding the law was not retrogressive? Was the statistical analysis you testified about based on data from the state?

Answer: It is my understanding that all data, including the last data set referenced in your question, were considered and supported the preclearance decision. The data on the number of persons with qualifying identification issued by the Georgia Department of Motor Services were provided by the State of Georgia. Population estimate data were obtained from the Census Bureau.

d. Since 2001, has the Department opposed Section 5 preclearance of any statewide voting change (either submitted to the Attorney General through the administrative process or presented to the District Court for the District of Columbia in a declaratory judgment action) that was enacted by a state legislative body controlled by Republicans?

Answer: The Department does not track party control of governmental units such as state legislatures, county boards, or city councils, as such information is irrelevant to Section 5 consideration. Please find attached a list of all Section 5 objections since 2001.

4. Last December, the *Washington Post* reported that the chief of the Division's Voting Section had modified the longstanding procedures for reviewing Section 5 submissions by instructing career staff not to include recommendations when analyzing Section 5 submissions. This change coincided with the Department's controversial decision to approve the Georgia photo ID law for voting and followed in the wake of the approval of the Texas redistricting plan.

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Removing experienced career staff from the decision-making process would seem to compromise enforcement and suggests a political motivation -- there is no paper trail if the recommendation of career staff differs from the final decision of political appointees.

a. When I asked you about this policy change during the oversight hearing, you responded that every memorandum that you receive from the sections of the Division includes a recommendation. What I'm interested in knowing is whether the career attorneys and analysts in the Voting Section were ever instructed by section management not to include a recommendation in memoranda analyzing Section 5 submissions. I'm asking about career attorneys' memoranda to section managers, not memoranda from the section managers to you. Was this ever the policy of the Voting Section?

b. Please describe any oral communication in which special litigation counsel, deputy chiefs, or the chief of the Voting Section announced to the Voting Section staff a change or modification in the form or content of Section 5 analyses, including whether or not to include recommendations with those analyses, between January 2005 and the present. Please also provide any written communication, whether by memoranda or electronic mail, in which special litigation counsel, deputy chiefs, or the chief of the Voting Section announced to the Voting Section staff a change or modification in the form or content of Section 5 analyses, including whether or not to include recommendations with those analyses, between January 2005 and the present.

c. If this was section policy, have career staff resumed including recommendations with their Section 5 analysis?

d. Will you instruct management in the Voting Section that it's in the best interests of voting rights enforcement for career staff to make Section 5 recommendations?

Answer (a-d): Career staff continue to be involved in the review and decision-making process of every Section 5 submission. We are not aware of any communication announcing a change in policy of career staff involvement in Section 5 analysis. As with every legal analysis, recommendations under Section 5 must be balanced and include all relevant information. It is my understanding that each person involved in the Section 5 analysis shares his or her assessment and recommendation with senior career management, and the ultimate recommendation of the Section is made with the full awareness of the views of each staff member involved in the matter. For those Section 5 recommendations that are forwarded to the Assistant Attorney General, see 28 CFR § 51.3, it is my understanding that I am informed whenever a difference of opinion may exist.

5. The career attorneys in the Voting Section who conducted the investigation of the Texas redistricting plan and the first Georgia photo ID law had recommended that the Division object to the proposed changes. They were overruled by political appointees, but later court decisions vindicated the recommendations of the career attorneys.
Given the experience of the career attorneys in enforcing the Voting Rights Act, why were they overruled in the Texas and Georgia preclearance decisions?

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Answer: In 2003, the Department conducted a deliberate and careful review of every relevant fact relating to the Texas submission of its congressional redistricting under Section 5 of the Voting Rights Act, concluding that there was no retrogression in the overall plan. The legislature offset one lost opportunity district for Latino voters by creating a new district in that region in which Hispanic voters dependably would be able to elect a representative of their own choice. Indeed, the plan was used during the 2004 elections, and resulted in an increase in the number of minority representatives elected to Congress from Texas.

In *LULAC v. Perry*, the Supreme Court agreed with the Department's principal argument that the state did not violate Section 2 by redrawing former congressional district 24. The Court also found no violation of the Constitution or the Voting Rights Act in 31 of Texas's 32 congressional districts. The Court's decision left the Texas redistricting plan largely intact and left it to the state to determine how to remedy the lone problem identified as to congressional district 23. In this regard, the Supreme Court reversed the decision of the lower court, which found no violation in the redistricting plan, including district 23. Moreover, the Supreme Court's 5-4 decision produced six separate opinions from six different Justices in 120 pages of discussion.

The Supreme Court's decision in no way calls into question the Department's decision to preclear the Texas redistricting plan under Section 5 of the Voting Rights Act. Indeed, only one Justice suggested that Section 5 had been violated; no other Justice joined him in that portion of his opinion. The majority's decision as to district 23 was founded on a new principle, under Section 2 of the Voting Rights Act, that the creation of an offsetting majority-minority district may not remedy the loss of a majority-minority district in the same part of the state, if the new district is not compact enough to preserve communities of interest. Indeed, this new compactness inquiry issue was not the subject of briefing and was not addressed by the Department.

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In *Common Cause/Georgia v. Billups*, the district court did not conclude that the identification requirement violated the Voting Rights Act. To the contrary, the court refused to issue a preliminary injunction on that ground. The court instead issued a

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preliminary injunction on constitutional grounds that the Department cannot lawfully consider in conducting a preclearance review under Section 5 of the Voting Rights Act. Accordingly, the court's preliminary ruling, in a matter that is still being actively litigated, does not call into question the Department's preclearance decision. In addition, the state court decision blocking Georgia's implementation of the identification requirement was issued on state constitutional grounds, and, therefore, also did not call into question the Department's preclearance decision. Indiana's voter identification law was upheld by the Seventh Circuit in *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007), in the face of allegations similar to those made against the Georgia law.

6. There were reports of voter deception and intimidation from around the country again in this election. Threatening letters targeted Latino voters in Orange County, California. There were misleading phone calls in Virginia, deceptive fliers in Maryland, and blatant anti-immigrant intimidation of voters at the polls in Tucson, Arizona.

a. Voter intimidation and deception are proven methods of disenfranchising minority voters. What did the Department do in advance of the recent elections to anticipate and deter such tactics?

Answer: Prior to the 2006 elections, Voting Section personnel reached out to representatives of minority advocacy groups and community organizations to explain the requirements of federal law and our interest in learning of problems affecting minority voters, and to encourage the gathering and communication of information about actual or potential violations of the Voting Rights Act or other federal election laws.

The Voting Section also reached out repeatedly over the past two years, as it traditionally does, to state and local election officials to alert them of their obligations under federal election laws, and to advise them of specific steps to avoid violations of federal law. In addition to numerous meetings and telephone calls with state and local officials across the United States, the Division has met with and addressed elections officials through appearances at meetings of elections officials organizations, such as the National Association of Secretaries of State, the National Association of State Election Directors, the National Association of County Officials, and the Election Center, and at conferences of local election officials in a number of states, including, but not limited to, California, Colorado, Connecticut, and Texas. In addition, written communications have been sent to state elections officials collectively and, when appropriate, individually.

Ultimately, the Department speaks most forcefully though litigation. During the period between the 2004 and 2006 general elections, the Department filed far more actions to protect voters against discrimination at the polls than in any time in its history. These lawsuits included key cases to (1) protect the rights of minority voters against race-based challenges to the eligibility of minority voters; (2) ensure appropriate treatment of minority voters; (3) prevent improperly influencing, coercing or ignoring the ballot choices of minority voters; (4) ensure that voters,

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including minority voters, are provided with provisional ballots; (5) ensure that voters, including minority voters, are provided the assistance in voting that they are legally entitled to receive; (6) ensure that minority language voters are provided the bilingual assistance in voting that they need and are legally entitled to receive; and (7) ensure that localities provide voters, including minority voters, with the information Congress determined necessary in all polling places, including the posting of information on voters' rights. *See, e.g., United States v. Long County*; *United States v. City of Boston*; *United States v. Hale County, Texas; United States v. Brazos County, Texas; United States v. City of Springfield, Massachusetts*; *United States v. Westchester County, New York; United States v. City of Azusa, California; United States v. City of Paramount, California; United States v. City of Rosemead, California; United States v. Ector County, Texas; United States v. Cochise County, Arizona; United States v. San Benito County, California.* These cases accelerated enforcement of the rights of voters to participate free from barriers at the polls during the 2002-2004 period.

In addition, in 2006, the Department took a strong proactive approach to potential election day problems and issues. Rather than simply respond to complaints, the Voting Section attempted to identify locations where problems were likely to occur and to pre-position personnel to document and address such issues as arise on election day. As a result of this extensive pre-election investigation and outreach, on election day the Department assigned more than 800 federal observers and Department monitors – a record number for a mid-term election – to selected polling places in 69 jurisdictions in 22 states across the country.

b. Anti-immigrant sentiment has been fueled by political campaigns exploiting the immigration reform issue. Given unsubstantiated allegations by anti-immigrant groups of widespread voting by illegal immigrants, what did the Department do to prevent harassment of Latino voters at the polls?

Answer: Much of the activity described above has been focused on protecting the rights of Latino citizens. Indeed, over 86 percent of all cases filed by the Voting Section to protect Latino voters under the language minority provisions of the Voting Rights Act have been filed in this Administration. In fact, a majority of all cases to protect Latino voters ever filed by the Department under the substantive provisions of the Voting Rights Act have been filed in this Administration, including approximately 87 percent of all cases to protect Latino voters under the voter assistance provisions of Section 208. Our election monitoring includes considerable focus on discriminatory challenges to voters, and our Section 2 lawsuit in Long County, Georgia, specifically involved race-based challenges to Latino voters.

As described above, the Division has been inclusive in its outreach, attention, and activity to enforce the voting rights of all language minority citizens. This Administration has been the first in history to file lawsuits to protect the voting rights of citizens of Vietnamese, Filipino, and Haitian heritage.

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7. During the oversight hearing, you stated that the Civil Rights Division "do[es] not enforce any criminal statutes with respect to voting." In response to Senator Schumer's question about deceptive fliers distributed in African-American communities in Maryland, you said you believed that the Criminal Division was investigating the matter, but you weren't sure. Your position on the division between the jurisdiction of the Civil Rights Division and Criminal Division is inconsistent with the handbook authored by attorneys in the Criminal Division's Public Integrity Section, entitled "Federal Prosecution of Election Offenses." According to the handbook, the Civil Rights Division supervises prosecutions involving voting discrimination on the basis of race or ethnic background. The facts in Maryland make clear that the deceptive fliers were targeted to mislead African-American voters in the exercise of their right to vote – the fliers were distributed in African-American communities and displayed photographs of prominent African-American leaders with false information about their voting preferences.

a. Were you incorrect when you testified at the hearing that the Civil Rights Division does not enforce any criminal statutes with respect to voting?

Answer: I appreciate the opportunity to clarify this issue. The vast majority of all voting rights related criminal investigations are assigned to, and handled by, the Criminal Division. However, a small percentage of voting related offenses are principally assigned to the Civil Rights Division to handle or supervise. The Civil Rights and Criminal Divisions cooperate in examining possible violations of federal voting laws. The determination of which office takes the lead in a case will, in the ordinary course, depend on the nature of the various allegations involved, the evidence available at the outset of a case (when initial assignment is made), the likely availability of additional evidence, the legal elements that need to be proved under relevant statutes, and the penalties available. For example, depending on the evidence developed, multiple criminal statutes may be implicated by the conduct. Subsequent investigation that materially alters the balance of factors may be a basis for reassignment of the investigation.

The Criminal Section's jurisdiction for voting and election matters is provided for in 28 C.F.R. §§ 0.50 and 0.55. Under the C.F.R., the Criminal Section handles voting or election matters involving the use of force or the threat of force, pursuant 18 U.S.C. § 245, when there is discrimination based on race, color, religion, or national origin. Misleading or deceptive conduct would not ordinarily constitute a use of force. Under 18 U.S.C. §§ 241 and 242, the Civil Rights Division also handles criminal voting or election matters that relate to discrimination based on race or color.

The Criminal Section is also responsible for investigating vote buying schemes that may be federally prosecuted under 18 U.S.C. § 594 and 42 U.S.C. §§ 1973i and 1973j that involve racial discrimination. Section 594 relates to intimidating voters to vote for or against a candidate for national office. Section 1973i prohibits, in pertinent part and under certain conditions, a person from paying, offering to pay, or accepting payment for registering to vote or for voting. Section 1973j is available

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to prosecute racially discriminatory vote-buying schemes that involve election officials.

While the Criminal Division prosecutes the bulk of voting and election related matters, the Civil Rights Division has been involved in the prosecution of the following election-related cases:

- ***U.S. v. Salyer* (E.D. Ky. 1982);**
- ***U.S. v. Dorman*, (N.D. Miss. 1984);**
- ***U.S. v. Limehouse* (D.S.C. 1987); and**
- ***U.S. v. Rosario* (D.N.J. 2001).**

b. Do you agree that where race discrimination is alleged, lawyers in the Civil Rights Division should take the lead because of their experience and sensitivity in matters of race discrimination and their familiarity with the affected communities?

Answer: The vast majority of all voting rights-related criminal matters are handled by the Criminal Division. However, a small percentage of voting related criminal matters are handled by the Civil Rights Division, including those that involve discrimination or intimidation on grounds of race or color. *See* 28 C.F.R. §§ 0.50 and 0.55. The office taking the lead in any particular case will, in the ordinary course, depend on the nature and scope of the various allegations involved, the evidence available at the outset of a case (when initial assignment is made), the likely availability of additional evidence, the legal elements that need to be proved under relevant statutes, and the penalties available. Depending on the evidence developed, multiple criminal statutes may be implicated.

The Civil Rights and Criminal Divisions coordinate and cooperate in examining possible violations of federal voting laws. In October 2002, the Department established a Ballot Access and Voting Integrity Initiative to deter discrimination and election fraud, ensure access to the polls, and better coordinate prosecution of election offenses and violations of voting rights. As part of this Initiative, the two Divisions established an annual joint conference in coordination with the U.S. Attorneys to train departmental attorneys who handle voting matters on an ongoing basis and establish better communications among the Civil Rights Division, the Criminal Division, and the District Election Officers of the U.S. Attorneys' Offices. As a result, the communication and coordination in such cases have significantly improved in the past few years. We will continue to explore means of improving our enforcement of the federal voting laws.

8. To clear up confusion about where responsibility lies in the Department to investigate and prosecute conduct designed to mislead, threaten, or intimidate voters, please respond to the following:

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a. Over what types of election-day and pre-election day schemes to discourage voter participation does the Voting Section have jurisdiction? Under what circumstances would Section 2 of the Voting Rights Act apply? Under what circumstances would Section 11(b) apply?

Answer: Section 2 has broad application to any voting qualification, prerequisite to voting, or voting standard, practice, or procedure administered by a state or political subdivision. Two recent cases illustrate the applicability of Section 2 to election day schemes to discourage voter participation. In *U.S. v. Long County, Georgia*, the Voting Section filed suit in 2006 alleging that the county challenged the eligibility of Hispanic citizens to vote based solely on their race and ethnicity. On February 10, 2006, the district court entered a consent decree that required defendants to train their election officials and poll workers on federal law, to maintain uniform procedures for responding to voter challenges, and to notify Hispanic voters who were challenged that no evidence was presented to support the challenges against them and that they are free to vote in future elections. In *U.S. v. City of Boston, Massachusetts*, the Voting Section filed suit in 2005 alleging that the city had subjected Hispanic, Chinese, and Vietnamese citizens to disparate and discriminatory practices, including denial of necessary assistance and denial of an opportunity to cast provisional ballots. The action also alleged that poll workers and others coerced, improperly influenced, or simply ignored voters' ballot choices, and subjected voters to other poor treatment. On October 18, 2005, the district court issued an Order adopting the Memorandum of Agreement and Settlement agreed to between the City of Boston and the Department, which, among other things, requires the City of Boston to increase existing training of all election poll workers on the legal requirements of the Voting Rights Act and other election laws.

Section 11(b) applies to actual or attempted voter intimidation, threats, or coercion, and applies to "any person" rather than only to governments. The Division has brought only three lawsuits, all involving non-governmental defendants, under Section 11(b) in its entire history. The only relief available under Section 11(b) is declaratory and injunctive relief to bar similar future misconduct. Where the misconduct falls within the responsibility of local election officials to prevent, claims cognizable under Section 11(b) can also be included as a count in a broader complaint, such as a Section 2 claim, where full relief can be obtained through other means. *See, e.g., United States v. City of Boston.*

b. Under what circumstances would the Criminal Section bear primary responsibility for the prosecution of an election crime?

c. Please identify the statutes that the Criminal Section enforces that address crimes affecting voting.

Answer (b-c): Please see the response to question 7(a) above.

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d. How many investigations of voting-related crimes has the Criminal Section opened since 2001? How many has the Criminal Section prosecuted?

Answer: The Criminal Section has opened seven investigations of voting-related crimes since 2001. Prior to that time, the Criminal Section had not opened an investigation of a voting-related crime since 1995. Please also see our response to question 7(a) above.

e. Does the Criminal Section have any active election-related investigations? Is the Criminal Section investigating reports of a cross-burning in Grand Coteau, Louisiana alleged to have been intended to intimidate African-American voters on the eve of a hotly-contested mayoral election between an African-American candidate and a white candidate?

Answer: Yes. The Criminal Section is investigating the cross burning in Grand Coteau, Louisiana. We also note that the Voting Section dispatched federal observers to monitor the Grand Coteau polls for that election. The Criminal Section currently also has open other election-related matters.

f. What types of allegations of election-related criminal activity would the Civil Rights Division refer to the Criminal Division?

Answer: Please see responses to Question 7, above. As set forth above, the Civil Rights Division generally defers to the Criminal Division when there are allegations of election-related criminal activity that do not include an element of racial discrimination.

9. Under Section 301(a)(3) of the Help America Vote Act of 2002, as of January 1, 2006, each polling place in America was to have "at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities." The Act mandates that an accessible voting system must enable individuals with disabilities to vote "in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters."

I'm concerned about the Department giving its approval to voting systems that have not been shown to satisfy any nationally-accepted set of standards for voting equipment accessibility to meet the Help America Vote Act's provisions on disability access. For example, it is my understanding that the Department agreed to a vote-by-phone system to satisfy Section 301(a)(3) in resolving a lawsuit against the state of Maine. According to disability rights advocates, vote-by-phone systems are not accessible to many voters with disabilities, including those with motor and dexterity disabilities and hearing and visual impairments, because these systems do not enable them to vote privately and independently, as mandated by the Act.

In a letter of March 4, 2005 signed by Counsel to Assistant Attorney General von Spakovsky, the Department provided guidance to Mississippi on meeting the access requirement. Mr. von Spakovsky directed the state to consult forthcoming voluntary guidance

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from the Election Assistance Commission, and existing voluntary guidance from the Federal Election Commission. The two commissions provide a set of specifications and requirements against which to evaluate a voting system. I've attached letters from the Association of Assistive Technology Act Programs, the National Council on Independent Living, and the National Disability Rights Network which detail how phone voting falls short of the access guidelines. The organizations urged you not to accept phone voting as a means of complying with the Act's accessibility mandate.

As jurisdictions around the country continue to upgrade their voting machinery, it's a particular concern that the Department has ignored its own guidelines and given its approval to inaccessible voting systems.

a. On what basis did the Department conclude that voting-by-phone would give voters with disabilities the opportunity available to other voters to vote privately and independently?

b. Did the Department consult the Voluntary Voting System Guidelines issued by the Election Assistance Commission in 2005 or the Voting System Standards issued by the Federal Election Commission in 2002? If so, did the Department conclude that phone voting met the guidelines? Please explain.

c. Did the Department consult a variety of disability rights groups representing individuals with a range of different disabilities to determine whether the vote-by-phone system would meet the needs of voters with different types of disabilities?

Answer (a-c): Section 301(a)(3) of HAVA requires that voting systems used in federal elections provide accessibility for persons with disabilities. Many voting systems have been designed to meet this mandate, including direct recording electronic (DRE) voting systems, optical scan ballot marking voting systems and vote-by-phone systems. While each voting system has some characteristics that are helpful to some voters with disabilities, we are not aware of a consensus as to the best existing voting system from an accessibility standpoint. The Department of Justice does not have authority to certify whether particular voting systems are compliant with HAVA.

During the November 2006 election, we understand that at least six states (Vermont, Maine, Connecticut, New Hampshire, Oregon, and Oklahoma) used a vote-by-phone system specifically designed to accommodate voters with disabilities. In many, if not all, of those states, we understand that the system was adopted with the active participation of voters with disabilities in the decision-making process. We are not aware of any legal challenge filed against vote-by-phone voting systems, nor any court ruling that they do not comply with HAVA.

Since HAVA's enactment in late 2002, jurisdictions across the country have had to make choices in order to comply with HAVA's requirements, including the accessibility requirements, by the statutorily-mandated deadline of January 1, 2004,

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or January 1, 2006, if the state requested a waiver. The 2002 Voting Systems Standards of the Federal Election Commission (VSS), developed before the enactment of HAVA, addressed accessibility of voting systems to a limited extent, but did not envision vote-by-phone systems specifically, and to date no vote-by-phone systems have been tested to the 2002 VSS. In a July 2005 Advisory, the U.S. Election Assistance Commission (EAC) attempted to provide a "gap analysis" between the 2002 VSS and the requirements of HAVA Section 301(a). That analysis recognized that compliance with HAVA's accessibility requirements is a "complex matter, which must take into account the disability of the voter, the advancement of technology and its availability, and the efforts of the elections officials to make the voting process accessible to disabled voters in a private and independent manner." The EAC did not adopt its 2005 Voluntary Voting Systems Guidelines until December 2005, just days before HAVA's final deadline of January 1, 2006, for states to have completed the selection and procurement of the new machines. These 2005 guidelines, while addressing accessibility more than the 2002 VSS, still are challenged by a lack of agreed upon institutional standards for testing of accessibility, and became effective only in January 2007.

Civil Rights Division Personnel Practices

1. At the November 16, 2006 oversight hearing on the Civil Rights Division, I asked you about the involuntary transfer of Bob Berman, the long-serving career Deputy Chief of the Voting Section who supervised enforcement of Section 5 of the Voting Rights Act. You stated that you would review the circumstances of Mr. Berman's transfer and inform me whether he had been transferred from the Voting Section in retaliation for his role in review of the submissions of the Georgia photo identification law or the 2003 Texas redistricting plan. Please state whether Mr. Berman was transferred in whole or in part because of his role in reviewing the Texas or Georgia submissions and explain in detail the reasons for his transfer.

Answer: Mr. Berman was not transferred in whole or in part in retaliation for his role in reviewing the Georgia and Texas preclearance submissions. Mr. Berman requested and received a detail with the Administrative Office of the United States Courts, which he completed from September 26, 2005 to January 27, 2006. Mr. Berman decided to pursue this detail in connection with a program designed to better prepare employees for becoming a candidate for the Senior Executive Service. Since Mr. Berman's return to the Civil Rights Division, he has served in a senior position in the Office of Professional Development.

2. You testified that you "do not make decisions based on retaliation or ideology" and that you make them "based on the talents and interests and the needs of the Department of Justice Civil Rights Division." In your written testimony, you also state that, as one of your first acts as Assistant Attorney General, you assigned two career Division attorneys to the Personal Development Office.

a. Did you make the decision to transfer Mr. Berman from the Voting Section to his current position? Is he one of the attorneys whom you personally decided to transfer to

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the Personal Development Office? If not, who decided to transfer Mr. Berman to the Personal Development Office?

Answer: I approved the transfer of Mr. Berman to the Professional Development Office.

b. Please identify all Division personnel, past and present, who were involved in the decision to transfer Mr. Berman, and describe the role of each in that decision.

Answer: The Civil Rights Division has substantial confidentiality interests in the deliberative process that led to my decision.

3. Mr. Berman had developed over many years a broad expertise on Section 5 of the Voting Rights Act, but that expertise is not relevant to his current duties in the Personal Development Office. Although many senior attorneys in the Division have experience that is relevant to the work of the Personal Development Office, few, if any, have Mr. Berman's particular experience and knowledge in the area of Section 5 enforcement. It is my understanding that Mr. Berman did not seek to be transferred from the Voting Section to his current position in the Personal Development Office. Given these facts, isn't his transfer inconsistent with your statement that staffing decisions in the Division are based on attorneys' "talents" and "interests," and on "the needs of the Department?" Please explain why Mr. Berman was selected for his current position.

Answer: I concluded that this transfer would serve Mr. Berman's talents and interests and the needs of the Department, as I understood them.

4. If Mr. Berman wishes to return to the Voting Section, would you be willing to assign him to his former position as Deputy Section Chief responsible for supervising the review of Section 5 submissions?

Answer: Consistent with my management style and my historical practices, any staffing decision would be made based on the talents and interests of an individual and the needs of the Department. In this process, I place great weight on the judgments of career section management.

5. According to a July 23, 2006 article in the Boston Globe, political appointees now have more influence over the Division's attorney hiring process than has traditionally been the case.

a. Please describe in detail the process for recruiting and hiring Honors attorneys in the Civil Rights Division. Please include in your description which persons (and/or positions) in the Department are responsible for each stage in the recruitment and hiring process, including the role of political appointees.

Answer: The Attorney General's Honors Program (HP) is one of the most prestigious and competitive hiring programs in the country. It is administered and promoted by the Office of Attorney Recruitment and Management (OARM). This

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is a career office with administrative oversight of all career attorneys within the Department. OARM manages the applications and conducts the initial screening process to make certain that all applicants are eligible for participation in the HP. Applicants are then referred to components (such as the Civil Rights Division) based on the applicant's stated preference. The applications are reviewed by each component, which typically includes the input of both career and political appointees, and which results in applicants being selected for interviews. Applicants are then interviewed by both career employees and political appointees and recommendations are made to the respective Assistant Attorney General. The attorneys most recently involved in the Honors Program hiring process within the Civil Rights Division included attorneys in the Office of the Assistant Attorney General, both career and political appointees, as well as nearly all of the Section Chiefs.

b. Please describe in detail the process for recruiting and hiring lateral career attorneys in the Civil Rights Division. Please include in your description which persons (and/or positions) in the Division are responsible for each stage in the recruitment and hiring process, including the role of political appointees.

Answer: Attorney vacancies are posted on the Department's website. Applicants submit their employment applications and/or resumes to the Office of Attorney Recruitment and Management. When the application period for the vacancy announcement has closed, copies of all resumes received in response to the posting are given simultaneously to the career Section Chief and to the Office of the Assistant Attorney General. The Section Chief chooses candidates to interview, and the Office of the Assistant Attorney General may also choose candidates to be interviewed. Candidates are generally interviewed first by section personnel. Based on those interviews, the Section Chief forwards recommendations to the Office of the Assistant Attorney General, which then interviews the candidates. Hiring decisions are made with input of both the career Section Chief and other Division leadership.

c. Are all Section Chiefs in the Division given an opportunity to review applications for lateral attorney vacancies in their Sections and to help select attorneys whom the Division will interview? If so, has that been the case throughout the current Administration? Please explain in detail the role, if any, that Section Chiefs currently have in reviewing applications for lateral attorney positions. If that role has been changed at any point in this Administration, please explain how it has changed.

Answer: Consistent with my management style and my historical practices, Section Chiefs review the resumes of all applicants for vacancies in their respective sections, and recommend candidates for interviews. The Section Chiefs participate fully in the interview process. Hiring decisions are made with input of both the career Section Chief and other Division leadership. I am not aware of the specific hiring practices of the Division's prior leadership.

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d. Are all Section Chiefs allowed to participate in each interview with an applicant for a lateral attorney position in their Sections? Please explain the role, if any, of the career Section Chiefs in interviewing applicants for lateral attorney positions.

Answer: Please see the response to subpart b. above.

6. The Boston Globe reported that the number of attorneys hired by the Division with civil rights backgrounds has declined sharply in recent years, particularly in the Voting Section, Employment Litigation Section, and Appellate Section. Please provide the resumes of all persons hired as career attorneys in the Division during and after 2001.

Answer: We respectfully disagree with many of the assertions made in the *Boston Globe* article, nor is it clear what methodology was employed in reaching its conclusions. Attorneys from an extremely wide variety of backgrounds have been hired to work in the Division since 2001. The Civil Rights Division, like every other component of the Department of Justice, is charged with enforcing the laws passed by Congress. As such, we seek to hire outstanding attorneys with demonstrated legal skills and abilities. The Department considers attorneys from a wide variety of educational backgrounds, professional experiences, and demonstrated qualities. The resumes responsive to your request are attached, redacted to protect the attorneys' addresses, social security numbers, and other personal identifying information that implicates individual privacy interests.

7. In recent years, a large proportion of the Division's resources have been consumed by the litigation of deportation cases. You testified that 87 of 144 briefs, or over 60% of the briefs filed by the Appellate Section this year, were in these non-civil rights immigration cases.

a. For each Section in the Division, please state the number of attorneys currently working on immigration cases, the total number of attorney hours spent on such cases, and the percentage of the Section's work that these cases represent.

Answer: As of January 18, 2007, there were 22 Civil Rights Division attorneys (four in the Appellate Section, two in the Disability Rights Section, four in the Criminal Section, three in the Housing and Civil Enforcement Section, three in the Special Litigation Section, two in the Voting Section, three in the Employment Litigation Section, and one in the Educational Opportunities Section) actively working on an OIL case. The vast majority of OIL cases are awaiting scheduling of oral argument, are under submission, or have been decided.

To the extent you seek attorney hours spent on all OIL cases handled within the Civil Rights Division, those figures, dating from November 2004 to January 5, 2007, are approximately as follows:

Section	Attorney Hours	% of Time Spent on OIL Cases
Appellate	18,040.75	39%
Coordination &	792.25	3%

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Criminal	1,006.25	1%
Disability Rights	1,922.50	3%
Educational Opportunities	1,336.00	4%
Employment Litigation	4,241.75	4%
Housing and Civil Enforcement	2,692.25	2%
Special Litigation	1,610.75	1%
Voting	1,237.00	1%

b. Please explain how the Division determines which attorneys will be assigned to handle immigration cases. If this process differs from Section to Section, please provide an answer for each of the Division's Sections.

Answer: The Civil Division sends all OIL cases assigned to the Civil Rights Division to a Deputy Chief in the Appellate Section. Under guidelines established by the Section Chief, that Deputy Chief then determines which cases will be assigned to available attorneys within the Appellate Section and which will be delegated to the trial sections. Cases are assigned to trial sections on a rotating basis, ensuring that the number of cases assigned is proportional to the size of the attorney staff.

Upon receiving OIL cases, most trial sections assign them based primarily on availability of the lawyers and on a rotating basis. For example, the Disability Rights Section (DRS) often assigns OIL cases to newly hired lawyers, both to provide immediate writing experience and because the newer lawyers do not yet have a DRS caseload. When all the newer lawyers have completed an OIL case, DRS assigns OIL cases to attorneys who have not recently worked on one and who are available. The Voting Section assigns OIL cases on an ad hoc basis, considering availability and other assignments. The Educational Opportunities Section assigns OIL cases to all of its attorneys, based primarily upon workload considerations. The Criminal Section has a special projects unit of four attorneys who work on projects that do not require travel, and the OIL cases now are rotated among those four lawyers, with other Section lawyers occasionally receiving OIL cases. The Housing and Civil Enforcement Section generally assigns OIL cases first to its least experienced attorneys and then to the more experienced attorneys. The Special Litigation Section generally assigns OIL cases alphabetically, with consideration to caseload problems that might require skipping a lawyer at a particular time. That lawyer will be assigned an OIL case as soon as his or her caseload permits it. The Employment Litigation Section creates a rotation of five attorneys to take OIL cases as they are assigned. A lawyer is removed from the rotation once he or she has done three OIL cases, and another lawyer is then placed into the rotation. No one lawyer will do more than three OIL cases until all the lawyers in the Section have done three OIL cases. Nearly all the sections solicit or allow volunteers for OIL cases, other assignments permitting.

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c. It is my understanding that some career attorneys in the Division have been assigned to work only on immigration cases, and are not permitted to work on civil rights cases. Please state whether this is true now, and whether it has been the case at any point since the Division began handling immigration litigation. In addition, if so, please explain the reasons why some attorneys have been assigned solely to immigration cases.

Answer: My policy is that all attorneys within the Division are permitted to work on enforcing the federal civil rights laws. As of January 5, 2007, two lawyers in the Division were principally assigned to OIL cases, consistent with their interests and the approval of their Section Chief. One other lawyer has a current docket of slightly more than 50% OIL work, for additional brief-writing and oral argument experience.

d. Does work on non-civil rights matters represent more than 50% of the docket for any attorney in the Division?

Answer: As stated above, three of the Division's approximately 325 lawyers have a docket of slightly more than 50% OIL work.

e. Have any immigration cases been assigned to career attorneys who were hired after 2001?

Answer: The majority of OIL cases have been assigned to career attorneys hired after 2001. As of January 5, 2007, of the 417 OIL cases assigned within the Civil Rights Division, approximately 213 have been assigned to career attorneys hired after January 1, 2001.

8. The Committee received testimony that, in a departure from long-standing practice, career attorneys in the Appellate Section have been told not to discuss their civil rights cases with the career Division attorneys in other Sections who served as trial counsel in the same litigation. Is this true currently, and has it been the case at any point during this Administration? If so, please explain the reason for such a rule, and why you believe that preventing appellate counsel from discussing cases with trial counsel can possibly allow the Division to present the strongest possible case on appeal?

Answer: No. I am not aware of such a rule prior to my tenure as Assistant Attorney General.

9. Please identify each political appointee in the Civil Rights Division who has converted to career status since 2001. Include the political position held by the attorney, the career position that he or she assumed and the date of the conversion from political appointee to career attorney.

Answer: The following attorneys have converted from a Schedule C position in the Division to a position of career attorney in the Department:

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Andrew Lelling, Schedule C, Counsel to the AAG, GS-15, Civil Rights Division, to Trial Attorney, GS-905-15, Civil Rights Division, effective 3/9/2003;

Minh Vu, Noncareer SES, Counselor to the AAG, ES-3, Civil Rights Division, to Trial Attorney, GS-905-15, Civil Rights Division, effective 11/2/2003;

James C. Ho, Schedule C, Special Assistant to the AAG, GS-905-14 to Attorney Advisor, Office of Legal Counsel, GS-905-14, effective 9/17/01;

Oliver Benton Curtis, III, Schedule C, Special Assistant to the AAG, GS-905-14 to USAO-SDFL, effective 1/7/2007.

10. Please report all international travel undertaken by employees of the Civil Rights Division since 2001. Please include the employees who undertook each trip and the duration of each trip. Please account for the time of employees while traveling, including any speeches they delivered, meetings they participated in and other activities – including personal time -- while on official travel.

Answer: The Civil Rights Division maintains international travel information for only those employee trips that are processed directly by the Division. If a Division employee takes a trip that is funded by another agency, such as USAID, the State Department, or the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT), and the trip is processed directly by the funding agency, that trip would not be included in the Division's records. In addition, the Division processes approximately 3,500 – 4,000 employee trips each year, and the Division's system does not allow a search that distinguishes between domestic and international travel. Consequently, Division staff was required to manually search through 23,292 vouchers to locate international travel information. That search produced the following list of international trips taken by Division employees since 2001 processed directly by the Division. USAID, the State Department, or OPDAT reimbursed the Division for over 60% of these trips that the Division processed.

Alex Acosta traveled to the Dominican Republic on September 24, 2002, through September 27, 2002, to attend an anti-trafficking legislation conference. Mr. Acosta traveled to Ljubljana, Slovenia, and Warsaw, Poland, on May 6, 2005, through May 15, 2005, to discuss trafficking issues. He took one day of personal travel in Warsaw, Poland, on May 14. Mr. Acosta traveled to Paris, France, on June 14, 2004, through June 18, 2004, to attend the Organization for Security and Cooperation in Europe (OSCE) Hate Crime Conference. The Division was reimbursed for Mr. Acosta's trip to Slovenia and Poland.

T. March Bell traveled to Helsinki, Finland, and Tallinn, Estonia, on March 29, 2004, through April 4, 2004, to conduct a week-long training at the invitation of the U.S. Embassy. Mr. Bell traveled to Mexico City, Mexico, on September 6, 2004, through September 10, 2004, for meetings related to the President's Trafficking Initiative. Mr. Bell traveled to Singapore, Malaysia, and Cambodia on December 30, 2004, through January 12, 2005, to conduct assessments to further program design for the President's Trafficking

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Initiative. Mr. Bell traveled to Vienna, Austria, on January 22, 2005, through January 27, 2005, at the invitation of the U.S. Embassy to participate in the International Information Programs and the U.S. Speaker and Specialist Program. Mr. Bell traveled to Jakarta, Indonesia, on March 5, 2005, through March 15, 2005, to make presentations and further develop the President's Trafficking Initiative. Mr. Bell traveled to Mexico City, Mexico, on May 2, 2005, through May 5, 2005, for the President's Trafficking Initiative. Mr. Bell traveled to Mumbai, India, and Dar es Salaam, Tanzania, on May 13, 2005, through May 28, 2005, to conduct an assessment to promote program design for the President's Trafficking Initiative. Mr. Bell traveled to San Salvador, El Salvador, on August 15, 2005, through August 19, 2005, to conduct a training at the request of OPDAT. Mr. Bell traveled to Bangkok, Thailand, on September 9, 2005, through September 17, 2005, for training with the International Criminal Investigative Training Assistance Program (ICITAP). Mr. Bell traveled to Mexico City, Mexico, on September 18, 2005, through September 21, 2005, to conduct site assessments for the President's Trafficking Initiative. Mr. Bell traveled to Mexico City, Mexico, on October 17, 2005, through October 19, 2005, to speak at a joint United States-Mexico best practices exchange pursuant to the President's Trafficking Initiative. Mr. Bell traveled to Kilimanjaro, Arusha, and Dar es Salaam, Tanzania, on January 3, 2006, through January 17, 2006, to conduct an assessment and make site selections for the President's Trafficking Initiative. Mr. Bell traveled to Mexico City, Tapachula, and Cancun, Mexico, on February 12, 2006, through February 18, 2006, to meet with local government officials and discuss trafficking cases for the President's Trafficking Initiative. Mr. Bell traveled to Jakarta, Indonesia; Singapore; and Malaysia on April 17, 2006, through April 30, 2006, to assess a task force development for additional sites for the President's Trafficking Initiative. Mr. Bell traveled to Mexico City, Mexico, on May 17, 2006, through May 18, 2006, for meetings related to the President's Trafficking Initiative. Mr. Bell traveled to Singapore and Malaysia on December 9, 2006, through December 16, 2006, to assess additional sites and conduct presentations at the request of the U.S. Embassy pursuant to Malaysian participation in the President's Trafficking Initiative. The Division was reimbursed for each of these trips, other than the September 2005 trip to Bangkok, by a President's Trafficking Initiative account funded by a transfer from USAID, OPDAT, or the State Department.

Ralph Boyd traveled to Geneva and London on August 1, 2001, through August 7, 2001, for the Committee on the Elimination of Racial Discrimination. Mr. Boyd traveled to Rome, Italy; and Davos, Bern, and Zurich, Switzerland; on January 21, 2003, through January 26, 2003, to meet with officials on human trafficking. Mr. Boyd traveled to Ottawa and Montreal, Canada, on February 24, 2002, through February 27, 2002, to be awarded the U.S. Speaker and Specialist Grant. The Division was reimbursed for Mr. Boyd's trip to Canada.

Lou DeBaca traveled to Bangkok, Thailand, on May 7, 2005, through May 16, 2005, for trafficking training. Mr. DeBaca traveled to Mexico City, Mexico, on May 17, 2006, through May 20, 2006, for meetings at the embassy on the Mexican Trafficking Project. Mr. DeBaca traveled to Mexico City, Mexico, on October 23, 2006, through October 25, 2006, for meetings at the U.S. Embassy on the President's Trafficking Initiative. The Division was reimbursed for each of these trips.

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Mark Kappelhoff traveled to Garmisch, Germany, on March 5, 2005, through March 12, 2005, for a human trafficking conference. The Division was reimbursed for this trip.

Assistant Attorney General Wan Kim traveled to Geneva, Switzerland, on July 15, 2006, through July 19, 2006, for the International Covenant on Civil and Political Rights Conference. Assistant Attorney General Kim traveled to Singapore and Malaysia on December 9, 2006, through December 17, 2006, to meet with government officials on human trafficking. The Division was reimbursed for Assistant Attorney General Kim's trip to Singapore and Malaysia.

Andrew Lelling traveled to Ottawa, Canada, on June 23, 2003, returning that same day, to meet with officials on human trafficking. Mr. Lelling traveled to Iceland on February 25, 2003, through March 1, 2003, to participate in the International Information Programs and the U.S. Speaker and Specialist Program. The Division was reimbursed for Mr. Lelling's trip to Iceland.

Tobi Longwitz traveled to Geneva, Switzerland, on May 3, 2006, through May 9, 2006, for the Convention Against Torture. Ms. Longwitz traveled to Geneva, Switzerland, on July 14, 2006, through July 20, 2006, for the International Covenant on Political and Civil Rights Conference.

Robert Moossy traveled to Vancouver, Canada, on May 17, 2005, through May 21, 2005, for a human trafficking conference.

Bradley Schlozman traveled to Bangkok, Thailand, on November 14, 2003, through November 23, 2003, for a human trafficking conference. Mr. Schlozman traveled to Tallinn, Estonia, on March 31, 2004, through April 3, 2004, to participate in the International Information Programs and the U.S. Speaker and Specialist Program. Mr. Schlozman took personal travel on March 27 through March 30. Mr. Schlozman traveled to Singapore, Malaysia, and Cambodia on December 30, 2004, through January 12, 2005, for the President's Trafficking Initiative. Mr. Schlozman traveled to New Delhi, India, on March 13, 2005, through March 22, 2005, for a trafficking assessment for the State Department. Mr. Schlozman traveled to Bern, Switzerland, and Tokyo City, Japan, on June 12, 2004, through June 26, 2004, for human trafficking meetings and a conference with Swiss and Japanese officials. He took personal travel on June 17 and 18 in Bern and on June 21 in Tokyo City. Mr. Schlozman traveled to Beijing, China, on August 7, 2005, through August 12, 2005, to meet with Chinese officials on human rights. He took personal travel on August 11. Mr. Schlozman traveled to Taipei, Hong Kong, and Manila on November 23, 2005, through December 7, 2005, to meet with officials on human trafficking. He took personal travel on November 26 and 27 in Taipei. Mr. Schlozman traveled to Dar es Salaam, Tanzania, on January 3, 2006, through January 17, 2006, to meet with officials on human trafficking. The Division was reimbursed for five of these eight trips.

Gordon Todd traveled to Paris, France, on June 14, 2004, through June 18, 2004, to attend the Organization for Security and Cooperation in Europe (OSCE) Conference as part of

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the U.S. Delegation. Mr. Todd traveled to Ljubljana, Slovenia, and Warsaw, Poland, on May 6, 2005, through May 15, 2005, to discuss human trafficking issues.

Jason Torchinksy traveled to Brussels, Belgium, on November 14, 2003, through November 20, 2003, to attend a European Union – United States Seminar.

Michael Zubrensky traveled to Athens and Thessaloniki, Greece, on December 7, 2001, through December 13, 2001, for a human trafficking workshop. The Division was reimbursed for this trip.

Holly Wiseman traveled to Moscow and Krasnodar City, Russia, on May 15, 2001, through May 27, 2001, for a *U.S. v. Virchenko* pre-trial investigation.

11. Please provide statistics for the Criminal Section dating back to 1999. Include for each year, the number of defendants charged and the number convicted, broken down according to whether the case involved a color of law, hate crime, human trafficking or FACE violation. For human trafficking matters, please identify those that did not involve a charge pursuant to a statute explicitly prohibiting slavery, involuntary servitude or human trafficking. For those matters, please identify the statutes pursuant to which charges were brought. Also, please identify whether each case was prosecuted by the Criminal Section alone, the U.S. Attorney's Office alone, or jointly.

Answer: In FY 1999, the Criminal Section of the Civil Rights Division charged a total of 138 defendants. Of those defendants, fifty-eight were charged with color of law crimes, forty-five were charged with bias crimes, ten were charged with damage of a house of worship crimes, six were charged with FACE Act violations, eight were charged with sex trafficking crimes, and eleven were charged with labor trafficking crimes. In FY 1999, the Criminal Section convicted a total of ninety-eight defendants. Of those defendants convicted, thirty-one were convicted of color of law crimes, thirty-eight were convicted of bias crimes, fourteen were convicted of damage of a house of worship crimes, two were convicted of FACE Act violations, five were convicted of sex trafficking crimes, and eight were convicted of labor trafficking crimes.

In FY 2000, the Criminal Section of the Civil Rights Division charged a total of 122 defendants. Of those defendants, sixty-six were charged with color of law crimes, thirty-two were charged with bias crimes, sixteen were charged with damage of a house of worship crimes, three were charged with FACE Act violations, and five were charged with sex trafficking crimes. In FY 2000, the Criminal Section convicted a total of 112 defendants. Of those defendants convicted, fifty-four were convicted of color of law crimes, thirty were convicted of bias crimes, thirteen were convicted of damage of a house of worship crimes, five were convicted of FACE Act violations, seven were convicted of sex trafficking crimes, and three were convicted of labor trafficking crimes.

In FY 2001, the Criminal Section of the Civil Rights Division charged a total of 191 defendants. Of those defendants, 103 were charged with color of law crimes, forty-one were charged with bias crimes, five were charged with damage of a house of worship

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crimes, four were charged with FACE Act violations, twenty-six were charged with sex trafficking crimes, and twelve were charged with labor trafficking crimes. In FY 2001, the Criminal Section convicted a total of 119 defendants. Of those defendants convicted, fifty-nine were convicted of color of law crimes, twenty-eight were convicted of bias crimes, five were convicted of damage of a house of worship crimes, four were convicted of FACE Act violations, fifteen were convicted with sex trafficking crimes, and eight were convicted of labor trafficking crimes.

In FY 2002, the Criminal Section of the Civil Rights Division charged a total of 125 defendants. Of those defendants, fifty-nine were charged with color of law crimes, twenty were charged with bias crimes, three were charged with damage of a house of worship crimes, two were charged with FACE Act violations, twenty-seven were charged with sex trafficking crimes, and fourteen were charged with labor trafficking crimes. In FY 2002, the Criminal Section convicted a total of 124 defendants. Of those defendants convicted, sixty-eight were convicted of color of law crimes, twenty-five were convicted of bias crimes, two were convicted of damage of a house of worship crimes, one was convicted of a FACE Act violation, twenty-three were convicted with sex trafficking crimes, and five were convicted of labor trafficking crimes.

In FY 2003, the Criminal Section of the Civil Rights Division charged a total of 125 defendants. Of those defendants, sixty-one were charged with color of law crimes, twenty-six were charged with bias crimes, eight were charged with damage of a house of worship crimes, three were charged with FACE Act violations, twenty-one were charged with sex trafficking crimes, and six were charged with labor trafficking crimes. In FY 2003, the Criminal Section convicted a total of 104 defendants. Of those defendants convicted, forty-one were convicted of color of law crimes, twenty-seven were convicted of bias crimes, ten were convicted of damage of a house of worship crimes, five were convicted of FACE Act violations, sixteen were convicted with sex trafficking crimes, and five were convicted of labor trafficking crimes.

In FY 2004, the Criminal Section of the Civil Rights Division charged a total of 156 defendants. Of those defendants, sixty-six were charged with color of law crimes, thirty-eight were charged with bias crimes, four were charged with damage of a house of worship crimes, one was charged with a FACE Act violation, forty were charged with sex trafficking crimes, and seven were charged with labor trafficking crimes. In FY 2004, the Criminal Section convicted a total of 112 defendants. Of those defendants convicted, forty-eight were convicted of color of law crimes, twenty-six were convicted of bias crimes, three were convicted of damage of a house of worship crimes, two were convicted of FACE Act violations, thirty were convicted of sex trafficking crimes, and three were convicted of labor trafficking crimes.

In FY 2005, the Criminal Section of the Civil Rights Division charged a total of 168 defendants. Of those defendants, forty-five were charged with color of law crimes, sixteen were charged with bias crimes, ten were charged with damage of a house of worship crimes, one was charged with a FACE Act violation, seventy-five were charged with sex trafficking crimes, and twenty-one were charged with labor trafficking crimes. In FY

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2005, the Criminal Section convicted a total of 109 defendants. Of those defendants convicted, fifty-six were convicted of color of law crimes, thirteen were convicted of bias crimes, four were convicted of damage of a house of worship crimes, one was convicted of a FACE Act violation, twenty-five were convicted of sex trafficking crimes, and ten were convicted of labor trafficking crimes.

In FY 2006, the Criminal Section of the Civil Rights Division charged a total of 200 defendants. Of those defendants, sixty-six were charged with color of law crimes, twenty were charged with bias crimes, two were charged with damage of a house of worship crimes, one was charged with a FACE Act violation, eighty-five were charged with sex trafficking crimes, and twenty-six were charged with labor trafficking crimes. In FY 2006, the Criminal Section convicted a total of 180 defendants. Of those defendants convicted, fifty-five were convicted of color of law crimes, nineteen were convicted of bias crimes, seven were convicted of damage of a house of worship crimes, one was convicted of a FACE Act violation, sixty were convicted of sex trafficking crimes, and thirty-eight were convicted of labor trafficking crimes.

For human trafficking matters handled by the Civil Rights Division between FY 2001 and 2006, 255 of 360 defendants prosecuted by the Civil Rights Division and United States Attorneys' Offices, in human trafficking-related offenses, have been charged with or pleaded guilty to human trafficking charges. Defendants not charged with human trafficking offenses were charged with crimes such as alien harboring (8 U.S.C. § 1324), money laundering (18 U.S.C. § 1956 et seq.), visa fraud (18 U.S.C. § 1946 et seq.), or similar offenses. Consistent with the United States Attorney's Manual, the Division bases its charging decision on the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction. During the time period applicable to the TVPA as described above, 3.2% of human trafficking cases were handled by the Criminal Section alone. The Civil Rights Division and the U.S. Attorney's Office participated in all other cases. Additional trafficking cases involving victims who are prosecuted by the Criminal Division.

12. The following questions relate to the removal of Albert Moskowitz as chief of the Criminal Section:

a. What was the date of your confirmation as Assistant Attorney General by the Senate?

Answer: November 4, 2005

b. On what date were you sworn in as Assistant Attorney General?

Answer: November 9, 2005

c. On what date was Albert Moskowitz informed of the decision that he was to be removed as Chief of the Criminal Section?

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Answer: Pursuant to a discussion on or about November 8, 2005, Mr. Moskowitz began serving as Counsel to the Assistant Attorney General, specifically as Acting Director of the Professional Development Office, on November 27, 2005.

d. On what date did his removal become effective?

Answer: Mr. Moskowitz began serving as Counsel to the Assistant Attorney General, specifically as Acting Director of the Professional Development Office, on November 27, 2005.

e. Did you make the decision to remove Mr. Moskowitz?

Answer: I fully supported the decision that, from a management perspective, the Division would best be served by having Mr. Moskowitz serve as the head of the Office of Professional Development.

f. Did you inform him of his removal?

Answer: I participated in informing Mr. Moskowitz that he would head the Professional Development Office.

g. Who else was involved in the decision? Please describe in detail your consultations regarding the removal of Mr. Moskowitz.

Answer: The Civil Rights Division has substantial confidentiality interests in the deliberations process that led to this decision.

13. Please provide for the years 2002 to the present a copy of each award recommendation for a career attorney as it was transmitted from the relevant Section Chief to the relevant reviewer. Please also provide a copy of each final award recommendation, identifying any changes made by a reviewer.

Answer: The Division has substantial confidentiality interests in internal deliberations leading to award decisions, including recommendations from Section Chiefs.

14. Please provide a copy of each performance evaluation of a career attorney that was changed by a reviewer after it was transmitted from a Section Chief to a reviewer. Please also provide a copy of each such performance evaluation as it was originally transmitted from the Section Chief to the relevant reviewer.

Answer: The Division has substantial confidentiality interests in internal deliberations, including performance evaluations.

15. Please provide a detailed account of the firing of Ty Clevenger from the Special Litigation Section.

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Answer: Mr. Clevenger resigned from the Department of Justice on October 5, 2006. Additional information related to that decision implicates significant individual privacy interests.

16. You stated that the attrition rate for the Division is in line with its historical averages. That statement is at odds with publicly reported data, which suggest that some 19% of attorneys left the Division in 2005 and that over half of the attorneys in the Voting Section have left in the past 18 months, whether through departures, involuntary transfers or details. Do you dispute these numbers? If not, how do you explain your lack of concern about the desire of attorneys to leave the Civil Rights Division? As leader of the Division, shouldn't you be concerned that the Division is not a desirable place to work? Have you made inquiries with the Voting Section leadership to learn why attorneys are leaving the Section? The numbers alone raise serious concerns about the job that the management of the Section is doing. Please review the performance of management and the causes for the low morale in the Voting Section and report your findings.

Answer: The average attrition rate in the Civil Rights Division during this Administration is almost identical to a comparable period during the previous Administration. We nevertheless make every effort to retain our talented and experienced attorneys. I have worked hard to create an environment of hard work, mutual respect, open dialogue, and professionalism. In this vein, the Division recently created a new Office of Professional Development that is focused on the needs of individual attorneys for training and career resources. The Division also recently created an internal Ombudsman to meet with Division employees on a wide variety of issues and concerns. I am also in regular contact with the leadership of each Section, including the Voting Section, and work closely with career staff to address any problems that arise.

The Division's attorney attrition rate in FY 2005 was 17.75 percent. During FY 2005, a number of Division attorneys accepted a retirement package offered to multiple Justice Department components.

The Voting Section has achieved some of its highest levels of enforcement during the past year. In fact, the 18 new lawsuits the section filed in CY 2006 is more than twice the average number of lawsuits filed by the Division annually over the preceding 30 years. In the past year, the Voting Section has brought lawsuits under Sections 2, 4(f)(4), 5, 203, and 208 of the Voting Rights Act; the 1960 Civil Rights Act; the National Voter Registration Act; the Help America Vote Act; and the Uniformed and Overseas Citizens Absentee Voting Act. The Division deployed a record number of monitors and observers to jurisdictions across the country for the 2006 mid-term elections. In FY 2006, the Voting Section processed the largest number of Section 5 submissions in its history. Our commitment to enforcing the language minority requirements of the Voting Rights Act remains strong, with five such lawsuits filed in CY 2006, which is only one short of the all-time record set in CY 2005. In FY 2006, the Division's Voting Section obtained 37.5%, or three out of eight, of the judgments ever obtained under Section 208 of the Voting Rights Act in its twenty-four year history. In CY 2006, the Voting Section filed the largest number of cases under UOCAVA in any year since 1992. In CY 2006, the Voting Section also filed

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the largest number of suits under the National Voter Registration Act since immediately following the passage of the Act in 1995. We are pleased with the direction and accomplishments of the Voting Section under its current management.

17. You stated that ideology is not a factor in hiring in the Civil Rights Division. How, then, do you account for the fact that the profile of attorneys being hired by the Division – as documented in recent press reports -- has changed dramatically and includes a disproportionate number of persons hired who were members of the Federalist Society or conservative religious organizations, or who worked for Republican candidates or organizations, or who clerked for conservative judges? Is it your position that these changes occurred by chance?

Answer: As set forth above, we seek to hire outstanding attorneys with demonstrated legal skills and abilities regardless of their political, ideological, and religious backgrounds, and the attorneys that we have hired come from an extremely wide variety of backgrounds. As we do not employ a political litmus test in making hiring decisions, it is to be expected that our hires reflect a wide scope of talented attorneys from all political, ideological, and religious backgrounds who are committed to the work of the Division.

18. You stated that you focus on excellence in hiring. Yet, the belief appears widespread among law students and other potential applicants – and the record supports their belief -- that ideology is crucial in hiring decisions by the Civil Rights Division. The profile of recent hires supports this belief and has discouraged highly qualified applicants from applying to the Civil Rights Division. The profile of recent applicants shows that the Division no longer hires from a large segment of the most sought after law school graduates. Aren't you concerned that the Division's hiring practices are diluting the talent that the Division is attracting?

Answer: No. The Civil Rights Division continues to attract top-notch legal talent to its ranks, including from the top law schools and the most prestigious judicial clerkships.

19. The Division has strayed from its original core mission to combat racial discrimination, and I'm concerned that the Division's current hiring practices are contributing to this problem. In particular, the Division traditionally hired many attorneys who had experience in enforcing civil rights laws on behalf of minorities. How many applicants have you hired in the past three years who brought experience in enforcing civil rights laws on behalf of racial minorities? Have you hired any attorneys who have previously worked for civil rights groups that enforce civil rights laws on behalf of minorities?

Answer: The Civil Rights Division continues to aggressively combat racial discrimination. During this Administration, the Division has filed a number of cases on behalf of racial minority victims, including:

- **In November 2006, the Division filed a complaint against Tallahassee Community College (TCC) alleging that TCC failed to select an African-American applicant for the position of HomeSafenet Trainer because of the applicant's race in violation of Title VII. Under a court-approved consent decree entered on November 7, 2006, TCC agreed to offer the applicant $34,363 in back pay and accumulated interest.**

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- **In October and November 2006, defendants Joseph Kuzlik and David Fredericy pleaded guilty to conspiracy, interference with housing rights, and making false statements to federal investigators. In February 2005, these defendants poured mercury on the front porch and driveway of a bi-racial couple in an attempt to force them out of their Ohio home.**

- **In August 2006, the Division obtained a verdict against a former apartment manager for discrimination on the basis of race as a result of his refusal to rent to African Americans in Boaz, Alabama. The Division conducted an investigation of the manager and his employer through the use of fair housing testers. The defendant was ordered to pay a civil penalty of $10,000. Earlier in the year, the defendant's employer agreed to pay a civil penalty of $17,000 and compensatory damages of $32,700 to individuals who were subjected to the alleged discriminatory housing practices.**

- **In July 2006, the Division filed suit against the City of Chesapeake, Virginia, alleging that the City had engaged in a pattern or practice of employment discrimination on the basis of race and national origin in violation of Section 707 of Title VII of the Civil Rights Act of 1964 by using a mathematics test to screen applicants for entry-level police officer positions in a manner that had an unlawful disparate impact against African-American and Hispanic applicants.**

- **In July 2006, the court entered a consent decree resolving our suit, which was filed in April 2006, against the City of Virginia Beach, Virginia, alleging that the City had engaged in a pattern or practice of employment discrimination in violation of Section 707 of Title VII through its use of a mathematics test that disproportionately excluded African-American and Hispanic applicants for the position of entry-level police officer. The decree alters the City's method for selecting entry-level police officers in a way that will eliminate the disparate impact of the mathematics test. In addition, the decree requires the City to provide remedial relief, including money damages, priority job offers, and retroactive seniority, to identifiable African-American and Hispanic victims of the challenged test.**

- **In July 2006, the Division filed a complaint against the City of Euclid, Ohio, alleging that the mixed at-large/ward system of electing the city council diluted the voting strength of African-American citizens in violation of Section 2 of the Voting Rights Act. In its investigation, the Division found that while African Americans composed nearly 30% of Euclid's electorate, and although there had been eight recent African-American candidacies for the city council, not a single African-American candidate had ever been elected to that body. Further, the Division found that in seven recent city council elections, white voters voted sufficiently as a bloc to defeat the African-American voters' candidates of choice.**

- **In March 2006, in *United States v. Nix* (N.D. Ill.), the defendant entered a guilty plea to interference with an Arab-American family's housing rights by igniting an explosive device inside the family's van that was parked near their home.**

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- **In 2004, the Division entered into a consent decree resolving allegations that Cracker Barrel Old Country Store, Inc., a nationwide family restaurant chain, accommodated a severe and pervasive pattern of racial discrimination at its restaurants, including allowing its servers to refuse to serve African-American customers and treating such customers differently in terms of seating, service, and responsiveness to complaints. Cracker Barrel agreed to implement far-reaching policy changes and training programs to remedy these violations.**

- **In 2004, the Division alleged that the City of Gallup, New Mexico, engaged in a pattern or practice of hiring discrimination on the basis of race against Native-American applicants for jobs in various City departments. The Division obtained a very favorable consent decree and is currently engaged in determining appropriate remedial relief for individual victims of discrimination.**

- **In June 2004, the Division filed the first lawsuit since 1990 alleging racial discrimination in education under Title IV of the Civil Rights Act against Lafayette High School in New York City. The complaint alleged that Asian students were severely harassed by other students and the school district was deliberately indifferent to the harassment. The suit was resolved by consent decree filed simultaneously with the complaint.**

- **In 2003, the Division successfully settled a racial discrimination and retaliation lawsuit against the city of Fort Lauderdale, Florida, for a total of $455,000 in compensatory damages. The lawsuit alleged that the city of Fort Lauderdale violated Title VII by denying an African-American employee promotion because of his race. The lawsuit further alleged that the city retaliated against the employee when he complained that he had been denied promotion for discriminatory reasons.**

- **In 2002, the Division filed and resolved *United States v. Fidelity Federal Bank* (E.D.N.Y.), a case involving a pattern or practice of discriminatory abusive credit collection practices on the basis of national origin against Hispanics in violation of the Equal Credit Opportunity Act. Under the terms of the Settlement Agreement and Order, Fidelity paid $1.6 million to both compensate the victims and fund a Consumer Education Program.**

- **Between FY 2001 and FY 2006, the Division brought 39 cross-burning prosecutions, charging a total of 60 defendants. The Division convicted 58 defendants during that same period. For example, in September 2006, two defendants were convicted of conspiring to interfere with the housing rights of a mixed-race family that included an African American by burning a cross in front of their house. In a separate case in August 2006, a defendant pleaded guilty to intimidating and interfering with an African-American family that was negotiating for the purchase of a house by burning a cross on the property adjacent to the house.**

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- **Since 2001, the Division has obtained four consent decrees involving redlining of predominantly African-American neighborhoods by major banking institutions. The first, filed and resolved in 2002, involved a major bank in Chicago that will invest more than $10 million and open two new branches in minority neighborhoods to settle a lawsuit alleging that it had engaged in mortgage redlining on the basis of race and national origin. In May 2004, the Division obtained a consent decree requiring a bank to invest $3.2 million in small business and residential loan programs and to open three new branches in the City of Detroit. This was the first redlining case the Division had ever brought alleging discrimination in business lending. In July 2004, the Division filed and resolved a lawsuit against another bank in Chicago. The suit alleged that the bank intentionally avoided serving the credit needs of residents and small businesses located in minority neighborhoods. The bank has agreed to invest $5.7 million and open new branches in these neighborhoods. On October 13, 2006, the Division filed a complaint alleging that Centier Bank discriminated on the basis of race and national origin by refusing to provide its lending services to residents of minority neighborhoods in the Gary, Indiana, metropolitan area in violation of the Fair Housing Act and the Equal Credit Opportunity Act. The suit was resolved by a consent decree entered on October 16, 2006, which requires the Bank to: invest a minimum of $3.5 million in a special financing program for residential and CRA small business loans; commit at least $375,000 in targeted advertising; invest $500,000 to provide credit counseling, financial literacy, business planning, and other related educational programs targeted at the residents and small businesses of African-American and Hispanic areas and to sponsor programs offered by community or governmental organizations engaged in fair lending work; open or acquire at least two full service offices within designated African-American neighborhoods; expand an existing supermarket branch in a majority Hispanic neighborhood to provide full lending services; provide the same services offered at its majority white suburban locations to all branches regardless of their location; and train employees on the requirements of the Fair Housing Act and Equal Credit Opportunity Act in addition to other remedial relief.**

- **After September 11, 2001, the Civil Rights Division implemented an initiative to combat "backlash" crimes involving violence and threats aimed at individuals perceived to be Arab, Muslim, Sikh, or South Asian. This initiative has led to numerous prosecutions involving physical assaults, some minor and some involving dangerous weapons and resulting in serious injuries, as well as threats made over the telephone, on the internet, through the mail, and in face-to-face interactions. We have also prosecuted cases involving shootings, bombings, and vandalism directed at homes, businesses, and places of worship. The Department has investigated more than 750 bias-motivated incidents since September 11, 2001. Our efforts have resulted in 32 federal convictions in "backlash" cases. The Department also assisted local law enforcement in bringing more than 160 such criminal prosecutions.**

While the Division has not maintained such hiring statistics, the attorneys that we have hired come from an extremely wide variety of backgrounds, including those who have previously worked for civil rights groups that enforce civil rights laws on behalf of minorities.

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20. I'm also concerned that lack of experience at the political level may be contributing to this problem. Describe the civil rights experience that each of the political appointees in the Division had at the time of his or her appointment. Also, please provide the resume of each political appointee.

Answer: Like every other component of the Department of Justice, the Civil Rights Division is charged with enforcing the laws passed by Congress. As such, we seek to hire outstanding attorneys with demonstrated legal skills and abilities. The Division considers attorneys from a wide variety of educational backgrounds, professional experiences, and demonstrated qualities. Attorneys from an extremely wide variety of backgrounds and experiences have been hired to work in the Division under this Administration. For example, the Division has hired not only attorneys with significant prior civil rights experience, but also attorneys with other crucial skills, such as a significant record of actual litigation or management experience. We will continue to hire the best attorneys available. We measure three important things, among others, when evaluating candidates for attorney positions in the Civil Rights Division: whether they have a demonstrated record of excellence, whether they are talented attorneys consistent with that excellent record, and whether they share a commitment to the work of the Division.

The Division's political appointees also reflect these hiring standards. President Bush has appointed both the first Hispanic American and the first immigrant to head the Civil Rights Division. The Office of the Assistant Attorney General has included men and women from all backgrounds, including African-American, Native-American, Asian-American, and Hispanic attorneys committed to the work of the Civil Rights Division. The resumes responsive to your request are attached, redacted to protect attorneys' addresses, social security numbers, and other personal identifying information that implicates individual privacy interests.

Employment Litigation Section

1. Many of the Employment Litigation Section's cases are based on referrals from the Equal Opportunity Employment Commission under Title VII of the Civil Rights Act of 1964, which outlaws job discrimination based on race, color, national origin, religion, or gender. The EEOC sends the Division almost 400 charges of discrimination a year in which its initial determination has found reasonable cause to believe that discrimination occurred. The Division also has nationwide jurisdiction under Title VII to investigate systemic discrimination. Yet according to the Division's website, if one excludes cases that were developed by the Clinton Administration or by a U.S. Attorney's office, the Division has filed only 33 Title VII job discrimination cases since 2001. That's an average of only 5 or 6 Title VII cases a year. The Division's Employment Litigation Section has nearly 30 attorneys. Can you explain why the Section currently files only a handful of Title VII cases each year?

Answer: Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Most allegations of employment discrimination are made against private employers. Those claims are

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investigated and potentially litigated by the Equal Employment Opportunity Commission ("EEOC"). The Civil Rights Division's Employment Litigation Section is responsible for enforcing Title VII against public employers.

The Employment Litigation Section received 606 charges from the EEOC in CY 2001, 597 charges in CY 2002, 504 charges in CY 2003, 393 charges in CY 2004, 393 charges in CY 2005, and 290 charges in CY 2006. The EEOC itself does not file suit on every charge in which it has found reasonable cause to believe that a private employer has violated Title VII. It also is important to note that a strong employment discrimination case can, at times, take years to develop.

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

Additionally, during Fiscal Year 2006, the Section resolved liability or relief issues in eight pattern or practice lawsuits. Six of these cases involved consent decrees that were filed in Fiscal Year 2006, and two involved cases in which consent decrees were filed in Fiscal Year 2005.

We remain committed to the vigorous and even-handed enforcement of Title VII, as enacted by Congress.

2. One of the main reasons the Justice Department was given authority to enforce Title VII was to enable the federal government to correct broad, systemic discrimination that private citizens or civil rights groups lacked the resources to challenge. The Division's authority to file pattern or practice suits under Title VII is its main way of challenging systemic job discrimination. Under Section 707 of Title VII, the Division has authority to investigate potential problems of systemic race discrimination anywhere in the country, without waiting for a referral from the EEOC. But the Division's record on such cases is even worse than its overall record on Title VII.

Except for cases developed by the Clinton Administration or a U.S. Attorney's Office, for the first three years of the Administration, the Division did not file a single pattern or practice suit. In the entire six years of this Administration, the Department has filed only two Title VII pattern or practice cases to correct systemic racial discrimination against African Americans or Latinos. The first wasn't filed until February of this year. During the same period, the Division filed two pattern or practice cases alleging discrimination against white men. This record doesn't reflect the reality that race discrimination against African Americans and Latinos is still an unfortunate fact of life in America. Is it your view that job discrimination against whites is as widespread as job discrimination against African American and Latino workers? If not, why has the Division filed so few cases alleging a pattern or practice of discrimination against Latinos and African Americans, and how do you explain this allocation of the Division's resources?

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Answer: Since my confirmation as Assistant Attorney General, the Civil Rights Division has filed three lawsuits alleging a pattern or practice of employment discrimination, including two on behalf of African-American and Hispanic victims. In comparison, the Division filed one such case in FY 1998; one in FY 1999; and one in FY 2000.

Moreover, the Division filed four cases alleging a pattern or practice of employment discrimination in CY 2004, which is the largest number filed in a single year since the mid-1990s, as well as two in CY 2005.

We remain committed to the vigorous and even-handed enforcement of Title VII, as enacted by Congress.

3. Excluding cases developed by the Clinton Administration or by a U.S. Attorneys' Office, the Division has filed only 25 Title VII cases based on individual charges of discrimination. Not a single case alleged national origin discrimination against a Latino worker. In addition, only two of these cases alleged race discrimination against African Americans – an average of about one case every two years. Why is it that of almost 400 discrimination charges the Division receives from the EEOC each year under Title VII, the Division has filed just two cases in six years under Section 706 of Title VII alleging race discrimination against African Americans and none alleging national origin discrimination against Latinos?

Answer: The Civil Rights Division remains diligent in combating employment discrimination against all Americans regardless of their race, color, religion, sex, or national origin. To that end, the Division has vindicated the rights of African-American workers who have been discriminated against on the basis of race in violation of Title VII. The Division has filed or authorized six (not two) Section 706 cases on behalf of African-American workers during this Administration. For example, on November 2, 2006, the Division filed a complaint in *United States v. Board of Directors of Tallahassee Community College* (N.D. Fla.), pursuant to Section 706 of Title VII, alleging that the victim was discriminated against on the basis of his race when he was not promoted to a particular position. On July 13, 2004, we filed a complaint in intervention in *Lemons & United States v. Pattonville Fire Protection District* (E.D. Mo.), pursuant to Section 706 of Title VII, alleging that the victim was harassed on the basis of his race and constructively discharged from his unit. The Division also has filed or authorized three pattern or practice complaints alleging discrimination on the basis of race against African Americans during this time frame.

During this Administration, the Division also has vindicated the rights of Hispanic workers who have been discriminated against on the basis of national origin in violation of Title VII. For example, the Division obtained a settlement agreement with the District of Columbia Public Schools that favorably resolved, pre-suit, a Section 706 referral in which the charging party, a Hispanic man, alleged that he was the victim of discrimination on the basis of national origin. The Division also has filed three pattern or practice complaints alleging discrimination on the basis of national origin against Hispanics during this time frame.

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This Administration places a very high priority on developing successful cases. Our results reflect this effort. To date, this Administration has prevailed in or favorably resolved every complaint that it has filed under Section 706. With the sole exception of *United States v. City of Garland*, which was filed in 1998, this Administration has successfully prosecuted or favorably resolved every case it has brought to trial under Section 707.

In contrast, the number of referred EEOC charges is an inaccurate measure of the Division's success. There are myriad reasons for this. For example, the Division may take an individual referral and then expend time and resources on an investigation to determine whether a "pattern or practice" suit is more appropriate. In addition, private counsel often "cherry-pick" the best Section 706 charges, i.e., those allegations that are most suit-worthy.

4. In the past six years, the Division has filed two cases based on individual charges alleging race or national origin discrimination against white males, compared to only two individual cases alleging race discrimination against African Americans and none alleging discrimination against Latinos.

a. Do you believe that race and ethnic discrimination against white men is a greater problem in American workplaces than racial discrimination against Latino workers? If not, how do you explain the fact that the Division has filed more Title VII cases alleging race or national origin cases against white males than against Latinos?

b. Do you believe that racial and ethnic discrimination against white men is as significant a problem in American workplaces as racial discrimination against African Americans?

c. Please explain why the Division focused its enforcement of racial and ethnic discrimination on charges filed by white males.

Answer (a-c): Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in employment on the basis of race, color, national origin, sex, and religion. Title VII's protections extend to all Americans regardless of their race, color, national origin, sex, or religion. The Civil Rights Division is committed to vigorously enforcing Title VII and combating employment discrimination on behalf of all Americans.

Last year, the Division filed three lawsuits alleging a pattern or practice of employment discrimination. This compares to one filed in FY 1998; one filed in FY 1999; and one filed in FY 2000. The lawsuits filed in 2006 included *United States v. City of Virginia Beach* (E.D. Va.), and *United States v. City of Chesapeake* (E.D. Va.), in which the Division alleged that the defendants 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; the *City of Chesapeake* litigation is ongoing.

During the past six years, the Division also has filed pattern-or-practice of employment discrimination lawsuits on behalf of African Americans, Hispanic Americans, Native

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Americans and women, among others. We are fully committed to the vigorous enforcement of federal law.

5. For each calendar year from 2001 to 2006, please specify:

a. The total number of charges received by the Employment Litigation Section from the EEOC.

b. The total number of EEOC charges received by the Employment Litigation Section that allege racial discrimination against African Americans.

c. The total number of EEOC charges received by the Employment Litigation Section that allege national origin discrimination against Latinos.

d. The total number of EEOC charges received by the Employment Litigation Section that allege racial or national origin discrimination against Asian Americans.

e. The total number of EEOC charges received by the Employment Litigation Section that allege racial or national origin discrimination against Native Americans.

f. The total number of EEOC charges received by the Employment Litigation Section that allege racial or national origin discrimination against African Americans.

Answer (a-f): The Employment Litigation Section received 606 charges from the EEOC in CY 2001, 597 charges in CY 2002, 504 charges in CY 2003, 393 charges in CY 2004, 393 charges in CY 2005, and 290 charges in CY 2006.

Title VII's protections apply to all persons regardless of their race and national origin. Though the Division tracks EEOC referrals by protected category (e.g. race and national origin), we do not track EEOC referrals by subcategories within the protected categories (e.g. African American, Latino, Native American, and Asian American). Consequently, we can provide only the total number of charges for the protected categories of race and national origin referred to the Department by the EEOC. According to our records, in FY 2001, race was listed as a basis of discrimination in 284 charges while national origin was listed as a basis of discrimination in 77 charges. In FY 2002, the numbers were 139 and 72; in FY 2003, they were 147 and 51; in FY 2004, they were 107 and 54; in FY 2005, they were 188 and 43; and in FY 2006, the numbers were 123 and 31. Some of these numbers include charges in which the charging party alleged both race and national origin as a basis of discrimination.

6. The subjects on which the Division chooses to file suit, typically reflect its

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overall enforcement priorities. Given that the Division has filed so few Title VII cases alleging employment discrimination against African Americans and Latinos, is it fair to conclude that employment discrimination against these groups is a low priority for the Division?

Answer: Please see the answer to question number 4.

7. In answers to written questions provided to the Committee on October 27, 2005, you stated that you could not provide complete answers to my questions about investigations by the Employment Litigation Section because "the management information systems do not accurately track the number of hours spent by Section attorneys on an investigation or litigation tasks," "the date on which an investigation is authorized," or "the demographic identity of the potential victims" or "whether the investigation involves claims of discrimination based on race, ethnicity, gender, color, or religion." This seems to be basic information that would be essential for monitoring the Division's enforcement and evaluating its priorities. You informed me that "if confirmed, [you] would work with both attorneys and information management systems professionals to determine whether it would be appropriate and feasible to expand the categories of information collected for the Section's investigations and cases, as well as to better track the time spent by Employment Litigation Section professionals in these matters."

Are you now able to provide a complete answer to the following question? Please specify, for each calendar year since January 2001, the number of Employment Litigation Section investigations formally authorized by the Civil Rights Division, and for each investigation:

a. the date the investigation was authorized;

b. whether the investigation is currently pending, and if not, at what stage of the investigation it was closed (i.e., after formal investigation, after suit was recommended, after suit was filed, after trial, or after appeal);

c. the subject matter of the investigation and the statutory authority under which it was conducted, including whether the investigation involved a potential pattern or practice of employment discrimination;

d. whether the investigation involved claims of discrimination based on race, ethnicity, gender, color, or religion, and the demographic identity of the potential victims; and

e. the total number of hours spent by career attorneys in the Employment Litigation Section on the investigation and/or litigation.

Answer (a-e): The Employment Litigation Section's information system collects data regarding the current number of open investigations, the number of investigations opened and closed by fiscal year, and authority for these investigations. The system does not track investigations by the type of discrimination alleged. Investigations may be opened by the Section under Title VII or the Uniform Servicemembers Employment and Reemployment

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Rights Act (USERRA), which the Section assumed responsibility for enforcing in FY 2005 and FY 2006. Title VII cases may allege individual violations under Section 706 of Title VII, a pattern or practice under Section 707 of Title VII, or both individual discrimination and a pattern or practice of discrimination under both Sections 706 and 707.

The data tracked by our system is summarized below.

In FY 2006, the Section initiated 29 Section 706 investigations, 1 Section 707 investigation, 1 dual Section 706/707 investigation, and 25 USERRA investigations. The Section closed 36 Section 706 investigations and cases, 6 Section 707 investigations and cases, and 23 USERRA investigations and cases. The Section filed 3 Section 706 complaints and motions to intervene, 3 Section 707 complaints and motions to intervene, and 4 USERRA complaints and motions to intervene. The Section entered into 5 Section 706 settlement agreements and consent decrees, 4 Section 707 settlement agreements and consent decrees, 2 dual Section 706/707 settlement agreements and consent decrees, and 6 USERRA settlement agreements and consent decrees.

In FY 2005, the Section initiated 26 Section 706 investigations, 5 Section 707 investigations, 2 dual Section 706/707 investigations, and 33 USERRA investigations. The Section closed 22 Section 706 investigations and cases, 7 Section 707 investigations and cases, and 6 USERRA investigations and cases. The Section filed 4 Section 706 complaints and motions to intervene, 1 Section 707 complaint or motion to intervene, 1 dual Section 706/707 complaint or motion to intervene, and 6 USERRA complaints and motions to intervene. The Section entered into 8 Section 706 settlement agreements and consent decrees, 4 Section 707 settlement agreements and consent decrees, and 3 USERRA settlement agreements and consent decrees.

In FY 2004, the Section initiated 33 Section 706 investigations and 47 Section 707 investigations. The Section closed 37 Section 706 investigations and cases, 10 Section 707 investigations and cases, and 3 dual Section 706/707 investigations and cases. The Section filed 7 Section 706 complaints and motions to intervene, 3 Section 707 complaints and motions to intervene, and 1 dual Section 706/707 complaint or motion to intervene. The Section entered into 5 Section 706 settlement agreements and consent decrees and 1 Section 707 settlement agreement or consent decree.

In FY 2003, the Section initiated 26 Section 706 investigations and 9 Section 707 investigations. The Section closed 45 Section 706 investigations and cases and 5 Section 707 investigations and cases. The Section filed 5 Section 706 complaints and motions to intervene. The Section entered into 6 Section 706 settlement agreements and consent decrees.

In FY 2002, the Section initiated 43 Section 706 investigations. The Section closed 46 Section 706 investigations and cases, 14 Section 707 investigations and cases, and one investigation or case under Executive Order 11246. The Section filed 5 Section 706 complaints and motions to intervene, 1 Section 707 complaint or motion to intervene, and 1 Eleventh Amendment plaintiff-intervenor case. The Section entered into 13 Section 706

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settlement agreements and consent decrees, 1 Section 707 settlement agreement or consent decree, and 1 settlement agreement or consent decree filed under the Small Business Act.

In FY 2001, the Section initiated 37 Section 706 investigations and 1 Section 707 investigation. The Section closed 21 Section 706 investigations and cases, 7 Section 707 investigations and cases, and 19 Section 709 cases. The Section filed 6 Section 706 complaints and motions to intervene, 1 Section 707 complaint or motion to intervene, and 4 Eleventh Amendment plaintiff-intervenor cases. The Section entered into 4 Section 706 settlement agreements and consent decrees, 1 Section 707 settlement agreement or consent decree, and one settlement agreement or consent decree filed under Executive Order 11246.

8. What have you done to improve the Employment Litigation Section's information tracking?

Answer: The Department of Justice is in the process of developing a Department-wide Litigation Case Management System (LCMS). The LCMS is projected to improve the flow of case information across components in the Department. The Division's ICM system will be replaced by LCMS in the next few years. The Division also continually reviews its existing information tracking systems to make sure that they are as complete and accurate as possible. The Employment Litigation Section, for example, has devoted significant resources to reviewing the existing databases to correct problems that were causing inaccuracies in the existing databases.

9. Please list the specific categories of information currently provided by Employment Litigation Section personnel concerning active investigations. Does that information differ from the information recorded by the Division's other civil sections concerning their respective investigations, and if so, why?

Answer: The Interactive Case Management (ICM) system is a customized computer database and software system designed to track, count, and measure the work that is performed by each of the Division's ten program-related sections. Due to the unique nature of the work of each section in the Division, ICM procedures vary to some degree among sections, but all sections follow some basic procedures. ICM tracks two types of activity: matters and cases. In general, a "matter" is an issue under investigation, while a "case" is an action in which a complaint has been filed. At the outset of a matter or case, the section's administrative staff enters information about the matter or case into the ICM system. The ICM system notes the attorney(s) assigned to the matter or case; the geographic location, date, and nature of the reported allegation; and any law enforcement or other referring agency. Updates of significant activity are provided throughout the duration of the matter or case. When a matter or case is closed, it is noted as closed in the ICM system.

10. Please list the specific categories of information currently provided by Employment Litigation Section personnel concerning pending cases. Does that information differ from the information recorded by other civil sections concerning their litigation, and if so, why?

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See response to question 9 above.

11. It is my understanding that Division personnel in the Employment Litigation Section are required to record the number of hours spent each day on active cases and matters. Is that correct, and if so, why did you consider that information "too inaccurate for submission to members of Congress"?

Answer: The Interactive Case Management (ICM) system is a customized computer database and software system designed to track, count, and measure the work that is performed by each of the Division's ten program-related sections. While Division personnel do record time in the ICM, these records are not reviewed for accuracy.

The Department of Justice is in the process of developing a Department-wide Litigation Case Management System (LCMS). The LCMS is projected to improve the flow of case information across components in the Department. The Division's ICM system will be replaced by LCMS in the next few years.

Educational Opportunities

1. Since you became reviewer for the Education Section as Deputy Assistant Attorney General and during your tenure as Assistant Attorney General, the Education Section has been noticeably inactive. In particular, it no longer appears committed to pursuing desegregation as a goal. In fact, the Department, in a brief with your name on it, has opposed even voluntary efforts to achieve desegregation. Please provide a full account of the Education Section's efforts to achieve desegregation in the last three years.

Answer: The Division continues its important work of ensuring that equal educational opportunities are available on a non-discriminatory basis. We remain active in pursuit of the Section's mission and continue to pursue desegregation as a goal. The Division currently is a party to approximately 280 elementary and secondary school desegregation cases. To ensure that districts comply with their obligations, the Division actively reviews these desegregation cases to monitor issues such as student assignment, faculty and staff assignment and hiring, transportation policies, extracurricular activities, the availability of equitable facilities, and the distribution of resources.

In addition to investigations conducted in districts where full case reviews have been initiated, the Section has opened more than 100 investigations since the beginning of FY 2004 – an average of well over 30 new investigations each year. This compares to the average of 16 new investigations opened by the Section in the last three years of the previous Administration (the only years for which we have such figures). These new investigations include more than 30 concerning specific allegations of desegregation. From the start of FY 2004 to the present, we have obtained litigated relief, entered consent decrees, or engaged in out-of-court settlement agreements in more than 85 cases. The relief we have received includes: eliminating one-race classrooms and schools; ensuring non-discriminatory hiring and promotion of faculty and administrators; improving facilities

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and educational opportunities at one-race minority schools; eliminating transfers that hinder desegregation; and eliminating racially separate class superlatives and honors.

The position taken by the United States in *Meredith v. Jefferson County Public Schools* and *Parents Involved in Community Schools v. Seattle School District No. 1* is fully consistent with our historical position that the use of race must satisfy constitutional standards. Copies of the United States' amicus briefs in both cases, which set forth fully its position in these cases, may be found at: http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2005-0908.mer.ami.html (*Parents Involved*) and http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2005-0915.mer.ami.html (*Meredith*). The briefs of the United States strongly reaffirm the *Brown v. Board of Education* ruling that the state's ultimate objective in crafting public school programs must be to "achieve a system of determining admission to the public schools on a nonracial basis." 349 U.S. 294, 300-01 (1955). The Department recognizes that school districts across the country have a strong interest in providing a high-quality education to all students, and supports their efforts to seek innovative, race-neutral solutions that will improve educational opportunities for all children, including open enrollment plans.

2. In 2005, the Department of Education issued a controversial new policy guidance for use in deciding if colleges and universities are complying with Title IX. Under the guidance, the Department will presume that a college has complied with Title IX and has met female students' interest in sports if the school emails its female students a "model survey" asking about their athletic interests, and students either do not respond to the email, or do not express a desire for more sports activities. This presumption can only be rebutted by specific evidence that there is sufficient student interest in creating a new female sports team, and the burden of proof is on the students or the Department, not on the school. Under the survey, schools no longer need to ask about factors that were previously important, such as coaches' and administrators' opinions and female participation in sports at nearby high schools and recreational leagues, even though these factors are important guides to female students' interest and potential.

a. Did the Civil Rights Division review this guidance before it was issued, and did you have a role in that review?

Answer: We have no record that the Civil Rights Division reviewed this guidance. However, given the nature of what I understand to be the Department's purposes in issuing this guidance--to clarify how surveys can be used appropriately in assessing student interest in particular sports, and to provide a model survey that schools could choose to employ, and not to set new policy--it is not unusual for such a document to be issued without review by our Division.

b. The guidance gives schools an "easy out" under Title IX since many students do not open or respond to email surveys. How can you reconcile this guidance with the statute's goal of providing equality in educational opportunities?

Answer: The Civil Rights Division does not enforce the guidance.

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3. The Department of Education also recently issued new Title IX regulations on same-sex education, which greatly expand school districts' ability to provide same-sex education for one gender, without also providing same-sex opportunities to the other gender. These regulations undermine Title IX by providing insufficient protections to prevent schools from providing same-sex educational opportunities based on unfounded gender stereotypes.

a. Did the Civil Rights Division review and approve these regulations before they were finalized?

Answer: The Civil Rights Division reviewed the regulations before they were finalized.

b. If so, please explain why you believe they are adequate to protect against gender discrimination and stereotyping.

Answer: The Department of Education issued these regulations to provide educators with more flexibility to offer additional choices to parents for the education of their children in the form of single-sex classes, extracurricular activities, and schools at the elementary and secondary education levels. At the same time, the amended regulations ensure that single-sex classes, extracurricular activities, and schools are provided in a non-discriminatory manner in compliance with Title IX.

The Title IX statute requires equal educational opportunity regardless of sex. Title IX and its implementing regulations have always permitted single-sex elementary and secondary schools as long as they were operated in a manner that did not discriminate on the basis of sex. Providing added flexibility for the operation of single-sex classes and extracurricular activities is consistent with the intent of Title IX as long as they are offered under conditions that ensure non-discrimination. The amended regulations contain numerous requirements that help to ensure non-discrimination whenever single-sex classes, extracurricular activities, or schools are operated.

For example, under the amended regulations, the Department of Education will consider a wide range of factors in determining whether a particular class, activity, or school is a substantially equal educational opportunity. Such factors include the following: policies and criteria of admission; educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology; the qualifications of faculty and staff; geographic accessibility; the quality, accessibility, and availability of facilities and resources; and intangible features such as reputation of faculty.

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Moreover, the amended regulations allow single-sex classes and extracurricular activities only if they are based on an important objective (either to improve the educational achievement of its students through an established policy of providing diverse educational opportunities or to meet the particular identified needs of its students), the single-sex nature of the class or activity is substantially related to achieving the important objective, the important objective is implemented in an evenhanded manner, student enrollment in the single-sex class or activity is completely voluntary, and a substantially equal coeducational class or activity is offered to all other students. The amended regulations allow the operation of public single-sex schools only if they provide students of the excluded sex a substantially equal single-sex or coeducational school.

Finally, the Supreme Court has held that sex-based classifications are permissible under the Equal Protection Clause if they are based on an important governmental objective and the sex-based action is substantially related to achievement of that objective. The Supreme Court also has stated that the justification must be genuine, not hypothesized or invented post hoc in response to litigation, and that it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. Public schools remain subject to these constitutional requirements prohibiting unlawful gender stereotyping.

Appellate Section

1. I'm concerned about the direction of the Division's Appellate Section, which handles appeals of cases filed by the other sections, and files amicus briefs at the appellate level in civil rights cases in which the United States has an interest. In the Bush Administration, the Division has filed only 49 amicus briefs in the courts of appeals, an average of just 8 cases a year, and the number is decreasing. Only six amicus briefs were filed in each of the past three years – far less than the 22 filed by the Section in 1999 during the Clinton years. The appellate amicus filings are a good indicator of the Division's priorities. According to the Division's website, since the political leadership took over the Division, the Appellate Section has filed only one amicus brief in a civil rights case in a court of appeals involving African Americans, and that case was not filed until this year.

a. How do you explain the sharp drop in the Division's amicus filings in civil rights cases?

Answer: During this Administration, the Appellate Section of the Civil Rights Division has an 87% success rate in filing amicus briefs in civil rights cases – as compared to just 61% during the previous Administration. Overall during FY 2006, the Appellate Section filed more briefs than in any year in the Division's recorded history. During FY 2006, the Division's Appellate Section filed 145 briefs and substantive papers in the United States Supreme Court, the courts of appeals, and the district courts. (The total number that I provided previously inadvertently failed to include an amicus brief the Division had filed jointly with the United States Attorney's Office for the Southern District of New York.) Eighty-seven of these

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filings were appellate briefs for the Office of Immigration Litigation (OIL). Excluding OIL decisions, the Appellate Section had an overall success rate of 90% during this period, which is the highest success rate the Section has had for any fiscal year since FY 1992. In FY 2006, the Appellate Section filed 17 amicus briefs, an increase over the previous two fiscal years. As of January 5, 2007, the Appellate Section has filed a total of 94 amicus briefs under this Administration.

b. How do you explain the fact that the Division filed just one amicus brief in the courts of appeals in nearly six years in a civil rights case involving African Americans?

Answer: The Civil Rights Division has been active in enforcing the federal civil rights laws on behalf of all Americans, including African Americans. Indeed, during this Administration, the Appellate Section of the Division has been involved in numerous cases upholding the civil rights of African-Americans both on direct appeal and as amicus curiae. Some of these cases include:

- ***United States v. Hobbs and Kratzer*: On July 19, 2006, the United States Court of Appeals for the Fourth Circuit affirmed convictions the Division obtained for violations of 18 U.S.C. 241. Defendants were convicted for agreeing to hang a noose, burn a cross, and throw a dead raccoon on the property of an African-American family that had recently moved into a previously all-white town in North Carolina.**

- ***George v. Colony Lakes Property Owners Ass'n*: On June 16, 2006, the United States District Court for the Northern District of Illinois issued a decision in a Fair Housing Act case. The plaintiffs alleged that the defendant homeowners association amended its bylaws to terminate existing leases and disallow future leases in order to remove all of the African Americans from townhouses in the neighborhood and that the president and various homeowners in the association made statements indicating a racially discriminatory motive for passing the amendment. The district court agreed with the position advocated in an amicus brief filed by the Appellate Section that Section 3617 of the Fair Housing Act prohibits post-acquisition discrimination and denied defendant's motion to dismiss plaintiffs' claims under Section 3617.**

- ***Johnson v. California*: On February 23, 2005, the Supreme Court issued a decision in a case involving a challenge by an African-American prisoner to the policy of the California Department of Corrections of segregating inmates by race in two-person cells for at least the first 60 days of their incarceration. The Court agreed with the position of the United States as amicus curiae that strict scrutiny applies to all government-imposed racial classifications, even in the prison context.**

- ***United States v. Nichols*: On September 14, 2004, the United States Court of Appeals for the Fourth Circuit affirmed a defendant's conviction and sentence for assaulting and terrorizing African-American and Hispanic residents along a**

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street in Bessemer City, North Carolina. The defendant was convicted of one count of conspiring to violate constitutional rights under 18 U.S.C. 241 and two counts of interfering with housing rights through the use of force and threat of force, in violation of 42 U.S.C. 3631, for two separate attacks.

- ***Jones v. Donnelly & Sons Co.*: On May 3, 2004, the Supreme Court issued a decision in an employment discrimination suit under 42 U.S.C. 1981 involving claims of racial harassment and discriminatory terminations and transfers. Agreeing with the United States' position as amicus curiae, the Court held that the employees' claims were governed by the four-year federal statute of limitations established by 28 U.S.C. 1658(a), rather than by the two-year state statute of limitations.**

- ***United States v. Charleston County*: On April 29, 2004, the United States Court of Appeals for the Fourth Circuit affirmed the district court's judgment in favor of the United States and four private plaintiffs, who were African-American voters. The court of appeals held that Charleston County's at-large method of electing County Council members violated Section 2 of the Voting Rights Act because it diluted minority voting strength.**

- ***United States v. Fuselier*: On April 20, 2004, the United States Court of Appeals for the Fifth Circuit affirmed a defendant's sentence of 13 years' imprisonment arising from a cross burning at a home rented by three African-American men in Longville, Louisiana. Agreeing with the Division's contentions, the court of appeals upheld the defendant's four level enhancement for serving as a leader or organizer of the criminal activity.**

- ***United States v. May*: On March 4, 2004, in a case personally argued by the Assistant Attorney General for the Civil Rights Division, the United States Court of Appeals for the Fourth Circuit agreed with the Division that the district court should have imposed a stiffer sentence on the perpetrator of a cross burning in Gastonia, North Carolina. On March 28, 2005, the defendant was re-sentenced by another district court judge to one year and one day in prison.**

- ***United States v. Allen*: On August 26, 2003, the United States Court of Appeals for the Ninth Circuit affirmed the convictions of the founders and leaders of a white supremacist organization. The defendants were convicted of violating 18 U.S.C. 245 for chasing a group of African-American and Hispanic individuals out of a public park while wielding weapons and shouting threats and racial slurs.**

- ***Peters v. School Board of the City of Virginia Beach*: On April 22, 2003, the United States Court of Appeals for the Fourth Circuit held that Title VI of the Civil Rights Act of 1964 encompasses claims of retaliation, and thus individuals may bring suit in federal court under Title VI seeking damages against recipients of federal financial assistance that intentionally retaliate against them**

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for opposing racial discrimination. Agreeing with the position set forth in the Division's brief as amicus curiae, the court of appeals vacated the district court's dismissal of a claim by a former employee of a school district who alleged that she was terminated because she had opposed discrimination against African-American students.

- ***Commonwealth of Virginia v. Black*: On April 7, 2003, the Supreme Court issued a decision upholding a Virginia statute that makes it a criminal offense to burn a cross with the intent to intimidate any person or group of persons. Agreeing with the position of the United States as amicus curiae, the Court held that the First Amendment does not prohibit a state from banning cross burning with the intent to intimidate.**

- ***United States v. Lee*: On May 5, 2002, the United States Court of Appeals for the Eleventh Circuit affirmed a defendant's sentence of 48 months' imprisonment. The defendant pled guilty to violating 18 U.S.C. 241 in connection with the involuntary servitude of an African-American farm worker.**

- ***Fair Housing of Marin v. Combs*: On April 9, 2002, the United States Court of Appeals for the Ninth Circuit issued an opinion affirming the district court's award of damages to a private, non-profit fair housing organization. Agreeing with the position the Division advocated in its amicus brief, the court held that the organization had standing to bring suit under the Fair Housing Act because the defendant's illegal racial discrimination against African Americans interfered with the organization's efforts to assist individuals in securing non-discriminatory housing.**

Housing Discrimination

1. Hurricane Katrina devastated the historic city of New Orleans and other communities on the Gulf Coast two years ago, and many of its victims have yet to recover. One of the greatest tragedies has been the federal government's failure to do its job to protect the victims of Katrina. When you addressed the United Nations Human Rights Committee in July, you said this:

"The Division is working to ensure that all Americans have an unfettered chance at the American dream by having access to the housing of their choosing. Massive efforts have been made by the Division to protect citizens from discrimination following Hurricane Katrina."

Yet it appears that, for months after Katrina, the Division failed to take action to protect Katrina victims from housing discrimination. That's in stark contrast to the Division's quick response in 1992 after Hurricane Andrew:

-- Immediately after Hurricane Andrew, the Division created a joint task force with HUD and the local U.S. Attorney's office in Miami to operate a housing discrimination hotline.

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-- Within a few days of Hurricane Andrew, lawyers from the Division and the U.S. Attorney's office, working with HUD staff in Miami, were handling telephone calls and receiving reports of housing discrimination.

-- The Justice Department filed a case within weeks of Hurricane Andrew, asking for preliminary relief for a Black family that tried to rent an apartment in suburban Fort Lauderdale after being displaced by the hurricane.

-- Within a few days of Hurricane Andrew, the Division also began fair housing testing in areas of South Florida where hurricane survivors were searching for housing, and filed eight pattern or practice suits based on the results of that testing.

To my knowledge, there wasn't the same broad, immediate response after Hurricane Katrina. The Attorney General didn't announce the fair housing initiative, "Operation Home Sweet Home," until February 2005, five months after the catastrophe. That initiative wasn't focused only on Katrina victims, but at least it included some areas recovering from the effects of Katrina and other areas where Katrina victims had relocated. Senator Specter and I worked together to pass the Fair Housing Act Amendments to give stronger protection to victims of housing discrimination, and the Division should enforce the law vigorously. Why didn't the Division immediately set up a task force to protect Katrina victims from housing discrimination, as was done after Hurricane Andrew?

Answer: Hurricane Katrina was the most catastrophic natural disaster in our nation's history. It devastated a 90,000 square-mile area (roughly the size of Great Britain), and resulted in the largest displacement of Americans in our nation's history, forcing more than 270,000 into shelters after landfall. It is estimated to have caused approximately 1,700 deaths and caused an estimated $125 billion in damages. By contrast, Hurricane Andrew caused twenty-three deaths in the United States and an estimated $26.5 billion in damages.

The time period after Hurricane Katrina was focused on exigencies including rescuing thousands of refugees from their underwater homes and providing food, clothing and medication to devastated areas. In addition, the federal government was quickly trying to evacuate residents to a variety of other states across the country. In the early days and weeks after Hurricane Katrina, it was not clear where refugees would relocate.

Immediately after the hurricane, many victims were not in a financial position to seek or secure housing. Thus, the federal government's primary concern was to find housing for these displaced victims. The Department of Housing and Urban Development (HUD) established links on its website for mayors, communities and individuals to offer housing assistance assets for victims. HUD also established two toll-free hotlines to assist Katrina victims and created the Hurricane Recovery and Response Center.

At that time, the Department of Justice detailed attorneys and other staff to HUD's Office of Fair Housing and Equal Opportunity and FEMA. Division architects and attorneys provided extensive assistance to HUD and FEMA concerning the accessibility of FEMA trailers and other short-term housing.

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During this time period, HUD properly took the lead to address individual complaints of housing discrimination. The Justice Department has jurisdiction to initiate investigations only of a pattern or practice of violations of the Fair Housing Act. HUD's Office of Fair Housing and Equal Opportunity placed staff in all disaster recovery centers and made extensive outreach efforts to inform individuals of their housing rights. HUD also implemented accelerated case processing procedures for all fair housing cases generated as a result of the aftermath of Hurricane Katrina.

In February 2006, the Attorney General announced "Operation Home Sweet Home," a concentrated initiative to expose and eliminate housing discrimination in America. This initiative was inspired in part by the plight of displaced victims of Hurricane Katrina, who were suddenly forced to find new places to live all across America. For this reason, Operation Home Sweet Home targets housing discrimination throughout the United States. A key component of this initiative is concentrated testing for housing discrimination in areas recovering from the effects of Hurricane Katrina and those areas where Katrina victims have been relocated. The Division will continue to dedicate renewed energy, resources and manpower to the testing program through investigations and visits designed to expose discriminatory practices. In addition, the Division has expanded our outreach significantly by creating a new fair housing website (http://www.usdoj.gov/crt/housing/fairhousing/index.html), establishing a telephone tip line and a new e-mail address specifically to receive fair housing complaints, and sending outreach letters to over 400 public and private fair housing organizations.

2. How many lawsuits has the Division filed in response to complaints from Hurricane Katrina victims?

Answer: HUD is the agency charged with receiving and investigating fair housing complaints directly from the public. The Division can file lawsuits with regard to such complaints only if it receives a referral from HUD based on the fact that at least one of the parties elects to proceed in federal court. However, the Division has not received any election referrals from HUD based upon complaints filed by Hurricane Katrina victims.

3. How many lawsuits has the Division filed as a result of testing it conducted in Gulf Coast states after Hurricane Katrina?

Answer: The Division has not filed any lawsuits as a result of testing it conducted in Gulf Coast states after Hurricane Katrina. In 2004 and 2005, the Department filed two race discrimination lawsuits based on testing it conducted in states bordering the Gulf of Mexico. Those cases are *United States v. B & S Properties of St. Bernard, LLC* (E.D. La.) and *United States v. Dawson Development Co.* (N.D. Ala.), both of which resulted in favorable settlements or judgments. Notably, the housing that was at issue in the *B & S Properties* case, located in Chalmette, Louisiana, was destroyed by Katrina and has not been rebuilt.

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Under the Operation Home Sweet Home initiative, we are conducting fair housing tests in areas recovering from the effects of Hurricane Katrina and in areas where Katrina victims have relocated. We cannot predict what our testing efforts will uncover. But I can assure you that we will prosecute vigorously those who deny housing to others because of race or other prohibited reasons.

As a historical note, the Division's testing in south Florida following Hurricane Andrew did not produce any lawsuits for almost three years after the hurricane. In this regard, it is worth noting the standard for Fair Housing Act litigation by the Department. Absent a referral from HUD, the Department cannot file suit unless it alleges a pattern or practice of discrimination or a denial of rights to a group of persons. This requires more than simply alleging that an isolated act of unlawful discrimination occurred. Proving such a pattern can be difficult and takes time even in a normal housing market. The devastation caused by Hurricane Katrina makes detecting discrimination even more difficult, however, because in many places housing is not available for people of any race.

4. Civil rights organizations have sued on behalf of Katrina victims who suffered racial discrimination in housing. Just last month, an organization filed suit against St. Bernard Parish, Louisiana, which is predominately white, to stop it from enforcing ordinances that allowed housing to be sold only to blood relatives of current residents.
Has the Department intervened in any of these lawsuits in Gulf States on race discrimination in housing? If so, how many, and in which cases?

Answer: It would be inappropriate for me to comment on any matter that may be under investigation or otherwise being considered within the Department. I can assure you that we will continue to monitor developments in the areas affected by Hurricane Katrina and that, when appropriate, we will open investigations and initiate enforcement actions.

With respect to the St. Bernard Parish matter, our understanding is that the Parish suspended the rule after the lawsuit was filed.

Hate Crimes

1. After the September 11th attacks, a shameful increase took place in hate crimes against Muslims, Sikhs, and Americans of Middle Eastern descent. Justice Department officials expressed their commitment to investigating and prosecuting these "backlash" hate crimes. But the Department's ability to respond is severely limited by the outdated and unnecessary requirements in existing law. The Department has consistently declined to take a position on legislation to strengthen its ability to prosecute hate crimes. Please provide the Department's current position on the need for federal legislation to strengthen hate crime enforcement.

Answer: Violent crime motivated by prejudice or animus against a particular class or group of citizens should never be tolerated. Not only are they prosecutable as violent crimes under existing laws in every State, but bias-motivated crimes are specifically

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prohibited by many states. This Administration is committed to investigating and prosecuting bias-motivated crimes at the federal level to the fullest extent of the law.

In FY 2006, the Division both charged and convicted more defendants in bias-motivated cases than the previous year. In addition, from FY 2001 through FY 2006, the Division brought 39 cross-burning prosecutions, charging a total of 60 defendants. Prosecuting hate crimes remains a priority of the Department. The Civil Rights Division is committed to the vigorous enforcement of our nation's civil rights laws and, in recent years, has brought a number of high profile hate crime cases. Examples of recent prosecutions include:

- ***United States v. Coombs* (M.D. Fla.): In August 2006, a defendant in Florida pleaded guilty to burning a cross in his yard to intimidate an African-American family that was considering buying a house located next door to the defendant's residence.**

- ***United States v. Saldana, et al.* (C.D. Cal.): In August 2006, four Latino gang members were convicted of threatening and assaulting African Americans in a neighborhood that the defendants and their gang members sought to control. All four defendants, members of the notorious Avenues street gang, were convicted of a conspiracy charge that alleged numerous violent assaults against African Americans, including murders that took place in 1999 and 2000. Specifically, the jury found that the defendants caused the death of Christopher Bowser, an African-American man who was shot while waiting at a bus stop in Highland Park on December 11, 2000. The jury also found that the defendants caused the death of Kenneth Kurry Wilson, an African-American man who was gunned down while looking for a parking place in Highland Park on April 18, 1999. Three of the defendants were also convicted of murdering Wilson because he was African American and because he was using a public street, and using a firearm during the commission of a conspiracy and hate crime. All four defendants received life sentences.**

- ***United States v. Oakley* (D.D.C.): In April 2006, the defendant entered a guilty plea to emailing a bomb threat to the Council on American Islamic Relations.**

- ***United States v. Baird* (W.D. Ark.): In April 2006, the defendant entered a guilty plea to burning a cross near the home of a woman whose white daughter's African-American boyfriend was living with her and her daughter. Three additional defendants were charged in May 2006 with participating in the cross burning. The defendant was sentenced in November 2006. Three additional defendants were tried in September 2006, two of whom were convicted on charges of conspiracy and are awaiting sentencing.**

- ***United States v. Nix* (N.D. Ill.): In March 2006, the defendant entered a guilty plea to interference with an Arab-American family's housing rights by igniting an explosive device inside the family's van that was parked near their home.**

- ***United States v. Baalman, et al.* (D. Utah): From December 2005 through January 2006, in Salt Lake City, three white supremacists pled guilty to assaulting an African-**

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American man riding his bicycle to work because of his race and because they wanted to control the public streets for the exclusive use of white persons.

- *United States v. Fredericy and Kuzlik* (N.D. Ohio): In October and November 2006, defendants Joseph Kuzlik and David Fredericy pled guilty to conspiracy, interference with housing rights, and making false statements to federal investigators. In February 2005, these defendants poured mercury on the front porch and driveway of a bi-racial family in an attempt to force them out of their Ohio home.

- *United States v. Hobbs, et al.* (E.D.N.C.): In a case stemming from a series of racially-motivated threats aimed at an African-American family in North Carolina, four adults were convicted and one juvenile was adjudicated delinquent. Two of the adults were convicted at trial for conspiring to interfere with the family's housing rights and, on July 5, 2005, were sentenced to 21 months in prison. A third defendant pleaded guilty to a civil rights conspiracy charge, and the fourth defendant pleaded guilty to obstruction of justice for his role in the offense.

- *United States v. Hildenbrand, et al.* (W.D. Mo.): In April 2004, five white supremacists pleaded guilty to assaulting two African-American men who were dining with two white women in a Denny's restaurant in Springfield, Missouri. One of the victims was stabbed and suffered serious injuries. The defendants were sentenced to terms of incarceration ranging from 24 to 51 months.

- *United States v. May* (W.D.N.C.): On March 4, 2004, in a case personally argued by the then-Assistant Attorney General for the Civil Rights Division, the United States Court of Appeals for the Fourth Circuit agreed with the Division that the district court should have imposed a stiffer sentence on the perpetrator of a cross burning in Gastonia, North Carolina. On March 28, 2005, the defendant was re-sentenced by another district court judge to one year and one day in prison.

An additional bias-motivated murder case is set for trial later this year. In *United States v. Eye and Sandstrom*, attorneys from the Civil Rights Division and the United States Attorney's Office for the Western District of Missouri are prosecuting two men who, according to the indictment, fatally shot an African-American man as he was walking to work in downtown Kansas City.

The Division also has worked in recent years with local prosecutors in an effort to investigate Civil Rights era murders. James Ford Seale was indicted on January 25, 2007, by a federal grand jury for two counts of kidnapping resulting in death, and one count of conspiracy, for his participation in the abductions and murder of two nineteen-year-old African-American men, Henry Dee and Charles Moore, in 1964. According to the allegations in the indictment, the victims in this case were kidnapped by a group of White Knights of the Ku Klux Klan that included James Seale. Dee and Moore were beaten by their captors, then transported and finally forcibly drowned by being thrown into the Old Mississippi River, tied to heavy objects alleged to have included an engine block, iron weights, and railroad ties.

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In 2004, the Division announced that federal assistance would be provided to local officials conducting a renewed investigation into the 1955 murder of Emmett Till, a 14-year old African-American boy from Chicago. Till was brutally murdered while visiting relatives in Mississippi after he purportedly whistled at a white woman. Two defendants were acquitted in state court four weeks after the murder. Subsequent to the trial, the defendants admitted their guilt. Both men are now deceased. The investigation showed that there was no federal jurisdiction. Thus, on March 16, 2006, the Justice Department reported the results of its investigation to the district attorney for Greenville, Mississippi, for her consideration. A state grand jury in Mississippi declined to indict the case.

In February 2003, the Division successfully prosecuted Ernest Henry Avants for the 1966 murder of Ben Chester White, an elderly African-American sharecropper in Mississippi who, because of his race and efforts to bring the Reverend Martin Luther King, Jr., to the area, was lured into a national forest and shot multiple times. That conviction was affirmed in April 2004.

Moreover, after September 11, 2001, the Civil Rights Division implemented an initiative to combat "backlash" crimes involving violence and threats aimed at individuals perceived to be Arab, Muslim, Sikh, or South Asian. This initiative has led to numerous prosecutions involving physical assaults, some minor and some involving dangerous weapons and resulting in serious injuries, as well as threats made over the telephone, on the internet, through the mail, and in face-to-face interactions. We have also prosecuted cases involving shootings, bombings, and vandalism directed at homes, businesses, and places of worship. The Department has investigated more than 750 bias-motivated incidents since September 11, 2001. Our efforts have resulted in 32 federal convictions in "backlash" cases. The Department also assisted local law enforcement in bringing more than 160 such criminal prosecutions.

Additionally, the Community Relations Service (CRS) of the U.S. Department of Justice launched proactive information and conflict resolution efforts with Arab American, Muslim, and Sikh communities. CRS created a series of educational law enforcement protocols for federal, state, and local officials addressing racial and cultural conflict issues between law enforcement and Arab American, Muslim American, and Sikh American communities. CRS also created a law enforcement roll-call video titled, "The First Three to Five Seconds," that addresses cultural behaviors and sensitivities, stereotypes, and expectations encountered in interactions and communications with Arab and Muslim communities and recently released a video called "On Common Ground: Understanding Sikh Americans."

CRS established the Arab, Muslim, Sikh Cultural Awareness Train the Trainer Program, which has created a group of community-based Arab, Muslim, and Sikh trainers capable of delivering law enforcement training across the country. This program has been implemented in numerous cities across the nation. As a result of this training effort, as well as direct training of law enforcement by CRS, federal, state, and local law enforcement and

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local communities have reported increased cultural knowledge and awareness, a newly developed cooperative spirit within the community, and decreased community anxieties.

CRS instituted a Rapid Response Team, which aims to defuse rumors and prevent escalation of violence when there are allegations of racial profiling or discrimination, or when a hate incident has taken place, by facilitating dialogue between law enforcement and the community and facilitating rapid and accurate dissemination of information.

2. Forty-five states and the District of Columbia have enhanced penalties for hate crimes. The federal criminal code has enhanced penalties for crimes based on race, religion, national origin, gender, disability, or sexual orientation.

a. Please report to this Committee on the number of federal prosecutions that have gone forward under this provision over the past five years - with the number under each category for crimes based on race, religion, national origin, gender, disability, and sexual orientation.

b. Please also provide information on the overall number of civil rights prosecutions in 2005 and 2006 that involved racial, religious or national origin bias – as well as information on any training in your division on the prosecution of hate crimes.

Answer: Hate crimes are some of most deplorable and offensive acts that the Civil Rights Division encounters in its prosecutions. The Criminal Section, along with its partners in the United States Attorneys' Offices around the country, enforce prohibitions against bias crimes under a variety of civil rights statutes and other Title 18 offenses, depending on the conduct involved. The statistics include charges of conspiracy, murder, and post-September 11, 2001 "backlash" crimes. The Division maintains statistics of prosecutions under these statutes.

Examples of the crimes prosecuted by the Department include:

- ***United States v. Eye and Sandstrom* (W.D. Mo.), where the Department is seeking the death penalty against defendants who allegedly shot and killed an African-American man because of his race and because he was using the street. The government alleges that as the victim walked down the street, the defendants, whom he did not know, drove by and shot at him. Their shots missed the victim, so the defendants allegedly circled the neighborhood until they found him again. One of the defendants got out of the car, rushed up to the victim, and shot him in the chest, killing him. Trial is currently set for August 2007.**

- **In *United States v. Saldana* (C.D. Cal.), four members of a violent Latino street gang were convicted of participating in a conspiracy aimed at threatening, assaulting, and even murdering African-Americans in a neighborhood claimed by the defendants' gang.**

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- **In *United States v. Coombs* (M.D. Fla.), a man in Florida pleaded guilty to burning a cross in his yard to intimidate an African-American family who was considering buying the house next door to his residence and two others were convicted after trial of conspiring to do so.**

- **In *United States v. Fredericy and Kuzlik* (N.D. Ohio), two men pleaded guilty for pouring mercury, a highly toxic substance, on the front porch and driveway of a bi-racial couple in an attempt to force them out of their home.**

- **In another case, *U.S. v. Walker, et al.* (D. Utah), three members of a white supremacist organization are charged with assaulting a Mexican American bartender in Salt Lake City at his place of employment. These same defendants allegedly assaulted an individual of Native-American heritage outside another bar in Salt Lake City.**

In the past five years, the Department has filed 97 cases alleging bias crimes and crimes against houses of worship. The Department does not maintain statistics that characterize the type of discrimination (e.g., race, religion, or national origin). In Fiscal Year 2005, the Department charged sixteen defendants with bias motivated crimes and ten defendants with crimes related to houses of worship. In Fiscal Year 2006, the Department charged twenty defendants with bias motivated crimes and two defendants with crimes related to houses of worship.

In response to your request for information regarding training, Section attorneys regularly participate in training and outreach initiatives. For example, several times every year, Section attorneys have provided lectures at the FBI National Academy training for local law enforcement on a variety of topics that have included hate crimes investigation and enforcement; Section attorneys provided hate crime instruction at FBI in-service training directly to FBI agents; Section attorneys provided training to federal prosecutors across the country at the Justice Department National Advocacy Center; and the Section participated in community education programs such as the Annual Hate Crimes and Violence Summit held at the University of Maryland Baltimore County campus and the Oregon Hate Crimes Conference in Portland, Oregon, sponsored by a coalition of groups and entities including the City of Portland, the Portland United States Attorney's Office, and the FBI. Importantly, the Section regularly provides in-house training on prosecuting bias crimes to facilitate attorney development.

In addition, the Criminal Section participates in a regular meeting with officials from the Anti-Defamation League and other members of the Hate Crimes Coalition to discuss the Division's on-going efforts to investigate and prosecute bias motivated crimes.

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Written Questions for Wan Kim
Submitted by Senator Russell D. Feingold

1. The Civil Rights Division's Criminal Section has significantly more prosecutors on staff than it did at the close of the last administration. It seems that this increase in staff has been used almost exclusively to prosecute trafficking cases. The prosecution of sex trafficking is a new addition to the Criminal Section's responsibilities, and is clearly a worthy one. What is the Section doing as it moves forward to ensure that prosecution of trafficking does not grow to consume an ever larger portion of the Criminal Section's resources, thus jeopardizing its core responsibilities? Specifically, how will the Division allocate staff and resources within the Criminal Section in order to maintain an appropriate balance of cases in the future?

Answer: The Criminal Section aggressively investigates and prosecutes all civil rights criminal violations. Since 2001, the Criminal Section has increased the staffing of prosecutors by approximately 12 percent. During this time, we have compiled a significant record on criminal civil rights prosecutions. This record includes the ninety-six criminal civil rights prosecutions brought in FY 2004, a record for cases filed in a single year. In the past six fiscal years (FY 2001 - 2006), as compared to the previous six years (FY 1995 - FY 2000), the Criminal Section not only brought more color of law cases, but also has obtained convictions of 50% more color of law defendants.

We also have filed more than six times as many cases of human trafficking, a modern day form of slavery. Our criminal prosecutions span the full breadth of the Division's jurisdiction, and our prosecutors handle all types of cases within our jurisdiction. As we have increased our staff, so have we increased our investigation and prosecution efforts as demonstrated by the increased activity in our overall enforcement program.

2. How is the Civil Rights Division as a whole handling the allocation of staff and resources for areas such as the 9/11 Backlash Initiative that may warrant an increase in resources because they are time-sensitive? What has the Division done specifically with regard to staffing and resources for this Initiative? Did the Division bring on new attorneys to work on this matter or were staffing needs handled solely through distribution of work to existing staff?

Answer: The Division has for the most part used current staff to address challenges such as post-9/11 backlash. While we have brought on certain staff to assist the Assistant Attorney General on coordination and outreach on issues such as 9/11 backlash, at the operational level our current staff and existing structures are well-suited to respond to evolving challenges.

I personally chair a meeting every two months that brings together representatives from various federal agencies with leaders from the Muslim, Arab, Sikh and South Asian communities to address civil rights and civil liberties concerns. These meetings have been highly successful in matching problems with the key government representatives necessary to address them. Additionally, I have spoken at a variety of fora on backlash issues,

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including delivering the keynote address at the American Arab Anti-Discrimination Committee annual convention and addressing the Detroit Bridges meeting – a regionally-based interagency meeting co-hosted by DHS, the U.S. Attorney's Office, and the FBI that is similar to the one I hold here in Washington.

Senior Division personnel have also actively reached out to these communities. For example, in 2006, the chief of our Voting Section met with Arab and Muslim leaders in Michigan to learn about their concerns. In addition, an attorney on my staff who is involved with the backlash initiative staffed a booth at the Islamic Society of North America annual convention to listen to community concerns. Also, our Special Counsel for Religious Discrimination spoke at the law student convention of the National Muslim American Lawyer's Association. Attorneys on my staff are in regular contact with Muslim, Arab, Sikh, and South Asian groups to address civil rights issues as they arise.

3. I welcomed the President's pledge to end racial profiling in his first address to a joint Congress back in February 2001, as well as his accompanying charge to Attorney General Ashcroft to actively work with Congress and State and local law enforcement towards this end. And while I applauded the Justice Department's issuance of policy guidance to federal law enforcement agencies banning racial profiling in 2003, this was only a first step as it does not carry the force of law. What has the Division done since 2003 on this matter, which both the President and the former Attorney General declared was a priority? How has DOJ ensured that this priority—ending racial profiling—has not been overlooked or neglected for other matters?

Answer: In June 2003, the Civil Rights Division issued "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies." The Guidance was adopted by the President as executive policy immediately governing all federal law enforcement activities. The Guidance was developed for Federal officials to eliminate racial profiling in law enforcement and emphasizes that "[r]acial profiling in law enforcement is not merely wrong, but also ineffective. Race-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society." The Guidance "in many cases imposes more restrictions on the consideration of race and ethnicity in Federal law enforcement than the Constitution requires."

Upon issuance of the Guidance, then-Assistant Attorney General for the Civil Rights Division Ralph Boyd sent a copy of the Guidance along with a letter to the heads of all Executive Branch agencies and the heads of all federal law enforcement agencies. The letter advises each federal law enforcement agency to review all of its policies and procedures to ensure conformity with the Guidance and to review and, if necessary, revise its training programs. The Assistant Attorney General further offered the assistance of the Civil Rights Division in reviewing any revisions or changes to agency policies, procedures, or training programs.

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In April 2004, then-Assistant Attorney General for the Civil Rights Division Alex Acosta sent a follow-up memorandum to federal law enforcement agencies reminding them that the Guidance had been adopted by the President as executive policy and governs all federal law enforcement activities. The memorandum also announced that the Civil Rights Division would be hosting a conference in June 2004 to learn how the Guidance was being implemented. The following month, the Civil Rights Division met with representatives of major law enforcement agencies within the Department of Justice and Department of Homeland Security (DHS) to discuss the specific steps that the agencies had taken to implement the Guidance.

In June 2004, Assistant Attorney General Acosta convened a conference with the general counsels (or their representatives) of federal executive branch law enforcement agencies to review their implementation of the Guidance. In addition to hearing reports from each agency about their implementation of the Guidance, the conference also provided a forum in which agencies were able to discuss promising policies and practices with each other. Several agencies also shared the specific steps they took to revise their training programs and materials to ensure conformity with the Guidance.

The Civil Rights Division also has provided technical assistance to various federal law enforcement agencies. For example, the Division worked with the Drug Enforcement Administration (DEA) to develop a training video to educate DEA personnel on the requirements of the Guidance. This training video is presented to all entry-level Special Agents, Intelligence Analysts, Diversion Investigators, and Chemists. Additionally, this video is mandatory training for DEA field and Headquarters employees. DEA also has issued internal policies prohibiting racial profiling and other forms of discrimination. In 2000, then Acting Administrator Donnie Marshal issued a memorandum to all DEA employees stating that "DEA has not and will not investigate or collect intelligence against any one or any group based on their racial or ethnic makeup" and that race and ethnicity "are never a basis for law enforcement to suspect an individual of wrongdoing." To further emphasize DEA's commitment to fairness in its investigative and enforcement activities, § 6641.11(F) of the DEA Agents Manual states: "Agents, TFOs (Task Force Officers), or any state/local officer participating in a DEA sponsored Task Force will not detain any person based solely on the sex, race, color, or national origin of that person. An individual's sex, race, color, or national origin shall not, by itself, be considered to be indicative of criminal activity."

The Division also has coordinated with the Federal Bureau of Investigation (FBI) about its training of FBI agents on racial profiling issues. For example, from January through April, 2006, the FBI conducted cultural diversity training for executive managers and supervisors. That training included a video vignette on racial profiling and discussion of its prohibited use in traditional law enforcement activities. In addition, the Division reviewed a training tutorial entitled "Guidance Regarding the Use of Race for Law Enforcement Officers" developed by DHS to help explain the DOJ Guidance and DHS policy to its law enforcement officers.

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In addition to these activities, the Civil Rights Division has incorporated the Guidance into its regular training courses at the National Advocacy Center (NAC) at the National Advocacy Center in Columbia, South Carolina. Most recently, for example, the Division provided specific training on the racial profiling Guidance at its criminal and civil training sessions held at the NAC in 2006 and already in 2007. The Division over the years also has engaged in outreach efforts with groups such as the International Association of Chiefs of Police to discuss the federal racial profiling Guidance. In 2007, the Division plans to train the legal advisors of federal law enforcement agencies and senior police officers.

4. Please explain how the Division calculates and reports statistics regarding new prosecutions of civil rights cases.

Answer: The Division keeps tracks of statistics in a computer database system. Cases filed are calculated based on the date an indictment is returned by a federal grand jury or a criminal information is filed in federal district court. The database also includes information on the results of each case, the number of cases filed, and the number of defendants charged in the following categories: Color of Law (law enforcement misconduct), Bias Crimes, House of Worship, FACE, Sex Trafficking, and Labor Trafficking.

5. It seems that there are some discrepancies between the statistics on new prosecutions released by the Division and those reported by the Executive Office of U.S. Attorneys. What is your explanation for the differences between these two sets of statistics?

Answer: There may be several reasons for the differences. First, the United States Attorneys' Offices (USAOs) use a different automated data system from the system used by the Division. According to the United States Attorneys' Annual Statistical Report for 2002, USAOs characterize their cases by the most significant or most serious offense, which may or may not be a civil rights offense, even though the Division would characterize the offense as a civil rights prosecution. For example, a case that the Division may report as a trafficking offense may be reported by the USAO as an organized crime offense or a smuggling offense.

Another reason may be the difference between the USAO reporting date and the Division reporting date for events. The Division keeps statistics based on the date an event actually occurs (such as the date an indictment is returned, which would be counted by the Division as the date a case was filed). According to the United States Attorneys' Annual Statistical Report for 2002, USAOs report statistics according to the date an event was recorded or posted in their data base even if the event occurred prior to the start of the reporting period.

A third reason for the discrepancies may be that USAOs are responsible for some civil rights cases over which the Division does not have jurisdiction. Such cases include sex trafficking cases under 18 U.S.C. § 1591 that have only juvenile victims; the Child Exploitation and Obscenity Section of the Criminal Division is the branch within Justice

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with responsibility for those cases. Similarly, the Public Integrity Section of the Criminal Division has responsibility for most criminal voting cases.

6. Why is it that some information on the Civil Rights Division's webpage—such as information on the educational opportunities section or the special litigation section—has not been updated for years? Will you commit the resources necessary to ensure that the webpage is an up-to-date, coherent, and accessible source of information on all of the Division's activities?

Answer: The Division's website is a valuable resource as it informs the public, in general, and the civil rights community, in particular, of our priorities and accomplishments. Information provided on the website, including descriptions of recent prosecutions, summaries of federal statutes, copies of settlement agreements, and technical assistance pamphlets, encourages responsible and lawful behavior by both detailing "best practices" for compliance with federal civil rights laws and explaining "what not to do." In working towards that end, in FY 2006, the Division developed new pages on our website describing our enforcement efforts associated with safeguarding the rights of members and veterans of our armed forces, as well as the Attorney General's fair housing initiative, Operation Home Sweet Home.

The public visits the Division's website quite frequently. For example, since its introduction in 2002, the www.ada.gov website has had a 260% increase in visitors, making it one of the top five most visited websites in the Department. In FY 2006, the website served 3.1 million visitors, who generated more than 49 million hits.

Each section within the Civil Rights Division has designated a web content manager who is responsible for ensuring that his or her respective section's site is kept current and provides accurate information. The Division is committed to providing the most current information about the law enforcement efforts of each of our sections. We will work to ensure that our website is a source of up-to-date, coherent, and accessible information regarding our activities.

7. At the hearing and in response to criticisms regarding the drop-off in prosecution of racial discrimination cases and, in particular, cases on behalf of African-Americans, you stated that the priorities of Division have to do with bringing cases "responsibly." You further noted that the Division would bring cases only where you found facts that met "high legal standards." While I agree that the Division should not be capricious with its resources and should not advance unmerited legal arguments, I am concerned that the Division may be backing away from its historic role as the leader in civil rights enforcement. Because of the historic and persistent vulnerability of the minority populations that our civil rights laws are designed to protect, the Division has been called upon at times to advance untested legal theories based on difficult or complicated fact patterns. How do you reconcile your commitment to bringing cases "responsibly" with your responsibility to keep the Division on the cutting edge of civil rights enforcement and your duty to protect the most vulnerable segments of society?

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Answer: Having served for more than a decade at the Department of Justice, I very much appreciate my duty to fairly enforce federal laws. Every case brought by the United States must be pursued carefully and responsibly, in full accord with the appropriate legal standards. Both my personal experiences and the experiences of the Division help to reinforce the special responsibilities of a government attorney, as set forth in more detail in the attached letter. *See* Letter from Hon. William E. Moschella to Hon. F. James Sensenbrenner (Apr. 12, 2006).

The duty to bring cases responsibly, however, does not preclude vigorous law enforcement. The Division's record of accomplishments during 2006 demonstrates our strong commitment to civil rights enforcement. For example, the Voting Section filed 18 new lawsuits in CY 2006, more than doubling the average number of lawsuits filed annually during the preceding 30 years. In FY 2006, we obtained a record number of convictions in the prosecution of human trafficking crimes. Human trafficking is a modern day form of slavery, and human trafficking crimes are deplorable offenses of fear, force, and violence that disproportionately affect women and minority immigrants. In FY 2006, the Employment Litigation Section filed as many lawsuits challenging a pattern or practice of discrimination as during the last three years of the previous Administration combined. In FY 2006, the Housing and Civil Enforcement Section filed more cases alleging sexual harassment than in any year in its history. And, in FY 2006, the Disability Rights Section obtained the highest success rate to date in mediating complaints brought under the Americans with Disabilities Act. We will continue to aggressively and responsibly enforce the nation's civil rights laws on behalf of all Americans.

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Written Questions for Wan Kim
Submitted by Senator Charles Schumer

1. Protecting the Right to Vote

The right to vote is perhaps our most fundamental civil right, the wellspring of our democracy. Unfortunately, the mid-term election held on November 7, 2006 was marred by many instances of misleading, threatening, and downright criminal behavior that should have no place in our democracy.

a. **Please provide a list of the matters related to the November 7, 2006 election that are or were under investigation by the Civil Rights Division, the Criminal Division, or any other unit of the Department of Justice. For each matter on the list, please include the location of the activity, the nature of the matter, the legal basis for the investigation, and the conclusion reached by the Division.**

Answer:

A. Civil Rights Division - Voting Section

In November 2006, the Department opened multiple phone lines in order to handle calls from citizens with election complaints, as well as an internet-based system for reporting problems. On or about November 7, 2006, the Voting Section received approximately 147 calls and 94 e-mail contacts through its website. These 241 election day contacts raised approximately 351 issues, as some contacts raised multiple issues.

On election day we were able to resolve all issues raised by approximately 36 of the 241 contacts we received. Of the additional contacts, 6 simply provided comments, and 7 persons contacting us sought only election-related information, such as where they should go to vote.

The information provided to us by approximately 150 of these election day contacts did not indicate a possible violation of any of the federal laws the Department enforces. For example, a number of voters called complaining about an isolated mechanical failure of an individual piece of voting equipment.

As a result of pre-election investigation and outreach, the Department assigned more than 800 federal observers and Department monitors to selected polling places across the country. Approximately 470 federal observers from the Office of Personnel Management and 358 Department of Justice staff monitored the general election in 69 jurisdictions in 22 states in areas that we determined warranted scrutiny in order to prevent and document possible violations of voting rights. Election monitoring, among other things, involved receiving

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numerous calls and contacts within the course of the site monitoring. Consistent with past practice, Department personnel addressed and documented potentially discriminatory practices regardless of whether they were the subject of a formal complaint.

After Election Day, we reviewed all complaints and determined which matters warranted additional action. We have since initiated new investigations of these matters or incorporated them into ongoing investigations in the relevant jurisdiction. Any comment on these current investigations would be inappropriate at this time.

The Criminal Section of the Civil Rights Division has three matters related to the November 7, 2006, election under investigation. The first is the cross burning in Grand Coteau, Louisiana. The second is the mailing of misleading letters in Orange County, California. The third is the presence of armed men at the polls in Pima County, Arizona. The basis for each investigation is the allegation that persons attempted to intimidate voters because they were exercising their right to vote and because of their race or national origin. The investigations are continuing, and further comment would be inappropriate at this time. We are also monitoring a local investigation into allegations that two residents of Swain County, North Carolina, were forced to apply for absentee ballots and vote a straight Democratic ticket or be evicted from their trailer park.

B. Criminal Division - Public Integrity Section

We are aware of at least 25 criminal matters that are currently under investigation around the country by the Criminal Division and various United States Attorneys' Offices. However, because Department procedures do not require United States Attorneys' Offices to consult with Headquarters before requesting a preliminary investigation of an election fraud allegation, the actual figure may be higher. As these criminal investigations are currently open, it would not be appropriate to comment on them.

Although most election crimes are handled by the Department of Justice's Criminal Division, election crimes motivated by racial animus may be handled by the Criminal Section of the Civil Rights Division.

b. Please provide a list of election crime matters in which racial animus is suspected and that are currently being addressed by your Division's Criminal Section.

Answer: See response to subpart B above.

c. Please specify how many attorneys in your Division's Criminal Section are currently assigned to address election crimes motivated by racial animus.

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Answer: The Criminal Section of the Civil Rights Division does not make specific attorney assignments to address election crimes motivated by racial animus. As with most cases in the Criminal Section, attorney assignments are made based on the need(s) of the investigation or case.

2. Organization of Voting Protection Activities

During your appearance before the Senate Committee on the Judiciary on November 16, 2006, you indicated that voting-related enforcement is divided between the Civil Rights and Criminal Divisions due to historic "concerns that Federal prosecutors being involved in voter access issues would lead to intimidation of voters at the polls."

a. Federal criminal prosecutors, including Assistant United States Attorneys, reportedly have served as election monitors under the auspices of the Department of Justice. **Please explain how you reconcile deploying prosecutors as election monitors with the historic division between the Civil Rights and Criminal Divisions.**

Answer: A person's status as an Office of Personnel Management employee, an attorney, or a prosecutor does not conflict at all with his or her sole function on election day as an observer or monitor. When Assistant United States Attorneys, prosecutors in the Criminal Section of the Civil Rights Division, or other Department attorneys and staff monitor elections, they are under the supervision and control of the Voting Section of the Civil Rights Division. Such monitoring is focused solely on the enforcement of the federal civil voting rights statutes for which the Voting Section is responsible. Any investigation of federal criminal statutes is kept separate from the enforcement of federal civil voting rights laws and is conducted under the supervision of the appropriate prosecuting office. Non-Voting Section personnel provide necessary resources that allow the Section to investigate and deter discrimination in far more places than would be possible otherwise. These personnel also add to the language skills available to the Section and enhance our ability to obtain evidence of mistreatment of language minority voters.

b. **Currently, what Department of Justice Division or official is ultimately responsible for protecting the right to vote in America?**

Answer: The Attorney General of the United States bears the ultimate responsibility to enforce the federal laws that protect the right to vote in the United States.

c. As an organizational alternative to this historic division, the Department could unify its voting rights activities under a single manager to provide accountability and programmatic coherence. **In your view, what would be the costs and benefits of unifying the Department of Justice's voter protection activities under a single manager?**

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Answer: The Department has historically concluded that the responsibility to ensure voter access, on the one hand, should be distinct from the responsibility to police voter fraud, on the other. For example, the Criminal Division has a great deal of institutional expertise in prosecuting all types of fraud, including voter fraud, while the Civil Rights Division is best situated to deal with issues of discrimination at the polls.

d. Currently, under 18 U.S.C. § 594, the maximum sentence of imprisonment for voter intimidation is 1 year imprisonment. **Do you believe that a higher maximum penalty would be appropriate for this crime?**

Answer: The Department has not been presented with a specific legislative proposal in this regard but will enforce, as appropriate, any legislation that is enacted into law.

3. Alabama Voter Database

This summer, Civil Rights Division attorneys successfully argued that control of Alabama's computerized voter database should be shifted from the Democratic secretary of state to the Republican governor. Creation of a computerized database of voters is required under the Help America Vote Act of 2002. Nevertheless, the Division's stance in this instance was viewed by some as unusually aggressive, and the *New York Times* editorial page characterized this as a case in which "party politics seems to have been a driving force."

a. Please identify which states were tardy in creating their computerized voter databases as required by the Help America Vote Act of 2002.

Answer: The 55 states and territories covered by HAVA were required to comply with the statewide voter registration database provisions of Section 303(a) of the Help America Vote Act of 2002 by January 1, 2004 (with the exception of one state that did not have voter registration). 42 U.S.C. §§ 15483(a), (d)(1)(A). The vast majority of states sought and received from the U.S. Election Assistance Commission a waiver of compliance from the statutory deadline until January 1, 2006, pursuant to 42 U.S.C. § 15483(d)(1)(B). By January 1, 2006, virtually all states were moving rapidly toward full compliance. The Department brought formal enforcement actions against several states for violations of Section 303(a), including New York in March 2006, Alabama in May 2006, Maine in July 2006, and New Jersey in October 2006. The Department also reached an out-of-court agreement with California over a year ago regarding compliance with Section 303(a) and has worked informally on compliance issues with a significant number of other states.

b. Please explain your reasons for singling out the Alabama Secretary of State for such aggressive action, given that other states were reportedly also tardy in creating the required voter databases.

Answer: We understood Alabama to rank last among the fifty states in its efforts to comply with HAVA's database requirements. At the time we filed suit, Alabama was

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the only state in the nation that had failed to choose the vendor or software designer who would implement the database. Moreover, Alabama officials testified that they could not guarantee compliance by the time of the 2008 primaries - *six years* after HAVA's enactment and despite having accepted $41 million in federal funds allocated expressly for that purpose. The Court's Memorandum Opinion and Order of August 8, 2006, summarizes this failure to comply with federal law:

> **On June 13, 2003 . . . the HAVA Committee was formed to advise Defendant Worley on the development of the state plan and to make recommendations on all aspects of the plan. . . . Defendant Worley issued a request for proposals ("RFP") for a new voter registration system on August 12, 2003. On September 10, 2004, a full thirteen months later, Defendant Worley and the HAVA Committee heard vendor proposals. Deliberating in an admirably non-partisan fashion, the HAVA Committee unanimously recommended a vendor to Defendant Worley on December 14, 2004. . . . On May 27, 2005, after five and one-half months, Defendant Worley chose another vendor, ignoring the unanimous recommendation of the HAVA Committee . . . . Three months later, in August 2005, Defendant Worley terminated negotiations with her choice of vendor and issued a revised RFP requesting further bids. As of the filing of this action in May 2006, for aught that appears in the record, no HAVA-compliant system was being developed.**

The Department nonethless urged voluntary compliance: "Plaintiff maintains that the best outcome, even now, is for Defendants willingly to submit a realistic plan to comply with HAVA." Plaintiff's Response to Defendants' Submission of HAVA Plan, dated July 13, 2006, at 10, filed in *U.S. v. Alabama*, No. 2:06cv00392 (M.D. Ala. May 1, 2006).

In deciding to appoint a special master, the court carefully reviewed the evidence regarding Alabama's lack of compliance. The court held hearings on May 30, July 20, and August 2, 2006. The written evidence included an uncontested factual declaration from the Department of Justice and hundreds of pages of exhibits and documents submitted by both parties, potential interveners, and amici. The court heard oral testimony from a number of witnesses, including a software vendor, counsel for Secretary Worley, and Secretary Worley herself, on more than one occasion. The court invited statements and testimony even from witnesses who were not parties or were not otherwise permitted to join the case.

In its decision, the court explained that it would appoint a special master only because Secretary Worley refused to commit to comply with HAVA before the 2008 presidential primary. As the court noted in its Order,

> **It was against this factual backdrop that the decision to appoint a Special Master was made. In view of her history, the Court simply lacks confidence that Defendant Worley can or will achieve HAVA compliance before the 2008 federal primary election. The Court has repeatedly expressed reluctance to intervene in the affairs of the Secretary of State. The Court must now acknowledge, reluctantly still, that it**

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has no other viable alternative than the appointment of a special master to achieve full and timely HAVA compliance.

c. **What do you think the Division could have done differently to avoid charges of partisanship?**

Answer: In the wake of the judicial determination to appoint a special master in this case, as set forth above, charges of partisanship are unfounded. We also note that the Alabama Probate Judges Association supported the appointment of the Governor as the special master. The probate judges are Alabama's local chief elections officials, and more than 75% of them are Democrats.

d. It is troubling when a major newspaper perceives the Civil Rights Division as sacrificing substance to politics. **What specific actions are you taking to demonstrate to the public and to Congress that the Civil Rights Division does not play political favorites?**

Answer: **Having served at the Department of Justice for more than a decade, I am always disappointed to hear unfounded charges of partisanship. Our record of even-handedly enforcing federal law best demonstrates that the Division makes litigation decisions that do not turn on partisan considerations.**

4. Voter Identification Rules

In a November 9, 2006 letter to Senator Edward M. Kennedy, the Office of Legislative Affairs (OLA) did not identify any specific steps the Civil Rights Division has taken to keep voters and poll workers accurately informed about voting rules in states where courts have blocked new voter identification laws. OLA's response to Senator Kennedy noted that the status of voter identification rules is "quite mixed." However, the uncertainty in this area of the law should not negate the need for Civil Rights Division involvement; on the contrary, mixed messages heighten the risk that voters will become confused and discouraged. Without Civil Rights Division involvement, it is conceivable that state legislatures could inhibit voting merely by cynically passing laws that are unlikely to survive scrutiny, simply in order to sow confusion and depress voter turnout.

a. **What specific actions, if any, has the Civil Rights Division taken to assist states in ensuring that confusion over contested identification requirements is not discouraging citizens' exercise of their voting rights?**

Answer: The Voting Section of the Civil Rights Division has increased its outreach to state and local election officials to encourage, among other things, clarity as to election requirements consistent with the federal laws. For example, the Voting Section has addressed the specific potential source of confusion in connection with identification requirements in the State of Georgia, which have gone through many stages. The Department contacted the state promptly to obtain information upon learning of a

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mailing that appeared to conflict with a state court order. The state subsequently sent another letter consistent with the state court order to those same voters who had received the initial mailing.

b. What specific actions, if any, does the Civil Rights Division plan to undertake in the future to ensure that citizens are not discouraged from voting in states where identification requirements remain unsettled?

Answer: The Division will respond as appropriate to such circumstances as may arise given its statutory authority.

c. Do you believe that the Civil Rights Division's responsibility extends to ensuring that voters are not discouraged from going to the polls, simply due to confusion over identification requirements?

Answer: The Civil Rights Division is responsible for enforcing the federal laws passed by Congress. Whenever confusion results in a violation of such laws, the Division will vigorously act to enforce the law.

d. In your view, what additional federal legislation or assistance, if any, is needed to ensure that new identification rules, especially if they are contested, do not inhibit voting by qualified citizens?

Answer: The Department will review any proposed legislation and enforce, as appropriate, any statutes within our jurisdiction that are enacted into law.

5. Attrition of Career Attorneys

You stated before the Senate Committee on the Judiciary on November 16, 2006, that "approximately 12 or 13 percent of [Civil Rights Division] attorneys leave each year." However, in previous written responses furnished to members of this Committee, you specified that in FY 2005, the Civil Rights Division lost 63 of its career attorneys. This number represents over 17% of the Division's total attorneys. Many observers attribute this increased attrition rate to low job satisfaction, flagging enforcement of traditional civil rights, and a lack of open dialogue between appointed leaders and career attorneys.

a. What percentage and what number of career attorneys left the Civil Rights Division in FY 2006?

Answer: The average Division attorney attrition rate from FY 2001 through FY 2005 is, as I stated, between 12 and 13 percent. In FY 2005, the attrition rate was approximately 17 percent (16.6 percent for career attorneys), with 63 attorneys, 59 of whom were career attorneys, leaving the Division that year. In FY 2006, the Division's career attorney attrition rate was 14.24 percent, with 47 career attorneys leaving the Division that year.

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b. What do you believe to be the reasons for your Division's high attrition rate?

Answer: The average rate of attorney attrition in the Civil Rights Division during this Administration is almost identical to a comparable period of the prior Administration. As such, the average rate of attorney attrition is in line with historical averages.

c. In written responses submitted after your confirmation hearing, you stated that your goal was "to create an environment of hard work, mutual respect, open dialogue and professionalism" and pledged to "work very hard to constantly improve the morale of all employees at the Civil Rights Division." **Since taking over the leadership of the Civil Rights Division, what specific actions have you taken to keep the attrition rate for career civil rights attorneys as low as possible?**

Answer: We make every effort to retain our talented and experienced attorneys. During my tenure as Assistant Attorney General, the Division has created a new Office of Professional Development that is focused on the needs of individual attorneys for training and career resources. The Division also has created an internal Ombudsman to meet with Division employees on a wide variety of issues and concerns. I am in regular contact with the leadership of each Section and work closely with career staff to address any problems that arise. I very much value the expertise and efforts of the Division's dedicated employees.

d. What percentage of the career attorneys now working in the Civil Rights Division were also working for the Division in January of 2001? In other words, what percentage of attorneys now working in the Division have 5 or more years of experience in civil rights enforcement?

Answer: Approximately 50 percent of the attorneys now working in the Civil Rights Division were also working for the Division in January 2001. A greater percentage has "5 or more years of experience in civil rights enforcement," as we also have hired attorneys with a wide variety of backgrounds and experience, including attorneys with civil rights enforcement experience gained through employment in the private sector or in other government agencies.

6. Civil Rights Attorneys Handling Deportation Appeals

On November 4, 2004, Deputy Attorney General James Comey issued a memo asking all of DOJ's litigating components to assist the Office of Immigration Litigation in handling a temporary backlog of deportation cases. The memo stated that help would be needed for only four months. This supposedly temporary arrangement has now been in place for over two years, and yet Civil Rights Division attorneys continue to work on these cases. Critics charge that this diversion of attorney resources is weakening the enforcement of civil rights laws nationally and is contributing to a high attrition rate for experienced civil rights lawyers. Based on information you have provided to this Committee, in both FY 2005 and FY 2006, approximately 60% of

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appellate briefs filed by Division attorneys were in Office of Immigration Litigation cases. Limiting the Division's civil rights work to a mere 40% of cases appears to be, by definition, a less vigorous enforcement of civil rights at the appellate level.

a. Please explain whether you believe the deportation backlog has hindered civil rights enforcement, and the background and reasons for your conclusion.

Answer: The Division's assistance in handling the extraordinary caseload of immigration briefs has not impacted the Division's civil rights enforcement efforts. Attorneys in all of the Department's litigating Divisions and every United States Attorney's Office are assisting in handling the extraordinary caseload of immigration briefs, and that practice extends to the Civil Rights Division as well. Despite this extra work, Civil Rights Division attorneys have set a number of records in terms of the initiation of cases. Please consider the following records set during 2006:

- **During CY 2006, the Voting Section filed 18 new lawsuits, more than doubling the average number of lawsuits filed annually during the preceding 30 years;**
- **During FY 2006, the Criminal Section obtained a record number of convictions in the prosecution of crimes of human trafficking, a modern day form of slavery involving deplorable offenses of fear, force, and violence that disproportionately affect women and minority immigrants;**
- **During FY 2006, the Employment Litigation Section filed as many lawsuits challenging a pattern or practice of discrimination as during the last three years of the previous Administration combined;**
- **During FY 2006, the Housing and Civil Enforcement Section filed more cases alleging sexual harassment than in any year in its history; and**
- **During FY 2006, the Disability Rights Section obtained the highest success rate to date in mediating complaints brought under the Americans with Disabilities Act (82%).**

The attorneys and staff of the Civil Rights Division - career professionals and political appointees alike – have helped achieve major advancements for all Americans through the fair, faithful, and vigorous enforcement of our federal civil rights laws. We take great pride in these accomplishments.

b. Please explain which area(s) of civil rights enforcement the Appellate Section has deemphasized due to the immigration case backlog that your Division continues to handle.

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Answer: As stated above, the Division's assistance in handling the extraordinary caseload of immigration briefs has not impacted the Division's civil rights enforcement efforts, including those of the Appellate Section. Indeed, despite this extra work, the Division's Appellate Section is still doing tremendous work. Overall during FY 2006, the Appellate Section filed more briefs than in any year in the Division's recorded history. During FY 2006, the Division's Appellate Section filed 145 briefs and substantive papers in the United States Supreme Court, the courts of appeals, and the district courts. (The total number that I provided previously inadvertently failed to include an amicus brief the Division had filed jointly with the United States Attorney's Office for the Southern District of New York.) Eighty-seven of these filings were appellate briefs for the Office of Immigration Litigation (OIL). Excluding OIL decisions, the Appellate Section had an overall success rate of 90% during this period, which is the highest success rate the Section has had for any fiscal year since FY 1992. In FY 2006, the Appellate Section filed 17 amicus briefs, an increase over the previous two fiscal years. As of January 5, 2007, the Appellate Section has filed a total of 94 amicus briefs under this Administration.

c. Can you provide a specific deadline for when civil rights attorneys will be able to stop handling deportation appeals and return to full-time civil rights enforcement?

Answer: The Department will not shirk from its responsibility to enforce the immigration laws passed by Congress. Until OIL has sufficient staff to manage the overwhelming workload, the Department must continue to share this responsibility. The Department is seeking to augment staffing and resource levels such that OIL ultimately will have sufficient staff to assume responsibility for all cases, including the Second Circuit cases formerly handled by SDNY. In this regard, OIL received a significant budget increase for the fiscal year that ended September 30, 2006. In addition, the President has sought another substantial budget increase for OIL in FY 2007 and FY 2008. Finally, the Administration has proposed several much-needed legislative reforms that would help reduce the volume of immigration cases in the federal courts. Because OIL has not received the necessary budget increases and because the legislative reforms have not yet been enacted, OIL is unable to shoulder the entire immigration workload on its own.

7. Attorney General Honors Program

An experienced civil service is the backbone of all our agencies, and the Civil Rights Division can boast of a long tradition of excellence and commitment. Unfortunately, this tradition has been shaken in recent years by evidence that conservative ideology now outweighs traditional civil rights experience. As has been documented in various press reports, the profile and experience of incoming attorneys has changed markedly during the past few years. At this time of year, the Civil Rights Division is usually engaged in hiring promising advocates through the Attorney General's Honors Program. The Civil Rights Division has advertised that it plans to fill 10 positions through the Honors program this year.

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a. Please explain whether you have made any changes to the Honors program hiring process this year in response to concerns about politicization in Civil Rights Division hiring. If so, what were the changes?

Answer: No changes have been made to the Honors Program this year in response to concerns about politicization. Consistent with my management style and my historical practices, however, I have included a large number of career employees in the Honors Program hiring process.

b. What future changes, if any, do you intend to make to respond to concerns about politicization of the hiring process?

Answer: I do not intend to make any future changes in response to concerns about politicization. Consistent with my management style and my historical practices, however, I have included a large number of career employees to participate in the Honors Program hiring process.

8. Enforcing the Freedom of Access to Clinic Entrances Act

The Special Litigation Section of the Civil Rights Division is charged with enforcing the Freedom of Access to Clinic Entrances Act (FACE Act). The FACE Act protects patients and health care providers against threats and obstruction at reproductive health facilities. However, the Internet webpage of the Special Litigation Section does not list a single investigation, complaint filed, or case concluded since 1999 for an enforcement action brought under the Access Act (see http://www.usdoj.gov/crt/split/findsettle.htm, last visited November 21, 2006). Nor does this appear to be simply an issue of untimely website maintenance, since the same webpage highlights recent actions in every other area of Special Litigation responsibility. Your prepared testimony for the oversight hearing of November 16, 2006, also did not mention any steps to enforce the FACE Act among the Division's accomplishments and activities during the past year.

a. How many complaints under the FACE Act, if any, did the Civil Rights Division receive in each fiscal year from 1999 through 2006, and how were these complaints resolved?

Answer: The Special Litigation Section of the Civil Rights Division investigates alleged FACE violations under 18 U.S.C. Section 248(c). The Section reviews the factual allegations of each complaint and determines whether further factual inquiry is warranted and if the statutory requirements of the FACE Act may be met. If warranted, the Special Litigation Section also reviews each complaint to determine whether to refer the matter to the Division's Criminal Section, the local United States Attorney's Office, or the FBI. If appropriate, the Section conducts further investigatory action to determine whether a FACE investigation may be warranted.

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The Criminal Section of the Civil Rights Division investigates and prosecutes violations of 18 U.S.C Section 248(a), which prohibits the use of force, threats of force, or physical obstruction to interfere with the operation of people and facilities that provide or receive reproductive health services. The Criminal Section opens investigations based on credible information from a variety of sources including victims and the Federal Bureau of Investigation. The Criminal Section does not keep track of the number of FACE complaints it receives.

The Special Litigation Section received nineteen complaints in FY 1999. The Section received sixteen complaints in FY 2000. The Section received twenty-seven complaints in FY 2001. The Section received seventeen complaints in FY 2002. The Section received no complaints in FY 2003. The Section received three complaints in FY 2004. The Section received no complaints in FY 2005. The Section received two complaints in FY 2006. Please see the responses to questions 8(b) and (c) regarding further action taken as a result of FACE complaints.

b. How many investigations under the FACE Act, if any, did the Civil Rights Division undertake in each fiscal year from 1999 through 2006, and what were the results of these investigations?

Answer: Both the Criminal Section and the Special Litigation Section of the Civil Rights Division can initiate investigations under the FACE Act. The Division undertook fifty-seven FACE investigations in FY 1999. The Division undertook thirty-four FACE investigations in FY 2000. The Division undertook twenty-six FACE investigations in FY 2001. The Division undertook sixteen FACE investigations in FY 2002. The Division undertook fifteen FACE investigations in FY 2003. The Division undertook twelve FACE investigations in FY 2004. The Division undertook sixteen FACE investigations in FY 2005. The Division undertook thirteen FACE investigations in FY 2006.

As a result of these investigations, the Criminal Section obtained convictions for twenty-two defendants, and the Special Litigation Section monitored the alleged violations.

c. How many cases under the FACE Act, if any, did the Civil Rights Division file in each fiscal year from 1999 through 2006?

Answer: In FY 1999, the Division filed seven cases. In FY 2000, the Division filed four cases. In FY 2001, the Division filed three cases. In FY 2002, the Division filed two cases. In FY 2003, the Division filed four cases. In FY 2004, the Division filed two cases. In FY 2005 and FY 2006, the Division filed one case per year. So far in FY 2007, the Division has filed three cases.

d. How many attorneys in the Special Litigation Section, or any other unit of the Civil Rights Division, are currently assigned to work on matters related to the FACE Act?

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Answer: Attorneys are not generally assigned to enforce any one particular statute. Rather, attorney assignments are made based on the needs of the investigation or case. In addition to any attorneys assigned to a particular investigation or case, the Special Litigation and Criminal Sections each assign a Deputy Chief to coordinate the Sections' FACE Act enforcement efforts and to serve as a liaison to the provider community.

e. Please explain what specific actions you have taken during your tenure as Assistant Attorney General to ensure that the Civil Rights Division is fulfilling its responsibility for enforcing the FACE Act and protecting the safety of patients and providers at family clinics.

Answer: The Division has played a pivotal role in enforcing FACE to protect patients and health care providers against threats of force and physical obstruction of reproductive health facilities. The Division has obtained temporary restraining orders and preliminary and permanent injunctions under FACE and has won civil and criminal contempt motions. In addition, the Division works closely with the offices of the United States Attorneys and State Attorneys General by providing technical assistance and conducting joint FACE investigations and prosecutions.

Pursuant to 18 U.S.C. § 248(c)(2), the Division's Special Litigation Section seeks relief, including temporary, preliminary or permanent injunctive relief, civil penalties, and compensatory damages, for FACE violations. In addition, the Criminal Section of the Civil Rights Division provides expert assistance in the prosecution of criminal FACE Act violations across the nation, and the Special Litigation Section provides expert assistance when civil remedies are appropriate.

We identify potential FACE Act violations by constantly monitoring news reports, coordinating with federal law enforcement officers in the field, and communicating regularly with provider groups to ensure that we are informed of incidents that may warrant federal involvement. We have continued to lead the Task Force on Violence Against Reproductive Health Care Providers, working closely with the FBI, ATF, USMS, USPIS and attorneys from the Criminal Division to ensure unified, consistent, and responsive federal involvement when FACE Act violations occur. The Task Force also meets regularly with representatives from several provider groups, including Planned Parenthood Federation of America, the National Abortion Federation, and the Feminist Majority Foundation, to address their concerns.

In January 2007, we secured a conviction against Defendant James Charles Kopp for murdering Dr. Barnett Slepian, a provider of reproductive health services, in violation of FACE and 18 U.S.C. § 924(c) (use of a firearm in the commission of a felony). In other recent cases, we have taken action when offenders have made threats against clinics, damaged their property, obstructed access, or attempted to do so. For example, in December 2006, we secured a conviction in Jacksonville, Florida, against a defendant who told his father that he was going to burn a clinic and was subsequently intercepted

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by law enforcement officers when he arrived at the clinic armed with a container of gasoline. In October 2006, a federal indictment was obtained in Des Moines, Iowa, against a defendant who drove his car into a clinic and set it on fire. In September 2006, a federal indictment was obtained against a defendant who made bomb threats to a clinic in Savannah, Georgia. And in May 2006, we secured an indictment against a defendant who obstructed the entry into a clinic in Bellevue, Nebraska, by lying across the doorway while verbally harassing employees and patients seeking entry.

9. Case Tracking

Case tracking is critically important, both for an effective Civil Rights Division and for effective Congressional oversight. Measuring outcomes accurately is a basic tool of management, yet the Division's capacity to do so appears limited. Nelson D. Hermilla, your Division's head of privacy and information operations, stated in an April 8, 2005, letter to the Transactional Records Access Clearinghouse at Syracuse University (TRAC) that the Division's recordkeeping system gives you "no way to obtain either an exact number of complaints that the Criminal Section declined to investigate nor to obtain a complete breakdown by type of complaint[.]"

a. Is the Civil Rights Division now able to track the number and the type of complaints investigated and not investigated?

Answer: The language quoted from Mr. Hermilla's letter refers to TRAC's specific request for a "breakdown of complaints by source" from the Division's Criminal Section. As the letter to TRAC explained, the form in which TRAC requested the data does not reflect the manner in which the Division compiles its information.

The Interactive Case Management (ICM) system is a customized computer database and software system designed to track, count, and measure the work that is performed by each of the Division's ten program-related sections. Due to the unique nature of the work of each section in the Division, ICM procedures vary to some degree among sections, but all sections follow some basic procedures. ICM tracks two types of activity: matters and cases. In general, a "matter" is an issue under investigation, while a "case" is an action in which a complaint has been filed. At the outset of a matter or case, the section's administrative staff enters information about the matter or case into the ICM system. The ICM system notes the attorney(s) assigned to the matter or case; the geographic location, date, and nature of the reported allegation; and any law enforcement or other referring agency. Updates of significant activity are provided throughout the duration of the matter or case. When a matter or case is closed, it is noted as closed in the ICM system.

To the best of our knowledge, the Division has not ever tracked exact numbers of complaints it has declined to investigate.

b. If not, can you commit to a date by which the Division will have this capability?

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Answer: Please see response in (c) below.

c. Please describe what steps you have taken, if any, since your confirmation as Assistant Attorney General to improve the Division's systems for tracking and managing complaints, investigations, and cases.

Answer: The Civil Rights Division is actively participating in a Department-wide working group for Litigation Case Management System (LCMS) that is led by the JMD staff. The LCMS is projected to improve the flow of case information across components in the Department. We anticipate that the Division's current case management system will be replaced by LCMS in the next few years.

The Division's current leadership has reiterated the importance of keeping accurate and timely records in the Division's case management system.

d. Please explain how you use or plan to use case tracking systems to verify that the Division is living up to President George W. Bush's public commitments to vigorously enforce the civil rights laws.

Answer: The Division's current case management system, the Interactive Case Management System (ICM), is a computer database and software system designed to track and measure the work that is performed at section level for the Division. The system allows the Division to produce reliable statistics and monitor performance, thereby enabling the Division to meet the requirements of Government Performance and Review Act (GPRA). These requirements include responding to requests from Congress for information about the nature of the Division's work, and justifying resource needs and expenditures at both the Division and Section levels. The Division's management places emphasis on the timeliness, accuracy and consistency of critical data entered into the ICM system so that accurate reports of the matters before the Division are maintained. This system provides a centralized location from which the status of each case may be accessed, and helps ensure that the Division's cases are properly monitored.

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Written Questions for Wan Kim
Submitted by Senator Richard Durbin

Personnel issues

1. The July 23, 2006 *Boston Globe* article entitled "Civil rights hiring shifted in Bush era" raises troubling questions about the hiring practices of the Bush Administration's Civil Rights Division within the Department of Justice. The article says:

> "For decades, [career attorney hiring] committees had 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 *Boston Globe* article also indicates that efforts are being made to pack the Civil Rights Division with conservative ideologues. It reports that 26% of the lawyers hired into the Civil Rights Division's most controversial sections since 2003 are members of the Federalist Society, and 17% are members of the Republican National Lawyers Association. The article states that several of these new attorneys worked for controversial conservative figures including Kenneth Starr, Ed Meese, and Charles Pickering.

Mr. Kim, many of us are troubled by these developments. What steps have you taken to de-politicize the hiring of career attorneys in the Civil Rights Division?

Answer: We respectfully disagree with many of the assertions made in the *Boston Globe* article. There is no political litmus test used in deciding to hire attorneys in the Civil Rights Division. During the past six years, we have hired people from an extremely wide variety of backgrounds and experiences. We will continue to hire the best attorneys available. It is my goal to ensure that every attorney hired to work in the Civil Rights Division has a demonstrated record of excellence, is a talented attorney consistent with that excellent record, and shares a commitment to the work of the Division.

The *Boston Globe* article ignores salient facts pertaining to the Division's hiring record during this Administration. For example, all five individuals hired as career section chiefs during this Administration had previously served as career attorneys in the Division. These five chiefs have an average of approximately 17 years of experience in the Division, and also had a wide variety of work experiences, including working in the Clinton White House, with the American Civil Liberties Union, and as Special Assistant to Acting Assistant Attorney General Bill Lann Lee. In sum, there is no political litmus test used in deciding to hire attorneys in the Civil Rights Division.

2. Through FOIA requests, the *Boston Globe* obtained information showing that only 42% of lawyers hired into the Civil Rights Division since 2003 had any civil rights experience, while

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77% hired in 2001 and 2002 had such experience. And of the 42%, half of those attorneys gained their civil rights experience by defending allegations of discrimination or fighting affirmative action.

Mr. Kim, how do you explain this troubling trend within the Division? Do you share my concern about this trend?

Answer: We respectfully disagree with many of the assertions made in the *Boston Globe* article, nor is it clear what methodology was employed in reaching its conclusions. The Civil Rights Division, like every other component of the Department of Justice, is charged with enforcing the laws passed by Congress. As such, we seek to hire outstanding attorneys with demonstrated legal skills and abilities. The Department considers attorneys from a wide variety of educational backgrounds, professional experiences, and demonstrated qualities. Attorneys from an extremely wide variety of backgrounds and experiences have been hired to work in the Division under this Administration. For example, the Division has hired not only attorneys with significant prior civil rights experience, but also attorneys with other crucial skills, such as a significant record of actual litigation or management experience.

The *Boston Globe* article ignores salient facts pertaining to the Division's hiring record during this Administration. For example, all five individuals hired as career section chiefs during this Administration had previously served as career attorneys in the Division. These five chiefs have an average of approximately 17 years of experience in the Division, and also had a wide variety of work experiences.

3. Please list the total number of attorneys who have worked in the Civil Rights Division each year for the past 12 years. Please provide additional lists of the number of attorneys who have worked in each section of the Civil Rights Division each year for the past 12 years.

Answer: Please see attached chart.

4. Please identify the number of attorneys who departed from the Civil Rights Division in FY 2006.

Answer: Fifty-two attorneys left the Civil Rights Division in FY 2006. Forty-seven of those attorneys were career attorneys.

General enforcement

5. In several sections within the Civil Rights Division, career attorneys are now reportedly required to receive permission from front office political appointees before being allowed to conduct a preliminary or supplemental investigation of a discrimination complaint. This is a change in policy from the Clinton Administration, when career attorneys were permitted to conduct preliminary and supplemental investigations by their section management. The added

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layer of bureaucracy imposed by the Bush Administration has slowed the pace of investigations and civil rights law enforcement.

A. Is it true that, in this Administration, the Civil Rights Division front office must approve all preliminary and supplemental investigations? If so, please explain the basis for this new policy. Is the policy in effect for some sections but not others? If so, please explain which sections are covered by this policy and why.

Answer: The Division's leadership plays an important role in approving the dedication of Division resources to pursuing meritorious complaints. The Office of the Assistant Attorney General has an obligation not only to be aware of but to approve investigations to ensure that the Division's resources are being allocated appropriately. That said, the determination of which complaints merit investigation and dedication of the Division's resources is initially made by the sections' career attorneys. All sections of the Division conduct outreach and solicit complaints through a variety of measures, including the Web, telephone hotlines, and communication with advocacy organizations, as well as by referral from other governmental agencies. As the law enforcement responsibility of each section varies, so does the process for initiating an investigation. However, regardless of how a case or matter comes to the Division, career attorneys regularly gather information about potential violations of federal law under the guidance of their section chiefs.

B. For all sections that are required to have preliminary and supplemental investigations approved by the Civil Rights Division front office, what is the average length of time between when a request is made to the front office to begin a preliminary or supplemental investigation, and when the request is approved? Please provide data for the past six years.

Answer: The process for Assistant Attorney General approval of a sections chief's recommendation to initiate an investigation exists to ensure that the Division is using its resources effectively and has the opportunity to coordinate its efforts with other Department components, such as the FBI and the United States Attorneys' offices. Every effort is made to review a section chief's recommendation in a timely fashion, but there is no set time period for its review. The time required for a thorough review depends on various factors, including the number and complexity of the issues raised and the amount of other cases or matters also under review. However, if a case or matter is time-sensitive, the Office of the Assistant Attorney General will expedite its review as necessary.

Housing discrimination

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6. Mr. Kim, you testified that in FY 2006 the Civil Rights Division filed two testing cases involving housing discrimination. Did either of these cases included allegations of race discrimination? Please provide a summary description of each case.

Answer: Two cases filed by the Housing and Civil Enforcement Section in the Civil Rights Division in FY 2006, *United States v. Douglass Management, Inc.* (D.D.C.) and *United States v. Fountainbleau Apartments* (E.D. Tenn.), were based on evidence developed through its testing program. In addition, the Housing and Civil Enforcement Section filed nine cases involving race discrimination in FY 2006 and has filed four such cases thus far in FY 2007.

In the *Douglass Management* case, the Division alleged that the owners and managers of a Washington, D.C., apartment complex refused to rent apartments to persons who use guide dogs. This was the first case ever brought based on evidence generated by our testing program alleging discrimination against guide-dog users. The case was resolved by consent decree. The defendants were required to adopt non-discriminatory policies and practices, pay $20,000 in a civil penalty, and pay up to $25,000 in damages to persons harmed by the discrimination.

In the *Fountainbleau* case, the Division alleged that the owners and managers of an apartment complex in East Ridge, Tennessee, refused to rent apartments to families with children. That case is pending.

7. The Civil Rights Division claims to have a significant new initiative ("Operation Home Sweet Home") to use testing practices to root out housing discrimination. However, the Civil Rights Division filed just one testing case involving housing discrimination each year over the past three years. Prior to 2001, the Division was filing between 5-10 testing cases involving housing discrimination each year. Of those cases, 2-5 each year involved claims of race discrimination. How do you explain this decrease in testing cases being filed by the Bush Administration's Civil Rights Division?

Answer: The Division is committed to utilizing its testing program fully and effectively to uncover and prosecute unlawful discrimination. Indeed, we have ramped up our efforts to do so. Since the February 2006 inception of the Attorney General's fair housing initiative, Operation Home Sweet Home, the testing program's resources have been increased and the program, in turn, has been increasing the quantity and improving the quality of its testing. We plan to conduct more tests in this fiscal year than in any past year in the testing program's history.

Since the testing program's inception in 1991, during the first Bush Administration, the Division has filed eighty cases based upon evidence developed by its testing program. Of those eighty cases, fifty-two alleged race discrimination, twenty-seven alleged familial status discrimination, twenty-four alleged disability discrimination and three alleged national origin discrimination. (Please note that some cases alleged discrimination on more than one ground.)

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Over the past three fiscal years, the Division has filed five cases based upon evidence developed by its testing program, including three cases alleging race discrimination (one of which was a public accommodations case), one alleging disability discrimination against guide-dog users and one alleging familial status discrimination. We have resolved successfully through settlement or trial all of those cases, except the pending familial status case.

There are several reasons for the historical pattern of case filings based upon testing program evidence. During the program's early period, the testing focused on potential race discrimination and as a result virtually all of the cases filed through FY 1997 include allegations of racial discrimination. The testing and the resulting litigation had their intended effect. Many apartment management companies and real estate companies across the country implemented fair housing training programs for their employees and monitored their employees' performance. The discrimination in today's housing environment often tends to be more subtle and more difficult to detect through testing.

In addition, in the mid-1990s, the Division expended considerable testing resources to determine whether there was compliance with the Fair Housing Act's accessibility requirements for multi-family housing. That testing resulted in the filing of twenty-one cases alleging violations of those requirements between the start of FY 1998 and January 2001. During this same period, there was also a significant decrease in the number and percentage of testing cases being filed alleging race discrimination.

We have learned that there are better methods of identifying significant violations of the Fair Housing Act's multi-family housing accessibility requirements. Accordingly, the Division has been able to increase the number of accessibility cases filed, from twenty-nine in CY 1995 – CY 2000 to forty-five during CY 2001 – CY 2006, while freeing up testing resources for other uses.

During this Administration, we have used the testing program in new ways. For example, we have tested for the first time to detect discrimination against guide-dog users and wheelchair users. In FY 2003, we filed and settled the first case using evidence developed by the testing program that alleged that a retirement community discriminated against wheelchair users. In FY 2006, we filed and settled the first case using evidence developed by the testing program that alleged rental discrimination against guide-dog users. In addition, testing to detect racial discrimination remains a priority. Indeed, a major focus of the Attorney General's fair housing initiative, Operation Home Sweet Home, is the use of our testing program to detect racial discrimination in housing.

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8. You testified that in FY 2006, the Division filed three cases alleging that multi-family housing was not designed and constructed in compliance with the Fair Housing Act's requirements for accessible housing. In FY 2005 and FY 2004, the Division filed 12 such cases. How do you explain this decrease in disability case filings from 12 per year to only three?

Answer: During this Administration, the Division has filed forty cases alleging that multi-family housing was not designed and constructed in compliance with the Fair Housing Act's requirements for accessible housing, including significant cases covering dozens of housing complexes. Our settlements in FY 2005 alone created more than 12,000 new accessible housing opportunities – a number that is almost three times greater than the entire number of accessible housing opportunities created during the eight years of the previous Administration.

Inevitably, there will be some variation in the number of cases filed in one fiscal year compared to another. One source of variation stems from the number of HUD referrals pursuant to Section 812 of the Fair Housing Act ("election referrals") that involve design and construct violations, a matter over which the Division has no control. The Division received fewer election referrals of design and construct cases in FY 2006 than in FY 2004 and FY 2005. Excluding such cases based upon HUD election referrals, the Division filed between three and five design and construct cases in each fiscal year – four cases in 2004, five cases in 2005 and three cases in 2006.

There has been no letdown in our design and construct work. We continue to investigate allegations of design and construct violations and prepare to file suit when that is warranted. We resolved five cases in FY 2006 through consent decrees, and in a sixth case, the settlement was filed before the end of the fiscal year and entered by the court shortly thereafter. Finally, following the banner year in design and construct settlements in FY 2005, noted above, we needed to commit additional resources in FY 2006 to ensure compliance with those settlements, to make the promise of new, accessible units a reality.

9. In FY 2005 the Civil Rights Division filed two pattern or practice housing race discrimination cases under the Fair Housing Act, in FY 2004 it filed three such cases, and in FY 2003 it filed five.

A. How many pattern or practice housing discrimination cases alleging race discrimination were filed in FY 2006?

Answer: In FY 2006, the Division filed three pattern or practice housing discrimination cases alleging race discrimination. In FY 2005 and FY 2004, it filed three cases per year. In FY 2003, it filed six cases.

B. The trend appears to be a steady decrease each year in filing pattern or practice race discrimination cases under the Fair Housing Act. Prior to

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2001, the Division filed between 5-10 such cases per year. How do you explain this continuing decrease during the Bush Administration?

Answer: We are bringing significant cases alleging patterns or practices of racial discrimination in violation of the Fair Housing Act. For example, in October 2006, we filed and settled a case alleging that one of the largest residential and small business lenders in the Gary, Indiana, metropolitan area discriminated on the basis of race and national origin by refusing to provide its lending services to residents of minority neighborhoods. In addition, a major focus of the Attorney General's fair housing initiative, Operation Home Sweet Home, is the use of our testing program to detect racial discrimination in housing.

During this Administration, thirty-one percent of the Division's Fair Housing Act cases have alleged race discrimination. In addition, the Division has brought many more pattern or practice cases alleging sexual harassment or inaccessible multi-family housing than in the past.

The share of the Division's Fair Housing Act work addressing racial discrimination is consistent with the share of fair housing election referrals we have received from HUD. Since 2001, 26% of HUD's election referrals to the Division have involved race discrimination claims, reflecting an approximately 20% decrease from the election referrals during the 1996 to 2000 period.

Moreover, cases brought by fair housing groups reflect roughly the same proportion of fair housing cases alleging racial discrimination as reflected in the Division's cases. One study reported that between 2000 and 2005, 32.5% of all cases filed had a race discrimination claim as the primary basis for the lawsuit. That same study reported that, of the open cases at the end of 2005, 26% had a race discrimination claim as the primary basis for the lawsuit.

10. Professor Lauren E. Willis, who previously worked as a trial attorney in the Civil Rights Division, wrote an op-ed in the October 8, 2006 *Washington Post* in which she proposed a five-step action plan to decrease racial disparities in the home loan market. Does the Civil Rights Division agree with this action plan? What role, if any, do you believe the Civil Rights Division can play in helping to carry out the five steps in Professor Willis's proposal?

Answer: The Division has vigorously enforced the Fair Housing Act and the Equal Credit Opportunity Act. For example, we have brought and resolved several redlining cases in the past six years, including one a few months ago against Centier Bank in Indiana for refusing to provide its lending services to residents of minority communities. We also have utilized loan-pricing data first made available in 2005 under the new Home Mortgage Disclosure Act reporting requirements to open investigations of loan-pricing discrimination.

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The Division does not have authority to regulate institutions that engage in home lending. Proposals aimed at "making price shopping for home loans easier for all Americans" appear to relate to issues now being considered by the Department of Housing and Urban Development pursuant to its responsibilities concerning the Real Estate Settlement Practices Act (RESPA). Other proposals appear to fall within the ambit of the bank regulatory agencies.

As a general matter, however, the Division does support consumer education, which is a common component of our fair lending settlements. In addition, several years ago, we joined with our partner agencies on the Inter-Agency Fair Lending Task Force to publish a pamphlet designed to help consumers shop wisely for home loans, called "Putting Your Home on the Line is Risky Business." This pamphlet is available at http://www.usdoj.gov/crt/housing/brochure_rb.htm.

Employment discrimination

11. One of the witnesses at the November 16, 2006 hearing, Joe Rich of the Lawyers' Committee for Civil Rights, indicated in his written testimony that, in two major Supreme Court cases, the Bush Administration has sought to have the Court endorse a very restrictive view of Title VII, the nation's primary employment discrimination law. The two cases are *Burlington Northern and Santa Fe Railway Co. v. White* and *Ledbetter v. Goodyear*.

A. Did the Civil Rights Division agree with the position advocated by the Solicitor General's office in the *Burlington Northern* case? If not, please explain the position advocated by the Division.

Answer: The Department has a long-standing policy against the disclosure of internal deliberations. In the amicus brief that it filed with the Supreme Court in this case, the United States argued that the term "discriminate" in Title VII's anti-retaliation provision must be read consistently with the statute's core anti-discrimination provision, which prohibits discrimination on the basis of race, sex, national origin, or religion. As discussed more fully in its amicus brief, the United States determined that this position was the correct interpretation based on the text and structure of Title VII. A majority of the Circuits that had decided the issue – the First, Second, Third, Fourth, Sixth, and Eleventh – had reached the same conclusion. A copy of the United States' amicus brief, which sets forth fully its position in this case, may be found at: http://www.usdoj.gov/osg/briefs/2005/3mer/1ami/2005-0259.mer.ami.html. The Department acknowledges and accepts the Supreme Court's decision in this case, and as with all decisions of the Supreme Court the Department will follow the Court's precedent.

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B. Regarding the second case, Mr. Rich stated that "in *Ledbetter v. Goodyear* the civil rights community was forced to advocate for the EEOC's position regarding the statute of limitations in Title VII disparate pay cases, because of DOJ's failure to support EEOC regulations." Why did the Justice Department refuse to support the EEOC regulations? What was the Civil Rights Division's role in this decision?

Answer: As stated above, the Department has a long-standing policy against the disclosure of internal deliberations. In the amicus brief that it filed with the Supreme Court in this case, the United States argued that Supreme Court precedent forecloses Title VII claims that are based on the theory that paychecks issued in the limitations period perpetuate time-barred acts of discrimination. The brief of the United States explained that the Supreme Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), is not to the contrary, as *Bazemore* simply permits the challenging of paychecks issued pursuant to an ongoing policy of intentional discrimination. A copy of the United States' amicus brief, which sets forth fully its position in this case, may be found at: http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2005-1074.mer.ami.html.

C. David Palmer, the chief of the Employment Litigation Section, has recently been nominated by the President to serve as a commissioner on the EEOC. What positions did Mr. Palmer recommend be taken by the Justice Department in *Burlington Northern and Santa Fe Railway Co. v. White* and *Ledbetter v. Goodyear*?

Answer: Pursuant to the Department's usual practice, the Office of the Solicitor General determined the position of the United States in these cases after consultation with other Department components, including the Civil Rights Division and, in *Ledbetter*, the Civil Division. The Department has substantial confidentiality interests in our deliberative process relating to these matters.

12. The Bush Administration has filed many fewer pattern or practice cases and disparate impact cases on behalf of African Americans than the Clinton Administration. Were there any instances in which the Employment Litigation Section management recommended bringing a pattern or practice or disparate impact case on behalf of African Americans, and the political appointees in the Civil Rights Division front office rejected the recommendation? If so, please explain.

Answer: The Division has been active in enforcing the federal civil rights laws on behalf of all Americans, including African-Americans. Indeed, during this Administration, the Division has filed scores of cases on behalf of African-American victims. Some examples are:

- **In November 2006, the Division filed a complaint against Tallahassee Community College (TCC) alleging that TCC failed to select an African American applicant for the position of HomeSafenet Trainer because of the**

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applicant's race in violation of Title VII. Under a court-approved consent decree entered on November 7, 2006, TCC agreed to offer the applicant $34,363 in back pay and accumulated interest.

- In July 2006, the Division filed suit against the City of Chesapeake, Virginia, alleging that the City had engaged in a pattern or practice of employment discrimination on the basis of race and national origin in violation of Section 707 of Title VII of the Civil Rights Act of 1964 by using a mathematics test to screen applicants for entry-level police officer positions in a manner that had an unlawful disparate impact against African-American and Hispanic applicants.

- In July 2006, the court entered a consent decree resolving our suit against the City of Virginia Beach, Virginia, alleging that the City had engaged in a pattern or practice of employment discrimination in violation of Title VII through its use of a mathematics test that disproportionately excluded African-American and Hispanic applicants for the position of entry-level police officer. The decree alters the City's method for selecting entry-level police officers in a way that will eliminate the disparate impact of the mathematics test. In addition, the decree requires the City to provide remedial relief, including money damages, priority job offers, and retroactive seniority, to identifiable African-American and Hispanic victims of the challenged test.

- In July 2006, the Division filed a complaint against the City of Euclid, Ohio, alleging that the mixed at-large/ward system of electing the city council diluted the voting strength of African-American citizens in violation of Section 2 of the Voting Rights Act. In its investigation, the Division found that while African-Americans composed nearly 30% of Euclid's electorate, and although there had been eight recent African-American candidacies for the city council, not a single African-American candidate had ever been elected to that body. Further, the Division found that in seven recent city council elections, white voters voted sufficiently as a bloc to defeat the African-American voters' candidates of choice.

- In 2003, the Division successfully settled a racial discrimination and retaliation lawsuit against the city of Fort Lauderdale, Florida. The lawsuit alleged that the city of Fort Lauderdale violated Title VII by denying an African-American employee a promotion because of his race. The lawsuit further alleged that the city retaliated against the employee when he complained that he had been denied a promotion for discriminatory reasons.

- In 2002, the Division filed a lawsuit under Section 208 of the Voting Rights Act that was the first ever to protect the voting rights of Haitian Americans.

- In October and November 2006, defendants Joseph Kuzlik and David Fredericy pled guilty to conspiracy, interference with housing rights, and making false statements to federal investigators. In February 2005, these defendants poured mercury on the front porch and driveway of a bi-racial couple in an attempt to

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force them out of their Ohio home. Fredericy was sentenced to 33 months in prison, and Kuzlik was sentenced to 27 months in prison.

- **In August 2006, the Division obtained a verdict against a former apartment manager for discrimination on the basis of race as a result of his refusal to rent to African-Americans in Boaz, Alabama. The Division conducted an investigation of the manager and his employer through the use of fair housing testers. The defendant was ordered to pay a civil penalty of $10,000. Earlier in the year, the defendant's employer agreed to pay a civil penalty of $17,000 and compensatory damages of $32,700 to individuals who were subjected to the alleged discriminatory housing practices.**

- **In December 2005, the Division filed a complaint alleging that a Wisconsin nightclub violated Title II by discriminating against African-Americans. According to our complaint, nightclub employees falsely told African-Americans they could not enter because a private party was underway or the club was full to capacity, while at the same time admitting whites. On December 29, 2006, the court approved a consent decree settling the case and requiring the nightclub to adopt new entry procedures designed to prevent racial discrimination, to pay for periodic testing to assure that discrimination does not continue, to post a prominent sign at the entries advising that the nightclub does not discriminate on the basis of race or color, to train its managers, to send periodic reports to the Department, and to adopt an objective dress code approved by the Department.**

- **In 2004, the Division entered into a consent decree resolving allegations that Cracker Barrel Old Country Store, Inc., a nationwide family restaurant chain, accommodated a severe and pervasive pattern of racial discrimination at its restaurants, including allowing its servers to refuse to serve African-American customers and treating such customers differently in terms of seating, service, and responsiveness to complaints. Cracker Barrel agreed to implement far-reaching policy changes and training programs to remedy these violations.**

- **Since 2001, the Division has obtained four consent decrees involving redlining of predominantly African-American neighborhoods by major banking institutions. The first, filed and resolved in 2002, involved a major bank in Chicago that will invest more than $10 million and open two new branches in minority neighborhoods to settle a lawsuit alleging that it had engaged in mortgage redlining on the basis of race and national origin. In May 2004, the Division obtained a consent decree requiring a bank to invest $3.2 million in small business and residential loan programs and to open three new branches in the City of Detroit. This was the first redlining case the Division has ever brought alleging discrimination in business lending. In July 2004, the Justice Department filed and resolved a lawsuit against another bank in Chicago. The suit alleged that the bank intentionally avoided serving the credit needs of residents and small businesses located in minority neighborhoods. The bank has agreed to invest $5.7 million and open new branches in these neighborhoods. On**

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October 13, 2006, the Justice Department filed a complaint alleging that Centier Bank discriminated on the basis of race and national origin by refusing to provide its lending services to residents of minority neighborhoods in the Gary, Indiana, metropolitan area in violation of the Fair Housing Act and the Equal Credit Opportunity Act. The suit was resolved by a consent decree entered on October 16, 2006, which requires the Bank to: invest a minimum of $3.5 million in a special financing program for residential and CRA small business loans; commit at least $375,000 in targeted advertising; invest $500,000 to provide credit counseling, financial literacy, business planning, and other related educational programs targeted at the residents and small businesses of African-American and Hispanic areas and to sponsor programs offered by community or governmental organizations engaged in fair lending work; open or acquire at least two full service offices within designated African-American neighborhoods; expand an existing supermarket branch in a majority Hispanic neighborhood to provide full lending services; provide the same services offered at its majority white suburban locations to all branches regardless of their location; train employees on the requirements of the Fair Housing Act and Equal Credit Opportunity Act; as well as other remedial relief.

- On January 25, 2007, the federal district court in Jackson, Mississippi, unsealed an indictment charging James Seale, 71, with two counts of kidnapping resulting in death and one count of conspiracy in connection with the 1964 abductions and murders of 19-year-old African-Americans Charles Moore and Henry Dee. Seale, a former member of the White Knights of the Ku Klux Klan, is charged with having acted in concert with fellow Klansmen to kidnap Moore and Dee, beat them, transport them across state lines, and murder them by attaching heavy weights to them and throwing them, still alive, into the Old Mississippi River. If the defendant is convicted, he will face a maximum sentence of life imprisonment on each count.

- In 2004, the Division announced that federal assistance would be provided to local officials conducting a renewed investigation into the 1955 murder of Emmett Till, a 14-year old African-American boy from Chicago. Till was brutally murdered while visiting relatives in Mississippi after he purportedly whistled at a white woman. Two defendants were acquitted in state court four weeks after the murder. Subsequent to the trial, the defendants admitted their guilt. Both men are now deceased. The investigation showed that there was no federal jurisdiction. Thus, on March 16, 2006, the Justice Department reported the results of its investigation to the district attorney for Greenville, Mississippi, for her consideration. A state grand jury in Mississippi declined to indict the case.

- In April 2004, five white supremacists pleaded guilty to assaulting two African-American men who were dining with two white women in a Denny's restaurant in Springfield, Missouri. One of the victims was stabbed and suffered serious

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injuries. The defendants were sentenced to terms of incarceration ranging from 24 to 51 months.

- **In February 2003, the Division successfully prosecuted Ernest Henry Avants for the 1966 murder of Ben Chester White, an elderly African-American farm worker in Mississippi who, because of his race and efforts to bring the Reverend Martin Luther King, Jr., to the area, was lured into a national forest and shot multiple times. That conviction was affirmed in April 2004.**

- **In September 2006, two defendants were convicted of conspiring to interfere with the housing rights of a family that included an African American by burning a cross in front of their house. In April 2006, an additional defendant pleaded guilty to the same offense.**

- **A defendant pleaded guilty on August 16, 2006, to intimidating and interfering with an African-American family that was negotiating for the purchase of a house by burning a cross on the property adjacent to the house.**

- **On April 13, 2004, a defendant pleaded guilty to building and burning a cross in the front yard of an African-American couple's home; that defendant was sentenced to 18 months of incarceration.**

- **In a case stemming from a series of racially-motivated threats aimed at an African-American family in North Carolina, four adults were convicted and one juvenile was adjudicated delinquent. Two of the adults were convicted at trial for conspiring to interfere with the family's housing rights and, on July 5, 2005, were sentenced to 21 months in prison. A third defendant pleaded guilty to a civil rights conspiracy charge, and the fourth defendant pleaded guilty to obstruction of justice for his role in the offense.**

- **On March 4, 2004, in a case personally argued by the then-Assistant Attorney General for the Civil Rights Division, the United States Court of Appeals for the Fourth Circuit agreed with the Division that the district court should have imposed a stiffer sentence on the perpetrator of a cross burning in Gastonia, North Carolina. On March 28, 2005, the defendant was re-sentenced by another district court judge to one year and one day in prison.**

With regard to the request regarding recommendations from the Employment Section, disclosure of the requested information would violate the Department's long standing policy against revealing internal deliberations.

13. Please provide information regarding all lawsuits brought each year by the Civil Rights Division's Employment Litigation Section over the past six years, including a brief description of each suit, the status or resolution of each suit, and the number of victims at issue in each suit.

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Answer: Since January 1, 2001, the Employment Litigation Section has filed the following lawsuits:

United States v. State of Delaware (D. Del.)

On January 10, 2001, we filed a complaint in the United States District Court for the District of Delaware against the State of Delaware, pursuant to Section 707 of Title VII. The complaint alleged that the defendant's use of certain written examinations for the selection of entry-level state troopers had an unlawful disparate impact against blacks and was not job-related and consistent with business necessity, as required by Title VII. This suit was brought to trial and successfully prosecuted by the Division.

United States v. Village of Cuba, New Mexico (D.N.M.)

On January 12, 2001, we filed a complaint in the United States District Court for the District of New Mexico against the Village of Cuba, New Mexico, pursuant to Section 706 of Title VII. The complaint alleged that the defendant discriminated against three female charging parties by failing or refusing to increase their hourly compensation at the same rate as the increase in hourly compensation given to male hourly employees. This suit was resolved through the entry of a consent decree in November 2001.

United States v. Matagorda County, Texas, and Sheriff James D. Mitchell (S.D. Tex.)

On January 12, 2001, we filed a complaint in the United States District Court for the Southern District of Texas against Matagorda County, Texas, and Sheriff James D. Mitchell pursuant to Section 706 of Title VII. The complaint alleged that the Defendants discriminated against a charging party on the basis of his race. This case was resolved through the entry of a consent decree on January 19, 2002.

United States v. City of Sulphur, Oklahoma (E.D. Okla.)

On January 18, 2001, we filed a complaint in the United States District Court for the Eastern District of Oklahoma against the City of Sulphur, Oklahoma, pursuant to Section 706 of Title VII. The complaint alleged that the defendant discriminated against a charging party on the basis of his national origin when it refused to employ him as a supervisor in the city's sanitation department. This case was resolved through the entry of a consent decree on February 23, 2001.

United States v. City of Bastrop, Louisiana (W.D. La.)

On January 19, 2001, we filed a complaint in the United States District Court for the Western District of Louisiana, pursuant to Section 706 of Title VII. The complaint alleged that the defendant subjected the charging party to racial and sexual

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harassment while she was employed by the City. This case was resolved through the entry of a consent decree on October 1, 2001.

United States v. New York City Housing Authority (S.D.N.Y.)

On May 31, 2001, the Assistant Attorney General for the Civil Rights Division authorized the United States Attorney's Office for the Southern District of New York to file a complaint against the New York City Housing Authority, pursuant to Section 706 of Title VII. The complaint alleged that the complainants, female participants in the City's Work Experience Program (WEP), were subjected to a hostile work environment on the basis of race or sex and that one of the complainants was retaliated against because of her complaints of sexual harassment. This case was resolved through the entry of a consent decree on May 12, 2006.

United States v. Northwest New Mexico Regional Solid Waste Authority (D.N.M.)

On March 20, 2002, we filed a complaint in the United States District Court for the District of New Mexico against the Northwest New Mexico Regional Solid Waste Authority (Authority), pursuant to Section 706 of Title VII. The complaint alleged that the Authority racially and sexually harassed a Native-American female and other similarly situated females. The complaint also alleged that the Authority created a work environment that was so racially and/or sexually hostile that female employees were forced to resign from their jobs. This case was resolved through the entry of a consent decree on February 3, 2003.

United States v. New York City Department of Parks and Recreation (S.D.N.Y.)

On June 19, 2002, a complaint, authorized by the Assistant Attorney General of the Civil Rights Division, was filed by the United States Attorney's Office for the Southern District of New York against the City of New York and the New York City Department of Parks and Recreation, pursuant to Section 707 of Title VII. The complaint alleged that the City of New York and its Parks Department engaged in a pattern or practice of discrimination against black and Hispanic employees in the Parks Department on the basis of their race and/or national origin in making promotion decisions. This case was resolved through the entry of a consent decree on June 8, 2005.

United States v. Zuni Public School District (D.N.M.)

On August 23, 2002, we filed a complaint in the United States District Court for the District of New Mexico against the Zuni Public School District, pursuant to Section 706 of Title VII. The complaint alleged that the District subjected a female teacher to sexual harassment that created a hostile work environment and that adversely affected the terms, conditions, and privileges of her employment, and that the District failed to take appropriate action to remedy the effects of the

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discriminatory treatment. This case was resolved through the entry of a consent decree on September 9, 2002.

United States v. Fort Lauderdale (S.D. Fla.)

On September 9, 2002, we filed a complaint in the United States District Court for the Southern District of Florida against the City of Fort Lauderdale, Florida, pursuant to Section 706 of Title VII. The complaint alleged that the City violated Title VII by refusing to promote the charging party to the position of Engineering Inspector I because of his race and by subjecting the charging party to retaliatory harassment. This case was resolved through the entry of a consent decree on January 13, 2003.

United States v. Indiana Department of Transportation (S.D. Ind.)

On September 25, 2002, we filed a complaint in the United States District Court for the Southern District of Indiana against the Indiana Department of Transportation (IDOT), pursuant to Section 706 of Title VII. The complaint alleged that the IDOT failed or refused to promote the charging party because of his national origin. This case was resolved through the entry of a consent decree on September 3, 2003.

United States v. Prince George's County Fire Department (D. Md.)

On October 30, 2002, we filed a complaint in the United States District Court for the District of Maryland against Prince George's County, Maryland, pursuant to Section 706 of Title VII. The complaint alleged that the County discriminated against a female formerly employed as a fire technician in the County's Fire Department by subjecting her to a hostile work environment based on her sex and also by retaliating against her for her complaints of sex discrimination. This case was resolved through the entry of a consent decree on October 23, 2003.

United States v. Regents of the University of California (E.D. Cal.)

On March 4, 2003, we filed a complaint in the United States District Court for the Eastern District of California against the Regents of the University of California, pursuant to Section 706 of Title VII. The complaint alleged that the Regents at the University of California Davis Medical Center engaged in unlawful retaliation against the charging party and a similarly situated individual after these individuals complained of conduct that they reasonably believed to be sexual harassment. This case was resolved through the entry of a consent decree on March 13, 2003.

United States v. University of Guam (D. Guam)

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On June 30, 2003, we filed a complaint in the United States District Court for the District of Guam against the University of Guam, pursuant to Section 706 of Title VII. The complaint alleged that 11 individuals who had filed charges against the University with the EEOC suffered discriminatory terms, conditions, and privileges of employment and discharge, constructive discharge, or refusal to renew their contracts because of their national origin and/or race or in retaliation for complaining about what they reasonably believed to be employment discrimination prohibited by Title VII. This case was resolved through the entry of a consent decree on July 3, 2003.

United States v. Town of West Terre Haute (S.D. Ind.)

On July 11, 2003, we filed a complaint in the United States District Court for the Southern District of Indiana against the Town of West Terre Haute, Indiana, pursuant to Section 706 of Title VII. The complaint alleged that the Town discriminated against a former 911 dispatcher with the Town's Police Department by subjecting her to sexual harassment for a period of approximately two years, which created a hostile work environment and resulted in her constructive discharge. The complaint specifically alleged that the former head of the Police Department repeatedly subjected the charging party to harassing and unwelcome conduct of a sexual nature, including, but not limited to, unwanted touching, obscene gestures, lewd comments about her sexual partners, crude comments about her body, and threatening remarks. The complaint further alleged that the Town failed to investigate or take any action in response to the charging party's complaints about the sexual harassment. This case was resolved through the entry of a consent decree on April 9, 2004.

United States v. Greenwood Community School Corporation (S.D. Ind.)

On July 18, 2003, we filed a complaint in the United States District Court for the Southern District of Indiana against the Greenwood Community School Corporation, pursuant to Section 706 of Title VII. The complaint alleged retaliation against the charging party, a current employee of the school district, because he previously had filed a charge of sex discrimination against Greenwood with the EEOC. This case was resolved through the entry of a consent decree on July 28, 2003.

United States v. City of Erie (W.D. Pa.)

On January 8, 2004, we filed a complaint in the United States District Court for the Western District of Pennsylvania against the City of Erie, Pennsylvania, pursuant to Section 707 of Title VII. The complaint alleged that the City engaged in a pattern or practice of gender-based employment discrimination against women in the hiring of entry-level police officers by using a physical agility test that resulted in

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a disparate impact against women and did not otherwise meet the requirements of Title VII. The Section successfully prosecuted this case.

United States v. University of Medicine and Dentistry of New Jersey (D.N.J.)

On February 13, 2004, we filed a complaint in the United States District Court for the District of New Jersey against the University of Medicine and Dentistry of New Jersey (UMDNJ), pursuant to Section 706 of Title VII. The complaint alleged that the UMDNJ unlawfully failed to promote a senior housekeeper to the position of housekeeping supervisor in retaliation for bringing an earlier Title VII claim against the UMDNJ. This case was resolved through the entry of a consent decree on March 18, 2005.

Bond & United States v. City of Baltimore Department of Public Works (D. Md.)

On March 8, 2004, we filed a complaint in intervention in the United States District Court for the District of Maryland against the City of Baltimore, pursuant to Section 706 of Title VII. The complaint alleged that the charging party was subjected to sexual harassment by her supervisor and coworkers at the City's Department of Public Works (DPW) and that, despite receiving numerous complaints, the DPW failed to take appropriate action to remedy the situation. This case was resolved through the entry of a consent decree on November 29, 2004.

United States v. University of New Mexico (D.N.M.)

On March 16, 2004, we filed a complaint in the United States District Court for the District of New Mexico against the University of New Mexico, pursuant to Section 706 of Title VII. The complaint alleged that the University violated Title VII by refusing to provide modified-duty assignments to three pregnant women, even though it provided modified-duty assignments to employees who were not pregnant. The complaint also alleged that the University terminated one of the three women after she announced that she was pregnant and requested a modified-duty assignment. This case was resolved through the entry of a consent decree on May 3, 2004.

Lemons & United States v. Pattonville FPD (E.D. Mo.)

On July 13, 2004, we filed a complaint in intervention in the United States District Court for the Eastern District of Missouri against the Pattonville-Bridgeton Fire Protection District (Pattonville FPD), pursuant to Section 706 of Title VII. The complaint in intervention alleged that the only black firefighter at the Pattonville FPD between 1989 and 2003 was the victim of racial harassment. The complaint also alleged that the Pattonville FPD constructively discharged the charging party. This case was resolved through the entry of a consent decree on August 16, 2005.

Jane Doe I, II, III & United States v. District of Columbia (D.D.C.)

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On August 5, 2004, we filed complaints in intervention in three cases in the United States District Court for the District of Columbia against the District of Columbia, pursuant to Section 706 of Title VII. The cases involved three female plaintiffs who alleged that they were discriminated against on the basis of their sex, in violation of Title VII. Our complaints in intervention sought: (1) compensatory damages on behalf of the plaintiffs and similarly situated individuals; and (2) to enjoin the District of Columbia from failing to or refusing to provide remedial, make-whole relief to the plaintiffs. This case was resolved through the entry of a consent decree on September 6, 2005.

United States v. Los Angeles Metropolitan Transit Authority (C.D. Cal.)

On September 16, 2004, we filed a complaint in the United States District Court for the Central District of California against the Los Angeles Metropolitan Transportation Authority (MTA), pursuant to Sections 706 and 707 of Title VII. The complaint alleged that the MTA engaged in a pattern or practice of discrimination by failing or refusing to reasonably accommodate employees and applicants for employment who, in accordance with their religious observances, practices, and/or beliefs, need accommodation because they are unable to comply with a requirement applied by MTA management that employees in the MTA's Operations Division be available to work weekends, on any shift, at any location. The complaint further alleged that the MTA discriminated against a member of the Jewish faith and former bus operator trainee for the MTA by failing or refusing reasonably to accommodate his religious observance, practice, and/or belief of observing the Sabbath from sundown on Friday until sundown on Saturday and by subsequently discharging him from employment. This case was resolved through the entry of a consent decree on October 4, 2005.

United States v. City of Gallup (D.N.M.)

On September 29, 2004, we filed a complaint in the United States District Court for the District of New Mexico against the City of Gallup, New Mexico, pursuant to Section 707 of Title VII. The complaint alleged that the City engaged in a pattern or practice of employment discrimination in hiring against American Indians based on race. This case was resolved through the entry of a consent decree on October 27, 2004.

United States v. New York Metropolitan Transportation Authority & New York City Transit Authority (E.D.N.Y.)

On September 30, 2004, we filed a complaint in the United States District Court for the Eastern District of New York against the New York Metropolitan Transportation Authority (MTA) and New York City Transit Authority (NYCTA), pursuant to Section 707 of Title VII. The complaint alleged that the MTA and the NYCTA engaged in a pattern or practice of employment discrimination in violation

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of Section 707 of Title VII against Muslim and Sikh train and bus operators who wear religious head coverings. This case is currently being litigated.

United States v. City of Elsa (S.D. Tex.)

On February 1, 2005, we filed a complaint in the United States District Court for the Southern District of Texas against the City of Elsa, Texas, pursuant to Section 706 of Title VII. The complaint alleged that the City engaged in unlawful employment discrimination by removing the charging party's duties as bailiff and warrant officer because of her sex and by retaliating against three former City employees for filing charges of discrimination as well as for opposing conduct that they reasonably and in good faith believed to be unlawful under Title VII. This case was resolved through the entry of a consent decree on December 15, 2005.

United States v. Escambia County Board of Education (S.D. Ala.)

On March 1, 2005, we filed a complaint in the United States District Court for the Southern District of Alabama against the Escambia County, Alabama, Board of Education, pursuant to Section 706 of Title VII. The complaint alleged that the Board engaged in unlawful employment discrimination by subjecting the charging party, a female formerly employed as a custodian at one of the Board's schools, to a sexually hostile working environment and by terminating her employment in retaliation for her complaining of what she reasonably believed to be sexual harassment against her. This case was resolved through the entry of a consent decree on August 14, 2006.

United States v. City of Cairo (S.D. Ill.)

On March 3, 2005, we filed a complaint in the United States District Court for the Southern District of Illinois against the City of Cairo, Illinois, pursuant to Section 706 of Title VII. The complaint alleged that the City engaged in unlawful employment discrimination by subjecting the charging party, a former communications dispatcher in the City's police department, to sexual harassment by her supervisor, the assistant chief of police. This case was resolved through the entry of a consent decree on August 28, 2006.

Colon Ortiz v. International Ethical Laboratories, Inc. (D.P.R.)

On March 9, 2005, we filed a complaint in the United States District Court for the District of Puerto Rico against International Ethical Laboratories (IEL). The complaint alleged that IEL violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) by denying the plaintiff reemployment rights upon his return from military service and by discharging him. This case was resolved through the entry of a consent decree on July 24, 2006.

Goodreau v. Bridgestone/Firestone North America Tire, LLC (M.D. Tenn.)

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On March 29, 2005, we filed a complaint in the United States District Court for the Middle District of Tennessee against Bridgestone/Firestone North America Tire Co. (Bridgestone). The complaint alleged that Bridgestone violated USERRA by failing to advance the plaintiff on its progressive pay schedule during a period of approximately 15 months during which he was serving on active military duty. This case was resolved through the entry of a consent decree on April 4, 2005.

Villalobos v. Gulfstream Academy of Aeronautics, Inc. (S.D. Fla.)

On April 18, 2005, we filed a complaint in the United States District Court for the Southern District of Florida against Gulfstream Academy of Aeronautics, Inc., Thomas L. Cooper, Thomas P. Cooper, and Mark Ottosen. The complaint alleged that the defendants violated USERRA by denying the plaintiff retention in employment and instead discharging him because of his military service. The plaintiff withdrew his claims and complaint after the lawsuit was filed.

Lincoln v. First Express, Inc. (D.N.J.)

On May 27, 2005, we filed a complaint in the United States District Court for the District of New Jersey against First Express, Inc. The complaint alleged that First Express violated USERRA by denying the plaintiff prompt reemployment and the wages he would have earned from such prompt reemployment after his completion of active military service in the uniformed services. This case was resolved through the entry of a consent decree on July 28, 2005.

United States v. Weimar Independent School District (S.D. Tex.)

On June 23, 2005, we filed a complaint in the United States District Court for the Southern District of Texas against the Weimar Independent School District (Weimar ISD), pursuant to Section 706 of Title VII. The complaint alleged that Weimar ISD failed to hire the charging party for a high school principal position because of her race. This case was resolved through the entry of a consent decree on June 27, 2005.

United States v. Pontiac, Michigan, Fire Department (E.D. Mich.)

On July 26, 2005, we filed a complaint in the United States District Court for the Eastern District of Michigan against the City of Pontiac, Michigan, pursuant to Section 707 of Title VII. The complaint alleged that the City engaged in a pattern or practice of discrimination on the basis of race and sex by creating and maintaining dual hiring and promotional systems in its Fire Department. More specifically, the complaint alleged that, since 1984, the City has maintained collective bargaining agreements with Local 376, Fire Fighters Union, that require the City to use dual hiring and promotional eligibility lists, with one list including all candidates in rank order and a second list of only "minority" candidates, including women, in rank

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order. This case was resolved through the entry of a consent decree on September 28, 2006.

Veryzer v. Mills & Murphy Software Systems, Inc. (M.D. Fla.)

On August 5, 2005, we filed a complaint in the United States District Court for the Middle District of Florida against Mills & Murphy Software System, Inc. (Mills). The complaint alleged that Mills violated USERRA by terminating the plaintiff's employment due to her active military service in the Georgia Air National Guard and by failing to re-employ her after completion of her active military service. This case was resolved through a settlement agreement on October 13, 2006.

United States v. Indiana Department of Correction (S.D. Ind.)

On August 10, 2005, we filed a complaint in the United States District Court for the Southern District of Indiana against the Indiana Department of Correction (IDOC). The complaint alleged that IDOC violated USERRA when, upon the charging party's return from active military duty, IDOC suspended him from employment, terminated him with loss of pay, seniority, and related benefits, and refused to pay him for the period he was not allowed to work due to his termination. This case was resolved through the entry of a consent decree on August 10, 2005.

United States v. State of Ohio Environmental Protection Agency (S.D. Ohio)

On August 26, 2005, we filed a complaint in the United States District Court for the Southern District of Ohio against the State of Ohio, the Ohio Environmental Protection Agency, and the Ohio Department of Administrative Services, pursuant to Sections 706 and 707 of Title VII. The complaint alleged both a pattern or practice of discrimination and discrimination against the charging party on the basis of religion. This case was resolved through the entry of a consent decree on September 5, 2006.

McCullough v. City of Independence, Missouri (W.D. Mo.)

On October 7, 2005, we filed a complaint in the United States District Court for the Western District of Missouri against the City of Independence, Missouri. The complaint alleged that the City violated USERRA by requiring the plaintiff to provide official military orders or an official memorandum or letter to indicate that he was absent for military purposes, suspending him from employment, placing him on a six month probationary period, refusing to pay McCullough for the period he was not allowed to work due to his suspension, and failing and refusing to clear his personnel file of wrongdoing in the matter. This case was resolved through the entry of a consent decree on December 26, 2005.

White v. SOG Specialty Knives (W.D. Mo.)

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On October 27, 2005, we filed a complaint in the United States District Court for the Western District of Missouri alleging that S.O.G. Specialty Knives (SSK) violated USERRA (1) by considering the plaintiff's military service and deployment to Iraq as motivating factors in SSK's decision to immediately discharge him from his position; (2) by reemploying the plaintiff upon his return from active duty in a position that was not of like seniority, status, and pay, the duties of which the plaintiff was qualified to perform; and (3) by discharging the plaintiff, within one year of his reemployment, without cause. This case was resolved through the entry of a consent decree on November 2, 2005.

Woodall, McMahon & Madison v. American Airlines (N.D. Tex.)

On January 12, 2006, we filed a class-action complaint in the United States District Court for the Northern District of Texas against American Airlines, Inc., alleging violations of USERRA. This lawsuit is the first class-action complaint filed by the United States under USERRA. The complaint charges that American Airlines violated USERRA by denying pilots employment benefits during their military service.

The complaint alleged that American Airlines conducted an audit of the leave taken for military service by its pilots in 2001. The complaint further alleged that based on the results of that audit, American Airlines reduced the employment benefits of those of its pilots who had taken military leave, while not reducing the same benefits of those of its pilots who had taken similar types of non-military leave. This case is currently being litigated.

United States v. Southern Illinois University (S.D. Ill.)

On February 8, 2006, we filed a complaint in the United States District Court for the Southern District of Illinois against Southern Illinois University (SIU) pursuant to Section 707 of Title VII. The complaint alleged that SIU violated Title VII by maintaining three paid graduate fellowship programs that were open only to students who either were of a specified race or national origin or were female. Participants in these programs were employed by SIU as part of the fellowship. While denying that it violated Title VII, SIU admitted that it limited eligibility for and participation in the paid fellowship programs on the basis of race and sex. This case was resolved through the entry of a consent decree on February 9, 2006.

U.S. v. Langston University (W.D. Okla.)

On February 24, 2006, we filed a complaint in the United States District Court for the Western District of Oklahoma against Langston University pursuant to Section 706 of Title VII. The complaint alleged that Langston University violated Title VII by paying the plaintiff less than comparably situated faculty members at

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the University due to her race. This case was resolved through the entry of a consent decree on February 27, 2006.

Bower v. Roadway Express (D. Or.)

On March 1, 2006, the Division filed a complaint in the United States District Court for the District of Oregon on behalf of the plaintiff against Roadway Express, Inc. (Roadway), alleging violations of USERRA. The complaint alleged that Roadway willfully violated USERRA when it refused to reinstate and reasonably accommodate the plaintiff upon his return from active military service in the United States Army. The complaint sought declaratory relief, reinstatement, and backpay. This case was resolved through a settlement agreement on November 3, 2006.

United States v. Alcalde De Vega Alta (D.P.R.)

On March 21, 2006, we filed a complaint against the Municipio de Vega Alta, Puerto Rico, in the United States District Court for the District of Puerto Rico, pursuant to Section 706 of Title VII. The complaint alleges that Vega Alta, in its police department, engaged in gender discrimination and retaliation in violation of Title VII of the Civil Rights Act, as amended, by excluding females from regular police officer duties. The duties from which females were excluded include driving patrol cars and other motorized vehicles, conducting investigations commensurate with their previous work experience, and working as shift supervisors. The complaint further alleges that the female officers were assigned instead to clerical, dispatch, and school guard duties because of their sex. The complaint also alleged that Vega Alta retaliated against a male police officer because he participated in the EEOC investigation of a charge or charges filed by one or more of the affected female police officers. This case is being litigated.

United States v. City of Virginia Beach (E.D. Va.)

On April 3, 2006, we filed a complaint in the United States District Court for the Eastern District of Virginia against the City of Virginia Beach, Virginia, pursuant to Section 707 of Title VII. The complaint alleges that the City engaged in a pattern or practice of discrimination on the basis of race and national origin by screening applicants for entry-level police officer positions in a manner that had an unlawful disparate impact on African-American and Hispanic applicants. This case was resolved through the entry of a consent decree on July 24, 2006.

United States v. City of Chesapeake (E.D. Va.)

On July 24, 2006, we filed a complaint in the United States District Court for the Eastern District of Virginia against the City of Chesapeake, Virginia, pursuant to Section 707 of Title VII. The complaint alleges that the City engaged in a pattern or practice of discrimination on the basis of race and national origin by screening applicants for entry-level police officer positions in a manner that has an unlawful

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disparate impact on African-American and Hispanic applicants. This case is currently being litigated.

United States v. San Antonio (W.D. Tex.)

On September 29, 2006, we filed a complaint in the United States District Court for the Western District of Texas against the City of San Antonio, Texas, pursuant to Section 706 of Title VII. The complaint alleges that the city unlawfully discriminated against a detective on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964 when the city's police department forced her to take a light-duty position under the department's mandatory maternity light-duty policy, despite the detective's ability to perform her job in her full-duty capacity. This case is currently being litigated.

United States v. Board of Directors of Tallahassee Community College (N.D. Fla.)

On November 2, 2006, we filed a complaint in the United States District Court for the Northern District of Florida against the Board of Directors of Tallahassee Community College pursuant to Section 706 of Title VII. In our complaint, we alleged that the defendant discriminated against the charging party on the basis of his race when he was not promoted to a particular position. This case was resolved through the entry of a consent decree on November 7, 2006.

Donelan v. City of Highland Heights (E.D. Ky.)

On December 21, 2006, the Division filed a complaint on behalf of the plaintiff in the United States District Court for the Eastern District of Kentucky, alleging that his employment as a patrol officer with the City of Highland Heights was terminated in violation of USERRA. The complaint alleged that, from the time the plaintiff informed the police chief that he was considering joining the U.S. Air Force Reserve through the time his employment was terminated, the chief discriminated against the plaintiff by making hostile remarks about the plaintiff's military service and subjecting him to hostile actions. The complaint also alleged that the chief terminated the plaintiff's employment without just cause shortly after the plaintiff returned from military training. This case is currently being litigated.

A complaint based on an individual charge of discrimination under Section 706 of Title VII usually involves only one victim per charge. In some cases, such as *United States v. University of Guam*, one complaint will be filed that is based on several (in that particular case eleven) different Section 706 charges. In other cases, such as *United States v. Prince Georges County Fire Department*, there is only one charging party but the relief results in widespread changes to the defendant employer's employment practices that benefit many employees. Complaints alleging a pattern or practice of discrimination in violation of Section 707 involve multiple victims. The widespread changes in the defendants' employment practices that result from such cases typically benefit innumerable current and prospective employees. We

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cannot uniformly provide an accurate number of victims, however, because the precise identity of victims and the relief to which they are entitled typically are subject to extensive proceedings and sometimes cannot be determined for years after the conclusion of the primary litigation.

Prison conditions and police misconduct

14. In his testimony before the Senate Judiciary Committee on July 18, 2006, Attorney General Gonzales testified: "The [Civil Rights] Division has also authorized over 30 percent more investigations under the Civil Rights of Institutionalized Persons Act (CRIPA) in the past five and one-half years than in the previous comparable time frame."

D. In February 2005, the Justice Department provided data to the Senate Judiciary Committee indicating the Civil Rights Division's Special Litigation Section – which enforces the CRIPA statute – received a 73% increase in attorneys between 1998 and 2002. In that light, isn't Attorney General Gonzales's testimony misleading? Shouldn't we expect a 73% increase in CRIPA investigations during the Bush Administration rather than just a 30% increase?

Answer: Each investigation rests on its own facts, and the Department of Justice does not set numerical quotas on the number of complaints or prosecutions our attorneys are required to bring. However, as of January 17, 2007, the Special Litigation Section had 46 authorized attorneys in comparison to the 36 authorized at the end of the previous Administration – an increase of 28%. In recent years, the Civil Rights Division has authorized more than 30 percent more investigations under the Civil Rights of Institutionalized Persons Act (CRIPA) than during a comparable period of the previous Administration. In FY 2006 alone, the Division handled CRIPA matters and cases involving over 175 facilities in 34 states, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of Guam and the Virgin Islands. The Division continued its investigations of 77 facilities into 2006 and monitored the implementation of consent decrees, settlement agreements, memoranda of understanding, and court orders involving 99 facilities. We are proud of this record of vigorous enforcement.

E. Please provide the number of CRIPA investigations authorized each year over the past 12 years.

Answer: In FY 2007, as of January 12, 2007, the Division has authorized three investigations. In FY 2006, the Division authorized eight investigations (as of July 18, 2006, the Division had authorized seven investigations). In FY 2005, the Division authorized eleven investigations. In FY 2004, the Division authorized fourteen investigations. In FY 2003, the Division authorized twelve investigations. In FY 2002, the Division authorized sixteen

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investigations. In FY 2001, the Division authorized six investigations (three of which were filed under the current Administration). In FY 2000, the Division authorized four investigations. In FY 1999, the Division authorized five investigations. In FY 1998, the Division authorized ten investigations. In FY 1997, the Division authorized sixteen investigations. In FY 1996, the Division authorized seven investigations. In FY 1995, the Division authorized twenty-five investigations (two of which were filed during or after July 1995).

15. In his testimony before the Senate Judiciary Committee on July 18, 2006, Attorney General Gonzales testified: "And in matters involving children committed to juvenile justice facilities, this Administration has increased the number of settlement agreements by 50 percent and has more than doubled the number of investigations and findings letters issued."

In light of the 73% increase in attorneys within the Civil Rights Division's Special Litigation Section – which monitors juvenile justice facilities – shouldn't we expect a 73% increase in settlement agreements, investigations, and findings letters?

Answer: Each investigation rests on its own facts, and the Department of Justice does not set numerical quotas on the number of complaints or prosecutions our attorneys are required to bring. However, as of January 17, 2007, the Special Litigation Section had 46 authorized attorneys in comparison to the 36 authorized at the end of the previous Administration – an increase of 28%. With regard to juvenile justice facilities, this Administration has increased the number of settlement agreements by more than 60%, has more than doubled the number of investigations, and has more than doubled the number of findings letters issued.

16. In your responses to written questions submitted following your 2005 confirmation hearing, you stated: "The vast majority of the pattern or practice investigations authorized by the Department of Justice have involved allegations of use of excessive force." How many such investigations initiated since January 2001 have involved allegations of discriminatory law enforcement? How many such investigations initiated prior to January 2001 involved such allegations?

Answer: The Special Litigation Section investigates patterns or practices of violations of federally protected rights by law enforcement agencies under Section 14141 of the 1994 Violent Crime Control and Law Enforcement Act and the Omnibus Crime Control and Safe Streets Action of 1968, 42 U.S.C. § 3789d. The anti-discrimination provision of this statute prohibits discrimination on the basis of race, color, sex or national origin by police departments receiving federal funds.

The Civil Rights Division has been active in pattern or practice enforcement across the breadth of the Division through investigations, lawsuits, and settlement agreements. From 2001 to 2006, the Division has ensured the integrity of law enforcement by more than tripling the number of settlements negotiated with police

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departments across the country since 2001. During this Administration, the Civil Rights Division has successfully resolved fourteen pattern or practice police misconduct investigations involving eleven law enforcement agencies, compared to only four investigations resolved by settlement during a comparable time period of the previous administration. The Division also has filed more consent decrees (4 vs. 3) than in the preceding 6 years. We have issued, moreover, more than six times the numbers of technical assistance letters to police departments (19 vs. 3).

We are currently conducting nine Section 14141 pattern or practice investigations of police departments and monitoring eleven agreements between the United States and police departments. In 2005 alone, the Division initiated four pattern or practice investigations against police departments.

Overall, the Division has obtained significant relief under its police misconduct authority to prevent excessive uses of force, unconstitutional uses of canines, biased policing, and unconstitutional searches and seizures. The Division works with police departments to implement widespread reforms, including training, supervising, and disciplining officers and implementing systems to receive, investigate, and respond to civilian complaints of misconduct. The reforms instituted by large and small police departments pursuant to settlements with various departments have had a widespread impact and are being used as models by other police departments. The Division also cooperatively works with departments large and small to provide valuable expert technical assistance and guidance from experts with years of police management experience.

17. In your written testimony from November 16, 2006, you stated: "During this Administration, the Civil Rights Division has successfully resolved fourteen pattern or practice police misconduct investigations involving eleven law enforcement agencies, compared to only four investigations resolved by settlement during a comparable time period of the previous administration. Since 2001, the Division has opened more investigations (16 vs. 15) and filed more consent decrees (4 vs. 3) than in the preceding 6 years."

A. Please provide summaries of each of the 18 pattern or practice police misconduct investigations that have been "successfully resolved," including the date the investigation was opened, the date it was resolved, and the nature of the resolution.

Answer: In December 1994, the Division opened an investigation of the New Jersey State Police Department. The Division successfully resolved this investigation in December 1999 when the United States entered into a Consent Decree with the jurisdiction.

In July 1995, the Division opened an investigation of the Steubenville, Ohio, Police Department. The Division successfully resolved this investigation in October 1997, when the United States entered into a Consent Decree with the jurisdiction. In March 2005, the Consent Decree was terminated.

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In April 1996, the Division opened an investigation of the Pittsburgh, Pennsylvania, Bureau of Police. The Division successfully resolved this investigation in April 1997, when the United States entered into a Consent Decree with the jurisdiction. In April 2005, the Consent Decree was terminated.

In June 1996, the Division opened an investigation of the Montgomery County, Maryland, Police Department. The Division successfully resolved this investigation in January 2000, when the United States entered into a Memorandum of Agreement with the jurisdiction. In February 2005, the Memorandum of Agreement was terminated.

In August 1996, the Division opened an investigation of the Los Angeles, California, Police Department. The Division successfully resolved this investigation in June 2001, when the United States entered into a Consent Decree with the jurisdiction.

In December 1997, the Division opened an investigation of the Buffalo, New York, Police Department. The Division successfully resolved this investigation in September 2002, when the United States entered into a Memorandum of Agreement with the jurisdiction.

In March 1998, the Division opened an investigation of the Columbus, Ohio, Division of Police. The Division successfully resolved this investigation in September 2002, when the United States entered into a settlement with the jurisdiction. In May 2004, the settlement was terminated.

In January 1999, the Division opened an investigation of the District of Columbia Metropolitan Police Department. The Division successfully resolved this investigation in June 2001, when the United States entered into a Memorandum of Agreement with the jurisdiction.

In July 1999, the Division opened an investigation of the Prince George's County, Maryland, Police Department. The Division successfully resolved this investigation in March 2004, when the United States entered into a Consent Decree with the jurisdiction.

In January 2000, the Division opened an investigation of the Mount Prospect, Illinois, Police Department. The Division successfully resolved this investigation in January 2003, when the United States entered into a Memorandum of Agreement with the jurisdiction.

In May 2000, the Division opened an investigation of the Highland Park, Illinois, Police Department. The Division successfully resolved this investigation in July 2001, when the United States entered into a

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Memorandum of Agreement with the jurisdiction. In July 2004, the Memorandum of Agreement was terminated.

In August 2000, the Division opened an investigation of the Cleveland, Ohio, Police Department. The Division successfully resolved this investigation in February 2004, when the United States entered into a settlement with the jurisdiction. In March 2004, the settlement was terminated.

In October 2000, the Division opened a second investigation of the Prince George's County, Maryland, Police Department. The Division successfully resolved this investigation in January 2004, when the United States entered into a Consent Decree with the jurisdiction.

In December 2000, the Division opened an investigation of the Detroit, Michigan, Police Department. The Division successfully resolved this investigation in July 2003, when the United States entered into a Consent Decree with the jurisdiction.

In May 2001, the Division opened an investigation of the Cincinnati, Ohio, Police Department. The Division successfully resolved this investigation in April 2002, when the United States entered into a Memorandum of Agreement with the jurisdiction.

In December 2001, the Division opened a second investigation of the Detroit, Michigan, Police Department. The Division successfully resolved this investigation in July 2003, when the United States entered into a Consent Decree with the jurisdiction.

In July 2002, the Division opened a second investigation of the Cleveland, Ohio, Police Department. The Division successfully resolved this investigation in May 2004, when the United States entered into a Memorandum of Agreement with the jurisdiction.

In January 2003, the Division opened an investigation of the Villa Rica, Georgia, Police Department. The Division successfully resolved this investigation in December 2003, when the United States entered into a Memorandum of Agreement with the jurisdiction. In December 2006, the Memorandum of Agreement was terminated.

B. Please summarize each of the 31 investigations opened, including the agency under investigation, the size of the agency being investigated, the date the investigation was opened, and the allegations under investigation.

Answer: In August 1997, the Division opened an investigation of the New York City Police Department. The size of the agency was 39,099 personnel. The Division investigated allegations of improper use of force.

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In November 1997, the Division opened an investigation of the Orange County, Florida, Police Department. The size of the agency was 1,162 personnel. The Division investigated allegations of improper use of force.

In December 1997, the Division opened an investigation of the Buffalo, New York, Police Department. The size of the agency was 944 personnel. The Division investigated allegations of improper use of force.

In March 1998, the Division opened an investigation of the Columbus, Ohio, Division of Police. The size of the agency was 1,776 personnel. The Division investigated allegations of improper use of force, false arrest, and improper searches and seizures.

In March 1998, the Division opened an investigation of the Eastpointe, Michigan, Police Department. The size of the agency was 53 personnel. The Division investigated allegations of racial profiling.

In January 1999, the Division opened an investigation of the District of Columbia Metropolitan Police Department. The size of the agency was 3,443 personnel. The Division investigated allegations of improper use of force.

In March 1999, the Division opened an investigation of the Charleston, West Virginia, Police Department. The size of the agency was 183 personnel. The Division investigated allegations of improper use of force.

In March 1999, the Division opened a second investigation of the New York City Police Department. The size of the agency was 39,099 personnel. The Division investigated allegations of racial profiling.

In July 1999, the Division opened an investigation of the Prince George's County, Maryland, Police Department. The size of the agency was 1,405 personnel. The Division investigated allegations of improper use of force by canine officers.

In July 1999, the Division opened an investigation of the Riverside, California, Police Department. The size of the agency was 1,234 personnel. The Division investigated allegations of improper use of force and racial profiling.

In January 2000, the Division opened an investigation of the Mount Prospect, Illinois, Police Department. The size of the agency was 82 personnel. The Division investigated allegations of racial profiling.

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In May 2000, the Division opened an investigation of the Highland Park, Illinois, Police Department. The size of the agency was 60 personnel. The Division investigated allegations of racial profiling.

In August 2000, the Division opened an investigation of the Cleveland, Ohio, Police Department. The size of the agency was 1,837 personnel. The Division investigated allegations of improper use of force and racial profiling.

In October 2000, the Division opened a second investigation of the Prince George's County, Maryland, Police Department. The size of the agency was 1,405 personnel. The Division investigated allegations of improper use of force.

In December 2000, the Division opened an investigation of the Detroit, Michigan, Police Department. The size of the agency was 4,016 personnel. The Division investigated allegations of improper use of force.

In February 2001, the Division opened an investigation of the Tulsa, Oklahoma, Police Department. The size of the agency was 796 personnel. The Division investigated allegations of improper use of force and racial profiling.

In May 2001, the Division opened an investigation of the Cincinnati, Ohio, Police Department. The size of the agency was 1,004 personnel. The Division investigated allegations of improper use of force.

In May 2001, the Division opened a second investigation of the Detroit, Michigan, Police Department. The size of the agency was 4,016 personnel. The Division investigated allegations of unlawful arrest and detention and unconstitutional conditions in the Department's holding cells.

In April 2002, the Division opened an investigation of the Schenectady, New York, Police Department. The size of the agency was 156 personnel. The Division investigated allegations of improper use of force, racial profiling, race-based searches and seizures, and unlawful searches and seizures.

In May 2002, the Division opened an investigation of the Miami, Florida, Police Department. The size of the agency was 1,117 personnel. The Division investigated allegations of improper use of force and planting of evidence.

In May 2002, the Division opened an investigation of the Portland, Maine, Police Department. The size of the agency was 150 personnel. The Division investigated allegations of improper use of force.

In July 2002, the Division opened a second investigation of the Miami, Florida, Police Department. The size of the agency was 1,837 personnel. The

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Division investigated allegations of unconstitutional conditions in the Department's holding cells.

In December 2002, the Division opened an investigation of the Providence, Rhode Island, Police Department. The size of the agency was 468 personnel. The Division investigated allegations of improper use of force, race-based response to calls for assistance, and race-based uses of force.

In January 2003, the Division opened an investigation of the Villa Rica, Georgia, Police Department. The size of the agency was 37 personnel. The Division investigated allegations of racial profiling.

In March 2003, the Division opened an investigation of the Alabaster, Alabama, Police Department. The size of the agency was 50 personnel. The Division investigated allegations of improper use of force and racial profiling.

In June 2003, the Division opened an investigation of the Bakersfield, California, Police Department. The size of the agency was 284 personnel. The Division investigated allegations of improper use of force.

In February 2004, the Division opened an investigation of the Virgin Islands Police Department. The size of the agency was 456 personnel. The Division investigated allegations of improper use of force.

In February 2004, the Division opened a second investigation of the Virgin Islands Police Department. The size of the agency was 456 personnel. The Division investigated allegations of improprieties by the Department's Narcotics Strike Force.

In August 2004, the Division opened an investigation of the Beacon, New York, Police Department. The size of the agency was 38 personnel. The Division investigated allegations of improper use of force and unlawful arrests.

In December 2005, the Division opened an investigation of the Warren, Ohio, Police Department. The size of the agency was 73 personnel. The Division investigated allegations of improper use of force and improper strip and body cavity searches.

In October 2005, the Division opened an investigation of the Easton, Pennsylvania, Police Department. The size of the agency was 64 personnel. The Division investigated allegations of improper use of force.

Criminal civil rights prosecutions

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18. In your testimony from November 16, 2006, you stated: "During the past 6 years, we have obtained convictions of 50% more law enforcement officials for color of law violations than in the preceding 6 years." According to data that the Justice Department provided to this Committee in February 2005, the number of prosecutors serving in the Civil Rights Division's Criminal Section increased by 52% between 1998 and 2004. In this light, your testimony conveys the misleading impression that the Bush Administration was more successful than the Clinton Administration in obtaining criminal civil rights prosecutions. Given that the Criminal Section has expanded by over 50% since 1998, we should expect that the number of convictions of law enforcement officials would increase by 50% over the past 6 years.

Please indicate all categories of civil rights prosecutions in which the number of convictions grew by less than 50% over the past 6 years, and provide an explanation as to why the number of convictions wasn't higher.

Answer: By any measure, the overall productivity of the Criminal Section is as high as or higher than it has ever been. For example, in FY 2006, the Section secured 180 total convictions, which was a 51% increase in total convictions over FY 2001. In that time frame, the Section's authorized attorney slots increased by only approximately 14%, suggesting that the Section has become more efficient and productive over time. Indeed, the Section has convicted 50% more law enforcement officials for color of law violations in the past six years, as compared to the previous six years, while also bringing six times the number of prosecutions for human trafficking offenses.

A substantial decrease in the number of complaints about violations of the Freedom of Access to Clinic Entrances Act (FACE) has, in consequence, resulted in fewer FACE prosecutions. Despite receiving substantially fewer complaints, the Division identifies potential FACE Act violations by constantly monitoring news reports, coordinating with federal law enforcement officers in the field, and communicating regularly with provider groups to ensure that we are informed of incidents that may warrant federal involvement. We have continued to lead the Task Force on Violence Against Reproductive Health Care Providers, working closely with the FBI, ATF, USMS, USPIS and attorneys from the Criminal Division to ensure unified, consistent, and responsive federal involvement when FACE Act violations occur. The Task Force also meets regularly with representatives from several provider groups, including Planned Parenthood Federation of America, the National Abortion Federation, and the Feminist Majority Foundation, to address their concerns. We review the factual allegations of each complaint made to the Division and determine whether further factual inquiry is warranted and the statutory requirements of the FACE Act may be met.

Here are examples of recent prosecutions:

- ***United States v. Jordi* (S.D. Fla.): In February 2004, the defendant pleaded guilty to attempted arson for plotting to bomb unspecified abortion clinics. The**

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defendant was arrested after purchasing a weapon and some bomb materials but before he had an opportunity to carry out any attacks.

- ***U.S. v. Skinner* (N.D. Ala.): In April 2006, the defendant pleaded guilty to a FACE Act violation for intentionally driving his car into the West Alabama Women's Center causing damage to the clinic.**

- ***United States v. Kopp* (W.D.N.Y.): In January 2007, Defendant James Charles Kopp was convicted of murdering Dr. Barnett Slepian, a provider of reproductive health services, on October 23, 1998, in violation of 18 U.S.C. § 248 (Freedom of Access to Clinic Entrances) and 18 U.S.C. § 924(c) (use of a firearm in the commission of a felony). Kopp fled the United States after the shooting, and a grand jury indicted Kopp in 2000. Kopp was apprehended in France on March 29, 2001. Following his extradition to the United States on June 5, 2002, Kopp was convicted of state murder charges for killing Dr. Slepian. After the state prosecution, the United States Attorney's Office, in conjunction with the Criminal Section, prosecuted Kopp on the federal charges.**

Similarly, FBI statistics reflect that fewer incidents of bias crimes have been reported. According to the FBI's Hate Crime Statistics for 2000, the FBI documented 8,055 single bias incidents. Yet, by 2005, the FBI reported 7,160 single bias incidents.

The Civil Rights Division is deeply committed to the vigorous enforcement of our nation's civil rights laws and, in recent years, has brought a number of high profile hate crime cases. In fact, Criminal Section Deputy Chief Barbara Bernstein recently was selected to receive the coveted Helene and Joseph Sherwood Prize for Combating Hate by the Anti-Defamation League. As one of the select few in law enforcement to receive the prestigious award, the ADL said that Deputy Chief Bernstein "exemplifies an ongoing commitment, support, and contribution in helping to eliminate hate and prejudice."

We continue to aggressively prosecute those within our society who attack others because of the victims' race, color, national origin, or religious beliefs. Here are examples of recent prosecutions:

- ***United States v. Coombs* (M.D. Fla.): In August 2006, a defendant in Florida pleaded guilty to burning a cross in his yard to intimidate an African-American family who were considering buying a house located next door to the defendant's residence.**

- ***United States v. Saldana, et al.* (C.D. Cal.): In August 2006, four Latino gang members were convicted of threatening and assaulting African-Americans in a neighborhood that the defendants and their gang members sought to control. All four defendants, members of the notorious Avenues street gang, were convicted of a conspiracy charge that alleged numerous violent assaults**

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against African-Americans, including murders that took place in 1999 and 2000. Specifically, the jury found that the defendants caused the death of Christopher Bowser, an African-American man who was shot while waiting at a bus stop in Highland Park on December 11, 2000. The jury also found that the defendants caused the death of Kenneth Kurry Wilson, an African-American man who was gunned down while looking for a parking place in Highland Park on April 18, 1999. Three of the defendants were also convicted of murdering Wilson because he was African American and because he was using a public street, and using a firearm during the commission of a conspiracy and hate crimes. All four of the defendants received life sentences.

- ***United States v. Fredericy and Kuzlik*** **(N.D. Ohio): In October and November 2006, defendants Joseph Kuzlik and David Fredericy pleaded guilty to conspiracy, interference with housing rights, and making false statements to federal investigators. In February 2005, these defendants poured mercury on the front porch and driveway of a bi-racial couple in an attempt to force them out of their Ohio home.**

- ***United States v. Oakley*** **(D.D.C.): In April 2006, the defendant entered a guilty plea to e-mailing a bomb threat to the Council on American Islamic Relations.**

- ***United States v. Baird*** **(W.D. Ark.): In April 2006, a defendant entered a guilty plea to burning a cross near the home of a woman who was living with her white daughter and her daughter's African-American boyfriend. The defendant was sentenced in November 2006. Three additional defendants were tried in September 2006, two of whom were convicted on charges of conspiracy and are awaiting sentencing.**

- ***United States v. Nix*** **(N.D. Ill.): In March 2006, the defendant entered a guilty plea to interference with an Arab-American family's housing rights by igniting an explosive device inside the family's van that was parked near their home.**

- ***United States v. Baalman, et al.*** **(D. Utah): From December 2005 through January 2006, in Salt Lake City, three white supremacists pleaded guilty to assaulting an African-American man riding his bicycle to work because of his race and because they wanted to control the public streets for the exclusive use of white persons.**

In addition to the above cited cases, in recent years, the Division has aided local prosecutors in efforts to prosecute historical Civil Rights era murders. James Ford Seale was indicted on January 25, 2007, by a federal grand jury for two counts of kidnapping resulting in death, and one count of conspiracy, for his participation in the abductions and murder of two nineteen-year-old African-American men, Henry

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Dee and Charles Moore, in 1964. According to the allegations in the indictment, the victims in this case were kidnapped by a group of White Knights of the Ku Klux Klan that included James Seale. Dee and Moore were beaten by their captors, then transported and finally forcibly drowned by being thrown into the Old Mississippi River, tied to heavy objects alleged to have included an engine block, iron weights, and railroad ties.

The Justice Department also assisted the Mississippi District Attorney's Office in reopening the investigation into the 1955 murder of Emmett Till, a 14-year-old African-American teenager, who was kidnapped and killed in rural Mississippi. The investigation showed that there was no federal jurisdiction. Thus, on March 16, 2006, the Justice Department reported the results of that investigation to the District Attorney for Greenville, Mississippi, Joyce Chiles, for her to consider whether to pursue state charges. A state grand jury in Mississippi declined to indict the case. Also, in 2003, the Justice Department convicted Ernest Avants for the 1966 killing of Ben Chester White, an African-American sharecropper, on national forest land. White was murdered as part of a plot by white supremacists to lure Martin Luther King, Jr., to Mississippi so that they could assassinate him.

The Criminal Section also includes data related to "backlash" crimes in its bias crime statistics. After September 11, 2001, the Criminal Section implemented an initiative to combat "backlash" crimes involving violence and threats aimed at individuals perceived to be Arab, Muslim, Sikh, or South Asian. This initiative has led to numerous prosecutions involving physical assaults, some minor and some involving dangerous weapons and resulting in serious injury or death, as well as threats made over the telephone, on the internet, through the mail, and in face-to-face interactions. We have also prosecuted cases involving shootings, bombings, and vandalism directed at homes, businesses, and places of worship.

These offenses are prosecuted under a variety of civil rights statutes and other Title 18 offenses, depending on the conduct involved. The Department has investigated more than 750 bias-motivated incidents since September 11, 2001. However, the number of backlash allegations referred to the Department has dropped approximately 86% from a high of 312 in 2001 to just 44 last year. The Department also assisted local law enforcement in bringing more than 160 such criminal prosecutions from 2001 to 2006.

Our efforts have resulted in 32 federal convictions in "backlash" cases. For example, in *United States v. Cunningham* (W.D. Wash.), a defendant who shot at worshipers leaving a Seattle mosque was sentenced to seventy-eight months in prison in December 2002. In *United States v. Goldstein, et al.* (M.D. Fla.), defendants who conspired to destroy mosques and Islamic centers in Florida were convicted. The leader was sentenced to 151 months in prison in June 2003 and his coconspirators also received lengthy prison terms. And last year, a defendant in *United States v. Nunez-Flores* (W.D. Tex.), who threw a Molotov cocktail at an

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Islamic Center in El Paso, received a sentence of 171 months in prison in June 2005.

An additional bias-motivated murder case is set for trial later this year. In *United States v. Eye and Sandstrom*, attorneys from the Civil Rights Division and the United States Attorney's Office for the Western District of Missouri are prosecuting two men who, according to the indictment, fatally shot an African-American man as he was walking to work in downtown Kansas City.

Prosecuting hate crimes remains a priority of the Department. The Civil Rights Division has continued to use the same vigorous enforcement standards for prosecuting hate crimes that have been a hallmark of the Division's efforts.

19. In his testimony before the Senate Judiciary Committee on July 18, 2006, Attorney General Gonzales testified: "[T]he Department has obtained convictions against 30 percent more law enforcement officials for criminal civil rights violations than during the comparable period of the previous administration." How do you reconcile your claim of a 50% increase in law enforcement convictions with Attorney General Gonzales's recent claim of a 30% increase?

Answer: Attorney General Alberto Gonzales testified in July 2006 that there had been a 30% increase in the number of color of law defendants convicted since 2001 over a comparable period prior to 2001. The testimony was based on 272 color of law defendants convicted during FY 2001 through 2005. In FY 1996 through 2000, the Department obtained the convictions of 190 color of law defendants. The Attorney General's testimony actually understated the percentage increase in defendants convicted: the additional eighty-two convictions during the relevant time frame represent a 43% increase.

In November 2006, Assistant Attorney General Wan Kim provided written testimony to the Senate Judiciary Committee that "during the past six years, we have obtained convictions of 50% more law enforcement officials for color of law violations than in the preceding six years." This testimony was based on 327 color of law convictions during FY 2001 through 2006 compared to 219 color of law convictions during FY 1995 through 2000.

Thus, Assistant Attorney General Kim's testimony encompassed a longer time frame than that of the Attorney General and reflected continued productivity and success by the Department's prosecutors. Both sets of testimony accurately reflect that the Civil Rights Division has prosecuted significantly more color of law defendants in the past six fiscal years compared to the previous six fiscal years.

20. In his testimony before the Senate Judiciary Committee on July 18, 2006, Attorney General Gonzales testified: "The Civil Rights Division recently brought more criminal civil rights cases in a single year than in any other year in the Division's history...." Isn't it true that the Civil Rights Division has more attorneys in its Criminal Section now than in any other year in the Division's history?

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Answer: No (as of February 1, 2007). However, the Administration has increased the number of prosecutor positions in the Criminal Section by approximately 12% from FY 2001 to FY 2007.

In the last six fiscal years, the Civil Rights Division has compiled an impressive record in prosecuting criminal civil rights cases, including the ninety-six criminal civil rights prosecutions brought in FY 2004, a record for cases filed in a single year. We are proud of this record of vigorous enforcement.

21. In his testimony before the Senate Judiciary Committee on July 18, 2006, Attorney General Gonzales testified: "Between fiscal years 2001 and 2005, Federal prosecutors charged 189 defendants with sex trafficking, an increase of more than 450 percent over the previous five years." Given that the Trafficking Victims Protection Act – which created several new statutes to combat sex trafficking – wasn't passed by Congress and signed into law by President Clinton until October 2000, and given the fact that the Civil Rights Division had fewer prosecutors in the Clinton Administration than in this one, isn't the data used in the Gonzales testimony unfair and misleading?

Answer: Human trafficking is a modern day form of slavery, involving the exploitation and enslavement of society's most vulnerable members – often minority women and children who are poor, are frequently unemployed or underemployed, and lack access to social safety nets. It ranks among the world's most vile and degrading criminal practices. Human trafficking offenses transgress the victims' human liberty in violation of the Thirteenth Amendment's guarantee of freedom. As such, trafficking offends the core civil rights on which our Constitution and our country are based. The Civil Rights Division has long prosecuted human trafficking violations.

Congress showed great leadership by enacting the Trafficking Victims Protection Act of 2000, which provided additional tools to supplement the existing statutory framework for prosecuting these horrible offenses. Early in this Administration, the President identified the eradication of human trafficking as a priority. Two particular actions by the President focused federal resources on trafficking. First, in February 2002, the President issued Executive Order 13257, creating a cabinet-level Interagency Task Force to Monitor and Combat Trafficking in Persons. Second, in February 2003, the White House released National Security Presidential Directive 22 (NSPD-22) to identify human trafficking as an important national security matter as well as to instruct federal agencies to strengthen their collective efforts, capabilities, and coordination to support the President's goal of abolishing human trafficking. The February 2003 NSPD-22 created a three-point plan of action: implementing training in federal agencies, developing cooperation with state and local law enforcement in the United States, and integrating and coordinating international programs.

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As the Attorney General has noted, the Department of Justice has greatly increased the investigation and prosecution of human trafficking offenses. Indeed, the Department made eradication of human trafficking a priority through several proactive initiatives, including holding hundreds of intensive training and awareness raising events; forming forty-two United States Attorney-led Task Forces; convening those task forces into three national training conferences; developing a comprehensive curriculum; developing a series of federal, state, and local partnerships that pool the assets of law enforcement; forming a special trafficking unit of specialists and experts; developing a closed circuit television communications capacity to conduct best practices discussions with Task Forces; and developing numerous law enforcement tools and resources that empower practitioners. The President and the Attorney General also have devoted substantial time to public speaking at national anti-trafficking events.

In Fiscal Year 2006, the Division continued to aggressively pursue those who commit human trafficking crimes, obtaining a record ninety-eight convictions of human trafficking defendants. Working with the various United States Attorneys' Offices, we charged a record number of sex trafficking defendants (eighty-five) and twenty-six labor trafficking defendants. In addition to prosecuting the perpetrators of these horrible crimes, the Criminal Section also aids their victims. Under the 2000 Trafficking Victims Protection Act, 1,123 trafficking victims from seventy-two countries have obtained eligibility for refugee-type benefits from HHS with the aid of the Civil Rights Division and other law enforcement agencies.

22. You testified that in FY 2006, the Justice Department charged 85 sex trafficking defendants and 26 labor trafficking defendants. Why did the Justice Department bring over three times as many sex trafficking cases as labor trafficking cases? Does the Department receive over three times as many sex trafficking allegations as labor trafficking allegations? Does the Department place greater value on sex trafficking cases than labor trafficking cases?

Answer: The prosecution of the despicable crime of human trafficking continues to be a major element of our Criminal Section's work. The victims of human trafficking are often minority women and children who are poor, are frequently unemployed or underemployed, and lack access to social safety nets. The Attorney General's initiative to combat human trafficking has made the prosecution of these crimes a top priority. The Division does not place a greater value on any specific type of human trafficking allegation or case. The Division works with the United States Attorneys' Offices, federal, state, and local law enforcement, and non-governmental organizations to aggressively investigate and prosecute all meritorious human trafficking allegations.

In Fiscal Year 2006, the Division continued to aggressively pursue those who commit human trafficking crimes, obtaining a record ninety-eight convictions of human trafficking defendants. Working with the various United States Attorneys' Offices, we charged a record number of sex trafficking defendants (eighty-five) and

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twenty-six labor trafficking defendants. In addition to prosecuting the perpetrators of these horrible crimes, the Criminal Section also aids their victims. Under the 2000 Trafficking Victims Protection Act, 1123 trafficking victims from seventy-two countries have obtained eligibility for refugee-type benefits from HHS with the aid of the Civil Rights Division and other law enforcement agencies.

23. Please provide data regarding the number of criminal civil rights defendants charged and convicted each year for the past three years, indicating whether the prosecutions involved laws regarding hate crimes, human trafficking (broken down by sex trafficking and labor trafficking), law enforcement misconduct, and the Freedom of Access to Clinic Entrances Act.

Answer: In FY 2004, the Criminal Section of the Civil Rights Division charged a total of 156 defendants. Of those defendants, sixty-six were charged with color of law crimes, thirty-eight were charged with bias crimes, four were charged with damage of a house of worship crimes, one was charged with a FACE Act violation, forty were charged with sex trafficking crimes, and seven were charged with labor trafficking crimes. In FY 2004, the Criminal Section convicted a total of 112 defendants. Of those defendants convicted, forty-eight were convicted of color of law crimes, twenty-six were convicted of bias crimes, three were convicted of damage of a house of worship crimes, two were convicted of FACE Act violations, thirty were convicted of sex trafficking crimes, and three were convicted of labor trafficking crimes.

In FY 2005, the Criminal Section of the Civil Rights Division charged a total of 168 defendants. Of those defendants, forty-five were charged with color of law crimes, sixteen were charged with bias crimes, ten were charged with damage of a house of worship crimes, one was charged with a FACE Act violation, seventy-five were charged with sex trafficking crimes, and twenty-one were charged with labor trafficking crimes. In FY 2005, the Criminal Section convicted a total of 109 defendants. Of those defendants convicted, fifty-six were convicted of color of law crimes, thirteen were convicted of bias crimes, four were convicted of damage of a house of worship crimes, one was convicted of a FACE Act violation, twenty-five were convicted of sex trafficking crimes, and ten were convicted of labor trafficking crimes.

In FY 2006, the Criminal Section of the Civil Rights Division charged a total of 200 defendants. Of those defendants, sixty-six were charged with color of law crimes, twenty were charged with bias crimes, two were charged with damage of a house of worship crimes, one was charged with a FACE Act violation, eighty-five were charged with sex trafficking crimes, and twenty-six were charged with labor trafficking crimes. In FY 2006, the Criminal Section convicted a total of 180 defendants. Of those defendants convicted, fifty-five were convicted of color of law crimes, nineteen were convicted of bias crimes, seven were convicted of damage of a house of worship crimes, one was convicted of a FACE Act violation, sixty were

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convicted of sex trafficking crimes, and thirty-eight were convicted of labor trafficking crimes.

Appellate filings

24. You testified that 87 of 144 briefs, over 60% of all briefs, filed by the Civil Rights Division's Appellate Section in FY 2006 were in defense of decisions made by the U.S. government to deport illegal immigrants. In FY 2005, 62% of all briefs filed by the Division's Appellate Section were in deportation defense cases.

A. Are you at all concerned about this trend? Please explain.

Answer: Attorneys in all of the Department's litigating Divisions and every United States Attorney's Office are assisting in handling the extraordinary caseload of immigration briefs. While the Civil Rights Division shares in these responsibilities as well, the Division's Appellate Section is still doing tremendous work. Overall during FY 2006, the Appellate Section filed more briefs than in any year in the Division's recorded history. During FY 2006, the Division's Appellate Section filed 145 briefs and substantive papers in the United States Supreme Court, the courts of appeals, and the district courts. (The total number that I provided previously inadvertently failed to include an amicus brief the Division had filed jointly with the United States Attorney's Office for the Southern District of New York.) As you note, 87 of these filings were appellate briefs for the Office of Immigration Litigation (OIL). Excluding OIL decisions, the Appellate Section had an overall success rate of 90% during this period, which is the highest success rate the Section has had for any fiscal year since FY 1992. In FY 2006, the Appellate Section filed 17 amicus briefs, an increase over the previous two fiscal years. As of January 5, 2007, the Appellate Section had filed a total of 94 amicus briefs under this Administration.

B. When is the Division's Appellate Section going to be able to return to its mission of filing briefs to enforce civil rights laws rather than to deport illegal immigrants? Can you provide a commitment as to when the Civil Rights Division attorneys will no longer have to work on such cases?

Answer: As stated above, attorneys in all of the Department's litigating Divisions and every United States Attorney's Office are assisting in handling the extraordinary caseload of immigration briefs, and that practice extends to the Civil Rights Division as well. The Department will not shirk from its responsibility to enforce the immigration laws passed by Congress. Until OIL has sufficient staff to manage the overwhelming workload, the Department must continue to share this responsibility. The Department is seeking to augment staffing and resource levels such that OIL ultimately will have sufficient staff to assume responsibility for all cases, including the

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Second Circuit cases formerly handled by SDNY. In this regard, OIL received a significant budget increase for the fiscal year that ended September 30, 2006. In addition, the President has sought another substantial budget increase for OIL in FY 2007 and FY 2008.

C. Please provide information about the number of Civil Rights Division attorney hours spent working on deportation appeals in FY 2006.

Answer: According to our time-keeping records, Civil Rights Division attorneys spent a total of 19,329.75 hours on Office of Immigration Litigation cases in FY 2006. This represents 5.4% of the hours worked by Division attorneys during FY 2006.

25. If 87 of the 144 briefs filed by the Appellate Section concerned deportations, then only 57 briefs and substantive papers were filed in FY 2006. According to data you provided to the Judiciary Committee last year, 57 substantive appellate filings represents by far the lowest number of such filings since at least 1990, and perhaps in the history of the Division. Please provide an explanation for the historic low number of substantive appellate filings in FY 2006.

Answer: Attorneys in all of the Department's litigating Divisions and every United States Attorney's Office are assisting in handling the extraordinary caseload of immigration briefs. While the Civil Rights Division shares in these responsibilities as well, the Division's Appellate Section is still doing tremendous work. Overall during FY 2006, the Appellate Section filed more briefs than in any year in the Division's recorded history. During FY 2006, the Division's Appellate Section filed 145 briefs and substantive papers in the United States Supreme Court, the courts of appeals, and the district courts. (The total number that I provided previously inadvertently failed to include an amicus brief the Division had filed jointly with the United States Attorney's Office for the Southern District of New York.) As you note, 87 of these filings were appellate briefs for the Office of Immigration Litigation (OIL). Excluding OIL decisions, the Appellate Section had an overall success rate of 90% during this period, which is the highest success rate the Section has had for any fiscal year since FY 1992. In FY 2006, the Appellate Section filed 17 amicus briefs, an increase over the previous two fiscal years. As of January 5, 2007, the Appellate Section had filed a total of 94 amicus briefs under this Administration.

26. In your testimony, you stated the Civil Rights Division has filed amicus briefs in 94 cases during the Bush Administration. Please provide a brief description of each of these 94 cases, and the position advanced by the Division, broken down by year.

Answer: Please see attachment.

27. Please provide a brief description of each instance during the past six years in which section management within the Civil Rights Division recommended amicus participation

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in a district court or appellate court case, and the recommendation was rejected, and provide an explanation as to why the amicus recommendation was rejected.

Answer: The Department has a long-standing policy against the disclosure of internal deliberations.

Disability rights

28. In your November 16 testimony, you discussed the Civil Rights Division's efforts to enforce the Americans with Disabilities Act and to safeguard the rights of the disabled. However, there is no mention of the mentally disabled in your testimony regarding ADA enforcement; instead, you report only on efforts made to assist people with physical disabilities.

A. Please indicate the number of cases brought and settlement agreements reached by the Disability Rights Section on behalf of people with mental disabilities for each year during the past six years.

Answer: The Civil Rights Division is firmly committed to protecting the rights of persons with mental disabilities. In enforcing the Americans with Disabilities Act of 1990 (ADA) during the past six years, the Disability Rights Section achieved consent decrees or settlement agreements in eleven matters involving persons with mental disabilities. The Disability Rights Section filed complaints in four cases that were resolved by consent decree and settled seven matters without filing complaints.

The Division continues to vindicate the rights of persons with mental disabilities under other statutes in addition to the ADA. For example, since 2001, the Special Litigation Section has incorporated provisions protecting the rights of persons with mental disabilities in thirty-seven enforcement actions under the Civil Rights of Institutionalized Persons Act. The Section filed complaints in twenty-three cases that were resolved by consent decree or by Rule 41 order. The Section settled fourteen matters without filing complaints.

In addition, since 2001 the Housing and Civil Enforcement Section has filed eighteen cases in which mental disability was one of several grounds of alleged discrimination. Over the same period, the Section settled nineteen cases in which mental disability was one of the grounds of alleged discrimination.

B. Please indicate all instances during the past six years in which career attorneys in the Disability Rights Section recommended bringing a federal lawsuit on behalf of a person with a mental disability, and the political appointees in the Civil Rights Division front office rejected the request.

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Please discuss the nature of each recommendation and explain why the recommendation was rejected.

Answer: Disclosure of the requested information would violate the Department's long standing policy against revealing internal deliberations.

Voting rights

29. In your November 16 testimony, you indicated that 229 complaints about election procedures were made directly to the Voting Section on election day, November 7, 2006.

C. Please provide a description and status report of all complaints the Civil Rights Division is continuing to investigate that were made to your office on November 7, 2006.

Answer: In November 2006, the Department opened multiple phone lines in order to handle calls from citizens with election complaints, as well as an internet-based system for reporting problems. On or about November 7, 2006, the Voting Section received approximately 147 calls and 94 e-mail contacts through its website. These 241 election day contacts raised approximately 351 issues, as some contacts raised multiple issues.

On election day, we were able to resolve all issues raised by approximately 36 of the 241 election day contacts we received. Of the additional election day contacts, 6 simply provided comments, and 7 persons contacting us sought only election-related information, such as where they should go to vote.

The information provided to us by approximately 150 of these election day contacts did not indicate a possible violation of any of the federal laws the Department enforces. For example, a number of voters called complaining about an isolated mechanical failure of an individual piece of voting equipment.

As a result of pre-election investigation and outreach, the Department assigned more than 800 federal observers and Department monitors to selected polling places across the country. Approximately 470 federal observers from the Office of Personnel Management and 358 Department of Justice staff monitored the general election in 69 jurisdictions in 22 states in areas that we determined warranted scrutiny in order to prevent and document possible violations of voting rights. Election monitoring, among other things, involved receiving numerous calls and contacts within the course of the site monitoring. Consistent with past practice, Department personnel addressed and documented potentially discriminatory practices regardless of whether they were the subject of a formal complaint.

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After Election Day, we reviewed all complaints and determined which matters warranted additional action. We have since initiated new investigations of these matters or incorporated them into ongoing investigations in the relevant jurisdiction. Any comment on these current investigations would be inappropriate at this time.

The Criminal Section of the Civil Rights Division has three matters related to the November 7, 2006, election under investigation. The first is the cross burning in Grand Coteau, Louisiana. The second is the mailing of misleading letters in Orange County, California. The third is the presence of armed men at the polls in Pima County, Arizona. The basis for each investigation is the allegation that persons attempted to intimidate voters because they were exercising their right to vote and because of their race or national origin. The investigations are continuing, and further comment would be inappropriate at this time. We are also monitoring a local investigation into allegations that two residents of Swain County, North Carolina, were forced to apply for absentee ballots and vote a straight Democratic ticket or be evicted from their trailer park.

D. Please provide a description and status report of all election day complaints the Civil Rights Division is investigating that you learned about through other means – e.g. news articles, letters from community groups, etc.

Answer: The Department in 2006 took a strong proactive approach to potential election day problems and issues. Rather than wait for complaints, the Voting Section attempted to identify locations where problems were likely to occur and to pre-position personnel to document and address such issues as arise on election day. As a result of this extensive pre-election investigation and outreach, on election day the Department assigned more than 800 federal observers and Department monitors – a record number for a mid-term election – to selected polling places in 69 jurisdictions in 22 states across the country. The Department continues, as it becomes aware of complaints from other sources that had not already come to its attention, such as through news articles or post election day contacts from civil rights or community organizations, to investigate complaints arising from the November 2006 elections. As you are aware, we cannot discuss the details of ongoing investigations.

E. Please provide a description and status report of all pre-election day complaints you are investigating in connection with the 2006 federal election.

Answer: Please see responses to subparts C and D above.

F. Please provide a description and status report of all election day complaints or pre-election complaints involving the November 7, 2006 election that

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the Criminal Division is investigating. Please indicate why the matter is being investigated by the Criminal Division rather than the Civil Rights Division.

Answer: As previously noted, whether a matter is being handled by the CRT or being investigated by the Criminal Division and a United States Attorney's Office depends on the nature of the allegations in a particular case. We are aware of at least 25 criminal matters that are currently under investigation around the country by the Criminal Division and various United States Attorneys' Offices. However, because Department procedures do not require United States Attorneys' Offices to consult with Headquarters before requesting a preliminary investigation of an election fraud allegation, the actual figure may be higher. As these criminal investigations are currently open, it would not be appropriate to comment on them.

Backlash initiative

30. After the September 11th terrorist attacks, then-Assistant Attorney General for Civil Rights Ralph F. Boyd, Jr. established the Initiative to Combat Post-9/11 Discriminatory Backlash to work proactively to combat violations of civil rights laws against Arab, Muslim, Sikh, and South-Asian Americans, and those perceived to be members of these groups. Mr. Boyd appointed a Special Counsel on Post-9/11 National Origin Discrimination to head the Initiative. It is my understanding that this Special Counsel position is currently vacant.

A. How long has this Special Counsel position been vacant? Do you intend to fill the position?

Answer: On January 21, 2006, the attorney who served as Special Counsel on Post-9/11 National Origin Discrimination left the Department to accept a civil rights position with the Department of Homeland Security, where he continues to work closely with the Division on these important issues. On December 12, 2005, the Assistant Attorney General hired an attorney for his staff who speaks Arabic and has extensive educational and professional experience with the Middle East and Islam. This individual does not use the title "Special Counsel on Post-9/11 National Origin Discrimination." However, he helps coordinate the Division's efforts to counter post-9/11 backlash and the Division's outreach to the affected communities. He works on these issues jointly with the Special Counsel for Religious Discrimination, an individual on the Assistant Attorney General's staff with more than twelve years of experience representing individuals of various faiths, including Muslims and Sikhs, in religious discrimination matters.

B. Please describe the activities of this Initiative since you were confirmed.

Answer: Since my confirmation on November 13, 2005, the Division has continued to place a priority on addressing discrimination and hate crimes

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against individuals resulting from post-9/11 backlash. We have opened 53 investigations of backlash-related hate crimes since that time, and brought one prosecution, involving vandalism of a mosque in northern Virginia. We have had continued success in our ongoing prosecutions during this time. For example, in *United States v. Nix and Alba* (N.D. Ill.), we obtained a fifteen month prison sentence on August 22, 2006, for a man who ignited a commercial firework device in a Palestinian-American family's minivan in Illinois. An accomplice who provided the device received six months home confinement on March 6, 2006. Similarly, in *United States v. Russell and Lin* (W.D. Wash.), we obtained prison sentences of three months each on April 7, 2006, and June 2, 2006, respectively, for two men who burned a cross at the home of an Arab-American family.

In the area of education, we opened eight investigations of harassment of or discrimination against Muslim students during FY 2006, of a total of thirteen such investigations since 9/11. Six of these eight investigations were closed upon a determination that there was no violation of federal law, and two are pending.

We have continued to litigate actively a case against the New York Metropolitan Transit Authority regarding its refusal to permit Muslim women and Sikh men to wear religious head coverings while working as bus and subway drivers. I have instructed all of our sections to continue to look actively for cases involving backlash discrimination.

The Division also has engaged in extensive outreach to the affected communities. I personally chair a meeting every two months that brings together representatives from various federal agencies with leaders from the Muslim, Arab, Sikh and South Asian communities to address civil rights and civil liberties concerns. These meetings have been highly successful in matching problems with the key government representatives necessary to address them. Additionally, I have spoken at a variety of fora on backlash issues, including delivering the keynote address at the American Arab Anti-Discrimination Committee annual convention and addressing the Detroit Bridges meeting – a regionally-based interagency meeting co-hosted by DHS, the U.S. Attorney's Office, and the FBI that is similar to the one I hold here in Washington.

Senior Division personnel have also actively reached out to these communities. For example, in 2006, the chief of our Voting Section met with Arab and Muslim leaders in Michigan to learn about their concerns. In addition, an attorney on my staff who is involved with the backlash initiative staffed a booth at the Islamic Society of North America annual convention to listen to community concerns. Also, our Special Counsel for Religious Discrimination spoke at the law student convention of the National Association of Muslim Lawyers. Attorneys on my staff are in regular contact

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with Muslim, Arab, Sikh, and South Asian groups to address civil rights issues as they arise.

C. On August 20, 2004, then-Assistant Attorney General R. Alexander Acosta sent a letter to state Departments of Education raising concerns about incidents of discrimination directed against Muslim, Arab, Sikh, and South-Asian students and asking them to inform school officials that such discrimination is illegal. Please describe any similar proactive outreach you have made in order to alleviate post-9/11 discrimination against these vulnerable groups.

Answer: As set forth in my response to B above, the Division has been proactive in reaching out to the Muslim, Arab, Sikh, and South Asian communities in a variety of ways, including regular meetings, frequent speaking engagements, and open channels of communication.

31. According to the Civil Rights Division's website: "The Civil Rights Division, the Federal Bureau of Investigation, and United States Attorneys offices have investigated 742 incidents since 9/11 involving violence, threats, vandalism and arson against Arab-Americans, Muslims, Sikhs, South-Asian Americans and other individuals perceived to be of Middle Eastern origin.... Federal charges have been brought in 27 cases against 35 defendants, with 32 convictions to date."

A. The webpage indicates that it was last updated on August 16, 2006. Please provide updated statistics on the number of incidents and cases.

Answer: As of January 9, 2007, the Civil Rights Division, the Federal Bureau of Investigation, and United States Attorneys' offices have investigated over 762 incidents since 9/11 involving violence, threats, vandalism and arson against Arab-Americans, Muslims, Sikhs, South-Asian Americans and other individuals perceived to be of Middle Eastern origin. The incidents have consisted of telephone, internet, mail, and face-to-face threats; minor assaults as well as assaults with dangerous weapons and assaults resulting in serious injury and death; and vandalism, shootings, arson and bombings directed at homes, businesses, and places of worship.

Federal charges have been brought in 27 cases against 35 defendants, with 32 convictions to date. Additionally, Civil Rights Division attorneys have coordinated with state and local prosecutors in over 150 non-federal criminal prosecutions, in many cases providing substantial assistance.

B. The webpage provides summaries of eight cases. Please provide summaries of the remaining cases, including a description of the incident, the date of the incident and the current status of the case.

Answer: The Civil Rights Division has placed a priority on prosecuting bias crimes and incidents of discrimination against Muslims, Sikhs, and persons of Arab and South-Asian descent, as well as persons perceived to be

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members of these groups. As noted above, federal charges have been brought in 27 cases against 35 defendants, with 32 convictions to date. A representative sample of eight cases, involving eleven defendants, is described on our website. The remaining cases include:

- ***United States v. Labana* (E.D. Va.): On May 10, 2006, Manjit Labana was indicted on charges of damaging religious property. On September 13, 2001, Labana allegedly spray-painted threatening messages and profanity on the walls, doors and carpets of the All Dulles Area Muslim Society Center Mosque. Presently, he is a fugitive and is believed to have fled the United States.**

- ***United States v. Oakley* (D.D.C.): On April 7, 2006, Max Oakley pleaded guilty to sending threats by an instrument of interstate commerce. On July 25, 2005, Oakley emailed a bomb threat to the headquarters of the Council on American-Islamic Relations in Washington, D.C. On July 20, 2006, he was sentenced to three years probation and fined $1000.**

- ***United States v. Barnett* (E.D. Mich.): On November 15, 2005, John Barnett pleaded guilty to interference with the religious exercise of worshippers of a mosque. On May 12, 2004, Barnett sent an e-mail threat to the Islamic Center of America in Detroit from his home in New York. Barnett died prior to sentencing.**

- ***United States v. Bratisax* (E.D. Mich.): On November 9, 2005, Michael Bratisax pleaded guilty to interference with the religious exercise of worshippers of a mosque. On May 12, 2004, Bratisax sent two threatening emails to the Islamic Center of America in Detroit from his home in New York. On March 13, 2006, he was sentenced to two years probation, with conditions including attending anger management and diversity training, refraining from drinking alcohol, submitting to random drug and alcohol testing, and creating a website dedicated to anger management and diversity.**

- ***United States v. Nix and Alba* (N.D. Ill.): On November 2, 2005, Daniel Alba pleaded guilty to making false statements in the course of a federal investigation. Alba lied about his knowledge of an incident where another man, Eric Nix, planted an explosive device in a van owned by a Muslim family of Palestinian descent while the van was parked outside the family's home in Burbank, Illinois. The bomb exploded, terrifying the family and destroying the vehicle. On March 14, 2006, Alba was sentenced to six months home confinement.**

- ***United States v. Razani* (C.D. Cal.): On October 3, 2005, Tony Razani pleaded guilty to transmitting a threat by interstate communication. On September 25, 2002, Razani sent an email containing racially derogatory**

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language and an explicit death threat to an Arab-American woman. On April 3, 2006, he was sentenced to six months home detention and three years probation.

- ***United States v. Sargent, Lin, and Russel* (W.D. Wash.): On July 19, 2005, Collin Patrick Sargent pleaded guilty to conspiracy to interfere with housing rights. In July 2004, a group of individuals burned a cross in the yard of an Arab-American family in Edmonds, Washington. On February 17, 2006, Sargent was sentenced to three months home detention, three years of probation, and community service. On December 13, 2005, Joseph Lin pleaded guilty to conspiracy with another man, Jaysen Russel, to mislead a grand jury about their participation in the cross burning. On April 7, 2006, Lin was sentenced to three months in prison and three months of supervised release. On February 1, 2006, Russel pleaded guilty to conspiracy to mislead a grand jury. On June 2, 2006, he was sentenced to three months in prison and three months of supervised release.**
- ***United States v. Stern* (D. Nev.): On May 16, 2005, Leonard Arthur Stern pleaded guilty to transmitting a threat by interstate communication. On September 16, 2001, Stern sent a threatening email to an Arab-American. He later lied to federal investigators about his actions. On November 28, 2005, he was sentenced to six months home confinement, five years probation, and a $3000 fine.**

- ***United States v. Middleman* (D.D.C.): On January 26, 2005, Daniel Middleman pleaded guilty to transmitting threats by interstate communication. On April 25, 2003, Middleman sent a threatening email to the President of the Arab-American Institute in Washington, D.C. On May 9, 2003, he sent a second threatening email. On October 14, 2005, he was sentenced to ten months in prison.**

- ***United States v. Ehrgott* (D. Nev.): On January 13, 2005, Dale T. Ehrgott pleaded guilty to interference by threat of force with federally protected activities. On August 28, 2003, Ehrgott sent a threatening email to the Washington, D.C., office of the Council on American-Islamic Relations from Reno. On January 13, 2005, he was sentenced to a year of probation and fifty hours community service.**

- ***United States v. Doyle* (D. Neb.): On November 17, 2004, George M. Doyle pleaded guilty to interference with the religious exercise of worshippers of a mosque. On May 11, 2004, Doyle left threatening voice mail messages on the answering machine of the Islamic Center of Omaha. On November 17, 2004, he was sentenced to ten days incarceration and ordered to apologize to the victims.**

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- *United States v. Murrillo* (E.D. Tex.): On November 10, 2004, Curtis William Murrillo was acquitted of charges of interference by use of force with federally protected activities. On March 17, 2002, Curtis William Murrillo allegedly assaulted an Iranian-American man who was a patron at a McDonald's restaurant.

- *United States v. Bjarnason* (W.D. Tex.): On September 30, 2004, Jared Bjarnason pleaded guilty to interference with the religious exercise of worshippers of a mosque and transmitting threats by interstate communication. On April 4, 2004, Bjarnason emailed the Islamic Center of El Paso, Texas, and threatened to burn down the mosque if American hostages held in Iraq were not released within seventy-two hours. Using a provision of the USA PATRIOT Act, federal agents were able to identify Bjarnason as the sender before the seventy-two hour period had expired. On December 21, 2004, he was sentenced to eighteen months imprisonment.

- *United States v. Krugel and Rubin* (C.D. Cal.): On February 4, 2003, Earl Krugel, a member of the Jewish Defense League, pleaded guilty to conspiracy. In December 2001, Krugel and Irving Rubin conspired to bomb a mosque and the field offices of the Muslim Political Affairs Council and United States Congressman Darrel Issa in California. On November 13, 2002, Rubin died from a self-inflicted injury in jail. On September 22, 2005, Krugel was sentenced to twenty years in prison.

- *United States v. Warden* (E.D. Tex.): On October 15, 2002, Norman Lee Warden pleaded guilty to illegal possession of a firearm by a felon. On May 27, 2002, Warden set fire to gas pumps located at a convenience store owned by a Middle Eastern man. Warden also left a threatening note at the scene. On January 23, 2003, he was sentenced to thirty-seven months in prison. In a subsequent local prosecution of the incident, Warden pleaded guilty to additional charges and received a sixteen year prison sentence.

- *United States v. Kitts and Kitts* (E.D. Tenn.): On September 11, 2002, Jason Kitts and Travis Kitts pleaded guilty to interference by use of force with federally protected activities. On September 24, 2001, the two men assaulted two Indian resident managers of a motel in Alcoa, Tennessee. On December 10, 2002, Travis Kitts was sentenced to thirty-six months in prison and Jason Kitts was sentenced to twenty months in prison.

- *United States v. Fritts* (W.D. Wisc.): On March 4, 2002, Wesley Fritts pleaded guilty to mailing threatening communications. On October 17, 2001, Fritts mailed fake anthrax and a threat to an Arab-American restaurant in Janesville, Wisconsin. On May 13, 2002, he was sentenced to twenty-one months incarceration.

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- ***United States v. Bolen*** **(E.D. Mich.): On February 6, 2002, Justin Bolen pleaded guilty to interference with housing rights. On October 10, 2001, Bolen placed a telephone call to a Pakistani family's home in Detroit and left a threatening message on their voicemail. On May 14, 2002, he was sentenced to ten months incarceration.**

- ***United States v. Iverson*** **(W.D. Wisc.): On January 31, 2002, Thomas Iverson pleaded guilty to transmitting threats by an instrument of interstate commerce. On September 29, 2001, Iverson telephoned bomb threats to the Jordanian owner of a liquor store and to a 911 emergency operator in Beloit, Wisconsin. On April 12, 2002, he was sentenced to twenty-seven months incarceration. In a subsequent local prosecution, he pleaded guilty to a state hate crime and received an additional two year sentence of incarceration.**

- ***United States v. Montes*** **(W.D. Tex.): On December 4, 2001, Joe Luis Montes pleaded guilty to making obscene or harassing phone calls. On September 17, 2001, Montes threatened Indian employees of a truck stop in Hewitt during a phone call. On January 30, 2002, he was sentenced to two years probation and given a $500 fine.**

32. The Civil Rights Division's website states: "All of the Civil Rights Division's litigating sections (such as the Employment Litigation Section, the Educational Opportunities Section, the Housing and Civil Enforcement Section) have put a priority on investigating allegations of discrimination against Muslims, Sikhs, Arab-Americans, South-Asian Americans, and others perceived to be members of these groups. Many such complaints have been handled by the Civil Rights Division and resolved informally. A number of complaints have resulted in the Civil Rights Division filing suits or reaching formal settlements." The webpage provides summaries of six cases. Please provide summaries of the remaining cases, including a description of the incident and the current status of the case.

Answer: The Civil Rights Division has investigated allegations of discrimination against Muslims, Sikhs, Arab-Americans, South-Asian Americans, and others perceived to be members of these groups. As noted above, information on a representative sample of six of these cases can be found on our website. The remaining cases include:

- **In a matter involving an allegation of education discrimination in a southern state, the Division investigated a complaint of harassment of a Muslim elementary student. After cooperation by the school district with our inquiry, it was determined that remedial action had been taken and there was no violation of federal law.**

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- **In a matter involving an allegation of discrimination in a western state, the Division began investigating a complaint by Muslim college students that they were harassed by a sports team coach and dismissed from the team because of their religion. The Division's investigation is ongoing.**

- **In *Guru Nanak Sikh Society v. County of Sutter*, the Division filed an amicus brief in the Ninth Circuit arguing that Sutter County, California, violated RLUIPA when it denied a Sikh congregation the use permit necessary to build a gurdwara. The Ninth Circuit agreed and ruled in the congregation's favor.**

- **The Division reached a settlement with the City of Plano, Texas, to accommodate the needs of a Muslim school bus driver to attend Friday religious services.**

- **In six separate matters involving allegations of education discrimination in western states, the Division investigated published reports of harassment of Muslim high school students by other students. After reviewing information provided by the districts and finding no evidence of violations of federal law, the Division closed these investigations.**

- **In a matter involving an allegation of education discrimination in a southern state, the Division investigated a complaint of harassment of a Muslim student by an instructor at a community college. After cooperation by the college in our inquiry, it was determined that remedial action had been taken and the complainant was satisfied with the results.**

- **In a matter involving an allegation of education discrimination in a Western state, the Division investigated a complaint by a Muslim student that his high school refused to accommodate his religious dress at his graduation ceremony. After our inquiry, the high school reversed its course and allowed the student to attend while wearing his religious dress.**

- **In a matter involving an allegation of education discrimination in a southern state, the Division investigated a report of harassment of Muslim students by a teacher at a high school. After cooperation by the school district in our inquiry, it was determined that remedial action had been taken and there was no violation of federal law.**

- **In a matter involving an allegation of education discrimination in a northeastern state, the Division investigated a complaint by a high school student who withdrew from a magnet school because she was not permitted to wear her hijab with her junior ROTC uniform. The case was closed after it was determined that the school was following Department of Defense regulations.**

- **In July 2004, the Division opened a Religious Land Use and Institutionalized Persons Act (RLUIPA) investigation in a municipality in the southeastern United States after a mosque was denied a variance to build in excess of the**

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height limit specified in the zoning code. The Division closed its investigation in February 2005 after finding no bias or discrimination involved.

- **In December 2003, the Division investigated a matter involving access to public accommodations in which a Sikh man was denied entry into two restaurants in the northeast owned by the same individual when he would not remove his turban. The investigation determined that the owner had already taken remedial action.**

- **In December 2003, the Division investigated a matter involving access to public accommodations in which a Sikh man was denied access to a shooting range because of his turban. The investigation was closed when it was determined that the owner took remedial action.**

- **In December 2003, the Division opened an investigation under RLUIPA after the City of Morton Grove, Illinois, amidst heated community opposition that involved some open expressions of anti-Muslim sentiment, denied a Muslim school a permit to build a mosque. With the help of mediators from the Department's Community Relations Service, the village and the school reached an agreement in 2004 to allow the mosque's construction with conditions to address traffic and parking.**

- **In December 2002, the Division opened an RLUIPA investigation in Loudon County, Virginia, after a K through 12 Islamic school was denied a permit necessary for its building plans and evidence indicated that the denial was due in part to anti-Muslim sentiment. One month later, the county reversed itself and issued the permit.**

33. How many complaints has the Civil Rights Division received regarding discriminatory law enforcement against Muslims, Sikhs, Arab-Americans, South-Asian Americans, and others perceived to be members of these groups? How many investigations has the Division opened regarding discriminatory law enforcement against Muslims, Sikhs, Arab-Americans, South-Asian Americans, and others perceived to be members of these groups?

Answer: The Division enforces 18 U.S.C. § 242, which prohibits official misconduct committed under color of law. We have investigated 50 cases alleging official misconduct committed under the color of law where the victim was Middle Eastern, South Asian, Arab, Muslim or Sikh. These investigations involved allegations that police or prison guards used excessive force or otherwise deprived an individual of due process of law. Such conduct, when committed with willful intent, can be a violation of federal law.

Additionally, the Office of the Assistant Attorney General on a number of occasions has received inquiries by phone or email from community contacts regarding alleged discrimination by federal law enforcement officials. We have assisted these

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contacts in locating the proper federal agency with which to file a complaint. We do not keep any formal record of such contacts or responses.

Religious liberty

34. The Civil Rights Division recently filed an amicus brief in the case Lown v. Salvation Army. In that brief, the United States contended that, even though the Salvation Army receives direct government funding, it could not be a state actor and therefore could not violate the Establishment and Equal Protection Clauses in discriminating on the basis of religion in government-funded Salvation Army jobs. Is this the first time the Civil Rights Division has ever filed a brief in federal court contending that government-funded religious discrimination is lawful and does not implicate Establishment Clause concerns? If not, please provide other instances in which the Division has taken this position.

Answer: In the *Lown v. Salvation Army* case, the Division filed a brief for the United States arguing that the Establishment Clause was not violated merely because a party contracting with the state to provide secular social services was a religious employer eligible for Title VII's Section 702 exemption, which permits religious employers to consider religion in hiring decisions. The district court agreed with the position advocated by the United States in its ruling on September 30, 2005. We are not aware of any other case in which the Division has filed a brief on this issue.

35. Over the past several years, the Civil Rights Division has filed a number of amicus briefs in support of the Child Evangelism Fellowship in its efforts to distribute evangelical religious materials to public school students and their families. Prior to this initiative, the Civil Rights Division rarely intervened in cases in which it did not have statutory enforcement power.

A. Why is the Civil Rights Division intervening in Child Evangelism Fellowship cases and other individual Establishment Clause cases that do not implicate federal statutory enforcement power and do not involve the federal government as a defendant?

Answer: Under Title IV of the Civil Rights Act of 1964, the Attorney General is authorized to file suit when a student is being "deprived by a school board of the equal protection of the laws." Additionally, Title IX of the Civil Rights Act of 1964 authorizes the Attorney General to intervene in any equal protection case filed in federal court that is of general public importance. For example, the Division intervened under Title IX in the case of a Muslim girl in Muskogee, Oklahoma, who was barred from wearing her headscarf because it conflicted with the school's dress code. Title III of the Civil Rights Act of 1964 also prohibits discrimination in public facilities on the basis of race, color, religion or national origin.

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B. Please identify other cases in which the Civil Rights Division has intervened as an amicus where the Justice Department does not have statutory enforcement power.

Answer: The Division filed amicus briefs in the courts of appeals in *Child Evangelism Fellowship v. Montgomery County Public Schools* and *Child Evangelism Fellowship v. Stafford Township*, arguing that schools had discriminated based on religion against the after-school youth activities run by Child Evangelism Fellowship chapters by refusing to allow them to distribute their permission slips and informational flyers in the same manner that other youth-serving groups were allowed. These cases fell within the Division's statutory enforcement authority under Title IX, and raised substantially similar issues to those that arise in cases involving the Division's Title III and Title IV enforcement authority.

36. Many advocates of President Bush's faith-based initiative have argued that, under existing law, faith-based organizations do not have to comply with state and local civil rights laws, including those that protect against sexual orientation discrimination in employment. Do you support the view that faith-based organizations receiving direct grant funds may circumvent state and local anti-discrimination laws when those laws conflict with the desire to make staffing decisions based on religion and/or religious beliefs? Please explain.

Answer: The Civil Rights Division has not had occasion to take a position on this issue.

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Attachments

to Civil Rights Division Oversight Hearing Questions for the Record

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Voting Section Objections 2001- 2007 by State

State	Subjurisdiction	Objection	Date
Alabama	Mobile County (2006-6792)	Change in method of election for filling vacancies occurring on the Mobile County Commission from special election to gubernatorial appointment	1-8-07
Arizona	State (2002-0276)	2001 legislative redistricting plan	5-20-02
	Coconino Association for Vocations, Industry, and Technology (Coconino Cty.) (2002-3844)	Method of election	2-4-03
California	Chualar Union Elementary School District (Monterey Cty.) (2000-2967)	Method of electing school trustees from districts to at large	3-29-02
Florida	State (2002-2637)	2002 redistricting plan for the Florida House of Representatives	7-1-02
Georgia	Ashburn (Turner Cty.) (94-4606)	Adoption of numbered posts and majority-vote requirement	10-1-01
	Putnam County (2002-2987 and 2988)	2001 redistricting plan	8-9-02
	Albany (Dougherty Cty.) (2001-1955)	2001 redistricting plan	9-23-02
	Marion County School District	2002 redistricting plan	10-15-02
	Randolph County (2006-3856)	Change in voter registration and candidate eligibility	9-12-06

Voting Section Objections 2001- 2007 by State

State	Subjurisdiction	Objection	Date
Louisiana	Minden (Webster Parish) (2002-1011)	2001 council redistricting plan	7-2-02
	Pointe Coupee Parish School District (Pointe Coupee Parish) (2002-2717)	2002 redistricting plan	10-4-02
	DeSoto Parish School District (DeSoto Parish) (2002-2926)	2002 redistricting plan	12-31-02
	Richland Parish School District (2002-3400)	2002 redistricting plan	5-13-02
	Tangipahoa Parish (2002-3135)	2003 redistricting plan	10-6-03
	Plaquemine (Iberville Parish) (2003-1711)	2003 redistricting plan	12-12-03
	Ville Platte (Evangeline Parish) (2003-4549)	2003 redistricting plan	6-4-04
	Delhi (Richland Parish) (2003-3795)	2003 redistricting plan	4-25-05
Mississippi	Kilmichael (Montgomery Cty.) (2001-2130)	Cancellation of the June 5, 2001, general election	12-11-01
North Carolina	Harnett County School District (2001-3769)	2001 redistricting plan (board of education)	7-23-02
	Harnett County School District (2001-3768)	2001 redistricting plan (board of commissioners)	7-23-02

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Voting Section Objections 2001- 2007 by State

State	Subjurisdiction	Objection	Date
South Carolina	Charleston (Berkeley and Charleston Ctys.) (2001-1578)	2001 redistricting plan	10-12-01
	Greer (Greenville and Spartanburg Ctys.) (2001-1777)	2001 redistricting plan	11-2-01
	Sumter County (2001-3865)	2001 redistricting plan	6-27-02
	Union County School District (Union Cty.) (2002-2379)	2002 redistricting plan	9-3-02
	Clinton (Laurens Cty.) (2002-1512) (2002-2706)	Annexations designation to Ward 1	12-9-02
	Cherokee County School District No. 1 (Cherokee Cty.) (2002-3457)	Reduction in the size of the school board	6-16-03
	North (Orangeburg Cty.)(2002-5306)	Annexations	9-16-03
	Charleston County School District (2003-2066)	Method of electing the board of trustees School Board members from nonpartisan to partisan elections	2-26-04
	Richland-Lexington School District No. 5 (2002-3766)	Act Number 326, (2002), Providing for a majority-vote requirement and numbered posts	6-25-04

Voting Section Objections 2001- 2007 by State

State	Subjurisdiction	Objection	Date
Texas	Haskell Consolidated Independent School District (Haskell, Knox, and Throckmorton Ctys.) (2000-4426)	Cumulative voting with staggered terms	9-24-01
	State (2001-2430)	Redistricting plan (House)	11-16-01
	Waller County (2001-3951)	2001 redistricting plans for the commissioners court, justice of the peace and constable districts	6-21-02
	Freeport (Brazoria Cty) (2002-1725)	Method of electing city council members	8-12-02
	North Harris Montgomery Community College District (2006-2240)	Reduction in polling places and early voting locations	5-5-06
Virginia	Northampton County (2001-1495)	Method of electing the board of supervisors from six single-member districts to three double-member districts and the 2001 redistricting plan for the board of supervisors	9-28-01
	Pittsylvania County (2001-2026)	2001 redistricting plan for the board of supervisors and school board	4-29-02
	Cumberland County (2001-2374)	2001 Redistricting plan for the board of supervisors	7-9-02
	Northampton County (2002-5693)	2002 redistricting plan for the board of supervisors	5-19-03

Voting Section Objections 2001- 2007 by State

State	Subjurisdiction	Objection	Date
	Northampton County (2003-3010)	Redistricting plan	10-21-03

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 12, 2006

The Honorable F. James Sensenbrenner
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter dated February 28, 2006, requesting information about the Civil Rights Division. You first requested information about the Division's procedures in Voting Rights Act cases.

The Voting Section of the Civil Rights Division employs a consistent and straightforward decision-making process. Regardless of the type of decision to be made – whether to file a lawsuit, to make a determination under Section 5, or to provide legal arguments – the decision-making process begins with a careful analysis of the facts and the legal elements at issue. Justice Department attorneys have great legal skill and knowledge. They are expected to identify all of the relevant facts, legal issues and other concerns that bear upon a law enforcement decision. This process often begins with a search for relevant and reliable evidence. Voting Section attorneys interview potential witnesses; locate, authenticate and review documents; corroborate potential facts; and track back from the many second- and third-hand allegations, regularly received by the Section, in order to identify trustworthy evidence. After identifying and obtaining evidence that bears upon a particular course of action, Section attorneys identify and explore potential defenses. They are responsible for making recommendations that follow the law as written by the Congress and interpreted by the judiciary. Varied and sometimes contradicting views are encouraged. Only after this careful process, does a matter move forward for decision.

Each stage of the decision-making process is interactive. The activity of Department attorneys is guided and encouraged at every step by more senior attorneys, typically Special Litigation Counsel and Deputy Section Chiefs, as well as by the Chief of the Voting Section. Each of these supervisors is a career attorney, as well, with significant experience in civil rights and voting rights litigation. The current Voting Section Chief has been with the Civil Rights Division for over 30 years. The Section Chief is responsible for presenting the Section recommendation to Division leadership. Under 28 C.F.R. 51.3, the Chief of the Voting Section

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has the authority to preclear state voting redistricting plans submitted under Section 5 of the Voting Rights Act.

The Department of Justice rightly expects the highest standards and strict adherence to the law by its attorneys. Nowhere is such fidelity more important than when addressing the sensitive areas touched on by the Voting Section, where we strive to maintain the highest standards of professionalism.

Citing *Johnson v. Miller,* 864 F. Supp. 1354 (S.D. Ga. 1994); *Miller v. Johnson,* 515 U.S. 900 (1995); *Abrams v. Johnson,* 521 U.S. 74 (1997); and *United States v. Jones,* 125 F.3d 1418 (11th Cir. 1997), you also requested information of any "instances, past or present, where the Civil Rights Division's legal work was either admonished in a court opinion or where the Division paid attorneys' fees or settlement fees over its involvement in a lawsuit." The following cases arguably contain "admonish[ments]" similar in degree to those in the cases that you cited or involve the payment of attorneys' or settlement fees for purportedly unfounded litigation. While the Department fully respects and accepts the court rulings, judicial statements, dispositions and payments in these matters, we do not concede by listing them here that each was warranted.

1. *Johnson v. Miller.* In 1992, the Voting Section of the Civil Rights Division precleared a legislative redistricting plan in Georgia, after rejecting two previous plans because there were only two majority black districts. In 1994, voters challenged the constitutionality of the state's Eleventh Congressional District, contending that it was a racial gerrymander, and sought to enjoin its use in congressional elections. Shortly after the case was filed, the Voting Section intervened as a defendant. The plaintiffs prevailed. 864 F. Supp. 1354 (S.D. Ga. 1994) (Copy of opinion enclosed as Attachment A). As relevant to your request, the court stated, "[d]uring the redistricting process, [the ACLU attorney] was in constant contact with . . . the DOJ line attorneys overseeing preclearance of Georgia's redistricting efforts. . . . The Court was presented with a sampling of these communiques, and we find them disturbing. It is obvious from a review of the materials that [the ACLU attorney's] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities." *Id.* at 136; *see also id.* (Voting Section attorneys' "professed amnesia [about their relationship with the ACLU attorney] less than credible"); *id.* at 1364 ("Though counsel for the United States objected to Plaintiffs' 'characterization that the Justice Department "suggested things" [to the General Assembly],' it is disingenuous to submit that DOJ's objections were anything less than implicit commands.") (citation omitted); *id.* at 1367-68 ("the Department of Justice had cultivated a number of partisan 'informants' within the ranks of the Georgia

legislature". . . ."We find this practice disturbing."); *id.* at 1368 ("the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment"); *id.* ("It is surprising that the Department of Justice was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote.").

In 1994, the United States appealed *Johnson v. Miller* to the U.S. Supreme Court, arguing that evidence of a legislature's deliberate use of race in redistricting is insufficient to establish a racial gerrymander claim. The Court found for the plaintiffs-appellees. *Miller v. Johnson*, 515 U.S. 900, 910 (1995) (Copy of opinion enclosed as Attachment B). As relevant to your request, the Court stated, "[i]nstead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts. Although the Government now disavows having had that policy and seems to concede its impropriety, the District Court's well-documented factual finding was that the Department did adopt a maximization policy and followed it in objecting to Georgia's first two plans." *Id.* at 924-25 (citations omitted). *See also id.* at 926 ("The Justice Department's maximization policy seems quite far removed from [Section 5 of the VRA]'s purpose."); *id.* at 927 ("the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Act, once upheld as a proper exercise of Congress' authority under [Section] 2 of the Fifteenth Amendment into tension with the Fourteenth Amendment.") (citation omitted). In 1995, the Department agreed to pay $202,000 to settle plaintiffs' interim claims for attorneys' fees. In 1997, the Department agreed to pay an additional $395,000 to settle plaintiffs' remaining claims for attorneys' fees, expenses and costs.

2. *Hays v. State of Louisiana.* In 1992, the Voting Section of the Civil Rights Division precleared a redistricting plan for Louisiana. The same year, voters sued Louisiana, contending, among other things, that the plan constituted impermissible gerrymandering in violation of the Equal Protection Clause. The Voting Section initially participated as *amicus curiae* in September 1992 and subsequently intervened as a defendant in July 1994. The district court held the plan to be unconstitutional. 839 F. Supp. 1188 (W.D. La. 1993) (Copy of opinion enclosed as Attachment C). As relevant to your request, the court stated, "neither Section 2 nor Section 5 of the Voting Rights Act justify the [U.S. Attorney General's Office's] insistence that Louisiana adopt a plan with two safe, black majority districts." *Id.* at 1196 n.21; *see also id.* (DOJ's position was "nothing more than...'gloss' on the Voting Rights Act – a gloss unapproved by Congress and unsanctioned by the courts."); *id.* ("[the Assistant Attorney General's Office] arrogated the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies.").

Louisiana enacted a new redistricting plan. The district court struck down the revised plan. 936 F. Supp. 360 (W.D. La. 1996) (*per curiam*) (Copy of opinion enclosed as Attachment D). As relevant to your request, the court stated, "the Justice Department impermissibly encouraged -- nay, mandated -- racial gerrymandering." *Id.* at 369. The court also noted that "the Legislature succumbed to the illegitimate preclearance demands of the Justice Department." *Id.* at 372; *see also id.* at 363-64, 368-70. In 1999, the Department agreed to pay $1,147,228 to settle claims for attorneys' fees, expenses, and costs.

3. *Scott v. Department of Justice.* On August 12, 1992, the Voting Section of the Civil Rights Division precleared a redistricting plan in Florida. In 1994, voters sued the Department and the State of Florida, contending that the state's configuration for a certain Senate district violated the Equal Protection Clause. After the Supreme Court's decision in *Miller v. Johnson*, 515 U.S. 900 (1995), and *United States v. Hays*, 515 U.S. 737 (1995), the parties agreed to proceed by mediation. The district court approved the mediated settlement (which did not address attorneys' fees) in March 1996. *Scott v. Department of Justice*, 920 F. Supp. 1248 (M.D. Fla. 1996). In 1999, the Department and plaintiffs settled plaintiffs' claims for attorneys' fees, expenses and costs for $95,000.

4. *United States v. City of Torrance.* In 1993, the Employment Litigation Section of the Civil Rights Division brought suit, alleging that the City of Torrance, California, had engaged in a pattern or practice of discrimination in its hiring of new police officers and firemen. The defendant prevailed. The district court concluded that the Division's actions violated Rule 11 of the Federal Rules of Civil Procedure, or alternatively 42 U.S.C. 2000e-5(k), and awarded attorneys' fees. The Ninth Circuit affirmed the district court. 2000 WL 576422 (9th Cir. May 11, 2000) (Copy of opinion enclosed as Attachment E). The court stated that attorneys' fees may be awarded in a Title VII case when the plaintiff's action is "frivolous, unreasonable, or without foundation." *Id.* at *1 (citation quotation marks omitted). As relevant to your request, the court stated, "[i]n this case, the record amply supports the district court's determination that this standard was satisfied, that is, 'that the Government had an insufficient factual basis for bringing the adverse impact claim' and 'that the Government continued to pursue the claim . . . long after it became apparent that the case lacked merit.'" *Id.* The Ninth Circuit affirmed the district court's award, in 1998, of $1,714,727.50 in attorneys' fees.

5. *United States v. Jones.* In 1993, the Voting Section of the Civil Rights Division sued county officials in Dallas County, Alabama, under Section 2 of Voting Rights Act and the Fourteenth and Fifteenth Amendments. The Division alleged that at least fifty-two white voters who did not reside in a black-majority district

were improperly permitted to vote in that district. The defendants prevailed and the district court ordered the government to pay attorneys' fees under the Equal Access to Justice Act ("EAJA"), 22 U.S.C. 2412(d)(1(A). The Eleventh Circuit affirmed. As relevant to your request, the court stated that a "properly conducted investigation would have quickly revealed that there was no basis for the claim that the Defendants were guilty of purposeful discrimination against black voters. . . . The filing of an action charging a person with depriving a fellow citizen of a fundamental constitutional right without conducting a proper investigation of its truth is unconscionable. . . . Hopefully, we will not again be faced with reviewing a case as carelessly instigated as this one." 125 F.3d 1418, 1431 (11th Cir. 1997) (Copy of opinion enclosed as Attachment F). In 1995, the district court ordered the Department to pay $73,038.74 in attorneys' fees and expenses. In 1998, the appellate court ordered the Department to pay an additional $13,587.50 in attorneys' fees.

6. *Motoyoshi v. United States*. In 1993, the Office of Redress Administration of the Civil Rights Division denied compensation to a Japanese-American man relocated during World War II. He filed suit challenging the denial. The district court granted the plaintiff's motion for summary judgment. As relevant to your request, the court stated that the Department's "failure to consider and determine plaintiff's eligibility for compensation . . . was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 33 Fed. Cl. 45, 52 (1995) (Copy of opinion enclosed as Attachment G). In 1995, the court ordered the Department to pay $8,437 in attorneys' fees under the EAJA.

7. *United States v. Tucson Estates Property Owners Association, Inc.* In 1993, the Housing and Civil Enforcement Section of the Civil Rights Division brought suit alleging that an owners' association in Tucson violated the Fair Housing Act. The defendants prevailed on summary judgment. *United States v. Tucson Estates Prop. Owners Ass'n, Inc.* No. 93-503, slip op. (D. Ariz. Nov. 7, 1995) (Copy of order is enclosed as Attachment H). As relevant to your request, the court stated, "it is not a reasonable *legal* basis that the United States lacked in this case; it was the *factual* basis upon which its legal theory rested that was unreasonable. Based on the totality of the circumstances present prior to and during litigation, this Court finds that the United States' position was not substantially justified." *Id.* at 5 (emphasis in original) (citation and quotation marks omitted). In 1995, the court ordered the Department to pay $150,333.07 in attorneys' fees and expenses under the EAJA.

8. *United States v. Laroche*. In 1993, the Housing and Civil Enforcement Section of the Civil Rights Division brought a Fair Housing Act suit in federal district court in Oregon. The defendants prevailed on summary judgment. The court awarded

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defendants $17,885.78 in attorneys' fees and costs. The United States appealed. During the pendency of the appeal, the parties entered into a settlement and filed a joint stipulation of dismissal on April 24, 1995. The district court withdrew and rendered void its rulings on summary judgment and attorneys' fees and dismissed the case on December 28, 1995.

9. *Smith v. Beasley* and *Able v. Wilkins* (consolidated cases). In 1994, the Voting Section of the Civil Rights Division precleared South Carolina State House districts, and then precleared State Senate Districts in 1995. Voters challenged the constitutionality of South Carolina House and Senate districts created by the state legislature in two separate actions, which were consolidated. The Voting Section intervened as a defendant in the House action on May 3, 1996. On September 27, 1996, the court found that six of nine House districts and all three Senate districts were unconstitutional as they were drawn with race as the predominant factor. As relevant to your request, the court stated, "[t]he Department of Justice's advocacy position is evidenced in many memoranda, letters and notes of telephone conversations, but most particularly by the apparent epidemic of amnesia that has dimmed the memory of many DOJ attorneys who were involved with South Carolina's efforts to produce a reapportionment plan that would pass preclearance." 946 F. Supp. 1174, 1190-91 (D.S.C. 1996) (Copy of opinion enclosed as Attachment I); *see also id.* at 1208 ("[t]he Department of Justice in the present case, as it had done in *Miller*, misunderstood its role under the preclearance provisions of the Voting Rights Act. Here, Department of Justice attorneys became advocates for the coalition that was seeking to maximize the number of majority [black voting age population] districts in an effort to achieve proportionality. . . . It is obvious that the Voting Section of the Department of Justice misunderstands its role in the reapportionment process."). In 1996, the Department settled plaintiffs' claims for attorneys' fees and costs for $282,500.

10. *United States v. Weisz.* In 1994, the Housing and Civil Enforcement Section of the Civil Rights Division initiated a religious discrimination suit under the Fair Housing Act. The district court granted defendant's motion for judgment on the pleadings. 914 F. Supp. 1050, 1055 (S.D.N.Y. 1996). In 1997, the Department settled the issue of attorneys' fees and costs for $7,857.50.

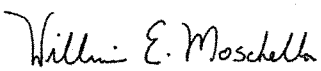
11. *Abrams v. Johnson.* In 1996, the United States appealed a later proceeding in *Johnson v. Miller* to the Supreme Court, alleging that the district court's plan did not defer to the legislative preferences of the Georgia Assembly because it had only one majority-black district when all previous Assembly plans had two, and that it diluted minority voting strength by not adequately representing the voting interests of Georgia's black population, in violation of the Voting Rights Act. The Court found for the plaintiffs-appellees. 521 U.S. 74 (1997) (Copy of opinion

> enclosed as Attachment J). As relevant to your request, the court made a number of statements. *E.g., id.* at 90 ("Interference by the Justice Department, leading the state legislature to act based on an overriding concern with race, disturbed any sound basis to defer to the 1991 unprecleared plan; the unconstitutional predominance of race in the provenance of the Second and Eleventh Districts of the 1992 precleared plan caused them to be improper departure points; and the proposals for either two or three majority-black districts in plans urged upon the trial court in the remedy phase were flawed by evidence of predominant racial motive in their design."); *id.* at 93.

In total, the Division was ordered to pay or agreed to pay $4,107,595.09 from 1993 to 2000 in the eleven cases specified above. In searching for instances where the "Division's legal work" has been "admonished in a court opinion," we have diligently searched through both published and unpublished judicial decisions available on electronic databases. In searching for instances "where the Division paid attorneys' fees or settlement fees over its involvement in a lawsuit," we also have diligently searched through financial records maintained by the Division for such expenditures of government funds. We note that these records are only complete for the past thirteen fiscal years. Consistent with your request, our summary does not include cases where the Department was only assessed costs pursuant to Fed. R. Civ. P. 54(d)(1), which provides for the prevailing party in an action to be awarded costs other than attorneys' fees by the losing side "as of course." Please be aware, however, that the amounts paid by the Division in seven of the eleven cases listed above may include such costs because those settlement agreements or court orders did not separate costs from attorneys' fees. In the event that we discover any additional information responsive to your February 28, 2006, letter, we will supplement this letter in a timely manner.

Thank you for the opportunity to address the work of the Civil Rights Division. Please do not hesitate to contact the Department of Justice if we can be of further assistance in this or any other matter.

Sincerely,



William E. Moschella
Assistant Attorney General

Attachments

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

Section	FY 2007	FY 2006	FY 2005	FY 2004	FY 2003	FY 2002	FY 2001	FY 2000	FY 1999	FY 1998	FY 1997	FY 1996	FY 1995
AAG	10	8	10	10	12	11	10	11	12	14	12	12	12
ADM	2	2	2	2	2	2	3	3	3	4	3	3	3
APP	19	19	21	22	19	17	18	17	18	18	18	18	18
CAO	11	10	11	11	11	13	12	12	11	12	5	6	6
COR	8	10	10	11	9	10	10	10	7	7	7	7	9
CRM	51	53	52	57	56	52	50	46	35	31	31	29	28
DRS	38	43	45	42	40	43	44	37	32	31	29	29	22
EDO	19	17	19	19	19	20	23	20	17	18	18	18	17
EMP	39	34	34	35	34	36	38	30	32	31	28	30	34
HCE	40	45	47	45	40	44	48	43	38	37	39	38	37
OSC	11	14	14	13	14	12	10	10	10	8	10	10	15
SPL	37	39	44	46	45	45	33	33	28	26	25	24	20
VOT	34	33	37	36	38	42	41	35	31	31	34	30	32
Total	319	327	346	349	339	347	340	307	274	268	259	254	253

Figures represent the number of attorneys on board during the fiscal year

AMICUS BRIEFS FILED BY APPELLATE SECTION UNDER CURRENT ADMINISTRATION

2001

A. Supreme Court

1. *Pollard v. E.I. DuPont de Nemours Co.*, No. 00-763 (filed 02/22/01)

The issue in this case was whether an award of front pay in an action brought under Section 706 of Title VII of the Civil Rights Act of 1964 is subject to the cap on compensatory and punitive damages established by the Civil Rights Act of 1991, 42 U.S.C. 1981a(b)(3). The United States, along with the Equal Employment Opportunity Commission, argued that front pay is a form of equitable relief not subject to the statutory cap for certain compensatory damages under Section 1981a(b)(3).

2. *Arons v. Office of Disciplinary Counsel*, No. 00-509 (filed 05/10/01)

The issue in this case was whether the Supreme Court should review a decision of the Supreme Court of Delaware holding that the Individuals with Disabilities Education Act (IDEA) establishes a clear federal right to non-lawyer representation in those proceedings that preempts a contrary state rule against the unauthorized practice of law. In response to the Supreme Court's request for its views, the United States argued that the Court should not review the decision of the Supreme Court of Delaware because (1) the decision did not create any judicial conflict; (2) the practical problem created by the decision was limited in scope because of the relatively small number of IDEA hearings; and (3) to the extent that the decision did present practical problems, the Delaware Supreme Court was willing to reconsider its decision.

3. *Edelman v. Lynchburg College*, No. 00-1072 (filed 06/01/01)

The issue in this case was whether an EEOC regulation, 29 C.F.R. 1601.12(b), permitting the verification of a charge of discrimination to relate back to the date of the filing of the initial complaint, is contrary to Title VII of the Civil Rights Act of 1964 and, therefore, invalid. In response to the Supreme Court's request for its views, the United States argued the Court should grant certiorari because the EEOC regulation is consistent with Title VII.

4. *Edelman v. Lynchburg College*, No. 00-1072 (filed 08/30/01)

The issue in this case was whether an EEOC regulation, 29 C.F.R. 1601.12(b), permitting the verification of a charge of discrimination to relate back to the date of the filing of the initial complaint, is contrary to Title VII of the Civil Rights Act of 1964 and, therefore, invalid. Following the Supreme Court's grant of the petition for a writ of certiorari, the United States argued that, while Title VII does require a charge of discrimination to be filed with the EEOC within the statutory limitations period and

verified before the EEOC may take formal action on it, the statute does not require the charge to be verified during the statutory limitation period. The United States argued that the EEOC regulation is consistent with Title VII and is therefore entitled to deference.

5. *Swierkiewicz v. Sorema*, No. 00-1853 (filed 11/16/01)

The issue in this case was whether a complaint alleging employment discrimination under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 must plead specific facts showing the plaintiff can establish a *prima facie* case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The United States argued that the Second Circuit erred in requiring a plaintiff to allege substantially more in a complaint than is required by Fed. R. Civ. P. 8(a), as interpreted by the Supreme Court in *Conley v. Gibson*, 355 U.S. 41 (1957).

B. Courts of Appeals

1. *Cason v. Nissan Motor Acceptance Corp. (NMAC)*, No. 00-6483 (6th Cir.) (filed 02/16/01)

The issue in this case was whether the district court abused its discretion in certifying a plaintiff class in a lawsuit challenging alleged racial discrimination under the Equal Credit
Opportunity Act. The Division argued that the district court did not abuse its discretion in certifying a nationwide plaintiff class of African Americans who obtained credit from NMAC, because the case involved discrimination claims focusing on the class-wide effect of NMAC's policy.

2. *Coleman v. General Motors Acceptance Corp. (GMAC)*, No. 00-6484 (6th Cir.) (filed 03/14/01)

The issue in this case was whether the district court abused its discretion in certifying a plaintiff class in a lawsuit challenging alleged racial discrimination under the Equal Credit
Opportunity Act. The Division argued that the district court did not abuse its discretion in certifying a nationwide plaintiff class of African Americans who obtained credit from GMAC, because the case involved discrimination claims focusing on the class-wide effect of GMAC's policy.

3. *Fair Housing of Marin v. Combs*, No. 00-15925 (9th Cir.) (filed 03/26/01)

The issue in this case was whether the district court's factual findings support its legal conclusion that plaintiff, a non-profit fair housing organization, had standing to bring a Fair Housing Act suit alleging racial discrimination in renting apartments. The Division argued that the district court's finding that the defendant's illegal racial discrimination interfered with the organization's attempts to assist tenants in securing

non-discriminatory housing was a sufficient basis for organizational standing under the Fair Housing Act.

4. *Rendon v. Valleycrest Productions*, No. 01-11197 (11th Cir.) (filed 04/23/01)

The issue in this case was whether Title III of the Americans with Disabilities Act (ADA) applies to the process by which a production company selects contestants for a television quiz show. The Division argued that Title III applies to discriminatory eligibility criteria that tend to screen out individuals with disabilities, even when those criteria are implemented over the telephone. The Division also argued that Title III applies in this case because the defendants' screening process is a necessary prerequisite for participating in the televised quiz show in defendants' studio, and because that contest is a service or privilege of a place of public accommodation within the meaning of the ADA.

5. *Barnett v. Memphis City Schools*, No. 01-5050 (6th Cir.) (filed 05/03/01)

The issues in this case were (1) whether the school system violated the procedural requirements of the Individuals with Disabilities Education Act (IDEA); and (2) whether the school system failed to provide one student a free appropriate public education (FAPE) under the IDEA, where there is objective evidence spanning more than five years that the student either regressed in attaining educational goals or failed to make meaningful educational progress throughout his school career. The Division argued that procedural errors the school system committed, including failing to undertake proper evaluations and adjust the student's educational plan, constitute serious statutory violations. The Division also argued that the student did not receive a FAPE because he received no meaningful educational benefit from his educational plan, based on the objective test results, and that the school system was obligated to alter his plan when its own testing revealed that he was not progressing.

6. *Legarreta v. Nelson*, No. 01-50301 (5th Cir.) (filed 08/03/01)

The issues in this case were (1) whether the district court erred in ruling that plaintiffs seeking a declaratory judgment that a change in voting is subject to preclearance under Section 5 of the Voting Rights Act of 1965 must allege that the change was motivated by racial discrimination; and (2) whether the district court erred in ruling that plaintiffs' claim challenging the appointment of a master to oversee the actions of an elected school board was so insubstantial as to justify refusal to convene a three-judge district court under Section 5. The Division argued that the district court erred in refusing to impanel a three-judge court to hear plaintiffs' Section 5 coverage claim.

7. *Barden v. City of Sacramento*, No. 01-15744 (9th Cir.) (filed 08/06/01)

The issue in this case was whether the provision, construction, and maintenance of a system of public sidewalks is a "program or activity" subject to the accessibility

requirements of Section 504 of the Rehabilitation Act, or one of a city's "services, programs, or activities" under Title II of the Americans with Disabilities Act (ADA). The Division argued that the City's program of providing, constructing, and maintaining a system of public sidewalks is both a "program or activity" under Section 504 and a "service, program, or activity" under Title II.

8. *Stevens v. Premier Cruises, Inc.*, No. 98-5913 (11th Cir.) (filed 09/21/01)

The issues in this case were (1) whether customary international law establishes that the flag state of a vessel has the responsibility for regulating and implementing any changes to the physical aspects of a vessel; and (2) whether application of the Americans with Disabilities Act (ADA) to foreign-flag cruise ships would conflict with that law. The United States argued that customary international law and U.S. treaties authorize both flag states and port states to regulate the physical aspects of passenger vessels. The United States also argued that there is no conflict, as a matter of law, between these international law principles and enforcement of the "barrier removal" provisions of the ADA against a foreign-flag cruise ship accepting passengers in U.S. ports.

9. *Porter v. Manhattan Beach Unified School District*, No. 01-55032 (9th Cir.) (filed 10/01/01)

The issue in this case was whether a district court has jurisdiction over a civil action alleging violations of the Individuals with Disabilities Education Act (IDEA) when the complaining party has not exhausted certain administrative "due process" procedures offered by the State. The Division argued that the district court erred in requiring exhaustion of this process, which is not identified in the IDEA as a precondition to suit.

10. *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, No. 01-35554 (9th Cir.) (filed 10/19/01)

The issues in this case were (1) whether, in the context of a movie theater, the regulation's requirement that "lines of sight" be "comparable" to those enjoyed by members of the general public means only that wheelchair users must be provided an unobstructed view of the movie screen; and (2) whether, in the context of stadium-style movie theaters, the regulation's requirement that wheelchair areas be "an integral part of any fixed seating plan" is satisfied if wheelchair users are excluded altogether from the stadium section of the theaters where the vast majority of the public sits. The Division argued that the district court incorrectly held (1) that the regulation's "lines of sight" mandate requires only that wheelchair users have an unobstructed view of the movie screen and (2) that failing to place wheelchair seating in the stadium portion of the theaters does not, as a matter of law, violate the regulation's requirement that wheelchair areas "be an integral part of any fixed seating plan." The Division also argued that the comparable "lines of sight" portion of the regulation requires that viewing angles for wheelchair users be comparable to those enjoyed by other patrons.

11. *Litman v. George Mason University*, No. 01-2128 (4th Cir.) (filed 12/03/01)

The issue in this case was whether Section 901 of Title IX of the Education Amendments of 1972, and thus the implied private right of action for violations of Section 901, encompasses a prohibition on retaliation for complaining about sex discrimination. The Division argued that the language, structure, history, and consistent administrative interpretation of Title IX show that Title IX itself prohibits retaliation, and thus individuals may bring a suit in federal court under Title IX seeking damages against those entities that intentionally retaliate against them for complaining about sex discrimination.

2002

A. Supreme Court

1. *Hope v. Pelzer*, No. 01-309 (filed 02/19/02)

The issues in this case were (1) whether the Eleventh Circuit correctly held that state officials sued in their individual capacities under 42 U.S.C. 1983 are entitled to qualified immunity unless they have violated statutory or constitutional rights clearly established by a case presenting facts materially similar to those in plaintiff's case; and (2) whether tying a prisoner to a hitching post for hours in the hot sun violates clearly established constitutional rights for purposes of qualified immunity under 42 U.S.C. 1983. The United States argued that the Eleventh Circuit applied an unduly stringent standard for determining whether the law was clearly established for purposes of a qualified immunity defense and that the use of the hitching post violated clearly established Eighth Amendment rights.

2. *Barnes v. Gorman*, No. 01-682 (filed 02/27/02)

The issue in this case was whether a punitive damages remedy may be imputed to Congress in an inferred private right of action under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. The United States argued that punitive damages are not available under either Title II or Section 504.

3. *Memorial Hospital Ass'ns v. Humphrey*, No. 00-1860 (filed 03/07/02)

The issues in this case were (1) whether an employer must offer a reasonable accommodation to an employee before terminating her employment even when the employee knows about and has previously rejected the reasonable accommodation; and (2) whether an indefinite leave of absence that might plausibly allow an employee to return to work qualifies as a reasonable accommodation. In response to the Supreme Court's invitation for its views, the United States argued the facts of the case do not present the first issue because the employee did not "reject" the accommodation of a leave of absence, but rather agreed to try an alternative accommodation first. When that accommodation failed to work, the employer refused to discuss any further possible accommodations. The United States also argued that in these circumstances, neither the

text of the Americans with Disabilities Act nor its implementing regulations support the employer's argument that the employee forfeited her right to a reasonable accommodation. On the second question, the United States argued the court of appeals did not address whether an "indefinite" leave of absence could be a reasonable accommodation. The United States also argued that to the extent the court of appeals held that a leave of absence can be a reasonable accommodation if it might "plausibly" work, that holding is in conflict with another circuit precedent that applies a "likely" standard, but does not present an issue upon which there is a deep or considered split among courts of appeals. Accordingly, the United States urged the Court to deny the petition for a writ of certiorari.

4. *Commonwealth of Virginia v. Black*, No. 01-1107 (filed 08/09/02)

The issue in this case was whether a state statute that prohibits the burning of a cross with the intent to intimidate violates the First Amendment. The United States argued that a statute may properly bar intimidation by cross burning as a regulation of conduct, by broadly regulating threatening behavior, or by focusing on cross burning as a particular form of threatening conduct.

5. *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, No. 01-1269 (filed 09/06/02)

The issue in this case was whether the court of appeals erred in holding that, in considering a claim against a city for intentional discrimination from the delay arising out of a facially-neutral, citizen-initiated referendum petition, a court may inquire into the intent of the citizens supporting the referendum petition and impute that intent to city officials, who had no discretion under the City's Charter but to delay proceedings in response to the properly filed petition. The United States argued that the First Amendment protects the actions of city officials taken to give effect to a facially-neutral, citizen-initiated referendum petition and that such actions would be unlawful only upon a showing that, although the petition was facially neutral, the officials' actions were nonetheless a sham designed to further unlawful discrimination. The United States also argued that, because the building permit delay here followed as a matter of course from the filing of the petition, the court of appeals erred in finding evidence of intentional discrimination.

6. *Meyer v. Holley*, No. 01-1120 (filed 09/09/02)

The issues in this case were (1) whether the Fair Housing Act and implementing regulations promulgated by the Department of Housing and Urban Development establish broader rules of vicarious liability than would apply under general principles of agency and corporate law; and (2) whether the court of appeals' judgment in this case, which reversed the district court's dismissal of respondents' suit and remanded the case for further proceedings, should be affirmed. The United States argued the Fair Housing Act and implementing regulations are consistent with general principles of agency and corporation law and, therefore, shield corporate officers and owners from personal

liability for the acts of the corporation's employees. The United States also argued that further proceedings are warranted to determine whether petitioner is subject to personal liability under corporate veil-piercing principles.

7. *Branch v. Smith*, Nos. 01-1437 & 01-1596 (filed 09/30/02)

The issues in this case were (1) whether the Attorney General is required under Section 5 of the Voting Rights Act to review a voting change subject to a federal court injunction that the jurisdiction involved has not appealed; and (2) whether the districting plan imposed by the state court in this case was precleared under Section 5 when the Attorney General requested additional information from the State rather than issuing an objection within 60 days of the initial submission. The United States argued that the state court plan was not precleared by operation of law when the Department of Justice requested additional information from the State about its submission, rather than objecting to the plan within the 60-day statutory period for ruling on submissions. The United States also argued that the basis for the Attorney General's decision to request additional information extends the 60-day review period and is not subject to judicial review.

B. Courts of Appeals

1. *Pace v. Bogalusa City School Board*, No. 01-31026 (5th Cir.) (filed 01/09/02)

The issue in this case was whether a finding that a child with a disability has received meaningful educational benefits from his individualized educational program, thereby satisfying the Individuals with Disabilities Education Act (IDEA), necessarily precludes claims alleging violations of the Americans with Disabilities Act (ADA) or Section 504 of the Rehabilitation Act based on the school's lack of accessibility. The Division argued that the district court improperly precluded plaintiff's ADA and Section 504 claims because those claims, which related to the general accessibility of the school, were legally distinct from the (IDEA) claims, which focused on the school's provision of educational services.

2. *Communities for Equity v. Michigan High School Athletic Ass'n,* No. 02-1127 (6th Cir.) (filed 02/28/02)

The issues in this case were (1) whether a district court order requiring defendants to develop a remedial plan for violations of Title IX of the Education Amendments of 1972, the Fourteenth Amendment, and a state civil rights statute was a final, appealable order under 28 U.S.C. 1291; and (2) whether the order was appealable as an injunction under 28 U.S.C. 1292(a)(1). The Division argued that the district court's order was not a final order under Section 1291, and was not appealable under Section 1292(a)(1) because it did not contain other injunctive relief or specify the nature, requirements, and extent of the remedial plan.

3. *Peters v. School Board of the City of Virginia Beach*, No. 01-2413 (4th Cir.) (filed 02/28/02)

The issue in this case was whether Section 601 of Title VI of the Civil Rights Act of 1964, and thus the implied private right of action for violations of Section 601, encompasses a prohibition on retaliation for opposing unlawful racial discrimination. The Division argued that the language, structure, history, and consistent administrative interpretation of Title VI show that Title VI itself prohibits retaliation, and thus individuals may bring a suit in federal court under Title VI seeking damages against those entities that intentionally retaliate against them for opposing racial discrimination.

4. *Old Person v. Brown*, No. 02-35171 (9th Cir.) (filed 03/26/02)

The issue in this case was whether a district court may decline to award immediate relief for a violation of Section 2 of the Voting Rights Act, and permit an illegal plan to be used in an upcoming election, because a new plan to be adopted by state officials following the election might cure the dilution of Indian voting strength for subsequent elections. The Division argued that the district court decision violates well-established principles requiring that relief for a violation of voting rights under Section 2 be both complete and prompt. The Division also argued that the district court committed legal error in concluding that factors such as the imminence of the next election and administrative convenience for candidates and state officials in preparing for the election should be taken into account in determining whether there is a Section 2 violation.

5. *Henrietta D. v. Giuliani*, Nos. 02-7022 & 02-7074 (2d Cir.) (filed 05/29/02)

The issue in this case was whether an individual may sue a state official in his official capacity to enjoin continuing violations of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. The Division argued that state officials sued in their official capacities are appropriate defendants under these anti-discrimination statutes, and therefore there is no need to reach the question whether the State itself would be immune from suit under the Eleventh Amendment.

6. *Boudreau v. Ryan*, No. 02-1730 (7th Cir.) (filed 06/19/02)

The issue in this case was whether an individual may sue a state official in his official capacity to enjoin continuing violations of Title II of the Americans with Disabilities Act. The Division argued that state officials sued in their official capacities are appropriate defendants under this anti-discrimination statute, and that the court's contrary decision in *Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000), should be overruled because it was wrong when decided and has been further undermined by intervening Supreme Court decisions.

7. *Girty v. School District of Valley Grove*, No. 01-3934 (3d Cir.) (filed 06/28/02)

The issue in this case was whether the district court correctly determined that Valley Grove failed to demonstrate that Charles Girty, a child with a disability, could not be educated satisfactorily in a regular education setting with supplementary aids and services. The Division argued that (1) the state appeals panel used an incorrect legal standard when it reversed the hearing officer; (2) the district court's decision is not clearly erroneous; and (3) the relief entered by the district court is proper.

8. *Anderson v. Rochester-Genesee Regional Transportation Authority*, No. 01-9105 (2d Cir.) (filed 10/25/02)

The issues in this case were (1) whether 49 C.F.R. 37.131(b) obligates public authorities to provide paratransit service to all eligible persons requesting next-day rides; (2) how 49 C.F.R. 37.131(b) interacts with the "capacity constraints" provision of 49 C.F.R. 37.131(f); and (3) how a paratransit provider should determine if it has denied a "substantial number" of trips in violation of 49 C.F.R. 37.131(f)(3)(i)(B). The Division argued that 49 C.F.R. 37.131(b) requires a provider to formulate and implement a plan to meet 100% of anticipated demand for next-day paratransit service, but that 49 C.F.R. 37.131(f) makes clear that an occasional failure to meet 100% of anticipated demand will not constitute a "pattern or practice" violation of the regulations, as long as the number of trip denials is insubstantial.

9. *Bronx Household of Faith v. Board of Education of the City of New York*, No. 02-7781 (2d Cir.) (filed 10/25/02)

The issue in this case was whether defendants engaged in viewpoint discrimination when they barred a religious organization from renting school facilities for weekly meetings, which were to consist of singing, religious instruction, prayer and worship, socializing, and organization of charitable activities, pursuant to a community-use policy permitting "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," but barring "religious services or religious instruction." The Division argued that, consistent with *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001), the district court correctly held that Bronx Household established a likelihood of success in proving that the school district engaged in viewpoint discrimination by denying it access to school property. Accordingly, the Division argued that the preliminary injunction entered in favor of Bronx Household should be affirmed.

10. *Johnson v. Bush*, No. 02-14469 (11th Cir.) (filed 11/26/02)

The issues in this case were (1) whether the 1968 Florida constitutional provision barring felons from voting violates the Equal Protection Clause because it was motivated by racial discrimination; and (2) whether that provision violates the results test of Section 2 of the Voting Rights Act because of the manner in which it interacts with Florida's alleged discriminatory criminal justice system. The Division argued that plaintiffs' equal protection claim fails because the record is devoid of evidence that the legislature acted with discriminatory intent when it revised the State constitution in 1968. The Division

also argued that plaintiffs' Section 2 claim fails because the statistics they presented do not establish that the Florida criminal justice system is operated in a racially discriminatory manner.

11. *Meineker v. Hoyts Cinemas Corp.*, No. 02-9034 (2d Cir.) (filed 11/27/02)

The issues in this case were (1) whether the district court erred in concluding, on a motion for summary judgment, that defendant's stadium-style movie theaters provide patrons in
wheelchairs "lines of sight comparable to those for members of the general public," as required by Standard 4.33.3 of the Department of Justice's ADA regulations; and (2) whether the district court erred in concluding that the wheelchair spaces in defendant's stadium-style movie theaters are an "integral" part of the fixed seating plan, as required by Standard 4.33.3, even though in 14 of the 18 theaters defendant provides no wheelchair seating in the stadium sections where the vast majority of the public sits. The Division argued that the district court misconstrued the regulation, which the Department of Justice has interpreted as requiring that wheelchair users in movie theaters be provided lines of sight within the range of viewing angles offered to most patrons of the cinema and that wheelchair seating in a stadium-style theater be integrated into the elevated, stadium portion of the auditorium.

12. *Radaszewski v. Garner*, No. 02-3657 (7th Cir.) (filed 11/29/02)

The issue in this case was whether suits under Title II of the Americans with Disabilities Act may be brought against state officials in their official capacities for prospective relief. The Division argued that state officials sued in their official capacities are appropriate defendants under this anti-discrimination statute. The Division also argued that *Walker* v. *Snyder*, 213 F.3d 344 (7th Cir. 2000), which held that official-capacity suits are not available to enforce Title II, should be overruled because it was wrong when decided and has been further undermined by intervening Supreme Court decisions.

2003

A. Supreme Court

1-2. *Gratz v. Bollinger*, No. 02-516, and *Grutter* v. *Bollinger*, No. 02-241 (filed 01/16/03)

The issue in these cases was whether the use of racial preferences in student admissions to a state university and law school violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, or 42 U.S.C. 1981. The United States argued that the race- and ethnic-conscious admissions programs used at the University of Michigan College of Literature, Science, and Arts, and at the University of Michigan Law School, are unconstitutional because they amount to quotas and because race-neutral alternatives are available.

3. *Desert Palace, Inc. v. Costa*, No. 02-679 (filed 02/28/03)

The issue in this case was whether a plaintiff alleging gender discrimination in violation of Title VII must adduce direct evidence of discriminatory intent to trigger application of the mixed-motive analysis under *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). The United States argued that *Price Waterhouse* requires plaintiffs in Title VII cases to proffer direct evidence of discriminatory intent as a prerequisite to establishing liability under the mixed-motive framework, and that the 1991 amendments to Title VII did not abrogate the need for a heightened evidentiary standard for plaintiffs in mixed-motive cases.

4. *Raytheon v. Hernandez*, No. 02-749 (filed 05/09/03)

The issue in this case was whether an employer's general policy against rehiring former employees who were discharged for misconduct, when applied to a former drug user who
was lawfully discharged for using illegal drugs, constitutes "disparate treatment" prohibited by Title I of the Americans with Disabilities Act (ADA). The United States argued that the Ninth Circuit erred in concluding that Raytheon's no-rehire policy violates the ADA because, in refusing to rehire Hernandez, Raytheon applied a neutral policy in a nondiscriminatory fashion. The United States argued that, because the ADA explicitly allows employers to hold employees who use illegal drugs to the same qualification and behavioral standards as other employees even if an employee is unable to meet those standards because of his drug use, Raytheon's application to Hernandez of its no-rehire policy does not constitute unlawful disparate treatment under the ADA.

5. *City of Sacramento v. Barden*, No. 02-815 (filed 05/27/03)

The issue in this case was whether a city's provision, construction, and maintenance of a system of public sidewalks is subject to accessibility requirements under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA). In response to the Supreme Court's invitation for its views, the United States argued that the Court should deny the petition for certiorari. The United States argued the court of appeals' decision is correct because providing a system of public sidewalks is both a "program or activity" under Section 504 and a "service, program, or activity" under Title II of the ADA.

6. *Jones v. Donnelley & Sons Co.*, No. 02-1205 (filed 08/04/03)

The issue in this case was whether a claim for racial discrimination relating to the terms or conditions of employment in violation of 42 U.S.C. 1981 is governed by the uniform federal statute of limitations established by 28 U.S.C. 1658(a) or a varying limitations period borrowed from the law of the forum state. The United States argued that petitioners' claims are governed by the four-year federal statute of limitations established by 28 U.S.C. 1658(a), which is applicable, "[e]xcept as otherwise provided by

law, [to] a civil action arising under an Act of Congress enacted after" December 1, 1990. The United States explained that, under the Supreme Court's decision in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), Section 1981, as originally enacted, prohibited discrimination only in the making and enforcement of contracts and, thus, would not have prohibited the conduct alleged by petitioners in this case. In the Civil Rights Act of 1991, however, Congress amended Section 1981 to make it applicable to "the making, performance, modification, and termination of contracts." The United States argued that petitioners' claims therefore "arise under" the 1991 Act and, in accordance with the plain language of Section 1658, are governed by that statute's four-year limitations period, rather than by the two-year state statute of limitations.

7. *Locke v. Davey*, No. 02-1315 (filed 09/08/03)

The issue in this case was whether a State may deprive an otherwise eligible student of scholarship funds made available to high school graduates based on academic achievement, financial need, and enrollment at an accredited post-secondary school, solely because the student elects to major in theology taught from a religious perspective. The United States argued that the First Amendment prohibits excluding only those students who choose to pursue a degree in theology taught from a religious viewpoint. The United States also argued that disqualifying otherwise eligible students solely because they elect to pursue a theology degree from a religious perspective is impermissible viewpoint discrimination that sends a stigmatizing message that the State disfavors promising students who pursue such religious studies.

B. Courts of Appeals

1. *Meineker v. Hoyts Cinemas Corp.*, No. 02-9034 (2d Cir.) (filed 01/03/03)

The issues in this case were (1) whether the district court erred in concluding, on a motion for summary judgment, that defendant's stadium-style movie theaters provide patrons in wheelchairs "lines of sight comparable to those for members of the general public," as required by Standard 4.33.3 of the Department of Justice's ADA regulations; and (2) whether the district court erred in concluding that the wheelchair spaces in defendant's stadium-style movie theaters are an "integral" part of the fixed seating plan, as required by Standard 4.33.3, even though in 14 of the 18 theaters defendant provides no wheelchair seating in the stadium sections where the vast majority of the public sits. The Division argued in its reply brief as amicus curiae that the court misconstrued the regulation, which the Department of Justice has interpreted as requiring that wheelchair users in movie theaters be provided lines of sight within the range of viewing angles offered to most patrons of the cinema and that wheelchair seating in a stadium-style theater be integrated into the elevated, stadium portion of the auditorium.

2. *Donovan v. Punxsutawney Area School District*, No. 02-3897 (3d Cir.) (filed 01/09/03)

The issues in this case were (1) whether the Equal Access Act (EAA) requires that Punxsutawney Area High School permit students to hold meetings of a Bible club during the school's activity period when other student clubs are permitted to meet; and (2) whether the school's refusal to allow students to hold Bible club meetings during the activity period on an equal basis with other student groups violates the First Amendment. The Division argued that because other noncurriculum-related student groups hold sessions during the activity period, the school has created a limited open forum as defined by the EAA during this period. Thus, plaintiff must be allowed the same access to school facilities as other student groups. The Division also argued that denying plaintiff access simply because of the religious perspective of the group constitutes impermissible viewpoint discrimination in violation of the First Amendment and that providing the group equal access to the school facilities during the activity period, consistent with the terms of the EAA, does not violate the Establishment Clause.

3. *Spector v. Norwegian Cruise Lines, Ltd.*, Nos. 02-21154 & 03-20056 (5th Cir.) (filed 04/03/03)

The issues in this case were (1) whether Title III of the Americans with Disabilities Act (ADA) applies to foreign-flagged cruise ships calling at U.S. ports to embark or disembark passengers; and (2) whether cruise ships are exempt from the barrier removal requirements of Title III because the regulatory agencies (Department of Justice and Department of Transportation) have not issued new construction and alterations standards for cruise ships. The Division argued that (1) Congress intended Title III to apply to foreign-flagged cruise ships when they voluntarily enter U.S. ports to receive passengers; (2) such coverage does not result in an unlawful extraterritorial application of the statute because the discrimination occurs in U.S. internal waters; and (3) application of Title III neither interferes with the internal affairs of the ship nor violates international law. The Division also argued that the district court erred in granting defendant's motion to dismiss plaintiffs' barrier removal claims because of the absence of regulations governing new construction and alterations as to cruise ships. The Division argued that the obligation to remove barriers to access is a statutory one that does not depend on the existence of implementing regulations. The Division urged the court of appeals to reverse the dismissal of the barrier removal claims and remand for a hearing as to whether the remedies sought by the plaintiffs are "readily achievable" within the meaning of Title III.

4. *Child Evangelism Fellowship of New Jersey (CEF) v. Stafford Township School District*, No. 03-1101 (3d Cir.) (filed 05/09/03)

The issues in this case were (1) whether the district court correctly found that the school district engaged in unconstitutional viewpoint discrimination by barring a religious youth organization from distributing and displaying its permission slip flyers at two elementary schools, pursuant to a written policy providing for teacher distribution of materials promoting community-sponsored activities to students and an unwritten practice of allowing community organizations to promote recreational activities on school property and at school events; and (2) whether the district court correctly found that

granting access to a religious youth organization seeking to promote its after-school activities on equal terms with other youth-oriented community organizations would not violate the Establishment Clause. The Division argued that the district court was correct in finding that CEF established a likelihood of success in proving that, by barring CEF's efforts to promote its after-school activities in the same manner as other community organizations, the school district engaged in impermissible viewpoint discrimination and that permitting CEF to promote its after-school activities would not violate the Establishment Clause.

5. *Lillbask ex. rel. Mauclaire v. Sergi*, No. 03-7274 (2d Cir.) (filed 06/10/03)

The issue in this case was whether a Connecticut statute that bars parents from raising an issue in an administrative due process hearing if the issue was not first raised at an Individualized Education Program Team meeting conflicts with the Individuals with Disabilities Education Act (IDEA) and is therefore invalid. The Division argued that the state statute is preempted by the IDEA both because it conflicts with rights expressly provided by the federal statute and because it is an obstacle to the full accomplishment of the IDEA's goals and purposes.

6. *Child Evangelism Fellowship of Maryland (CEF) v. Montgomery County Public Schools*, No. 03-1534 (4th Cir.) (filed 06/11/03)

The issues in this case were (1) whether Montgomery County Public Schools engaged in unconstitutional viewpoint discrimination when it barred a religious youth organization from including its promotional permission slip/flyer with other community groups' materials that were sent to parents in students' take-home folders; and (2) whether granting access to a religious youth organization seeking to promote its after school activities on equal terms with other youth-oriented community organizations would violate the Establishment Clause. The Division argued CEF established a likelihood of success by proving that: (1) the school district engaged in impermissible viewpoint discrimination by barring CEF's efforts to promote its after-school activities; and (2) permitting CEF to promote its after-school activities would not violate the Establishment Clause.

7. *Communities for Equity v. Michigan High School Athletic Ass'n (MHSAA)*, No. 02-1127 (6th Cir.) (filed 08/15/03)

The issues in this case were (1) whether the district court erred in finding that MHSAA's scheduling of girls' athletic seasons violates the Equal Protection Clause of the Fourteenth Amendment; and (2) whether the district court erred in finding that MHSAA's scheduling of girls' athletic seasons violates Title IX of the Education Amendments of 1972. The Division argued that MHSAA is a state actor and that its sports seasons schedule constitutes intentional discrimination in violation of equal protection. The Division also argued that MHSAA's seasons schedule violates Title IX and that MHSAA is subject to Title IX under a "ceded controlling authority" theory, which provides that when a recipient cedes virtually all controlling authority over a

program receiving federal financial assistance to another entity, and that entity subjects an individual beneficiary to discrimination under the program, the entity ceded authority violates Title IX.

8. *Atkinson v. Lafayette College*, No. 03-3426 (3d Cir.) (filed 11/06/03)

The issue in this case was whether Section 901 of Title IX, and thus the implied private right of action for violations of Section 901, encompasses a prohibition against retaliation for complaining about sex discrimination. The Division argued that Title IX was enacted to redress comprehensively a pervasive problem of sex discrimination and that the language of Section 901 should be read to encompass a prohibition against retaliation based on sex.

9. *Boswell v. SkyWest Airlines, Inc.*, No. 02-4188 (10th Cir.) (filed 11/24/03)

The issues in this case were whether the Air Carriers Access Act (ACAA) creates an implied cause of action to sue in federal court and whether SkyWest is required to provide passengers with medical oxygen. In response to the court's invitation, the Division argued the ACAA and the regulations do not impose this requirement on SkyWest and that the ACAA, which expressly provides an administrative mechanism for adjudicating complaints, does not also impliedly create a right to litigate such claims in federal district court.

10. *Midrash Sephardi v. Town of Surfside*, No. 03-13858-CC (11th Cir.) (filed 11/25/03)

The issues in this case were (1) whether Surfside's zoning scheme treats religious assemblies on less than equal terms with secular assemblies within the meaning of Section 2(b)(1) of the Religious Land Use and Institutionalized Persons Act (RLUIPA) by prohibiting churches and synagogues within certain districts but permitting noncommercial "private clubs" and "lodges" in such districts; and (2) whether, in determining if the zoning regulations of a town violate the rights of a religious institution under Section 2(a)(1) of RLUIPA, a court is permitted to ignore the effect of those regulations on congregants who reside outside the town. The Division argued the district court erred in granting summary judgment to Surfside on both of these claims. First, the Division argued that the district court erred in concluding that religious assemblies are not similarly situated to secular assemblies such as lodges and private clubs. Because such secular assemblies are similarly situated in the relevant respects, and because they receive better treatment under the zoning laws than do religious assemblies, Surfside's zoning scheme violates RLUIPA's "equal terms" provision. Second, the Division argued that the district court erred in concluding the plaintiffs failed at least to raise a triable issue of fact as to whether the zoning scheme imposes a substantial burden on their free exercise of religion. The Division argued that nothing in the text or legislative history of RLUIPA supports the district court's interpretation limiting the statute's coverage to town residents.

2004

A. Supreme Court

1. *Pennsylvania State Police v. Suders*, No. 03-95 (filed 01/20/04)

The issue in this case dealt with the circumstances in which an employer may assert the affirmative defense recognized in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998). The Supreme Court held in these cases that an employer will not be held strictly liable for its supervisor's harassing behavior if the employer exercised reasonable care to prevent or correct promptly any harassing behavior and if the employee unreasonably failed to take advantage of these preventative measures. In this case, the plaintiff alleged that a hostile work environment created by a supervisor culminated in a constructive discharge. The United States argued that unless a constructive discharge is effected through a supervisor's official act, the employer may avoid vicarious liability by establishing the elements of the defense recognized in *Ellerth/Faragher*.

2. *Jackson v. Birmingham Board of Education*, No. 02-1672 (filed 05/11/04)

The issue in this case was whether the private right of action for violations of Title IX of the Education Amendments of 1972 encompasses redress for retaliation for complaints about unlawful sex discrimination. In response to the Supreme Court's invitation, the United States urged the Court to grant the petition for a writ of certiorari because (1) the court of appeals erred in ruling that Title IX does not encompass a cause of action for retaliation; (2) there is a circuit split on this issue; and (3) the issue is one of recurring importance.

3. *Higbee Co. v. Chapman*, No. 02-1646 (filed 05/28/04)

The issue in this case was whether the "full and equal benefit" clause of 42 U.S.C. 1981(a) applies to private entities. In response to the Supreme Court's invitation, the United States argued that the Court should deny the petition for a writ of certiorari because (1) the language of the statute unambiguously extends the protections of Section 1981 to private discrimination; (2) the apparent circuit split is the result of certain courts of appeals' reliance on a decision that predated the 1991 Amendments to the Civil Rights Act, which expressly provided that Section 1981 applied to private discrimination; and (3) the order on appeal is an interlocutory order.

4. *Johnson v. California*, No. 03-636 (filed 06/04/04)

The issues in this case were (1) whether state-imposed racial classifications in prisons are subject to strict scrutiny under the Equal Protection Clause; and (2) whether California's policy of segregating prisoners by race in two-person cells for a minimum of 60 days each time a prisoner enters a new institution violates the Equal Protection Clause. The United States argued that the court of appeals erred in applying the "reasonably

related" standard of review because the Supreme Court has repeatedly held that all racial classifications imposed by government must be analyzed under strict scrutiny and that the policy is unconstitutional because it is not narrowly tailored.

5. *Jackson v. Birmingham Board of Education*, No. 02-1672 (filed 08/19/04)

The issue in this case was whether the private right of action for violations of Title IX of the Education Amendments of 1972 encompasses redress for retaliation for complaints about unlawful sex discrimination. Following the Supreme Court's grant of the petition for a writ of certiorari, the United States argued that Title IX prohibits retaliation and that this prohibition may be enforced in a private action.

6. *Spector v. Norwegian Cruise Lines, Ltd.*, No. 03-1388 (filed 12/03/04)

The issue in this case was whether Title III of the Americans with Disabilities Act applies to foreign-flagged cruise ships operating in the ports and internal waters of the United States. The United States argued, as it did in the court of appeals, that Title III applies to foreign-flagged cruise ships when they voluntarily enter U.S. ports to receive passengers and that such coverage does not result in an unlawful extraterritorial application of the statute because the discrimination occurs in U.S. internal waters.

B. Courts of Appeals

1. *Pardini v. Allegheny Intermediate Unit*, Nos. 03-2897 & 03-3988 (3d. Cir.) (filed 04/06/04)

The issue in this case was whether the "stay-put" provision of the Individuals with Disabilities Act (IDEA) requires continuation of the early intervention services that were provided under the family's individualized family service plan, once the child turns three and during the parties' dispute regarding the content of the child's individualized education plan. The Division argued that the district court correctly held that the IDEA does not require continuation of such services.

2. *Guru Nanak Sikh Society v. County of Sutter*, No. 03-17343 (9th Cir.) (filed 05/19/04)

The issues in this case were (1) whether Section 2(a)(1) of the Religious Land Use and Institutionalized Persons Act (RLUIPA), as applied through Section 2(a)(2)(C), is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment; and (2) whether the County's denial of plaintiff's application for a use permit to build a Sikh temple substantially burdened the plaintiff's exercise of religion in violation of RLUIPA. The Division supported the merits of plaintiff's RLUIPA claim as amicus curiae and defended the constitutionality of RLUIPA as intervenor.

3. *Saints Constantine & Helen Greek Orthodox Church v. City of New Berlin*, No. 04-2326 (7th Cir.) (filed 08/13/04)

The issue in the case was whether a church's claim that the denial of a zoning application substantially burdens its religious exercise is subject to a per se rule that the church must demonstrate that there is no alternative location in the jurisdiction where its religious exercise is permissible. The Division argued that the district court misinterpreted *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752 (7th Cir. 2003), as holding that zoning restrictions do not impose a substantial burden on religious exercise if a church can locate elsewhere in the city.

4. *George v. BART*, No. 04-15782 (9th Cir.) (filed 10/06/04)

The issue in this case was whether the Department of Transportation's (DOT) regulations enforcing Title II of the Americans with Disabilities Act with respect to accessible routes in public transit stations were arbitrary and capricious. The Division argued that the district court erred in invalidating the DOT regulations without briefing or evidence on the issue and asked the court of appeals to remand the case for appropriate proceedings.

5. *Sandusky County v. Blackwell*, Nos. 04-4265 & 04-4266 (6th Cir.) (filed 10/21/04)

The issues in this case were (1) whether the Help America Vote Act of 2002 (HAVA) could be enforced privately under 42 U.S.C. 1983 and (2) whether HAVA precluded States from choosing precinct-based voting systems. The Division argued that private plaintiffs do not have a private right of action under Section 1983 to enforce HAVA terms relating to provisional voting and that HAVA allows States to decide whether to count provisional ballots cast outside of a precinct.

6. *Bay County Democratic Party v. Land*, Nos. 04-2307 & 04-2318 (6th Cir.) (filed 10/26/04)

The issues in this case were whether the Help America Vote Act of 2002 (HAVA) could be enforced privately under 42 U.S.C. 1983 and whether HAVA precluded States from choosing precinct-based voting systems. The Division argued that private plaintiffs do not have a private right of action under Section 1983 to enforce HAVA terms relating to provisional voting and that HAVA allows States to decide whether to count provisional ballots cast outside of a precinct.

C. District Court

1. *Barnes-Wallace v. Boy Scouts of America (BSA)*, No. 00cv1726 (S.D. Cal.) (submitted 03/04/04)

The issue in this case was whether the City's two leases of public land to the Boy Scouts, under which the Boy Scouts agreed to build and maintain two parks and keep them open to the general public in exchange for limited control over the parks, violated

the Establishment Clause. The Division argued that the lease did not violate the Establishment Clause because it was entered into for a secular purpose and without a primary purpose of advancing religion. The lease was part of an expansive City program to enable various groups to operate and maintain public grounds for public use in a manner that could not be performed on the City budget. Under this program, BSA constructed and maintains an aquatic park that may be reserved specifically for BSA activities, and also may be reserved for use by any youth group on a first-come, first-served basis. The Division also argued that there was no violation of the Equal Protection Clause since the plaintiffs, *inter alia*, could not show discriminatory intent by the City in awarding the lease to BSA.

2. *Florida Democratic Party v. Hood*, No. 04-395 (N.D. Fla.) (submitted 10/19/04)

The issue in this case was whether Florida's provisional voting scheme, which requires a voter whose registration is disputed to cast a provisional ballot at the polling place to which he is assigned in order to have that vote counted, violates the Help America Vote Act of 2002 (HAVA). The Division argued that private plaintiffs do not have a private right of action under Section 1983 to enforce HAVA terms relating to provisional voting and that HAVA does not preempt precinct-based election systems.

2005

A. Supreme Court

1. *Schaffer v. Weast*, No. 04-698 (filed 06/24/05)

The issue in this case was whether, under the Individuals with Disabilities Education Act (IDEA), when parents initiate an administrative "due process" hearing to seek reimbursement for private-school tuition and challenge their child's individualized education program, the burden of proof falls on the parents or the school district. The United States argued that traditional rules governing the allocation of the burden of proof, the interpretation of Spending Clause legislation, and the text, structure, and purposes of the IDEA support placing the burden of proof on the party that initiates and seeks relief at the administrative due process hearing under the IDEA.

2. *Arbaugh v. Y & H Corp.*, No. 04-944 (filed 08/01/05)

The issue in this case was whether the 15-employee requirement of Title VII of the Civil Rights Act of 1964 limits the courts' subject matter jurisdiction or instead is only an element of a Title VII claim. The United States argued that the numerosity requirement is an element of the plaintiff's cause of action under Title VII, and is not jurisdictional, and that the lower courts' dismissal of this action should therefore be reversed.

3. *Arlington Central School District Board of Education v. Murphy*, No. 05-18 (filed 12/09/05)

The issue in this case was whether the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1415(i)(3)(B), which provides that the court may "award reasonable attorneys' fees as part of the costs" to a prevailing party, authorizes an award of expert fees. In response to the Supreme Court's invitation, the United States argued that certiorari should be granted because of the existing circuit split and because the Second Circuit's holding that expert fees are available contradicts the clear statutory language of the IDEA.

B. Courts of Appeals

1. *Barnes-Wallace v. Boy Scouts of America*, Nos. 04-55732 & 04-56167 (9th Cir.) (filed 02/15/05)

The issue in this case was whether the City's two leases of public land to the Boy Scouts, under which the Boy Scouts agreed to build and maintain two parks and keep them open to the general public in exchange for limited control over the parks, violate the Establishment Clause. The Division argued that the district court was incorrect as a threshold matter in finding that the Boy Scouts was a religious organization such that the Establishment Clause applied to the City's leases with the Boy Scouts. The Division also argued that even if the Boy Scouts is a religious organization, the leases do not violate the Establishment Clause because they are not properly considered aid to a religious organization, or, if they are, such aid does not violate the Establishment Clause because it is made available to nonprofit organizations in a neutral manner, serves a secular purpose, and does not advance religion.

2-3. *Muntaqim v. Coombe*, No. 01-7260 (2d Cir.) (filed 03/04/05), and *Hayden* v. *Pataki*, No. 04-3886 (2d Cir.) (filed 04/26/05)

The issue in these cases was whether Section 2 of the Voting Rights Act of 1965 applies to New York Election Law § 5-106(2), which prohibits presently incarcerated felons from voting. The Division argued that plaintiffs could not state a claim for vote dilution or denial because Section 2 does not apply to felon disenfranchisement laws.

4. *Atkinson v. Lafayette College*, No. 03-3426 (3d Cir.) (filed 05/17/05)

The issue in this case was whether Section 901 of Title IX of the Education Amendments of 1972, and thus the implied private right of action for violations of Section 901, encompasses a prohibition on retaliation for complaining about sex discrimination. The Division argued that Title IX's implied private right of action encompasses retaliation claims against an individual because he or she has complained about sex discrimination.

5. *Baker v. Home Depot*, No. 05-1069 (2d Cir.) (filed 06/15/05)

The issue in this case was whether Home Depot offered plaintiff a reasonable accommodation in offering to excuse him from working Sunday mornings so that he could observe his religious beliefs. The Division argued that this was not a reasonable accommodation because in order to observe his religious beliefs plaintiff must refrain from working at all on Sundays, not merely on Sunday mornings.

6. *Fitzgerald v. Camdenton R-III School District*, No. 04-3102 (8th Cir.) (filed 10/03/05)

The issue in this case was whether the "child find" provision of the Individuals with Disabilities Education Act (IDEA) requires a school district to evaluate a child the school district suspects of having a disability if the child's parents refuse consent, remove the child from public school, and waive any claim to public educational benefits under the IDEA. The Division argued that if parents are privately funding their child's education and waive all benefits under the IDEA, the "child find" provision does not require the child to be tested.

7. *Faith Center v. Glover*, No. 05-16132 (9th Cir.) (filed 11/22/05)

The issue in this case was whether Contra Costa County engaged in unconstitutional viewpoint discrimination when it barred a religious organization from using library meeting rooms to conduct meetings that included worship. The Division argued that the County's denial of access to Faith Center amounts to impermissible viewpoint discrimination under the standards set out in *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001). The Division also argued that the County would not violate the Establishment Clause by allowing Faith Center to use meeting rooms on equal terms with other community groups.

8. *Wisconsin Community Services v. City of Milwaukee*, No. 04-1966 (7th Cir.) (en banc) (filed 11/23/05)

On rehearing en banc, the court invited the United States to address four issues: (1) whether 28 C.F.R. 35.130(b)(7) and 28 C.F.R. 41.53 apply to disputes about zoning in suits under the Rehabilitation Act and Title II of the Americans with Disabilities Act; (2) if so, whether either regulation creates an entitlement to accommodation in the absence of intentional discrimination or disparate impact; (3) if the answer to Questions 1 and 2 is yes, whether the regulations are valid; and (4) if neither the Rehabilitation Act nor Title II establishes an accommodation requirement for zoning disputes independent of intentional discrimination and disparate impact, whether the approach of the Fair Housing Amendments Act applies to disputes about zoning.

The Division argued that Section 35.130(b)(7) applies to zoning, but that Section 41.53 does not. In addition, the Division argued that Section 35.130(b)(7) requires a plaintiff to show that, due to his disability, a challenged rule or practice has a greater adverse effect on him than on other individuals who do not have that disability. The Division also argued that the failure to make reasonable accommodations is a theory of

liability distinct from either intentional or disparate-impact discrimination under Section 35.130(b)(7). In addition, the Division argued that the regulation, as interpreted, is valid under Title II.

C. District Courts

1. *Bronx Household of Faith v. Board of Education of the City of New York*, No. 01-8598 (S.D.N.Y.) (filed 05/17/05)

The issue in this case was how Supreme Court precedent concerning viewpoint discrimination should be applied to religious speech in a limited public forum open to a wide range of expressive activities. On remand from the Second Circuit's affirmance of a preliminary injunction in Bronx Household's favor, the Division argued that there are no new, substantive facts that would establish entanglement or preclude converting the preliminary injunction into a permanent injunction. The Division also argued the City's proposed change in policy would continue to violate the First Amendment because, in part, neither a state agency nor a court can practically or legally distinguish between religious worship and religious viewpoint.

D. State Courts

1. *Bush v. Holmes*, No. 04-2323 (Fla.) (filed 01/24/05)

The issue in this case concerned the scope of the U.S. Supreme Court's decision in *Locke* v. *Davey*, 540 U.S. 712 (2004), and the degree to which a State may depart from the Free Exercise principle of nondiscrimination on the basis of religion in order to seek greater separation of church and state than that required by the federal Constitution. The Division argued that (1) the Florida Appeals Court erred in holding that *Locke* barred the appellants' free exercise claim; (2) adopting the court of appeals' reading of the "no-sectarian-aid" provision of the Florida Constitution would raise sufficient risks of federal constitutional violations; and (3) the Florida Supreme Court should apply the doctrine of constitutional avoidance and adopt a narrower interpretation of the no-aid provision.

2006

A. Supreme Court

1. *League of United Latin American Citizens v. Perry*, Nos. 05-204, 05-254, 05-276, 05-439 (filed 02/01/06)

The issues in this case were (1) whether the State's redistricting plan violates Section 2 of the Voting Rights Act of 1965 because it redrew the lines of old District 24, in which African Americans constituted 21.4% of the voting age population; and (2) whether the State's redistricting plan violates Section 2 because it establishes six rather than seven majority-Hispanic districts in south and west Texas, where Hispanics constitute 58% of the citizen voting age population. The United States argued the

redistricting plan does not violate Section 2. Specifically, the United States argued that under the old plan, District 24, a district where African Americans comprise 21.4% of the population, was not entitled to Section 2 protection because minorities could not satisfy the three preconditions required to prove a vote dilution claim set out in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). The United States also argued that Hispanics are not entitled, under Section 2, to an additional majority-minority district in the south and west region of Texas, primarily because they already have greater than proportional representation in that region.

2. *Arlington Central School District Board of Education v. Murphy*, No. 05-18 (filed 02/21/06)

The issue in this case was whether the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1415(i)(3)(B), which provides that the court may "award reasonable attorneys' fees as part of the costs" to a prevailing party, authorizes an award of expert fees. Following the Supreme Court's grant of the petition for a writ of certiorari, the United States argued that the plain language of the IDEA does not permit recovery of expert fees.

3. *Burlington Northern & Santa Fe Railway Company v. White*, No. 05-259 (filed 03/09/06)

The issue in this case was whether a plaintiff who asserts a claim of retaliatory discrimination in violation of Title VII of the Civil Rights Act of 1964 must show that she suffered a materially adverse employment action. The United States argued that Title VII's anti-retaliation provision should be read consistently with its substantive prohibition on sex discrimination in employment, 42 U.S.C. 2000e-2, and so the retaliation provision should be read to prohibit the same type of employment actions. The United States argued, based on the prior decisions of the Supreme Court and the courts of appeals, that to be actionable, a retaliatory employment action must be "materially adverse." Finally, the United States argued that under this materially adverse standard, the plaintiff's suspension without pay and her reassignment to substantially different duties – here from a skilled position to an unskilled laborer position – were "materially adverse" employment actions.

4-5. *Parents Involved in Community Schools v. Seattle School District No. 1*, No. 05-908, and *Meredith* v. *Jefferson County Public Schools*, No. 05-915 (filed 08/21/06)

The issues in these cases were whether the race-based student assignment plans of the Seattle School District and Jefferson County Public Schools violate the Equal Protection Clause of the Fourteenth Amendment. The United States argued that the student assignment plans do not serve a compelling governmental interest because they operate as a form of racial balancing and are not designed to achieve genuine racial diversity. The United States also argued that even if the student assignment plans serve a

compelling governmental interest, they are nonetheless unconstitutional because they are not narrowly tailored.

6. *Winkelman v. Parma City School District*, No. 05-983 (filed 09/20/06)

The issue in this case was to what extent, if any, a non-lawyer parent of a minor child with a disability may proceed pro se in a federal court action brought pursuant to the Individuals with Disabilities Education Act (IDEA). In response to the Supreme Court's request for its views, the United States argued that parents should be able to proceed pro se in federal court on both procedural and substantive claims under the IDEA and urged the Court to grant the petition for a writ of certiorari to resolve an inter-circuit conflict.

7. *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074 (filed 10/23/06)

The issue in this case was whether or under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination, when the allegedly disparate pay is received during the statutory limitations period but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period. The United States argued that the Supreme Court's decision in *Bazemore* v. *Friday*, 478 U.S. 385, 395 (1986), does not carve out an exception for disparate-pay claims from Title VII's timely-filing requirement and that – absent an ongoing discriminatory pay structure – the 180-day limitations period does not begin anew with each paycheck.

8. *Winkelman v. Parma City School District*, No. 05-983 (filed 12/15/06)

The issue in this case was to what extent, if any, a non-lawyer parent of a minor child with a disability may proceed pro se in a federal court action brought pursuant to the Individuals with Disabilities Education Act (IDEA). Following the Supreme Court's grant of the petition for a writ of certiorari, the United States argued that parents should be able to proceed pro se in federal court on both procedural and substantive claims under the IDEA.

B. Courts of Appeals

1. *Living Water Church of God v. Meridian Charter Township*, No. 05-2309 (6th Cir.) (filed 03/15/06)

The issue in this case was whether the defendant violated plaintiff's rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) by denying it a special use permit to construct a building in excess of 25,000 square feet. The Division argued that denial of the permit operates as a substantial burden on plaintiff's exercise of religion in violation of RLUIPA because the church cannot carry out all its ministries in a smaller building.

2. *Faith Temple Church v. Town of Brighton*, No. 06-0354 (2d Cir.) (filed 05/24/06)

The issue in this case was whether the Town's use of its eminent domain power qualifies as the imposition or implementation of a "land use regulation" under the Religious Land Use and Institutionalized Persons Act (RLUIPA). The Division argued that the Town's attempted use of eminent domain satisfies the "land use regulation" provision of RLUIPA.

3. *Jones v. Gale*, No. 06-1308 (8th Cir.) (filed 05/25/06)

The issue in this case was whether private plaintiffs can enforce the requirements of Title II of the Americans with Disabilities Act through *Ex parte Young* suits. The Division argued that, as the Eighth Circuit has already held, plaintiffs are permitted to enforce Title II through *Ex parte Young* suits.

4. *Lighthouse Institute for Evangelism v. City of Long Branch*, No. 06-1319 (3d Cir.) (filed 06/07/06)

The issue in this case was whether a claim brought under the Religious Land Use and Institutionalized Persons Act's (RLUIPA) "equal terms" provision requires proof of a substantial burden on the plaintiff's religious exercise, as is required for a claim brought under RLUIPA's "substantial burden" provision. The Division argued that the plaintiff is not required to prove that the land use regulation at issue substantially burdened its religious exercise in order to prove a violation of RLUIPA's "equal terms" provision.

5. *Bronx Household of Faith v. Board of Education*, No. 06-0725 (2d Cir.) (filed 07/17/06)

The issue in this case was whether the school board engaged in unconstitutional viewpoint discrimination by refusing to allow a religious organization to rent public school facilities for worship during non-school hours on an equal basis with other community organizations renting these facilities for expressive activities. The Division argued that the school board engaged in impermissible viewpoint discrimination by denying Bronx Household access to school property, and that permitting Bronx Household to use the school property would not endorse religion in violation of the Establishment Clause.

6. *Westchester Day School v. Village of Mamaroneck*, No. 06-1464 (2d Cir.) (filed 08/11/06)

The issue in this case was whether a village violated a Jewish school's rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) when it denied the school permission to expand its dilapidated and overcrowded facilities. The Division argued as amicus curiae that, as the district court held, the village violated the school's rights under RLUIPA. The Division also defended the constitutionality of RLUIPA as intervenor.

C. District Courts

1. *George v. Colony Lakes Property Owners Ass'n*, No. 05-cv-05899 (N.D. Ill.) (filed 04/14/06)

The issue in this case is whether a HUD regulation, 24 C.F.R. 100.400(c)(2), permissibly interprets Section 3617 of the Fair Housing Act to cover racial discrimination that occurs post-acquisition of a dwelling. The Division argued that Section 3617 by its plain language reaches post-acquisition discrimination and, therefore, the HUD regulation is valid.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY SENATOR LEAHY ON NOVEMBER 27, 2006

Joseph D. Rich
December 27, 2006

1. **Was it your impression while you were at the Bush Justice Department that the current Civil Rights Division hires lawyers from all ideologies and backgrounds? Why or why not?**

   As indicated in my written testimony submitted on November 16, new hiring procedures instituted by the Bush Administration almost completely froze out participation of career staff in the hiring process. But, while I had virtually no involvement in hiring decisions, it is my clear impression that new hires during the Bush Administration were not from all ideologies and backgrounds. Further, it is my impression that those with a conservative ideology, as evidenced, for example, by membership in the Federalist Society, have been actively sought and favored in the hiring process. This impression is based on information in the July 23, 2006 article in the *Boston Globe* analyzing the resumes of persons hired and testimony by a former Employment Section manager at a December 14, 2005 American Constitution Society panel discussion – both of which are set forth in my November 16 testimony (pp. 7-8). Furthermore, based on discussions I have had with career staff and persons who interviewed for jobs at the Department, it is evident that aggressive civil rights enforcement experience or association with well-established civil rights organizations that were considered "liberal" by Bush appointees was a negative in the hiring process.

2. **As someone who has worked in the Civil Rights Division since 1968, in Republican and Democratic Administrations, what has been your experience with the hiring of Honors Program lawyers? And how does the 2002 hiring change compare to the hiring process at the Justice Department under previous Administrations?**

   As discussed at pp. 5-6 of my November 16 testimony, the change in the honors hiring process in the Civil Rights Division in 2002 was a major change in the honors hiring process which had been followed during my entire career up until then. This change removed any input from career staff into the hiring process, leaving the screening, interviewing and selection exclusively with political appointees who had very little, if any, experience in civil rights enforcement. I

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did not personally participate in the pre-2002 honor hiring process because these committees were made up of career staff attorneys and I was a career manager from 1973-2005. But, I did participate in recommending staff for these committees and fully understood the primary role these committees played over many decades in the hiring process and decision-making until the change in 2002. I do not have knowledge of the role that career attorneys played in the honors hiring process in other Divisions and offices in the Department of Justice.

3. **Has political ideology previously been a factor in the hiring process for *career* positions in the division? Do you believe it is now a factor? Why?**

It has been typical for enforcement priorities to change when a new administration takes over and often these priorities reflect the political ideology of the administration in office. Enforcement priorities often have changed during an administration for other reasons as well, e.g. new laws to enforce such as the ADA, or major events that occur such as church bombings, which required a shift in priorities. Such changes in priorities are appropriate.

But, as discussed in my November 16 testimony, until the Bush Administration I had never seen political ideology inserted into the hiring process. Career staff historically have shared a devotion and commitment to fair enforcement of the civil rights laws whatever the priorities of political leadership has been. The most important criteria in hiring until this Administration had been basic qualifications and commitment to and experience in civil rights enforcement.

4. **In your experience in the field of lateral hiring, have Section Chiefs historically had input in lateral hires and did they have such input after 2002.**

Historically, the role of section chiefs in lateral hiring was primary. Once approval was received to fill vacancies, the section chief with assistance of section staff screened applications; chose those to be interviewed; conducted interviews; and recommended persons to be hired to the political leadership of the Division. I do not recall any such recommendation ever being rejected by political appointees.

In the Bush Administration, my experience was that there was virtually no section chief or section participation in the lateral hiring process. Initially, in 2001, as described on p. 8 of my November 16 testimony, Attorney General Ashcroft announced a Voting Rights Initiative in March, 2001 which included increased Voting Section staff. Hiring for these positions was overtly political. A new political position -- Special Counsel for Voting Rights -- was created and filled by a Republican congressional candidate defeated in the 2000 election. Two career line attorneys were hired to assist this Special Counsel with no input from me or the section. The two persons hired were both active Republican political operatives. One of them was promoted to a front office special counsel position

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in 2003 where for the next two and one half years -- until December 2005 when he received a recess political appointment to the Federal Election Commission -- he was the primary supervisor of the Voting Section. Even though he was clearly in a political position, he held himself out as a career Department attorney because he was hired in that manner.

After the 2001 hiring, there were virtually no lateral hires in the Voting Section until early 2005, shortly before I left the Department. At that time, I had no input in the selection of interviewees. I was invited to attend two interviews but never was asked my recommendation. Both interviewees were hired shortly after the interviews, but I was not informed of this.

In other sections, my understanding is that the role of section chiefs in lateral hires during the Bush Administration has varied, but that for the first time political appointees play the primary role in all phases of the hiring process including screening of persons to be interviewed and the final selection process, a significant change from past practice.

5. **What effect, if any, do you believe the shift from veteran career hires to political appointees handling those hires has had on the Division and the enforcement of civil rights laws?**

The effect has been very negative. This shift has not only lowered morale of career attorneys hired prior to this Administration, but also has resulted in a new career staff with significantly less civil rights enforcement experience or interest in such enforcement. The lowering of a commitment to and expertise in civil rights enforcement at the career staff level inevitably has a negative impact on civil rights enforcement. It is extremely important in the future that efforts be made to restore the hiring process in the Division to one that consciously seeks to avoid the perception and reality of political favoritism or any other kind of cronyism.

6. **a. How does the current Civil Rights Division's practice of excluding career staff recommendations in major voting cases compare to practices of the Division under previous administrations?**

b. Why is it important that the recommendations of career staff be taken into account in Section 5 pre-clearance decisions, hiring decisions, and in the Civil Rights Division's litigation decisions(i.e. whether to file an amicus brief, and if so, what party to support in an amicus brief)?

1. The major change in the decision making process in the Voting Section has been in the Section 5 review process. As discussed in my November 16 testimony, in the Georgia, Texas and Mississippi Section 5 matters, political appointees rejected in each case unanimous or nearly unanimous

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recommendations of career staff in matters that had very obvious and strong political overtones.

The rejection of unanimous staff recommendations in each of these very high profile and sensitive matters is historically anomalous. In past administrations, both Democratic and Republican, political appointees almost always have agreed with career staff recommendations to interpose an objection. In those instances when staff recommendations were rejected by political appointees, written explanations of the reasons for such rejections were prepared by political decision-makers to provide the legal rationale for their decision and to make a complete record of the decision-making process which could act as a kind of precedent for future Section 5 decisions. This longstanding process had been successful in ensuring that inappropriate political factors were not injected into the Section 5 decision-making, and it served as a vehicle for future decision-making by creating a type of legal precedent to guide career staff.

However, in each of the above instances in which staff recommendations were rejected, political appointees did not prepare any such written explanation for their rejection of the career staff recommendations. This deviated from the longstanding practice and reflected the chasm that had grown between career and political staff in the Bush Administration. Compounding this break from well-established process was the Division's apparent change in process with respect to Section 5 staff memoranda. As reported in the Washington Post on December 10, 2005, Voting Section leadership instituted a new rule requiring staff who reviewed Section 5 voting submissions to limit their written analysis to the facts surrounding the matter and prohibited the career staff from making recommendations as to whether or not the Department should impose an objection to the voting change. This is a major change in the Voting Section's Section 5 analytical practices, undermining the bottom-up decision-making process developed over thirty years ago. This is especially disturbing in light of the series of decisions discussed above, because prohibiting staff recommendations on submissions increases the ability of political appointees to make politically-motivated preclearance decisions without contradiction of career staff.

2. My understanding is that career staff still make recommendations to bring enforcement actions involving litigation in the Voting Section and elsewhere in the Division – although those recommendations are not always followed. This is not a change from the past.

3. With regard to hiring, I have already discussed the importance of career staff in that process.

4. Decision making on filing amicus briefs was discussed briefly at p. 12 of my November 16 testimony. In the weeks preceding the 2004 presidential election, the Civil Rights Division filed several controversial *amicus curiae* briefs in cases involving the Help America Vote Act (HAVA) which further demonstrate the

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politicization of decision-making on voting matters discussed above with respect to Section 5. Career attorneys in the Voting Section were not informed of these briefs until very shortly before filing and had no input into their drafting. The Division unsuccessfully argued in three *amicus* filings involving HAVA's provisional ballot requirement in Ohio, Florida and Michigan, that private citizens could not enforce any rights under HAVA in the federal courts; that is, the Department took the position that only it alone could enforce HAVA.

These filings were extremely troubling. First, the Division historically has been in favor of private plaintiffs having access to the federal courts in order to vindicate their right to vote, and the Division's briefs went beyond the facts of these cases to attempt to restrict any private enforcement of the HAVA statute. Furthermore, the Civil Rights Division filed these briefs without an invitation from the Court.

Second, the timing of the filing of these briefs so close to a major election on a highly charged partisan issue -- in states understood to hold the balance in the 2004 Presidential election -- and taking a position advocated by the Republican Party, all added to the perception that the Division's voting rights decisions were driven by political considerations. Historically, when it has had discretion as it did here, the Department has avoided taking positions in politically charged voting matters so close to an election to avoid this message being sent.

7. **Response to Mr. Carvin's testimony that criticism of Administration's positions in civil rights case are merely ideological:**

As described in my November 16 testimony and above, the differences on the Section 5 matters and in the decisions to file several amicus briefs in highly charged and partisan voting cases shortly before the November, 2004 election were not ideological. Rather, the differences were that political appointees injected partisan political factors into substantive decision-making, something that had been successfully avoided in the past. This is evident in the nature of the decision-making in each case and in the changes in process followed in making the decisions.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY SENATOR KENNEDY ON NOVEMBER 27, 2006

Joseph D. Rich
December 27, 2006

1. **Please explain why you believe that the Section 5 determinations in Mississippi, Texas and Georgia reflect political motivations and not merely the current law. Was the normal review process followed and were normal factors considered? Did the political appointees make each of these decisions in a consistent way? To what extent were the views of career attorneys considered or ignored?**

   Initially, of course, in each of these Section 5 matters, the political appointees' decisions to reject staff recommendations resulted in decisions favorable to and advocated by the Republican Party. Beyond the result, the rejection of unanimous staff recommendations in each of these very high profile and sensitive matters is historically anomalous. In past administrations, both Republican and Democratic, the political appointees almost always have agreed with career staff recommendations to interpose an objection. On those few instances when staff recommendations were rejected by political appointees in the past, memoranda or written explanation of the reasons for such rejections were prepared by political decision-makers for career staff to provide the legal rationale for the decision and to make a complete record of the decision-making process which could act as guidance for future Section 5 decision making. This longstanding process has been successful in ensuring that inappropriate political factors were not injected into the decision-making, and served as a vehicle for future decision-making by setting forth a type of legal precedent to guide career staff.

   However, in each of the Section 5 matters referred to above, staff recommendations were rejected, but political appointees did not prepare any such explanation for these rejections. This deviated from longstanding practice and reflected the chasm that had grown between career and political staff in the Bush Administration. Compounding this break from well-established process was the Department's apparent change in the process for drafting staff memoranda for Section 5 matters. As reported in the Washington Post on December 10, 2005, Voting Section leadership instituted

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a new rule requiring staff who reviewed Section 5 voting submissions to limit their written analysis to the facts surrounding the matter and prohibited the career staff from making recommendations as to whether or not the Department should impose an objection to the voting change. This is a major change in the Voting Section's Section 5 analytical practices, undermining the bottom-up decision-making process developed over thirty years ago. This is especially disturbing in light of the series of decisions discussed above, because eliminating staff recommendations on Section 5 submissions increases the ability of political appointees to make politically motivated preclearance decisions without contradiction of career staff.

In sum, this series of decisions and changes in process concerning Section 5 matters and procedures, has created an impression that the Department's *imprimatur* is being used selectively to advance Republican Party interests even when the arguments are weak or the practices are unconstitutional. This impression is strengthened when one views the process followed in reaching these decisions. Historically, the Justice Department has protected against any partisan application of the preclearance requirement through a well-established, bottom-up, process applied to Section 5 decision-making. Under this process, nonpolitical career staff of the Civil Rights Division are solely responsible for investigating and making recommendations on all Section 5 submissions, and the staff's analyses frame each preclearance determination in terms of the law of Section 5 and the facts pertinent to the specific submitted change. This has had the effect of steering the political staff to correctly making Section 5 decisions based on the law and the facts, and not based on partisan interests, and there have been only rare instances when staff recommendations were ignored as they were in the matters described above.

2. **Before the 2004 Presidential election, the division filed several amicus briefs in voting rights cases, each time in support of restrictive state voting procedures, particularly for counting provisional ballots. Were these filings typical of what the Division has done in your experience?**

Definitely not. First, the courts in which the briefs were filed had not invited participation by the Department. Second, career attorneys in the Voting Section were not made aware of these briefs or the decision to participate in these cases until very shortly before filing and had no input into the drafting of the briefs. Third, and especially troubling, the timing of the filing of these briefs so close to a major election, which address a highly charged partisan issue in states understood to hold the balance in the 2004 Presidential election (Ohio, Florida and Michigan), and taking a position advocated by the Republican Party, all created a strong perception that the Division's decisions to participate in these cases were driven by political considerations. Historically, when it has had the discretion, as was the case here, the Department has avoided taking positions in politically charged voting matters so close to an election to avoid this message being sent.

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Responses of Theodore M. Shaw
Director-Counsel and President, NAACP Legal Defense & Education Fund, Inc.
To Written Questions from Senator Edward M. Kennedy
Oversight of the Civil Rights Division, U.S. Department of Justice

1. *What do the court rulings on the Georgia Photo ID laws and the Supreme Court's recent decision on Texas redistricting indicate about the Justice Department's oversight of Section 5 of the Voting Rights Act?*

The recent preclearances of the Georgia Photo ID law and the Texas state redistricting plan at issue in the Supreme Court's recent ruling of *LULAC v. Perry*, 126 S. Ct. 2594 (2006), raise important questions about the status of the Justice Department's Section 5 enforcement authority. The Justice Department is charged with the responsibility of reviewing these and all proposed voting changes arising in the covered jurisdictions to determine whether the change will result in retrogression of minority voting strength or was otherwise adopted with a prohibited discriminatory purpose. Indeed, the Justice Department's Section 5 preclearance determinations are not reviewable and thus, no court has ever overturned an administrative preclearance determination. *See Morris v. Gressette*, 432 U.S. 491 (1977) (holding that the administrative decision not to object to a submitted change is not subject to a judicial review). Accordingly, challenges to a particular precleared voting change will, inevitably, be based on other statutory or constitutional grounds.

Despite the unique analytical standards surrounding the Section 5 process, voting cases brought under different provisions of the Act or on other constitutional grounds shed light on whether a particular voting change might impair the ability of minority voters' seeking to participate in the political process. Various aspects of the Court's ruling in *LULAC v. Perry* raise findings that, in our view, would be significant in any Section 5 retrogression analysis of the Texas redistricting plan. For example, the *LULAC* Court recognized that significant levels of racially polarized voting in one of the plan's contested district were "particularly severe," noting that the "Anglo citizen voting-age majority will often, if not always, prevent Latinos from electing the candidate of their choice in the district." *Id.* at 2615. Levels of racially polarized voting are significant factors that are considered in both the Section 2 and Section 5 contexts. In the Section 5 context, racially polarized voting may suggest that reconfiguring district boundaries or reducing a district's minority population percentage might eliminate minority electoral opportunity. Although the functional analysis used to determine the occurrence of a Section 2 or other violation differs from that used to make a preclearance determination under Section 5, these cases may be instructive about the effect of a particular change.

2. *The suit against Euclid, Ohio is the only case brought by the Bush Justice Department alleging race discrimination in voting against African-Americans. It took almost six years for the Administration to file that suit. However, the Administration has filed the Division's first-ever lawsuit alleging discrimination against white voters. That suit was filed in Noxubee County, Mississippi.*

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Some might assume that the Justice Department isn't filing cases to protect minority voters because discrimination against these voters isn't a problem. In your view, is voting discrimination against minorities still a serious problem? Do you believe that minorities as well as whites face voting discrimination in Mississippi?

In our view, the Justice Department has historically retained primary enforcement responsibility under the Voting Rights Act of 1965. This delegation of authority stems from the unique nature of federal voting rights litigation, which is both complex and costly. Although advocacy groups have played and will continue to play an important role in this area, the Justice Department is best positioned to identify discrimination where it may occur, carry out investigations to determine whether the claims are meritorious and ultimately, bring its resources to bear through litigation aimed at vindicating the rights of those whom the statute was designed to protect.

Despite this unique delegation of enforcement responsibility, the NAACP Legal Defense and Educational Fund has committed tremendous resources to addressing the problems that minority voters continue to face in states such as Louisiana, Mississippi, Alabama and the covered jurisdictions generally. As the recent reauthorization of the Voting Rights Act illustrates, voting discrimination against our nation's racial minorities remains an ongoing problem. These problems are so significant that the Senate voted, by a margin of 98-0, to extend the protections provided by Section 5 of the Voting Rights Act for an additional 25 years.

3. *The nation is best served when both the Justice Department and civil rights groups work actively to enforce our civil rights laws. Civil rights organizations have a unique perspective, expertise, and ties to local communities. But they lack the Justice Department's resources, its large number of attorneys, and its access to data collected by federal agencies.*

What is the effect, from your perspective, of having a Justice Department that doesn't enforce the law, or enforces it selectively for political reasons. Do civil rights organizations have the resources to fill the gap if the Department fails to enforce the law vigorously?

As the NAACP Legal Defense & Educational Fund is well aware, the nation's work in eradicating racial discrimination remains unfinished business. Sadly, there are many forms of discrimination still permeating our social structures and keeping the African-American and other minority communities from full participation in our society. The Civil Rights Division of the Justice Department has an important and unique role to play in enforcing our nation's civil rights laws. When the Division refuses to enforce these laws, or enforces the laws in a political manner, we all suffer. Not only is discrimination allowed to thrive, but the lack of enforcement by the federal government sends the unfortunate message that compliance with civil rights laws may not be important. Civil rights organizations and private lawyers cannot possibly compensate for the lack of enforcement of civil rights laws by the federal government. As I noted in my oral testimony, civil rights organizations simply do not have the resources and staff to litigate many lawsuits at any given time, especially systemic discrimination cases which are costly and protracted.

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The LDF fields a steady stream of requests for assistance and its resources allow it to respond affirmatively to only a small number of these requests. When the Justice Department defaults on its obligations, the demands on LDF and other public interest law firms increase exponentially. The result is justice delayed or denied.

4. Last month, the NAACP Legal Defense and Educational Fund filed a brief in the Supreme Court defending voluntary integration in public schools. That issue is so important for the nation that I joined with several of my Senate colleagues in filing an amicus brief in that case. I was surprised that the Justice Department filed a brief opposing voluntary desegregation programs. It seems incredible that 50 years after Brown v. Board of Education, and 50 years after federal troops were needed to carry out the desegregation of Little Rock High School, we now see the federal government opposing voluntary desegregation.

Can you put into context for us the significance of that case and the Department's position?

On December 4, 2006, the Supreme Court heard two cases regarding whether public school districts in Seattle and Louisville can voluntarily use race-conscious measures to avoid racial isolation and achieve racial diversity in their elementary and secondary schools. (*Parents Involved in Community Schools v. Seattle School District*, 05-908 and *Meredith v. Jefferson County Board of Education*, 05-915). The white petitioners in these cases seek to prohibit school districts from using race-conscious student assignment policies. If school districts were no longer to have the tools necessary to prevent widespread resegregation of their schools, America's half-century long effort, since *Brown v. Board of Education*, to integrate public schools would effectively come to an end.

The Solicitor General filed a brief in support of the petitioners, urging the Court to prohibit school districts from using any race-conscious measures to promote integration in schools, and further asserting that there is indeed no "compelling interest" in the integration of schools. As I mentioned in my oral testimony, the Justice Department's position in these cases and other recent education cases runs counter to the decades-long efforts by every branch of the federal government to encourage and support voluntary race-conscious school integration. It is also a reversal of the Justice Department's own position and involvement in hundreds of desegregation cases, where it has demanded that school districts take affirmative race-conscious steps to integrate their schools.

5. The Boston Globe has reported a steep decline in the percentage of attorneys hired by the Division who have a background in civil rights.

How important is it for the Division, or any organization that litigates civil rights cases, to look for civil rights experience in hiring attorneys?

As in any specialty within the practice of law, it is preferable to recruit and hire lawyers with experience in civil rights litigation in order to maximize the prospects for success in litigation. It is often the case that defendants in civil rights cases are represented by lawyers with

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expertise in the area of civil rights, even to the point of having experience with the particular type of civil rights claim involved, such as voting rights, employment discrimination or school desegregation. Accordingly, it is desirable for attorneys prosecuting civil rights claims to have at least some experience in the practice of civil rights law. Just as importantly, the Justice Department should ensure that it hires lawyers who are committed to strong enforcement of civil rights laws.

Recent law school graduates are hired through the Justice Department's Honors Program. These lawyers are not yet experienced. However, the record is now well established that this Administration has made its most important hiring criterion for the Honors Program an ideological leaning which is philosophically inconsistent with meaningful enforcement of civil rights laws on behalf of African Americans, Latinos, and other for whom they were originally enacted. The damage that has been done to the Department's reputation, credibility, and capacity to litigate civil rights cases is significant and unless deliberately addressed will be long lasting.

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Responses of Theodore M. Shaw
Director-Counsel and President, NAACP Legal Defense & Education Fund, Inc.
To Written Questions from Senator Patrick Leahy
Oversight of the Civil Rights Division, U.S. Department of Justice

1. *At the oversight hearing, Bob Driscoll testified that cases of the current Civil Rights Division have been "largely upheld by the Supreme Court, and so you would think if an administration was sailing beyond the markers of any established area of civil rights a court would tell it so at some point." What is your response to this statement? In the employment context, does Mr. Driscoll's statement hold up in the wake of the Supreme Court's recent decisions Burlington Northern and Santa Fe Railway Co. v. White and Ledbetter v. Goodyear?*

As a general matter, the degree of success of the Civil Rights Division should not be measured according to its record of appeals to the United States Supreme Court. Strong enforcement of our nation's civil rights laws should be motivated and measured by the desire to eliminate discriminatory practices wherever they are found and to provide proper redress to victims of discrimination, within the confines of the law. Historically, the views of the Division and indeed the entire Department of Justice have greatly contributed to advances in the judicial interpretation of our nation's civil rights laws. In recent years, however, the Division has been reticent to aggressively enforce the civil rights laws, and has even taken legal positions at odds with litigants seeking strong enforcement.

In *Burlington Northern*, the Supreme Court squarely rejected the position of the Division in an employment discrimination case. In that case, the Division joined an amicus brief which sided with the employer and urged an exceedingly narrow interpretation of the retaliation provision under Title VII—that only retaliatory actions relating to employment or occurring at the workplace were forbidden. The Division's position also contracted longstanding policy of the Equal Employment Opportunity Commission. The Court rejected the Division's position, noting specifically that it could not find "significant support" for the position in the EEOC's own interpretations.

In the same Supreme Court term, the Civil Rights Division aligned with an employer defendant a second time in arguing against a longstanding EEOC policy and against the interest of a victim of employment discrimination. In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Division contended that an employee cannot recover in a pay discrimination claim if the pay disparity, while still manifested in each paycheck, arose from a decision outside of the statutory limitations period. This position was contrary to the EEOC's position in the court below and to longstanding EEOC policy permitting recovery under Title VII as long as the disparate pay is received within the limitations period. The position of the Division reflected the recent trend of contravening well-established EEOC policy and siding against the person seeking to enforce anti-discrimination laws.

2. *I have read disturbing accounts of voter intimidation and suppression during the 2006 mid-term elections. The Arizona Republic reported that at a polling site in the 49th precinct in Tucson, Arizona, an area with a heavy percentage of Latino voters, three vigilantes armed with a clipboard, a video camera and a visible firearm stopped only Latino voters as they entered and exited the polls. Republican leaders in Maryland have admitted that part of their election day*

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strategy including bussing in hundreds of poor African Americans from Philadelphia to hand out misleading flyers in African-American communities in Maryland. These flyers falsely suggested that prominent African-American Democrats supported Republican Senate candidate Michael Steele and Republican Gubernatorial candidate Bob Ehrlich. I understand that the FBI is now investigating allegations in Virginia that in the days leading up to last week's election, many voters in heavily Democratic precincts received calls directing them to the wrong polling sites, giving incorrect information about their eligibility to vote or encouraging them not to vote on election day. In light of these incidents, do you believe the Civil Rights Division is doing enough to protect voting rights for African-American and Latino citizens?

There are steps that the Justice Department might take in order to enhance its ability to investigate and prosecute serious acts of voter intimidation that impede voter access to the polls. Most recently, the NAACP Legal Defense & Educational Fund urged the U.S. Department of Justice to open and conduct a thorough investigation into a recent November 3, 2006, cross-burning incident in Grand Coteau, Louisiana. In my view, this incident was a clear and unmistakable expression of racial animus and hatred. Because this particularly virulent act of intimidation was staged on public property on the eve of a racially heated election, many African-American voters could have been discouraged from freely participating in the political process. African-American residents whom we spoke with believe that the cross-burning may have been a tool to intimidate minority voters from freely exercising their right to vote during the November 7, 2006 general election. We are hopeful that incidents such as this one will be expeditiously investigated and prosecuted where appropriate.

In addition to the misleading flyers distributed in Maryland, we also learned that Maryland Republicans instructed their poll watchers that their "most important duty on Election Day was to challenge people and to instruct election judges they could face jail time if a challenge is ignored." Collectively, these efforts may discourage voters, particularly minority voters, from freely participating in the electoral process.

More can be done to make clear which sections of the Justice Department hold primary enforcement responsibility for the investigation and prosecution of these kinds of matters. Indeed, there are a number of federal statutes which may reach acts of voter intimidation such as the misleading flyers distributed during the November 7 general election in Maryland and the November 3 cross-burning incident in Grand Coteau. In some instances, it may be appropriate to open both criminal and civil investigations into these matters which may require some level of coordination between different offices of the Department. For instance, the Grand Coteau cross-burning incident may yield sufficient evidence of a prosecutable violation of federal criminal civil rights statutes including 18 U.S.C. § 241 (conspiracy against rights) and 18 U.S.C. § 245 (federally protected activity). However, the facts may also reveal a violation of Section 11(b) of the Voting Rights Act which prohibits individuals from intimidating, threatening, or coercing any person for voting or attempting to vote. Similarly, Section 1971 (b) of the Civil Rights Act of 1957, applicable during federal elections, prohibits efforts to intimidate, threaten or coerce persons for the purpose of interfering with their right to vote. Determining whether these matters should be pursued in the criminal or civil context are important questions that make clear the need for coordination between the Voting and Criminal Sections of the Civil Rights Division and the Public Integrity Section of the Criminal Division.

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The ongoing nature of voter intimidation makes clear the need to continue to ferret out those barriers that continue to stand in the way of African-American, Latino and other minority voters seeking to participate in the electoral process.

From discussions with high ranking Justice Department officials of this Administration, LDF has become convinced that the Justice Department's priority on election day is to deliver the message to minority voters that election fraud will be prosecuted, rather than that threats, intimidation, and other actions aimed at suppressing minority vote will be prosecuted. Protections against voter fraud already exist and should be enforced. But when the Justice Department's primary election day activities consist of voter fraud warnings directed at minority voters rather than election protection activities, the Department has strayed far from the purpose of the Voting Rights Act it is charged to enforce.

3. *On August 26, 2005, the Justice Department approved—over the objections of career lawyers—Georgia's restrictive photo identification voting measure that will require all voters to show a driver's license or one of five forms of government-issued photo identification at the polls. In another closely watched case, in 2003, the Justice Department overrode a unanimous recommendation of the career staff, which had concluded in a detailed, 73-page memorandum that the Tom Delay-sponsored redistricting plan was retrogressive because it diluted the power of minority voters to elect their candidate of choice. In approving Georgia's voter identification law and the Tom Delay-sponsored Texas redistricting plan, what message does the Justice Department sent about the current Civil Rights Division's commitment to protect minority voters?*

See Response to Question 4.

4. *Since the Justice Department's approval of the Georgia redistricting plan, five courts in total -three federal courts and two state courts—have subsequently enjoined two iterations of the Georgia photo identification law on grounds that such a law is unconstitutional. Similarly, in the Texas redistricting case, the U.S. Supreme Court partially struck down that plan, under Section 2 of the Voting Rights Act, on the basis that the plan diminished the opportunity of Latino voters to participate effectively in the political process and "bears the mark of intentional discrimination." Do you believe that federal court decisions in the Georgia photo identification law case and the Texas redistricting case shed light on the Justice Department's oversight under Section 5 of the Voting Rights Act? Please explain your answer in detail.*

The Justice Department's Section 5 review of proposed voting changes looks to see whether a change will result in retrogression of minority voting strength or was otherwise adopted with a prohibited discriminatory purpose. Indeed, the Justice Department's Section 5 preclearance determinations are not reviewable and thus, no court has ever overturned an administrative preclearance determination. *See Morris v. Gressette*, 432 U.S. 491 (1977) (holding that the administrative decision not to object to a submitted change cannot be challenged in court). For this reason, challenges to a particular voting change that has been precleared will inevitably be one based on other statutory or constitutional grounds.

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Despite the unique analytical standards surrounding the Section 5 process, voting cases brought under different provisions of the Voting Rights Act or on other constitutional grounds can shed light on whether a particular voting change might impair the ability of minority voters to participate in the political process. Although the functional analysis used to determine whether a Section 2 or other violation has occurred differs from that used to make a preclearance determination under Section 5, these cases may be instructive about the effect of a particular change.

Various aspects of the Court's ruling in *LULAC v. Perry*, 126 S.Ct. 2594 (2006), raise findings that would be significant in any Section 5 retrogression analysis of the Texas redistricting plan. For example, the *LULAC* Court recognized that significant levels of racially polarized voting continue to hamper minority electoral opportunities. In particular, the Court found that polarization levels within challenged District 23 were "particularly severe" and noted that the "Anglo citizen voting-age majority will often, if not always, prevent Latinos from electing the candidate of their choice in the district." *LULAC v. Perry*, 126 S.Ct. at 2615. Levels of racially polarized voting are significant factors that are considered in both the Section 2 and Section 5 context. In the Section 5 context, racially polarized voting may suggest that a reduction in the minority population percentage of a particular district would eliminate minority electoral opportunity.

The *LULAC* Court also recognized that the State of Texas eliminated minority electoral opportunity in the face of growing numbers of politically cohesive Latino voters. Although the Court's analysis of the Section 2 challenge considered the issue of vote dilution alone, the Court noted that the Texas redistricting plan "bears the mark of intentional discrimination that could give rise to an equal protection violation." 548 U.S. at 34. This finding is relevant in the Section 5 context to the extent that it may yield evidence that a particular change was adopted with a retrogressive or otherwise impermissible purpose.

5. *This term, the U.S. Supreme Court will hear two cases—Parents Involved in Community Schools v. Seattle School District, and Meredith v. Jefferson County Board of Education—concerning voluntary programs to integrate public schools. The desegregation plans in both cities aim for school populations that reflect that racial and ethnic makeup of their communities. The Justice Department has submitted a "friend of the court" brief supporting the challengers of the voluntary integration plan. The Justice Department, which in 1954 filed a brief supporting desegregation of public schools in the landmark decision of Brown v. Board of Education, now argues that Louisville and Seattle plans violate the equal protection clause of the Fourteenth Amendment because the plans took race into account in assigning students to schools. What do you believe the Justice Department's historical shift from being a friend of integration to now being an opponent of integration says about the current Justice Department's commitment to desegregating our public schools and fulfilling the promise of Brown?*

Unfortunately, the Department's decision to support the challenge to the voluntary integration plans speaks volumes about the level of its commitment to fulfilling the promise of *Brown*. The Department's position is nothing short of a stunning turnaround from a longstanding commitment to promoting desegregation at the K-12 level. The white petitioners in these cases seek to prohibit school districts from using race-conscious student assignment

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policies. If school districts were no longer to have the tools necessary to prevent widespread resegregation of their schools, America's half-century long effort, since *Brown v. Board of Education*, to integrate public schools would effectively come to an end. The Solicitor General filed a brief in support of the petitioners, urging the Court to prohibit school districts from using any race-conscious measures to promote integration in schools, and further asserting that there is indeed no "compelling interest" in the integration of schools. As I mentioned in my oral testimony, the Justice Department's position in these cases and other recent education cases runs counter to the decades-long efforts by every branch of the federal government to encourage and support voluntary race-conscious school integration. It is also a reversal of the Justice Department's own position and involvement in hundreds of desegregation cases, where it has demanded that school districts take affirmative race-conscious steps to integrate their schools.

6. *Earlier this year, we reauthorized the expiring sections of the Voting Rights Act after establishing in nearly 20 hearings in the House and Senate the continued need for those protections. The organization you head, the NAACP Legal Defense Fund, has been a principle defender of the Voting Rights Act and has worked with the Civil Rights Division to enforce its mandates. The Voting Rights Act remains not only one of the landmark achievements of the civil rights era, but a vital protection of the right to vote for all Americans. Yet, the Bush Civil Rights Division has filed only three lawsuits under Section 2 of the VRA, the key section that provides a cause of action for discrimination against minority voters, and all of those cases were filed in 2005 and none of them involves discrimination against Blacks. Are you concerned that the Civil Rights Division's decision to bring so few voting rights cases creates an impression that racial discrimination against African-American voters—particularly in the South—is not longer an issue? Please discuss.*

The Voting Rights Act was enacted to help protect the constitutional rights of all Americans to vote free from racial discrimination. Indeed, civil rights organizations, advocates and citizens have all hoped that we would quickly resolve and eliminate the issues and problems that impede access to the ballot box. Despite these aspirations, stark evidence remains that voting discrimination persists and that much of this discrimination inhibits the ability of African-American voters seeking to participate in the political process. As the recent record developed during the Voting Rights Act reauthorization efforts makes clear, we have not yet eliminated the entrenched discrimination in voting that gave rise to the Act.

The NAACP Legal Defense & Educational Fund remains concerned that the Division has abandoned its historic commitment to aggressively vindicate and protect the rights of all minority voters. Indeed, the Justice Department has always played a lead role in bringing affirmative litigation to help enforce Section 2 and other key provisions of the Act. In large part, this reality is attributable to the exceedingly high costs associated with bringing litigation that is dependent on experts and other technical witnesses. In more recent years, organizations such as the NAACP Legal Defense & Educational Fund have shouldered a significantly higher burden and greater responsibility for investigating matters that implicate the rights of African-American voters.

The reauthorization of the Voting Rights Act resulted in amendments to Section 14 of the Act that will allow prevailing parties to recover reasonable litigation expenses in addition to attorney's fees. The Legal Defense Fund remains hopeful that this amendment will provide

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some marginal assistance to the efforts of organizations and individuals seeking to enforce the provisions of the Act. However, given the complex nature of these cases and the limited resources of non-governmental civil rights organizations, it remains critical that DOJ maintain a commitment to pursuing those cases that might otherwise go untried due to lack of funds.

7. *The decline in the Civil Rights Division's enforcement of traditional civil rights laws protecting against employment, disability, housing and voting rights discrimination has been widely reported. From your vantage point as head of the NAACP Legal Defense Fund, has the decline in enforcement had an impact on the law's ability to protect the poor, the disenfranchised, and victims of discrimination?*

Yes, the decline in enforcement by the Civil Rights Division has had a substantial impact on our country's ability to protect against discrimination, as Congress intended through passage of the various federal civil rights laws. In prior administrations, there have always been significant numbers of cases devoted to eradicating race discrimination, including individual and systemic cases, whatever the other priorities of the Division may have been. Now, unfortunately, there are far too few cases addressing race discrimination against African Americans and other minorities across subject areas. This lack of enforcement means that victims of race discrimination are not able to pursue rights and remedies available to them under our nation's civil rights laws. As we approach the fiftieth anniversary of the Civil Rights Division, which was established primarily to advance racial justice in this country, it is particularly troubling that the Division has overseen such a precipitous decline in race cases. In our view, there is no more important role and function for the Civil Rights Division than to fulfill our nation's commitment toward achieving equal opportunity for all.

8. *Recent cases show a troubling trend of the Civil Rights Division shifting course from positions advocated by the Justice Department in different administrations.*

In 1992, during the Administration of George H.W. Bush, the Justice Department filed suit against the New York City Board of Education alleging that custodian jobs were awarded within an "old boys" network in violation of Title VII. The suit was settled in 2000 by means of a court approved consent decree but litigation over the consent decree continued. In April of 2003, the Justice Department abruptly abandoned the claims of the female and minority custodians and refused to defend the settlement against a challenge from white male custodians to the seniority rights of female and minority custodians.

In another case, the Civil Rights Division spent four years in litigation to overturn discriminatory hiring criteria used by the Southeastern Pennsylvania Transportation Authority. But in late 2001, on the very day an appellate brief in the case was due, the Department abruptly dropped the civil rights suit altogether.

In a case challenging the Buffalo Police Department, an organization with a long history of employment discrimination, the Civil Rights Division assisted minority plaintiffs who alleged that they were systematically excluded from becoming police officers by means of a discriminatory employment test. As recently as June 2001—in the early months of the Bush administration—the Justice Department opposed such tests. But one year later the Department

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adopted a completely different position and insisted that the same career lawyer who had worked for years opposing the tests take the opposition position in court.

Are you worried about the recent trends of the Civil Rights Division shifting course from positions advocated by the Justice Department in previous administrations? Why or why not? What do these shifting of positions suggest about the current Civil Rights Division commitment to equal opportunity in the workplace. Please explain in detail.

Yes, the NAACP Legal Defense Fund is very concerned about changes by the Civil Rights Division in legal positions in ongoing cases, as manifested in the cases described above and elsewhere. As I mentioned in my oral testimony, some variation in policy and priorities usually takes place between administrations. But it is an entirely different matter when the Division suddenly takes completely contrary positions in litigation in which it has been involved for years, and even more importantly, when those positions are adverse to the interests of the discrimination victims it purports to represent. These changes risk the credibility of the Division before federal courts and certainly harm the Division's reputation as the country's chief enforcer of civil rights laws. Just as importantly, they result in legal injury to persons victimized by the discrimination at issue who are relying upon the Division for aggressive enforcement of civil rights laws. Finally, these changes create a crisis of confidence in the work and mission of the Division itself.

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SUBMISSIONS FOR THE RECORD

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
STATEMENT OF MICHAEL CARVIN

Chairman Spector, members of the Committee, thank you for the opportunity to comment on the Justice Department's civil rights enforcement efforts.

I would like to specifically respond to a series of articles in the *Washington Post* and elsewhere which have alleged that the Civil Rights Division's leadership has "twisted the law" and engaged in "undue political influence" by overriding the recommendations of the career attorneys in the voting rights section, in order to achieve partisan ends. While this portrayal of neutral civil servants having their dispassionate legal analysis rejected by ideological and politically-motivated Presidential appointees provides for juicy sound-bites, the reality is quite different and, if anything, the polar opposite of what has been suggested. In truth, for the past 15 years, the career lawyers of the voting rights section have consistently advanced an ideologically-driven, expansive view of the Voting Rights Act which directly resulted in the grotesque racial gerrymanders of the 1990's and which has been consistently rejected by the Supreme Court. Consequently, any supervising attorney who neutrally adhered to the rule of law, and the binding Supreme Court precedent which severely circumscribed the Department's now-discredited view of its sweeping Section 5 authority, would be at odds with the voting rights section's effort to nonetheless continue its racial "maximization" agenda. At worst, any disagreement between the career voting rights staff and their superiors reflects an honest disagreement about two different approaches to the law.

In short, the notion that the voting rights section's positions somehow reflect a view of the law or facts free from ideology, while the Presidential appointees are driven by politics, is plainly untrue under any fair-minded analysis.

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Moreover, contrary to the revisionist history offered by the Department's career attorneys, any current tensions between liberal career lawyers and the Division's leadership in a Republican administration are simply par for the course. In this instance, it reflects nothing more than the career attorneys' refusal to accept that elections have consequences and that the election of a Republican President will lead to a Justice Department with a different, less "result-oriented" approach to the law, particularly where, as here, the Supreme Court has repeatedly rejected the Division's prior expansive view of Section 5 and the Voting Rights Act. That being so, it is quite unfair, and just silly, to portray career voting rights lawyers as noble "whistleblowers" exposing the corruption of politically motivated appointees, simply because the Division leadership sometimes disagrees with the section's skewed view of the law and facts.

Worse still, giving media and congressional support and attention to these disgruntled employees in the voting rights section endorses and encourages their wholly unprofessional behavior. It is plainly impermissible, under any canon of legal ethics or rule of government confidentiality, to publicly disclose internal deliberative memoranda on sensitive legal issues, as was done by some members of the voting rights section to the *Washington Post*. To reward this behavior by portraying these unethical lawyers as "truth-telling" heroes whose selective leaking justifies examination by the Senate Judiciary Committee can only further undermine the Justice Department's institutional ability to properly perform its important law enforcement functions.

Thank you. I would be happy to answer any questions.

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TESTIMONY OF ROBERT N. DRISCOLL

Testimony of Robert N. Driscoll before the United States Senate Committee on the Judiciary on November 14, 2006.

Thank you, Chairman Specter, Ranking Member Leahy, and members of the Committee for the opportunity to discuss the work of the Civil Rights Division. My name is Bob Driscoll and I am currently a partner at Alston & Bird LLP, here in Washington. From 2001 to 2003, I had the honor of serving as Deputy Assistant Attorney General under Assistant Attorney General Ralph Boyd. During that time I worked on a variety of issues, including racial profiling guidance to federal law enforcement, desegregation, and police misconduct.

Although I appear on this panel primarily to answer any questions that Committee members might have, I did want to take the opportunity to express my support for the Division's work in one less controversial (and therefore less publicized) area: enforcement of the Civil Rights of Institutionalized Persons Act (CRIPA), which protects the Constitutional rights of residents of state-run institutions such as nursing homes, juvenile facilities, and prisons. When I joined the Division in 2001, the Special Litigation Section was, at the direction of Congress, hiring additional attorneys to enforce CRIPA. Ralph Boyd also chose CRIPA enforcement as a priority, as have Assistant Attorney Generals Acosta and Kim. My view is that these resources have been put to good use.

CRIPA is important both in its substance – the statute protects some of the most vulnerable members of society – and in its procedure. In particular, CRIPA is a statute that expressly makes litigation a last resort: it requires the Department of Justice to explain what the Constitutional problem is to the state or locality being investigated, explain the minimum necessary remedial measures that will cure the alleged violations, offer any available technical or financial assistance to the jurisdiction being investigated to help it achieve compliance with the Constitution, and offer sufficient time for the jurisdiction to cure any Constitutional problem on its own. Only after the Attorney General *personally* certifies that the jurisdiction has been provided adequate time to cure the alleged violations and that all good-faith negotiations have failed at reaching a voluntary resolution, can litigation be initiated.

I think CRIPA makes sense because it allows both federal and state or local resources to be spent attempting to bring a facility into compliance with Constitutional standards and not on litigation, except in rare instances. As this Committee considers future Civil Rights legislation, I would encourage you to look to CRIPA as a model. I would also encourage the Division to continue to use the cooperative approach mandated by CRIPA in other investigations of states and local jurisdictions.

Again, thank you for inviting me to testify and I look forward to answering your questions.

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Statement of U.S. Senator Russ Feingold

At the Senate Judiciary Committee Hearing
On Oversight of the Civil Rights Division

November 16, 2006

Mr. Chairman, thank you for calling this hearing. I understand this is not only the first oversight hearing since Mr. Kim took over the Civil Rights Division about a year ago, but is also the first oversight hearing of the Division that this Committee has held since May 2002.

For the separation of powers designed by the framers to work, we in the legislative branch need to take our oversight authority seriously. While this hearing is a good first step, it is just a *first* step. It is clear that the Civil Rights Division of the Department of Justice requires our attention and that one hearing will not suffice. So I applaud you, Mr. Chairman, for holding this hearing, and I look forward to much more oversight in the next Congress.

The DOJ Civil Rights Division holds a place of special importance in our federal government. Created in 1957, it is charged with ensuring that the ideals of freedom and equality that have distinguished our country since its founding are realities for all citizens. While the structure of our civil rights laws provides for individual citizens to operate as private attorneys general, it often falls to the Department of Justice to litigate the most difficult cases. In order to protect the rights of all Americans, the Department of Justice must be open to developing new litigation theories and strategies and to taking on cases that are too complex to rely on private enforcement. We depend on the Department to be the leader in civil rights enforcement. Filling this role means the Department must sometimes pursue cases that are not guaranteed or easy victories.

Today, and continuing next year, we will consider whether the Civil Rights Division is living up to this charge. The core responsibilities of the Division lie in its enforcement of the civil rights laws, which prohibit discrimination in education, employment, housing, voting, lending, policing and institutionalization. It is essential that the Civil Rights Division continue to give these responsibilities priority, even as it finds itself taking on additional areas of enforcement, such as immigration and trafficking. I am concerned at what seem to be clear signs that the DOJ has not found a way to do this and has instead concentrated too heavily on a few things to the detriment of many others.

I mentioned that voting rights is a core responsibility of the Division. The just completed elections revealed far too many instances of what appear to be intentional efforts to suppress or intimidate voters. This is a serious problem that requires the Department's serious attention. It's not "just politics." If voters lose faith in elections, they will lose faith in their government. It is as simple as that. I hope we all agree that we cannot let that happen.

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I just want to say to Mr. Kim that oversight need not be something for the Division to fear or resist. A cooperative relationship between the Congress and the executive branch can make government more responsive to the people, and more trusted as it carries out its work. Particularly in the area of civil rights, we should all be on the same side. If we work together, if we communicate better than we have in the past several years, Congress can make sure that adequate funding and direction is available for the very important work you are expected to do.

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from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
November 16, 2006

CONTACT: Laura Capps/Melissa Wagoner
(202) 224-2633

STATEMENT BY SENATOR EDWARD M. KENNEDY ON OVERSIGHT OF THE CIVIL RIGHTS DIVISION

(AS PREPARED FOR DELIVERY)

A year from now, the nation will celebrate the fiftieth anniversary of the Civil Rights Division. When Congress authorized the Division as part of the Civil Rights Act of 1957, it brought America closer to realizing its highest ideals --- the goal of liberty and justice for all.

In the years that followed, the Division was at the forefront of the nation's continuing struggle to guarantee equal justice for all Americans. It helped protect voting rights of African Americans who suffered discrimination. It worked to desegregate schools and universities. It opened doors of opportunity for women, Latinos, Native Americans, Asians, persons with disabilities, and members of language minority groups.

Much of the success in the past few decades has come from the Division's genuine and sustained commitment to vigorously enforce the nation's civil rights laws. There has been enormous progress, but civil rights is still the unfinished business of the nation. It's extremely important for the Division to continue its strong commitment to equal opportunity and equal justice.

That's why so many of us are so very concerned about the direction of the Division in recent years. Assistant Attorney General Kim and his predecessors have often spoken about the work of the Division's Criminal Section, and we commend it. But the number of attorneys in that Section increased by 52% between 1998 and 2004, so it's no surprise that the Criminal Section has been relatively active. But the core of the Division's work is far broader than the work of one section, and includes protecting our citizens from discrimination in all its ugly forms in their day-to-day lives. In these areas, the Division seems to be falling short.

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We've seen repeated reports that the Division's enforcement decisions are based on politics, not law. When former Majority Leader Tom Delay engineered a redistricting of Texas to deliver the House of Representatives to Republicans, the Division promptly pre-cleared it, ignoring the unanimous view of its career attorneys that the plan discriminated against minority voters. The Supreme Court recently ruled that the plan violated the voting rights of Latino citizens.

When Georgia passed a photo identification requirement for voting, the Division promptly pre-cleared the change, overruling the advice of career staff that the law would disenfranchise minority voters. The district court and the conservative Eleventh Circuit called the Georgia law a 21st century poll tax and halted its enforcement. Yet the Division went ahead and pre-cleared a new version of the Georgia law that was also blocked by state and federal courts.

The Division has also significantly curtailed its litigation against race discrimination, despite the reality that African Americans continue to face serious discrimination in many parts of our society.

Also troubling are reports that political considerations control the hiring of career lawyers in the Division. The system of seasoned career attorneys making hiring recommendations has been dismantled, and these decisions are now left to political appointees. Loyalty to right-wing groups like the Federalist Society has replaced academic credentials, experience, and commitment to civil rights in the hiring process.

These problems have hobbled the important work of the Division and we need to correct them. Mr. Chairman, I commend you for holding this hearing today. I welcome the opportunity to consider these important issues, and I look forward to the testimony of our witnesses.

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Department of Justice

STATEMENT

OF

WAN J. KIM
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

ACTIVITIES OF THE CIVIL RIGHTS DIVISION

PRESENTED ON

NOVEMBER 16, 2006

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

Before the
Committee on the Judiciary
United States Senate

Concerning
Activities of the Civil Rights Division

November 16, 2006

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

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

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

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

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PROTECTING VOTING RIGHTS

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

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

Congress has passed legislation in certain distinct areas related to voting and elections. These laws include, among others, the Voting Rights Act of 1965 and subsequent amendments thereto, the Uniformed and Overseas Citizen Absentee Voting Act of 1986 ("UOCAVA"), the National Voter Registration Act of 1993 ("Motor Voter" or "NVRA"), and the Help America Vote Act of 2002 ("HAVA"). The Civil Rights Division enforces the civil provisions of these laws, while the Criminal Division supervises all Department prosecutors in enforcement of the criminal and anti-fraud provisions of these laws.

In the past year, the Voting Section has brought lawsuits under each of these statutes. In fact, the 17 new lawsuits we have filed over the past year is double the average number of lawsuits filed in the preceding 30 years. Additionally, because 2006 is an election year, the Division has worked overtime to meet its responsibilities to protect the voting rights of our citizens.

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

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

Our most recent success under Section 2 involves the Division's lawsuit against Osceola County, Florida, where we brought a challenge to the county's at-large election system. Last month, we prevailed at trial. The court held the at-large election system violated the rights of Hispanic voters under Section 2, and the court ordered the county to abandon it.

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

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

The Division also had a record-breaking year with regard to enforcement of Section 208 of the Voting Rights Act. In Fiscal Year 2006, the Division's Voting Section obtained three out of the eight judgments ever obtained under Section 208 since it was enacted twenty-four years ago. As the Committee knows, Section 208 assures all voters who need assistance in marking their ballots the right to choose a person they trust to provide that assistance. Voters may choose any person other than an agent of their employer or union to assist them in the voting booth. This year the Division brought 3 successful cases under Section 208. During the past six years, we have brought six of the eight cases ever filed under Section 208 in the history of the Act, including the first case ever under the Voting Rights Act to protect the rights of Haitian Americans.

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

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Our commitment to enforcing the language minority requirements of the Voting Rights Act, reauthorized by Congress this summer, remains strong, with four lawsuits filed in FY 06. During the past 6 years, the Civil Rights Division has litigated more cases on behalf of minority language voters than in all other years combined since 1965. Specifically, we have successfully litigated 60 percent of all language minority cases in the history of the Voting Rights Act.

Our cases on behalf of language minority voters have made a remarkable difference in the accessibility of the election process to those voters. As a result of our lawsuit, Boston now employs five times more bilingual poll workers than before. As a result of our lawsuit, San Diego added over 1,000 bilingual poll workers, and Hispanic voter registration increased by over 20 percent between our settlement in July 2004 and the November 2004 general election. There was a similar increase among Filipino voters, and Vietnamese voter registration rose 37 percent. Our lawsuits also spur voluntary compliance: after the San Diego lawsuit, Los Angeles County added over 2,200 bilingual poll workers, an increase of over 62 percent. In many cases, violations of Section 203 are accompanied by such overt discrimination by poll workers that Section 2 claims could have been brought as well. However, we have been able to obtain complete and comprehensive relief through our litigation and remedies under Section 203 without the added expense and delay of a Section 2 claim.

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

In Fiscal Year 2006, the Voting Section also filed the largest number of suits under the National Voter Registration Act since immediately following the passage of the Act in 1995. We filed lawsuits in Indiana, Maine, Missouri, and New Jersey. The Voting Section's suits against New Jersey and Maine also alleged violations of the Help America Vote Act ("HAVA"). We resolved the suits with settlement agreements that set up timetables for implementation of a statewide computer database. The suit against Indiana, which admitted that its lists contained more than 300,000 ineligible voters, also was settled by consent decree. We are still litigating a suit against Missouri regarding its failure, over the course of many years, to remove from its voter rolls registrants who had moved or had died. The state's failure in that regard caused

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dozens of jurisdictions to report that voter registrations exceeded the total number of citizens eligible to vote.

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

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

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

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

A major component of the Division's work to protect voting rights is its election monitoring program, which is among the most effective means of ensuring that federal voting rights are respected on election day. Each year the Justice Department deploys hundreds of

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personnel to monitor elections across the country. Just last week, the Division deployed a record number of monitors and observers to jurisdictions across the country for a mid-term election. In total, approximately 900 federal personnel monitored the polls in 69 political subdivisions in 22 states during the general election on November 7, 2006 – a record level of coverage for a mid-term election. In CY 2006, we have sent over 1,500 federal personnel to monitor elections, doubling the number sent in 2000, a presidential election year.

Such extensive efforts require substantial planning and resources. Our decisions to deploy observers and monitors are made carefully and purposefully so that our resources are used where they are most needed. To that end, I personally met with representatives of a number of civil rights organizations prior to the election this year, including organizations that advocate on behalf of racial and language minorities, as well as groups who focus on disability rights. During these meetings, I encouraged these groups to share information about their concerns with us so that we could respond appropriately where needed. We made a detailed presentation about the Division's preparations for the general election and our election day activities, distributed information about how to request monitoring for a jurisdiction, and explained how to contact us on election day through our toll free number and internet-based complaint system. I also met with representatives from the National Association of Attorneys General, the National Association of Secretaries of State and other representatives of similar associations before this year's general election. This meeting provided a forum for discussion of state and local officials' concerns, and for the Division to provide information about our election day plans.

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

CRIMINAL CIVIL RIGHTS PROSECUTIONS

The Civil Rights Division's Criminal Section continues to vigorously enforce federal criminal civil rights protections. This year, our overall conviction rate rose from 91% in FY 2005 to 98% in FY 2006 – the highest conviction rate recorded in the past two decades. Additionally, in FY 2006, we charged 196 defendants with civil rights violations, the highest total number of defendants charged in the past two decades, and have obtained convictions of the second highest number of defendants (159) in the past two decades.

Our criminal prosecutions span the full breadth of the Division's jurisdiction. In color of law matters, we filed 41 cases (up from 29 the previous year) and charged 62 defendants (compared to 45 in the previous year). We achieved a record success rate of 98% convictions in color of law matters, which are arguably our most challenging prosecutions. Additionally, we

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charged 20 defendants in cases of bias crime, including charges of conspiracy, murder, and post-September 11, 2001 "backlash" crimes.

Our human trafficking efforts continue at an unprecedented pace. Working with the various United States Attorneys' Offices, we charged 111 defendants in 32 cases and obtained 79 convictions, a record number that more than doubled the number of convictions in the previous year. Since 2001, the Department has prosecuted 360 human trafficking defendants, secured almost 240 convictions and guilty pleas, and opened nearly 650 new investigations. That represents a six-fold increase in the number of human trafficking cases filed in court, quadruple the number of defendants charged, and triple the number of defendants convicted in comparison to 1995-2000.

Color of Law Violations

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

During the past 6 years, we have obtained convictions of 50% more law enforcement officials for color of law violations than in the preceding 6 years. In *United States* v. *Walker and Ramsey*, for example, involved the politically-motivated assassination of the county sheriff-elect at the direction of the incumbent sheriff. In previous state trials, the sheriff had been convicted of murder and sentenced to life in prison, but the other defendants had been acquitted of murder charges. The Department stepped in and sought, successfully, convictions of two of the men, including a former deputy sheriff.

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

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

In addition to investigation and prosecution of color of law matters, Criminal Section staff conduct a significant amount of training and outreach. These efforts are designed to help law enforcement agencies prevent the occurrence of these violations. In Fiscal Year 2006, for example, we made presentations on the Criminal Section's civil rights enforcement program to local law enforcement officials attending the FBI's National Academy at Quantico, Virginia. We also made presentations to federal officials such as the FBI and the Department of Homeland Security.

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

Hate Crimes

Hate crimes are some of most deplorable and offensive acts that the Division encounters in its prosecutions. During Fiscal Year 2006, the Division has continued to bring to justice those who commit these terrible crimes. For example, in *United States* v. *Eye and Sandstrom*, the government is seeking the death penalty against defendants who allegedly shot and killed an African-American man because of his race. The government alleges that as the victim walked down the street, the defendants, whom he did not know, drove by and shot at him. Their shots missed the victim, so the defendants allegedly circled the neighborhood until they found him again. One of the defendants got out of the car, rushed up to the victim, and shot him in the chest, killing him. Trial is currently set for January 2007.

Our other cases involve equally disturbing violations. In *United States* v. *Saldana*, four members of a violent Latino street gang were convicted of participating in a conspiracy aimed at threatening, assaulting, and even murdering African-Americans in a neighborhood claimed by the defendants' gang. In *United States* v. *Coombs*, a man in Florida pled guilty to burning a cross in his yard to intimidate an African-American family who was considering buying the house next door to his residence. In *United States* v. *Fredericy and Kuzlik*, one man pled guilty and another will go to trial for his alleged role in pouring mercury, a highly toxic substance, on the front porch and driveway of a bi-racial couple in an attempt to force them out of their home. In another case, *U.S.* v. *Walker et al.*, we charged three members of a white supremacist organization with assaulting a Mexican American bartender in Salt Lake City at his place of employment. These same defendants allegedly assaulted an individual of Native-American heritage outside another bar in Salt Lake City.

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Human Trafficking

The prosecution of the despicable crime of human trafficking continues to be a major element of our Criminal Section's work. The victims of human trafficking are often minority women and children, who are poor, are frequently unemployed or underemployed, and lack access to social safety nets. The Attorney General's initiative on human trafficking has made the prosecution of these crimes a top priority.

In Fiscal Year 2006, the Division continued to aggressively pursue those who commit human trafficking crimes, obtaining a record 79 convictions of human trafficking defendants. Working with the various United States Attorneys' Offices, we charged a record number of sex trafficking defendants (85) and a record number of labor trafficking defendants (26). In addition to prosecuting the perpetrators of these horrible crimes, the Criminal Section also aids their victims. Under the 2000 Trafficking Victims Protection Act, 1,010 trafficking victims from 65 countries have obtained eligibility for refugee-type benefits from HHS with the aid of the Civil Rights Division and other law enforcement agencies.

This year, the Section obtained two of the longest sentences ever imposed in a sex trafficking case in *United States* v. *Carreto, et al.* Defendants organized and operated a trafficking ring that smuggled Mexican women and girls into the United States and then forced them into prostitution in Queens and Brooklyn, New York. On April 27, 2006, two defendants were sentenced to 50 years in prison and a third defendant was sentenced to 25 years in prison for their crimes.

In *United States* v. *Arlan and Linda Kaufman*, the defendants, who operated a residential treatment facility for mentally ill adults, forced their severely ill residents to labor on the Kaufmans' farm and to participate as subjects in pornographic videos. The defendants committed fraud when they billed Medicare for this "treatment" they provided the victims. The defendants were charged with conspiracy, forced labor, involuntary servitude, and fraud in a thirty-five-count indictment. On November 7, 2005, a jury convicted the defendants on all counts. On January 23, 2006, Arlan Kaufman was sentenced to serve 30 years in prison and Linda Kaufman was sentenced to serve seven years.

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

In addition to our work in enforcement, the Criminal Section also actively reaches out to educate law enforcement agencies about human trafficking. For example, our human trafficking staff designed and launched a series of interactive human trafficking training sessions broadcast

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live on the Justice Television Network in which nearly 80% of the U.S. Attorney's Offices participated. The Division is also supporting the 32 task forces funded by the Bureau of Justice Assistance and Office for Victims of Crime by providing training and technical assistance. We are supporting the President's Initiative Against Trafficking and Child Sex Tourism by performing assessments of anti-trafficking activities in targeted countries and making recommendations on program development.

Additionally, a national conference on human trafficking was held this October in New Orleans, Louisiana. Division staff played a central role in developing the program, moderated panels, gave speeches, and lead interactive breakout sessions during the conference. Over six hundred practitioners from law enforcement, non-governmental organizations, and academia attended this very successful conference. At the conference, Attorney General Gonzales announced additional funding totaling nearly $8 million for law enforcement agencies and service organizations for the purpose of identifying and assisting victims of human trafficking and apprehending and prosecuting those engaged in trafficking offenses. The funding will be used to create new trafficking task forces in 10 cities around the country.

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

HOUSING AND CIVIL ENFORCEMENT

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

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

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During the coming year, and in particular under Operation Home Sweet Home, the Division will continue to aggressively combat housing discrimination. The Division has expanded our outreach significantly by creating a new fair housing website (*http://www.usdoj.gov/crt/housing/fairhousing/index.html*), establishing a telephone tip line and a new e-mail address specifically to receive fair housing complaints, and sending outreach letters to over 400 public and private fair housing organizations. In FY 2006, we filed two cases developed through our testing program that allege a pattern or practice of discrimination, and expect to see more in the future as a result of our enhanced testing program.

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

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

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

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

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We recently filed and resolved a lawsuit against Centier Bank in Indiana, alleging violations of the Equal Credit Opportunity Act and the Fair Housing Act. In this case, we alleged Centier unlawfully failed to provide its lending products and services on an equal basis to minority neighborhoods, thereby denying hundreds of loans to prospective African American and Hispanic residents. Under the settlement agreement, the bank will open new offices and expand existing operations in the previously excluded areas, as well as invest $3.5 million in a special financing program and spend at least $875,000 to promote its products and services in these previously excluded areas.

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

In addition to these proactive outreach efforts, the Division continues to actively litigate cases involving housing that is not designed and constructed in accordance with the Fair Housing Act and the Americans with Disabilities Act. We resolved five cases in Fiscal Year 2006 through consent decrees, and in a sixth case, the settlement was filed on September 29, 2006 and entered by the court shortly after the fiscal year ended. We also filed three new design and construction cases which are currently in litigation.

DISABILITY RIGHTS

Since the January 2001 announcement of the President's New Freedom Initiative, the Division's Disability Rights Section has achieved results for people with disabilities in over 2,000 actions under the Americans with Disabilities Act ("ADA"). In FY 2006 alone, the Division achieved favorable results for persons with disabilities in 305 cases and matters, which provided injunctive relief and compensatory damages for people with disabilities across the country and set major ADA precedents in a number of important areas. The Division also continued its important work under Project Civic Access, a wide-ranging initiative to ensure that towns and cities across America comply with the ADA. Many Americans with disabilities are able to enjoy life in a much fuller capacity as a result of our enforcement activities, and the Division will continue to make our efforts in this area a priority.

Our work under the ADA during FY 2006 involved cases across the country and in a variety of settings, including hospitals, public transportation, restaurants, movie theaters, college campuses, and retail stores.

An example of our work in a hospital setting is an agreement we reached with Laurel Regional Hospital in Maryland on behalf of persons with speech or hearing impairments. The hospital agreed to assess the communication needs of individuals with speech or hearing

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disabilities and provide qualified interpreters (on-site or video interpreting) as soon as possible when necessary for effective communication.

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

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

Project Civic Access ("PCA") is a wide-ranging initiative to ensure that towns and cities across America comply with the ADA. The goal of Project Civic Access is to ensure that people with disabilities have an equal opportunity to participate in civic life. To date, we have reached 151 agreements with 142 communities to make public programs and facilities accessible. Each of these communities has agreed to take specific steps, depending on local circumstances, to make core government functions more accessible to people with disabilities. These agreements quite literally open civic life up to participation by individuals with all sorts of disabilities. The agreements have improved access to many aspects of civic life, including courthouses, libraries, parks, sidewalks, and other facilities, and address a wide range of accessibility issues, such as employment, voting, law enforcement activities, domestic violence shelters, and emergency preparedness and response. During the past 6 years, we have obtained more than 80% of the agreements reached under Project Civic Access since it began in 1999, improving the lives of more than 3 million Americans with disabilities.

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

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

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

In addition to the Business Connection meetings, we also operate an ADA Information Line as well as an informative website. Our ADA Information Line receives over 100,000 calls annually from people seeking information and publications on the ADA. In FY 2006, over 45,000 calls to the ADA Information Line have been answered by ADA Specialists. Also, the Section's popular ADA Website, *www.ada.gov*, continues to be active. In Fiscal Year 2006, it served more than 3.1 million visitors who viewed the pages and images more than 49 million times, an increase in hits of over 30% over the prior year.

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

The Disability Rights Section publishes regulations to implement Title II and Title III of the ADA and serves as the Attorney General's liaison to the U.S. Architectural and Transportation Barriers Compliance Board ("Access Board"). During 2006, the Section continued to develop revised ADA regulations that will adopt updated design standards consistent with the revised ADA Accessibility Guidelines published by the Access Board in July 2004. The revised guidelines are the result of a multi-year effort to promote consistency among the many federal and state accessibility requirements. We are now drafting a proposed rule and developing the required regulatory impact analysis.

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SPECIAL LITIGATION

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

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

In Fiscal Year 2006 alone, the Division handled CRIPA matters and cases involving over 175 facilities in 34 states, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of Guam and the Virgin Islands. The Division continued its investigations of 77 facilities into 2006, and monitored the implementation of consent decrees, settlement agreements, memoranda of understanding, and court orders involving 99 facilities.

With regard to juvenile justice facilities, this Administration has increased the number of settlement agreements by more than 70%, has more than doubled the number of investigations, and has more than doubled the number of findings letters issued. One recent example of the Division's work regarding juvenile justice facilities is the successful resolution of our lawsuit against the state of Mississippi in connection with conditions of confinement at the Oakley and Columbia Training Schools in June 2005. The Division filed suit in December 2003 following an investigation that found evidence of shockingly abusive practices, including hogtying, pole-shackling, and placing suicidal students for extended periods of time into a "dark room," naked, with only a hole in the floor for a toilet. Children who became ill during strenuous physical exercise were made to eat their vomit. The consent decree requires the state to implement reform regarding protection from harm and use of force. We also separately entered into a settlement agreement with the state regarding mental health care and special education services. Since the settlement, we have made numerous monitoring visits to ensure that the principles of the settlement are effectuated. I personally visited a facility in August and while there, my staff received allegations and reviewed documents of staff abuse on youth and youth-on-youth violence.

The Division's important health care work is illustrated by a recent historic settlement with California involving four state mental health care facilities that provide inpatient psychiatric care to nearly 5,000 people committed civilly or in connection with criminal proceedings. The Division's investigation, which commenced in March 2002, initially involved one facility but ultimately expanded to include three others. Among other violations, we found a pattern and practice of preventable suicides and serious, life-threatening assaults by staff and other patients. In two instances, patients were murdered by other patients. The extensive reforms required by the consent decree, which was filed in court this summer, mandate that individuals in the

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hospitals are adequately protected from harm, are provided adequate services to support their recovery and mental health, and are served in the most integrated setting appropriate for their needs, consistent with the terms of any court-ordered confinement.

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

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

The Division has ensured the integrity of law enforcement by more than tripling the number of settlements negotiated with police departments across the country since 2001. During this Administration, the Civil Rights Division has successfully resolved fourteen pattern or practice police misconduct investigations involving eleven law enforcement agencies, compared to only four investigations resolved by settlement during a comparable time period of the previous administration. Since 2001, the Division has opened more investigations (16 vs. 15) and filed more consent decrees (4 vs. 3) than in the preceding 6 years. We have issued, moreover, more than six times the numbers of technical assistance letters to police departments (19 vs. 3).

EMPLOYMENT DISCRIMINATION

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

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

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

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

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

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

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

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Wesley McCullough, whose employer allegedly disciplined him for failing to submit "written" orders to obtain military leave. We entered into a consent decree in which the employer agreed to rescind the discipline and provide Mr. McCullough payment for the time he was suspended. The employer also agreed to amend its policies to allow for verbal notice of military service.

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

EQUAL EDUCATIONAL OPPORTUNITIES

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

To ensure that districts comply with their obligations, the Division actively reviews open desegregation cases to monitor issues such as student assignment, faculty assignment and hiring, transportation policies, extracurricular activities, the availability of equitable facilities, and the distribution of resources. In FY 2006, the Educational Opportunities Section initiated 38 new case reviews to determine whether districts have met their desegregation obligations, our second highest total to date for any fiscal year. For those districts that have achieved unitary status, we join in the school districts' motions to dismiss the case. For those districts that have not met their obligations, the Section works with the district to put it on the path to unitary status. This year, we identified 14 cases in which additional relief was needed.

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

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

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The Educational Opportunities Section is also achieving results for persons with disabilities in the education setting. In Fiscal Year 2006, the Section successfully defended the Department of Education's regulation interpreting the "stay put" provision of the Individuals With Disabilities Education Act in a case involving the State of Virginia and a local school district. The Section also successfully defended the Equal Education Opportunities Act from an attack by the state of Texas, which alleged that Congress did not properly abrogate the state's immunity from suit.

PROTECTING CIVIL RIGHTS AT THE APPELLATE LEVEL

During Fiscal Year 2006, the Division's Appellate Section filed 144 briefs and substantive papers in the United States Supreme Court, the courts of appeals, and the district courts. Eighty-seven of these filings were appellate briefs for the Office of Immigration Litigation ("OIL"). Excluding OIL decisions, 90% of the decisions reaching the merits were in full or partial accord with the Division's contentions. The Supreme Court reached the merits in five cases; all were consistent with the government's positions. The courts of appeals rendered 31 merits decisions, 87% of which were in full or partial accord with the Division's contentions. The district courts rendered three decisions; all were consistent with the government's positions. In Fiscal Year 2006, the Division filed 16 amicus briefs, an increase over the previous two years, bringing the total number of amicus briefs filed during this Administration to 94.

I would like to highlight two cases that the Appellate Section handled this past year – one in the Supreme Court and two in the Courts of Appeals.

In the United States Court of Appeals for Fourth Circuit, the Appellate Section filed a brief defending the Division's a criminal conviction obtained by the Division in *United States* v. *Hobbs and Kratzer*. In this case, the defendants were convicted of violating 18 U.S.C. § 241 after they and others agreed to hang a noose, burn a cross, and throw a dead raccoon on the property of an African-American family that had recently moved into the previously all-white town of Nine Mile in Richlands, North Carolina. They were each sentenced to 21 months' imprisonment. The defendants appealed, and the Appellate Section filed a brief defending the convictions. The Fourth Circuit issued a decision affirming the convictions.

In *Wisconsin Community Servs.* v. *City of Milwaukee*, the Division filed an amicus brief at the en banc level in the Seventh Circuit at the Court's invitation. In that case, the Plaintiff, which operates an outpatient clinic for persons with mental-health problems, tried to move its operations to a larger building in a business zone. The City denied plaintiff's request for a special-use permit to operate in the new location. The district court held that the City had an obligation under Title II of the Americans With Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act to make a reasonable accommodation in its zoning rules to allow plaintiff to open the clinic in the business zone. A divided panel of the Seventh Circuit vacated that decision and remanded for further proceedings. On rehearing en banc, the Seventh Circuit overturned the district court's decision and remanded for further proceedings, but rejected some

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of the panel's reasoning. The en banc Court agreed with the Division's positions on a number of key points. Most significantly, the Seventh Circuit agreed with the Division that the Title II regulation, 28 C.F.R. § 35.130(b)(7), "makes clear that the duty to accommodate is an independent basis of liability under the ADA," and thus "a plaintiff need not allege either disparate treatment or disparate impact in order to state a reasonable accommodation claim under Title II of the ADA." Judge Easterbrook, the author of the panel opinion, explained in a concurrence that he had changed his mind on this issue and now "accept[s] the Civil Rights Division's reading of this regulation."

PROTECTION OF IMMIGRANTS' EMPLOYMENT RIGHTS

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

This is where the Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") takes action. OSC enforces the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 ("IRCA"), which protects lawful workers from intentional employment discrimination based upon citizenship, immigration status, or national origin, from unfair documentary practices relating to the employment eligibility verification process, and from retaliation.

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

Since the beginning of Fiscal Year 2006, OSC has settled 76 charges through either formal settlement agreements or letters of resolution. For example, in *United States* v. *Branch Bank and Trust Co.*, an asylee from Liberia was terminated because the bank refused to accept his valid documents for employment reverification. In response to OSC's investigation, the bank entered into a settlement agreement with the charging party under which it agreed to reinstate him and provide him with full back pay for the seven-month period he was out of work. In *United States* v. *Kmart Corporation*, our complaint alleged that a Kmart store maintained a discriminatory employment eligibility verification policy that led to the termination of four

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persons legally allowed to work. We settled this case, and under the terms of the agreement, Kmart provided back pay to the four wrongfully terminated victims and a civil penalty.

Informal interventions are another type of our enforcement activities. Through its hotlines, OSC often is able to bring early, cost-effective resolutions to employment disputes that might otherwise result in the filing of charges and litigation expenses. Since the beginning of Fiscal Year 2006, OSC has successfully completed 220 telephone interventions.

OSC also engages in educational and outreach activities to workers, employers, the bar, unions, legal services, and advocacy organizations to address potential immigration-related employment discrimination. Our outreach program is multi-faceted, and includes employer and worker toll-free hotlines, public service announcements, outreach and training materials designed to reach both English speakers and those with limited English proficiency, presentations, a website, and a periodic newsletter. OSC distributed approximately 65,400 individual pieces of educational materials in FY 2006, 39 percent of which were in Spanish. This year, its public service announcements have aired more than 20,100 times on television and radio in English and Spanish. OSC also operates a grant program which awards funds to organizations for the purpose of conducting public education programs under the anti-discrimination provisions of the Immigration and Nationality Act. OSC's grantees have included state and local fair employment practices agencies, business organizations, non-profit and faith-based immigrant service organizations, and, among others this year, immigration service providers and pro-bono attorneys in the post-Katrina Gulf Coast region.

LIMITED ENGLISH PROFICIENCY

In addition to the Division's major efforts for those who are limited-English proficient in the areas of voting and education, we are also making strides on behalf of those who need language assistance in other areas. This Administration has made a priority of ensuring implementation and enforcement of civil rights laws affecting persons with limited English proficiency ("LEP"). The Division's Coordination and Review Section plays a central role in this effort, and during Fiscal Year 2006 continued its work to ensure that individuals with limited English proficiency are able to effectively participate in or benefit from federally assisted programs and activities.

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

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In FY 2006, the Coordination and Review Section continued its outreach and interagency efforts designed to provide information on the needs of persons who are limited English proficient. Among other things, these efforts included completing the development and release of the interagency video entitled "Breaking Down the Language Barrier: Translating Limited English Proficiency Policy into Practice" in English, Spanish, and Vietnamese, and subtitled in Chinese and Korean. The Section also issued a new brochure for federal agencies and the agencies' recipients explaining the requirements and steps to ensure that LEP individuals have meaningful access to programs and services. The Division developed a survey form, which it distributed to all of the more than 80 federal agencies about efforts to ensure access to LEP individuals in their own programs, and I personally sent a memorandum to all agencies asking that they respond to the survey form. Many did, and our Coordination and Review Section has analyzed the results and is working on a report that will outline promising practices of federal agencies. I was also the featured presenter at the fourth anniversary meeting of the Federal Interagency Working Group on LEP on February 2, 2006, a meeting that was attended by almost 150 people from 40 different federal agencies.

Another area of focus by the Coordination and Review Section this year has been emergency preparedness. On December 12, 2005, the Division sent a memorandum regarding hurricane-related Title VI and LEP issues to federal funding agency civil rights offices and other relevant federal agencies. The Division continues to work with agencies to assist them in ensuring that the needs of national origin minorities (including LEP individuals) are effectively included in emergency preparedness activities and planning.

As part of its responsibility to ensure consistent and effective implementation by federal funding agencies of Title VI and of Title IX of the Education Amendments of 1972, the Coordination and Review Section provided 46 separate training sessions for agencies during Fiscal Year 2006, up from 28 such sessions in 2005. In a section of only eight attorneys and seven coordinator/investigators, this is quite remarkable.

The Coordination and Review Section continues to investigate and resolve administrative complaints alleging race, color, national origin, sex, and religious discrimination and to provide technical assistance to recipients, federal agencies, and the public. This year, the Section initiated six new investigations and completed five investigations that resulted in no violation letters of finding. At this time, Coordination and Review has a caseload of 61 active investigations, 37 of which involved LEP allegations.

PROTECTION OF RELIGIOUS LIBERTIES

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

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virtually every religious discrimination case in which we have been involved, and have increased the enforcement of religious liberties in all areas of our jurisdiction.

For example, the Civil Rights Division reviewed 81 cases of alleged religious discrimination in education from FY 2001 to FY 2006, resulting in 37 investigations. This is compared to one review and one investigation in the prior six-year period. In FY 2006, the Division reviewed 22 cases and investigated 13. The largest category of cases involved harassment of students based on religion. Of the 13 investigations in FY 2006, eight involved harassment claims. Seven of these involved Muslim students.

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

While many of these cases involved straightforward religious discrimination, the Division also has sought to prevent harassment based on religion. For example, in January 2006 we reached a consent decree in a Fair Housing Act case against a Chicago man for harassing his next-door neighbors because of their Jewish religion and their national origin. The Division also has been active in preventing discrimination based on religion in access to public accommodations and public facilities under Titles II and III of the Civil Rights Act of 1964. Investigations under these two statutes increased from one in 1995-2000 to ten in 2001-2006. For example, in the area of public accommodations, we reached a settlement with a restaurant in Virginia that had denied service to two Sikh men because of their turbans. In the area of access to public facilities, we investigated the city of Balch Springs, Texas after officials told seniors at a city senior center that they could no longer pray before meals, sing gospel music, or hold Bible studies, all of which were initiated by the seniors themselves without the involvement of any city employees. The city settled, and agreed to permit seniors to engage in religious expression to the same extent that they can engage in other forms of expression at the center.

The Civil Rights Division also has been active in enforcing the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). The Division has reviewed more than 120 complaints, and has opened 26 formal investigations under RLUIPA. The majority of these

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investigations have been resolved favorably without filing suit. These cases have involved Muslims, Sikhs, Buddhists, Jews, Hindus, and Christians of various denominations.

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

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

Of particular note are the Division's efforts to combat "backlash" crimes following the September 11, 2001 terrorist attacks. Under this initiative, the Division investigates and prosecutes backlash crimes involving violence and threats aimed at individuals perceived to be Arab, Muslim, Sikh, or South Asian. This initiative has led to numerous prosecutions involving physical assaults, some involving dangerous weapons and resulting in serious injury or death, as well as threats made over the telephone, on the internet, through the mail, and in person. We have also prosecuted cases involving shootings, bombings, and vandalism directed at homes, businesses, and places of worship. The Department has investigated more than 700 bias-motivated incidents since September 11, 2001, and we have obtained 32 federal convictions in such cases. We have also assisted local law enforcement in bringing more than 150 such criminal prosecutions.

Two recent examples of our backlash prosecutions are *United States* v. *Oakley*, in which the defendant pled guilty to emailing a bomb threat to the Council on American Islamic Relations, and *United States* v. *Nix*, in which the defendant detonated an explosive device in a Pakistani family's van which was parked outside their home. The defendant set off the explosive with intent to interfere with the family's housing rights. These backlash crimes, and others we have prosecuted since September 11, 2001, are an unfortunate reality of American life today. As President Bush has stated, "those who feel like they can intimidate our fellow citizens to take out their anger don't represent the best of America, they represent the worst of humankind, and they should be ashamed of that kind of behavior."

In recent years the Division has continued its investigations and prosecution of church-burning cases. In addition, anti-Semitic attacks remain a persistent problem in the United States. We recently prosecuted five individuals in Oregon for conspiring to intimidate Jews at the Temple Beth Israel in Eugene, Oregon. Defendants threw swastika-etched rocks at the

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synagogue, breaking two stained glass windows, while 80 members of the synagogue were inside attending a religious service. Notably, three of the five defendants are self-avowed white supremacists who belong to the hate group Volksfront. Sentencing for three of these defendants is scheduled to occur this month.

PROFESSIONAL DEVELOPMENT OPPORTUNITIES

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

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

The program's inaugural session, conducted in June of this year, was an unqualified success. We have already held a second session of the program, and are ready with our third offering, scheduled for the beginning of next month. We plan to conduct these programs approximately three or four times a year.

The office's responsibility also extends to providing advanced training opportunities for more experienced attorneys. In that regard, it has worked closely with the Department's Office of Legal Education, located at the National Advocacy Center in Columbia, South Carolina. This partnership has already resulted in two programs for Departmental attorneys, including United States Attorney's offices. The most recent one, on the Division's enforcement responsibility to stem the flow of human trafficking, utilized the Department's television network to broadcast the training live to offices throughout the country.

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

Finally, the Professional Development Office coordinates the Division's participation in both the Department's pro bono program, in which all attorneys are encouraged to take part, and

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its Mentor Program, which pairs attorneys new to the Division, most of whom are recent law school graduates or judicial clerks, with a more experienced attorney who serves as an informal resource and guide during the new lawyer's first year in the Department.

CONCLUSION

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

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Statement of Senator Patrick Leahy,
Ranking Member, Judiciary Committee,
On Department of Justice Civil Rights Division Oversight
November 16, 2006

Today, the Committee is holding a long-awaited oversight hearing on the Civil Rights Division of the Justice Department. More than a year ago, the *Washington Post* ran two front page articles detailing how President Bush's political appointees within the Division were overriding career litigators' recommendations on crucial voting rights cases. Other newspapers like the *Boston Globe* have been investigating related issues, as well. A number of us have raised concerns for some time. I regret that it has taken so many months to schedule this hearing with the Assistant Attorney General of the Civil Rights Division, and that it has been delayed until this lame duck session.

For almost 50 years, the Civil Rights Division has stood at the forefront of America's march toward equality. Founded in 1957, the Division vigorously implemented civil rights laws during the turbulent era of the Civil Rights Movement. Its attorneys participated in landmark cases that helped transform the legal landscape of our country and brought us closer to the ideal of a "more perfect union." These cases included successfully prosecuting the murderers of civil rights workers, eliminating voter disenfranchisement laws, and battling discrimination in education and government services throughout the nation.

There are several reports from former career attorneys that under the current Administration the Civil Rights Division is retreating from its historic roots. I am concerned that President Bush's political appointees have reversed longstanding civil rights policies and impeded civil rights progress. There are disturbing reports that career lawyers have been shut out of the Division's decision-making process, that the Division's civil rights enforcement on behalf of racial minorities has sharply declined, and that the Department has packed the Division with attorneys who have no background in civil rights litigation.

UNDUE POLITICAL INFLUENCE

Just a few months ago, President Bush signed into law the reauthorization of the Voting Rights Act (VRA). He proudly declared that "[m]y administration will vigorously enforce the provisions of this law, and we will defend it in court." We need to ensure that is so.

I fear that the Bush Administration may, in this instance as in so many other instances, be saying one thing, but doing another. Press accounts indicate that this Administration used weak enforcement and partisan manipulation to undermine the VRA in connection with last week's election. The Associated Press reports that the FBI is looking into complaints that callers tried to intimidate or confuse Democratic voters in the bitter contest between GOP Sen. George Allen and Democratic challenger Jim Webb. In Maryland, a state where Democrats outnumber Republicans by nearly 2-to-1, sample

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ballots suggesting Republican Gov. Robert L. Ehrlich and Senate candidate Michael Steele were Democrats were handed out by people bused in from out of state. The Associated Press reports that the ballots were paid for by the campaigns of Mr. Ehrlich, Mr. Steele and the Republican Party. Perhaps most disturbing, the *Arizona Republic* reports that in Tucson, three vigilantes, one man carrying a camcorder, one holding a clipboard, and one a holstered gun, stopped Hispanic voters and questioned them outside a Tucson polling place.

This manipulation has been most evident in Section 5 preclearance. The Supreme Court repeatedly has held that covered jurisdictions have the burden to prove that voting changes will not harm minority voters. If the jurisdiction failed to meet that burden, preclearance of the proposed electoral changes must be denied. Press reports indicate that contrary to the law, the Bush Administration has turned this principle on its head. Political appointees endorsed redistricting plans or restrictions on the franchise – in Arizona, Georgia, Texas, and Mississippi – despite the strong objections of career lawyers who expressed concerns about the potential for those plans to discriminate against minority voters.

Career attorneys in the Voting Section recommended that a Georgia law requiring a photo identification to vote not be precleared because it would reduce black voters' access to the polls and therefore harm minority voters. The career attorneys also found that state officials in Georgia failed to introduce key evidence regarding the racial impact of the law. Yet, political appointees overruled the career attorneys and approved the law. The *Dallas Morning News* broke a story that the Department adopted a new policy banning staff attorneys' opinions in voting rights cases. Under the new policy the career attorneys' "recommendation was stripped out of that document and was not forwarded to higher level officials" in the Division. This marked a significant change in an institution that once took pride in insulating itself from politics. I note that a majority of Republican-appointed judges on a federal appellate court agreed with the career attorneys in this case when they later enjoined Georgia from enforcing the law, labeling it a "poll tax."

There is also evidence that the Bush Justice Department exerted undue political influence in cases that consistently favored Republicans. In a 2002 Mississippi redistricting case, the Voting Section stalled the redistricting process for so long that a pro-Republican redistricting plan went into effect by default. In the recent Texas redistricting case, the *Washington Post* noted how "highly unusual" it was for political appointees to overrule career attorneys' unanimous finding that a redistricting plan put the voting rights of minority citizens at risk. The Supreme Court recently agreed with the career attorney recommendation that the redistricting plan approved by the political appointees in the Division hurt Hispanic voters in Texas, and ordered Texas to redraw its plan.

All of these cases demonstrate the need for oversight at the Civil Rights Division, and the restoration of the principle that partisan politics has no place in the administration of justice.

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DISMAL ENFORCEMENT RECORD

The Bush Administration has compiled one of the worst civil rights records in modern American history. Over the last five years, the Civil Rights Division has filed only two disparate impact cases under Title VII. Vote dilution claims have come to a grinding halt. Only four Section 2 VRA suits have been filed by this Administration on behalf of *any* minority group. The Division's Appellate Section – which historically has intervened in key discrimination cases – filed only six amicus briefs in the courts of appeal in 2004, a number that represents less than a third of the 22 briefs that were filed in 1999. Even the number of criminal prosecutions brought by the Justice Department for violations of civil rights laws diminished from 83 in 2000 to 51 in 2003.

The lack of cases filed by the Bush Administration falsely gives the impression that overt discrimination against minorities is a thing of the past. In nearly six years of power, the Bush Administration has filed only one suit on behalf of African-American voters. Until July of 2006, the Division's only case alleging racial discrimination in voting sought to protect white voters in Mississippi. During the entire tenure of the Bush Administration, the Division has brought only seven pattern or practice employment discrimination cases, only three of which alleged claims of racial or national origin discrimination-- and one of those was a case challenging the affirmative action policies of Southern Illinois University as discriminatory. Regrettably discrimination against racial and ethnic minorities persists. The Department must fulfill its duty to enforce the law in these cases as well.

POLITICS IN HIRING AND FIRING

I am also concerned about reports that political ideology has harmed the Civil Rights Division's hiring practices and ability to retain experienced litigators. In the Voting Section alone, more than 20 attorneys, representing about two-thirds of the lawyers in the section, have left in the last few years – over a dozen have left the section in the last 15 months. Included in this talent drain were the chief of the section, three deputy chiefs, and many experienced trial lawyers, representing almost 150 years of cumulative experience in civil rights enforcement.

The departures are not my only cause for concern. The Bush Administration's political appointees implemented a major policy change in its hiring process. Until 2002, hiring for career jobs in the Civil Rights Division under all administrations, Democratic and Republican, had been handled by civil servants, not political appointees. After the Bush Administration disbanded the hiring committees – comprised of veteran career lawyers – a noticeable shift in backgrounds of its attorneys emerged. According to internal documents obtained by the *Boston Globe*, "only 42 percent of the lawyers hired since 2003 . . . have civil rights experience" which is a downward turn as compared to two years before the change where "77 percent of those [] hired had civil rights backgrounds." The Civil Rights Division apparently hired lawyers with strong

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conservative credentials but little experience in civil rights. Sound familiar? It should, this is the same hiring philosophy that brought us the disastrous aftermath of Katrina.

Over the past couple of years, we have witnessed a radical assault by the Bush Administration on fundamental assumptions about the exercise of power in our constitutional system. Neither Congress nor a majority of the American people favor radical departures from our nation's time-honored tradition of civil rights enforcement.

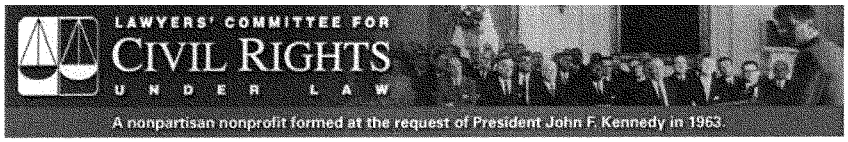
A TIME FOR ACCOUNTABILITY

As the Committee responsible for overseeing the Justice Department, we must ensure that the Department is upholding its duty to protect the American people -- all the people -- from discrimination. Our civil rights laws provide our Federal Government with the authority to impose criminal and civil sanctions against individuals and institutions that violate our peoples' civil rights. They provide meaning to our constitutional guarantees. If civil rights laws are ignored – particularly by the federal agency charged with their enforcement – discrimination will flourish, and the consequences for our nation will be great. The great civil rights champion Representative John Lewis rightly noted that "American citizens have a right to know whether the Justice Department is ignoring the law and bending to the will of politics." Accountability is overdue.

CONCLUSION

We welcome Assistant Attorney General Wan Kim. We are glad to have you back before this Committee so that we may more fully explore these issues with you.

We also welcome the testimony of several practitioners who have served in the Civil Rights Division. We will hear from Joe Rich, a well-respected civil rights attorney, who worked in the Justice Department for 37 years and, until last year, served as Chief of the Voting Section. We are also pleased to hear from Ted Shaw, the current Director-Counsel and President of the NAACP Legal Defense Fund, who began his career as a trial attorney in the Civil Rights Division.



My name is Joe Rich. Since May, 2005 I have been Director of the Housing and Community Development Project at the Lawyers' Committee for Civil Rights Under Law. Previously I worked for the Department of Justice's Civil Rights Division for almost 37 years. The last six years – from 1999-2005 – I was Chief of the Division's Voting Section. Prior to that I served as Deputy Chief of the Housing and Civil Enforcement Section for twelve years and Deputy Chief for the Education Section for ten years. During my almost 37 years in the Division, I served in Republican administrations for over 24 years and Democratic administrations for slightly over 12 years.

I want to thank the Committee for the opportunity to testify at this oversight hearing. Enforcement of our nation's civil rights laws is one of the Department of Justice's most important, and sensitive responsibilities, and careful oversight of this work is crucial. For too long, there has been virtually no Congressional oversight during a time that the Division has strayed seriously from its historic mission and traditions.

Since its creation in 1957 under President Eisenhower, the Civil Rights Division has been the primary guardian for protecting our citizens against illegal racial, ethnic, religious and gender discrimination. Through both Republican and Democratic Administrations, the Division developed a well-earned reputation for expertise and professionalism in its civil rights enforcement efforts.

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

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a similar fashion, the hiring process for new career employees began with the career staff, who made recommendations to the political appointees that were generally respected.

But in the last four years of my working in the Division, and particularly during the period from 2003-2005, this changed dramatically. During this Administration, unlike in the past, the political appointees have made it quite clear that they did not wish to draw on the expertise and institutional knowledge of career attorneys. Instead, there appeared to be a conscious, unprecedented effort to remake the Division's career staff. Political appointees often assumed an attitude of hostility toward much of the career staff and exhibited a general distrust for recommendations made by them. It was extremely frustrating and demoralizing because the political appointees were very reluctant to meet with the career staff to discuss their recommendations. The impact of this on staff morale has resulted in an alarming exodus of career attorneys -- the longtime backbone of the Division that had historically maintained the institutional knowledge of how to enforce our civil rights laws tracing back to the passage of our modern civil rights statutes.

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

Moreover, vigorous enforcement of civil rights laws has suffered, especially in maintaining a proper balance of enforcement priorities. The Civil Rights Division was formed in 1957 to attack the racial caste system that existed in this country. Since then, its responsibilities have steadily grown into other a wide variety of other areas, but combating racial discrimination remains a core mission of the Division. Although every administration will differ as to precisely how it balances enforcement priorities, it is clear from the record that this administration made race discrimination against African-Americans a very low enforcement priority.

Finally, in my experience as chief of the voting section, it became apparent that unprecedented weight was given by political appointees to partisan political factors in several decisions related to enforcement of the Voting Rights Act. This, too, was an alarming departure from historic practices in the Division. The emphasis on avoiding such partisanship has been central to maintaining the confidence and trust of the public and courts in the Division's enforcement of these vital laws. There is no doubt that enforcement of the Voting Rights Act inevitably brings political pressures to bear on many of the Division's enforcement decisions. But, until this Administration, there had been a shared understanding between political appointees and career staff that these pressures must be vigorously resisted. In many instances, this was not the case during the Bush Administration.

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Below, I discuss in more detail these areas of concern. It should be remembered that I left the Division about a year and a half ago, and I cannot speak to all that has occurred since then. However, I think it important to catalog these matters to demonstrate the state of the Division chiefly responsible for civil rights enforcement. It is hoped that increased oversight will help return the Division to its historic mission and restore the trust and confidence of the public in even-handed civil rights law enforcement.

RELATIONSHIP OF POLITICAL APPOINTEES AND CAREER STAFF

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

> Although the job of the Department of Justice is to enforce binding legal norms, three factors set up the potential for conflict between political appointees, who represent the policies of the administration then in power, and civil servants, whose tenure is not tied to an administration and whose loyalties are to the department where they work and the laws they enforce: the horizontal and vertical separation of powers; the indeterminacy of some legal norms; and the lack of a concrete client. The vertical separation of powers was designed to enable both civil service attorneys and political appointees to influence policy. *This design, as well as wise policy, requires cooperation between the two groups to achieve the proper balance between carrying out administration policy and carrying out core law enforcement duties. Where one group shuts itself out from influence by the other, the department's effectiveness suffers.* (emphasis added)

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

- Shortly after the new Administration started, and continuing until after I left, longtime career supervisors who were considered to have views that differed from those of the political appointees were reassigned or stripped of major responsibilities. In April, 2002, the employment section chief and a longtime deputy chief were summarily transferred to the Civil Division. Subsequently, a career special litigation counsel in the employment section was similarly transferred. In 2003, the chief of the housing section was demoted to a deputy chief position in another section and shortly thereafter took retirement. Also in 2003, the chief of the special litigation section was replaced. In the voting

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section, my responsibilities in many of the section's enforcement areas were stripped and given directly to supervisors or other attorneys in the section who were viewed as loyal to political appointees. This was a primary factor in my decision to leave the Department after nearly 37 years. After I left the Department, the chief of the criminal section was removed and given a job in a new Division training program, and shortly after that, the deputy chief in the voting section for Section 5 of the Voting Rights Act was transferred to the same office. In my experience, on only one occasion in the past had political appointees removed career section chiefs, and on that occasion it was on a more limited basis. In short, it is rare for political appointees to remove and replace career section chiefs for reasons not related to their job performance. Never in the past had deputy section chiefs been removed by political appointees.

- Regular meetings of all of the career section chiefs together with the political leadership were discontinued from the outset of the Administration. Such meetings had always been an important means of communication in an increasingly large Division that was physically separated in several different buildings. In the four years of the Bush Administration that I was there, I can remember only a handful of such meetings between political appointees and section chiefs.

- Communication between the direct supervisors of sections at the Deputy Assistant Attorney General level and section staff also virtually disappeared. In the voting section, for instance, section management was initially able to take disagreements in decisions made at the Deputy Assistant Attorney General level to the Assistant Attorney General for resolution. But it became increasingly evident that such debate, which is so important to the healthy development of policy, was frowned on. By 2003, it was made plain to me that efforts to raise issues on which there was disagreement with the Assistant Attorney General were discouraged. In past administrations, section chiefs had access to the Assistant Attorney General to raise issues of particular importance. This for the most part was the case until 2003 at which time, when such a meeting was sought, section staff were usually met with a hostile reception and never provided a true chance to debate policy differences. This discouraged me from seeking other meetings of this kind. Similarly, my efforts to hold periodic management meetings with political appointees were usually rebuffed. This resulted in political appointees not receiving the expertise and institutional knowledge of career staff on many matters. Indeed, a political special counsel in the front office was assigned to work solely on voting matters and often assumed many of my responsibilities as the chief of the section.

- Communication between sections was also discouraged. This was especially true when the appellate section was handling the appeals of trial section cases or amicus briefs in the subject matter of a trial section. When drafting briefs in controversial areas, appellate staff were on several occasions instructed not to share their work with the trial sections until shortly before or when the brief was

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filed in court. This was extremely frustrating for career staff in both the trial and appellate sections and hindered the adequate development of briefs and full debate of issues in the briefs.

- Political appointees have inserted themselves into section administration to a far greater level than I had ever experienced in the past. For example, assignments of cases and matters to section attorneys were made by political employees on many occasions, a rarity in the past. Moreover, assignment of work to sections and attorneys limited the civil rights work being done by career staff. This was especially true of attorneys in the appellate section, where over 60% of resources were being devoted to deportation appeals during 2005. Similarly, selected career attorneys in that Section were informed that they would no longer receive assignments to civil rights cases, and disfavored employees in other sections were assigned the deportation appeal cases. Political appointees also intruded into the attorney evaluation process, something that did not happen in the past.

IMPACT ON MORALE OF CAREER EMPLOYEES

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

- In the voting section, in the eighteen plus months since I left the Department on April 30, 2005, 19 of the 35 attorneys in the section (over 54%) have either left the Department, transferred to other sections (in some cases involuntarily) or gone on detail. At the time I left, there was a section chief and four deputy section chiefs. Only one of the five persons in section leadership remains in the section today.

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

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

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

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

HIRING PROCEDURES

Compounding the impact of the extraordinary loss of career staff in recent years has been a major change in the Division's hiring practices. Since 1954, the primary source of attorneys in all divisions in the Department has been the attorney general's honors program. This program was instituted by then Attorney General Herbert Brownell in order to end perceived personnel practices "marked by allegations of cronyism, favoritism and graft." *Enforcing Civil Rights at p.* 157. Since its adoption, the honors program has been consistently successful in drawing the top law school graduates to the Department.

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

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

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

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

But, in 2002, these longstanding hiring procedures were abandoned, not only in the Civil Rights Division but throughout the Department. The honors hiring committee in the Division was disbanded and all interviewing and hiring decisions were made directly by political appointees with no input that I was aware of from career staff or management. As for non-honors hires, the political appointees similarly took a much more active roll in selecting those persons who received interviews, and almost always participated in the interviewing process.

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

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

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

The reporter noted that current and former Division staffers "echoed to varying degrees" that this pattern was what they observed. For example, a former deputy chief in the Division who now teaches at the American University Law School testified at an American Constitution Society panel on December 14, 2005 that several of his students

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who had no interest in civil rights and who had applied to the Department with hopes of doing other kinds of work were often referred to the Civil Rights Division. He said every one of these persons was a member of the Federalist Society.

In the voting section, while most of the hiring occurred after I left the Department in April 2005 and after the extraordinary exodus of career staff that followed, my experience also confirms this analysis. To the extent there was hiring, the new procedures in which the section chief and career staff were almost totally frozen out of the process were clearly evident. For instance, shortly before I left, I was informed on two occasions by the political appointee with responsibility for the voting section that he was interviewing a candidate for an attorney staff position the same or next day. I attended the interviews, but was never asked my views of the candidates. Nor was I aware of any other candidates for these positions. Shortly after the interviews, I learned both candidates received offers almost immediately. There was also an occasion when, without prior consultation, I was informed of the hiring of a new attorney who would be arriving in the office in a matter of days. Similarly, without prior consultation with me and without the normal process of advertising for supervisory positions, I was informed of the appointment of a special counsel to the section only a few days before his arrival in the section.

Early on in the Bush Administration, the hiring in the voting section was overtly political. In March, 2001, after the contested 2000 election, Attorney General Ashcroft announced a Voting Rights Initiative. An important part of this Initiative was the creation of a new political position – Senior Counsel for Voting Rights – to examine issues of election reform. Two voting section career attorney slots were filled as part of this initiative to help this appointee. The decision to create these new positions was made with no input from me or other career staff and, once the new hires were on board, they operated separately from the voting section on election reform legislation. The person named as the Senior Counsel for Voting Rights was a defeated Republican candidate for Congress. The two line attorneys who filled career attorney slots assigned to the voting section were hired with no input from the section and were active Republican party attorneys. One of those "career" attorneys was promoted to a political position in 2003 – special counsel to the Assistant Attorney General. For the two and a half years that this attorney held this position, he spent virtually all his time reviewing voting section work. Although he was clearly in a political supervisory position, he continued to be listed as a voting section line attorney and enjoyed career status until his recess appointment to the Federal Election Commission in December.

ENFORCEMENT PRIORITIES

Changes in administrations have always been accompanied by changes in enforcement priorities and policies. In this Administration, it is clear that high priority has been given to religious discrimination. A new special counsel for religious discrimination was created to assist in implementing this priority. As is evident from the number of case filings, very high priority has also been placed on enforcement of those parts of the Voting Rights Act that require that adequate language assistance be provided

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to limited English speaking citizens when voting; and on enforcement of human trafficking criminal statutes.

Until this Administration, elimination of discrimination against African-Americans has always been the central priority of the Division's enforcement program. The Civil Rights Division was formed to eradicate race discrimination against African-Americans and, for most of its first fifteen years, it devoted all its resources to this goal. Over the years, the mission of the Division expanded as new civil rights laws were passed and new areas of civil rights enforcement were pursued by a variety of groups and organizations. But historically, combating discrimination against African-Americans has remained a central priority of the Division through both Republican and Democratic administrations.

A review of the enforcement record of the Civil Rights Division during the Bush Administration indicates this traditional priority has been downgraded significantly. For example, in the voting section, until July, 2006, no cases were initiated alleging discrimination against African-Americans pursuant to Section 2 of the Voting Rights Act, the primary non-discrimination provision in the Act. In fact, only nine Section 2 cases have been brought during the six years of the Bush Administration and one of them alleged discrimination against white voters.[1] By comparison, in the last year and a half of the Clinton Administration, fifteen Section 2 cases were filed, four alleging discrimination against African-Americans.[2]

An examination of the enforcement record of the employment section reveals a similar pattern. Since the beginning of the Bush Administration 34 Title VII cases have been filed, of which ten are pattern or practice cases, the most important employment discrimination cases brought by the Department both in their impact and complexity.[3] Only two of the pattern or practice cases brought by the Division allege discrimination against African-Americans and these were not filed until February and July, 2006, more than five years into the Bush Administration and after considerable attention had been brought to the failure to bring such cases.[4] In its first two years alone, the Clinton Administration filed thirteen pattern or practice cases, eight of which raised race discrimination claims. Moreover, two of the ten employment pattern or practice filings – filed before the recent cases alleging discrimination against African-Americans -- are "reverse" discrimination cases, alleging discrimination against whites.

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[1] This was the first voting case ever filed by the Voting Section on behalf of white voters.

[2] One of the nine cases filed during the Bush Administration in April 2001– Crockett County, TN – was the only case to allege discrimination against African-Americans until the recent filing in July, 2006 against Euclid OH, a filing that followed extensive publicity about the lack of such cases. However, the Crockett County case should properly be credited to the Clinton Administration. It was investigated and approved for filing by the Clinton Administration, but because of lengthy pre-suit negotiations, the complaint and consent decree were not filed until shortly after the beginning of the Bush Administration.

[3] Pattern or practice cases are the most important and significant cases brought by the DOJ because they have the greatest impact. Not only do pattern or practice cases affect a large number of employees, they often break new legal ground.

[4] One other pattern or practice case initiated and litigated by the United States Attorney's office for the Southern District of New York also alleged discrimination against African-Americans.

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The pattern of filings in the employment and voting areas indicate that the Bush Administration's enforcement priorities have downgraded the need to ensure that African Americans are not the victims of race-based discrimination. It also seems apparent from the fact that as many "reverse" discrimination cases have been filed as cases attacking discrimination against African-Americans, that increased priority has been given to seeing that whites are not discriminated against. While all citizens are entitled to the protections of our civil rights laws, African Americans have historically been and remain the primary victims of employment discrimination. For that reason alone, the Department has always placed high priority on fighting race-based discrimination against African Americans. African Americans have greater difficulty than whites in obtaining legal representation and access to justice. Whites, therefore, may not need the Department to champion their cause, while African Americans usually do. In such circumstances, it is incongruous that greater priority would be given to "reverse" discrimination than what historically has been the mission of the Division – fighting discrimination against African-Americans.

Another aspect of employment discrimination enforcement should also be noted. In two Title VII cases that recently reached the Supreme Court, the Bush Administration has sought to have the courts endorse a very restrictive view of Title VII. In an amicus curiae brief filed in *Burlington Northern and Santa Fe Railway Co. v. White*, 2006 U.S. LEXIS 4895 (June 22, 2006), the Solicitor General advocated for a narrow interpretation of Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), that was rejected by the Supreme Court. The Solicitor General joined with the employer in that case in arguing that the anti-retaliation provision confines actionable retaliation only to employer action and harm that concerns employment and the workplace. The Supreme Court held in an 8-1 decision that such a narrow interpretation of Title VII is inconsistent with the language of Title VII and inconsistent with the primary objective of the anti-retaliation provision: to provide broad protection to employees who participate in Title VII enforcement. In rejecting the Solicitor General's interpretation, the Court noted that "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." (original emphasis). The Administration should be seeking to expand Title VII's coverage, and not the other way around. More recently, in *Ledbetter v. Goodyear* the civil rights community was forced to advocate for the EEOC's position regarding the statute of limitation in Title VII disparate pay cases, because of DOJ's failure to support EEOC regulations.

POLITICIZATION OF DECISION-MAKING ON VOTING MATTERS

Historically, the Civil Rights Division has been extremely successful in keeping politics out of such decision-making.[5] This has been a significant accomplishment given

[5] A former career Deputy Assistant Attorney General discussed this in an article about decision-making in the administration of Section 5 of the Voting Rights Act. See James P. Turner, *A Case-Specific Approach to Implementing the Voting Rights Act*, in CONTROVERSIES IN MINORITY VOTING 296 (Bernard Grofman & Chandler Davidson, eds., 1992).

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that its decisions can directly affect who gets elected to office, particularly its decisions regarding redistrictings, election method changes, and annexations.

My experience in the voting section, however, indicated that the Bush Administration failed to maintain this standard of conduct. In a series of high profile Section 5 submissions regarding voting changes of great importance to minority voters, the Division's actions indicated that partisan political factors had improperly been brought into the Section 5 decision-making calculus. Political factors also seemed to play an inappropriate role in another series of filings shortly before the 2004 election.

First, in 2002, the Justice Department used the Section 5 process to enable the Republican Party in Mississippi to obtain implementation of a congressional redistricting plan that had been drawn at the Party's behest. The state legislature had failed to enact a plan following the 2000 Census, and the Republican-favored plan had been tentatively approved by a federal district court as a back-up in case a previous plan approved by a state court did not gain Section 5 preclearance in a timely manner. The State had submitted the state court plan in December, 2001 in ample time to obtain preclearance by the date specified by the federal court. It is crystal clear that the plan had no adverse impact on minority voters. Yet, the Justice Department extended the review period by asking the State to provide additional written information about a novel procedural issue – whether state law permitted a court to draw a redistricting plan. There was no evidence that such a procedure had any negative impact on minority voters which would have legitimately led to seeking additional information. The decision to request additional information was made by the Division's political staff without making a decision on the submission of the state court plan. The only fair assessment of this decision is that, by seeking such information, it was understood by the decision-makers that the Division's Section 5 review of the state court plan would be delayed and the federal court would proceed to order into effect the plan drawn by the Republican party -- which is exactly what happened.[6]

In 2003, partisan factors also appeared to affect its decision-making in deciding to preclear the State of Texas's controversial second post-2000 congressional redistricting plan. This was the plan that had been adopted by the state legislature at the urging of then House Majority Leader Tom DeLay. It was designed solely to increase the voting strength of the Republican party in Texas, and eventually resulted in the gain of five Congressional districts. The Department overrode a unanimous recommendation of the career staff, which had concluded in a detailed, lengthy memorandum that the plan retrogressed minority election opportunity. The rejection of a unanimous staff recommendation to interpose an objection is historically rare. In both Democratic and Republican Administrations, the political staff almost always has agreed with staff recommendations to interpose an objection.

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[6] Eventually, the case, *Branch v. Smith*, 538 U.S. 254 (2003), reached the Supreme Court, which held that the Justice Department had unreviewable discretion to seek additional information as it did here. However, this did not excuse the factoring in of political considerations in using that discretion as was clearly the case here.

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In 2004, shortly before the Presidential election, the Division filed a series of briefs as amicus curiae in three cases addressing a contentious political issue raising legal questions about the provisional ballot provisions of the Help America Vote Act. In each case, the brief supported the position of the Republican party on this issue.[7] Career attorneys in the voting section were not informed of these briefs until shortly before filing and had no input into them. The government's participation in these cases was not necessary or required. These filings were of significant concern to career attorneys because inserting itself unnecessarily into such a sensitive partisan political issue on the eve of a national election was unprecedented and sent a clear political message.

Most recently, in August, 2005, after I had left the Department, the Division precleared a Georgia law requiring voters to present a government-issued photo identification in order to vote at the polls on election day. The enactment represented one of the leading examples of legislation advocated by a number of Republicans across the country to deal with alleged problems of fraudulent voting at the polls, but which would erect barriers to voting of particular harm to minority voters. The voting section staff prepared a detailed memorandum recommending an objection on August 25. But, the very next day, on August 26, apparently without forwarding this memo to the Assistant Attorney General, the present section chief approved preclearance even though new information had just been received from the state and even though there was additional time before the deadline – which was September 30 -- for the Section 5 decision to be made.

In previous administrations, the Division historically has been able to avoid partisan application of the preclearance requirement in part because of the bottom-up nature of the Section 5 decision-making process. The nonpolitical career staff of the Civil Rights Division is solely responsible for investigating all Section 5 submissions, and the staff's analyses frame each preclearance determination in terms of the law of Section 5 and the facts pertinent to the specific submitted change. This has had the effect of steering the political staff to correctly make Section 5 decisions based on the law and the facts, and not based on partisan interests. However, it has been reported that after the Georgia decision, a new rule was instituted by the Division which prohibits career staff from making recommendations on submitted voting changes. This is a major change of policy in administration of Section 5, and it undermines the bottom-up decision process and increases the likelihood of politically-motivated preclearance decisions in the future.

CONCLUSION

It was evident to me that while I was in the Civil Rights Division during the Bush Administration, there was a conscious effort to attack and change career staff. This has resulted in a major loss of career personnel with many years of experience in civil rights

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[7] On October 18, 2004, the division filed a Memorandum in the consolidated cases of *Bay County Democratic Party v. Land*, No. 04-CV-10257 (E.D.Mich) and *Michigan State Conferences of NAACP Branches v. Land*, No. 04-CV-10267 (E.D.Mich.). On October 19, 2004 a similar Memorandum was filed in *Florida Democratic Party v. Hood*, 04CV395 (N.D.Fla.). And, on October 22, 2004 an amicus brief was filed *in Sandusky County Democratic Party v. Blackwell,* Nos. 04-4265, 04-4266 (6th Cir.).

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enforcement and in the valuable institutional memory that had always been maintained in the Division until now – in both Republican and Democratic administrations. Replacement of this staff through a new hiring process resulted in the perception and reality of politicization of the Division, and high profile decisions in voting matters have added significantly to this. The overall impact has been a loss of public confidence in fair and even-handed enforcement of civil rights laws by the Department of Justice.

The damage done is deep and will take time to overcome. I am hopeful that the new Division leadership will work diligently to start to repair this damage. Most importantly, careful and continuous oversight, now and in the future, is required to restore the Division to its historic role in leading the enforcement of civil rights laws.

TESTIMONY OF

THEODORE M. SHAW

DIRECTOR-COUNSEL AND PRESIDENT

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

OVERSIGHT HEARING

ON THE CIVIL RIGHTS DIVISION

U.S. SENATE JUDICIARY COMMITTEE

NAACP LEGAL DEFENSE

AND EDUCATIONAL FUND, INC.

November 16, 2006

My name is Theodore M. Shaw. I am the Director-Counsel and President of the NAACP Legal Defense & Educational Fund, Inc. (the "Legal Defense Fund"). The Legal Defense Fund is the nation's oldest civil rights law firm and has served as legal counsel for African Americans in most of the country's major racial discrimination cases.

The Legal Defense Fund is very familiar with the mission and work of the Civil Rights Division. As Assistant Attorney General Wan Kim has noted, the Division "was born of the Supreme Court's landmark decision in *Brown v. Board of Education*,"[1] which was litigated by my predecessor, Thurgood Marshall. Several of our lawyers, including Drew Days, Deval Patrick and Bill Lann Lee, have headed the Division. Personally, I began my career as a lawyer in the Division, hired through the Honors Program. The Legal Defense Fund has worked with the Division on countless cases over the years.

Next year, the Division will celebrate its 50th Anniversary. Established as part of the first civil rights law since Reconstruction, the Division has grown from a handful of lawyers to 350 lawyers—a number which civil rights organizations can only envy. During the 1960s, the Civil Rights Division led

[1] The Department of Justice's Civil Rights Division: A Historical Perspective as the Division Nears 50, Remarks by Wan Kim, Mar. 22, 2006, *available at* http://www.usdoj.gov/crt/speeches/historical_perspective.pdf

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the federal government's fight for racial justice. We all know the history of how Harold Tyler, Burke Marshall and John Doar relied upon the Division's moral stature and resources to insist on equal opportunity in the face of massive public resistance.

Above everything else, it is important for the Civil Rights Division today to retain its leadership role in the prosecution of injustice. Even now, there is simply no matching the power of the federal government behind a civil rights case. It is a position that we admire and respect. Over the years, the Legal Defense Fund has considered the Civil Rights Division a true partner—capable of a unique contribution—in our collective quest for justice.

In order to maintain this stature, it is critical that the work of the Civil Rights Division not be subjected to the vagaries of politics. While every administration has the right to establish its priorities, we, like many others, are deeply concerned that the current Division is unduly influenced by political considerations. Respectfully, we believe that this trend is not good for the Division, the Justice Department, civil rights enforcement generally, or indeed the country. As the nation's top enforcer of civil rights laws, the Division must at all times inspire confidence that its actions are based on the law and the facts.

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Recent disclosures about political appointees overriding well-founded recommendations of career attorneys in the Voting Section, concerning Section 5 enforcement matters in Georgia and Texas, undermine the credibility and reputation of a Division that has long been held in high esteem.

Career attorneys strongly objected to preclearing a Georgia voting statute requiring voters to produce photo identification at the polls, on the ground it would likely discriminate against African-American voters.[2] The very next day, political appointees at the Division overrode the recommendation and precleared the retrogressive voting change. Although the specific legal rationales have varied, five court rulings in total—three by federal courts[3] and two by state courts[4]—have subsequently enjoined two iterations of the Georgia photo identification law on constitutional, among other grounds. Significantly, the first ruling compared the law to a poll tax from the Jim Crow era.[5] Indeed, these court rulings were entirely foreseeable, and the Legal Defense Fund signaled as much to the Division when we

[2] *Criticism of Voting Law Was Overruled*, WASH. POST, Nov. 17, 2005.
[3] *Common Cause/Georgia v. Billups*, Civ. A. No. 4:05-CV-0201-HLM (N.D. Ga. Sept. 15, 2006); *Common Cause/Georgia v. Billups,* 439 F. Supp.2d 1294 (N.D. Ga. 2006); *Common Cause/Georgia v. Billups*, 406 F. Supp.2d 1326 (N.D. Ga. 2005).
[4] *Lake v. Perude*, 2006-CV-119207 (Ga. Super. Ct., Sept. 19, 2006); *Lake v. Perdue*, 2006-CV-119207 (Ga. Super. Ct., July 7, 2006).
[5] *Common Cause/Georgia v. Billups,* 406 F. Supp.2d 1326, 1366-70 (N.D. Ga. 2005).

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submitted our comment letter urging a denial of preclearance under Section 5 of the Voting Rights Act.[6] It is also noteworthy that the record before the Division was, at best, inadequate to determine the impact of the law on Georgia's African Americans, which also should have weighed against preclearance under Section 5, and in favor of a request for more information.

In another closely watched case from Texas, the Division precleared a controversial redistricting plan after six career lawyers, including the head of the Voting Section, and two analysts unanimously recommended that the Division interpose an objection under Section 5 and concluded that Texas "has not met its burden in showing that the proposed congressional redistricting plan does not have a discriminatory effect."[7] Subsequently, the Supreme Court, applying Section 2 of the Voting Rights Act, found that the plan diminished the opportunity of Latino voters to participate effectively in the political process and "bears the mark of intentional discrimination."[8] The holding of the Court effectively shows that the plan worsened the position of Texas' minority voters and that its passage raised serious questions of purposeful discrimination. Either of these rationales should have been

[6] Comment Letter from Theodore M. Shaw to John Tanner, Chief, Voting Section, Aug. 3, 2005.
[7] *Justice Staff Saw Texas Districting as Illegal*, WASH. POST, Dec. 2, 2005.
[8] *League of United Latin Am. Citizens v. Perry*, 126 S.Ct. 2594, 2622 (2006).

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enough to ensure that the plan was denied preclearance under Section 5 review.

These two examples illustrate the problems with the Division's recent civil rights enforcement. First, the role of the career staff is being diminished in favor of political appointees; and second, that shift is leading to outcomes that provide less vigorous civil rights protection for our nation.

There are good reasons for respecting the role of the career attorneys. Indeed, it appears that the extremely low number of objections interposed to voting changes over recent years is attributable, at least in part, to the disregard of careful and thorough work performed by attorneys and analysts, many of whom have significant experience with the preclearance provisions of Section 5. As the Section 5 process calls for a fact-intensive examination of a particular voting change (with more complicated voting changes taking up to 60 days to complete), the analysis performed by Section attorneys and analysts should be given tremendous deference as in the past.

The work of the Division is also undermined when the hiring of its lawyers is said to be motivated primarily by politics, instead of experience in civil rights litigation. The people of the United States—whom the Division represents—need to be assured that their interests in seeking justice will

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always be paramount. Similarly, it is important for the Division to ensure that it retains career lawyers and analysts with expertise and institutional knowledge throughout the various enforcement areas.

Enforcement of our nation's civil rights laws by the Division must be rigorous, and it must be constant. Enforcement by the Division should also be as even as possible, in order to represent all persons falling within the ambit of its protection. Regretfully, over the past six years, there has been a dearth of cases filed by the Division on behalf of African Americans across issue areas.

For example, during this period, the Civil Rights Division has filed only a handful of cases addressing employment discrimination against African Americans.[9] Remarkably, it was not until this year that the Division brought a case alleging that employment practices had a discriminatory impact on African Americans.[10] Unfortunately, this coincides with a dramatic decrease in enforcement of Title VII generally. Nearly half of the employment cases filed in the last two years have addressed discrimination against uniformed servicemembers.[11] And, while the Division has decreased

[9] Complaints Filed, U.S. Department of Justice, Civil Rights Division, Employment Litigation Section, *available at* http://www.usdoj.gov/crt/emp/papers.html
[10] *Id.*
[11] *Id.*

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the number of cases filed on behalf of African Americans, it has increased filings of claims alleging discrimination against white persons.[12]

We find these developments to be extremely troubling. They do not reflect the unfortunate reality that race discrimination still pervades many of our social structures. The Division's only two adverse impact employment cases—filed just this year—originated within miles of one another in Southern Virginia. This begs the question of how many more must exist elsewhere in the country.

While individual claims have a place on the Division's docket, it is imperative that the Division continue its longstanding tradition of bringing pattern and practice cases that otherwise will likely not be prosecuted by the private bar or civil rights organizations with limited resources. Litigation of systemic discrimination claims is costly, complicated and protracted, but this is precisely the type of case in which the federal government should bring to bear its extraordinary resources. Moreover, discrimination that adversely impacts a particular racial group is also actionable under the law; the Division need not only file cases requiring proof of intentional discrimination. The reluctance on the part of the Division to bring systemic cases makes our job

[12] *Id.*

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that much harder. Not only does the burden fall upon organizations and private attorneys to fill the void, but it signals to employers that they face reduced scrutiny of their practices and even gives fuel to the argument by some that certain forms of race discrimination may no longer exist.

We share similar concerns about the docket in the Voting Section. The Civil Rights Division was initially established as part of the 1957 voting rights statute, and the Division's first lawyers prosecuted voting rights violations against African Americans. Throughout its history, securing the right to vote for African Americans and having that vote count have been important priorities for the Division. While the Division under the Bush Administration has brought a record number of cases involving language provisions of the Voting Rights Act, it has approved only one case alleging voting discrimination against African Americans under Section 2 of the Voting Rights Act, again just this year.[13]

As an organization with a substantial voting rights docket, we know only too well that violations against African Americans continue to exist. The recent reauthorization of the Voting Rights Act made clear that racial minorities continue to be denied full participation in the political process.

[13] Litigation Brought by the Voting Section, U.S. Department of Justice, Civil Rights Division, Voting Section Home Page, *available at* http://www.usdoj.gov/crt/voting/litigation/caselist.htm

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The Civil Rights Division must remain true to its original charter, and be a leader in prosecuting these cases to the fullest extent of the law. Any move by the Division to focus instead on criminal fraud by voters is misguided, not in keeping with the separation of responsibilities between the Civil Rights Division and other divisions within the Justice Department, and risks alienating and intimidating the very communities the Division is charged with protecting. And, while the Division continues to monitor elections, as we witnessed just last week, it is important for the Division to maintain strong community ties in these jurisdictions so that its monitoring efforts can be maximized.

We also add a cautionary note concerning the enforcement priorities of the Criminal Section. While the Section has a much-publicized new focus on prosecuting human trafficking cases, we hope that this does not come at the expense of resources allocated to cases fulfilling the core mission of the Section. Specifically, we urge the Civil Rights Division not to abandon its traditional emphasis on law enforcement misconduct and racial bias crimes. As the Legal Defense Fund is acutely aware, racial equality in the criminal justice system remains elusive. We must all remain vigilant in order to bring about a fair and just system.

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Finally, we are troubled by Division efforts to narrow the interpretation of civil rights laws through amicus briefs, which the government may file as "the principal enforcer of the civil rights laws."[14] While the Division and the civil rights community are not always going to agree, it is a very different matter for the Division to advocate frequently against strong civil rights protections on the most important issues of the day. Unfortunately, there are numerous examples. Most recently, in two cases pending before the Supreme Court, *Meredith v. Jefferson County Board of Education* and *Parents Involved in Community Schools v. Seattle School District*, the Division took the position that voluntary race-conscious action to promote integration in public schools violates the Equal Protection Clause, a reversal of historic proportions.[15] In the seminal affirmative action case, *Grutter v. Bollinger*, the Division argued that the race-based admissions policy was unconstitutional,[16] a position with which the Supreme Court ultimately did not agree.[17] In a recent employment retaliation case, *Burlington Northern & Santa Fe Railway Co. v. White*, the Division joined the employer in arguing for a narrow interpretation of Title VII, contradicting longstanding policy of the Equal

[14] *See, e.g.*, Brief for the United States As Amicus Curiae Supporting Respondent, *Burlington Northern and Santa Fe Railway Co. v. White,* No. 05-259, at 1.
[15] Brief for the United States As Amicus Curiae Supporting Petitioner, *Meredith v. Jefferson Co. Bd. of Educ.*, No. 05-915.
[16] Brief for the United States As Amicus Curiae Supporting Petitioner, *Grutter v. Bollinger,* No. 02-241.
[17] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

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Employment Opportunity Commission ("EEOC").[18] Again, the Supreme Court rejected the Division's position.[19] Just last month, the Division joined the employer in arguing against an EEOC policy in the Supreme Court, this time involving the statute of limitations for discrimination in pay.[20]

In closing, we take this opportunity to urge the Civil Rights Division to make its entire docket available to the public. We see no reason why the public agency charged with enforcing our nation's civil rights laws should not make this information readily available to all. It is only through complete transparency in its work that the Division may be fully accountable to the people it purports to serve.

Thank you for the opportunity to testify. I would be happy to answer any questions.

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[18] Brief for the United States As Amicus Curiae Supporting Respondent, *Burlington Northern and Santa Fe Railway Co. v. White,* No. 05-259.
[19] *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006).
[20] Brief for the United States As Amicus Curiae Supporting Respondent, *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074.

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