

THE EROSION OF RIGHTS



Declining Civil Rights Enforcement Under the Bush Administration

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

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

2007

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FOREWORD

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

TABLE OF CONTENTS

| | |
|---|-----|
| EXECUTIVE SUMMARY | 1 |
| PART ONE—Findings & Recommendations of the Citizens’ Commission on Civil Rights and the Center for American Progress | |
| CHAPTER 1 THE EROSION OF RIGHTS AND RECOMMENDATIONS | 4 |
| PART TWO—Working Papers | |
| CHAPTER 2 DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION | 12 |
| The Attack on Professionalism in the Civil Rights Division | 13 |
| By Joseph Rich | |
| The Criminal Section | 18 |
| By Seth Rosenthal | |
| The Employment Litigation Section | 26 |
| By Richard S. Ugelow | |
| The Voting Section | 32 |
| By Joe Rich, Mark Posner, and Bob Kengle | |
| CHAPTER 3 RESHAPING THE COURTS. | 49 |
| President Bush’s Nominations to the U.S. Supreme Court | 50 |
| By Elliot M. Mincberg and Judith E. Schaeffer | |
| The Bush Administration’s Assault on the Lower Courts | 57 |
| By Adam Shah | |
| CHAPTER 4 THE STRUGGLE FOR IMMIGRATION REFORM | 70 |
| By Shaheena Ahmad Simons | |
| CHAPTER 5 POLICIES TO HELP ENGLISH LANGUAGE LEARNERS | 79 |
| By Peter Zamora | |
| CHAPTER 6 CIVIL RIGHTS AND COMMUNICATION POLICY—2006 | 86 |
| By Mark Lloyd | |
| CHAPTER 7 NEW DIRECTIONS FOR U.S. HOUSING POLICY: THE UNMET POTENTIAL OF TWO LARGE PROGRAMS | 97 |
| By Philip Tegeler | |
| EDITOR AND AUTHOR BIOGRAPHIES | 103 |
| ACKNOWLEDGEMENTS | 106 |
| MEMBERS OF THE COMMISSION | 107 |

EXECUTIVE SUMMARY

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

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

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

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

Richard Ugelow, who retired from the Civil Rights Division four years ago, explains how civil rights action against

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

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

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

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

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

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

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

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

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

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

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

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

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

PART ONE

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

CHAPTER I

The Erosion of Rights



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

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

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

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

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

gave comprehensive substantive content to equal rights in the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

DEPARTMENT OF JUSTICE: CIVIL RIGHTS DIVISION

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

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

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

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

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

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

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

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

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

Joe Rich and colleagues Bob Kengle and Mark Posner also write about the critical area of voting. Here the Justice Department has special responsibilities under Section 5 of the Voting Rights Act to approve or disapprove proposed electoral changes by states and localities. Because of the

political sensitivity of such reviews, the Department has adopted procedures to ensure the integrity of the process. But the Bush administration has cast these protections aside in cases arising in Mississippi, Texas and Georgia.

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

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

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

RESHAPING THE COURTS

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

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

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

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

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

THE STRUGGLE FOR IMMIGRATION REFORM

In the battle over immigration policy, the Bush administration has sought to thread its way between the draconian arguments of some conservatives that people not in the

nation lawfully should be treated harshly and deported and the arguments of progressive groups that new laws should provide worker protections and a pathway to citizenship for people who reside in the U.S. but lack legal status.

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

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

POLICIES TO HELP ENGLISH LANGUAGE LEARNERS

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

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

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

COMMUNICATIONS POLICY AND CIVIL RIGHTS

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

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

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

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

FEDERAL HOUSING POLICY: FUNDAMENTAL NEEDS AND UNTAPPED POTENTIAL

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

If people of color who are poor had a route to find decent, affordable housing and the ability to choose locations,

they would have access to educational opportunities, services and jobs that would allow them to work themselves out of poverty. The federal government, having dug the policy hole that has left the minority poor in concentrated poverty, certainly has a responsibility to help them.

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

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

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

RECOMMENDATIONS

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

CIVIL RIGHTS MONITORING BY CONGRESS

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

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

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

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

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

STATUTORY REMEDIES TO EFFECTUATE CIVIL RIGHTS

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

The Civil Rights Act of 1964 called upon federal agencies to prevent racial discrimination in programs or activities assisted by federal funds. While the law has been an effective tool for striking down discrimination in schools, health facilities, housing, public transportation and other areas, the Supreme Court, in the Sandoval case, ruled that individuals have no right to sue to enforce regulations that bar practices that have

a disparate impact on minorities and that are not dictated by necessity. While in the past some aggrieved parents have successfully brought suit for violations of the Elementary and Secondary Education Act (the underlying law of NCLB) in recent years the Supreme Court has been reluctant to imply a right of action that is not explicitly set forth in the statute.

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

SECURE JUDGES COMMITTED TO EQUAL JUSTICE

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

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

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

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

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

Immigration

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

Educating English Language Learners

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

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

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

Communications Policy

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

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

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

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

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

Housing

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

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

ENDNOTES

- 1 See *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (193).

PART TWO

Working Papers

CHAPTER 2

Department of Justice: Civil Rights Division



The Attack on Professionalism in the Civil Rights Division

By Joseph D. Rich

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

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

During the Bush administration, dramatic change has taken place. Political appointees have made it quite clear that they did not wish to draw on the expertise and institutional knowledge of career attorneys. Instead, there appeared to be a conscious effort to remake the Division's career staff. Political appointees often assumed an attitude of hostility toward career staff, exhibited a general distrust

for recommendations made by them and were very reluctant to meet with them to discuss their recommendations. The impact of this treatment on staff morale resulted in an alarming exodus of career attorneys—the longtime backbone of the Division that had historically maintained the institutional knowledge of how to enforce our civil rights laws, tracing back to the passage of our modern civil rights statutes.

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

RELATIONSHIP OF POLITICAL APPOINTEES AND CAREER STAFF

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

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

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

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

- Longtime career supervisors who were considered to have views that differed from those of the political appointees were reassigned or stripped of major responsibilities. In April, 2002, the employment section chief and a longtime deputy chief were summarily transferred to the Civil Division. Subsequently, a career special litigation counsel in the Employment Section was similarly transferred. In 2003, the chief of the Housing Section was demoted to a deputy chief position in another section and shortly thereafter retired. Also in 2003, the chief of the Special Litigation Section was replaced. In the Voting Section, many of the enforcement responsibilities were taken away from the chief and given directly to supervisors or other attorneys in the section who were viewed as loyal to political appointees. In 2005, the chief of the Criminal Section was removed and given a job in a training program, and shortly after that, the deputy chief in the Voting Section for Section 5 of the Voting Rights Act was transferred to the same office. On only one occasion in the past had political appointees removed career section chiefs, and on that occasion it was on a more limited basis. In short, it is rare for political appointees to remove and replace career section chiefs for reasons not related to their job performance. Never in the past had deputy section chiefs been removed by political appointees.
- Regular meetings of all of the career section chiefs together with the political leadership were virtually discontinued from the outset of the administration. Such meetings had always been an important means of communication in an increasingly large Division that was physically separated in several different buildings.
- Communication between the direct supervisors of several sections at the deputy assistant attorney general level and section staff also was greatly limited. In the Voting Section, for instance, section management was initially able to take disagreements in decisions made at the deputy assistant attorney general level to the assistant attorney general for resolution. But it became increasingly evident that such debate, which is so important to the healthy development of policy, was frowned on. In 2003, it was made plain that efforts to raise with the assistant attorney general issues on which there was disagreement would be discouraged. In past administrations, section chiefs had open access to the assistant attorney general to raise issues of particular importance. Attempts to hold periodic management meetings with political appointees were also usually not acted upon. This resulted in political appointees not receiving the expertise and institutional knowledge of career staff on many matters. Indeed, a political special counsel in the front office was assigned to work solely on voting matters and often assumed many of the responsibilities I held as the chief of the section.
- Communication between sections was also discouraged. This was especially true when the appellate section was handling the appeals of trial section cases or amicus briefs on the subjects handled by a trial section. When drafting briefs in controversial areas, appellate staff were on several occasions instructed not to share their work with the trial sections until shortly before or when the brief was filed in court. This was extremely frustrating for career staff in both the trial and appellate sections and hindered the adequate development of briefs and full debate of issues in the briefs.
- Political appointees have inserted themselves into section administration to a far greater level than the past. For example, on many occasions, assignments of cases and matters to section attorneys were made by political employees, something that was a rarity in the past. Moreover, assignment of work to sections and

attorneys was done in a way that limited the civil rights work being done by career staff. This was especially true of attorneys in the appellate section, where close to 40 percent of attorney time has been devoted to deportation appeals during 2005.¹ Similarly, selected career attorneys in that Section were informed that they would no longer receive assignments to civil rights cases, and disfavored employees in other sections were assigned the deportation appeal cases. Political appointees also intruded into the attorney evaluation process in certain instances, something that did not happen in the past.

IMPACT ON MORALE OF CAREER EMPLOYEES

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

- Based on a review of personnel rosters in the voting section, since April 2005 19 of the 35 attorneys in the section (over 54 percent) have either left the Department, transferred to other sections (in some cases involuntarily) or gone on details. During the same period, only one of the five persons in section leadership (the chief and four deputy chiefs) remains in the section today.
- Based on a review of personnel rosters in the employment section, the section chief and one of four deputy chiefs were involuntarily transferred to the Civil Division in April, 2002. Shortly after that, a special counsel was involuntarily transferred to the Civil Division. Since then, two other deputy chiefs left the section or retired. Overall, since 2002, the section chief and three of the four deputy chiefs have been involuntarily reassigned or left the section. In addition, in that period, 21 of the 32 attorneys in the section in 2002 (over 65 percent) have either left the Division or transferred to other sections.
- Loss of professionals—paralegals and civil rights analysts in both the voting and employment sections—has

also been significant. In the employment section alone, twelve professionals have left, many with over 20 years of experience.

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

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

HIRING PROCEDURES

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

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

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

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

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

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

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

Not surprisingly, these new hiring procedures have resulted in the resurfacing of the perception of favoritism, cronyism, and political influence which the honors program had been designed to eliminate in 1954. Indeed, information that has come to light recently indicates that in many instances, this is more than perception. In July,

2006, a reporter for the *Boston Globe* obtained pursuant to the Freedom of Information Act the resumes and other hiring data of successful applicants to the voting, employment, and appellate sections from 2001–2006. His analysis of this data indicated that:

- “Hiring of applicants with civil rights backgrounds—either civil rights litigators or members of civil rights groups—has plunged. Only 19 of the 45 [42 percent] lawyers hired since 2003 in those [the employment, appellate, and voting] sections were experienced in civil rights law, and of those, nine gained their experience either by defending employers against discrimination lawsuits or by fighting against race-conscious policies.” By contrast, “in the two years before the change, 77 percent of those who were hired had civil rights backgrounds.”
- “Meanwhile, conservative credentials [of those hired] have risen sharply. Since 2003, the three sections have hired 11 lawyers who said they were members of the conservative Federalist Society. Seven hires in the three sections are listed as members of the Republican National Lawyers Association, including two who volunteered for Bush-Cheney campaigns.”

The reporter noted that current and former Division staffers “echoed to varying degrees” that this pattern was what they observed. For example, a former deputy chief in the Division who now teaches at the American University Law School testified at an American Constitution Society panel on December 14, 2005 that several of his students who had no interest in civil rights and who had applied to the Department with hopes of doing other kinds of work were often referred to the Civil Rights Division. He said every one of these persons was a member of the Federalist Society.⁵

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

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

CONCLUSION

During the Bush administration there was an unprecedented effort to change the make-up of the career staff

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

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

ENDNOTES

- 1 See Confirmation Hearings for Wan Kim, October, 2005. Answer No. 12 to Written questions of senator Durbin (“According to available records, it is my understanding that during FY 2005, the Appellate Section filed 120 appellate briefs in the Office of Immigration Litigation, and that for the first three quarters of FY 2005 for which information is currently available, approximately 38.8% of attorney hours in the Appellate Section of the Civil Rights Division have been spent on cases regarding the Immigration and Nationality Act.
- 2 Landsberg, *Enforcing Civil Rights* at p. 157.
- 3 Charlie Savage, *Civil Rights Hiring Shifted in the Bush Era*, July 23, 2006 at A1.
- 4 *Id.*
- 5 American Constitution Society, *The Role of Political and Career Employees of the U.S. Department of Justice, Civil Rights Division*, December 14, 2005; video available at www.acslaw.org.

The Criminal Section

By Seth Rosenthal

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

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

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

BACKGROUND

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

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

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

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

The Section's core mission, indeed its historical *raison d'être*, has been to prosecute hate crimes¹ and official misconduct²—crimes that disproportionately victimize racial minorities. There are historical reasons for involving the federal government in such cases. Until recently, local prosecutors, especially in the South, often lacked the

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

Through the years, the Section also has prosecuted severe cases of worker exploitation qualifying as “peonage” and “involuntary servitude”—crimes that formerly victimized African Americans but now mainly victimize foreign nationals brought to the United States.³ The Section’s work in this area was once circumscribed by a judicially-crafted requirement effectively forcing the government to prove that the labor in question was compelled by violence or physical restraint. More subtle means of coercion were not prosecutable.⁴ In addition, cases involving either forced prostitution or the prostitution of minors were prosecuted under statutes that did not fall within the Section’s purview. They were handled by other components of the Justice Department under the Mann Act⁵ and, if they involved illegal aliens, the criminal provisions of the immigration laws.⁶

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

enticing, harboring, transporting or providing any minor for the purpose of prostitution.⁸

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

A SHIFT IN ENFORCEMENT PRIORITIES

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

PUBLIC RELATIONS

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

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

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

RESOURCES

In the past few years, the Section has obtained additional resources, which it has used to beef up its anti-trafficking efforts. Most significantly, in the 1999 and 2000 budget cycles, the Division requested and received authority to hire new Section lawyers. The reinforcements began arriving as George W. Bush assumed the presidency. Whereas the Section employed 31 prosecutors in FY 1998, it had 47 by FY 2003.¹⁶ It now employs upwards of 50. The added manpower has facilitated the transition to a Section docket that features an increased number of trafficking cases (principally sex trafficking cases), but no appreciable difference in other enforcement areas.

In addition, whereas every section attorney and supervisor has traditionally handled every kind of case that the Section prosecutes, the Section during the Bush years began formally assigning or hiring a handful of mid-level managers to work exclusively on trafficking issues. These managers occasionally have handled or supervised cases. They have spent much of their time, however, traveling both nationally and internationally to: coordinate federal

and local law enforcement efforts to combat human trafficking; educate local, state, federal and foreign officials about the trafficking problem; train law enforcement agents on investigating and prosecuting trafficking cases; and conduct outreach to public officials, non-governmental organizations and victims' rights advocates.

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

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

OUTPUT

Staff Sentiment

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

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

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

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

Statistics

It is exceedingly difficult to gauge whether the Section's prosecution statistics bear out Section staff's perception that Section output has increased in the trafficking arena while remaining largely static in core enforcement areas. It should also be emphasized up front that year-to-year statistics might not always reflect how productive the Section is. A number of variables might cause fluctuations in

the number of cases filed, and the number of defendants charged, from year to year. For instance, the number of prosecutable civil rights violations that occur and are reported may change; some cases are far more complex, and thus far more time-consuming and resource-intensive, than others; and the number of cases filed in previous years that are still being litigated may take up time and resources that would otherwise be devoted to new cases.

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

The following illustrates how the numbers have differed:

- From FY 2002–2005, the years for which EOUSA data are currently published online, the Division and the EOUSA have come up with quite different numbers regarding new civil rights prosecutions initiated per year. In FY 2002, EOUSA reported 81 new cases filed, while the Division reported a lesser number, 74. In FY 2003–05, though, the Division's numbers exceeded EOUSA's: 57 vs. 51 in FY 2003, 96 vs. 72 in FY 2004, and 83 vs. 67 in FY 2005.¹⁹ The statistics prepared by the Division under the Bush administration regarding the number of civil rights defendants prosecuted per year also differed from those maintained by EOUSA—and, curiously, they

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

- There have also been disparities between the AO's statistics and the statistics reported by the Division under Bush personnel. Some disparity is inevitable because the AO tracks cases on a calendar year basis, while the Division does so on a fiscal year basis. The disparities in the number of cases filed each year from 1999–2004 are generally not very significant, with the exception of 2004, where the Division claimed 96 new prosecutions (for FY 2004), as compared to only 44 for the AO (for calendar year 2004).²¹ The disparities in the number of defendants charged each year is greater, however, with the Division's numbers usually coming in much higher: 191 vs. 122 for FY 2001 vs. calendar year 2001; 125 vs. 125 for 2002; 123 vs. 98 for 2003; and 151 vs. 98 for 2004.²²

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

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

tion did not prosecute, oversee or include in any statistical tallies, as noted above.²⁵

A June 2006 DOJ report on trafficking prosecutions shows that the number of sex trafficking cases filed by all DOJ components (including cases filed under statutes not falling within the Criminal Section's purview) has climbed steadily since the enactment of the TVPA in October 2000: from four in FY 2001, to seven in FY 2002, to eight in FY 2003, to 23 in FY 2004, to 26 in FY 2005. By contrast, the number of labor trafficking cases filed (again, including cases filed under statutes not falling within the Section's purview) has fluctuated but remained pretty constant: six in FY 2001, three in FY 2002, three in FY 2003, three in FY 2004 and eight in FY 2005.²⁶

Nor does the annual number of labor trafficking cases filed during the Bush years differ materially from the number filed during President Clinton's second term, particularly given that, unlike the Bush administration, the Clinton administration did not include in its statistical tallies forced labor cases prosecuted under statutes that the Section was not given primary authority to enforce. The Section brought one labor trafficking case under the involuntary servitude statute in FY 1996, five in FY 1997, one in FY 1998, four in FY 1999 and none in FY 2000.²⁷

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

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

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

LOOKING AHEAD

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

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

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

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

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

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

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

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

Both sex trafficking and ordinary prostitution that initially looks like sex trafficking are prevalent. If the Department does not consider transferring primary authority for inves-

tigating and prosecuting these crimes from the Section to U.S. Attorneys’ Offices, it might run the risk of gradually transforming the Section into a roving, nationwide vice squad. That was not what the Department intended when it tapped the Section to take the lead on enforcing the TVPA, and it is not consistent with the Section’s traditional, still-vital mission.

CONCLUSION

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

ENDNOTES

- 1 Such offenses are prosecuted under 18 U.S.C. §245 (proscribing violence and intimidation based on race, religion and national origin in public accommodations, employment, education and employment) and 42 U.S.C. §3631 (proscribing racially-, ethnically- and religiously-motivated interference with housing rights).
- 2 Such offenses are prosecuted under 18 U.S.C. §§ 241–42.
- 3 Such offenses are prosecuted under 18 U.S.C. §§ 1581–84.
- 4 *United States v. Kozminski*, 487 U.S. 931 (1988) (interpreting 18 U.S.C. §1584).
- 5 18 U.S.C. § 2421 et seq.
- 6 8 U.S.C. §§ 1324–28.
- 7 18 U.S.C. §§ 1589–90.
- 8 18 U.S.C. § 1591.
- 9 See, e.g., *Transcript of Attorney General Alberto R. Gonzales, Assistant Attorney General Wan Kim and Senior Department Official at Pen and Pad Roundtable on Human Trafficking*, January 31, 2007 (available at http://www.usdoj.gov/crt/speeches/crt_speech_070131.html); *Prepared Remarks of Attorney General Alberto Gonzales at the Freedom Network USA Conference*, March 15, 2006 (available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_0603151.html); John Ashcroft, *Path-Breaking Strategies in the Global Fight Against Sex Trafficking*, Feb. 25, 2003 (available at <http://www.usdoj.gov/archive/ag/speeches/2003/022503sextraffickingfinal.htm>).
- 10 *Remarks by President George W. Bush at the National Training Conference on Human Trafficking*, July 16, 2004.
- 11 See *Attorney General Alberto R. Gonzales Announces Creation of Human Trafficking Prosecution Unit within the Civil Rights Division*, January 31, 2007 (available at http://www.usdoj.gov/opa/pr/2007/January/07_crt_060.html).
- 12 See <http://www.usdoj.gov>.
- 13 See http://www.usdoj.gov/whatwedo/whatwedo_ctip.html.
- 14 See http://www.usdoj.gov/crt/antitraffic_bull.html.
- 15 See http://www.usdoj.gov/whatwedo/whatwedo_ctip.html.
- 16 *Answers to Questions by Attorney General John Ashcroft to the Questions Submitted by Members of the Senate Judiciary Committee the June 8, 2004 Hearing on “DOJ Oversight: Terrorism and Other Topics”* (on file with author).
- 17 See *Attorney General Alberto R. Gonzales Announces Creation of Human Trafficking Prosecution Unit within the Civil Rights Division*, January 31, 2007 (available at http://www.usdoj.gov/opa/pr/2007/January/07_crt_060.html).

- 18 See <http://www.usdoj.gov/crt/nordwg.html>.
 - 19 Compare *United States Attorneys' Annual Statistical Reports* for FY 2002, 2003, 2004 and 2005 (available at http://www.usdoj.gov/usao/reading_room/foiamanuals.html) with *Answers to Questions by Attorney General John Ashcroft to the Questions Submitted by Members of the Senate Judiciary Committee the June 8, 2004 Hearing on "DOJ Oversight: Terrorism and Other Topics"* (on file with author).
 - 20 Compare *United States Attorneys' Annual Statistical Reports* for FY 2002, 2003, 2004 and 2005 (available at http://www.usdoj.gov/usao/reading_room/foiamanuals.html) and *Transactional Records Access Clearinghouse, Civil Rights Enforcement by Bush Administration Lags, Nov. 21, 2004*, at <http://trac.syr.edu/tracreports/civright/106/> [hereinafter *Enforcement Lags*] (reporting EOUSA statistics regarding number of civil rights defendants charged per year between FY 1999 and FY 2003) with *Answers to Questions by Attorney General John Ashcroft to the Questions Submitted by Members of the Senate Judiciary Committee the June 8, 2004 Hearing on "DOJ Oversight: Terrorism and Other Topics"* (on file with author).
 - 21 Compare Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics 2005*, Table D-2 (available at <http://www.uscourts.gov/caseload2005/contents.html>) with *Answers to Questions by Attorney General John Ashcroft to the Questions Submitted by Members of the Senate Judiciary Committee the June 8, 2004 Hearing on "DOJ Oversight: Terrorism and Other Topics"* (on file with author).
 - 22 *Id.*
 - 23 In 2004–05, the disparities between the EOUSA's and AO's numbers on the one hand, and the numbers offered by the Division on the other, led to a public spat between the Division's political appointees and a Syracuse University-based, non-partisan research group called the Transactional Records Access Clearinghouse (TRAC). Using the EOUSA's numbers regarding defendants charged from FY 1999–FY 2003, and the AO's numbers regarding cases filed between calendar years 1999 and 2003, TRAC concluded that the Department of Justice's overall criminal civil rights enforcement efforts had "sharply declined" during the Bush administration. See *Enforcement Lags*. (Oddly, the numbers that TRAC used are not precisely the same as the numbers that can be obtained from looking directly at EOUSA's and AO's numbers for corresponding years; they are, however, very close.) Political appointees in the Civil Rights Division immediately responded by citing—in a press release and on Tavis Smiley's National Public Radio program—the Division's internally-maintained statistics for those years, which, as noted above, differed from EOUSA's and the AO's. In the process, the appointees not only cited numbers on defendants charged per year that were, for the Bush years, higher than EOUSA's, they also suggested that the Department had initiated a greater number of official misconduct prosecutions during the first three years of the Bush administration (FY 2001–03) than during the final three years of the Clinton administration (FY 1998–2000). See Press Release, Nov. 22, 2004 (available at <http://www.trac.syr.edu/tracreports/civright/115>). Curiously, however, the official misconduct numbers they touted for FY 2001–03 were far greater than the numbers they had provided just a few months before to the Senate Judiciary Committee (146 vs. 119). The numbers provided to the Committee show rough equivalence (119 vs. 115) between the two three-year periods. Equally curiously, the political appointees did not respond to what was perhaps TRAC's most serious charge—that the *overall* number of civil rights prosecutions initiated per year had declined. (It might have been difficult to do so, however, since as noted above, TRAC's numbers on that subject relied on the AO, which maintains statistics on a calendar year basis, whereas the Division maintains them on a fiscal year basis.)
- Concerned about the deviation between the statistics internally-recorded by the Division and those maintained by EOUSA and the AO, TRAC subsequently made a Freedom of Information Act request for the Division's statistics, which, unlike EOUSA's and AO's, are not publicly available. Based on the material it received, TRAC concluded that from FY 1999 to FY 2003, the Division's internal record-keeping gradually improved: early on the Division "missed quite a few cases" that were included in the EOUSA's and AO's numbers, but "[a]s time went on the ... Division record systems improved and fewer cases were missed." Letter from Susan B. Long and David Burnham to Attorney General Alberto Gonzales, June 9, 2005 (available at <http://www.trac.syr.edu/tracreports/civright/115>). The result, according to TRAC, was that the purported increase in the Division's numbers "was only an artifact of improved recording." TRAC stuck by its earlier conclusion, based on EOUSA and AO statistics, that there had been a "real decline in the cases that actually were filed in court against different kinds of civil rights violators." *Id.*
- It is difficult to assess the validity of these conclusions. First, while comparing information obtained from the Division with information from EOUSA and AO may well show that the Division missed cases in the "early years" of the study (presumably 1999 and 2000), it does not follow that "fewer cases" were missed "as time went on" for one simple reason: the Division's numbers are higher for the later years (2001–03, presumably) than EOUSA's or AO's. The fact that the disparities neither went away nor decreased suggests either that the EOUSA and AO missed cases, that the Division overreported, or that the various entities tally the numbers differently—not that the Division missed fewer cases. It is similarly difficult to figure out how TRAC reached the conclusion that there was a "real decline" in cases filed. TRAC seems to imply that the Division's numbers in "later years" (2001–03) are not inflated (unless by counting as "civil rights cases" those not brought under civil rights statutes), only that the numbers for earlier years are depressed due to faulty record-keeping. If that is the case, it does not lead inexorably to the conclusion that there has been a "real decline" in the number of cases filed, and TRAC does not explain how it reached that conclusion.
- 24 *Answers to Questions by Attorney General John Ashcroft to the Questions Submitted by Members of the Senate Judiciary Committee the June 8, 2004 Hearing on "DOJ Oversight: Terrorism and Other Topics"* (on file with author).
 - 25 *Report on Activities to Combat Human Trafficking*, March 15, 2006, at 24–29 [hereinafter *Combat Trafficking Report*]; *Attorney General's Annual Report to Congress on U.S. Government Activities to Combat Trafficking in Persons, Fiscal Year 2005* (June 2006), at 15–17 [hereinafter *FY 2005 Trafficking Report*]. Both reports are available at http://www.usdoj.gov/whatwedo/whatwedo_ctip.html.
 - 26 *FY 2005 Trafficking Report*, at 15–17.
 - 27 *Combat Trafficking Report*, at 27.

Employment Litigation Section

By Richard S. Ugelow

INTRODUCTION

Title VII of the Civil Rights Act of 1964¹ prohibits discrimination in employment based upon race, sex, religion and national origin. With the enactment of the Equal Employment Opportunity Act of 1972 (1972 Amendments),² Title VII's coverage was extended to cover public as well as private sector employees. The 1972 Amendments designated the DOJ as the federal agency to enforce Title VII against public sector employers, while the Equal Employment Opportunity Commission (EEOC) was given responsibility for enforcement in the private sector. Within the DOJ, the Employment Litigation Section (ELS) of the Civil Rights Division is the office delegated day-to-day enforcement responsibility of Title VII against state and local government employers.

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

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

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

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

THEORIES OF LIABILITY FOR EMPLOYMENT DISCRIMINATION

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

DISPARATE TREATMENT

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

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

DISPARATE IMPACT

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

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

THE STATUTORY SCHEME

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

SECTION 706 OF TITLE VII

Section 706 of Title VII authorizes the attorney general to file a suit based upon an individual charge of discrimination that has been referred to the Department of Justice by the EEOC. Under Title VII, individuals who believe they are the victims of employment discrimination may file a charge of discrimination with the EEOC. If the charge of discrimination is against a state or local government

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

SECTION 707 OF TITLE VII

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

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

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

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

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

The DOJ also has used pattern or practice authority to reform cognitive tests that disproportionately exclude minorities (African Americans and Hispanics) from police officer, fire fighter, correctional officer and myriad other positions. Similarly, the authority has been used to ensure that women have access to physically demanding jobs in which they were underrepresented, such as police and correctional officer, for which they were otherwise

qualified. Indeed, historically, the DOJ focused its litigation efforts on dismantling artificial (non job-related) barriers that denied job opportunities to minorities and women in such protective service jobs because these positions offer prestige, promotional opportunities, and excellent pay and benefits.

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

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

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

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

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

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

Of the 32 Title VII cases brought by the Bush administration, nine are pattern or practice cases, five of which raise allegations of race discrimination. Two of the race discrimination cases are "reverse" discrimination cases, alleging discrimination against whites.⁷ Another case alleges discrimination against Native Americans⁸ and one case was filed by the U.S. Attorney's Office for the Southern District of New York.⁹ Thus, the Employment Litigation Section can lay claim to filing exactly *one* pattern or practice case in five years that alleges discrimination against African Americans. And that case was not filed until February 7, 2006, more than five years into the Bush administration.¹⁰ In its first two years alone, the Clinton administration filed 13 pattern or practice cases, eight of which raised race discrimination claims.

The Bush administration's record does not fare any better when looking at its use of section 706 enforcement authority. Twenty-four section 706 cases have been filed since January 20, 2001, five of which allege that the defendants engaged in race discrimination in violation of Title VII. Since the year 2000, the EEOC referred more than 3,200 individual charges of discrimination to

the ELS.¹¹ It is inconceivable that there were only five litigation-worthy suits to be filed on behalf of African Americans in that group. During its term in office, the Clinton administration filed 73 section 706 cases, of which 12 alleged violations of race discrimination.

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

It seems that the reduction in enforcement of anti-discrimination laws is by design and is not limited to the DOJ. *The Washington Post* reported that the EEOC workforce has been reduced by 19 percent since 2001, that its backlog of unresolved charges of discrimination has increased to 47,516 from 33,562 in 2005, and that its proposed 2007 budget is \$4 million less than 2006.¹²

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

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

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

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

Moreover, the Bush administration seeks to have the courts endorse a very restrictive view of Title VII violations. In an amicus curiae brief filed in *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 126 S. Ct. 2405 (2006), the Solicitor General advocated for a narrow interpretation of Title VII’s anti-retaliation provision, 42 U.S.C. § 2000e-3(a), that was rejected by the Supreme Court. After the plaintiff filed a complaint alleging that she was a victim of sexual harassment, Burlington Northern transferred the plaintiff from the position of fork lift operator to the less desirable job of laborer. The plaintiff was later suspended without pay for insubordination. The solicitor general joined with the employer in that case in arguing that the anti-retaliation provision confines actionable retaliation only to employer action and harm that concerns employment and the workplace. The Supreme Court held that such a narrow interpretation is inconsistent with the language of Title VII and inconsistent with the primary objective of the anti-retaliation provision: to provide broad protection to employees who participate in

Title VII enforcement. In rejecting the solicitor general’s interpretation, the Court noted that “[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace” (original emphasis). The administration should be seeking to expand Title VII’s coverage and not the other way around. Even a very conservative Supreme Court disagreed with the DOJ.

CONCLUSIONS & RECOMMENDATIONS

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

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

Beyond its litigation program, the DOJ needs to demonstrate leadership by using the bully pulpit. The Department needs to reach out and talk to constituent groups and help and encourage employers to develop better and more job-related selection procedures, which make job opportunities available to all qualified applicants regardless of their race, sex, religion, or national origin.

ENDNOTES

- 1 42 U.S.C. § 2000e *et seq.*
- 2 P.L. 92-261.
- 3 42 U.S.C. §§ 2000e-5 & 6.
- 4 David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?* 42 Vand. L. Rev. 1121, 1161 (1989).
- 5 <http://www.usdoj.gov/crt/emp/papers.html>, last visited June 28, 2006.
- 6 Three of these cases are interventions in ongoing litigation filed by three Jane Does against the District of Columbia. Each case raises an identical issue—the lawfulness of a pregnancy policy. See *Jane Doe and the United States v. District of Columbia*, C.A. 02-2338(RMU) (D.D.C. filed Aug. 5, 2004); *Jane Doe II and the United States v. District of Columbia*, C.A. 02-2339(RMU) (D.D.C. filed Aug. 5, 2004); and *Jane Doe III and the United States v. District of Columbia*, C.A. 02-2340(RMU) (D.D.C. filed Aug. 5, 2004.) . These cases, because they raise a single legal issue, should be counted as one and not three cases.
- 7 *United States v. Board of Trustees of Southern Illinois University*, C.A. 06-4037-JLF (S.D. Ill. Filed Feb. 8, 2006) and *United States v. Pontiac, Michigan Fire Department*, 2:05cv72913 (E.D. Mich., filed July 27, 2005).
- 8 *United States v. City of Gallop, NM*, CIV 04-1108 (D.N.M. filed Sept. 29, 2004).
- 9 *United States v. City of New York and New York City Housing Authority*, 1:02-cv-044699-DC-MHD (S.D.N.Y. filed June 19, 2002).
- 10 *United States v. Virginia Beach Police Department*, 06cv189 (E.D. Va. filed Feb. 7, 2006).
- 11 Letter from the Department of Justice dated July 14, 2006. In the author’s possession.
- 12 Christopher Lee, “EEO Is Hobbled, Groups Contend,” *The Washington Post*, June 14, 2006, at A21.
- 13 These numbers are, of course, dynamic.
- 14 Most attorneys in ELS are promoted to the GS-15, senior trial attorney level, within about three years of hire. A criterion for being promoted to senior trial attorney is the demonstrated ability to handle complex matters independently.

The Voting Section

By Joseph D. Rich, Mark Posner and Robert Kengle

INTRODUCTION

This article is designed to critique the enforcement record of the Civil Rights Division's Voting Section during the Bush administration. Since publication of *Rights at Risk* in 2002, the debate over the federal government's enforcement of voting rights laws has grown very contentious. In 2005 there was extensive newspaper publicity indicating politicization of voting rights enforcement by the Department of Justice's Civil Rights Division and the negative impact that this politicization was having on the protection of minority voting rights, particularly for African Americans. Other articles have reported adversarial attitudes and efforts to marginalize the pre-existing career Division management, accompanied by fundamental changes in the Division's hiring procedures, by Bush political appointees. This article focuses upon the Voting Section's enforcement record.

BACKGROUND

ENFORCEMENT RESPONSIBILITIES OF THE VOTING SECTION

The mission of the Voting Section historically has centered upon enforcement of the Voting Rights Act of 1965 ("VRA"), the primary federal statute banning racial discrimination in the election process. There are several important sections of the VRA that traditionally have been the primary focus of the Voting Section's enforcement program.

First, a critical part of the Voting Section's work involves Section 5 of the VRA. Section 5 requires that jurisdictions covered under the special provisions of Section 4 (nine states in their entirety and portions of seven other states) prove to the Department of Justice or the District Court for the District of Columbia that any and all new voting procedures will not have either the purpose or the effect of denying or abridging the right to vote on account of race or membership in a language minority group. Covered jurisdictions may not implement new voting procedures unless and until such federal "preclearance" is obtained. All voting changes submitted to the Department of Justice are

reviewed by the Voting Section, and if the Section finds a violation of Section 5, it forwards a recommendation to the Assistant Attorney General for Civil Rights that a written objection be issued prohibiting the jurisdiction from proceeding with implementation of the submitted change. Similarly, if a covered jurisdiction seeks preclearance by filing a Section 5 declaratory judgment action before the District Court for the District of Columbia, the Attorney General is the sole statutory defendant and the litigation is handled by the Voting Section. The Voting Section plays a special and critical role in enforcing Section 5 since minority voters do not have any statutory role in the Section 5 administrative or judicial processes, though the Voting Section actively solicits comments from minority voters when conducting its administrative reviews and minority voters often are able to intervene in Section 5 declaratory judgment lawsuits.

Second, the Voting Section is responsible for enforcing Section 2 of the VRA. As amended in 1982, Section 2 sets forth a nationwide prohibition on practices and procedures that deny individuals an equal opportunity to participate in the political process on the basis of race or membership in a language minority group. Section 2 is enforced through litigation brought by the Justice Department, and also frequently is enforced through lawsuits filed by private individuals and groups. The most complex and important Section 2 cases have been the vote dilution cases, and because of the Voting Section's resources and expertise, the Justice Department has played a crucial role in the enforcement of Section 2. The 1982 amendments to the VRA established a "results test" for proving minority vote dilution under Section 2. Since then, the most important VRA cases brought by the Voting Section have been those challenging at-large elections and redistricting plans that dilute African-American, Hispanic and American Indian voting strength.

Third, Section 203 and Section 4(f)(4) of the VRA, which first were passed in 1975, require jurisdictions to provide language assistance including bilingual written materials and oral assistance if the numbers of limited English proficient Spanish Heritage, Asian American or American Indian voting age citizens exceed specified thresholds.

Fourth, Sections 6, 7 and 8 of the VRA provide the attorney general with the authority to dispatch federal observers to monitor the voting process in the jurisdictions covered under Section 4.

The Voting Section also enforces several other voting rights laws not directly addressing discrimination issues—the Help America Vote Act of 2002 (HAVA), the National Voter Registration Act of 1993 (NVRA or Motor-Voter) and the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA).

STRUCTURE OF THE CIVIL RIGHTS DIVISION'S VOTING SECTION

The Voting Section is a component of the Department of Justice's Civil Rights Division. The Voting Section reports to the assistant attorney general for civil rights, a presidential appointee, to whom the attorney general has delegated the authority to institute and defend voting rights litigation on behalf of the United States, and to make administrative decisions under Section 5 of the VRA. The immediate staff of the assistant attorney general are primarily political appointees, although one attorney historically has served as a “career” deputy assistant attorney general. Typically one deputy assistant attorney general and one or more counsel review the recommendations of the Voting Section on behalf of the assistant attorney general, although the ultimate decision to bring litigation or interpose Section 5 objections remains with the assistant attorney general.

The Voting Section's Section 5 work is handled by a staff of career attorneys and civil rights analysts, who, together with the support staff, are managed by a section chief and several deputy chiefs. A principal deputy position was created in 2005. Career attorneys also fill several special counsel positions. The deputy chiefs and special counsel supervise particular investigations, litigation and other matters. The Voting Section also has carried a staff of social science professionals, which recently has included a geographer, a statistician and a historian.

From the early 1980s a single deputy chief has been designated to supervise the crucial Section 5 administrative review process, although as of January 2007 that position had been unfilled for a number of months. The Section's staff of career civil rights analysts is dedicated to reviewing

Section 5 administrative submissions; the Section's attorneys also review the more complex administrative submissions as required. It has been a longstanding practice to assign several career attorneys to serve as full-time “attorney-reviewers” to assist the Section 5 deputy in supervising the review of Section 5 administrative submissions by attorneys and analysts. Approximately 40 percent of the Section's staff has been allocated to Section 5 responsibilities.

SUMMARY OF VOTING SECTION ENFORCEMENT

SECTION 5

Background Information

Section 5 applies mostly, but not exclusively, to states located in the South and Southwest. As enacted in 1965 and amended in 1970, jurisdictions were covered based upon their use of literacy tests and other discriminatory devices that were known to have been used to bar African American citizens from registering and voting. In 1975, Section 5 coverage was extended to jurisdictions that administered their elections only in the English language in a manner that inhibited participation by language minority citizens. Currently, the covered areas include Alabama, Arizona, Georgia, Louisiana, Mississippi, three of New York City's five boroughs, forty of North Carolina's one hundred counties, South Carolina, Texas, and all of Virginia except for a few counties and independent cities that recently have been released from coverage, as permitted by Section 4 of the VRA. In addition, Section 5 covers a small number of counties in California, Florida and South Dakota, and townships in Michigan and New Hampshire.¹

The Section 5 preclearance requirement applies to any and all types of voting changes that the covered jurisdictions enact or seek to initiate. This includes changes that have the potential to dilute the opportunity of minority citizens to cast an effective vote, such as redistrictings, changes in the method of electing officials (including changes to at-large elections, majority-vote requirements, and provisions limiting or prohibiting the use of single-shot voting), and annexations and other changes in jurisdictions' boundaries. It also includes changes regarding the administration of elections, including changes in voter registration procedures, polling place procedures, early voting and absentee voting procedures, polling places and early voting locations, the procedures for providing election information in

languages other than English, and candidate qualifications and qualification procedures.²

As a matter of practice, jurisdictions almost always choose the Justice Department route to preclearance because it is substantially faster, cheaper, and simpler than initiating a case in the District Court for the District of Columbia. The Justice Department's records reflect that, since 1965, Section 5 jurisdictions have submitted over 440,000 voting changes to the Justice Department but have filed only sixty-eight preclearance lawsuits involving perhaps several hundred voting changes.

Section 5 Nondiscrimination Standards

As noted, Section 5 prohibits covered jurisdictions from enacting or seeking to administer voting changes that have a discriminatory purpose or a discriminatory effect. The specific meaning of these two nondiscrimination standards has been the subject of recent controversies and is discussed below.

First, the Section 5 effect standard prohibits covered jurisdictions from implementing any voting change that “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”³ Pursuant to this standard, an “effects” analysis is conducted by comparing minority voters’ relative electoral opportunities under the new and the pre-existing provisions. A change has a discriminatory effect if it would worsen minority electoral opportunity, but does not have that effect if it either would improve minority opportunity or leave that opportunity unchanged. A non-retrogressive voting change does not violate the Section 5 effect standard even if it fails to allow minority voters an equal and nondiscriminatory opportunity to participate in the political process.⁴

Historically, both the courts and the Justice Department have applied the retrogression standard to those changes that potentially might dilute minority strength by focusing on the effect of the changes on the ability of minority voters to elect candidates of their choice. However, in 2003 the Supreme Court substantially reinterpreted this approach in its controversial five-to-four decision in *Georgia v. Ashcroft*. The Court held that while the retrogression analysis would continue, in part, to include consideration of the impact of a change on the ability of minority voters to elect candidates of their choice, it also

must include consideration of the impact of the change on the opportunity of minority voters to influence (but not decide) elections, and the impact of the change on the ability of representatives chosen by minority voters to exert leadership, influence, and power once they enter into the legislative body to which they were elected.⁵ This revision of the retrogression standard raised substantial concern that it would allow discriminatory changes to be precleared and, furthermore, that it did not provide a workable basis on which to analyze the effect of submitted voting changes. As a result, in 2006 Congress amended Section 5 (as part of a Section 5 reauthorization, discussed below) to return the retrogression standard to the previous “ability to elect” focus.

The Section 5 purpose standard historically has been implemented by the courts and the Justice Department to complement the effect standard by broadly interpreting it as prohibiting the implementation of voting changes that have any discriminatory intent, regardless of whether the intended harm is retrogression or vote dilution. In 2000, however, in another controversial 5–4 decision, the Supreme Court in *Reno v. Bossier Parish School Board* held that discriminatory purpose under Section 5 only could have a much more limited meaning: henceforth, only an intent to cause retrogression would violate Section 5 and other discriminatory purposes no longer would be prohibited.⁶ This effectively read the purpose standard out of Section 5 since, as reinterpreted, the standard now added little or nothing to the prohibition on retrogressive voting changes contained in the Section 5 effect standard.⁷ The Court’s holding in *Bossier Parish School Board* also effectively reversed several prior decisions of the Court that held that the Section 5 purpose standard applies to any and all discriminatory purposes, and was not limited to retrogressive purpose.⁸ In response, Congress amended Section 5 in 2006 to return the purpose standard to its former meaning, so that it now again prohibits the implementation of voting changes that have any discriminatory purpose.

Prior to 1997, the Justice Department also reviewed voting changes to determine whether they complied with other provisions of the VRA, including Section 2 and Sections 4(f)(4) and 203. However, in that year the Supreme Court held, this time by a 7–2 vote, that such reviews are not permitted by Section 5.⁹ This reinterpretation of Section 5 was not altered by Congress in the 2006 legislation.

ENFORCEMENT OF SECTION 5 BY THE BUSH ADMINISTRATION

Two things stand out with regard to the Bush administration's administrative enforcement of Section 5. First, it has interposed very few Section 5 objections. As discussed below, this appears to be the result of forces outside the control of the Justice Department, and, with the notable exceptions discussed below, does not appear to be a consequence of the manner in which the Bush administration has exercised its discretionary enforcement authority. Second, the Bush administration's stewardship of the Section 5 preclearance process in certain high profile submissions has been highly politicized and, as a result, the Justice Department made inappropriate decisions and damaged its credibility.

The Low Number of Section 5 Objections

From 2001 through 2005, the Justice Department interposed objections to a total of only 48 voting changes contained in 40 separate submissions made by Section 5 jurisdictions. The extent to which this represents an historically low number of objections is made clear when one compares the number of objections interposed during this five-year period to previous five-year periods dating from 1981 through 1995. As indicated by the following table, the number of objections remained high until the mid-1990s, when there was a sharp drop-off in objections that has continued to the present day.¹⁰

| OBJECTIONS | 1981–85 | 1986–90 | 1991–95 | 1996–2000 | 2001–05 |
|-------------|---------|---------------------|---------|-----------|---------|
| Submissions | 186 | 138 | 302 | 32 | 40 |
| Changes | 496 | 1,137 ¹¹ | 579 | 55 | 48 |

It does not appear that the low number of Section 5 objections during the Bush administration generally is the result of any failure on the part of the Justice Department to vigorously enforce the preclearance requirement. As noted, the number of objections noticeably began to decrease during the Clinton administration, when the Justice Department was seeking to enforce Section 5 to its full extent. The conclusion that the Justice Department's enforcement approach generally is not responsible for the low objection numbers also is supported by the experiences of two of the authors of this essay who, up until recently, occupied leadership posts in the Voting Section of the Department's Civil Rights Division.

The lower number of objections during the Bush administration also is not attributable to a decrease in the overall number of preclearance submissions to the Justice Department. From 2001 to 2005, Section 5 jurisdictions submitted over 81,000 voting changes to the Department in a total of almost 25,000 submissions. These numbers are comparable to the submission numbers for the previous five-year periods included in the preceding data table.

Instead, the lower number of objections appears to be the result of other factors. First, the Supreme Court's 2000 decision in *Bossier Parish School Board* appears to have exacted a heavy toll on the Justice Department's ability to interpose objections. Prior to that holding, an increasing percentage of the Department's objections were to nonretrogressive voting changes and were based on the Section 5 purpose standard. During the 1980s, a little over a fourth of the objections fell in that category and, in the 1990s, a little over a half did so.¹² The Department particularly relied on the purpose standard in interposing objections to redistricting plans: about a third of the Department's objections to post-1980 redistricting plans were to nonretrogressive plans and were based on discriminatory purpose; and in the 1990s over four-fifths of the redistricting objections fell in that category.¹³ In addition, from the mid-1980s to the mid-1990s, the Department interposed a significant number of objections based on discriminatory purpose to changes from at-large election methods to mixed systems of districts

and at-large seats.¹⁴ The number of objections to redistrictings and mixed election systems initially fell in the mid-1990s, when the post-1990 Census redistricting cycle ran its course and the number of jurisdictions changing from at-large elections

also substantially slowed. However, following the 2000 Census, it is likely that a larger number of objections again would have been interposed to non-retrogressive, intentionally discriminatory redistricting plans but for the Supreme Court's decision in *Bossier Parish School Board*, given the history of Section 5 redistricting objections following the previous two censuses.

Second, it appears that the reduction in the number of objections beginning in the mid-1990s also may be attributed to the success the VRA has enjoyed in requiring or encouraging local governments in the covered

areas to abandon their at-large election systems in favor of single-member district systems, or mixed district/at-large systems, that better reflect minority voting strength. Historically, the three types of voting changes that have accounted for the great majority of the Justice Department's Section 5 objections are annexations, election method changes, and redistrictings. Annexation objections typically have been based on the retrogressive effect of annexing white population in the context of an at-large method of election and racially polarized voting; a substantial portion of the Department's election method objections similarly have been based on retrogression and the use of at-large elections in the context of polarized voting (i.e., objections to the adoption of at-large elections, and the adoption of provisions such as majority-vote requirements and numbered posts that may limit minority electoral opportunity when added to a pre-existing at-large system). During the 1980s and into the 1990s, a large number of counties, cities and school districts in the covered areas changed from at large to district or mixed election systems as a consequence of Congress' adoption of the Section 2 results standard in 1982, and also as a result of Section 5 objections to annexations and other changes.¹⁵ This may have increased the possibility of the covered jurisdictions enacting discriminatory redistricting plans, but it has substantially reduced the number of discriminatory annexations and election method changes that recently have been adopted.

There are other, somewhat more speculative explanations that could be offered for the reduction in the number of Section 5 objections over the past ten years. First is the increased deterrent effect of Section 5.¹⁶ In other words, it may be that the covered jurisdictions are doing a better job at avoiding discriminatory voting changes because they are paying more attention to Section 5 during the process of adopting voting changes. Second, some might argue that jurisdictions are doing a better job because of a sea change in attitudes toward minority participation in the political process as minority registration has dramatically increased in covered jurisdictions. Third, and related to the above explanations, there has been an increase in the number minority elected officials (largely due to the election method changes noted above), and such representation has increased the ability of the minority community to successfully oppose discriminatory voting changes.

The Politicization of Section 5

Historically, the Justice Department has adhered to a strong institutional norm against efforts to inject partisan political considerations into its Section 5 decision-making.¹⁷ This has been a significant accomplishment given that its preclearance decisions can directly affect who gets elected to office, particularly its decisions regarding redistrictings, election method changes, and annexations. The political appointees in the Bush administration, however, have failed to maintain this high standard of conduct. In a series of preclearance determinations regarding voting changes of great importance to minority voters, the Justice Department has corrupted the Section 5 process by allowing partisan politics into the Section 5 decision-making calculus.

The influence of politics first became apparent only a few months after the Bush administration's political leadership of the Civil Rights Division was put in place in the summer of 2001. In December 2001, the Justice Department was asked by the State of Mississippi to review its plan for redrawing its congressional districts in light of the 2000 Census. In conducting this review, the Department proceeded to use the Section 5 process to enable the Republican Party of Mississippi to substitute its plan for the state's plan. The Department took this action not because of any discrimination concerns associated with the state's plan, but rather simply because the Republican plan would better enable President Bush's party to elect congresspersons from this state.¹⁸

The somewhat complicated chain of events that set the stage for the Justice Department's Section 5 decision-making on the Mississippi plan is as follows. Under state law, the Mississippi legislature was responsible for enacting a new congressional redistricting plan, but failed to do so. A Mississippi state court then ordered a plan into effect a plan that was favored by the state Democratic Party. Because the state court is an arm of the state government, the new plan had to receive Section 5 preclearance to be implemented, and accordingly the State of Mississippi submitted this plan to the Justice Department for review. However, the Republican Party brought its own lawsuit in federal district court, and the federal court entered into the fray by stating that it would order into effect its plan, drawn by the state Republican Party, if the state court plan was not precleared by the Department of Justice by February 27, 2002. This at first did not seem to be noteworthy since the State's December 2001 submission to the Justice

Department gave the Department ample time to review the state plan by the February 27, 2002 deadline (Section 5 grants the Department 60 calendar days in which to conduct administrative reviews, and that 60-day period was due to expire before February 27). Indeed, Voting Section staff attorneys quickly reviewed the state court plan and, when that review demonstrated that the plan did not adversely affect minority voters, they recommended that the Department grant preclearance.

Nonetheless, political appointees in the Assistant Attorney General's office rejected the preclearance recommendation, notwithstanding the fact that they failed to identify any discrimination concerns with regard to the plan submitted by the State. Instead, they ordered that the Department exercise its authority to extend the review period beyond the February 27 deadline by asking the State on February 14, 2002, to provide a substantial amount of additional written information with regard to the fact that it was a state court, rather than the state legislature, that had adopted the new plan. This change in the enacting authority was technically a voting change (because the state court previously had not been thought to have the authority to order a state congressional plan into effect) and this voting change technically needed to be precleared by the Department in order for the Department to preclear the state's new congressional plan. However, there was no reason to believe that it was discriminatory for a state court to have the authority to order a new plan into effect if and when the state legislature fails to carry out its redistricting responsibility. As a result of this "more information" letter, the February 27 deadline passed without a final preclearance decision by the Justice Department on the state plan, and the federal court ordered its plan into effect.

The Justice Department's request for additional information was highly irregular first because, as noted, the Department was seeking information that almost certainly was not going to affect the its ultimate preclearance decision.¹⁹ In addition, the decision to request additional information was irregular because it was made by the Civil Rights Division's political staff over the unanimous recommendation of the Division's career staff to preclear the state court plan as well as the change in the authority of the state court. It is extremely unusual and perhaps unprecedented for the Division's political staff to override a unanimous staff recommendation to preclear a submitted change.

In 2003, partisan political concerns again played an important role in the Justice Department's preclearance of the controversial mid-decade Congressional redistricting plan enacted by the State of Texas. This was the highly partisan plan that had been adopted by the state legislature at the urging of then Republican House Majority Leader Tom DeLay. It was drawn in 2003 after an initial post-2000 plan had been implemented by a federal district court in 2001 (following the Texas legislature's failure to adopt a new plan). The 2003 plan was designed solely to increase the voting strength of the Republican Party in Texas (and it eventually resulted in the gain of five congressional districts for Republicans). However, in order to accomplish this end, the plan targeted several areas of minority voting strength, which had the effect of both limiting the opportunity of minority voters to elect candidates of their choice to Congress and their opportunity to exert a substantial influence in congressional elections.²⁰ As a result, the career staff of the Voting Section concluded in a detailed, lengthy memorandum that the plan violated Section 5 because it resulted in a retrogression of minority electoral opportunity.²¹ Nonetheless, the Department's political appointees precleared the plan.²²

In 2005, the Justice Department precleared a Georgia law requiring voters to present government-issued picture identification in order to vote at the polls on election day. The enactment represented one of the leading examples of legislation advocated by a number of Republicans across the country to deal with alleged problems of fraudulent voting at the polls but which would erect barriers to voting that particularly would harm minority voters. The Voting Section staff prepared a detailed memorandum recommending an objection. Included in the memo was reference to an explicitly racial statement by a state legislator who was the sponsor of the legislation. The legislator said, "if there are fewer black voters because of this bill, it will only be because there is less opportunity for fraud" and added that "when black voters in her black precincts are not paid to vote, they do not go to the polls."²³ Yet, the very next day the Department precleared this law even though it received additional information from the State on that same day that was not fully analyzed. Contrary to the normal procedure within the Department, the staff memorandum recommending an objection was not forwarded to the Assistant Attorney General for Civil Rights for consideration prior to him making the final preclearance decision.²⁴

Historically, the Justice Department has avoided partisan application of the preclearance requirement in large part because of the well-established, bottom-up, process applied to Section 5 decision-making. Under this process, the nonpolitical career staff of the Civil Rights Division is solely responsible for investigating and making recommendations on all Section 5 submissions, and the staff's analyses frame each preclearance determination in terms of the law of Section 5 and the facts pertinent to the specific submitted change. This has had the effect of steering the political staff to make appropriate Section 5 decisions based upon the law and the facts, and not based upon partisan interests.

The rejection of the staff recommendations in each of the high profile and sensitive matters discussed above is an historical anomaly. In both Democratic and Republican administrations the political staff almost always has agreed with staff recommendations to interpose an objection and, as noted, it is extremely unusual for the political staff to reject a recommendation that a submitted change be precleared. In the few instances when staff recommendations to deny preclearance have been rejected by political appointees during past administrations, memoranda or written explanations of the reasons for such rejections were prepared by political decision-makers for career staff to provide the legal rationale for the decision and to make a complete record of the decision-making process to guide future Section 5 decisions. This longstanding deliberative process also has played an important role in ensuring that inappropriate political factors do not influence Section 5 decision-making. However, in each of the above instances in which staff recommendations were rejected, political staff did not prepare any such explanation for their rejection of the staff recommendations. This not only deviated from longstanding practice but also reflected the chasm that had grown between career and political staff in the Bush administration.

Compounding this break from well-established process was the Department's response to staff memoranda with which they disagreed. As reported in *The Washington Post* in December 2005, Voting Section leadership instituted a new rule requiring that staff members who review Section 5 voting submissions limit their written analysis to the facts surrounding the matter and prohibited the career staff from making recommendations

as to whether or not the Department should impose an objection to the voting change.²⁵ This is a radical change in the Voting Section's Section 5 analytical practices, undermining the bottom-up decision-making process developed over the past thirty years. This is especially disturbing in light of the series of decisions discussed above because prohibiting staff recommendations on submissions increases the ability of political appointees to make politically-motivated preclearance decisions without appearing to repudiate career staff directly. The abandonment of the process does serious damage to a principled administration of the law.

In sum, the Bush administration has abused the authority entrusted in the Justice Department to fairly and vigorously enforce Section 5 of the VRA, and thereby protect the voting rights of our nation's minority citizens, by allowing partisan political concerns to influence its decision-making. This has damaged the Section 5 process, undermined the credibility of the Justice Department and the Civil Rights Division, and resulted in discriminatory voting changes being precleared.

Section 5 Declaratory Judgment Actions

During the Bush administration, Section 5 jurisdictions have filed five declaratory judgment actions in the District Court for the District of Columbia seeking preclearance of particular voting changes. All but one of these lawsuits was dismissed when the changes were addressed by the Justice Department in administrative reviews. The one lawsuit that was litigated, in part, was the *Georgia v. Ashcroft* case discussed above. The State sought judicial preclearance of its 2001 congressional, state house of representatives, and state senate redistricting plans. The Justice Department agreed that the congressional and state house plans were entitled to preclearance, and opposed preclearance of the state senate plan only with regard to the manner in which three senate districts had been redrawn. The district court agreed with the Justice Department that the state senate plan should not be precleared²⁶ but, for the reasons noted above, the Supreme Court vacated the district court's decision. On remand, the suit was dismissed after the State's interim senate plan (which had a population deviation nearly identical to the 2001 plan at issue in the D.C. case) was found unconstitutional in a separate case by a federal court in Georgia based upon a one-person, one-vote violation, and thus the D.C. Court did not address the legality of the 2001 plan on remand.

REAUTHORIZATION OF SECTION 5 IN 2006

The Substance of the Reauthorization Legislation

In July 2006, Congress enacted and President Bush signed into law the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006, reauthorizing Section 5 for an additional twenty-four years, until 2031. The previous reauthorization of Section 5, in 1982, had extended the statute until 2007.²⁷ As is discussed in further detail below, the legislation also extended the language minority requirements of Sections 4(f) and 203 until 2031 and 2032, respectively, and extended to 2031 the authority of the Attorney General to send federal observers to monitor elections in the Section 5 jurisdictions.²⁸

The 2006 legislation made two important changes to the Section 5 nondiscrimination standards, as discussed above, while retaining the statute's existing geographic and subject-matter coverage limitations and the existing preclearance procedures. The legislation overrides the Supreme Court's re-interpretation of the Section 5 purpose standard, in the 2000 *Reno v. Bossier Parish* case, by specifying that "[t]he term 'purpose' . . . shall include any discriminatory purpose." Accordingly, the test for discriminatory purpose under Section 5 is again the same as the constitutional test under the Fourteenth and Fifteenth Amendments, and is no longer restricted to the question of whether covered jurisdictions were motivated by a purpose to retrogress minority voting strength. The legislation also generally overrides the Supreme Court's recent re-interpretation of the Section 5 effect standard, in *Georgia v. Ashcroft*, by specifying that the question of retrogressive effect is to be analyzed by focusing on "the ability of [minority] citizens to elect their preferred candidates of choice." Accordingly, it appears that a voting change that retrogresses the opportunity of minority voters to elect their preferred candidates no longer can be justified by arguing that the change increased the number of minority "influence" districts and/or by arguing that the change increased the power of legislators aligned with minority legislators.²⁹

As was also noted above, the reauthorization legislation does not override the Supreme Court's ruling in the 1997 *Bossier Parish* case that preclearance denials may not be based solely on violations of other provisions of the VRA, such as Section 2 or Section 203. Such an amendment was not proposed in Congress and was not sought by civil rights groups.

The Legislative Process

Initially, the reauthorization legislation had broad bipartisan support. After extensive oversight hearings were held in the fall of 2005 by a subcommittee of the House Judiciary Committee, the bill to reauthorize Section 5 (and reauthorize Sections 4(f) and 203, and the Attorney General's election-observer authority) was introduced in the House on May 2, 2006 by the Republican Chairman of the House Judiciary Committee, James Sensenbrenner. The bill gained 152 co-sponsors, including, most significantly, the Speaker of the House, Dennis Hastert, the Minority Leader, Nancy Pelosi, and the ranking minority member of the Judiciary Committee, John Conyers. The next day, an identical bill was introduced in the Senate by the Republican Chair of the Senate Judiciary Committee, Arlen Specter, and gained 57 co-sponsors, including the Majority Leader, Bill Frist, the Minority Leader, Harry Reid, and the ranking minority member of the Senate Judiciary Committee, Patrick Leahy. The legislation appeared to be on its way to almost certain enactment when, a few weeks thereafter, it was overwhelmingly approved by the House Judiciary Committee by a vote of 33 to one.

The legislative process, however, then became more complicated and the end result more uncertain. In late June, the House leadership sought to call the bill up for consideration on the House floor but a large group of Republican representatives revolted, expressing opposition to retention of the existing geographic coverage provisions of Section 5 and opposition to continuation of the bilingual balloting requirements of Sections 4(f)(4) and 203. As a result, the leadership reversed course and refused to bring the bill to the floor. This action raised a substantial question as to whether the leadership in the House or Senate would give either body the opportunity to vote on this legislation in 2006.

The legislative tide turned again, however, after several weeks of discussion, negotiation, and lobbying by outside groups, and the bill was finally brought to the House floor in mid-July. The House then defeated four amendments that would have altered and undermined the legislation, including amendments that sought to substantially restrict the geographic coverage of Section 5 and an amendment that would have deleted the extension of the bilingual balloting requirements. The latter proposal received the most support, being defeated by a vote of 185 to 238. The House then passed the legislation on July 13, 2006, by a vote of 390 to 33.

Almost immediately thereafter, the opponents of the bill in the Senate decided to forego any effort to defeat or significantly amend the legislation. The bill sped through the Senate Judiciary Committee (which previously had held several hearings on reauthorization) to the Senate floor, and on July 20, 2006, the Senate joined the House in approving the legislation by a vote of 98 to zero. The President signed the legislation on July 27, 2006.

During the legislative process, President Bush and the Justice Department expressed general support for an extension of Section 5 and strongly supported extension of the bilingual balloting provisions, but took a passive role in terms of obtaining congressional passage. The Justice Department's relative silence was particularly notable and of concern given its role as the principal draftsman of the VRA in 1965, and as the principal entity responsible for enforcing both Section 5 and the bilingual provisions. In reauthorizing Section 5 in the past, Congress always had looked to the Department to provide specific data about the nature and scope of the Department's preclearance decisions during the preceding authorization period and it had provided extensive data and otherwise participated in the legislative process. However, during the recent reauthorization process, the Department made a conscious decision in 2005 not to gather and prepare the necessary data, although the Department knew that it was reasonably likely that reauthorization would be considered by Congress in 2006. While the Department eventually did provide data to Congress once the hearings began, its initial decision resulted in its abandoning its historical position of playing a central role in the passage and reauthorization of the VRA and raised considerable concern among congressional proponents and civil rights groups as to what the Department's eventual position would be.

Challenges to the Constitutionality of Reauthorizing Section 5

Prior to Congress reauthorizing Section 5, there was a great deal of discussion among law professors and legal practitioners as to whether Congress possessed the authority under the Fourteenth and Fifteenth Amendments to extend the term of Section 5 beyond 2007. The Supreme Court has twice rejected broad challenges to the constitutionality of Section 5,³⁰ and rejected a third "as applied" constitutional challenge.³¹ Nonetheless, there is a substantial question as to whether the Supreme Court would conclude that this fourth reauthorization of Section 5

satisfies the current test for assessing congressional authority to adopt civil rights legislation pursuant to the Civil War Amendments. This test specifies that Congress only may enact remedies that are "congruent and proportional" to the unconstitutional conduct that is to be prevented or remedied.³² Precisely how this test applies to the reauthorization, rather than the original enactment, of a civil rights remedy, and, in particular, how this test applies to the reauthorization of Section 5, is not clear.

Shortly after the 2006 renewal, a lawsuit was filed challenging the constitutionality of the 2006 reauthorization. As required by Section 14(b) of the VRA, 42 U.S.C. § 1973l(b), the suit was filed in the District Court for the District of Columbia. At this time this case is pending before a three-judge court in that court.³³ Although Congress assembled a compelling factual record that fully supports the reauthorization of Section 5, the Justice Department's failure to make its best case for doing so during the legislative process is likely to haunt its efforts in defending this and other such challenges.

SECTION 2 OF THE VRA

Until the Bush administration, the investigation and prosecution of racially discriminatory election practices under Section 2 of the VRA was a priority of the Voting Section, especially after 1982, when Congress amended Section 2 to its current form. After six years in office, the Bush administration has brought fewer Section 2 cases, and brought them at a significantly lower rate, than any other administration since 1982. The fact that Section 2 enforcement has now come to a virtual standstill reflects a decision by the administration that developing these cases—and especially Section 2 cases on behalf of African American and American Indian voters—should not be a priority.

While Section 2 most often is thought of as applying to at-large elections systems or redistricting plans, it is applicable to a variety of election practices. For the Department of Justice, which cannot institute litigation based solely upon the Constitution, Section 2 provides the jurisdictional basis to challenge intentional racial discrimination in the voting process. Nevertheless, challenges based upon minority vote dilution have been the primary application of amended Section 2, and the Bush administration's Section 2 enforcement record has been the point of repeated criticism.

The Voting Section filed a total of 33 Section 2 cases (involving vote dilution and/or other types of claims) during the 77 months of the Reagan administration that followed the 1982 amendment of Section 2; eight were filed during the 48 months of the Bush I administration; 34 were filed during the 96 months of the Clinton administration; while ten were filed so far during the first six years of the Bush II administration.³⁴ Thus, the overall rate of Section 2 claims per year for the current administration is the lowest among any administration following the 1982 Amendments; in descending order they were Reagan: 5.1 per year; Clinton: 4.25 per year; Bush I: 2 per year; Bush II: 1.67 per year.

However, in considering the current administration's Section 2 record, the most relevant comparison is between the final six years of the Clinton administration and the six years elapsed to date in the Bush II administration.³⁵ This comparison shows a clear disparity between the number and types of Section 2 cases the Voting Section filed.

A total of 22 cases were filed under Section 2 during the final six years of the Clinton administration (a rate of 3.67 cases per year). Fourteen of those cases raised vote dilution claims: six on behalf of black citizens, four on behalf of Hispanic citizens and four on behalf of American Indian citizens.³⁶ Three of the eight cases raising other types of Section 2 claims involved Hispanics, two involved African Americans, two involved American Indians, one involved Asian Americans and one involved Arab Americans³⁷ (see Table 1).

TABLE 1: CLINTON ADMINISTRATION (JANUARY 1995 FORWARD)

| | Cases | Hispanic Claims | African-American Claims | American Indian Claims | Asian Claims | Other Claims |
|---------------------|-------|-----------------|-------------------------|------------------------|--------------|--------------|
| Dilution | 14 | 4 | 6 | 4 | 0 | 0 |
| Other | 8 | 3 | 2 | 2 | 1 | 1 |
| Total ³⁸ | 22 | 7 | 8 | 6 | 1 | 1 |

The comparable data for the current administration show a total of 10 Section 2 cases of any type, only five of which involved vote dilution claims.³⁹ Three of those five vote dilution cases involved Hispanic voters, while the other two concerned African American voters. Among the current administration's five other cases invoking Section 2, four

stated claims on behalf of Hispanic citizens, one raised a claim on behalf of Asian citizens and one was on behalf of white citizens⁴⁰ (see Table 2).

Furthermore, the statistics provided above are, if anything, overly charitable toward the Bush administration, because two of the four vote dilution cases filed during this administration in 2001 resulted from investigations during the Clinton administration. *United States v. Crockett County, Tennessee*, one of only two cases filed on behalf of African Americans since 2001, more fairly should be attributed to the Clinton administration because it was a case investigated and approved for pre-suit negotiations during the final months of the Clinton administration, with the complaint and completed consent decree then filed in April, 2001 shortly after the beginning of the Bush administration. Similarly, *United States v. Alamosa County, Colorado*, brought in 2001 on behalf of Hispanic voters, was like *Crockett County* fully investigated during the Clinton administration.⁴¹

These patterns clearly indicate that targeting Section 2 vote dilution violations has not been a priority for this administration. It is equally clear that Section 2 cases involving African American and American Indian citizens are not a priority for the current administration. Whereas eight of the 22 Section 2 cases filed in the last six years of the Clinton administration were on behalf of African American citizens, and six were on behalf of American Indians, only two Section 2 cases of any type have been filed by this administration on behalf of African American citizens and

none has been filed on behalf of American Indian citizens.⁴²

There are strong reasons for the Voting Section to continue to target, investigate and prosecute

Section 2 violations, especially vote dilution violations. First, solely as a policy matter, the Department of Justice has been charged by Congress to enforce Section 2. While the Department has legitimate discretion to prioritize its efforts, it abuses that discretion if it chooses to disregard enforcement of major civil rights laws entrusted to it.

In addition, the Voting Section historically has had the resources and experience to pursue Section 2 cases based solely upon their merit.

Furthermore, there is no reason to be confident that jurisdictions that were in compliance with Section 2 in the past will necessarily stay that way. Fact patterns in jurisdictions often change over time, sometimes for the better, but in other cases giving rise to violations that were not previously evident. Demographic patterns obviously can change over time, in which case the first *Gingles* precondition—requiring proof that a majority-minority district can be drawn—may cease to be a barrier to establishing a Section 2 claim.⁴³ Moreover, increases in minority population and/or minority candidates unfortunately are often accompanied by increased racially polarized voting by members of the white community who feel threatened by such changes; this also would reinforce a Section 2 claim. For example, the Department’s 2005 *Osceola County* case involved a jurisdiction in which the

precedent of the *Blaine County* case, the Voting Section’s efforts to investigate the Fremont County matter were rejected by political appointees.⁴⁷

LANGUAGE MINORITY ENFORCEMENT

An analysis of cases demonstrates that the enforcement of the language minority requirements of the VRA has been by far the top priority of the Voting Section in the current administration.⁴⁸ Indeed, the number of language minority cases filed in recent years increased significantly, and officials of the Civil Rights Division invariably point to this record when other aspects of their enforcement activities are questioned.

The current administration has brought a total of 20 language minority cases, all but one of which followed the publication of the July 25, 2002 Section 203 language determinations.⁴⁹ All 20 cases involved Spanish-language claims; two cases included additional claims involving Asian-language groups.⁵⁰ Sixteen of these twenty cases raised claims under Section 203, 13 of which involved language groups that had been covered under Section 203 since at least 1992.⁵¹

| TABLE 2: BUSH II ADMINISTRATION | | | | | | |
|---------------------------------|-------|-----------------|-------------------------|------------------------|--------------|--------------|
| | Cases | Hispanic Claims | African-American Claims | American Indian Claims | Asian Claims | Other Claims |
| Dilution | 5 | 3 | 2 | 0 | 0 | 0 |
| Other | 5 | 4 | 0 | 0 | 1 | 1 |
| Total ⁴⁴ | 10 | 7 | 2 | 0 | 1 | 1 |

Hispanic population increased from twelve percent in 1990 to 29 percent in 2000; the lawsuit’s claim of intentional discrimination was based upon the County’s reversion from single-member districts to at-large elections for its county commission.

In other cases, minority groups that historically had only limited involvement in the electoral process may run into the barrier of racially polarized voting when they attempt to increase their participation. This often is the case with American Indians. Indeed, the Voting Section brought a series of Section 2 vote dilution cases involving American Indians in the late 1990s, including one which led to a major victory in Blaine County, Montana.⁴⁵ More recently, the ACLU has brought a series of Section 2 vote dilution cases on behalf of Indian voters, most recently against Fremont County, Wyoming.⁴⁶ Despite the very successful

Two cases were brought against counties in Texas under Section 4(f)(4), under which the defendant jurisdictions had been covered since 1975.⁵² Three cases brought language claims under Section 2.⁵³ Seven of these cases also included related claims under Section 208 of the VRA, which requires voting officials to permit voters who, among other things, do not have the ability to read or write (including read or write the English language) to have persons of their choice assist them when voting.

By contrast, the Clinton administration brought a total of seven language minority cases, three of which were brought during its final 65 months.⁵⁴ In all seven cases the language assistance claims were based upon Section 203. Three cases involved Spanish-language assistance, three involved Indian-language assistance and one involved Chinese-language assistance.

ENFORCEMENT OF OTHER VOTING LAWS

National Voter Registration Act

Since the effective date of the NVRA on January 1, 1995, the Voting Section has litigated several types of NVRA cases. The initial set of cases in 1994 and 1995 dealt primarily with constitutional challenges to the Act, which were resolved in favor of the NVRA's constitutionality.⁵⁵ Since this initial round of litigation, the Voting Section has brought a total of nine additional cases under the NVRA, one under the Clinton administration and the remainder under the current administration. Of the cases filed during the Bush administration, one dealt with the procedures for voter registration at Tennessee public assistance and driver licensing offices.⁵⁶ Two cases concerned the question of whether the NVRA's agency-based registration requirements applied to particular New York State agencies.⁵⁷

The six remaining NVRA cases have been based upon Section 8 of the NVRA, which requires election officials to conduct a uniform general program to remove ineligible registered voters from the rolls.⁵⁸ The Voting Section's most recent NVRA cases—*United States v. New Jersey*, *United States v. Maine*, *United States v. State of Indiana* and *United States v. State of Missouri*—appear to establish a new direction in the Voting Section's NVRA enforcement. The complaints in these cases allege that these states have failed to comply with Section 8 of the NVRA because they have failed to take required steps to remove ineligible voters from the voter rolls in a number of counties. Unlike the Voting Section's two previous cases based upon Section 8 of the NVRA (*United States v. City of St. Louis* and *United States v. Pulaski County*), the *New Jersey*, *Maine*, *Indiana* and *Missouri* cases do not allege that the registration procedures at issue harmed the voting process by causing delay or confusion or by interfering with the ability to cast an effective ballot.⁵⁹ In short, the emphasis on enforcement of Section 8 of the NVRA is directed toward removing names from registration lists. This stems from a concern that failure to purge ineligible voters increases the potential for vote fraud. However, none of these cases alleges instances of vote fraud in the complaint.⁶⁰

Help America Vote Act

The Help America Vote Act was enacted in the wake of the controversies following the 2000 general election. HAVA contained several provisions that are judicially enforceable, including requirements for the election day process (including the use of provisional ballots under

certain circumstances, voter notices and voting machine requirements) and for election administration (in the form of a requirement for statewide voter registration databases).

The Voting Section has filed six cases containing HAVA claims,⁶¹ and a seventh case was brought by the United States Attorney for the Southern District of New York.⁶² In conjunction with language minority claims under Section 203 of the VRA, the *Cochise County*, *San Benito County* and *Westchester County* cases included claims that the defendants had not posted polling place signs advising voters of their rights and obligations as required by HAVA; the *San Benito County* case also included a claim that the County had failed to provide voters with a written description of the provisional ballot process.

The *New Jersey*, *Maine*, *New York* and *Alabama* cases all allege that the States have violated Section 303(a) of HAVA by failing to implement official statewide computerized voter registration lists.⁶³ The *New York* and *Maine* cases raise the additional claim that the State has failed to acquire new HAVA-compliant voting machines with federal funds it had received for that purpose, while the *Alabama* case alleges that the State also violated Section 303(b) of HAVA by failing to implement the required voter registration forms and matching procedures. In these cases there is no real dispute that the States have failed to implement the required statewide voter registration databases; the principal question appears to be how the Court will fashion remedies and how vigorous the Department will be in pursuing such relief.

The Department also filed several controversial *amicus curiae* briefs in HAVA cases that further indicate the politicization of decision-making on voting matters discussed above with respect to Section 5. In the weeks preceding the 2004 presidential election, the Civil Rights Division unsuccessfully argued in three *amicus* filings involving HAVA's provisional ballot requirement in Ohio, Florida and Michigan that private citizens could not enforce any rights under HAVA in the federal courts; that is, the Department took the position that it alone could enforce HAVA.⁶⁴

These filings are extremely troubling. First, the Division historically has been in favor of private plaintiffs having access to the federal courts in order to vindicate their right to vote, and the Division's briefs went beyond the facts of these cases to attempt to restrict *any* private enforcement of the HAVA statute. Furthermore, while the Civil Rights

Division filed these briefs without an invitation from the Court, it can hardly be said that the Division had a compelling argument to interject into these cases: the Sixth Circuit utterly rejected DOJ's central argument that "a privately enforceable right may be conferred only with text that is 'clear and unambiguous.'" HAVA comes nowhere near that high mark." (United States' Brief at 19), finding that "[t]he rights-creating language of HAVA § 302(a)(2) is unambiguous." *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004)⁶⁵

Second, the timing of these briefs so close to a major election on a highly charged partisan issue in states understood to hold the balance in the 2004 presidential election, and taking a position advocated by the Republican Party, all added to the perception that the Division's voting rights decisions were driven by political considerations. Historically, the Department has avoided taking positions in politically charged voting matters so close to an election to avoid this message being sent.

Uniformed and Overseas Citizens Absentee Voting Act

The current administration has brought a total of seven cases under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)—two each in 2002, 2004 and three in 2006.⁶⁶ This is comparable to the record of the Clinton administration, which brought a total seven UOCAVA cases, five of which were filed during its last 65 months.⁶⁷

Most states and jurisdictions have adjusted their election schedules and procedures so as to provide adequate time for overseas citizens to apply for, receive and return their absentee ballots in time to have them counted. Thus, many of the Voting Section's cases under UOCAVA have occurred under the deadline of approaching elections when it becomes apparent that special circumstances have delayed the mailing of absentee ballots. Nevertheless, the Voting Section's *North Carolina* suit in 2006 and its *Georgia* suit in 2005 concerned those States' general law provisions for federal primary elections.

CONCLUSION

The enforcement record of the Voting Section during the Bush administration is troubling for several reasons. First, partisan political factors have played a significant role in some of its most sensitive decisions. Over its 37-year

history of the Voting Section, its career staff earned an outstanding reputation for professionalism and expertise in their enforcement of the VRA and other federal voting rights laws. Furthermore, the Section has developed procedures and processes that have been very successful in guarding against even the perception of political factors entering into enforcement decisions. This reputation has been severely damaged during this administration because of several controversial decisions and changes in traditional processes. The widespread perception and appearance of partisan favoritism has undercut the Division's credibility and threatens the long-term mission of the Voting Section.

Second, until this administration, elimination of discrimination against African Americans has always been the central priority of the Section's enforcement program. The VRA was passed to strengthen the federal government's role in fighting race discrimination against African Americans. Over the years, the mission of the Division expanded as the VRA was amended to protect other ethnic minorities and other voting rights laws were passed putting additional enforcement responsibilities on the Section. But, until this administration, combating discrimination against African Americans has remained a central priority of the Division through both Republican and Democratic administrations. The enforcement record of the Voting Section during the Bush administration indicates this traditional priority has been downgraded significantly, if not effectively ignored.

Third, enforcement of the primary nationwide anti-discrimination provision of the VRA—Section 2—has been significantly reduced. It certainly is appropriate for priority to be given to Section 203 enforcement, especially because the continued growth and increased civic involvement of language minority voting populations reinforce the need for an active program. But, it would be incorrect to argue that making Section 203 enforcement a priority requires a de-emphasis of Section 2 enforcement, especially to the extent that this has happened during this administration.

Congress has conducted only limited oversight of the Civil Rights Division's voting enforcement during the current administration. Given the concerns that surface when reviewing the Voting Section's enforcement record, increased congressional oversight now and in the future is crucial to restoring the appropriate role of the Department of Justice in the enforcement of federal voting rights laws.

ENDNOTES

- 1 U.S. Department of Justice, Civil Rights Division, Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited January 2007).
- 2 Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. §§ 51.12, 51.13.
- 3 *Beer v. United States*, 425 U.S. 130, 141 (1976).
- 4 The “effects” standard has a further specialized meaning when applied to annexations. An annexation that significantly reduces the minority population percentage in the context of polarized voting violates Section 5 if the jurisdiction elects its governing body in a manner that does not fairly reflect minority voting strength. *City of Richmond v. United States*, 422 U.S. 358 (1975). Annexations that are denied preclearance on this basis subsequently may receive preclearance if the jurisdiction modifies its election method to satisfy the “fairly reflects” standard.
- 5 539 U.S. 461 (2003).
- 6 528 U.S. 320 (2000).
- 7 It has been suggested that an intent to cause retrogression in the future might be non-redundant, but this was not clearly established. The only other instance in which the “purpose to retrogress” standard could alter a preclearance determination is when the voting change is not retrogressive but the jurisdiction nonetheless intended that the change be retrogressive, i.e., when there is an “incompetent” retrogressor. But, in the over six years the Justice Department enforced the “purpose to retrogress” requirement no such incompetent retrogressor was identified.
- 8 *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987); *City of Richmond v. United States*, *supra*.
- 9 *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997).
- 10 The objection data were obtained from data tables maintained by the Justice Department.
- 11 The objection figure for 1986–90 includes an objection in 1986 to 525 annexations by a single city, included in one submission.
- 12 Peyton McCrary, Christopher Seaman, & Richard Valelly, The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act, 11 MICH. J. RACE & L. 275, 297 (2006).
- 13 Mark A. Posner, The Real Story Behind the Justice Department’s Implementation of Section 5 of the VRA: Vigorous and Principled Enforcement, As Intended by Congress, 1 *Duke J. of Con. Law & Pub. Pol’y* 120, 152 (2006).
- 14 *Id.* at 153–54.
- 15 *Quiet Revolution in the South* (Chandler Davidson & Bernard Grofman, eds., 1994); Complete Listing of Objections Pursuant to Section 5 of the VRA available at http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm.
- 16 *National Commission on the Voting Rights Act, Protecting Minority Voters, The Voting Rights Act at Work 1982–2005*, at 80 (2006).
- 17 James P. Turner, A Case-Specific Approach to Implementing the Voting Rights Act, in *Controversies in Minority Voting* 296 (Bernard Grofman & Chandler Davidson, eds., 1992).
- 18 It is true that the Republican plan did not provide any less electoral opportunity to minority voters than the State’s plan, and thus the Justice Department’s manipulation of the Section 5 process did not harm minority voters. This, however, does not alter the fact that the Section 5 process was abused to advance a partisan political end.
- 19 In *Branch v. Smith*, 538 U.S. 254, 263–64 (2003), the Supreme Court rejected a claim that this additional information request by the Justice Department was invalid. However, the claim rejected by the Court was that the Department lacked the legal authority to make this request, and the Court reached this conclusion by determining only that the information requested by the Department was facially relevant to the State’s Section 5 submission. The Court did not examine the question whether, substantively, the Department’s request made any sense.
- 20 At the time the Texas congressional redistricting plan was reviewed by the Justice Department, the Section 5 effect standard was governed by the analysis set forth by the Supreme Court in the *Georgia v. Ashcroft* case.
- 21 The staff memorandum, dated December 12, 2003, is available at www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf. Especially revealing is the fact that because of stated Section 5 concerns, the State legislature had initially approved plans less partisan than the plan that was eventually adopted by a legislative conference committee heavily influenced by DeLay staff members. Plans approved by the Texas House and Senate had left intact one longtime Democratic district with a majority of black and Hispanic voters, but when the final plan emerged from the conference committee, this district was obliterated and distributed to several surrounding districts. Prior to the conference, there were explicit concerns stated by Republican state legislators that the “cracking” of this district would violate Section 5. But, in the end, the plan approved by Texas was not only the most partisan, but also the one that raised the most serious Section 5 issues by eliminating this district. See Section 5 Recommendation Memorandum.
- 22 Subsequently, in *LULAC v. Perry*, 126 S. Ct. 2594 (2006), the Supreme Court ruled that the Texas redistricting plan diluted Hispanic voting strength in violation of Section 2 of the VRA. In a concurring and dissenting opinion, Justice Stevens took the unusual step of approvingly citing to the Justice Department Section 5 staff recommendation even though the recommendation was not in the record of the case. 126 S. Ct. at 2644–45.

- 23 See Section 5 Recommendation Memorandum, August 25, 2005, p.6, available at www.washingtonpost.com/wp-srv/nation/documents/texasDO-Jmemo.pdf.
- 24 A federal district court in Georgia subsequently issued a preliminary injunction preventing the State of Georgia from implementing the ID law that the Justice Department had precleared. The Court concluded that there was a substantial likelihood that the law violated the Constitution because it significantly burdened the right to vote guaranteed by the Fourteenth Amendment, and because it amounted to an unconstitutional poll tax, a technique used in the Jim Crow era to deny African Americans the right to vote. *Common Cause v. Billips*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). Thereafter, the State of Georgia enacted a similar photo ID law that omitted the provisions that prompted the district court to conclude that the first law was an unconstitutional poll tax. The Justice Department precleared this law, but the district court again issued a preliminary injunction. *Common Cause v. Billips*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006). A Georgia state trial court also invalidated the 2006 photo ID law on state constitutional grounds. That decision is on appeal to the state supreme court. *Lake v. Perdue*, No. 2006CV 119207 (Ga. Super. Ct. Sept. 19, 2006).
- 25 Dan Eggen, “Staff Opinions Banned in Voting Rights Cases,” *The Washington Post*, December 10, 2005, p. A3.
- 26 *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002).
- 27 Section 5 originally was enacted in 1965 for a five-year term. It was extended in 1970 for five years and 1975 for seven years, prior to the twenty-five year extension enacted in 1982.
- 28 The legislation terminates the Attorney General’s authority to send federal examiners to Section 5 jurisdictions to register persons to vote. This authority has rarely been utilized in recent years, and civil rights groups agreed that it no longer was needed.
- 29 The reauthorization legislation also slightly changes the language used to define the overall Section 5 nondiscrimination requirement. Under the pre-2006 version of Section 5, covered jurisdictions were required to demonstrate that a submitted voting change “does not have the purpose and will not have the effect” of discriminating. Under the reauthorization legislation, this part of Section 5 now reads “neither has the purpose nor will have the effect” of discriminating. It does not appear that this is a substantive change.
- 30 *City of Rome v. United States*, 446 U.S. 156, 173–80 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 329, 335 (1966).
- 31 *Lopez v. Monterey County*, 525 U.S. 266, 283–84 (1999).
- 32 *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).
- 33 *Northwest Austin Municipal Utility District v. Gonzales*, C.A. No. 1-06CV01384 (D. D.C., filed August 4, 2006).
- 34 It would be misleading to suggest that the number of potential Section 2 cases has remained constant since the 1982 Amendments. Many jurisdictions with substantial minority populations and polarized voting abandoned at-large election systems in order to remedy or forestall Section 2 claims, and redistricting plans now usually are drawn so as to avoid Section 2 liability. Therefore, it is to be expected that the number of Section 2 cases will be lower than during the 1980s.
- 35 The first two years of the Bush II administration covered the post-2000 redistricting cycle, which required a substantial commitment of Voting Section resources, even at some cost to Section 2 enforcement. However, the Clinton Administration made a comparable commitment of resources during 1995 and 1996 to cases involving claims under the new doctrine of *Shaw v. Reno* and defense of the NVRA and so it is fair to compare these two time periods.
- 36 The six cases raising Section 2 vote dilution claims on behalf of African-American citizens were: *United States v. Lee County, Mississippi* (1995); *United States v. City of Baton Rouge, Louisiana* (1996); *United States v. City of New Roads, Louisiana* (1996); *United States v. Marion County, Georgia* (1999); *United States v. City of Morgan City, Louisiana* (2000); and *United States v. Charleston County, South Carolina* (2001). The four cases raising Section 2 vote dilution claims on behalf of Hispanic citizens were: *United States v. City of Lawrence, Massachusetts* (1998); *United States v. City of Passaic, New Jersey* (2000); *United States v. City of Santa Paula, California* (2000); and *United States v. Upper San Gabriel Valley Municipal Water District, California* (2000). The four cases raising Section 2 vote dilution claims on behalf of American Indian citizens were: *United States v. Blaine County, Montana* (1999); *United States v. Benson County, North Dakota* (2000); *United States v. Roosevelt County, Montana* (2000); and *United States v. State of South Dakota* (2000).
- 37 *United States v. Day County and Enemy Swim Sanitation District* (1999) raised claims of intentional discrimination against American Indians in the process of establishing the boundaries of a special purpose district. *United States v. Bernalillo County* (1998) involved claims of discrimination in the selection of American Indian poll workers, while *United States v. City of Passaic* (2000) raised similar claims with regard to Hispanic poll workers. *United States v. Board of Elections of City of New York* (1997) involved claims of discrimination against black and Hispanic voters by poll workers who helped coach white voters. *Grieg and United States v. City of St. Martinville* (2000) involved a cross-claim by the United States on behalf of black voters alleging that the City was denying the right to vote on account of race by failing to adopt a lawful redistricting plan and cancelling its elections. *United States v. City of Cicero* (2000) involved claims of intentional discrimination against Hispanic candidates. *United States v. Alameda County, California* (1995) concerned Asian American poll worker hiring; the case also raised a Section 203 claim. *United States v. City of Hamtramck* (2000) involved poll workers who participated in voter challenges to all Arab American citizens attempting to vote in a city election.
- 38 The total number of Section 2 cases filed was twenty-two; however, one case (*New York City Board of Elections*) stated Section 2 claims on behalf of both Hispanic and African-American citizens, and the total number of claims therefore is greater than the number of cases.

- 39 The three cases raising Section 2 vote dilution claims on behalf of Hispanic citizens were: *United States v. Alamosa County, Colorado* (2001); *United States v. Osceola County, Florida* (2005); and *United States v. Town of Port Chester, New York* (2006). The two cases raising Section 2 vote dilution claims on behalf of African-American citizens were: *United States v. Crockett County, Tennessee* (2001); and *United States v. City of Euclid, Ohio* (2006). The current Civil Rights Division press officers occasionally refer to Section 2 cases that the Division has “litigated”; this term appears to be intended to include cases filed in the previous Administration, such as *United States v. Charleston County, South Carolina*, which was filed at the end of the Clinton Administration. Given that the Charleston County case was exceptionally strong—as shown by the fact that the district court granted partial summary judgment to the United States on the three “Gingles preconditions”, leaving only the totality of the circumstances for trial—it is good, but hardly remarkable, that the Administration allowed it to go forward.
- 40 Among the five cases raising other types of Section 2 claims, *United States v. Osceola County, Florida* (2002), *United States v. Berks County, Pennsylvania* (2003) and *United States v. City of Boston, Massachusetts* (2006), each included claims that the defendant jurisdictions (which were not otherwise covered under the language minority provisions of the VRA) violated Section 2 by failing to provide bilingual assistance; the *Osceola County* and *Berks County* cases stated claims on behalf of Hispanic citizens, while the Boston case raised Section 2 claims on behalf of Hispanic as well as Asian American citizens. These cases also identified the hostile treatment of voters as supporting their Section 2 claims. *United States v. Long County, Georgia* (2006) was based upon challenges to the eligibility of Spanish-surnamed voters. *United States v. Ike Brown and Noxubee County, Mississippi* (2005), involved the claim that a black Democratic county chairman in Mississippi was targeting white voters for differential treatment; this was the first case brought by the Department of Justice alleging discrimination against white voters.
- 41 The only other Section 2 vote dilution case brought on behalf of African Americans by the Bush II Administration—*United States v. City of Euclid, Ohio*—was filed in July, 2006, only after significant adverse publicity about the Administration’s voting rights enforcement record. *United States v. Osceola County, Florida*, which was brought in 2005 on behalf of Hispanic voters, was an especially strong case which included a claim of intentional discrimination as well as a results claim. The court in the *Osceola County* case initially granted the Department’s motion for a preliminary injunction of at-large elections pending trial, and later issued final judgments in the Departments’ favor on both liability and remedy in the fall of 2006.
- 42 Further highlighting the low priority given to cases to protect African-American voters is the *Noxubee County, Mississippi*, Section 2 case filed in 2005—the first case in which the Voting Section ever alleged discrimination against white voters. Regardless of the merits of the discrimination claims in Noxubee County, it is ironic that at a time when no voting cases developed by the Bush Administration on behalf of African-American voters had been filed, the first case on behalf of white voters was filed in Mississippi.
- 43 In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court distilled the analysis of vote dilution claims under amended Section 2 to require that three initial conditions must be satisfied before a Court would be required to assess the totality of the circumstances. The first precondition requires that the minority population in a jurisdiction be sufficiently numerous that it can comprise a majority in a properly-apportioned single-member district. The second precondition requires proof of minority voter cohesion, and the third requires proof that white bloc voting usually leads to the defeat of minority voters’ candidates of choice.
- 44 The total number of Section 2 cases filed was ten; however, one case (*City of Boston*) stated Section 2 claims on behalf of both Hispanic and Asian-American citizens, and the total number of claims therefore is greater than the number of cases.
- 45 *United States v. Blaine County, Montana*, 363 F.3d 897 (9th Cir. 2004). The current Administration pursued a vigorous defense of the district court judgment and the constitutionality of Section 2 as applied to Indians during the appeal of the case.
- 46 *Large v. Fremont County*, No. 2:05-cv-00270-ABJ (D. Wyo.).
- 47 Ironically, attorneys from the Civil Rights Division’s Appellate Section intervened in the *Fremont County* case in 2006 on the limited issue of the constitutionality of Section 2.
- 48 In 2002 the Bureau of the Census released a new set of Section 203 covered jurisdictions as determined by the application of the statutory coverage formula to the 2000 Census data. The effort to ensure compliance with the new determinations was repeatedly identified as a high priority for the Voting Section.
- 49 The Voting Section has brought the following language minority cases during the current Administration: *United States v. City of Philadelphia, Pennsylvania* (2006); *United States v. City of Springfield, Massachusetts* (2006); *United States v. Brazos County, Texas* (2006); *United States v. Cochise County, Arizona* (2006); *United States v. Hale County, Texas* (2006); *United States v. Ector County, Texas* (2005); *United States v. City of Boston, Massachusetts* (2005); *United States v. City of Azusa, California* (2005); *United States v. City of Paramount, California* (2005); *United States v. City of Rosemead, California* (2005); *United States v. Ventura County, California* (2004); *United States v. Yakima County, Washington* (2004); *United States v. Suffolk County, New York* (2004); *United States v. San Diego County, California* (2004); *United States v. San Benito County, California* (2004); *United States v. Brentwood Union Free School District, New York* (2003); *United States v. Berks County, Pennsylvania* (2003); *United States v. Orange County, Florida* (2002), and *United States v. Osceola County, Florida* (2002). In addition, the United States Attorney for the Southern District of New York brought *United States v. Westchester County, New York* (2005).
- 50 *United States v. San Diego County* included a Section 203 claim on behalf of Filipino voters; *United States v. City of Boston* included a Section 2 claim on behalf of Chinese and Vietnamese voters.

- 51 With regard to the *United States v. San Diego County* case, San Diego County had been covered for Spanish language since 1992 but was not covered for Filipino assistance until 2002. *United States v. Yakima County* involved a county that was not covered under Section 203 until 2002. *United States v. Cochise County* involves a county that was covered under Section 203 from 1975 until 1992, and then became covered again in 2002.
- 52 The *United States v. Brazos County* and *United States v. Ector County* cases were brought under Section 4(f)(4).
- 53 *United States v. City of Boston* raised claims under Section 2 with regard to Chinese-language and Vietnamese-language assistance; *United States v. Berks County* and *United States v. Osceola County* both raised claims under Section 2 with regard to Spanish-language assistance.
- 54 *United States v. City of Lawrence, Massachusetts* (1998) (Spanish); *United States v. Passaic City and Passaic County, New Jersey* (1999) (Spanish); *United States v. Bernalillo County, New Mexico* (1998) (Indian); *United States v. Alameda County, California* (1995) (Chinese); *United States v. Socorro County, New Mexico* (1993) (American Indian); *United States v. Cibola County, New Mexico* (1993) (American Indian); *United States v. Metropolitan Dade County, Florida* (1993) (Spanish).
- 55 *United States v. State of Michigan* (1995); *Commonwealth of Virginia v. United States* (1995); *United States v. State of Mississippi* (1995); *United States v. Commonwealth of Pennsylvania* (1995); *United States v. State of Illinois* (1995); *Condon v. Reno* (1995); *Wilson v. United States* (1994).
- 56 *United States v. State of Tennessee* (2002).
- 57 *United States v. State of New York* (2004); *United States v. State of New York* (1996).
- 58 *United States v. State of New Jersey* (2006); *United States v. State of Maine* (2006); *United States v. State of Indiana* (2006); *United States v. State of Missouri* (2005); *United States v. Pulaski County, Arkansas* (2004); *United States v. City of St. Louis, Missouri* (2002).
- 59 The *St. Louis* and *Pulaski County* cases both concerned so-called “inactive voter” lists and the procedures that eligible voters had to follow in order to vote if their names appeared on the inactive list.
- 60 Because the district court in the *State of Missouri* case held that the Missouri Secretary of State was not a proper defendant for the claims in the case, it appears that if the case is to go forward it will require separate litigation against each of the counties. This would raise issues of whether significant Voting Section resources should be devoted to this type of litigation, where no specific harm has been alleged.
- 61 *United States v. State of New Jersey* (2006); *United States v. Cochise County, Arizona* (2006); *United States v. State of Maine* (2006); *United States v. State of Alabama* (2006); *United States v. New York State Board of Elections* (2006); *United States v. San Benito County, California* (2004).
- 62 *United States v. Westchester County, New York* (2005).
- 63 In November 2005 the Voting Section reached an out-of-court agreement under which the State of California agreed to implement a temporary plan and a long-term permanent plan to establish the computerized statewide voter registration list required by HAVA.
- 64 Memorandum By The United States As Amicus Curiae In Support Of Defendants’ Motion To Dismiss And Brief In Support Thereof, *Bay County Democratic Party v. Land* (No. 04-10257-BC) and *Michigan State Conference Of NAACP Branches v. Land* (No. 04-10267-BC) (E.D. Mich.); Memorandum Of The United States As Amicus Curiae In Support Of Defendant’s Motion To Dismiss And Brief In Support Thereof, *Florida Democratic Party v. Glenda Hood* (No. 04:04cv395 RH) (N.D. Fla.); Brief For The United States As Amicus Curiae Supporting Appellant And Urging Reversal, *The Sandusky County Democratic Party v. J. Kenneth Blackwell* (Nos. 04-4265, 04-4266) (6th Cir.). These briefs are available at www.usdoj.gov/crt/voting/hava/hava.html.
- 65 Similarly, the District Court in the Florida case found that HAVA “clearly creates a federal right enforceable under §1983.” *Florida Democratic Party v. Glenda Hood*, *supra*, slip op. at 10. And, in the Michigan case, the District Court found that HAVA §302(a)(2) “unambiguously creates in the voter the right to cast a provisional ballot under certain circumstances. *Bay County Democratic Party v. Land* and *Michigan State Conference Of NAACP Branches v. Land*, *supra*, slip op. at 28. These cases, of course, had very strong partisan overtones—arising in the electorally-critical States of Ohio, Michigan and Florida—and the Division’s position consistently was favorable to the Republican defendants.
- 66 *United States v. State of Connecticut* (2006); *U.S. v. State of North Carolina* (2006); *United States v. State of Alabama* (2006); *United States v. State of Georgia* (2004); *United States v. Commonwealth of Pennsylvania* (2004); *United States v. Oklahoma* (2002); *United States v. Texas* (2002).
- 67 *United States v. State of Michigan* (2000); *United States v. New York City Board of Elections* (1998); *United States v. State of Oklahoma* (1998); *United States v. State of Mississippi* (1996); *United States v. Orr* (1995); *United States v. State of New Jersey* (1994); *United States v. State of Michigan* (1993).

CHAPTER 3

Reshaping the Courts



President Bush's Nominations to the Supreme Court

By Elliot M. Mincberg and Judith E. Schaeffer¹

In the summer of 2005, shortly after the showdown in the Senate over the nuclear option, President Bush received his first opportunity to select a nominee for the United States Supreme Court as Justice Sandra Day O'Connor announced her resignation. Not long thereafter, he received a second opportunity, as Chief Justice William Rehnquist died in early September. The question that had prompted concern and speculation among many Americans was now at hand. Would President Bush fulfill his pledges to far right activists going all the way back to before the 2000 election and nominate justices in the mold of far right Justices Scalia and Thomas?² Or would he look for justices who appreciated the importance of the Court in protecting our constitutional and civil rights and liberties? And especially since one of the justices he was replacing was the first female justice in American history, what about diversity on the Court? And what would the Senate do?

As discussed below (with a detour for the nomination of White House counsel Harriet Miers, later withdrawn), the president nominated and the Senate confirmed John Roberts as Chief Justice and Samuel Alito as Associate Justice. The overall verdict was perhaps expressed by former Sen. Spencer Abraham, referring to the time he helped found the ultra-conservative Federalist Society in 1982: back-to-back successful appointments of individuals like Roberts and Alito “would have been beyond our best expectations.”³

THE FIRST STEP: THE ROBERTS NOMINATION

The resignation of Justice O'Connor provided a pivotal opportunity to far right advocates. Because she was a “swing vote,” rather than a justice who consistently delivered results favored by the right like Scalia and Thomas, the right saw her retirement as their long-sought opportunity to truly shift the balance on the Court. Led by White House Advisor Karl Rove, the administration had always seen the issue of judicial nominations as having key ideological and political components and was anxious to seize the opportunity. Yet the White House also recognized that, despite the 55–45 Republican edge in the Senate, proceeding too aggressively might create political risks, par-

ticularly since the “Gang of 14 agreement” theoretically preserved the filibuster.⁴ Judge John G. Roberts, Jr., who had been confirmed to the D.C. Circuit only two years earlier despite problems with a number of other nominees, proved to be an excellent political choice.

Compared with many past Court nominees, relatively little was known about John Roberts when he was nominated in mid-July, 2005. He had served as an attorney in both the Justice Department and the White House during the Reagan administration, worked as deputy solicitor general during the first Bush administration, spent most of his career as a well-reputed appellate lawyer at the D.C. law firm of Hogan & Hartson, and had served as a judge on the D.C. Circuit for just two years. No senators and few progressive groups initially opposed his nomination, instead expressing concern and calling for a comprehensive review of his record and thorough hearings. Initial concerns included several of the positions he had advocated as deputy solicitor general, arguing in briefs for the overruling of *Roe v. Wade* and weakening of constitutional protections for religious liberty, as well as several of his opinions on the D.C. Circuit—most notably, a dissenting opinion that strongly suggested that he thought it would be unconstitutional to apply the Endangered Species Act in a case, which in turn suggested he was sympathetic to efforts by very conservative judges and activists to limit the authority of Congress under the Commerce Clause.⁵

Many of these same aspects of Roberts's record were viewed much more positively by far right activists. In addition, the administration had an important ace in the hole. By the time of Roberts's nomination, Federalist Society leader Leonard Leo and American Center for Law and Justice head Jay Sekulow had spent more than a year assuring far right conservatives that Judge Roberts could be trusted as a Supreme Court nominee.⁶

Right wing activists were even more pleased, and organizations concerned with civil rights and civil liberties dismayed, as memos written by Roberts and other materials began to be released during the summer concerning his record as a Reagan and Bush administration lawyer. “The

documents released today show that as a White House lawyer John Roberts was a forceful proponent of Reagan administration policies on abortion, school prayer, criminal justice and other hotly contested issues. Those who try to paint Judge Roberts as a squishy moderate will not find any supporting evidence in these documents,” proclaimed noted arch-conservative Ed Whelan, president of the Ethics and Public Policy Center in Washington.⁷

By August 2005, although many documents concerning Roberts’s record continued to be withheld by the Bush administration, a number of progressive organizations concerned with civil rights and civil liberties announced their opposition to the Roberts nomination. The documents released showed a career-long pattern of opposition to civil rights, access to justice, privacy and reproductive choice, and Congressional authority to protect such rights, as well as promotion of unilateral executive power. For example, Roberts was a key architect and supporter of restrictive Reagan and Bush administration positions on voting rights, sex discrimination, court-stripping, privacy and reproductive rights, school desegregation, and employment discrimination and affirmative action. Indeed, documents demonstrated that on some issues he had advocated positions more restrictive on civil rights than had even arch-conservative stalwarts like William Bradford Reynolds and Theodore Olson.⁸

Nevertheless, as the confirmation process proceeded, significant senatorial opposition to Judge Roberts’s nomination did not materialize. A number of reasons were suggested: the revealing memos were considered old; Judge Roberts’s record on the D.C. Circuit remained relatively thin; and Roberts was extremely bright, charming, and liked by the influential D.C. legal establishment, and he gave the impression that he was not inclined toward the sweeping overhaul of constitutional doctrine favored by Justices Thomas and Scalia.⁹ There were also political concerns. Since Democrats had lost seats in 2004, many in their leadership became sensitive to concerns that staking out positions on judicial nominations was consuming too much energy and possibly threatening the party’s electoral prospects. These concerns were fed by repeated claims, advanced by far right activists, that Democrats, including former majority leader Tom Daschle (D-SD), had lost seats in the Senate partly because of their continued opposition to some of the president’s nominees. Although later opinion research showed that

the issue of judicial nominations had a marginal role, if any, in the Daschle defeat, the claims continued to be made.¹⁰ Especially in light of this political atmosphere, some commentators suggested that the Bush administration had “threaded the needle” in choosing Roberts.¹¹

Concern over Roberts’s views and record further dissipated among some when, in early September, 2005, Chief Justice William Rehnquist died and President Bush tapped Judge Roberts to replace him as Chief Justice, rather than to replace Justice O’Connor. Since Chief Justice Rehnquist had been much more conservative than O’Connor and very often voted with Scalia and Thomas, many suggested that replacing him with Judge Roberts would simply maintain, rather than shift, the balance on the Court.

The confirmation hearings for Judge Roberts provided very little insight into his legal views. This was clearly no accident. Since the 1987 defeat of the Supreme Court nomination of Judge Robert Bork, who candidly embraced far-right legal views, the game plan has been to advise nominees to simply make broad statements about respecting the law and precedent and to reveal as little as possible about their own legal views and judicial philosophy. This strategy was particularly effective during the hearings on Judge Roberts, who displayed his intelligence, charm, and thorough knowledge of the law while saying very little about his legal views and denying that they were reflected by his previous record in the Reagan and first Bush administrations. Judge Roberts stated that he saw himself like an umpire in a baseball game and that he had no agenda or “overarching judicial philosophy,” praised the significance of precedent, and said he believed the Constitution protects the right to privacy (as Judge Bork did not).¹² Despite intensive questioning on a number of civil rights and civil liberties issues, including issues he had written about as a political appointee in the Reagan and first Bush administrations, Roberts so “skillfully evaded efforts to nail down his personal views on the law and issues before the court ... that conservatives and liberals alike were left with no clear picture of where ... he would lead the Supreme Court.”¹³ As another commentator noted, “[e]ven after Roberts’s senatorial interrogation, we still have precious little grasp on what sort of justice he will be.”¹⁴

Largely as a result of Roberts’s deft performance at his hearing, his limited record as a judge, and the political and other factors discussed above, significant senatorial opposition to his confirmation never materialized. His

nomination was easily approved by the full Senate by a vote of 78–22. Recognizing that Judge Roberts’s testimony had left them unable to truly determine his legal views, and declining to vote against a nominee like Roberts because of his failure to adequately answer questions, Democrats who supported the nomination said they were “voting [their] hopes, and not [their] fears.”¹⁵ *The New York Times* disagreed: “Senators should vote against Mr. Roberts not because they know he does not have the qualities to be an excellent chief justice, but because he has not met the very heavy burden of proving that he does.”¹⁶

FALSE STEP: THE NOMINATION OF HARRIET MIERS

Shortly after the confirmation of Chief Justice Roberts, the Bush administration returned to the task that was so important to the hopes of the far right: filling Justice O’Connor’s seat and, so the far right hoped, moving the Court significantly towards the views of Justices Thomas and Scalia. They wanted “a nuclear weapon in the culture wars, a justice who would vote to roll back previous rulings on gay rights, school prayer and abortion.”¹⁷ At least initially, however, they were sorely disappointed.

President Bush chose White House Counsel Harriet Miers, a friend and colleague from his days in Texas. Progressive organizations concerned with civil rights and civil liberties raised concerns but, relatively speaking, were quiet. Instead it was activists on the right who almost immediately opposed her nomination or came very close, focusing especially in conversations with each other on her lack of clearly-identifiable right wing credentials and the fear that she could become “another Souter”—referring to the first Bush administration’s nomination of Justice David Souter, whose lack of such clear ideological credentials, they have claimed over the years, led to a Justice who badly failed the far right’s expectations for a Supreme Court appointment by a Republican president. Crucial right-wing opinion leaders, like George Will, Charles Krauthammer, David Frum, Rush Limbaugh, and William Kristol, spoke out against the nomination, criticizing Miers’s lack of movement credentials as well as their perception of her intellectual capabilities and qualifications.¹⁸ Several far right groups were formed specifically to oppose Miers’s nomination, such as “WithdrawMiers.org” founded by Eagle Forum’s Phyllis Schlafly, while some groups that had been formed specifically for the purpose of supporting the president’s nominees remained silent.

The administration began by trying to quell the rebellion, focusing in particular on Ms. Miers’s religious background. The president told reporters that Ms. Miers’s faith was one of the reasons he nominated her. Top White House advisers touted Ms. Miers’s affiliation with an evangelical church in conference calls with groups of far right activists. Right wing leader James Dobson of Focus on the Family even suggested to the press that, based on confidential briefings by the White House, he had specific information on Ms. Miers’s views that convinced him to support the nomination. “You will have to trust me on this one,” Mr. Dobson said, adding that if he was wrong, “the blood of those babies [aborted fetuses] will be on my hands to some degree.”¹⁹ The administration clearly was trying to focus on Miers’s religious views to send the message to the far right that they could trust Miers to rule their way on controversial issues like church-state separation, abortion rights, and gay rights.²⁰ This directly contradicted previous arguments by far right advocates and the administration, which had proclaimed even as recently as the Roberts nomination that any comment or questioning concerning a nominee’s religious views was improper.²¹

The White House’s attempts to appease right wing opposition to the Miers nomination failed. Ms. Miers withdrew her nomination a week before her confirmation hearings were to begin, claiming that she was concerned that answering questions about her nomination could call for documents protected by executive privilege. Of course this rationale had not interfered with Roberts’s and other Bush administration nominations; the White House simply refused to turn over documents but nonetheless insisted its nominees be voted on and confirmed. The actual reason was clear: without a demonstrated record of commitment to far right legal views that could truly change the Court if Miers replaced Justice O’Connor, the White House’s base would simply not accept her or even permit her to receive a hearing. This right-wing rejection of Ms. Miers’s nomination is a clear illustration of its unswerving dedication to remake the law by remaking the federal courts.

Indeed, the level of hypocrisy by right wing advocates as reflected in the Miers nomination imbroglio was truly remarkable. They praised Roberts and other nominees for refusing to answer questions about their views, but attacked Miers because they were not sufficiently sure of her views and insisted that she must answer specific questions. They demanded a prompt hearing and an up-or-down vote on

all the president's other judicial nominees, but insisted that Miers receive neither and that her nomination be withdrawn. They called on senators to ignore what they called the "inappropriate litmus tests and document demands" during the Roberts nomination, while criticizing the inadequacy of Miers's record in revealing her "constitutional philosophy."²²

THE FINAL STEP: THE NOMINATION OF SAMUEL ALITO

At the end of October, 2005, after the Miers withdrawal, President Bush nominated Judge Samuel Alito to fill the seat of Justice O'Connor on the Court. Many of the same far right voices who had opposed the Miers nomination quickly embraced the new nomination. Alito had often been mentioned by right-wing activists as a potential nominee to move the high Court to the right, based largely on his very conservative 15-year record on the United States Court of Appeals for the Third Circuit. They clearly believed that he would truly help achieve their long-term goal of moving the Court, and the law, dramatically to the right. As Jay Sekulow of the right-wing American Center for Law and Justice put it, "President Bush promised that he would nominate justices in the mold of Justices Scalia and Thomas. President Bush has done just that."²³

For the same reasons, Alito's public record as a judge had received significant attention from progressive civil rights and civil liberties organizations, as well as legal scholars and elected officials, and a number responded with immediate concern or outright opposition. For example, preliminary reports released just after the Alito nomination documented that his judicial record had demonstrated hostility toward women's rights of reproductive choice—a clear credential in the view of the far right. He had also issued a series of opinions, often in dissent, that sought to undermine established civil rights law, especially in its protection against discrimination based on race and gender. And he had similarly attempted to limit severely the federal government's ability to protect its own citizens. For example, he had argued in an opinion that the federal government could not apply a key part of the Family and Medical Leave Act to state employees, and claimed in one dissent that Congress could not even enact and apply a federal law banning the possession of machine guns.²⁴

Further research on Alito's record, including his activities and writings as a Justice Department attorney during the

Reagan administration, only deepened these concerns. Much attention was drawn to a 1985 memorandum written by Alito as part of an ultimately successful job application for a high-level position in the Reagan DOJ's Office of Legal Counsel. In that memo, written to Attorney General Ed Meese, Alito proudly touted his membership in right-wing groups like the Federalist Society and Concerned Alumni of Princeton and made a clear pledge of allegiance to a right-wing agenda to limit the federal courts' ability to protect individual rights. He referred to the "supremacy" of the executive branch and Congress over the judiciary, a view rejected by the founders. He expressed disagreement with key Supreme Court precedents in such areas as one-person one-vote and religious liberty. He stated that he was proud to have worked in the Solicitor General's office to advance right-wing legal positions that he stated he believed in "very strongly," including opposition to affirmative action and abortion rights.²⁵

Scholars and civil rights groups examining Alito's record were particularly concerned because his record in the Reagan administration and his 1985 job application appeared to provide a blueprint for his extremely troubling judicial record. For example:

- Alito felt so strongly about limiting Congress' authority and states' rights that he had urged President Reagan to veto an uncontroversial bill protecting against odometer fraud because Alito believed that the states, "not the federal government," are charged with protecting Americans' "health, safety, and welfare." President Reagan rejected Alito's advice and signed the bill, but Alito's views in this area continued to be reflected in opinions such as his dissent from the ruling upholding the federal machine gun law, in which he rejected the views of the majority of his court and six other federal appellate courts.²⁶
- In 1984, while serving as an Assistant Solicitor General in the Reagan Justice Department, Alito wrote a memorandum expressing his view that the Sixth Circuit had been wrong to strike down as applied a state law that authorized the police to shoot to kill a fleeing, unarmed teenager who was suspected only of a non-violent crime.²⁷ (The Supreme Court later affirmed the Sixth Circuit's ruling.²⁸) Alito's disturbing views about police power and the Fourth Amendment were later reflected in his opinions, including his dissent in a case in which he would have upheld the strip search of

a mother and her 10-year-old daughter, even though they were not named in the warrant that authorized the search of their home.²⁹

- Alito told Meese in his job application that he “personally believe[d] very strongly” in opposition to affirmative action, even as a remedy for past discrimination. As a judge, in civil rights cases where the Third Circuit was divided, Alito opposed civil rights protections more than any of his colleagues. He advocated positions detrimental to civil rights 85 percent of the time, filing dissents in more than a third of those cases. In one civil rights case, all 10 of Alito’s colleagues who decided the case with him agreed that a sex discrimination victim’s case was properly submitted to the jury. Alito was the only judge who dissented.
- In fact, Alito was the most frequent dissenter among all the other judges on the Third Circuit since he began serving in 1990. According to estimates by University of Chicago law professor Cass Sunstein, more than 90 percent of Alito’s dissents took positions more conservative than those of his colleagues, a much more lopsided percentage than, for example, noted conservative former Judge Michael Luttig.

The conclusion of George Washington law professor Jonathan Turley, who actually supported Chief Justice Roberts’s confirmation, summed it up well: “[T]here will be no one to the right of Sam Alito on this Court.”³⁰

In contrast to the Roberts nomination, the combination of Judge Alito’s stated views on the law and the fact that those views were clearly to the right of the justice he would replace on civil rights and other issues meant that opposition to and concern about the Alito nomination quickly mounted. Prior to Alito’s hearings, however, the level of opposition, particularly among senators, had not reached the level of opposition to, for example, the Bork nomination almost 20 years earlier. It was unclear how much of this was attributable to the 55–45 Republican majority, concern about charges of “obstructionism,” worry about how Democratic as well as Republican senators in the “Gang of 14” would act, “nomination fatigue” stretching back to before the “nuclear option” controversy, the fact that much of the activity on the nomination took place toward the end of 2005 during the holiday period, counterarguments by conservative senators and advocates,

or a combination of these. In any event, the hopes of those concerned about or opposed to the Alito nomination were linked to using the confirmation hearings to paint his views as “out of the mainstream.”

This idea, however, did not work. Although perhaps not as articulate and charming as Chief Justice Roberts, Judge Alito similarly resorted to explaining legal principles and precedents without making clear his own views, even views he had previously expressed, on crucial issues like reproductive rights, executive authority, civil rights, and federalism and “states’ rights.” He appeared sufficiently humble, likeable, and knowledgeable to avoid being penalized for his evasive answers to many questions.³¹ Some observers severely criticized Democrats on the Senate Judiciary Committee for ineffective questioning and lack of coordination.³² Sen. Barack Obama (D-IL), who opposed Alito and supported an attempted filibuster of his nomination, commented that “The Democrats have to do a much better job in making their case on these issues.”³³

In fact, after the hearings and shortly before the anticipated full Senate vote towards the beginning of 2006, Sens. Kerry and Kennedy announced their intention to filibuster the Alito nomination. Although the issue of filibuster had been discussed in a general way previously, it had not received specific public support from senators, and most observers concluded that it was too little and too late. Only 25 Democratic senators supported the filibuster. On January 31, 2006, the Senate voted to confirm Justice Alito 58–42, with most Democratic senators and one Republican, Lincoln Chafee, voting against him. This was a close vote by historic standards, and several senators stated after the 2006 election that such a confirmation will not happen again. But in the end, the objective of far right advocates was achieved, and two justices with extremely conservative records and philosophies were confirmed, replacing in one instance a key swing justice on the Court.

THE RESULTS SO FAR

As of early 2007, Chief Justice Roberts has served only one full term on the Supreme Court, and Justice Alito has served less, so it is premature to discuss definitively the results of their confirmation. After all, both confirmations are for life, which is precisely what worries civil rights advocates and excites the far right. It is clear that at least for

the moment, diversity on the Court has decreased, with one female and one African-American justice remaining on the bench. And as to the Court's rulings, the results so far are troubling.

Voting patterns on the Court during the 2005–06 term confirmed the hopes and fears of many about the two new justices. According to a review by the Georgetown University Law Center Supreme Court Institute, Roberts and Alito agreed with each other some 91 percent of the time. Roberts agreed with the far right's models for Supreme Court justices, Justices Scalia and Thomas, 86 and 82 percent of the time. Alito agreed with Thomas and Scalia 77 and 74 percent of the time. In non-unanimous cases, for example, Roberts agreed with Scalia some 78 percent of the time, compared with only 35 percent for Justice Stevens, one of the Court's more moderate justices.³⁴

More important than statistics were the results in particular cases. The pattern of rulings demonstrated that the fulcrum of the Court had clearly shifted to the right, with Justice Kennedy rather than Justice O'Connor serving as the key swing vote. In a number of controversial cases, Roberts and Alito joined with Scalia and Thomas to form a consistent, very conservative bloc which, when Justice Kennedy joined them, produced troubling rulings.

For example, in one case, this new 5–4 majority upheld most of the mid-decade redistricting plan inspired by former Rep. Tom DeLay, specifically rejecting a challenge by

African American voters to the redrawing of a Dallas-area congressional district. The same 5–4 majority ruled that the First Amendment does not protect government employee internal whistleblowers and that the exclusionary rule should not apply to violations of the constitutional requirement that police “knock and announce” searches. And the same 5–4 majority limited the reach of the Clean Water Act, with Alito and Roberts joining Thomas and Scalia in urging a dramatic cutback in the law and only Kennedy providing the decisive vote in favor of a more restrained approach.³⁵

During the 2006–07 Term, clear and dangerous opportunities are present for the Court's extremely conservative members to move the country backwards on key civil rights and civil liberties issues. For example, the Court has already heard argument on the constitutionality of voluntary school integration plans and on the validity of a federal abortion ban similar to the Nebraska so-called “partial birth” abortion ban that was struck down 5–4 by the Court several years ago, with Justice Kennedy in dissent. The prognosis for these and similar cases is clearly troubling. And if another justice in the mold of Scalia, Thomas, Roberts, and Alito were added to replace a justice like Stevens or Ginsburg, the results for civil and constitutional rights could be even more devastating. The lesson of 2005–06 is clear: the composition of the Supreme Court is vital to all Americans, and more successful efforts to prevent the balance of the Court from swinging even further to the right are crucial for our country.

ENDNOTES

- 1 Mr. Minberg participated in the writing of this chapter while serving as Senior Vice-President, Legal Director, and General Counsel at People For the American Way (“PFAW”). Ms. Schaeffer is the Associate Legal Director of PFAW.
- 2 See PFAW Foundation, *Courting Disaster 2005* (2005). In general, the voluminous reports of PFAW Foundation, PFAW, and the Alliance For Justice during 2005–06 contain a wealth of material utilized directly and indirectly in this chapter, and the outstanding work of these two organizations is specifically acknowledged and appreciated by the authors.
- 3 D. Kirkpatrick, “In Alito, GOP Reaps Harvest Planned in ’82,” *The New York Times* (Jan. 30, 2006) at A1.
- 4 In the spring of 2005, a group of 7 Democratic and 7 Republican Senators, dubbed the “Gang of 14,” agreed that they would not filibuster judicial nominees in the absence of “extraordinary circumstances.” While forestalling deployment of the nuclear option, the agreement effectively resulted in the confirmation of several of President Bush's most ideologically extreme nominees.
- 5 PFAW, *The Record of John G. Roberts, Jr.: A Preliminary Report* (July 19, 2005).
- 6 D. Kirkpatrick, “A Year of Work to Sell Roberts to Conservatives,” *The New York Times*, July 22, 2005, at 14.
- 7 D. Savage and H. Weinstein, “Files From Roberts’ Reagan Years Are Released,” *The Los Angeles Times*, Aug. 16, 2005, at A12.
- 8 See PFAW and AFJ reports on Roberts, such as PFAW, *Report in Opposition to the Confirmation of Supreme Court Nominee John Roberts* (Aug. 24, 2005). See also William L. Taylor, “John Roberts: The Nominee,” 52 *The New York Review of Books* 30 (Oct. 6, 2005).

- 9 See J. Chait, “Blindly battling over Roberts,” *The Los Angeles Times*, Aug. 12, 2005, at B13.
- 10 Judicial Nominations as a Campaign Issue in the 2004 South Dakota Senate Race (internal research report) (on file with Alliance for Justice).
- 11 S. Rothenberg, “Roberts May Not be The Issue Democrats Hoped for in 2006,” *Roll Call*, July 21, 2005.
- 12 See J. Rosen, “Answer Key,” *New Republic*, Nov. 21, 2005; A. Liptak, “Speaking Volumes,” *The New York Times*, Sept. 15, 2005.
- 13 G. Holland, “John Roberts sidesteps issues for now, but real world awaits,” *Associated Press*, Sept. 16, 2005.
- 14 J. Heilmann, “Pining for Bork,” *New York Magazine*, Oct. 3, 2005. For the report of the Alliance for Justice on the Roberts hearing, from which much of this description is derived, see <http://www.supremecourtwatch.org/roberts.aspx>. See also forthcoming AFJ report on judicial selection during the Bush Administration.
- 15 See, e.g., Statement of Sen. Kohl, Sept. 22, 2005, available at <http://kohl.senate.gov/~kohl/press/05/09/2005922450.html>; Statement of Sen. Feingold, Sept. 29, 2005, available at <http://feingold.senate.gov/~feingold/statements/05/09/2005929CR.html>.
- 16 Editorial, “Too Much of a Mystery,” *The New York Times*, Sept. 18, 2005, § 4 at 11.
- 17 L. Pitts, “Miers not such a stealth nominee after all,” *Chicago Tribune*, Oct. 18, 2005, at C23.
- 18 See, e.g., G. Will, “Can This Nomination Be Justified?,” *The Washington Post*, Oct. 5, 2005, at A23.
- 19 D. Kirkpatrick, “New Questions From the Right On Court Pick,” *The New York Times*, Oct. 6, 2005, at A1.
- 20 L. Pitts, “Miers not such a stealth nominee after all,” *Chicago Tribune*, Oct. 18, 2005, at C23.
- 21 PFAW, *Bush Administration Shares Right’s Hypocrisy on Religion and Judicial Nominations* (Oct. 12, 2005).
- 22 PFAW, *Harriet Miers’ Withdrawal: Right Will Bill Comes Due* (Oct. 2005).
- 23 American Center for Law and Justice press release re: Alito nomination (Oct. 31, 2005).
- 24 PFAW, *The Record of Samuel Alito: A Preliminary Report* (Nov. 2005).
- 25 See Attachment to PPO Non-Career Appointment Form of Samuel Alito (Npv. 15, 1985), discussed in, e.g., PFAW, *The Record and Legal Philosophy of Samuel Alito* (Jan. 4, 2006) (“PFAW Alito Report”).
- 26 This example, as well as the others in this section, is documented in PFAW Alito Report at 9–12.
- 27 Memorandum from Samuel A. Alito to the Solicitor General re *Memphis Police Dept. v. Garner*, May 18, 1984.
- 28 *Tennessee v. Garner*, 471 U.S. 1 (1985).
- 29 *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 111 (2004). The opinion from which Alito dissented was written by then-Judge Michael Chertoff, now the Secretary of the Department of Homeland Security.
- 30 See PFAW Alito Report at 7–8. As discussed in detail in the PFAW and Alliance For Justice reports, other issues were also raised concerning the Alito nomination, such as responses to Senate Judiciary Committee questions concerning his membership in the Concerned Alumni of Princeton and concerning his recusal or failure to recuse himself from cases concerning companies in which he had a financial interest. See PFAW Alito Report at 139–46. Alliance for Justice’s comprehensive report on Justice Alito’s pre-nomination record can be found at <http://www.supremecourtwatch.org/alitofinal.pdf>.
- 31 In addition, it became a media event when Alito’s wife burst into tears during the confirmation hearings, something that very likely garnered sympathy for the nominee. See, e.g., L. Copeland, “Debating the Tissues: What Makes a Good Cry,” *The Washington Post*, Jan. 13, 2006.
- 32 See, e.g., D. Gergen, “Is Zawahiri Dead?; Celebrity Obsession, Scandal and Politics,” Larry King Live (CNN), Jan. 13, 2006 ; R. Allen, “The Alito Hearings,” Newshour with Jim Lehrer, Jan. 12, 2006.
- 33 J. Zeleny, “Obama joins filibuster bid against Alito; But senator criticizes tactic, says it will fail,” *Chicago Tribune*, Jan. 30, 2006 at 3.
- 34 See PFAW, *Supreme Court Analysis, 2005–06 Term* (June 30, 2006) at 1.
- 35 *Id.*

The Bush Administration's Assault on the Lower Courts

By Adam Shah

President George W. Bush's administration has been marked so far by a policy of packing the lower courts, particularly the 13 courts of appeals one step below the Supreme Court, with staunch ideological conservatives whose record at the time of nomination showed hostility to civil rights in particular and to much of the basic progress in other areas achieved both through courts and through legislation. Aided by a complacent Senate for the majority of his time in office, Bush has been largely successful in this goal during his first six years in office, although he has suffered a few notable defeats during that period. Once on the bench, Bush-appointed judges have proven that the opposition to them by the civil rights community and others has been well-founded.

The Bush administration focused on the courts of appeals for two basic reasons: first, for the first five years of the administration, there were no vacancies on the U.S. Supreme Court and second, because the Supreme Court has discretionary jurisdiction in the vast majority of cases and appeals filed before it, the courts of appeals were the courts of last resort for the vast majority litigants. The courts of appeals decide more than 28,000 cases each year in the years since Bush took office—reaching a high of 33,974 in 2006—while the Supreme Court decides fewer than 90 cases on the merits and issued fewer than 80 decisions after full briefing and arguments.¹

The Senate has largely acquiesced in Bush's strategy. In the nearly six years of his presidency, President Bush has appointed 52 courts of appeals judges²—a rate slightly above that of President Clinton who appointed 65 courts of appeals judges in eight years by picking by-and large moderate nominees—and now 10 of the 13 federal circuits have a majority of Republican-appointed judges.³ However, on occasion, members of the Senate have resisted some of the most extreme candidates President Bush has sent. That resistance has taken the form of votes against nominees in the Senate Judiciary Committee and, when Democrats were in the minority in the Senate, filibusters on the Senate floor. These and other strategies have allowed pro-civil rights forces in the Senate to fend off nine such extreme nominees, former White House counselor Claude Allen, former Mis-

issippi federal Judge Charles Pickering, Michigan state appellate court Judge Henry Saad, Los Angeles state trial court Judge Carolyn Kuhl, former Interior Department Solicitor William Myers, North Carolina federal Judge Terrence Boyle and Mississippi attorney Michael Wallace.

BACKGROUND

The 2000 election that brought George W. Bush to the presidency despite losing the popular vote after the Supreme Court stopped the recount in *Bush v. Gore*,⁴ also left the Senate equally tied between Democrats and Republicans, giving the Republicans the slimmest majority in the Senate by virtue of Vice President Dick Cheney's deciding vote. With this tenuous hold on power, some expected President Bush to try to build consensus and govern from the center. President Bush soon signaled that, with respect to judicial nominations, he had no such intention.

On May 9, 2001, President Bush submitted his first 11 nominations to the Senate, all to the courts of appeals. This also appeared to signal the importance President Bush placed on lower court nominees. President George H. W. Bush did not make his 11th nomination to the courts of appeals until more than a year into his presidency, and President Clinton did not do so until more than two years into his presidency.⁵ Among these first 11 nominees were several members of the Federalist Society, a right-wing legal organization, and a number who had demonstrated a staunch opposition to civil rights causes, including an academic who had strongly criticized landmark Supreme Court civil rights decisions, three federal trial court judges and two state Supreme Court justices who had shown hostility to civil rights litigants, and three attorneys in private practice with troubling civil rights records.⁶

It must be noted that, among the first 11 nominees, President Bush, with the support of the two Republican Virginia senators at the time, John Warner and George Allen, also renominated Roger Gregory, an African American who had integrated the previously all-white Fourth Circuit when President Clinton gave him a recess appointment. The Senate confirmed Gregory, giving him a life-

time appointment to the Fourth Circuit. President Bush also nominated Barrington Parker, an African American federal district court judge appointed by President Clinton for elevation to the Second Circuit.

For the next five-plus years, President Bush and his allies in the Senate campaigned hard to win confirmation for these original nominees and many of the nominees that followed who engendered similar concerns among the civil rights community, breaking longstanding Senate rules and traditions in the process. Nevertheless, civil rights supporters won several important victories in the first six years of the Bush administration, capped off by President Bush's decision not to renominate several of the most controversial nominees in 2007.

DEFEATED BUSH NOMINEES⁷

Civil rights supporters were able to defeat two of President Bush's appellate court nominees with records that were very hostile to equal justice: North Carolina federal judge Terrence Boyle and Mississippi federal judge Charles Pickering. These two judges were nominated to circuits that covered most Southern states, the Fourth and Fifth Circuits. Both circuits had a large African American population and had been the location of major civil rights victories in the past. Both had been targeted by President Reagan and the previous President Bush to be turned into strong bastions of conservative legal theory. In many ways, that strategy was successful. The confirmation of Judges Boyle and Pickering would have cemented anti-civil rights majorities on those courts. The Senate refused to confirm either one.

CHARLES PICKERING

The first nominee to garner substantial Senate opposition was Pickering. Pickering was an ally of then-Senate Minority Leader Trent Lott (R-MS) and Sen. Patrick J. Leahy (D-VT) agreed to give him a hearing early in the process, on October 18, 2001, even as the Capitol complex was being cleared due to the anthrax attacks. Several progressive organizations noted that Judge Pickering had a very thin written record. Although he had been a federal district judge in Mississippi for more than a decade, he had chosen to publish fewer than 150 opinions in the Westlaw and Lexis electronic databases. As a whole, those published decisions were a cause for great concern. Many

of his decisions contained Pickering's personal opinions opposing, as a general matter, application of the federal writ of habeas corpus to state prisoners, the breadth of federal power, and other issues. As a result, the Judiciary Committee agreed to require Pickering to produce all of his unpublished decision and scheduled a second hearing on Pickering's nomination to take place after those decisions had been produced.

At Pickering's second hearing on February 7, 2002, senators explored his pre-bench history as someone who had written a law review student article explaining how Mississippi could strengthen its anti-miscegenation law,⁸ partnered with a Mississippi gubernatorial candidate who described himself as a "total segregationist" in the 1950s,⁹ and, as a state senator, indicated support for Mississippi's "Sovereignty Commission," which harassed civil rights workers and union organizers on behalf of the state government. Despite these actions, he stated in 1990 when he was confirmed to the district court that he had never had any contact with the Sovereignty Commission.

But the bulk of the hearing focused on Pickering's actions since coming to the bench, in particular, his handling of a criminal cross-burning trial brought in his court. In *United States v. Swann*, three defendants were charged with burning a cross on the lawn of a home owned by an interracial couple who had previously been harassed. One of the defendants, possibly the ringleader of the group, was a juvenile. A second pled guilty to a lesser offense. Both were sentenced to home confinement and probation.¹⁰ Swann chose to go to trial and was convicted of civil rights violations,¹¹ as well as using arson in the commission of a federal crime, a law that—at the time—carried a mandatory minimum of five years that had to be served consecutively to the base offense.¹² As a result, Swann faced a sentence of seven years as mandated by Congress.

In hearing post-trial motions, Pickering expressed concern about the length of the sentence and the fact that Swann faced a much longer sentence than his codefendants. Although not recorded in the official transcript, according to memoranda by the prosecutor, Pickering went further during in-chambers conferences. He told the attorneys that he believed the government was "probably right on the law," but nevertheless threatened to write a decision adverse to the government and "let the Fifth Circuit handle it" if the government did not agree

to reduce the sentence. He also entered an order requiring the prosecutor to check personally with then-Attorney General Janet Reno to ensure that she was aware of the disparate sentences and called the prosecutor at home the day after New Years (a federal holiday that year) to see if his order had been carried out. Eventually, the prosecutors relented and dropped the arson charge, allowing Swann to receive a lighter sentence.

Fifth Circuit precedent is clear that a judge cannot depart below a mandatory minimum sentence enshrined by Congress without agreement from prosecutors. Further, although Pickering's supporters were able to give several examples of Pickering giving leniency to a defendant by departing below then-mandatory federal sentencing guidelines, his defenders were unable to come up with a single other example of Pickering refusing to impose a mandatory minimum sentence established by Congress (rather than a sentence established by the guidelines) besides this cross-burning case.

Several legal ethics experts wrote letters to the Senate Judiciary Committee giving their opinion that Pickering's actions violated the canons of judicial ethics. These experts said that Pickering engaged in *ex parte* communications with the prosecutor by phoning him at home without the defense attorney on the line.¹⁵ Pickering also used his power to establish precedent as a threat against the government even when he admitted that he believed the government was correct, again in violation of the ethics canons in experts' opinions.

Pickering's decisions in other cases also showed a marked hostility to civil rights litigants. As documented in a report by the National Women's Law Center,¹⁶ while Pickering allowed a discrimination case filed by a white male to go to trial,¹⁷ he often dismissed those brought by women and members of racial minorities. In one case alleging sex discrimination and sexual harassment by a school district, Judge Pickering opined that the defendant "has enough problems educating children" without "the expense of going to a lengthy trial and stated that "some seem to think that every time an adverse employment action is taken against one protected by Title VII that discrimination has occurred and an action can be brought under Title VII."¹⁸ When asked about his record of dismissing employment discrimination claims before trial, Pickering testified that, as noted by Sen. Russ Feingold (D-WI),

[T]he Equal Employment Opportunity Commission "engages in mediation and it is my impression that most of the good cases are handled through mediation and are resolved." He went on to say, "The cases that come to court are generally the ones that the EEOC has found are not good cases, so then they are filed in court."¹⁹

In addition to being an express admission that Judge Pickering is predisposed against Title VII plaintiffs who appear in his court room, Judge Pickering's views have been challenged as factually incorrect by the National Women's Law Center:

In reality, the EEOC has a backlog of many thousands of cases and litigates only a tiny fraction of the charges in which it finds reason to believe that discrimination has occurred. And although some claims are resolved through EEOC mediation, most are not—thus giving victims of discrimination little choice but to pursue their claims in court.²⁰

The Senate Judiciary Committee rejected Judge Pickering's nomination to the Fifth Circuit on March 14, 2002, on a 10–9 party-line vote. Nevertheless, President Bush renominated Pickering when Republicans regained control of the Senate in 2003. The Republican-majority Judiciary Committee voted in his favor on October 2, 2003, again in a 10–9 party-line vote. Senators then refused to cut off debate on his nomination by a vote of 54–43 on October 30, 2003 (60 votes are necessary to invoke cloture and cut off debate in the Senate, which otherwise can continue indefinitely²¹). Despite the fact that in two consecutive sessions, the Senate refused to confirm Pickering, President Bush gave him a recess appointment to the Fifth Circuit on January 16, 2004. His recess appointment expired when Congress recessed that year on December 8, 2004, and Pickering announced that he was retiring from the federal bench the same day.

TERRENCE BOYLE

Judge Boyle was first nominated to a Fourth Circuit seat by President George H.W. Bush at the request of Boyle's former boss, Sen. Jesse Helms (R-NC), but his nomination lapsed when he did not receive a hearing before President Clinton was elected. The current President Bush

renominated him despite the fact that he has repeatedly been reversed by higher courts in civil rights and other cases.

Boyle's civil rights record is perhaps best exemplified by the *Cromartie v. Hunt* litigation, the long-running battle over North Carolina's twelfth district, a district with a large percentage of African Americans drawn after the Department of Justice objected to the congressional map North Carolina drew after the 1990 census that contained only one majority African American district. Boyle was reversed twice by the Supreme Court for striking down the district, the first time unanimously in a decision by Justice Thomas that chastised the lower court for failing to even hold a trial before reaching a decision.²²

As detailed in an Alliance for Justice report, Boyle has been reversed in more than 150 other cases, including for decisions in which he declared that states' rights principles trumped the Civil Rights Act of 1964 or other civil rights laws²³ and for decisions in which he ignored basic procedural rules or the plain language of a statute.²⁴

Also very troubling were his actions in a case brought by the U.S. Department of Justice alleging discrimination against women attempting to become guards in the North Carolina Corrections Department. The Justice Department's case was based on a claim that the effect of North Carolina's hiring practices was to discriminate against women, whether that discrimination was intentional or not. Such a claim is clearly cognizable under Title VII of the Civil Rights Act of 1964, especially after amendments made to it by the Civil Rights Act of 1991. The Justice Department and the state agreed to settle the lawsuit and presented a consent decree to Judge Boyle which would have implemented the agreement. Boyle refused to enter the decree. He stated that North Carolina's agreement to hire and promote qualified women and to provide \$5.5 million to women who had previously been discriminated against likely would constitute illegal discrimination against men and that Title VII, and especially the section allowing the U.S. Attorney General to bring lawsuits to stop patterns or practices of discrimination, only applied to intentional discrimination.²⁵ Nothing in the statute or decisions interpreting Title VII supported Judge Boyle's view.

Judge Boyle apparently became convinced that he was wrong on the law in an unpublished opinion that he never

provided to the Senate. Nevertheless, he allowed North Carolina to withdraw from the settlement agreement it had signed, a decision that the Fourth Circuit reversed.²⁶

In addition, articles by the Center for Investigative Reporting showed that Boyle had presided over several cases in which he had a financial interest.²⁷ Judge Boyle responded that, although he may have mistakenly participated in some such cases, he never did so intentionally, and his financial conflicts in the examples dug up by the Center for Investigative Reporting were "relatively insignificant. . . ."²⁸

THUMBNAIL SKETCHES OF OTHER NOMINEES WHO FAILED TO WIN CONFIRMATION

- District of Columbia attorney **Miguel Estrada**. District of Columbia Circuit. Filibustered seven times in 2003. Nomination withdrawn September 4, 2003. President Bush nominated Estrada to be the first Latino on the D.C. Circuit, regarded as the nation's second highest court, among his first 11 nominees. Nevertheless, Estrada was opposed by a broad cross-section of the civil rights community due to anti-civil rights actions in his sparse record as well as his failure to be forthcoming about his views during his Judiciary Committee hearing. As detailed by the Mexican American Legal Defense and Education Fund (MALDEF),²⁹ Estrada took several troubling positions in *pro bono* cases he took on as an attorney in private practice. In a Supreme Court case and a district court case, he argued against the First Amendment rights of individuals—primarily African Americans and Latinos—to congregate on public streets³⁰ and served on the board of an organization that promoted ordinances that would have that effect. As MALDEF explained: "Many of the individuals who are targeted under such ordinances are minorities, and often, Latino urban youth are harassed by police enforcing such ordinances."³¹ In one of the cases, Estrada argued that the NAACP did not have standing to challenge an anti-loitering statute because protecting the First Amendment rights of African Americans was not "germane" to the NAACP's stated goals. The court rejected this argument.³² During his hearing, Estrada failed to address these and other concerns about his record, the Justice Department refused to release memoranda Estrada had written as a member of the Solicitor General's office that would have given insight into

Estrada's views on the law, and Estrada refused to answer basic questions such as naming a Supreme Court case with which he either agreed or disagreed. Senators filibustered Estrada's nomination in 2003, and in September of that year, President Bush withdrew Estrada's nomination from consideration.

- Los Angeles County Superior Court Judge **Carolyn Kuhl**. Ninth Circuit. Filibustered November 14, 2003. Withdrawn December 8, 2004. Opposition to Kuhl's nominations was based on two main facts. First, as documented by Alliance for Justice, as a member of the Reagan Justice Department, "Kuhl aggressively pushed the Attorney General to reverse the Internal Revenue Service's policy [barring the university from continuing to retain a tax exemption because of its racially discriminatory policies] and reinstate the tax exempt status of Bob Jones University" and file a brief siding with Bob Jones University and against the IRS.³³ The Supreme Court rejected Kuhl's position by an 8–1 vote.³⁴ Second, as a California trial court judge, Kuhl rejected the invasion of privacy claim of a woman who brought a lawsuit after her doctor allowed a male drug company representative to watch her breast exam. The doctor did not identify the other man in the room as a drug company representative and the plaintiff, who became uncomfortable during the exam, only found out his identity from a receptionist after the exam. Kuhl held that the plaintiff should have affirmatively asked her doctor who the other man in the room was and had no case since she did not do so.³⁵
- U.S. Department of Health and Human Services Deputy Secretary **Claude Allen**. Fourth Circuit. Withdrawn December 8, 2004. Allen had little legal experience, having spent much of his career as an administrator. As discussed above, much of the opposition to Allen came from the fact that President Bush nominated Allen, a Virginia resident, to fill a seat that had previously been held by a Marylander. However, there was substantive opposition to Allen as well. According to news reports, as Secretary of Virginia's Department of Health and Human Services, Allen worked against legislation to provide health care to poor minors and, later, was slow to enroll children in the program because the program covered abortions for children who were victims of rape or incest. Allen stated that "abortion was a sticking point" when asked about why children were slow to be enrolled.³⁶ After Allen's nomination was withdrawn, President Bush appointed him White House counselor for domestic policy. However, Allen resigned in 2006 and was arrested soon after on felony theft charges.
- U.S. Defense Department General Counsel **William Haynes**. Fourth Circuit. Nomination withdrawn December 9, 2006. As the top attorney in the Defense Department, Haynes oversaw several controversial Defense Department policies and programs, including the detention of U.S. citizens Jose Padilla and Yasir Hamdi indefinitely without access to civilian courts or attorneys, the denial of Geneva Conventions' protections to persons detained in Afghanistan and elsewhere, the denial of access to any courts to detainees at Guantánamo Bay, Cuba, and the use of coercive interrogation techniques defined as torture by several human rights organizations. The denial to U.S. citizens of access to civilian courts was rejected by the Supreme Court in *Hamdi v. Rumsfeld*³⁷ and the denial of access to civilian courts to non-citizens held at Guantánamo was rejected twice by the Supreme Court along with the denial of all Geneva Convention protections.³⁸ Haynes never received a vote from the Judiciary Committee due to widespread opposition.
- Mississippi attorney **Michael Wallace**. Fifth Circuit. Nomination withdrawn December 9, 2006. After Judge Pickering's recess appointment lapsed, President Bush nominated Wallace to replace him. Wallace quickly drew opposition from the civil rights community. Like Kuhl, Wallace—at the time an aide to then-Rep. Trent Lott (R-MS)—argued strenuously that the denial of tax-exempt status to Bob Jones University was incorrect, even after the Supreme Court ruled 8–1 against his view. He also strongly opposed the restoration of an effects test to the Voting Rights Act of 1965 during its 1982 reauthorization. After losing that battle, Wallace argued that, despite the reauthorization, the Voting Rights Act did not have an effects test. One court to which he made this claim responded that Wallace had engaged in "needless multiplication of proceedings, at great waste of both the court's and the parties' time and resources."³⁹ Wallace also had a long history of attempting to undermine the Legal Services Corporation, first as a Lott staffer and then as a Reagan appointee to the Legal Services Corporation board. Wallace's controversial actions with respect to the Legal Services Corporation are detailed in a joint Alliance for Justice-People for the American

Way report on Wallace.⁴⁰ The American Bar Association gave Wallace a unanimous not qualified rating because of strong questions raised during their evaluation about Wallace's judicial temperament, specifically his commitment to equal justice under law, his open-mindedness, his freedom from bias, and his courtesy.⁴¹

JUDGES WHO WON SENATE CONFIRMATION

Civil rights allies in the Senate were not able to prevent confirmation of all nominees with troubling civil rights records. For instance, at the same time that Senators filibustered Miguel Estrada's nomination, several other nominees were confirmed despite opposition from civil rights groups. In addition, President Bush and his allies cast aside many rules and traditions in an attempt to get nominees confirmed.

JUDICIAL NOMINATIONS RULES AND PROCEDURES CAST ASIDE

Ending the ABA's Role in Prescreening Nominations

On March 23, 2001, President Bush's then-White House counsel, Alberto Gonzales announced that the American Bar Association Standing Committee on the Federal Judiciary (the ABA) would no longer be given the names of potential nominees to vet and rate them prior to their nomination being made official.⁴² The right-wing had sought this change ever since the ABA did not give a unanimous well-qualified rating to failed Supreme Court nominee Robert Bork.⁴³ Agitation from the right escalated when the ABA gave a relatively low split rating of majority qualified, minority not qualified to Justice Clarence Thomas when President George H.W. Bush nominated him for elevation to the Supreme Court in 1991.⁴⁴ However, both Presidents Reagan and George H.W. Bush ignored the calls from the right and continued to give the names of potential nominees to the ABA as every president had done since Dwight Eisenhower.

Gonzales justified the decision to remove the ABA from the process by arguing that no group should have a favored position in the nominating process and that the ABA could rate nominees post-nomination at the same time as the Senate and other outside organizations. However, the decision had the result of ensuring that the Bush

administration would not listen to anyone outside the conservative movement in selecting nominees.

Committee Protections for the Minority Cast Aside

Although the Senate confirmed several nominees with anti-civil rights records during the first two years of the Bush administration, the campaign to have President Bush's nominees confirmed intensified after Republicans gained a slight 51–49 Senate majority in the 2002 midterm elections. In 2003, Republicans went to work quickly to clear the path to confirmation for many of President Bush's nominees. The Senate rules contain many protections for the minority, but Republicans tried to tear down almost all of them in their zeal for confirming judicial nominees. President Bush quickly signaled that he would try to use his new, slim Republican majority in unprecedented ways. For the first time in memory, he renominated candidates who had been rejected by the Senate Judiciary Committee, resubmitting the nominations of both Pickering and Owen, along with those of other controversial candidates.

The Republican-controlled Senate soon showed that it was willing to allow the president to ignore the prerogatives of the Senate. The rules and traditions of the Senate Judiciary Committee provide the first line of defense against an overreaching majority. By a tradition memorialized in a letter from then-chairman Thurmond to then-ranking member Joseph Biden (D-DE) in 1986, the Judiciary Committee did not hold hearings on more than one controversial nominee at a time. Nevertheless, newly-reinstated Chairman Orrin Hatch immediately scheduled a hearing on three controversial circuit court nominees, Sixth Circuit nominees Jeffrey Sutton and Deborah Cook and D.C. Circuit nominee John Roberts. Democrats' objections fell on deaf ears, and Sen. Hatch proceeded to hold a hearing that lasted more than 12 hours, during which senators spent most of their time questioning Sutton about his controversial views of states' rights. To protest this breaking of tradition, Democrats on the committee invoked another protection for the minority: Senate Judiciary Committee Rule IV, which provides:

The Chairman shall entertain a non-debatable motion to bring a matter before the Committee to a vote. If there is objection to bring the matter to a vote without further debate, a roll call vote of the Committee shall be taken, and debate shall be terminated if the motion to bring the matter

to a vote without further debate passes with ten votes in the affirmative, one of which must be cast by the minority.⁴⁵

However, when they tried to invoke the rule by uniting to refuse to allow a vote on these nominees without further debate, Sen. Hatch reinterpreted the rule to apply only in situations in which the chairman refuses to bring a matter to a vote and members of the committee wish to bring the matter to a vote over the chairman's refusal.⁴⁶ Thus, the only written rule protecting the Senate minority was gutted by Sen. Hatch.

Refusing to Heed the Recommendation of Homestate Nominees

Sen. Hatch also did away with one other protection specifically designed to ensure that members of the Senate were consulted on judicial nominees, the tradition that the president must consult with home-state senators before putting forward nominees and, to ensure the president engages in meaningful consultation, the Senate does not act until home-state nominees sign off on a nominee. The Judiciary Committee would send out a request for home-state Senators' views on judicial nominees on a blue sheet of paper, called a "blue slip" by Senators. As then-Judiciary Committee Ranking Member Patrick J. Leahy (D-VT) pointed out:

When President Clinton was in office, the chairman's blue slip sent to Senators, asking their consent, said this:

Please return this form as soon as possible to the nominations office. No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators.⁴⁷

Sen. Leahy then pointed out that this changed when Sen. Hatch took over the chairmanship during the Bush administration:

When President Bush began his term, and Senator *Hatch* took over the chairmanship of this committee, he changed his blue slip to drop the assurance he had always provided Republican Senators who had an objection. He eliminated the statement of his consistent practice in the past by striking the sentence that provided: "No further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators." Now he just asks that the blue slip be returned as soon as possible,

disregarding years of tradition and respect for the interests of the home-State Senators. Can there be any other explanation for this other than the change in the White House? It is hard to imagine.⁴⁸

Indeed, unlike during the Clinton years, the Judiciary Committee held hearings and votes over the objection of home-state nominees. Thus, Kuhl, a Californian opposed initially by Sen. Barbara Boxer (D-CA) and subsequently by Sen. Dianne Feinstein (D-CA) whose controversial record is discussed above, received a Judiciary Committee hearing, a committee vote despite the opposition of both home-state Senators. Similarly, four Michiganders opposed by Michigan's two Democratic Senators, Karl Levin and Debbie Stabenow, received a committee hearing and a vote. In order to preserve the rights of home-state Senators, Democrats filibustered all five of these nominees.

The "Nuclear Option": Attempting to Do Away with the Minority's Right to Filibuster Nominees

Democrats filibustered a total of nine of President Bush's nominees in 2003 and 2004 to block some of his most extreme nominees and to protest Republicans' changing of the rules and precedents of the Senate. Those nine included Miguel Estrada and Kuhl, both of whose records are discussed above, Priscilla Owen, William Pryor, and Janice Rogers Brown, each of whom are discussed below, three of the Michiganders opposed by Sens. Levin and Stabenow, Henry Saad, David McKeague and Richard Griffin, and Ninth Circuit nominee William Myers. Democrats refused to agree to a time limitation on debate for these nominees, and, when the Republican leadership filed a motion to cut off debate, called a cloture motion, supporters of the nominees were unable to muster the 3/5 supermajority necessary for the debate to carry.⁴⁹

In response, the Republican leadership threatened to do away with the right of Senators to filibuster a judicial nominee through procedural maneuvers, arguing that such filibusters were unconstitutional even though Republican as well as Democratic senators had attempted to filibuster judicial nominees many times in the past. Lott, then chairman of the Senate Rules Committee (after losing his position as Republican leader in the Senate) was the first to suggest publicly that the leadership should attempt such a maneuver and dubbed the possibility of doing so the "nuclear option."⁵⁰ The move did not gain much

support in 2003 or 2004, but when Republicans gained a net of four additional Senate seats in the 2004 election, calls to use the nuclear option increased.

The Senate moved towards a showdown when Senate Majority Leader Bill Frist scheduled a debate on Priscilla Owen to begin on May 19, 2005, and filed a cloture motion to attempt to cut off a filibuster against her nomination on May 20, 2005. (Owen's nomination had been defeated in the Judiciary Committee in 2002 and was filibustered in 2003.) On the night of May 24, 2005, the day before the Senate was scheduled to vote on Owen's cloture motion and set the nuclear option in motion, seven Democratic and seven Republican Senators who dubbed themselves the Gang of 14, signed an agreement that headed off the nuclear option but, at the same time, allowed votes on three of the most controversial Bush nominees.

The gang of 14's agreement stated that all 14 would vote to end debate on the Owen, Pryor and Brown nominations, providing the Senate with the necessary 3/5 supermajority to force an up-or-down vote on these nominees. In return, all 14 agreed to vote against the nuclear option, which would deny the Republican leadership the necessary votes to employ it. The result of this agreement was the confirmation of Owen, Pryor and Brown, whose records are discussed below, despite their extremely controversial records.

The agreement also stated that further filibusters could be waged against judicial nominees "in extraordinary circumstances." This limitation on when senators could filibuster, unknown in prior Senate history, may have had an effect on the Supreme Court nomination of Samuel Alito, since he received more than 40 no votes, enough to sustain a filibuster, but a cloture motion to cut off a filibuster against his nomination succeeded.

THUMBNAIL SKETCHES OF NOMINEES CONFIRMED DURING THE BUSH ADMINISTRATION

Many of President Bush's appellate court appointees had troubling records. Below is a list of some of the most controversial appointees.

- University of Utah law professor **Michael McConnell**, Tenth Circuit, confirmed by voice vote November 15, 2002. In his academic writings, Professor McConnell

opposed several landmark civil rights decisions. Perhaps most vociferously, he opposed the Supreme Court's decision in *Bob Jones University v. United States*⁵¹ upholding the IRS' decision to deny tax-exempt funding to a college that discriminated on the basis of race because of its claimed religious beliefs. The Supreme Court rejected Bob Jones University's argument 8–1 and rejected its claimed First Amendment right to discriminate unanimously. McConnell often pointed to the Supreme Court's decision in *Bob Jones* as a paradigmatic example of the short shrift it gave to claimed violations of the Free Exercise Clause of the First Amendment⁵² even when it professed to give the highest level of scrutiny to such claimed infringements.⁵³ McConnell called the rejection of Bob Jones University's First Amendment claim "egregious."⁵⁴

Other seminal civil rights decisions that McConnell has argued were wrongly decided include *Bolling v. Sharpe*,⁵⁵ a companion case to *Brown v. Board of Education*,⁵⁶ in which the Supreme Court found that the federal government, as well as the states, must abide by equal protection principles and that District of Columbia public schools could not be segregated;⁵⁷ *Griggs v. Duke Power*,⁵⁸ the case establishing that proof of discriminatory intent is not necessary to establish a Title VII violation if it is established that the employer's policies had a disparate racial impact that was not dictated by business necessity;⁵⁹ and the one person-one vote doctrine enunciated in *Baker v. Carr*⁶⁰ and *Reynolds v. Sims*,⁶¹ which McConnell argued were not tethered to the original intent of the Fourteenth Amendment and therefore led to "pernicious" results.⁶²

- U.S. District of South Carolina Judge **Dennis Shedd**. Confirmed November 19, 2002, by vote of 55–44. Shedd began his political career as a staffer to former Senator Strom Thurmond (R-SC), who recommended him for elevation to the Fourth Circuit. In his published decisions as a district court judge, Shedd showed a strong propensity for dismissing the claims of civil rights and other plaintiffs on summary judgment motions before trial. When asked about his record presiding over civil rights cases by then-Senator John Edwards (D-NC), Shedd was unable to recollect a single case during his 12 years on the federal bench in which an employment discrimination plaintiff had prevailed at trial. In addition, in a lawsuit directed at removing the Confederate battle flag from the top of South Carolina's statehouse, over which Shedd presided, Shedd reported-

ly asserted that “South Carolinians don’t care if that flag flies or not”⁶³ and suggested that South Carolina’s state symbol, the palmetto tree that adorns the state’s current flag, may be equally controversial to the Confederate battle flag: “What about the Palmetto tree? What if that reminds me Palmetto trees were cut down to make Fort Moultrie and that offends me?”⁶⁴

- Ohio attorney **Jeffrey Sutton**, Fourth Circuit. Confirmed April 29, 2003, by a vote of 52–41. Sutton engendered strong opposition from several sections of the civil rights community, mainly due to his work to weaken federal protections for members of racial minorities, persons with disabilities, seniors, and women on states’ rights grounds. Sutton was the lead attorney in several Supreme Court cases aimed at freeing states from discrimination lawsuits: *Board of Trustees of the University of Alabama v. Garrett*,⁶⁵ in which he successfully argued that state employees could not sue their employers for discrimination on the basis of a disability; *Kimel v. Florida Board of Regents*,⁶⁶ in which he made the same successful argument regarding state employees subject to age discrimination; *Alexander v. Sandoval*,⁶⁷ in which he successfully argued that persons could not sue states under regulations pursuant to Title VI of the Civil Rights Act of 1964 for programs that had a discriminatory effect unless they could also prove that the state had a discriminatory purpose; and *United States v. Morrison*,⁶⁸ in which he successfully argued that Congress did not have the constitutional power to allow victims of gender-based violence to sue their attackers in federal court. Although Sutton argued at his hearing that these cases he argued were not necessarily representative of his opinions, before he was nominated, he told a reporter that he was “always on the lookout” for states’ rights cases and said: “I really believe in this federalism stuff.”⁶⁹
- Texas Supreme Court Justice **Priscilla Owen**, Fifth Circuit. Rejected by the Senate Judiciary Committee by 10–9 vote, September 5, 2002, filibustered three times in 2003. Confirmed 55–43, May 25, 2005. The Texas Supreme Court does not handle many civil rights claims, and thus Owen did not have a record on many traditional civil rights issues. However, as noted by People for the American Way, “19 Texas civil rights, women’s rights, labor, consumer, and other organizations concluded, ‘Owen’s rulings often favor the interest of corporate Texas or government at the expense of ordinary Texans.’”⁷⁰
- Alabama Attorney General **William Pryor**, Eleventh Circuit. Filibustered twice in 2003. Given a recess appointment February 20, 2004. Confirmed June 9, 2005, by a vote of 53–45. As Alabama Attorney General, Pryor repeatedly tried to limit Congress’ and the federal judiciary’s power to protect civil rights. He testified that Congress should “consider seriously . . . the repeal or amendment of Section 5 of the Voting Rights Act” of 1965, which requires certain jurisdictions to pre-clear any changes to voting practices, calling that section an “affront to federalism and an expensive burden that has far outlived its usefulness.”⁷² Congress later extended Section 5 in 2006. Pryor co-wrote briefs filed by Sixth Circuit Judge Jeffrey Sutton regarding the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Violence Against Women Act discussed above. In addition, Pryor has also advocated against federal court protection of civil rights. He unsuccessfully argued that, on states’ rights grounds, states should be permitted to refuse to give poor defendants attorneys if they are facing misdemeanor charges and end up with suspended jail sentences⁷³ and argued in favor of Alabama’s practice of handcuffing prisoners to hitching posts without access to food, water, or the bathroom.⁷⁴ Finally, Pryor was the only state attorney general to file an amicus brief in *Bush v. Gore*,⁷⁵ in which he argued in favor of cutting off the recount despite reports of disenfranchised voters, many of whom were members of racial minority.
- California Supreme Court Justice **Janice Rogers Brown**, D.C. Circuit. Filibustered on November 14, 2003. Confirmed 56–43 on June 8, 2003. Janice Rogers Brown’s record is littered with decisions and speeches hostile to civil rights and other basic rights Americans have come to take for granted. A joint report by the NAACP and People for the American Way noted that Brown, who often took a narrow view of First Amendment speech rights, suggested in a dissent that laws prohibiting verbal racial harassment such as Title VII of the Civil Rights Act of 1964 might be unconstitutional.⁷⁶ In a case upholding California’s anti-affirmative action initiative, Brown strongly criticized the

U.S. Supreme Court for failing to ban all governmental affirmative action programs even if such programs were subject to strict scrutiny review by the courts.⁷⁷ Each of these statements went far beyond what was at issue in the case, the validity of a state constitutional amendment banning many forms of affirmative action in California. Brown also used inflammatory rhetoric in her speeches. She has declared that the U.S. Supreme Court's decision to uphold the constitutionality of the New Deal in 1937 marked the "triumph of our socialist revolution."⁷⁸ She also criticized the heralded dissent by Oliver Wendell Holmes in *Lochner v. New York*⁷⁹ in which Holmes dissented from a decision striking down a New York maximum work hours law and argued that the U.S. Supreme Court baselessly created a constitutional right to capitalism, stating that Holmes' argument was "simply wrong."⁸⁰ Although Brown and her defenders dismissed her remarks as mere academic musings, Alliance for Justice has detailed the ways in which many of Brown's inflammatory statements made their way into her judicial decisions.⁸¹

- District of Columbia attorney **John Roberts**, D.C. Circuit. Confirmed May 8, 2003, by voice vote. Roberts' civil rights record is discussed in the Supreme Court article.

CONFIRMATIONS RESULTED IN A FEDERAL BENCH LESS HOSPITABLE TO CIVIL RIGHTS

Many of President Bush's appellate nominees were in their forties and some were even younger when nominated. Because judicial nominees are appointed for life, his nominees will have an effect on people's rights for decades to come.

People for the American Way has detailed the effect many of the Bush appointees discussed in the report, as well as others, have already had on the bench in a publication titled "Confirmed Judges-Confirmed Fears."⁸² As People for the American Way noted, Janice Rogers Brown wrote

an opinion that, if joined by other judges in the future, could significantly weaken protections against sexual harassment.⁸³ Judge Dennis Shedd cast a deciding vote refusing to allow a race discrimination case to go forward in which African American firefighters alleged that the City of Charlotte, North Carolina refused to investigate reports of race discrimination by an allegedly openly racist fire chief.⁸⁴ A Bush appointee not mentioned in this report, Sixth Circuit Judge John Rogers, cast a deciding vote just before the 2004 election staying the lower court's decision that an Ohio law allowing political parties to "challenge" any person attempting to vote violated the Constitution.⁸⁵ Judge Cole issued a strong dissent, arguing:

We have before us today a matter of historic proportions. In this appeal, partisan challengers, for the first time since the civil rights era, seek to target precincts that have a majority African American population, and without any legal standards or restrictions, challenge the voter qualifications of people as they stand waiting to exercise their fundamental right to vote.

This is just the tip of the iceberg. People for the American Way's report runs 100 pages long and cited many other examples of judicial opinions from Bush appointees that threaten rights that are now protected.

LOOKING FORWARD

President Bush began 2007 on a positive note. He withdrew several controversial nominees: Michael Wallace, William Haynes, Terrence Boyle, and Ninth Circuit nominee William Myers. It remains to be seen whether President Bush will cope with the new political alignment by consulting with Senators of both parties and putting forward judicial nominees with moderate views. If he does not, it will be up to civil rights supporters to ensure that no more nominees hostile to civil rights are confirmed to the federal bench.

ENDNOTES

- 1 See Federal Judicial Caseload Statistics Appendix B-5, available at <http://www.uscourts.gov/caseload2006/tables/B05Mar06.pdf> (last checked Dec. 6, 2006) (statistics on the caseload of the courts of appeals for the 12 month period ending March 31, 2006); John Roberts, 2005 Year-end Report on the Federal Judiciary, Jan. 1, 2006.
- 2 This number includes judges who have since retired from active service such as Third Circuit Senior Judge Franklin Van Antwerpen, ones who have since resigned such as Department of Homeland Security Secretary and former Third Circuit Judge Michael Chertoff, one judge who subsequently passed away, former Sixth Circuit Judge Susan Neilson, one judge Bush subsequently elevated to the Supreme Court, Chief Justice John Roberts whom Bush previously had appointed to the D.C. Circuit, and one judge, former Fifth Circuit Judge Charles Pickering, to whom Bush gave a recess appointment but whose appointment expired when the Senate did not confirm him for a lifetime position on that court.
- 3 Alliance for Justice keeps a running breakdown of the active judges on the various circuits by appointing president at http://www.allianceforjustice.org/judicial/judicial_selection_resources/selection_database/byCourtAndAppPres.asp (last checked December 17, 2006).
- 4 531 U.S. 98 (2000).
- 5 See <http://www.abanet.org/scfedjud/ratings/ratings101.pdf> (last checked December 17, 2006) (dates of President George H.W. Bush's nominations); <http://www.abanet.org/scfedjud/ratings/ratings103.pdf> (last checked December 17, 2006) (dates of President Bill Clinton's nominations).
- 6 Federalist Society members included D.C. Circuit nominees Miguel Estrada and John Roberts, Fifth Circuit nominees Priscilla Owen and Edith Brown Clement, Sixth Circuit nominees Jeffrey Sutton and Deborah Cook, and Tenth Circuit nominee Michael McConnell. McConnell strongly criticized *Bolling v. Sharpe* and *Bob Jones University v. United States* as an academic, Fourth Circuit nominees Dennis Shedd and Terrence Boyle—federal judges in South Carolina and North Carolina respectively—along with Clement, a Louisiana federal judge had troubling civil rights records, as were state supreme court justices Owen and Cook. The three attorneys in private practice were Estrada, Roberts and Sutton. The records of Estrada, Roberts, Owen, Sutton, McConnell, Shedd and Boyle are discussed below.
- 7 Fuller descriptions of these nominees are available from Alliance for Justice <http://www.independentjudiciary.com/index.cfm> (last checked January 16, 2007) and People for the American Way <http://www.pfaw.org/pfaw/general/default.aspx?oid=14172> (last checked January 16, 2007).
- 8 Charles W. Pickering, Recent Decision, *Criminal Law—Miscegenation—Incest*, 30 MISS. L.J. 326 (1959).
- 9 Sean Wilentz, The Racist Skeletons in Charles Pickering's Closet, SALON.COM, May 12, 2003.
- 10 See Court Reporter's Transcript of Defendant's Sentencing Hearing, *United States v. Thomas*, Crim. Action No. 2:94cr3PR (S.D. Miss. Aug. 15, 1994).
- 11 See 42 U.S.C. § 3631(a); 18 U.S.C. § 241.
- 12 See 18 U.S.C. § 844(h)(1). The mandatory minimum has since been raised to 10 years.
- 13 Court Reporter's Transcript of Defendant's Sentencing Hearing, *United States v. Swan*, Crim. Action No. 2:94cr3PR (S.D. Miss. Nov. 15, 1994).
- 14 Memorandum from Brad Berry, U.S. Department of Justice, to Linda K. Davis, U.S. Department of Justice, Nov. 29, 1994, at 3; Letter from Assistant U.S. Attorney Jack B. Lacy, Jr. to Linda K. Davis, U.S. Department of Justice, Jan. 5, 1995, at 2.
- 15 *Id.*
- 16 National Women's Law Center report on Charles Pickering (available at <http://www.nwlc.org/pdf/PickeringReport.pdf> (last checked Jan. 17, 2007)).
- 17 See *Green v. University of S. Miss.*, No. 2:99-CV-93PG, May 4, 2000.
- 18 *Thornton v. Walker*, No. 2:94-CV-278PG, Oct. 17, 1996.
- 19 *Cong. Record* p.S13558 Oct. 30, 2003 (statement of Senator Feingold).
- 20 NWLC Urges Senate Judiciary Committee to Reject the Nomination of Pickering for the 5th Circuit Again, Sep. 24, 2003, available at <http://www.nwlc.org/details.cfm?id=1631§ion=newsroom> (last checked Jan. 17, 2007).
- 21 See Senate Rule XXII (providing that 3/5 of Senators duly chosen and sworn—i.e., 60 votes—are necessary to invoke cloture).
- 22 See *Cromartie v. Hunt*, 34 F. Supp. 2d 1029 (E.D.N.C. 1998), *rev'd*, 526 U.S. 541 (1999) (Thomas, J.); *Cromartie v. Hunt*, 133 F. Supp. 2d 407 (E.D.N.C. 2000), *rev'd sub nom. Easley v. Cromartie*, 532 U.S. 234 (2001). In both cases, Boyle sat as one of three judges on a three-judge district court, and in both cases, Boyle cast a deciding vote to declare the district unconstitutional over the dissent of one of his colleagues.
- 23 See, e.g., *Ellis v. North Carolina*, No. 02-1428, 2002 U.S. App. LEXIS 23717 (4th Cir. Oct. 28, 2002) (reversing Judge Boyle); *Franks v. Ross*, 313 F.3d 184 (4th Cir. 2002) (reversing Judge Boyle); *Pierce v. King*, 918 F. Supp. 932 (E.D.N.C. 1996), *aff'd*, 131 F.3d 136 (4th Cir. 1997), *vacated*, 552 U.S. 802 (1998); *Williams v. Avnet, Inc.*, 910 F. Supp. 1124 (E.D.N.C. 1995), *aff'd on different grounds sub nom., Williams v. Channel Master Satellite Sys.*, 101 F.3d 346 (4th Cir. 1996) (specifically disagreeing with Boyle's basis for decision).
- 24 See Alliance for Justice Report on the nomination of Terrence W. Boyle at 4–8 (available at <http://www.independentjudiciary.com/resources/docs/Boyle%20Long%20Report%203-20-06.pdf>).
- 25 914 F. Supp. 1257, 1264 (E.D.N.C. 1996).

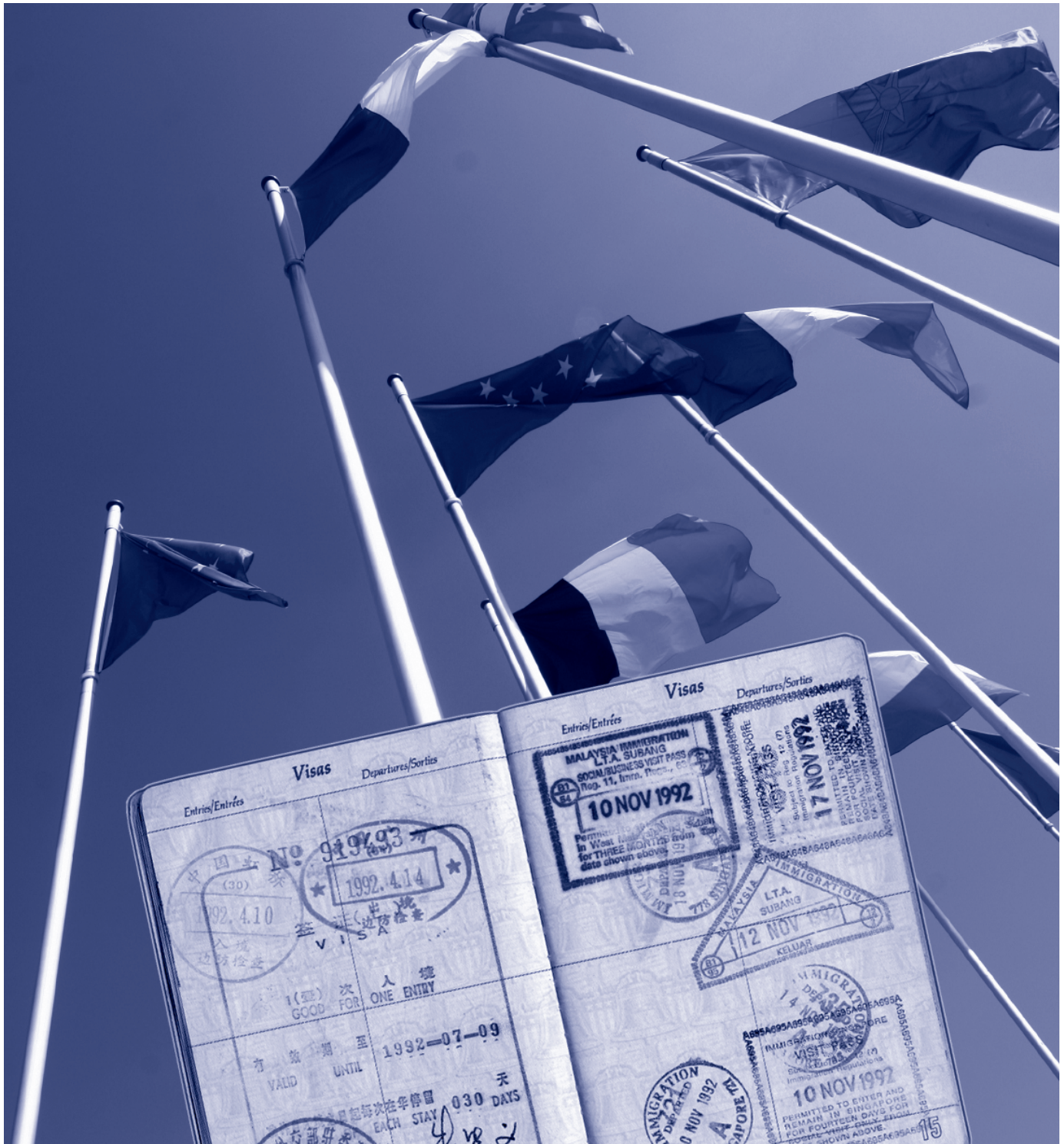
- 26 *United States v. North Carolina*, 180 F.3d 574 (4th Cir. 1999).
- 27 See Will Evans, “Documents Show Controversial Bush Judge Broke Ethics Laws,” salon.com, May 1, 2006 (available at http://muckraker.org/pg_one_investigation-1234-0.html (last checked Jan. 17, 2007)).
- 28 See Will Evans, “Embattled Bush Judge Disputes Salon Report,” salon.com, July 13, 2006 (available at http://www.muckraker.org/pg_one_investigation-1240-7-0.html (last checked Jan. 17, 2001)).
- 29 See Memorandum of the Mexican American Legal Defense and Educational Fund (MALDEF) and Southwest Voter Registration and Education Project (SVREP) Explaining Bases for Latino Opposition to the Nomination of Miguel Estrada to the DC Circuit Court of Appeals, available at http://www.maldef.org/news/latest/est_memo.cfm.
- 30 See *City of Chicago v. Morales*, 527 U.S. 41 (1999); *NAACP v. City of Annapolis*, 133 F. Supp. 2d 795 (D. Md. 2001).
- 31 Memorandum of the Mexican American Legal Defense and Educational Fund (MALDEF) and Southwest Voter Registration and Education Project (SVREP) Explaining Bases for Latino Opposition to the Nomination of Miguel Estrada to the DC Circuit Court of Appeals, available at http://www.maldef.org/news/latest/est_memo.cfm.
- 32 See *NAACP v. City of Annapolis*, 133 F. Supp. 2d 795 (D. Md. 2001).
- 33 See Alliance for Justice Report In Opposition to the Nomination of Judge Carolyn Kuhl To the U.S. Court of Appeals for the Ninth Circuit (available at <http://www.independentjudiciary.org/resources/docs/Kuhl%20Report.pdf> (last checked Jan. 17, 2007)) (citing Stuart Taylor, “200 in Agency Criticize Decision on Tax Exemptions,” *The New York Times*, Feb. 3, 1982).
- 34 See *Bob Jones University v. United States*, 461 U.S. 574 (1983).
- 35 See *Sanchez-Scott v. Alza Pharmaceuticals*, 86 Cal. App. 4th 365 (2001).
- 36 Donald Baker, “Va. Is Slow Getting Insurance to Children,” *The Washington Post*, Jan. 18, 1999.
- 37 542 U.S. 507 (2004).
- 38 See *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).
- 39 *Jordan v. Allain*, 619 F. Supp. 98, 111 (N.D. Miss. 1985).
- 40 See Report on the Nomination of Michael B. Wallace to the U.S. Court of Appeals for the Fifth Circuit at 21–28 (available at <http://www.independentjudiciary.com/resources/docs/FinalReportWallace.pdf> last checked Jan. 17, 2007).
- 41 Statement of the American Bar Association Standing Committee on the Federal Judiciary on the nomination of Michael B. Wallace, Sep. 26, 2006 (available at <http://www.abanet.org/scfedjud/statements/wallace2.pdf> (last checked Jan. 17, 2007)).
- 42 See Neil A. Lewis, “White House Ends Bar Assoc.’s Role in Screening Federal Judges,” *The New York Times*, Mar. 23, 2001.
- 43 See *Id.*
- 44 The ABA’s rating of Clarence Thomas can be found at <http://www.abanet.org/scfedjud/ratings/ratings102.pdf> (last checked December 17, 2006).
- 45 Available at http://www.judiciary.senate.gov/committee_rules.cfm (last checked December 17, 2006).
- 46 See Jennifer Dlouhy, “With Acrimony, Senate Judiciary Panel Endorses More Judicial Nominees,” *Congressional Quarterly Daily Monitor*, Feb. 27, 2003.
- 47 *Cong. Record* p.S8587 July 22, 2004 (statement of Senator Leahy).
- 48 *Id.*
- 49 See Senate Rule XXII.
- 50 See Ana Radelat, “Lott aims to change filibuster rules,” *Jackson Clarion-Ledger*, May 23, 2003.
- 51 461 U.S. 574 (1983).
- 52 “Congress shall make no law . . . prohibiting the free exercise” of religion. U.S. Constitution amend. 1.
- 53 The Supreme Court subsequently changed the standard for considering free exercise cases in *Employment Division v. Smith*, 494 U.S. 872 (1990), holding that a “valid and neutral law of general applicability” will normally pass muster under the First Amendment even if it impinges on a person’s religious practices.
- 54 Michael W. McConnell, “The Supreme Court 1997: A Symposium,” 76 *First Things* at 32 (Oct. 1997).
- 55 347 U.S. 497 (1954).
- 56 347 U.S. 483 (1954).
- 57 See Jack M. Balkin, et al., *What Brown v. Board of Education Should Have Said* 164 (2001) (discussion of *Bolling* by McConnell).
- 58 401 U.S. 424 (1971).

- 59 See Michael W. McConnell, "Affirmative Action after Teal," 38 *AEI Journal on Government & Society* 42 (March/April, 1983).
- 60 369 U.S. 186 (1962).
- 61 377 U.S. 533 (1964).
- 62 Michael W. McConnell, "The Redistricting Cases: Original Mistakes and Current Consequences," 24 *Harv. J.L. & Pub Pol'y* 103, 111 (2000).
- 63 "Judge Dismisses Most Flag Defendants," *Greenville News*, June 11, 1994.
- 64 "U.S. Judge Dims Hope of Battle Flag's Foes," *The State*, June 11, 1994.
- 65 531 U.S. 356 (2001).
- 66 528 U.S. 62 (2002).
- 67 532 U.S. 275 (2001).
- 68 529 U.S. 598 (2000).
- 69 See *Legal Times*, Nov. 2, 1998.
- 70 People for the American Way, Why the Senate Judiciary Committee Was Right to Reject the Nomination of Priscilla Owen, Mar. 5, 2004, available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=7806> (last checked Jan. 16, 2006).
- 71 *In re Jane Doe* 1, 19 S.W.3d 346, 366 (Tex. 2000) (Gonzales, J., concurring).
- 72 Judicial Activism: Asserting the Impact, Hearing Before the U.S. Senate Subcomm. on the Const., Federalism & Property Rights (testimony of Bill Pryor).
- 73 *Alabama v. Shelton*, 535 U.S. 654 (2002).
- 74 *Hope v. Pelzer*, 536 U.S. 730 (2002).
- 75 531 U.S. 98 (2000).
- 76 *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 892 (Cal. 1999) (Brown, J., dissenting), *cert. denied*, 529 U.S. 1138 (2000). Brown's views on the First Amendment are discussed in the joint People for the American Way-NAACP report available at http://www.pfaw.org/pfaw/dfiles/file_229.pdf (last checked Jan. 17, 2007).
- 77 *Hi-Voltage Wire Works, Inc. v. San Jose*, 12 P.3d 1068 (Cal. 2000).
- 78 Janice Rogers Brown, "A Whiter Shade of Pale," speech to the Federalist Society, April 20, 2000.
- 79 198 U.S. 45 (1905).
- 80 Janice Rogers Brown, "A Whiter Shade of Pale," speech to the Federalist Society, April 20, 2000.
- 81 See D.C. Circuit Court nominee Janice Rogers Brown: Inserting her own political views into her judicial opinions, available at <http://www.independentjudiciary.com/resources/docs/jrbwords.pdf> (last checked Jan. 17, 2007).
- 82 Available at http://media.pfaw.org/PDF/Judiciary/09-28_ConfirmedJudgesReportFinal.pdf (last checked Jan. 18, 2007).
- 83 See *Lutkewitte v. Gonzales*, 436 F.3d 248 (D.C. Cir. 2006).
- 84 *Belton v. City of Charlotte*, 175 Fed. Appx. 641 (4th Cir. 2006).
- 85 *Summit County Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547 (6th Cir. 2004).
- 86 *Id.* at 552 (Cole, J., dissenting).

CHAPTER 4

The Struggle for Immigration Reform

By Shaheena Ahmad Simons



INTRODUCTION

The Bush administration began the 2004 election year with a focus on immigration policy and a pledge to address the nation's "broken immigration system." As the campaign season commenced, the White House outlined broad plans for a temporary worker policy initiative—a proposal that, while deeply flawed and politically timed, signaled the administration's long-awaited re-engagement in the debate over immigration reform. Immigrants' rights advocates received the announcement with mingled skepticism and hope that it would reanimate efforts to find a comprehensive immigration solution, a solution that would protect workers, reunite families, and provide an earned path to citizenship for the immigrants who contribute to America's economic and social fabric.

Nearly three years later, well into the administration's second term, we are all still waiting. In 2005 and 2006 the House and the Senate passed major immigration-related bills—the draconian H.R. 4437, or Sensenbrenner bill, in the House and the more comprehensive S. 2611 in the Senate. Yet, even amidst a landscape of unprecedented Latino civic engagement and political demonstration in support of humane immigration reform, the only legislation to ultimately emerge from the last Congress was the "Secure Fence Act," authorizing construction and reinforcement of hundreds of miles of fencing on the U.S. border with Mexico. As Congress failed to move forward on genuine comprehensive reform, White House efforts to exert leadership were sporadic, ineffective, and countered by such problematic immigration initiatives as increased worksite enforcement raids.

Against this backdrop of federal inaction, state and local governments intensified legislative attacks against immigrants or perceived immigrants. In cities as disparate as Hazleton, PA and Escondido, CA, such legislation has proliferated—from English-only mandates, to ordinances that punish landlords for renting to undocumented tenants, to laws that penalize those that do business with undocumented immigrants. Organizations such as the Mexican American Legal Defense and Educational Fund (MALDEF), the Puerto Rican Legal Defense and Educational Fund (PRLDEF), the American Civil Liberties Union (ACLU), and others civil rights groups have mounted serious constitutional challenges to these efforts,

efforts that promote racial profiling and discrimination in a climate that is already manifestly hostile.

As civil rights litigators continue to battle anti-immigrant legislation at the state and local levels and in the courts, the last election has planted seeds of hope for a renewed focus on federal immigration legislation. The November 2006 midterm races saw some of the vocal and strident immigration hawks ousted from office, spurring optimism that a new Congress will yield a fair and comprehensive solution. Still, there is little doubt immigration reform remains divisive. This chapter reviews developments in the movement for comprehensive immigration reform and the protection of immigrants' rights since January 2004—when the Bush administration announced a "guestworker" initiative after three years of reticence on immigration.

WHITE HOUSE AND CONGRESSIONAL PROPOSALS FOR IMMIGRATION REFORM

A recent study from the Pew Hispanic Center estimated, based on Census data, that the nation's undocumented migrant population now stands between 11.5 and 12 million.¹ The Pew Center's study painted a detailed demographic portrait of a population that, while still residing largely in the shadows, has become an increasingly important element in American social and economic life. Among the significant trends that the Pew study documented was the growing phenomenon of "mixed-status" households; the Pew Center reported 3.1 million U.S. citizen children living in families in which the head of the family or a spouse was undocumented, as of March 2005.²

The study also found an extraordinarily high civilian labor force participation rate—94 percent—among undocumented immigrant men.³ The Pew Center's research indicated that undocumented workers are represented in a wide variety of segments of the U.S. labor force, but concentrated in the agriculture, construction, and service occupations.⁴ For example, the study reported that undocumented workers comprised 24 percent of all workers employed in farming occupations; 17 percent of the workforce in cleaning occupations; 14 percent of the workforce in construction; and 12 percent of the workforce in food preparation industries.⁵

It is in this context—the context of growing numbers of migrants, often living in "mixed-status" family circum-

stances, and contributing actively to American economic life—that efforts toward achieving comprehensive immigration reform have gathered momentum.

THE BUSH ADMINISTRATION'S ELECTION-YEAR GUESTWORKER PROPOSAL

The administration's January 2004 proposal, which was billed as a "guestworker" initiative and featured a renewable three-year temporary worker visa, was short on specifics and un tethered to any existing legislation.⁶ Although the president's announcement of the initiative acknowledged the many contributions of immigrants, as well as the tragedy of mounting migrant deaths on the U.S.-Mexico border, it omitted most of the elements that are key to humane, realistic, and comprehensive immigration reform, such as a defined path to citizenship, worker protections, and reduction of huge backlogs in the existing immigration system. The proposal also featured toughened border enforcement policies of a type that have consistently failed, and that have contributed to discrimination and abuse of migrants at the border.

While the initiative's substantive deficiencies and election-year timing drew criticism from immigrants' rights advocates, it also signaled the White House's re-engagement in the issue of immigration reform, on which it had been silent for the previous three years. That silence had effectively prevented the legislative progress of two key immigration-related proposals: the Development, Relief, and Education for Minors Act (DREAM Act), which would have enhanced access to higher education and provide a path to citizenship for deserving undocumented students who meet certain defined requirements; and the Agricultural Job Opportunity, Benefits, and Security Act (AgJOBS), to create an earned legalization program for undocumented workers in the agricultural industry. After three years of failure to engage in the immigration debate, many hoped that the administration's proposal, despite its shortcomings, would help propel Congress to enact comprehensive immigration reform. Indeed, a few months after the administration announced its principles on immigration, bi-partisan reform legislation was introduced in the form of the Safe, Orderly, Legal Visas and Enforcement Act of 2004 (SOLVE Act), which combined carefully-crafted enforcement measures with an earned path to citizenship. Although this vehicle, designed to address the root causes

of unauthorized immigration, did not move forward in 2004, it set the stage for genuine debate on comprehensive immigration reform.

THE LEGISLATIVE DEBATE OVER IMMIGRATION REFORM

The year following the president's address, Senators John McCain and Edward Kennedy and Representatives Jim Kolbe, Jeff Flake, and Luis Gutierrez co-sponsored bipartisan comprehensive immigration reform legislation, The Secure America and Orderly Immigration Act (S. 1033/H.R. 2230). While this Act laid some of the foundation for what would ultimately emerge from the Senate, it bore no resemblance whatsoever to H.R. 4437, the immigration bill approved by the House at the end of 2005.

THE IMMIGRATION DEBATE IN THE HOUSE: THE FOLLY OF THE SENSENBRENNER BILL'S "ENFORCEMENT-ONLY" APPROACH

On December 16, 2005, the House passed H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act, by a vote of 239–182.⁷ The bill had been introduced by Rep. James Sensenbrenner (R-WI), Rep. Peter King (R-NY) and five other original co-sponsors just 10 days earlier, on December 6, and reported out of the House Judiciary Committee two days later, on a party-line vote. The House held no hearings on the legislation prior to its passage.

H.R. 4437 is an amalgam of harsh and punitive enforcement-only measures curtailing labor protections and due process rights for immigrants, expanding failed border control policies and strategies, and encouraging state and local enforcement of federal immigration law.⁸ What H.R. 4437 does not contain is any pathway to citizenship for undocumented immigrants currently living and working in the United States, any realistic solutions for reducing existing backlogs in the immigration system, nor any sensible approach for handling future flows of migrants.⁹

Among other draconian measures, H.R. 4437 seeks to criminalize unauthorized presence in the United States, and to classify many other minor offenses as aggravated felonies, thereby creating a bar to most forms of immigration relief. The bill also greatly and vaguely expands what is encompassed in "alien smuggling," by making it a crime

to assist undocumented immigrants to “remain in the United States”¹⁰ when one acts with “knowing disregard of the fact that such person is an alien who lacks lawful authority to reside or remain in the United States.” This definition is so broad that it potentially sweeps in activity by relatives, legal providers, and non-profit organizations.

The Sensenbrenner bill also incorporates much of the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act), which had been introduced in 2003 but lost traction shortly thereafter. The CLEAR Act provisions of H.R. 4437 would affirm the “inherent authority” of state and local law enforcement to enforce federal immigration law.¹¹ The legislation would also encourage such state and local enforcement through increased funding, training, and a number of coercive measures—including withholding funds from localities that prohibit law enforcement officials from assisting federal immigration authorities.¹² Civil rights advocates have vigorously opposed such measures, which require state and local officials to assume immigration enforcement duties that are squarely within the purview of the federal government. This entanglement undermines community policing efforts, sow seeds of distrust between law enforcement and communities, and encourage racial profiling of individuals who may “appear” to be immigrants.

H.R. 4437 contains a patchwork of other measures that take steady aim at immigrants without providing solutions for those individuals, their families, or the businesses that employ them. The counter-productive nature of the bulk of H.R. 4437’s provisions is self-evident—rather than bringing immigrants out of the shadows, the Sensenbrenner bill would drive them further to the margins, actually undermining security concerns. Section 705 of the Sensenbrenner bill, which targets day laborers and their prospective employers, is a stark example of this effect. Section 705 of the H.R. 4437 would expand requirements for verifying employment authorization to cover entities or agencies that “refer or recruit” people for employment—a burdensome requirement designed to shut down day laborer hiring centers, on which workers and communities across the country have come to rely. Section 705 would carry with it harsh consequences for non-compliance: a center or agency that failed to comply with verification requirements for each and every worker would face substantial fines, up to a maximum of \$40,000 for each worker involved.

Section 705 is founded upon the myth that permeates much of H.R. 4437—that draconian and punitive “enforcement” measures will have the effect of driving out undocumented immigrants. In the context of Section 705, the reality is that the labor demands currently met by day workers will not evaporate with the closure of hiring centers. Communities across the country have made the judgment—based on their assessment of local needs—that hiring centers are a safe and orderly way to organize these forces of demand and supply. Like much of H.R. 4437, Section 705 would simply leave an already vulnerable group open to exploitation without doing anything positive to address the faultlines in the existing immigration system.

THE IMMIGRATION DEBATE IN THE SENATE: COMPREHENSIVE IMMIGRATION REFORM ACT OF 2006

The debate proceeded on a different track entirely in the Senate. On March 27, 2006, the Senate Judiciary Committee reported to the floor a sweeping comprehensive reform bill entitled the Comprehensive Immigration Reform Act of 2006, based in large part on the Secure America and Orderly Immigration Act of the previous year. The Committee bill featured a defined path to citizenship for millions of undocumented immigrants in the United States, meaningful reductions in the family immigration backlog, a temporary worker program to address future flows of immigrants, as well as the DREAM Act and AgJOBS legislation.

After a series of false starts, the Senate debate on the Committee bill began in earnest in May 2006, and on May 25, the Senate passed S. 2611, the Comprehensive Immigration Reform Act, by a vote of 62–36.¹³ Unlike the Sensenbrenner bill, S. 2611 is comprehensive in nature, in that it includes an earned path to citizenship for many, if not most, of the millions of undocumented immigrants living and working in the United States. The bill also greatly alleviates the family and business immigration backlogs that currently plague the system. Yet amendments during the Senate debate process eroded the Committee bill considerably, introducing problematic provisions and eradicating or weakening the Committee bill’s labor and due process protections.¹⁴

First, S. 2611 includes a needlessly complicated and arbitrary “three-tier” legalization architecture, which would divide undocumented immigrants into three categories

based on length of presence in the United States: those who have lived and worked in the United States since before April 5, 2001 would be eligible to proceed immediately upon a path to “earned adjustment;” those in the middle tier, who entered between April 5, 2001 and January 7, 2004, would be eligible for Deferred Mandatory Departure—under which they would be required to leave the U.S. within three years, but then permitted to return and embark on a more uncertain path to citizenship; and those in the third tier, who arrived after January 7, 2004, would need to return to their home countries.¹⁵

Although the Senate bill holds promise for millions of undocumented immigrants willing and ready to earn their citizenship, it also places significant obstacles upon that road, including potential “traps” for the unwary that inhere in the bill’s complicated legalization architecture. For one, the costs of legalization in fines, back taxes, and fees would likely amount to several thousand dollars, a considerable burden for low-wage workers and their families.¹⁶ In addition, the legislation imposes confusing and uncertain requirements upon immigrants who seek to adjust their immigration status; this is particularly true for those immigrants who fall within this second tier, who would also be required to waive their rights to judicial review of immigration decisions.¹⁷

In addition to creating a mystifying and arbitrary legalization architecture, the Senate bill also expands mandatory detention and expedited removal, increases detention space, and broadens the definitions of document fraud crimes.¹⁸ Like the House bill, the Senate’s legislation encourages state and local enforcement of federal immigration laws, by requiring the Department of Homeland Security to seek Memoranda of Understanding (MOUs) with states to enforce federal immigration law, and authorizing the entry of immigration offenses into the federal National Criminal Information Center database. Also like the Sensenbrenner bill, S. 2611 expands the reach of the Basic Pilot Program, an electronic employment eligibility verification system that has been rife with documented glitches. The program, in which participation is currently voluntary, would become a mandatory system over an 18-month period. Despite some improvements in the Senate version of the employment verification measures, such as enhanced antidiscrimination protections, expansion of the Basic Pilot Program remains problematic because it creates potential for error, privacy lapses, and employer abuse or racial profiling.

The Senate’s comprehensive immigration bill also included an “English-only” amendment introduced by Sen. James Inhofe (R-OK), which has since been replicated in various forms by numerous state and local governments. The Inhofe provision warrants discussion because it highlights growing hostility toward and stereotypes about the immigrant population in general, and Latino immigrants in particular. The Inhofe provision, a modern-day successor to these laws, would make English the national language and provide that “[u]nless otherwise authorized or provided by law, no person has a right, entitlement, or claim to have the Government of the United States or any of its officials or representatives act, communicate, perform, or provide services, or provide materials in any language other than English.”²⁰

Immigrants’ rights advocates moved quickly to condemn the Inhofe Amendment, whose broad sweep would potentially undermine the government’s ability to communicate with the public in situations where communication is urgently needed—conceivably implicating, for example, the ability of federal emergency workers to provide information and instructions in languages other than English, in the event of a natural disaster or threat to national security; the ability of medical personnel to communicate with patients at federal hospitals; or the due process rights of non-English speakers who face termination of vital services. At the same time, the Inhofe provision of S. 2611 contributes nothing toward the most direct and effective means to foster English proficiency—that is, to provide opportunities for people to learn English through adequate and affordable English acquisition programs.²¹

The Senate’s approval of Sen. Inhofe’s “English-only” measure revived the national debate over English as the official language, and helped to reinforce two prevalent myths—first, that the primacy of the English language is somehow under threat, and second, that immigrants, and in particular immigrants from Latin America, do not want to learn English. In fact, Latino immigrants are learning English as quickly or more quickly than previous generations of immigrants. As is typical of immigrant populations in the United States, by the third generation most Latinos tend to speak only English. In addition, by wide margins, Latino immigrants believe that learning English is essential for participation and success in American society. A recent survey by the Pew Hispanic Center found that an overwhelming majority of Latinos—

92 percent—believes that teaching English to the children of immigrants is very important, a percentage far higher than other respondents.²²

The Inhofe measure was one of several pernicious amendments designed to dilute and weaken the Committee bill and its McCain–Kennedy foundations. Others were only narrowly defeated, including a voter identification amendment advanced by Sen. Mitch McConnell (R-KY). The McConnell amendment would have required every voter in federal elections to present a federally-approved photo identification that complied with the REAL ID Act and contained proof of citizenship before casting a ballot on election day—a requirement that would doubtless have prevented an untold number of American citizens from exercising the franchise, with the burden falling disproportionately on the elderly, Native Americans, racial and ethnic minorities, and the poor.

Still, despite its many shortcomings, the bill that emerged from the Senate’s debate looked vastly different from what the House had produced in December 2005. Most significantly, the Senate bill recognized, at least in principle, that a path to citizenship for undocumented immigrants already in the United States, and a realistic approach to the future flow of immigrants, is part and parcel of securing our nation’s borders.

Following the Senate vote and heading into a Memorial Day recess, legislators were left with two vastly divergent pieces of legislation to be reconciled in a conference process. Rather than appoint conferees to broker with the Senate and negotiate a final bill in conference, however, the House announced a series of “field hearings” with such titles as: “What is the threat to the United States from Islamic extremists who abuse the legal immigration system?” “Would the Reid–Kennedy bill impose huge unfunded mandates on state and local governments?” and “Do the Reid–Kennedy bill’s amnesty provisions repeat the mistakes of the Immigration Reform and Control Act of 1986?”²³ As the summer progressed, it became clear that there would be no movement on comprehensive immigration reform until after the midterm elections. Indeed, the only related legislation to emerge from the 109th Congress was the Secure Fence Act of 2006 (H.R. 6061)—authorizing the construction of 700 miles of fence along the U.S.–Mexico border, with the stated purpose of establishing

“operational control over the international land and maritime borders of the United States.”²⁴ President Bush signed the Act on October 26, 2006.²⁵

WHITE HOUSE BORDER AND WORKSITE ENFORCEMENT INITIATIVES

As Congress debated comprehensive immigration reform, the administration’s efforts to exert leadership and find a “rational middle ground” on the issue remained inconsistent, and marked by a focus on “get-tough” border security and worksite enforcement measures—collectively dubbed the White House Border Security Initiative.²⁶ For example, in May 2006, the president delivered a 17-minute address calling for a compromise on immigration reform.²⁷ While his message included the need for a guestworker program, it also featured a security initiative involving the deployment of up to 6,000 National Guard troops to the U.S.–Mexico border, and additional stepped-up resources to “secure the border,” from additional border patrol agents to increased detention space for immigrants.

Another centerpiece of the Bush administration’s “get-tough” immigration package has been increased worksite enforcement. In 2005 and 2006, there surfaced media reports of Immigration and Customs Enforcement (ICE agents) posing as federal health and safety inspectors to conduct immigration raids—a practice that undermined vulnerable, low-wage immigrant workers’ trust and confidence in OSHA (Occupational Safety and Health Administration) personnel. Though the administration announced that it would discontinue this ruse in March 2006,²⁸ it soon renewed its focus on worksite enforcement with an April 2006 raid on the German-based firm IFCO systems, in which more than 1000 workers were rounded up in a series of multistate stings.²⁹

Shortly thereafter, in June 2006, the Department of Homeland Security’s published a notice of a proposed rule regarding “Safe Harbor Procedures for Employers who Receive a No-Match Letter” in the Federal Register. The proposed rule, which has not yet been formally adopted, provides that employers who receive a Social Security Administration (SSA) “no-match” letter (stating that information submitted for an employee does not match SSA records) may be deemed to have “constructive knowledge” that an employee is unauthorized to work. The proposed rule then sets out “safe harbor” pro-

cedures that an employer must follow to avoid a finding of “constructive knowledge;” if an employer is unable to resolve the “no-match,” the employer can either terminate the employee or risk liability under the Immigration and Nationality Act (INA).

If enacted into law, the Department of Homeland Security proposed rule would no doubt expose workers, both immigrant and native-born, to unlawful employment practices. Although current SSA no-match notices direct employers against taking adverse action against employees, many workers—even U.S. citizens or non-citizens authorized to work—still experience national origin discrimination, harassment, and wrongful termination based on erroneous “no-match” notices, which often arise out of innocent errors or discrepancies.

Enactment of the proposed rule would only escalate and exacerbate such unlawful conduct. The new DHS rule would also provide opportunities for unscrupulous employers to retaliate against workers who assert labor rights or engage in protected union or civil rights activities, by using no-match notices as pretexts for firings or other wrongful practices. The low-wage workers who are most in need of these protections are particularly vulnerable to exploitation.

A broad collective of immigrants’ rights and labor and employment rights advocates submitted comments critical of the proposed rule, based primarily on the concerns described above. But observers also noted the timing of the proposed rule, which was published after both the House and the Senate had passed their immigration measures containing worksite enforcement and employment verification mechanisms. Many advocates submitting comments took DHS to task for subverting a legislative process already well underway, while subjecting workers to needless risk of adverse job actions.

THE STATE AND LOCAL RESPONSE

The period following passage of the Sensenbrenner bill and through passage of S. 2611 was marked by unprecedented civic demonstrations by immigrants and by supporters of immigration reform—a series of marches so large and stunning that it prompted *The Washington Post* to proclaim in a front-page headline: “Immigration Debate Wakes a ‘Sleeping Latino Giant.’”³⁰

Yet the issue of comprehensive immigration reform continued to stagnate on the federal level, with the House failing to even appoint conferees to meet with Senate negotiators. At the same time, state and local governments—claiming frustration with what they called the federal government’s failure to address immigration issues—accelerated their efforts to pass legislation targeting immigrants.

State and local anti-immigrant legislation is, of course, nothing new. Civil rights litigators have battled anti-immigrant state ballot initiatives such as California’s Proposition 187 and Proposition 227, and Arizona’s Proposition 200. Also, MALDEF and other groups have for years represented day laborers in First Amendment challenges to municipal ordinances that bar solicitation on public rights-of-way, including traditional public fora for expression, such as sidewalks. Although this legislation is typically facially neutral, they are also typically enforced only against day laborers—and is motivated by often palpable anti-immigrant sentiment. Within the last three years, day laborers have won rulings from federal courts in Redondo Beach, CA, Glendale, CA, and Mamaroneck, NY, protecting their rights to solicit employment on public rights-of-way without fear of arrest, abuse, or harassment.

Day laborers, in many respects, became the “front line” in state and local efforts to target undocumented immigrants (even though day laborers are not always immigrants, and not always undocumented). Day workers, by virtue of the very act of solicitation in public places, are a uniquely visible population, and so in many communities they became the face of immigration and a flashpoint for anti-immigrant sentiment.

More recently, however, as the issue of immigration became more prominent on the national scene and in the media, state and local efforts to target immigrants have broadened and intensified. From Hazleton, PA to Escondido, CA to Farmers Branch, TX, a variety of these unconstitutional ordinances have mushroomed from coast to coast in recent months.³¹ These legislative enactments have included so-called “Official English” or “English-only” type laws, some of which categorically prohibit government employees from communicating, even voluntarily, with others in a language other than English—a prohibition that not only unlawfully prevents individuals from receiving information to which they are entitled, but also potentially violates the First Amendment rights of the government employees.

Other recently-enacted ordinances impose penalties upon businesses or non-profit organizations that do business with, employ, or contract with undocumented, or penalize landlords who lease or rent property to undocumented immigrants. Organizations have already filed suit to enjoin enforcement of these ordinances, which provide strong incentives for employers and landlords—generally not knowledgeable in the minutiae of federal immigration law—to discriminate on the basis of race or national origin. Civil rights groups have also challenged such ordinances as violating federal pre-emption doctrine, a framework under which the federal government has exclusive power to set immigration policy. A state or local legislative enactment is pre-empted under this doctrine: if it impermissibly regulates immigration by, for example, setting policy for entry into or abode within the United States; if Congress has occupied the field by enacting a comprehensive system of laws to deal with a particular issue; or if it frustrates or creates an obstacle to achieving the purpose of a federal law.³²

Civil rights groups have already achieved some success in their efforts to thwart anti-immigrant ordinances via the federal courts. In November 2006, for example, a federal judge in the Middle District of Pennsylvania issued a temporary restraining order blocking enforcement of Hazleton, PA anti-immigrant ordinance—even after the City Council had rewritten the legislation in an effort to ensure it passed constitutional muster.³³ A strong victory in Hazleton—whose anti-immigrant ordinance provided the model for a number of municipalities across the nation, would send a message not only about the unconstitutionality of such legislation, but also its futility. A genuine solution to problems in the immigration system will be achieved through a national and comprehensive—rather than a local and *ad hoc*—approach.

LOOKING AHEAD

Since the Bush administration sketched its general principles for a comprehensive immigration overhaul in January 2004, the story of immigration reform has been one of frequently shifting momentum. As a new Washington emerges from the 2006 election, optimism for meaningful reform has again grown—driven, in part, by a set of stakeholders that made themselves heard during that election—Latino voters. An election-eve poll commissioned by the NALEO (National Association of Latino and Elected Officials) Educational Fund and the National Council of La Raza (NCLR) found that Latino voters were “more enthusiastic” about voting this year than in previous years, and that a majority of Latinos (51 percent), including half of Latinos aged 18–24, ranked the immigration issue as an important factor in casting their vote.³⁴ The poll also found that nearly a third of Latino voters overall and nearly half of young Latinos had participated, or had a close family member participate, in the immigration marches of 2006.³⁵

Indeed, voters surveys following the election found that Republican gains among Latino voters had all but vanished in the 2006 election, in the wake of unyielding opposition of some Republicans to comprehensive reform. In 2004, 44 percent of Latinos said they voted Republican, a figure that dropped to below 30 percent in the last election.³⁶ Whether these trends will translate into the enactment of reform measures remains unclear. But recent events should prompt both hope for a meaningful and comprehensive fix for the immigration system, as well as steadfast vigilance against counter-productive “get-tough” enforcement at the federal, state, and local levels.

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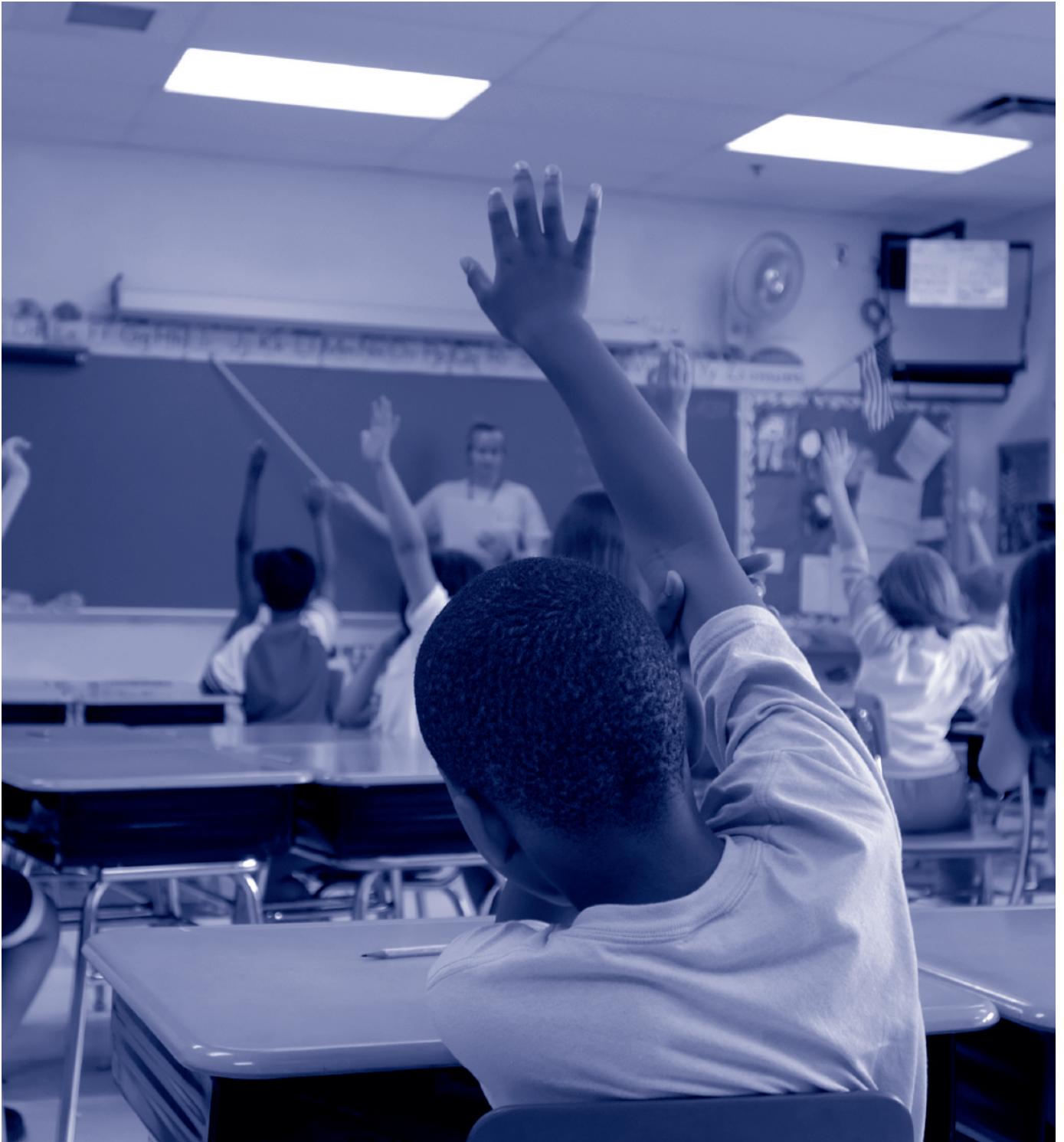
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- 15 S. 2611, Sec. 601.
- 16 See NILC Analysis of S. 2611, *supra* note 14.
- 17 *Id.*
- 18 See, generally, S. 2611, Titles I and II.
- 19 S. 2611, Sec. 231–232.
- 20 S. 2611, Sec. 162.
- 21 Adults who seek ESL classes face an acute shortage of high-quality English-acquisition programs, which are too few and too often oversubscribed. A October 2006 study by Dr. James Tucker for the NALEO Educational Fund surveyed the demand for and availability of adult ESL programs nationwide, and found tremendous unmet need. In Phoenix, Arizona, a large ESL provider reported an 18-month long waiting period for in-demand evening classes. In Boston, Massachusetts, there are at least 16,725 adults on waiting lists for ESL classes, and waiting times for some programs approach three years. In New York City, courses are so oversubscribed that last year, only 41,347 adults—out of an estimated one million adult English Language Learners—were able to enroll. See Dr. James Tucker, NALEO Educational Fund, "The ESL Logjam: Waiting Times for Adult ESL Classes and the Impact on English Learners," available at <http://www.naleo.org/downloads/ESLReportLoRes.pdf>
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- 34 A summary of the poll findings is available at <http://www.nclr.org/content/publications/detail/42997/>
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CHAPTER 5

Policies to Help English Language Learners

By Peter Zamora¹



The No Child Left Behind Act (NCLB), the primary federal education statute to address educational inequality in the U.S. education system, promises improved educational outcomes for the large and growing population of English Language Learners (ELLs) in public schools. Among other measures, NCLB requires public schools to annually assess nearly all students in language arts and mathematics, disseminate academic achievement data, and implement efforts to improve academic outcomes for underperforming students. Because of significant failures by federal, state, and local officials in implementing the data collection requirements of NCLB, however, data regarding ELL students are often flawed, incomplete, or inaccurate. Inadequate data have, in effect, frustrated the law's intent to improve educational outcomes for ELLs.

Considerable harm to our public schools and, ultimately, our society, will result if our public school system does not improve the educational outcomes of ELLs. Federal, state, and local officials must increase and improve their focus upon the academic needs of English Language Learners in order for NCLB to fulfill its aim of eliminating educational disparities affecting U.S. schools.

ENGLISH LANGUAGE LEARNER STUDENT DEMOGRAPHICS AND ACADEMIC NEEDS

State departments of education report that there are approximately 5.2 million English Language Learner (ELL) students enrolled in U.S. public schools, constituting over 10 percent of the total public school population.² Over the past 15 years, ELL student enrollment in U.S. public schools has nearly doubled, and experts predict that one-quarter of the total U.S. public school population will be ELL by 2025.³ Despite common assumptions to the contrary, native-born U.S. citizens predominate in the ELL student population: 76 percent of elementary school and 56 percent of secondary school English Language Learners are native-born, and over half of the ELLs in public secondary schools are second- or third-generation U.S. citizens.⁴ Two-thirds of ELLs come from low-income families.⁵ Over three-quarters of ELLs are Spanish-speaking.⁶

English Language Learners in U.S. public schools often confront significant educational disadvantages and perform poorly on many measures of academic success. ELL students often attend functionally segregated schools: 53 percent of

ELLs attend schools in which over 30 percent of the students are ELL.⁷ They drop out of school at very high rates: Latino ELLs aged 16–19, for example, have a 59 percent dropout rate.⁸ In the 2005 National Assessment of Educational Progress, only 29 percent of ELLs scored at or above the basic level in reading, compared with 75 percent of non-ELLs.⁹ Further, in the school year 2003–04, nearly two-thirds of the states failed to meet their own academic benchmarks set under NCLB for ELL student achievement.¹⁰ Nationwide, a lower percentage of ELL students achieved proficient scores on NCLB-required state tests than any other student group for whom data is disaggregated under the law.¹¹

Education researchers have clearly defined the most effective instructional strategies for English Language Learners. A considerable body of education research on ELL student achievement demonstrates that 1) native language instruction significantly improves academic achievement in English and 2) ELLs require specific instructional accommodations designed to minimize the effect of limited English proficiency upon academic achievement.¹² Despite knowing what works best for ELLs, states, districts, and schools have implemented a patchwork of instructional programs for ELLs, many of which do not reflect the best instructional practices for this student population.¹³

NO CHILD LEFT BEHIND'S APPROACH TO ENGLISH LANGUAGE LEARNERS

English Language Learners face the dual challenge of learning English while simultaneously acquiring academic knowledge in an unfamiliar language.¹⁴ No Child Left Behind addresses each of these challenges by imposing accountability upon states, districts, and schools for ELL students' acquisition of content knowledge (Title I) and English language skills (Title III). NCLB charges the U.S. Department of Education ("ED") with general oversight of Title I and Title III.

Title I intends to ensure that all children have a fair and equal opportunity to obtain a high-quality education and become proficient in core academic subjects.¹⁵ It requires states to administer tests in language arts and mathematics to all students in certain grades and to use these tests as the primary means of determining the annual academic performance of states, school districts, and schools.¹⁶ Schools, school districts, and states must show that increasing percentages of students (including members of

groups, including ELLs, singled out for focus) are reaching academic proficiency, with a goal of 100 percent proficiency in covered subject areas by 2014.¹⁷ When a school or school district fails to attain its performance target, NCLB imposes a variety of corrective measures designed to improve instruction and academic achievement.¹⁸ Title I also requires states to administer an annual assessment of the English proficiency of all students classified as ELL.¹⁹

No Child Left Behind requires, with a limited exception,²⁰ that all English Language Learners be assessed and included in school, school district, and state academic accountability systems. ELLs must receive reasonable testing accommodations²¹ and be assessed, to the extent practicable, in the language and form most likely to yield accurate data about their academic knowledge.²² NCLB provides states and school districts the flexibility to test ELL students in their native language for up to three years, with two additional years of native language assessment provided on a case-by-case basis.²³ Ultimately, NCLB holds schools, school districts, and states accountable for ensuring that ELLs reach full proficiency on state academic standards by 2014.²⁴

Title III of NCLB intends to ensure that ELL students attain the English proficiency necessary to achieve long-term academic success and to meet the same academic content standards as all students.²⁵ It requires states to establish goals to demonstrate annual increases in students making progress towards and gaining full academic English and content knowledge proficiency.²⁶ Title III funds may be used to support the development and implementation of language instructional programs, software, tutorials, community participation programs, and other methods for improving language acquisition.²⁷

FAILURES IN STATES' IMPLEMENTATION OF TITLE I ASSESSMENT AND ACCOUNTABILITY PROVISIONS FOR ENGLISH LANGUAGE LEARNERS

Failures by state departments of education in the implementation of No Child Left Behind's assessment and accountability provisions have hampered the effective operation of the law for English Language Learners. States, required under NCLB to develop appropriate assessments for all students tested, have not dedicated the attention and funding necessary to develop comprehensive assess-

ment systems that meet the particular needs of ELLs. Accurately assessing the academic knowledge of English Language Learners is particularly critical under Title I because, as noted above, NCLB designates ELLs for particular attention and accountability.²⁸ States, school districts, and schools will not be able to demonstrate success under NCLB accountability systems unless the ELL student population is assessed appropriately.

In evaluating NCLB assessment policies and practices for ELL students, the Government Accountability Office found that "states are generally not taking the appropriate set of comprehensive steps to create assessments that produce valid and reliable results [for English Language Learners]."²⁹ The GAO expert panel found that no state has implemented an assessment program for ELL students that is consistent with the *Standards for Educational and Psychological Testing*, the universally accepted guidance for test development.³⁰ The majority of states test ELL students using English-language tests, while requiring that test administrators provide accommodations to ELLs.³¹ Testing accommodations offered to ELLs vary greatly between states.³² Many states fail to monitor the accommodations process to ensure that the accommodations that ELL students should receive are in fact delivered.³³ The GAO found little research to support the appropriate use of accommodations for ELLs.³⁴

As noted previously, No Child Left Behind permits states to develop and implement native language content tests in order to measure ELLs' content knowledge without the student's limited English proficiency affecting his or her ability to demonstrate content knowledge. The GAO found that native language assessments may, if properly designed, improve the validity of results for ELL students.³⁵ No state, however, has developed and implemented a system of native language assessments that validly and reliably measure ELL student achievement at each grade level. In order to meet the goals of NCLB, states must invest the resources necessary to develop and implement valid and reliable assessments, preferably in the native language, for ELL students.

Due to the states' failures in the implementation of NCLB's assessment provisions for English Language Learners, school officials, teachers, parents, and advocates are unable to use sound data as the basis for the education reforms necessary to improve ELL student achievement. The

targeted instructional interventions that NCLB contemplates for low-performing groups of students are certain to be flawed if they are based upon inadequate data regarding ELL academic achievement. Therefore, Title I is failing at the first stage, that of data collection, for ELLs.

RECENT ED ENFORCEMENT OF TITLE I ASSESSMENT AND ACCOUNTABILITY PROVISIONS

The U.S. Department of Education has not vigorously enforced NCLB's provisions governing the validity and reliability of assessments administered to ELLs, and it has failed to provide sufficient assistance to the states in developing appropriate assessments. Although the assessment provisions of NCLB have been in place since 1994 (under the Improving America's School Act) and states have consistently used inadequate ELL assessment instruments during the intervening years, the U.S. Department of Education (ED) has only recently begun to enforce NCLB's assessment provisions as they relate to ELLs.

Results of an ED peer review released in 2006 showed that 25 of 38 states reviewed did not provide sufficient evidence of validity and reliability of academic testing practices for ELLs.³⁶ ED required these 25 states to develop plans to develop and implement appropriate testing practices for ELLs for the 2006–07 testing cycle. ED waived applicable sanctions for noncompliance for those states willing to work with the Department to improve compliance with NCLB's assessment provisions.

Partly in response to these peer review findings, in 2006 ED created a "LEP Partnership" between ED, state education agencies, National Council of La Raza, and MALDEF to provide long-overdue technical assistance to the states in ELL test development.³⁷ The LEP³⁸ Partnership met twice in 2006, in August and October, for preliminary sessions devoted to improving the quality of ELL assessments. While the Partnership is a promising avenue for a collaborative approach to ELL assessment issues neither the U.S. Department of Education nor state education agencies have yet guaranteed the resources necessary to develop the appropriate assessment and accountability systems for ELL students that are necessary for NCLB to work properly for this population.

Taken together, ED's peer review and its creation of the LEP Partnership signal a relatively new and still somewhat

limited commitment to enforcing NCLB's assessment and accountability provisions as they relate to ELL students. These are merely first steps toward appropriate implementation and enforcement of NCLB for ELL students, however, and must be pursued with continued focus and increased funding to address challenges in assessing ELLs and improving their academic achievement levels.

FAILURES IN STATES' IMPLEMENTATION OF TITLE III

While it often receives less public attention than Title I, Title III of the No Child Left Behind Act is a critical federal tool for encouraging the English language proficiency ultimately necessary for academic success in the U.S. education system. ED estimates that 80 percent of ELL students in U.S. schools receive academic support provided with Title III funds.³⁹

Title III, as noted previously, intends to ensure that ELL students attain the English proficiency necessary to achieve long-term academic success and to meet the same academic content standards as all students.⁴⁰ States and school districts use Title III funds to provide a variety of supports for ELL students' language acquisition, including professional development for teachers and support of language instructional programs. Unfortunately, Title III funds are not always used to support the best instructional practices for ELL students (including native language instruction, discussed above).⁴¹ Further, Title III has suffered from extremely poor implementation and enforcement since NCLB was signed into law in 2002.

The Government Accountability Office released a report in December of 2006 which found that many states have failed to provide adequate data regarding the number of students eligible for Title III services in the state. In other words, many states do not have a firm count of the number of ELL students present in their state's public schools, much less the type and quality of services offered to such students. As a result of the states' inadequate data collection, ED distributed Title III funds for fiscal years 2005 and 2006 using data on school-age ELL children generated by the American Community Survey (ACS). The ACS is a wholly inadequate measure of ELL student needs and inappropriate baseline for the distribution of Title III funds. Most importantly, ACS data, which is generated through the sampling of self-reported

survey responses, has no linkage with the identification of English Language Learner status.⁴² ACS figures on ELL school-age children also vary greatly from those reported by the states and vary greatly from year to year.⁴³ As a result, ED distributed Title III funds to the states erratically: Arkansas, for example received 82 percent more Title III funds in FY 06 as compared to FY 05, while the District of Columbia received almost 37 percent less. Improving the quality of the data generated for Title III purposes is critical to improving the language acquisition services provided under NCLB.

CONCLUSION AND RECOMMENDATIONS FOR IMPROVED NCLB IMPLEMENTATION TO BENEFIT ENGLISH LANGUAGE LEARNERS

While NCLB has far-reaching consequences for all U.S. public schools and students, it is at its core a federal civil rights measure designed to reduce class- and race-based inequalities in U.S. public schools. A critical component of President Lyndon Johnson's "War on Poverty," the Elementary and Secondary Education Act of 1965 was designed to remedy the damaging effects of poverty upon the academic achievement of the largely minority student populations of low-income schools; it has served, in essence, as a legislative counterpart to *Brown v. Board of Education*'s call for equality of educational opportunities.⁴⁴ The academic skills that NCLB intends to support in disadvantaged populations are essential for the protection of these populations' federal civil rights, including the right to vote (which requires academic skills and English language proficiency). Unfortunately, this baseline for understanding NCLB is often ignored or minimized in favor of a focus upon the Act's effect upon curriculum or other matters.

While "data quality" may not typically be considered a traditional civil rights issue, the poor quality of the data generated under flawed implementation of the No Child Left Behind Act NCLB has clearly undermined the operation of this critical civil rights statute. The No Child Left Behind Act codifies the idea that sound data regarding student achievement can drive education reform and improve outcomes for all students. Poor NCLB implementation and poor enforcement by the U.S. Department of Education, however, has led to inadequate data regarding the numbers of English Language Learners and their levels of academic achievement.

MALDEF advocates the following recommendations to address the No Child Left Behind Act implementation concerns described in this article:

- 1) ED must fully enforce NCLB assessment provisions for ELLs and provide effective and ongoing technical assistance in the development of appropriate assessments to state education agencies;
- 2) States must focus attention and resources upon developing and implementing valid and reliable assessments for ELLs, preferably in the native language;
- 3) A reauthorized NCLB should establish a separate funding stream to assist states in developing and implementing appropriate academic assessments for ELL students;
- 4) A reauthorized NCLB should require that states that have significant ELL populations from a single language group develop valid and reliable content assessments designed specifically for members of that language group;
- 5) States, school districts, and schools must implement sound and consistent methods for classifying ELLs;
- 6) Schools and school districts must implement the best instructional practices that will provide ELL students with the best opportunities to learn both English and content area knowledge;
- 7) Parents, advocates, and state and local school officials must ensure that ELLs are fully and appropriately included in NCLB accountability systems so that schools focus upon meeting the academic needs of ELLs; and
- 8) A reauthorized NCLB should not allow for exemptions of ELL students from Title I assessment systems beyond the current one-year exemption in reading/language arts for newly-arrived ELLs.

For the No Child Left Behind Act to reduce or eliminate academic achievement gaps, officials at all levels of government—federal, state, and local—must commit to better serving the ELL student population. If the large and growing population of English Language Learners in our public schools do not improve their academic achievement levels, our nation as a whole will suffer.

ENDNOTES

- 1 The author is the Washington, D.C. Acting Regional Counsel for the Mexican American Legal Defense and Educational Fund (MALDEF). He serves as Co-Chair of the Hispanic Education Coalition, which unites 25 national organizations in support of improved educational outcomes for Latino students and families.
- 2 See <http://www.ncela.gwu.edu/expert/faq/08leps.html> (publishing state-reported data regarding ELL enrollment); see also Section V below, which addresses the inaccuracy of state-reported data on ELLs.
- 3 See <http://www.ncela.gwu.edu/expert/faq/08leps.html>; <http://www.ed.gov/nclb/methods/english/lepfactsheet.html>.
- 4 See, e.g., Capps, R., Fix, M., Murray, J., Ost, J., Passel, J., & Herwanto, S., *The New Demography of America's Schools: Immigration and the No Child Left Behind Act*, Washington, DC: The Urban Institute (2005), p18.
- 5 *Id.* at 25.
- 6 See <http://www.ncela.gwu.edu/expert/fastfaq/4.html>.
- 7 See Capps, et al., *supra* note 4 at 2.
- 8 See Fry, R., "Hispanic Youths Dropping Out of Schools: Measuring the Problem," Washington, DC: Pew Hispanic Center (2003), p8.
- 9 National Center for Education Statistics, "National Assessment of Educational Progress (NAEP): Reading and Mathematics," Washington, DC (available at http://nces.ed.gov/nationsreportcard/nrc/reading_math_2005/).
- 10 U.S. Government Accountability Office, "No Child Left Behind Act: Assistance from Education Could Help States Better Measure Progress of Students with Limited English Proficiency," GAO-06-815, July 2006, p13 (available at <http://www.gao.gov/new.items/d06815.pdf>). See Section III for discussion of inadequacy of state-generated academic achievement data regarding ELLs.
- 11 *Id.* at 18. In 38 states, economically disadvantaged students outperformed ELL students, and in 14 states students with disabilities outperformed ELLs. In 12 states, all of the selected student groups outperformed ELLs.
- 12 See Goldenberg, C., "Improving Achievement for English Language Learners: What the Research Tells Us," *Education Week*, Vol. 25, Issue 43, pp34–36 (July 26, 2006). Appropriate educational accommodations for ELLs include: strategic use of the native language; predictable, clear, and consistent instructions, expectations, and routines; identifying and clarifying difficult words and passages; paraphrasing students' remarks; and other measures designed to minimize the effect of limited English proficiency upon academic achievement.
- 13 U.S. Government Accountability Office, "No Child Left Behind Act: Education's Data Improvement Efforts Could Strengthen the Basis for Distributing Title III Funds," GAO-07-140, December 2006, p32 (available at <http://www.gao.gov/new.items/d07140.pdf>).
- 14 See Short, D. & Fitzsimmons, S., "Double the Work: Challenges and Solutions to Acquiring Language and Academic Literacy for Adolescent English Language Learners—a report to the Carnegie Foundation of New York," Washington, DC: Alliance for Excellent Education (2006) (available at: <http://www.all4ed.org/publications/DoubleWork/DoubleWork.pdf>).
- 15 20 U.S.C. § 6301.
- 16 20 U.S.C. § 6311.
- 17 *Id.*, 20 U.S.C. § 6312.
- 18 20 U.S.C. § 6314.
- 19 20 U.S.C. § 6311(b)(6).
- 20 By regulation, ELL students who are new to U.S. schools (12 months or less) are exempt from one year of testing in language arts and one year of accountability in language arts and mathematics. See <http://www.ed.gov/legislation/FedRegister/finrule/2006-3/091306a.html>.
- 21 Testing "accommodations" are measures intended to permit ELL students to demonstrate academic knowledge despite their limited English ability. Testing accommodations may include extra time, bilingual dictionaries, oral instructions, and other measures.
- 22 20 U.S.C. § 6311(b)(3)(C)(ix)(III).
- 23 20 U.S.C. § 6311(b)(3)(C)(x).
- 24 20 U.S.C. § 6311.
- 25 20 U.S.C. § 6811.
- 26 20 U.S.C. § 6842.
- 27 20 U.S.C. § 6912.

- 28 NCLB imposes accountability measures upon states, school districts, and schools for the academic achievement of students who are 1) are economically disadvantaged, 2) represent major racial and ethnic groups, 3) have disabilities, and/or 4) are limited in English proficiency. 20 U.S.C. § 6311. These groups are not mutually exclusive; thus, the achievement results for a student who is economically disadvantaged, Hispanic, and has limited English proficiency may be counted in all three groups.
- 29 GAO, *supra* note 10 at 25.
- 30 *Id.* at 28. Standards include: 1) determining when language differences produce threats to the validity and reliability of test results; 2) providing information on how to use and interpret results when tests are used with ELL students, and 3) collecting the same evidence to support claims of validity for each linguistic subgroup as a whole. *Id.* at 10–11.
- 31 *Id.* at 30.
- 32 *Id.*
- 33 *Id.* at 32.
- 34 *Id.*
- 35 *Id.* at 32–33.
- 36 *Id.* at 27.
- 37 See <http://www.ed.gov/about/inits/ed/lep-partnership/index.html>. Please note that Limited English Proficient (LEP) and English Language Learner (ELL) are interchangeable terms.
- 38 “LEP” is the acronym of “Limited English Proficient,” another term for English Language Learner.
- 39 GAO, *supra* note 13 at 31.
- 40 20 U.S.C. § 6811.
- 41 GAO, *supra* note 13 at 32.
- 42 *Id.* at 16.
- 43 *Id.* at 22. California, for example, reported that it served 1.6 million ELL students in 2004–05, which was 516,000 more than the ACS data reflected (less than 1.1 million).
- 44 See Zamora, P., “In Recognition of the Special Educational Needs of Low-Income Families?: Ideological Discord and Its Effects Upon Title I of the Elementary and Secondary Education Acts of 1965 and 2001,” 10 *Geo. J. on Poverty L. & Pol’y* 413 (2003) (reviewing the history of the Elementary and Secondary Education Act of 1965).

CHAPTER 6

Civil Rights and Communications Policy—2006

By Mark Lloyd¹



INTRODUCTION

This is a report both on progress and a threat to civil rights principles in the making of communications policy. It is an essay about the interplay between principles of equal treatment before the law and the rules our lawmakers create which direct the activity of communications companies, such as AT&T, Comcast, and Disney/ABC.

Unfortunately, too little has improved since our last report to the Citizens' Commission, "Rights at Risk," was published in 2002. Minorities remain underemployed in the communications industry and largely left out of the ownership ranks. People of color and the poor in the United States remain largely unrepresented or badly represented in media. And too many Americans, especially in rural areas, are underserved or overcharged by cable and telecommunications companies.

What follows is a brief report of three key areas of communications policy: equal employment opportunity, minority ownership, and the digital divide in access to and use of advanced telecommunications services.

WHAT'S AT STAKE

Democracy and markets, indeed almost all human activity, rely on communications. The ability to express one's needs and ideas, and to acquire information to form opinions or make the best decisions is either limited or enhanced by one's communications capability. To a great extent the limits of an individual's or a group's communications capability are neither natural nor inevitable. The ability of an individual to find out what her elected officials are doing, to convey her opinion about issues of most concern to her, or to determine the best price for food or medicine is dependent to a degree upon local or national policy. Communications policy determines who gets to speak to whom, how soon and at what cost. A communications policy that enhances one group's ability to communicate and limits another group violates civil rights principles, those fundamental American principles of equality under the law.

Moreover, the perpetuation of a system that enhances one group's ability to communicate over another's also perpetuates the stereotypes one group holds about the other. If a white teacher believes it will be difficult to teach a brown child, her expectations for that child will be limited. If a

white police officer believes black men to be threatening, he will tend to shoot first. If a white citizen believes women of color are lazy, he will be less inclined to support laws that aid the poor. The evidence to support these assertions is compelling. The evidence of a lack of understanding and insight into the lives of people of color and the poor by Americans who are white and relatively well-to-do is also overwhelming.² These misperceptions are fed by media dominated by white Americans. What was true in the late 1960s for the Kerner Commission is sadly true today.

Important segments of the media failed to report adequately on the causes and consequences of civil disorders and on the underlying problems of race relations. They have not communicated to the majority of their audience—which is white—a sense of the degradation, misery, and hopelessness of life in the ghetto.³

Our inability to establish communications policies in line with civil rights goals stunts the potential contributions of all our children, threatens the peace of our community and warps our national character. Absent a repeat of the dramatic injustices that reached Americans on their television screens in the 60s it will be difficult, if not impossible, to advance a civil rights agenda on any front in the current communications environment.

While federal regulation of all communications industries has always referred to the necessity of broadcasters (radio and television stations) and common carriers (telegraph and telephone companies) to operate "in the public interest," it was not until the involvement of the civil rights community in the late 1960s and 70s that the public had any real say about its interest. While protest drove some changes, the most important changes occurred as a result of a legal action brought by the United Church of Christ- Office of Communications in concert with the Jackson, Mississippi chapter of the NAACP.⁴ Though many advances were made during this period, much was reversed in the mid-1980s and 90s. The last few years have solidified the setbacks of the past twenty years, even as we enter a future where communications becomes more important than ever to our society.

EQUAL EMPLOYMENT OPPORTUNITY

One direct outcome of both the Kerner Commission and the *UCC v. FCC* focus on the lack of service to minority communities was the establishment of equal employ-

ment opportunity guidelines.⁵ The FCC is charged with regulating “interstate and foreign communications services so that they are available, so far as possible, to all people of the United States, without discrimination on the basis of race, religion, national origin, or sex...”⁶ However, in 1976 the FCC required more of broadcasters (and cable entities) than simply refraining from discrimination. In order to demonstrate that a broadcast licensee had met its responsibility to serve in the public interest, broadcasters were required to “carry out a positive continuing of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice.”⁷ Those provisions called for an accounting of minorities and women employed at the stations and asked the stations to compare the numbers of minorities and women on staff to the number of minorities and women in the station’s service area. The FCC also asked stations to send job announcements to places where likely candidates might be found,⁸ including the offices of the local NAACP or Urban League. The FCC rationale for requiring a report of hiring statistics and outreach efforts was two-fold: 1) hiring without broad outreach may exclude minority and women candidates; and 2) a licensee who discriminates against minorities or women would not be inclined to serve the needs and interests of all sectors of its community of license.⁹

In 1998, the U.S. Court of Appeals ruled that the FCC’s EEO reporting and outreach rules were an unconstitutional violation of equal protection.¹⁰ In justifying the application of a “strict scrutiny” standard of review, Judge Silberman relied on the Supreme Court’s prior decision *Adarand v. Peña*,¹¹ and wrote: “[W]e do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target. As such, they can and surely will result in individuals being granted a preference because of their race.”¹² Silberman went on to write that even if the Supreme Court’s decision in *Metro Broadcasting v. FCC* (sustaining affirmative action policies designed to promote diversity of viewpoints in broadcasting)¹³ was good law, that court’s finding that “diversity” was important was not a determination that it was “compelling.”¹⁴ Moreover, the court ruled that the FCC’s EEO reporting remedy was not narrowly tailored as, according to the court, there was no evidence “linking low-level employees to programming content.”¹⁵

In response to Lutheran Church, the FCC froze enforcement of its EEO regulations. After the Lutheran Church decision, several studies on employment in the broadcast industry demonstrated that minorities were not especially well-represented. In January 1999, a coalition of minority organizations also began a protest against the program schedules of the national networks, which featured mainly white actors. The Center for Media and Public Affairs, Children Now, and the Tomas Rivera Institute provide studies supporting the claims of under representation.¹⁶ And studies released by the Radio-Television News Directors Association continue to find that minorities are underrepresented in television news rooms.¹⁷ After months of embarrassing headlines, and threats of boycotts (“black-outs” and “brown-outs”), most of the major networks announced agreements to put more minority actors on the air, and improve hiring practices. But in practice little has changed.¹⁸

In January 2000 the Commission issued modified EEO requirements for broadcast and cable operations. The new rules require broadcasters to widely disseminate information about job openings, place information detailing outreach efforts in their public file, and submit a statement of compliance with the FCC’s EEO rule. In addition, broadcasters with ten or more full-time employees must submit their annual EEO report to the FCC, but these reports will not be used to determine fitness to serve as a public trustee, they will be used “only to monitor industry employment trends and [in] reporting to Congress.”¹⁹

David Honig, who filed extensive briefs at both the Appeals Court and the FCC as counsel for the Rainbow/PUSH Coalition, the NAACP, and the Minority Media and Telecommunications Council said, “the effect of this ruling is that broadcasters understand that if you discriminate, you are going to lose your license.” He also said, “these are the best recruitment rules we can probably hope for.”²⁰ While the first statement is highly unlikely, the second is undoubtedly true.

The new rules provided broadcasters with discretion in establishing recruitment efforts to ensure all qualified candidates had an opportunity to apply for open positions and encouraged a broad dissemination of job openings. The 2000 rules also created two recruitment options:

- 1) Option A required licensees to undertake supplemental recruiting measures, i.e., job notifications with organi-

zations that requested such notices and recruitment via non-traditional measure; and/or

- 2) Option B allowed the licensee to design its own recruitment program, so long as the program provided for wide dissemination of the available job opportunities. Under this option, the licensee was also required to report the race and sex of job applicants.

In *MD/DC/DE Broadcasters Association v. FCC*,²¹ the federal appellate court in Washington, DC ruled that Option B was unconstitutional because it reasoned that reporting on race “clearly does create pressure to focus recruiting efforts upon women and minorities in order to include more applications from these groups.” According to the court, an investigation by the FCC resulting from any noncompliance with Option B would be “a powerful threat.” Option A, however, was not found unconstitutional. Nor has Option A proved to be particularly effective. The lack of reporting limits the ability of the public to determine whether broadcasters are complying with EEO regulations.

The fundamental premise advanced by the FCC in adopting equal employment opportunity rules to apply to federal licensees remains sound. Local broadcasters play an important and unique role in community discourse. They are given a license by the federal government to a scarce portion of the public electromagnetic spectrum. In that public space they are protected by the federal government from interference by others. They are also given special “must carry” rights over local cable operations.²² Local broadcasters are the most relied upon source for news, political discussion, and emergency information.²³ In exchange for their special status in our communities, broadcasters are, in theory, required to act as a public trustee, providing free over the air service for the public good of all segments of their community of license. But today, as was the case in the mid-1960s, the gift of this scarce, protected, powerful federal license is not tied to any demonstration that the licensee employs on a non-discriminatory basis.

The Leadership Conference on Civil Rights Education Fund in partnership with the Communications Workers of America commissioned a study by the Institute for Women's Policy Research (IWPR) looking into employment in the broad communications industry. The study prepared in 2006 found that minorities and women lost ground in the period of rapid media consolidation over the past decade.

Based on an analysis of EEO data, the IWPR study reports that minority employment in radio and TV has trailed minority employment in the overall economy in every year since 1990, with the gap accelerating since passage of the 1996 Telecommunications Act. By 2002, minority employment in radio and TV was 9.7 percentage points lower than minority employment in the rest of the economy. Similarly, female employment in the cable industry has declined since passage of the 1996 Act.²⁴

These findings are consistent with the results of the annual Radio TV News Directors Association (RTDNA) annual survey of minority and female employment in radio and TV news. Since 1998, when the FCC weakened EEO rules and media ownership rules, the RTDNA survey found a 60 percent decline in minority representation on radio news staff, while minority representation among TV news staff failed to keep pace with the rate of growth of minority workers in the overall economy. If Spanish-language news media are excluded from these numbers, the decline in the minority workforce in radio and TV news is all the more striking. Similarly, the proportion of women among radio news staff dropped by 33 percent over the 2001–2006 period.²⁵

The IWPR study also found that women and minorities in wired telecom, the most highly unionized sector of the communications industry, have the highest earnings. Yet, wage disparities by race and gender persist, with any narrowing of the race or gender pay gap due to lower white or male earnings rather than higher earnings for all demographic groups. Thus, the female/male and the minority/white pay gap appears wider in the highest paying sectors of wired and wireless telecom, than in the lowest paying sectors of radio/TV/cable broadcasting, newspaper publishing, and motion pictures/video.²⁶

The problem, of course, is not the FCC EEO rules, the problem is the application of underlying anti-affirmative law promulgated in *Croson* and applied to federal agencies in *Adarand*. The FCC has never conducted a *Croson/Adarand* analysis, it has never examined the relationship between historically discriminatory FCC policies and equal employment opportunity in the communications industry. Such an analysis would provide a legal basis for race conscious policies designed to redress past discrimination. That recommendation set forth five years ago in our last report to the Citizens' Commission is still needed today.

OWNERSHIP

Some may argue that the focus on employment is wrong, that instead civil rights advocates should be concerned about ownership. In the late 1970s, in recognition of the lack of progress made with stricter employment policies than those in place today, the FCC ruled that minority ownership was essential to create a diverse range of messages over the public's airwaves. Civil rights leaders were at the forefront of the battle for rules to promote minority ownership. Among those testifying before Congress in support of such rules in 1974, were Ron Brown, on behalf of the National Urban League, and Joseph Rauh, Jr., on behalf of the Leadership Conference on Civil Rights.²⁷ Policies promoting minority ownership were established by the FCC during the Carter administration,²⁸ and reaffirmed by the Supreme Court in the *Metro Broadcasting* decision of 1990.²⁹

In April 1995, however, Congress (with Republicans in control) teamed up with a chastened President Clinton to kill the most effective method for increasing minority ownership, the tax certificate.³⁰ With minority-owned broadcast licenses stuck at around three percent,³¹ loss of an incentive to sell to minorities has made any progress beyond that invisible ceiling impossible. And in June 1995, in reaction to the Supreme Court's *Adarand* decision,³² the FCC rescinded rules designed to help women and minorities participate effectively in the spectrum auctions for PCS licenses.³³

Congress reaffirmed its concern over the lack of minority ownership in the communications industry when it passed Section 257 of the 1996 Telecommunications Act. That section requires the FCC to examine and create regulations to remove the barriers to participation experienced by women, minorities and small businesses. However, the Bush administration has ignored its obligation to correct a history of discriminatory FCC licensing practices, and its most egregious error has been its apparent unwillingness to even keep track of the number of minority licensees.

In 2000, 187 minority broadcasters owned 449 full power commercial radio and television stations, or 3.8 percent of the 11,865 such stations licensed in the United States. The 23 full power commercial television stations owned by minorities in 2000 represented 1.9 percent of the country's 1,288 such licensed stations. This is the

lowest level of minority full power television ownership since the National Telecommunications and Information Administration (NTIA), a branch of the Department of Commerce, reports began in 1990.³⁴ On April 3, 2006, the National Association of Hispanic Journalists sent a letter to U.S. Commerce Secretary Carlos Gutierrez calling on the department to conduct a minority ownership study.³⁵ Responding on behalf of Sec. Gutierrez, NTIA's John M.R. Kneuer informed NAHJ President Veronica Villafañe that the agency had no present plans to conduct a minority ownership study, but that the Administration shared the association's concern that "American media reflect the diversity of the nation's people."³⁶ So the fact is we don't know absolutely whether minority ownership of broadcast operations has gone up or down, because the Bush administration won't tell us.

Regarding the licensing of new communications operations to minorities through auctions, the FCC spectrum auctions have failed miserably at ensuring a place for any new owners. Even a rosy General Accounting Office report on spectrum auctions³⁷ notes that "some industry stakeholders we interviewed stated that auctions limit participation to large companies." According to economist Gregory Rose, FCC spectrum auctions have resulted in an increase in market concentration and have permitted wealthy bidders to prevail in ways which increase their market power considerably. Rose's analysis demonstrates that the FCC auction procedure has been subject to collusion among bidders, and avoidance of head-to-head competition by the best capitalized and most successful bidders. This results in a concentration of wealthy bidders winning valuable rights to spectrum at significantly lower prices than other bidders.³⁸

Concerned that "sham buyers" were taking unfair advantage of the designated entity (DE) rules designed to assist minorities [by "fronting" for larger "white" entities and then quickly selling off their interest], the Commission changed its auction rules in 2006 by "eliminating the payoff for this 'flipping' of licenses," according to Commissioner Michael Copps.³⁹ Still, the new rules do not prohibit DEs from having "material relationships" with larger corporations nor did they even address the problem of limited minority ownership or deployment of advanced telecommunications services to minority communities. In addition, according to Rose, the new auction rules don't address the threat of big company retaliation against smaller firms that might compete in subsequent auctions.

There has been no progress since 2001 on increasing the number of minority owners in the communications industry. The best evidence still suggests that a third of the country is licensed to roughly three percent of the public spectrum. And there is no evidence that federal small business loans are sufficient to allow members of underrepresented groups to participate in the market for communications companies. Ethnic media will not be empowered to speak to and for the communities they serve if the FCC does not take seriously its obligation to remove the financial barriers that block minority participation in the communications industry. A Section 257 review of the impact of the relaxed ownership rules on minority ownership opportunities and service to underserved communities is long overdue.

THE DIGITAL DIVIDE

There are more than a few experts who think radio and television will not matter in the future. They argue that the power and influence of television, at present the dominant medium, will wane and will be replaced by the Internet. Others of us think television will simply migrate to the internet, the way it migrated to cable, and that neither the method of delivery nor the potential interactivity of digital media will destroy the lure of the tube: internet sites like blackplanet.com will not overwhelm either local television news or BET. Whatever the future holds for the place of the Internet in our communications environment, almost no one disputes its importance.

In 1995, the National Telecommunications and Information Administration of the Department of Commerce (NTIA) issued its first report on the access of all Americans to advanced telecommunications services. *Falling Through the Net: A Survey of the 'Haves' and 'Have Nots' in Rural and Urban America* documented a disturbing disparity in access to computers and the Internet. In 1998, NTIA issued a report called *Falling Through the Net II: New Data on the Digital Divide*. The term “digital divide” has proved very useful in drawing attention to the ever-present fact of inequality in America and how that inequality is spilling over to our new digital age.

The comprehensive NTIA studies and the persistence of Larry Irving, the lead official at NTIA, generated a federal commitment to establish policies to close the gap that existed between rural and urban America, between

communities of color and white America, and between rich and poor. In the 90s, both the White House controlled by Democrats and the Congress controlled by Republicans recognized the importance of making certain that all Americans had access to advanced communications technology. Policy makers understood that in a digital age, a digital divide would mean a divide in economic opportunity, in educational opportunity, in health care, and in all aspects of the social and political life of the nation.

UNIVERSAL SERVICE

One result of this commitment was money earmarked for rural America and for schools and libraries in an updated commitment to universal service embodied in the 1996 Telecommunications Act. Section 254 of the Telecommunications Act of 1996 directed the Federal Communications Commission (FCC) and the states to establish mechanisms to ensure the delivery of affordable telecommunications services to all Americans.⁴⁰ For the first time all telecommunications providers were required to contribute to a Universal Service Fund. In March of 1996, a Federal-State Joint Board on Universal Service (Joint Board) was established to make recommendations on implementing the universal service provisions of the Telecom Act. The Joint Board is comprised of FCC Commissioners, State Utility Commissioners, and a consumer advocate representative. In 1999 the FCC appointed the Universal Service Administrative Corporation (USAC) as sole administrator. USAC oversees four universal service programs:

- **High-Cost.** This program supports telecommunications companies providing services in areas, such as remote and rural areas, where the cost of getting that service to customers is high.⁴¹
- **Lifeline/Link-Up.** This program provides discounts on initial telephone installation or activation fees (Link-Up) and monthly service (Lifeline) to people with low income.⁴²
- **Schools and Libraries.** This is most often referred to as the E-Rate program. The Schools and Libraries program subsidizes classrooms and libraries in using educational and informational resources available through the Internet.⁴³

- **Rural Health Care.** This program helps link health care providers and patients in rural areas to the advanced diagnostic and medical service available at urban medical centers.⁴⁴

The universal service program has been a tremendous success. The E-Rate program alone validates the value of the revamped universal service. According to the National Education Association, three percent of the nation's classrooms were connected to the Internet in 1996. Today, 93 percent of classrooms are connected.⁴⁵ The American Library Association reports that in 1996 28 percent of library systems offered public access to the Internet in at least one branch. Today, more than 95 percent of libraries are helping connect America to the Internet.⁴⁶ According to USAC, roughly 82 percent of public schools and 61 percent of public libraries receive E-Rate funds.⁴⁷ The E-Rate has helped change the way Americans learn at our schools and gather information at our public libraries, it has in many ways made the Internet a powerful force in our lives.

Universal service fund disbursements have grown from approximately \$4.4 billion in 2000 to \$6.5 billion in 2005.⁴⁸ Happily the FCC has taken steps to improve the availability of information about Lifeline and Link-Up.

Despite the increase in disbursements the universal service fund is under increasing pressure. The evident value of access to advanced telecommunications services made possible in part by the E-Rate and other universal service programs has increased the demand. But FCC policy, driven largely by market players with market concerns, has lagged behind. Even while the need for universal service support was increasing, the FCC put in motion a process that, with assistance from the courts, exempted cable and telephone (DSL) broadband providers and limited the universal service contribution of wireless and Internet-based phone services (voice over Internet Protocol-VOIP).⁴⁹

The increasing popularity of cell phone and VOIP service has cut into the revenue of the traditional wireline services which make the largest contribution to the universal service fund. There were approximately 192 million traditional lines in 2000, but only 177 million traditional lines by 2004. Wireless subscribers grew from 101 million in 2000 to 181 million in 2004, and

to over 205 million in 2005. And in the period between 2000 and 2005, VOIP subscribers grew from 150-thousand to 4.2 million.⁵⁰

While the FCC promulgated rules in June 2006 to increase contributions from wireless and VOIP telecommunications services, the exemption of broadband services may continue to spell trouble for the future of universal service. As FCC Commissioner Michael Copps observes, "the jury may still be out on whether [the June proceeding] actually puts enough additional funds into the universal service fund as DSL's non-participation takes out."⁵¹

And despite, or because of its success, the early opponents of universal service have not gone away. There have been steady calls for its elimination. Some of these calls have focused on claims of "waste, fraud, and abuse." Rep. Joe Barton (TX-R), chair of the House Energy and Commerce Committee, is an outspoken opponent of the E-Rate program. In 2005, he concluded, "I think that the E-Rate program is broken. And I am not sure that it can be fixed."⁵² He repeated his concerns on June 21, 2006. "In just one aspect of this program, the E-Rate program, we've held numerous hearings in this committee and our oversight subcommittee and detailed the waste, fraud and abuse of that particular part of the Universal Service Fund. That's only a \$2 billion program. The E-Rate program is probably the one program in Universal Service that's in most need of reform but it's not the only one."⁵³

Of the hundreds of beneficiaries of the E-Rate program, only a relative handful of problems have emerged and are being prosecuted. Federal government programs have long been subject to waste, fraud and abuse, since the time of Washington and Jefferson. Government operations such as Defense, Medicaid and the Peace Corps have all been subject to these problems. The thoughtful response is not to kill a valuable program but to find ways to limit waste, fraud and abuse through clear regulations, independent monitoring, and effective punishment of abusers. In the first years of operation, USAC had only one auditor to deal with roughly 35,000 applicants per year. "At the early stages, we didn't have all the pieces in place to do robust audits," said Mel Blackwell, vice president of external communications at USAC. Since 2004, USAC has hired more full-time auditors, investigators and lawyers, in addition to starting a

whistle-blower hotline. The FCC's Office of the Inspector General has also created an assistant general position and hired more auditors to monitor the program.⁵⁴ While all reasonable parties agree that there should be zero tolerance for abuse of the program, Barton exaggerates the extent of the current problem. And regarding libraries, the American Library Association reports that it is "not aware of any libraries that have been swept into the allegations" of waste, fraud and abuse.⁵⁵

In a related issue, in the fall of 2004, the FCC determined that the E-Rate program was subject to an arcane set of accounting rules known as the Anti-Deficiency Act.⁵⁶ The application of these rules disrupted E-Rate funding for nearly 6 months and resulted in the loss of millions of dollars in investments that would have been used to support schools and libraries. In the spring of 2005, Congress exempted the USF from the Anti-Deficiency Act temporarily. This exemption should be made permanent, and Senator Olympia Snow (R-ME) and Rep. Barbara Cubin (R-WY At-Large) have sponsored legislation (S.241 and H.R.2533) to do just that.⁵⁷

SUPPORT FOR COMMUNITY TECHNOLOGY CENTERS

The bi-partisan support for Community Technology Centers has evaporated despite President Bush's No Child Left Behind Initiative, and a recognition by the Bush administration that community technology centers were vital in providing "disadvantaged residents of economically distressed urban and rural communities access to information technology and related training." The Community Technology Center Program in the U.S. Department of Education's Office of Vocational and Adult Education was terminated as of fiscal year 2006.⁵⁸

INFORMATION AVOIDANCE

We still do not know in 2006 where advanced communications technologies are being deployed and who has access to them. As was reported in 2002, the FCC is required by Section 706 of the Telecom Act to monitor the deployment of advanced telecommunications services and to report to Congress on whether deployment is occurring in a reasonable and timely manner. The FCC continues to put a smiley face on how telecommunications services are deployed while it fails to gather the information it

needs to conduct an adequate study. The FCC asks the industry to report on whether a now outdated definition of advanced telecommunications services (200 kilobits per second in one direction) is being provided to at least one subscriber in a zip code. This is not only useless information it is misleading.⁵⁹

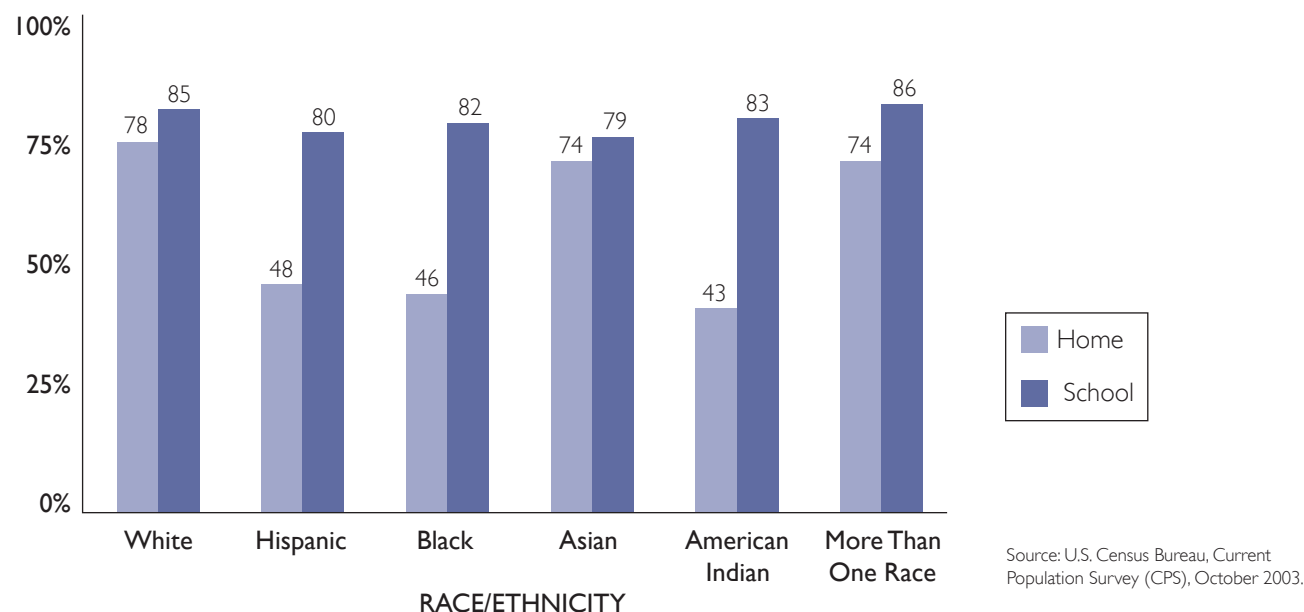
Refusing to determine the state of advanced telecommunications deployment goes beyond the offices of the FCC. By 2002, NTIA changed the title of its reports from *Falling Through the Net* to *A Nation Online*.⁶⁰ The new report focused on the fact that "more than half of all Americans [are] using computers and the Internet" at least somewhere. The term digital divide was banished, but the problem did not go away.

Robert W. Fairlie, Associate Professor and Director of Masters Program in Applied Economics and Finance at the University of California, Santa Cruz, analyzed data from the Department of Commerce's U.S. Census Bureau, taken from the Census Bureau's October 2003 Current Population Survey (CPS) on behalf of the Leadership Conference on Civil Rights Education Fund. According to Fairlie, the poor, people with disabilities, Latinos, Native Americans and African Americans continue to lack an equal opportunity to take part in the information age.⁶¹ We remain two nations, one online—the other still falling through the net.

While computer and Internet use is expanding rapidly across all groups in the United States, large disparities exist between white Americans and ethnic and racial groups, and persons with disabilities. Latinos, Blacks and Native Americans are substantially less likely to have a computer at home than are white, non-Latinos. In many instances, these disparities do not go away even when factoring in income and education. More than 70 percent of whites have access to a home computer. In contrast, access for Latinos and African Americans is only about 40 percent, while 50 percent of American Indians have access to a home computer. It is also disturbing to note that only 40 percent of the blind who are not in the labor force have access to the Internet.

Fairlie's studies have been confirmed by a report released in September 2006 by the Department of Education.⁶² While the E-Rate has helped close the digital divide at school, the lack of computer in minority households poses a significant barrier.

PERCENTAGE OF CHILDREN IN NURSERY SCHOOL AND STUDENTS IN GRADES K–12
USING COMPUTERS AT HOME AND AT SCHOOL, BY RACE/ETHNICITY, 2003



And despite the incredible opportunities new technologies might provide to the disabled community, the American Association of People with Disabilities finds that the digital age is beginning to look far too much like the old age of barriers and exclusion. According to Karen Peltz Strauss, Legal Advisor, Communications Service for the Deaf, “Thirty-five percent of disabled adults report that not being able to use an Information and Communications Technology–assistive device would mean they could not take care of themselves.”⁶³

The digital divide is real and will not vanish until the nation addresses the other problems of unequal access to educational and economic opportunities. And those key structural problems will not be addressed until the nation reforms its communications policies to ensure that all Americans can participate in our national conversation.

CONCLUSIONS & RECOMMENDATIONS

In the United States equality of opportunity requires equal access to the communications technologies now central to education, economic participation and civic engagement. We do not have equal access. Moreover, the current administration refuses to even devote the resources to determining where the gaps might exist. Many of the recommendations made by the author in 2002 are still apt:

- Either the FCC or a combination of federal agencies need to conduct a Croson/Adarand analysis to determine whether there is a basis to employ race-based measures to advance equal employment opportunity regulations and efforts to increase minority ownership in the communications industry.
- The FCC should review the impact of relaxed ownership rules in broadcasting on both minority ownership opportunities and service to minority communities.
- Efforts should increase to improve the access to telecommunications services on Indian land.
- The E-Rate program should be expanded to include support for Community Technology Centers.
- The FCC should improve the way it gathers information about the access of all Americans to advanced telecommunications services.

Democracy, markets, legal systems, hospitals and schools all require the tools of communication to operate effectively. When the rules of society allow some people access to communications resources but limit the access of others, the core American goals of equality and diversity suffer.

ENDNOTES

- 1 Mark Lloyd is a Senior Fellow at the Center for American Progress where he analyzes policy and conducts research on the relationship between communications and strong democratic communities. He is also an Affiliate Professor of Public Policy at Georgetown University. In 1997 he co-founded and served as the executive director of the Civil Rights Forum on Communications Policy, and from 2002 until 2004, he was a Martin Luther King, Jr. Visiting Scholar at MIT. An award winning journalist, Lloyd produced and reported for radio and television operations including NBC and CNN. He also worked as a communications lawyer at the firm of Dow, Lohnes & Albertson and served as the General Counsel of the Benton Foundation. He received his undergraduate degree from the University of Michigan and his law degree from the Georgetown University Law Center.
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CHAPTER 7

New Directions for U.S. Housing Policy: The Unmet Potential of Two Large Housing Programs

By Philip Tegeler



If the United States had a truly open housing market, it would supply housing to people at all levels of the economic spectrum in every community. But the housing market has been so distorted by government intervention at every level that it fails to supply a decent and affordable housing for many poor and working class families (NLIHC 2005)—a burden that falls most heavily on poor people of color (Pelletiere 2005). Government intervention has also created deeply segregated housing markets, which exacerbate these disparities.

The role of government in distorting the housing market and promoting segregation has included decades-old government decisions to eliminate integrated neighborhoods through urban renewal and replace them with racially and geographically isolated public housing developments; the delegation of land use and zoning powers from states to local governments and assignment of property tax based school revenue systems to these same exclusionary suburbs; the development of the interstate highway system in the 1950s and 60s, the continuing subsidization of exurban sprawl by the of the mortgage tax deduction (a modern cousin of the white flight promoted by the discriminatory government mortgage programs of the 1950s); and so on (Sheryll Cashin provides a powerful overview of this historical research in her recent book, *The Failures of Integration: How Race and Class are Undermining the American Dream*).

The geographic distribution of assisted housing, even today, has tended to follow the path of least resistance—to areas where affordable housing can feasibly be built within government and market constraints—rather than to areas of high employment, safe and healthy streets, and high quality educational programs. But this passivity is not inevitable—it is possible to envision a national housing policy that is more proactive and choice-driven. This essay will focus on the potential of our two largest low income housing programs—the Section 8 Housing Choice Voucher Program and the Low Income Housing Tax Credit (LIHTC) Program—to work together to promote new access to opportunity.

THE SECTION 8 PROGRAM AND ACCESS TO OPPORTUNITY

Virtually alone among federal housing programs, the Section 8 program has provided an option to families who

choose to move from higher-poverty segregated neighborhoods to less segregated areas. Unfortunately, this benefit of the voucher program is not automatic, and is highly dependent on program features that include how higher-rent areas are treated, how public housing agencies (PHAs) receive their funding, how PHAs interact with families and with each other when a voucher is used across jurisdictional lines (“portability”), and the extent to which families receive housing search assistance (Sard 2005; Tegeler, Hanley & Liben 1995). Each of these program features is subject to competing political, administrative and policy demands, and since the voucher program has no significant constituency outside of the housing industry, housing mobility becomes simply one goal among many (Khadduri 2005).

Although HUD and Congress took some promising steps during the Clinton administration with a series of housing mobility policies designed to help families move to lower poverty neighborhoods, these policy interventions only lasted a few years, and we are currently in the midst of a policy retrenchment, which has restricted families’ geographic choices in the voucher program, and is likely now leading to greater residential concentration among poor Black and Latino participants in the program.

The recent assault on housing mobility in the voucher program began in 2002, with the elimination (by HUD and Congress) of federal funding for regional housing mobility programs, and the consequent shutdown of dozens of such programs around the country. Then, in 2003, HUD began affirmatively restricting housing choice by cutting back on the use of Section 8 “exception payment standards,” which permit families to move to lower-poverty areas that have higher rents. In 2004, the administration’s original flexible voucher proposal (successfully resisted by Congress) would also have discouraged housing mobility by changing each agency’s Section 8 allocation to a single block-grant system, rather than paying each agency for all the vouchers that they are able to use. In the same way, HUD’s decision in June of 2004 to retroactively cut voucher funding in PIH Notice 2004-7 increased incentives for PHAs to adopt policies that discourage or prohibit families from moving to higher-rent areas—including across the board reductions in payment standards that restrict the choice of available neighborhoods. HUD further restricted mobility in a guidance issued in July of 2004 that would permit PHAs to restrict voucher holders’ portability rights, where PHAs make a showing that they would suffer financial harm.*

* HUD retracted this ambiguous and unlawful guidance in 2006, but only after much damage had been done. Little has been done to reinstate full portability rights for participating families.

It is time to undo this systematic dismantling of the Section 8 program, and to reinstate two of the program's original goals of housing choice and deconcentration of poverty. To accomplish this, the new Congress and HUD could take the following steps:

- Elimination of financial penalties imposed on PHAs when families move from one jurisdiction to another. Currently, a “sending” PHA has to pay a premium to a neighboring PHA for higher rents in the receiving town, with no possibility of reimbursement from HUD. A proposal in the pending 2007 Appropriations Bill would eliminate this penalty by allowing PHAs to seek reimbursement of excess “portability” costs from a HUD Central Reserve Fund.
- Reauthorization of the system in effect prior to 2000 that permitted the payment of somewhat higher Section 8 rents in more expensive, lower poverty areas. This system of “Exception Payment Standards” is still part of the Section 8 regulations, but, as noted above, its use was suspended unlawfully by HUD in 2003.
- Statutory changes to eliminate the byzantine administrative system of “portability” and replace it with a simpler system that allows families to move from jurisdiction to jurisdiction without bureaucratic complications. One leading proposal is to require receiving PHAs to simply “absorb” incoming families into their program, so long as spaces remain for families on the PHA waitlist.
- Reauthorization of an improved version of the Regional Opportunity Counselling Program, a multi-city program that helped families move to lower poverty neighborhoods (defunded in the first two years of the Bush administration).
- Experimentation with new approaches to cooperation among PHAs operating similar voucher programs in the same metropolitan areas. The Center on Budget and Policy Priorities has proposed a system of financial incentives for PHAs that take steps such as sharing waitlists, adopting common application forms, etc.
- Passage of a new national housing mobility program modeled on the successful Gautreaux Assisted Housing Mobility Program in Chicago. An estimated 50,000 new vouchers per year, dedicated to deconcentrating poverty

in 10–15 of America's most severely segregated urban neighborhoods, could have a substantial impact in ameliorating the impacts of concentrated poverty over a 10-year period.

The Poverty & Race Research Action Council (PRRAC), recently published a review of the best practices and most promising administrative approaches to promoting housing mobility in the Section 8 voucher program, in our report of the Third National Conference on Housing Mobility: *Keeping the Promise: Preserving and Enhancing Housing Mobility in the Section 8 Housing Choice Voucher Program*. The main lesson of this report is that housing mobility is feasible, we know how to make it work, and, given the assistance, many families in high poverty neighborhoods will make a choice to move to safer and higher opportunity areas.

THE LOW INCOME HOUSING TAX CREDIT PROGRAM

The Section 8 program alone is not sufficient to provide opportunities for poor families outside of segregated, high poverty metropolitan neighborhoods. A housing production strategy is also needed to provide the units for families in areas of opportunity.

The Federal Low Income Housing Tax Credit (LIHTC) Program, as the nation's largest low income housing production program, would seem to be the obvious answer to this problem. But the LIHTC program has failed in two major ways to increase racial and economic integration. First, the program has replicated some of the economic and racial geographic concentration of the old public housing program; and second, there is a significant question about whether those units that are being built outside higher-poverty neighborhoods are being managed in a way that promotes integration and choice.

The LIHTC program has operated with little civil rights oversight since its inception in 1986. The mandate of the Fair Housing Act—that all federal agencies take steps affirmatively to further fair housing—while binding on the Department of Treasury, is not directly incorporated in the LIHTC statute, and the Treasury has provided no fair housing guidance to the state housing finance agencies that administer the program. The program's fair housing responsibilities are alluded to only once in the Internal Rev-

enue Service (IRS) regulations, in a broad incorporation by reference to general housing regulations governing HUD-assisted housing. There are no specific site selection requirements in the Department of Treasury's LIHTC regulations, and decisions about which projects to fund are entirely delegated to state housing finance agencies (HFAs).

The Department of Treasury's failure to explicitly to require compliance with fair housing policy is accompanied by specific competing incentives in the LIHTC statute that promote a low income housing development in certain poor neighborhoods as a kind of community development incentive. The statute also directs states to give priority to projects that serve "the lowest income tenants... for the longest periods," and further encourages developers to fill these projects with the poorest of the poor. The LIHTC statute fails to give direction as to how much priority to assign these two goals, or how to reconcile them with the compelling goals of poverty deconcentration and racial integration mandated by the Fair Housing Act.

The Poverty & Race Research Action Council, along with the National Fair Housing Alliance, recently sponsored research on the degree to which LIHTC family housing was being sited to give families access to low poverty, integrated communities. The report, prepared by Abt Associates, *Are States Using the Low Income Tax Credit to Enable Families with Children to Live in Low Poverty and Racially Integrated Neighborhoods?* (Abt Associates 2006), showed a consistent trend throughout the country to locate LIHTC family housing in neighborhoods with a greater-than-average percentage of "minority" residents. In addition, only 22 percent of metropolitan LIHTC units are large enough to be occupied by families and are located in low poverty census tracts.

Because LIHTC siting policy is under the control of state housing finance agencies, the Abt report devotes considerable attention to state-by-state variations in the location of LIHTC family housing. States are ranked by the percentage of LIHTC family units found in low poverty locations. Because states vary in the overall extent of poverty in their large metropolitan areas, the paper also ranks states by comparing the proportion of LIHTC units in low poverty locations with the overall proportion of rental housing in such locations. States vary a great deal by either measure, suggesting that some states are focusing much more than others on the policy goal of increasing opportunities for families with

children to live in low poverty neighborhoods. States that appear to have made positive efforts are Utah, New Hampshire, New York, Wisconsin, Delaware, Nebraska, and Colorado. In contrast, Illinois, South Carolina, Kentucky, Pennsylvania, Connecticut, Massachusetts, Idaho, Arizona, and the District of Columbia place only small fractions of their LIHTC family housing in census tracts in which fewer than 10 percent of all people are poor.

In another report, *Building Opportunity: Civil Rights Best Practices in the Low Income Housing Tax Credit Program*, PRRAC and the Lawyers' Committee for Civil Rights Under Law undertook a 50-state survey of state "Qualified Allocation Plans" governing annual allocations of the LIHTC program by state housing finance agencies. Again, the survey found wide variations in practices, and—despite positive language in some of the state plans—an overall lack of priority given to civil rights and fair housing concerns in the program.

The overall message of these recent reports is that the federal agencies charged with administering the LIHTC program can no longer continue their "hands-off" approach to civil rights oversight of the program. The Department of the Treasury and the Internal Revenue Service have a direct responsibility under the Fair Housing Act, 42 U.S.C. §3608, and Executive Order 12892, to provide guidance to state grantees on fair housing performance. This guidance must include, at a minimum:

- Collection of racial and economic data: The most glaring omission in IRS oversight of the LIHTC program is the absence of any requirement for the collection and reporting of meaningful racial and economic data on project residents and applicants. This type of data collection activity is routine for HUD projects, but has generally not been required of LIHTC development
- Affirmative marketing and access to units in low poverty areas is essential to open up opportunities for low income families of color in developments located in higher opportunity areas.
- The IRS should require and encourage project siting that avoids perpetuation of segregation and furthers fair housing goals. Some examples of steps to encourage project siting and design to promote integration in state QAPs are set out in PRRAC's Best Practices survey.

- The IRS should prohibit some of the most exclusionary techniques used by the state housing finance agencies to limit development of LIHTC units in high-opportunity areas. For example, in some states, the approval of the municipality's chief elected official is listed as threshold requirement or as one of the bases upon which projects will be evaluated—which virtually guarantees rejection of developments that are not wanted by officials in a particular town.
- The LIHTC statute should be amended to eliminate the disproportionate emphasis on developments located in Qualified Census Tracts (QCTs); instead, priority should be given to family developments located in neighborhoods with low crime rates and high functioning and well resourced elementary and secondary schools.
- Using Section 8 and LIHTC together: One of the best ways to promote economic and racial integration in the voucher and LIHTC programs is to use the programs together, building on the LIHTC statutory requirement barring discrimination against Section 8 voucher holders in LIHTC developments. This could be accomplished by a simple set aside of family units for voucher holders in each LIHTC development, or by affirmative marketing efforts targeted to inner city voucher programs and regional housing mobility programs, to ensure that low income city residents are encouraged to take advantage of and actually benefit from developments in lower-poverty areas.

CONCLUSION: NO MORE MISSED OPPORTUNITIES

All government housing programs operate in the context of housing markets that tend to sort people by race and class, a tendency that is further distorted by government interventions like delegation of zoning authority to local jurisdictions, drawing of school district boundaries, siting of public housing, and subsidization of sprawl to distort property values on the metropolitan periphery. If HUD and Congress are serious about promoting fair housing, they should recognize these market and regulatory distortions, and compensate not just with new fair housing enforcement programs, but with programs that actually promote racially and economically integrated housing.

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