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

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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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART ONE

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

CHAPTER 1

The Erosion of Rights

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

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

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

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

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

DEPARTMENT OF JUSTICE: CIVIL RIGHTS DIVISION

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

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

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

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

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

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

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

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

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

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

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

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

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

RESHAPING THE COURTS

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

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

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

The question is not one of judicial restraint versus judicial activism. Indeed, the Rehnquist Court in recent years has exceeded the activism of its predecessors by showing a willingness to overturn acts of Congress designed to benefit poor or minority citizens. Nor are the Bush nominees to the Court people who fit the mold of thoughtful conservatives such as John Marshall Harlan, Felix Frankfuter 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'etre, has been to prosecute hate crimes[1] and official misconduct[2]—crimes that disproportionately victimize racial minorities. There are historical reasons for involving the federal government in such cases. Until recently, local prosecutors, especially in the South, often lacked the

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

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

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

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

A SHIFT IN ENFORCEMENT PRIORITIES

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

PUBLIC RELATIONS

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

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

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

RESOURCES

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

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

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

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

OUTPUT

Staff Sentiment

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

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

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

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

Statistics

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

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

The following illustrates how the numbers have differed:

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

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

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

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

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

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

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

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

Given the Section's change in emphasis, the increased number of trafficking prosecutions during the Bush years—however inexact and marginally useful the statistics—is what was or should have been expected. The Section now has more lawyers than it did before, and given that the numbers in the traditional enforcement areas appear to have remained the same, it stands to reason that the numbers show the added manpower provided by the new lawyers to have been collectively applied to trafficking cases. Moreover, it is unsurprising that the increase is attributable largely to sex trafficking prosecutions. Influential political conservatives favor prioritizing prosecution of sex-related offenses (take, for instance, the Department's recent push to prosecute obscenity), and some believe that the Department should employ the new sex trafficking statute to prosecute 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 investigating and prosecuting these crimes from the Section to U.S. Attorneys' Offices, it might run the risk of gradually transforming the Section into a roving, nationwide vice squad. That was not what the Department intended when it tapped the Section to take the lead on enforcing the TVPA, and it is not consistent with the Section's traditional, still-vital mission.

CONCLUSION

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

ENDNOTES

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

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

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

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

5 18 U.S.C. § 2421 et seq.

6 8 U.S.C. §§ 1324–28.

7 18 U.S.C. §§ 1589–90.

8 18 U.S.C. § 1591.

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

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

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

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

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

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

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

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

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

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

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

20 Compare *United States Attorneys' Annual Statistical Reports* for FY 2002, 2003, 2004 and 2005 (available at http://www.usdoj.gov/usao/reading_room/foiamanuals.html) and *Transactional Records Access Clearinghouse, Civil Rights Enforcement by Bush Administration Lags, Nov. 21, 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 1964[1] prohibits discrimination in employment based upon race, sex, religion and national origin. With the enactment of the Equal Employment Opportunity Act of 1972 (1972 Amendments),[2] Title VII's coverage was extended to cover public as well as private sector employees. The 1972 Amendments designated the DOJ as the federal agency to enforce Title VII against public sector employers, while the Equal Employment Opportunity Commission (EEOC) was given responsibility for enforcement in the private sector. Within the DOJ, the Employment Litigation Section (ELS) of the Civil Rights Division is the office delegated day-to-day enforcement responsibility of Title VII against state and local government employers.

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

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

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

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

THEORIES OF LIABILITY FOR EMPLOYMENT DISCRIMINATION

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

DISPARATE TREATMENT

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

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

DISPARATE IMPACT

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

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

THE STATUTORY SCHEME

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

SECTION 706 OF TITLE VII

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

SECTION 707 OF TITLE VII

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS & RECOMMENDATIONS

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

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

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

ENDNOTES

1 42 U.S.C. § 2000e *et seq*.

2 P.L. 92-261.

3 42 U.S.C. §§ 2000e-5 & 6.

4 David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?* 42 Vand. L. Rev. 1121, 1161 (1989).

5 http://www.usdoj.gov/crt/emp/papers.html, last visited June 28, 2006.

6 Three of these cases are interventions in ongoing litigation filed by three Jane Does against the District of Columbia. Each case raises an identical issue—the lawfulness of a pregnancy policy. See *Jane Doe and the United States v. District of Columbia*, C.A. 02-2338(RMU) (D.D.C. filed Aug. 5, 2004); *Jane Doe II and the United States v. District of Columbia*, C.A. 02-2339(RMU) (D.D.C. filed Aug. 5, 2004); and *Jane Doe III and the United States v. District of Columbia*, C.A. 02-2340(RMU) (D.D.C filed Aug. 5, 2004.) . These cases, because they raise a single legal issue, should be counted as one and not three cases.

7 *United States v. Board of Trustees of Southern Illinois University*, C.A. 06-4037-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

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INTRODUCTION

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

BACKGROUND

ENFORCEMENT RESPONSIBILITIES OF THE VOTING SECTION

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

First, a critical part of the Voting Section's work involves Section 5 of the VRA. Section 5 requires that jurisdictions covered under the special provisions of Section 4 (nine states in their entirety and portions of seven other states) prove to the Department of Justice or the District Court for the District of Columbia that any and all new voting procedures will not have either the purpose or the effect of denying or abridging the right to vote on account of race or membership in a language minority group. Covered jurisdictions may not implement new voting procedures unless and until such federal "preclearance" is obtained. All voting changes submitted to the Department of Justice are reviewed by the Voting Section, and if the Section finds a violation of Section 5, it forwards a recommendation to the Assistant Attorney General for Civil Rights that a written objection be issued prohibiting the jurisdiction from proceeding with implementation of the submitted change. Similarly, if a covered jurisdiction seeks preclearance by filing a Section 5 declaratory judgment action before the District Court for the District of Columbia, the Attorney General is the sole statutory defendant and the litigation is handled by the Voting Section. The Voting Section plays a special and critical role in enforcing Section 5 since minority voters do not have any statutory role in the Section 5 administrative or judicial processes, though the Voting Section actively solicits comments from minority voters when conducting its administrative reviews and minority voters often are able to intervene in Section 5 declaratory judgment lawsuits.

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

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

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

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

STRUCTURE OF THE CIVIL RIGHTS DIVISION'S VOTING SECTION

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

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

From the early 1980s a single deputy chief has been designated to supervise the crucial Section 5 administrative review process, although as of January 2007 that position had been unfilled for a number of months. The Section's staff of career civil rights analysts is dedicated to reviewing Section 5 administrative submissions; the Section's attorneys also review the more complex administrative submissions as required. It has been a longstanding practice to assign several career attorneys to serve as full-time "attorney-reviewers" to assist the Section 5 deputy in supervising the review of Section 5 administrative submissions by attorneys and analysts. Approximately 40 percent of the Section's staff has been allocated to Section 5 responsibilities.

SUMMARY OF VOTING SECTION ENFORCEMENT

SECTION 5

Background Information

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

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

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

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

Section 5 Nondiscrimination Standards

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

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

Historically, both the courts and the Justice Department have applied the retrogression standard to those changes that potentially might dilute minority strength by focusing on the effect of the changes on the ability of minority voters to elect candidates of their choice. However, in 2003 the Supreme Court substantially reinterpreted this approach in its controversial five-to-four decision in *Georgia v. Ashcroft*. The Court held that while the retrogression analysis would continue, in part, to include consideration of the impact of a change on the ability of minority voters to elect candidates of their choice, it also must include consideration of the impact of the change on the opportunity of minority voters to influence (but not decide) elections, and the impact of the change on the ability of representatives chosen by minority voters to exert leadership, influence, and power once they enter into the legislative body to which they were elected.[5] This revision of the retrogression standard raised substantial concern that it would allow discriminatory changes to be precleared and, furthermore, that it did not provide a workable basis on which to analyze the effect of submitted voting changes. As a result, in 2006 Congress amended Section 5 (as part of a Section 5 reauthorization, discussed below) to return the retrogression standard to the previous "ability to elect" focus.

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

Prior to 1997, the Justice Department also reviewed voting changes to determine whether they complied with other provisions of the VRA, including Section 2 and Sections 4(f)(4) and 203. However, in that year the Supreme Court held, this time by a 7–2 vote, that such reviews are not permitted by Section 5.[9] This reinterpretation of Section 5 was not altered by Congress in the 2006 legislation.

ENFORCEMENT OF SECTION 5 BY THE BUSH ADMINISTRATION

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

The Low Number of Section 5 Objections

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

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 precleared[26] 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 Americans[37] (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 citizens[40] (see Table 2).

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

These patterns clearly indicate that targeting Section 2 vote dilution violations has not been a priority for this administration. It is equally clear that Section 2 cases involving African American and American Indian citizens are not a priority for the current administration. Whereas eight of the 22 Section 2 cases filed in the last six years of the Clinton administration were on behalf of African American citizens, and six were on behalf of American Indians, only two Section 2 cases of any type have been filed by this administration on behalf of African American citizens and none has been filed on behalf of American Indian citizens.[42]

There are strong reasons for the Voting Section to continue to target, investigate and prosecute Section 2 violations, especially vote dilution violations. First, solely as a policy matter, the Department of Justice has been charged by Congress to enforce Section 2. While the Department has legitimate discretion to prioritize its efforts, it abuses that discretion if it chooses to disregard enforcement of major civil rights laws entrusted to it.

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

Furthermore, there is no reason to be confident that jurisdictions that were in compliance with Section 2 in the past will necessarily stay that way. Fact patterns in jurisdictions often change over time, sometimes for the better, but in other cases giving rise to violations that were not previously evident. Demographic patterns obviously can change over time, in which case the first *Gingles* precondition—requiring proof that a majority-minority district can be drawn—may cease to be a barrier to establishing a Section 2 claim.[43] Moreover, increases in minority population and/or minority candidates unfortunately are often accompanied by increased racially polarized voting by members of the white community who feel threatened by such changes; this also would reinforce a Section 2 claim. For example, the Department's 2005 *Osceola County* case involved a jurisdiction in which the Hispanic population increased from twelve percent in 1990 to 29 percent in 2000; the lawsuit's claim of intentional discrimination was based upon the County's reversion from single-member districts to at-large elections for its county commission.

In other cases, minority groups that historically had only limited involvement in the electoral process may run into the barrier of racially polarized voting when they attempt to increase their participation. This often is the case with American Indians. Indeed, the Voting Section brought a series of Section 2 vote dilution cases involving American Indians in the late 1990s, including one which led to a major victory in Blaine County, Montana.[45] More recently, the ACLU has brought a series of Section 2 vote dilution cases on behalf of Indian voters, most recently against Fremont County, Wyoming.[46] Despite the very successful precedent of the *Blaine County* case, the Voting Section's efforts to investigate the Fremont County matter were rejected by political appointees.[47]

LANGUAGE MINORITY ENFORCEMENT

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

The current administration has brought a total of 20 language minority cases, all but one of which followed the publication of the July 25, 2002 Section 203 language determinations.[49] All 20 cases involved Spanish-language claims; two cases included additional claims involving Asian-language groups.[50] Sixteen of these twenty cases raised claims under Section 203, 13 of which involved language groups that had been covered under Section 203 since at least 1992.[51]

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

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 failure to implement the required statewide voter registration databases; the principal question appears to be how the Court will fashion remedies and how vigorous the Department will be in pursuing such relief.

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

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

Division filed these briefs without an invitation from the Court, it can hardly be said that the Division had a compelling argument to interject into these cases: the Sixth Circuit utterly rejected DOJ's central argument that "a privately enforceable right may be conferred only with text that is 'clear and unambiguous.' HAVA comes nowhere near that high mark." (United States' Brief at 19), finding that "[t]he rights-creating language of HAVA § 302(a)(2) is unambiguous." *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004)[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 Divison's voting rights decisions were driven by political considerations. Historically, the Department has avoided taking positions in politically charged voting matters so close to an election to avoid this message being sent.

Uniformed and Overseas Citizens Absentee Voting Act

The current administration has brought a total of seven cases under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)—two each in 2002, 2004 and three in 2006.[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" retrogresser. But, in the over six years the Justice Department enforced the "purpose to retrogress" requirement no such incompetent retrogresser was identified.

8 *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987); *City of Richmond v. United States, supra*.

9 *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997).

10 The objection data were obtained from data tables maintained by the Justice Department.

11 The objection figure for 1986–90 includes an objection in 1986 to 525 annexations by a single city, included in one submission.

12 Peyton McCrary, Christopher Seaman, & Richard Valelly, The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act, 11 MICH. J. RaCE & L. 275, 297 (2006).

13 Mark A. Posner, The Real Story Behind the Justice Department's Implementation of Section 5 of theVRA: 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/texasDOJmemo.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).