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Testimony of

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before the

House Judiciary Committee

Oversight of the Civil Rights Division

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Good Morning. My name is Wade Henderson and I am the President and CEO of the Leadership Conference on Civil Rights. The Leadership Conference is the nation's premier civil and human rights coalition, and has coordinated the national legislative campaigns on behalf of every major civil rights law since 1957, including the work to pass the historic 1957 Civil Rights Act which created the Civil Rights Division 50 years ago this fall. The Leadership Conference's almost 200 member organizations represent persons of color, women, children, organized labor, individuals with disabilities, older Americans, major religious groups, gays and lesbians and civil liberties and human rights groups. It's a privilege to represent the civil rights community in addressing the Committee today.

Revelations indicating that the U.S. Department of Justice may have fired eight U.S. U.S. Attorneys to further a political agenda[1] were surprising to many; to those of us who have been watching the Civil Rights Division, they were not. Over the last six years, we have seen politics trump substance and alter the prosecution of our nation's civil rights laws in many parts of the Division. We have seen career civil rights division employees – section chiefs, deputy chiefs, and line lawyers -- forced out of their jobs in order to drive political agendas.[2] We have seen whole categories of cases not being brought, and the bar made unreachably high for bringing suit

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[1] Lipton, Eric and David Johnston. "Gonzales's Critics See Lasting, Improper Ties to White House." The New York Times. 15 March 2007. <http://www.nytimes.com/2007/03/15/washington/15justice.html>

Eggen, Dan and John Solomon. "Firings Had Genesis in White House: Ex-Counsel Miers First Suggested Dismissing Prosecutors 2 Years Ago, Documents Show." The Washington Post. 13 March 2007: A01.

Johnston, David. "Justice Dept. Names New Prosecutors, Forcing Some Out." The New York Times. 17 January 2007. <http://www.nytimes.com/2007/01/17/washington/17justice.html?ex=1174536000&en=585b767248eb6b75&ei=5070>

[2] Savage, Charlie. "Civil Rights Hiring Shifted in Bush Era: Conservative leanings stressed." Boston Globe. 23 July 2006.

in other cases. We have seen some outright overruling of career prosecutors for political reasons,[3] and also many cases being "slow walked," to death.

Recently, the Leadership Conference released a report entitled "The Bush Administration Takes Aim: Civil Rights Under Attack," which catalogued many examples of the Bush Administration undermining civil rights and labor enforcement. A copy of that report is attached.

And the problem continues.

This year, to commemorate the 50th anniversary of the creation of the Civil Rights Division, the Leadership Conference on Civil Rights Education Fund plans to issue a comprehensive report on the work of the Division over the past ten years. This report is being developed in conjunction with many of our member organizations, including the Lawyers' Committee for Civil Rights Under Law, the NAACP Legal Defense and Educational Fund, People for the American Way, Mexican American Legal Defense and Educational Fund, Asian American Justice Center, NAACP, National Partnership for Women and Families, National Fair Housing Alliance, American Association of Persons with Disabilities, National Disability Rights Network, American Civil Liberties Union, Anti-Defamation League, National Council of La Raza and many others. The following is a brief description of some of the report's preliminary findings.

In general, the concerns that we have with the enforcement within the Civil Rights Division fall into three broad categories: (1) a significant drop off in the number of cases brought overall; (2) a shifting of priorities away from traditional enforcement areas, where the

[3] Eggen, Dan. "Criticism of Voting Law Was Overruled: Justice Dept. Backed Georgia Measure Despite Fears of Discrimination." The Washington Post. 17 November 2005: A01; Eggen, Dan. "Justice Staff Saw Texas Districting As Illegal: Voting Rights Finding On Map Pushed by DeLay Was Overruled." The Washington Post. 2 December 2005: A01.

Division has long played a unique and significant role, and (3) politicization of personnel decisions and substantive decision-making within the Division.

Reduced Level of Enforcement

Over the last six years, the Civil Rights Division has brought fewer cases across the board. In the area of employment, since January 20, 2001, the Bush Administration has filed just 35 Title VII cases, or an average of approximately six cases per year. This number includes five cases in which the DOJ intervened in ongoing litigation and two cases initiated by the U.S. Attorney's Office for the Southern District of New York (using its own resources). By comparison, the Clinton Administration filed 34 cases in its first two years in office. By the end of its term in office, the Clinton Administration had filed 92 complaints of employment discrimination or more than eleven cases per year.

Similar trends can be seen in the work of the Housing and Civil Enforcement Section. Since 2001, the number of cases the Section has filed overall has fallen precipitously from 53 in 2001 to 31 in 2006. One major drop off in case handling has been with cases involving allegations of race discrimination. Since 2001, the number of race cases the Section has filed has fallen by 60 percent (from 20 to 8). There has also been a precipitous decline in the number of testing cases filed in the past four years especially.

Shifting Priorities

On the issue of priorities, the Employment Litigation Section has filed few cases on behalf of African Americans in recent years. In fact, the Section has directed a portion of its precious resources to "reverse discrimination" cases on behalf of white individuals. In other cases, the Section abandoned well-established government positions. In two recent Supreme Court cases, the Solicitor General refused to defend the longstanding legal positions of the Equal

Employment Opportunity Commission, opting instead for a more restrictive reading of Title VII. In these cases, the Employment Section either failed to advocate for the EEOC's position or was ineffective in attempting to direct policy toward aggressive enforcement.

In 2003, DOJ announced that it would no longer file disparate impact cases involving housing discrimination (HUD HUB Directors' meeting Rhode Island 2003). DOJ's decision was a sharp break from DOJ's decades-long, bipartisan policy to aggressively litigate these cases.

Disparate impact cases are crucial in the fight against housing discrimination. Many rental, sales, insurance, and related policies are not discriminatory on their face, but have a disparate impact on members of protected classes. Among those that are more subtly discriminatory, some have a discriminatory *intent* and others have a discriminatory *impact.* Even though there may not be any intent in the policy, it can have just as detrimental an effect on individuals and families trying to find housing. Examples of disparate impact include: (1) a limit on the number of persons per bedroom to one, which has a disparate impact against families with children, and (2) a minimum loan or insurance amount, which has a disparate impact against properties in minority neighborhoods. The federal government is often the only entity with the capacity to investigate and litigate such fair housing complaints.

The Voting Section did not file any cases on behalf of African American voters during a five-year period between 2001 and 2006 and no cases have been brought on behalf of Native American voters for the entire administration. In addition, during the same five-year period, the Department only filed one case alleging minority vote dilution in violation of Section 2 of the Act. Section 2 vote dilution cases are particularly important because the end result – an election system that enables minority voters to have an equal opportunity to elect its candidates of choice – has a significant positive impact on minority voters.

Recently, the Civil Rights Division has come under intense scrutiny from civil rights organizations and community leaders regarding cases that have been filed that appear to extend beyond the Division's historical mandate. Perhaps the most scrutinized of these cases was the Voting Section's recent litigation on behalf of white voters in Noxubee, Mississippi. This case recently went to trial and a decision is pending. However, the Division must deal with and respond to growing distrust among minority communities who feel increasingly abandoned and marginalized by the Division's litigation choices and priorities.

Furthermore, the Department has gone out of its way to take legal positions that have restricted civil rights. For example, the Division filed an *amicus curiae* brief in a 2004 Michigan case involving provisional ballots where the government argued that the Help America Vote Act permitted states to reject provisional ballots solely on the basis that the voter did not cast the ballot in the proper precinct.

In the employment context, the Division unsuccessfully sought to dismiss a case in the middle of litigation, which would have permitted the employer to use a discriminatory and invalid selection test.[4]

These filings, and many others, illustrate hostility toward the goals of effective civil rights enforcement.

Politicization of the Division

In the Voting Section, several decisions appear to have been made in which political considerations trumped the Civil Rights Division's obligation to enforce the Voting Rights Act. These decisions also suggest that the Division is no longer following its own guidance regarding the manner for making Section 5 preclearance determinations. In 2002, the administration intentionally delayed making a determination on a Mississippi Congressional plan drawn by a

[4] *United States v. Buffalo Police Department*, No. 73 CV-414 (W.D.N.Y.).

state appellate court so that a plan that favored Republicans drawn by federal judges would be used instead.[5] In 2003, the political appointees disregarded a recommendation that a Texas Congressional redistricting plan be objected to because it resulted in the retrogression of minority voting strength.[6] That plan was later struck down, on other grounds, by the Supreme Court.[7] In 2005, the administration precleared Georgia's government-issued photo identification law despite numerous comment letters outlining the impact that the law would have on minority voters and over the recommendation of an objection from the majority of the staff who worked on it.[8] The law was later found unconstitutional by a state and federal courts.[9]

Compounding all of these problems are the major changes in personnel across the Division that have resulted in the loss of dedicated career staff, low morale, and a decrease in productivity.

Changes in Administration have often brought changes in priorities within the Division, but these changes have never before challenged the core functions of the Division. And never before has there been such a concerted effort to structurally change the Division by focusing on personnel changes at every level.

The Division's record on every score has undermined effective enforcement of our

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[5] Rosenbaum, David E. "Justice Dept. Accused of Politics in Redistricting." The New York Times. 31 May 2002: A14.
[6] Eggen, Dan. "Justice Staff Saw Texas Districting As Illegal: Voting Rights Finding On Map Pushed by DeLay Was Overruled." The Washington Post. 2 December 2005: A01;
Section 5 Recommendation Memorandum, December 12, 2003 re: House Bill 3 (Congressional Redistricting Plan Enacted by the Texas Legislature) (2003-3885) and House Bill 1 (Extension of congressional candidates filing period, moving primary election date, procedures for canvassing, late counting of ballots) (2003-3917). http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf, last viewed March 20, 2007.
[7] *League of United Latin American Citizens v. Perry*, 547 U.S. (2006)
[8] Section 5 Recommendation Memorandum, August 25, 2005 re: Act No. 53 (H.B. 244) (2005). http://www.washingtonpost.com/wp-srv/politics/documents/dojgadocs1_11.pdf last viewed March 20, 2007.
[9] *Common Cause of Georgia v. Billups*, No. 4:05-CV-0201-HLM (N.D. Ga. Oct. 18, 2005)

nation's civil rights laws, but it is the personnel changes to career staff that are, in many ways, most disturbing. For it is the staff that builds trust with communities, develops the cases, and negotiates effective remedies. Career staff has always been the soul of the Division, and it is under attack.

The Blueprint for this attack appeared in an article in National Review in 2002. The article, "Fort Liberalism: Can Justice's civil rights division be Bushified," [10] argued that previous Republican administrations were not successful in stopping the civil rights division from engaging in aggressive civil rights enforcement because of the "entrenched" career staff. The article proposed that "the administration should permanently replace those [section chiefs] it believes it can't trust," and further, that "Republican political appointees should seize control of the hiring process," rather than leave it to career civil servants – a radical change in policy. It seems that those running the Division got the message.

To date, four career section chiefs have been forced out of their jobs, along with two deputy chiefs, including the long serving veteran who was responsible for overseeing enforcement of section 5 of the Voting Rights Act.

And, according to a July 2006 article in the *Boston Globe*, "[h]ires with traditional civil rights backgrounds – either civil rights litigators or members of civil rights groups – have plunged. Only 19 of the 45 lawyers [42 percent] hired since 2003 in [the employment, appellate, and voting] sections were experienced in civil rights law and of those, nine gained their experience either by defending employers against discrimination lawsuits or by fighting against race-conscious policies." By contrast, "in the two years before the change, 77 percent of those who were hired had civil rights backgrounds." And "[m]eanwhile, conservative credentials [of

[10] Miller, John J. "Fort Liberalism: Can Justice's civil rights division be Bushified?" National Review. 6 May 2002.

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

The reporter noted that current and former Division staffers "echoed to varying degrees" that this pattern was what they observed.

The amount of expertise in civil rights enforcement that has been driven out of the Division will be difficult to recapture.

Fifty years ago, the attempt to integrate Little Rock High School demonstrated the need for the federal government to finally say "enough." Enough of allowing the states to defy the U.S. Constitution and the courts. Enough of Congress and the Executive Branch sitting idly by while millions of Americans were denied their basic rights of citizenship. The 1957 Act and the creation of the Civil Rights Division were first steps in responding to a growing need.

For years, we in the civil rights community have looked to the Department of Justice as a leader in the fight for civil rights. In the 1960s and 1970s, it was the Civil Rights Division that played a significant role in desegregating schools in the old South. In the 1970s and 1980s, it was the Civil Rights Division that required police and fire departments across the country to open their ranks to racial and ethnic minorities and women. It was the Civil Rights Division that forced counties to give up election systems that locked out minority voters. And it was the civil rights division that prosecuted hate crimes when no local authority had the will.

Members of the Committee, today you begin a process that is long overdue. A process that will help us to understand the extent of the damage that has been done to the Civil Rights Division, and – hopefully – a roadmap for our way back to vigorous enforcement, integrity, and

justice. And a Civil Rights Division the nation can again be proud of.

Thank you.

The Record of the Employment Litigation Section under the Bush Administration

Since its creation fifty years ago, the Employment Litigation Section of the Department of Justice's Civil Rights Division has been at the forefront in protecting our citizens against illegal employment discrimination. For decades and through various administrations, the Employment Section was viewed as an aggressive and effective enforcer of Title VII. Under the current Administration, vigorous enforcement of equal employment opportunity laws has suffered. The Department of Justice has strayed from its historic mission and traditions. As such, careful oversight of its work is particularly critical at this time.

The Employment Litigation Section of the Civil Rights Division is tasked with an important role. The Section is responsible for aggressively enforcing the provisions of Title VII of the Civil Rights Act of 1964 against state and local government employers.[11] Title VII prohibits discrimination in employment based upon race, sex, religion and national origin. The enforcement authority of the Employment Section derives from sections 706 and 707 of Title VII.[12] Section 706 of Title VII authorizes the Attorney General to file a suit against a state or local government employer based upon an *individual* charge of discrimination that has been referred to the Department of Justice by the EEOC. Section 707 authorizes the Attorney General to bring suit against a state or local government employer where there is reason to believe that a "*pattern or practice*" of employment discrimination exists. These are cases that seek broad systemic reform of a selection practice that adversely impacts upon the job opportunities for a protected group.

The importance of the Department of Justice to the effective enforcement of Title VII cannot be overstated. It is the organization with the prestige, expertise, and financial and personnel resources to challenge discriminatory employment practices of state and local government employers. As a general rule, private attorneys and public interest organizations lack the financial and personnel resources to act as private "Attorneys General" in the Title VII enforcement scheme.

Unfortunately, since assuming office, the Bush Administration has cut back radically on its enforcement efforts. It has not filed Title VII lawsuits in substantial numbers and it appears to have abandoned serious Title VII enforcement on behalf of African-Americans. It is vital that the Department of Justice become more vigorous and out-spoken in the effort to address employment discrimination.

DOJ has failed to vigorously enforce the equal employment opportunity laws under this Administration.

A review of enforcement activity since 2001 reveals that the Employment Section has

[11] 42 U.S.C. § 2000e *et seq.*
[12] 42 U.S.C. §§ 2000e-5 & 6.

failed to fulfill its mission under this Administration.[13] The number of Title VII lawsuits filed by the Section is down considerably from prior Administrations – both Republican and Democrat.

Since January 20, 2001, the Bush Administration filed just 35 Title VII cases, or an average of approximately **six** cases per year. This number includes five cases in which the DOJ intervened in ongoing litigation and two cases initiated by the U.S. Attorney's Office for the Southern District of New York (using its own resources). By comparison, the Clinton Administration filed 34 cases in its first two years in office. By the end of its term in office, the Clinton Administration had filed 92 complaints of employment discrimination or more than **eleven** cases per year. Standing alone, the lack of Title VII enforcement by the Employment Section is grave cause for concern.

Furthermore, the mix of cases filed also has changed. The Section has filed few cases on behalf of African Americans. In fact, the Section has directed a portion of its precious resources to "reverse discrimination" cases on behalf of white individuals. In other cases, the Section abandoned well-established government positions. In two recent Supreme Court cases, the Solicitor General refused to defend the longstanding legal positions of the Equal Employment Opportunity Commission, opting instead for a more restrictive reading of Title VII. In these cases, the Employment Section either failed to advocate for the EEOC's position or was ineffective in attempting to direct policy toward aggressive enforcement. Compounding these problems are major changes in personnel that have resulted in the loss of dedicated career staff, low morale, and a decrease in productivity. Each of the concerns is addressed in more detail below.

DOJ has failed to enforce Title VII vigorously to address discrimination against individuals.

DOJ has the authority to bring suit on behalf of individual plaintiffs under section 706 of Title VII. Individuals who believe they are the victims of employment discrimination may file a charge of discrimination with the Equal Employment Opportunity Commission. If the charge of discrimination is against a state or local government employer, the EEOC may refer the charge to the DOJ following a determination that the charge has merit and efforts to resolve the matter voluntarily have failed.

DOJ receives more than 500 of these referrals from the EEOC each year. Even though cases brought pursuant to section 706 referrals do not affect large numbers of employees or may not establish new law, they are nevertheless important enforcement vehicles. Among others, these cases often address unique issues of intentional or purposeful discrimination or address issues that members of the private bar might not be qualified or able to handle. In smaller communities, members of the private bar might not be willing to represent an individual in a suit against the local government for fear of retaliation.

Since the year 2000, the EEOC referred over **3,000** individual charges of discrimination to the Employment Section, but the Section has filed just **25** individual cases since 2001. Thus,

[13] Information about the Employment Litigation Section's complaints, court approved consent decrees and judgments, and out-of-court settlements can be found at http://www.usdoj.gov/crt/emp/papers.html.

the Employment Section filed suit in **less than one percent** of the individual cases referred by the EEOC. By contrast, the Employment Section filed **73** individual cases during the previous Administration. At this rate, the Bush Administration will have filed **less than half** the number of individual Title VII cases that were filed during the previous Administration.

DOJ also has failed to vigorously enforce Title VII to address systemic discrimination in pattern or practice cases.

Pattern or practice Title VII cases are the most important and significant cases because they have greatest impact. Not only do pattern or practice cases affect a large number of employees, they often break new legal ground. These pattern or practice cases can eliminate employment and selection practices that have the purpose or effect of discriminating on the basis of race, sex, religion, and national origin. Pattern or practice suits are critically important vehicles for meaningful and far reaching reform of employment practices that unjustifiably limit employment opportunities for minorities and women -- and the DOJ is uniquely equipped to bring them. Pattern or practice suits are expensive and require substantial expertise. Few private parties or organizations have the expertise or resources to bring these suits. Thus, there is nobody to fill the void if the DOJ fails to bring such suits. Unfortunately, the number of pattern or practice cases filed during this Administration reveals that DOJ is not actively enforcing equal employment opportunity laws.

The number of pattern or practice cases is a strong indicator to the employer community as to whether the DOJ is actively enforcing Title VII. Unlike section 706 Title VII cases, section 707 pattern or practice cases are not dependent upon the referral of a charge of employment discrimination from the EEOC. Under section 707, the Attorney General has "self-starting" authority to initiate pattern or practice discrimination investigations and cases against public employers. Over the past **six years**, the Employment Section has filed just **10** pattern or practice cases. By comparison, in just the first **two years** of the Clinton Administration, the Employment Section filed **13** pattern or practice cases. A closer look behind these statistics reveals further evidence of DOJ's disturbing departure from vigorous enforcement of Title VII.

DOJ has filed few cases on behalf of African-Americans.

Traditionally, combating racial discrimination has been a core mission of the Employment Section. The Civil Rights Division was formed to eradicate race discrimination against African-Americans and, for most of its first fifteen years, it devoted all its resources to this goal. Over the years, the mission of the Division expanded as new civil rights laws were passed and new areas of civil rights enforcement were pursued by a variety of groups and organizations. But historically, combating discrimination against African-Americans has remained a central priority of the Division through both Republican and Democratic administrations. However, it is clear from the record of this Administration that race discrimination against African-Americans is a very low enforcement priority.

Of the 25 individual employment discrimination cases filed by this Administration, only **six** cases involved allegations of race discrimination. Under the Clinton Administration, the Employment Section filed **twelve** individual race discrimination cases.

The Bush Administration has also filed few pattern or practice cases on behalf of African Americans. Over the past six years, the Employment Section has filed just **six** pattern or practice cases alleging race discrimination. By comparison, the previous Administration filed **eight** pattern or practice cases alleging race discrimination **in its first two years**. Two of the systemic race discrimination cases filed during this Administration actually allege discrimination against whites.[14] Another case alleges discrimination against Native Americans[15] and another case was initially filed by the U.S. Attorney's Office for the Southern District of New York.[16] Thus, the ELS can lay claim to filing **two** pattern or practice cases in six years that allege race discrimination against African-Americans.[17] Furthermore, these two cases were not filed until 2006, more than five years into the Bush Administration.[18]

These statistics demonstrate that the current Administration has devoted fewer resources to addressing employment discrimination against African Americans. At the same time, the Administration has devoted increased resources to "reverse discrimination" cases.

DOJ has devoted significant resources to "reverse discrimination" cases alleging discrimination against whites.

Instead of devoting its resources to address discrimination against racial minorities, the Administration has directed significant resources to bring a number of "reverse discrimination" cases on behalf of white individuals.

In July 2005, the Employment Section filed a reverse discrimination suit on behalf of white males.[19] Ignoring decades of institutional discrimination against minorities by the City of Pontiac, the Employment Section alleged that a 1984 Collective Bargaining Agreement "creat[ed] and maintain[ed] a dual system for hire and promotion …which constitute[d] a pattern or practice of [discriminating against non-minorities and men]" in violation of Title VII.

In February 2006, the Employment Section filed another reverse discrimination case. In this case, the Employment Section attacked minority and women graduate fellowship programs at Southern Illinois University.[20] DOJ alleged that the fellowship program discriminated against whites and men. The fellowships at issue were aimed at increasing the minority enrollment in graduate programs at Southern Illinois University, where Blacks and Hispanics constituted less than 8% of the University's 5,500 graduate students. These fellowships had assisted 129 students with a combined annual budget of $200,000 which was a drop in the bucket compared to the approximate $12 million dollars in fellowship assistance flowing to the predominantly white graduate fellows. As a result of the suit, the university abandoned its fellowship program

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[14] *United States v. Board of Trustees of Southern Illinois University,* CA 06-4037 (S.D. Ill. filed Feb. 8, 2006); *United States v. Pontiac, Michigan Fire Department*, No. 2:05-CV-72913 (E.D. Mich. filed Jul. 27, 2005).
[15] *United States v. City of Gallup, NM*, CIV 04-1108 (D.N.M. filed Sept. 29, 2004).
[16] *United States v. City of New York and New York City Housing Authority*, 1:02-cv-044699-DC-MHD (S.D.N.Y. filed June 19, 2002)
[17] *United States v. Virginia Beach Police Dept*., (E.D. Va. filed Feb. 7, 2006); *United States v. Chesapeake City*, (E.D. Va. filed July 24, 2006).
[18] *United States v. Virginia Beach Police Department*, 06cv189 (E.D. Va. filed Feb. 7, 2006).
[19] *United States v. City of Pontiac, Michigan*, No. 2:05-CV-72913 (E.D. Mich. filed July 26, 2005).
[20] *United States v. Southern Illinois University*, CA 06-4037 (S.D. Ill. filed Feb. 8, 2006).

for minorities and women.

While all citizens are entitled to the protections of our civil rights laws, African Americans have historically been and remain the primary victims of race discrimination on the job. For that reason, the Department has always placed high priority on fighting race-based discrimination against African Americans. In redirecting precious resources to these "reverse discrimination" cases, this Administration has signaled a shift away from fulfilling its core mission.

In recent Supreme Court cases, DOJ has endorsed restrictive interpretations of Title VII.

In two recent Supreme Court cases, the Bush Administration endorsed restrictive interpretations of Title VII's anti-discrimination and anti-retaliation protections. In both of these cases, the Solicitor General expressly rejected EEOC's well-established position. In these cases, the Employment Litigation Section either agreed with the Solicitor General's restrictive interpretations, or the Employment Section was ineffective in urging the Solicitor General to aggressively enforce the protections of Title VII. Regardless, the Administration should be vigorously enforcing Title VII, rather than seeking to limit the scope of its protections.

In an amicus curiae brief filed in *Burlington Northern and Santa Fe Railway Co. v. White*,[21] the Solicitor General advocated unsuccessfully for a narrow interpretation of Title VII's anti-retaliation provision.[22] The Solicitor General refused to advocate the EEOC's well-established guidance that established broad protection for employees. Instead, the Solicitor General joined with the employer, arguing that the anti-retaliation provision only prohibits retaliation that affects the terms and conditions of employment, but not retaliation that takes place outside of the workplace. Ultimately, in a unanimous decision (with Justice Alito concurring in the judgment), the Supreme Court expressly rejected DOJ's watered-down position and endorsed the longstanding EEOC standard. Even conservative Justice Scalia stated that the EEOC standard deserved deference. The Court held that the Solicitor General's narrow interpretation was inconsistent with the language of Title VII and inconsistent with the primary objective of the anti-retaliation provision: to provide broad protection to employees who seek to enforce the protections of Title VII.

More recently, in the pending Supreme Court case of *Ledbetter v. Goodyear*,[23] the Solicitor General again failed to advocate for longstanding EEOC regulations, and the civil rights community again was forced to make those arguments in its place. *Ledbetter* presents a statute of limitations question in the pay discrimination context. Specifically, the question is whether a Title VII plaintiff may recover when disparate pay is received during the statutory limitations period, but is the result of intentional discriminatory decisions made outside the limitations period. The Solicitor General again sided with the employer, arguing that the employee cannot recover if the disparate pay is the result of a decision outside of the 180 day limitations period. In support of the Title VII plaintiff employee, the civil rights community advocated for deference to the EEOC's well-established position that every paycheck that compensates an employee less

[21] 126 S. Ct. 2405 (2006).
[22] 42 U.S.C. § 2000e-3(a).
[23] 421 F.3d 1169 (11th Cir. 2005), cert. granted, 126 S. Ct. 2965 (2006).

than a similarly-situated employee because of sex constitutes a new violation of Title VII. The Supreme Court has yet to issue its opinion in *Ledbetter*.

DOJ has abandoned established positions in ongoing cases.

DOJ also has abandoned long-standing positions in ongoing litigation and settled on appeal for a fraction of the amount awarded in an administrative hearing.

In one such case, the Employment Section unsuccessfully sought to dismiss a case in the middle of litigation, which would have permitted the employer to use a discriminatory and invalid selection test. The Employment Section first sued the City of Buffalo's police department in 1974, alleging that it had engaged in a pattern and practice of employment discrimination against African Americans, Hispanics, and women, in violation of Title VII and the Fourteenth Amendment.[24] After prevailing on the merits, a Final Decree and Order was entered in 1979, which ordered, among other things, interim hiring goals for minorities in the police department. In over two decades, the City never fully complied with the terms of this court-ordered settlement. Yet in 2002, the Employment Section dramatically reversed its position by offering to dismiss the case, arguing that the relief being provided minorities under the agreement constituted unconstitutional race-conscious relief, despite the fact that the selection procedure in place at the time had not been validated as required by Title VII. The Employment Section proposed that the City be permitted to use a discriminatory and invalid selection examination despite the fact that the City had failed for 24 years to comply with a court order to create a fair and non-discriminatory test. DOJ's arguments were expressly rejected by the court.

In a sex discrimination case against a textile manufacturer, the Employment Section settled on appeal for a fraction of the amount that had been awarded to victims of discrimination in the decision below.[25] The case originated when the Department of Labor's Office of Federal Contract Compliance Programs began an investigation of Greenwood Mills, a federal contractor, pursuant to its authority under Executive Order 11246. The investigation revealed that Greenwood Mills had hired just one woman and thirty men for entry-level jobs in its textile plant, despite the fact that significant numbers of women had applied. In 2002, the Administrative Review Board of the Department of Labor issued a decision granting nearly $400,000 in back pay and interest to be divided among the female applicants who had been rejected for these entry level jobs. When Greenwood Mills appealed this decision, the Employment Section settled the case for $56,000, rather than defend the judgment issued by the Department of Labor.

These cases provide further examples of the ways in which DOJ has abandoned its role as a vigorous enforcer of Title VII.

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[24] *United States v. Buffalo Police Department*, No. 73 CV-414 (W.D.N.Y.).
[25] *Greenwood Mills v. Chao,* C.A. No. 8:95-40004-20 (D.S.C.).

DOJ has reassigned dedicated career lawyers, morale has plummeted, productivity has lowered, and civil rights enforcement has suffered.

During the Bush Administration, the Employment Section has lost significant numbers of dedicated career lawyers. Under the new leadership, morale among career attorneys has plummeted, productivity has lowered, and civil rights enforcement has slowed. The political nature of this deterioration has been the subject of numerous articles.[26] There has always been normal turnover in career staff in the Civil Rights Division, but it has never reached such extreme levels and never has it been so closely related to the manner in which political appointees have administered the Division. It has stripped the division of career staff at a level not experienced before.

In the past, it was rare for political appointees to remove and replace career section chiefs for reasons not related to their job performance, and political appointees never removed deputy section chiefs. However, shortly after the new Administration took office, longtime career supervisors who were considered to have views that differed from those of the political appointees were reassigned or stripped of major responsibilities. The Employment Section chief and one of four deputy chiefs were involuntarily transferred in April 2002. Shortly after that, a special counsel was involuntarily transferred. Since then, two other deputy chiefs left the section or retired. Overall, since 2002, the section chief and three of the four deputy chiefs have been involuntarily reassigned or left the section.

This type of administration has had an extremely negative impact on the morale of career staff. The best indicator of this impact is in the unprecedented turnover of career personnel. Twenty-one of the 32 attorneys in the Section -- **over 65%** -- have either left the Division or transferred to other sections. Additionally, loss of professional paralegals and civil rights analysts had been significant. Twelve professionals have left the Employment Section, many with over 20 years of experience. These employees were instrumental in building and maintaining an aggressive Title VII enforcement unit.

The Employment Section became top heavy with management, which is likely to be part of the reason its productivity is way down. The Employment Section has a staff of approximately 60, of which seven are managers, 25 are line attorneys, twelve are paralegals, one is a trained statistician, and the remaining staff provides administrative support. Until 2001, the Section's management team consisted of a section chief and three and occasionally four deputy section chiefs. Today, there is one section chief and six deputy section chiefs. This means that there is approximately one supervisor for every three high-level line attorneys. The inexplicable increase in the Employment Section management team means that there are fewer attorneys available to tend to the Section's Title VII enforcement responsibilities.

Compounding the impact of the extraordinary loss of career staff in recent years has been a major change in the Division's hiring practices. The new hiring procedures virtually eliminated career staff input from the hiring of career attorneys. This has led to the perception and reality of new staff attorneys having little if any experience in or commitment to the enforcement of civil rights laws and, more seriously, injecting political factors into the hiring of

[26] *See* http://www.washingtonpost.com, 11/17/05., "Legal Affairs," September/October 2005.

career attorneys. The overall damage caused by losing a large body of the committed career staff and replacing it with persons with little or no interest or experience in civil rights enforcement has been severe and will be difficult to overcome.

Since 1954, the primary source of attorneys in all divisions in the Department has been the attorney general's honors program. This program was instituted by then Attorney General Herbert Brownell in order to end perceived personnel practices "marked by allegations of cronyism, favoritism and graft." Since its adoption, the honors program has been consistently successful in drawing the top law school graduates to the Department.

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

After interviewing was completed, the hiring committee would meet and recommend to the political appointees those whom they considered the most qualified. Law school performance was undoubtedly a central factor, but a demonstrated interest and/or experience in civil rights enforcement and a commitment to the work of the Division were also key qualities that interviewers sought in candidates selected to join the career staff of the Division. Political appointees rarely rejected these recommendations.

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

These procedures have been very successful over the years in maintaining an attorney staff that was of the highest quality – in Republican as well as Democratic administrations. A former Deputy Assistant Attorney General in the Reagan Administration, who was interviewed for a recent *Boston Globe* article about Division hiring practices, said that the system of hiring through committees of career professionals worked well. The article quoted him as saying: "There was obviously oversight from the front office, but I don't remember a time when an individual went through that process and was not accepted. I just don't think there was any quarrel with the quality of individuals who were being hired. And we certainly weren't placing any kind of litmus test on . . . the individuals who were ultimately determined to be best qualified."[27]

[27] Charlie Savage, *Civil Rights Hiring Shifted in Bush Era; Conservative Leanings Stressed*, BOSTON GLOBE, July 23, 2006, at A1.

But, in 2002, these longstanding hiring procedures were abandoned, not only in the Civil Rights Division but throughout the Department. The honors hiring committee in the Division was disbanded and all interviewing and hiring decisions were made directly by political appointees with no input from career staff or management. As for non-honors hires, the political appointees similarly took a much more active roll in selecting those persons who received interviews, and almost always participated in the interviewing process.

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

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

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

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

In addition to these personnel changes, the decision making process has changed. Political appointees in the Division have closed themselves off from career staff. Regular meetings of all of the career section chiefs together with the political leadership were discontinued from the outset of this Administration. Such meetings had always been an important means of communication in an increasingly large Division that was physically separated in several different buildings. This lack of cooperation between political appointees and career staff has caused vigorous enforcement of the law to suffer. One former Civil Rights Division attorney described the importance of including career attorneys in the decision making process:

> [S]eparation of powers was designed to enable both civil service attorneys and political appointees to influence policy. This design, as well as wise policy, requires cooperation between the two groups to achieve the proper balance between carrying out administration policy and carrying out core law enforcement duties. Where one group shuts itself out from influence by the other, the department's effectiveness suffers.[28]

During the Bush Administration, there has been a conscious effort to attack and change career staff. This has resulted in a major loss of career personnel with many years of experience in civil rights enforcement and in the valuable institutional memory that had always been maintained in the Division until now – in both Republican and Democratic administrations. Replacement of this staff through a new hiring process has resulted in the perception and reality of politicization of the Division. The overall impact has been a loss of public confidence in fair and even-handed enforcement of civil rights laws by the Department of Justice.

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[28] Brian K. Landsberg, "Role of Civil Servants and Appointees," *Enforcing Civil Rights*: *Race Discrimination and the Department of Justice* (University Press of Kansas 1997) at 156. Landsberg was a career attorney in the Civil Rights Division from 1964-86 during which he was chief of the Education Section for five years and then chief of the Appellate Section for twelve years. He now is professor of law at McGeorge Law School.

The Employment Litigation Section by the Numbers

Total Title VII cases:

- The Employment Section has filed **35** Title VII cases filed over 6 years, or **6** cases per year on average.
- This is about half the rate of the previous Administration, which filed a total of **92** Title VII cases, an average of more than **11** cases per year.

Individual Title VII cases:

- Over the past six years, the EEOC has referred over **3,000** individual charges of discrimination to the Employment Litigation Section.
- The Section has filed just **25** individual cases since 2001, or an average of about **4** cases per year.
- This is about half the rate of the previous Administration, which filed a total of **73** individual cases, an average of about **9** cases per year.

Pattern or practice Title VII cases:

- Over the past six years, the Employment Section has filed just **10** pattern or practice cases.
- By comparison, the previous Administration filed **13** pattern or practice cases in the first two years alone.

Race discrimination cases:

- Only **6** of the **25** individual Title VII cases involve allegations of race discrimination; by contrast, the previous Administration filed **12** individual race discrimination cases.
- The Employment Section has filed **6** pattern or practice race discrimination cases since 2001; by contrast, the previous Administration filed **8** pattern or practice race discrimination cases **in its first two years**.
- The Employment Section can lay claim to filing just **2** pattern or practice cases that allege race discrimination against African Americans.
- The Employment Section has filed **2** "reverse discrimination" pattern or practice cases alleging discrimination against white males.

Sex discrimination cases:

- The Employment Section has filed just **1** pattern or practice sex discrimination case on behalf of women.

Staff reassignment and attrition:

- Under this Administration, the section chief and **3** of the 4 deputy chiefs have been involuntarily reassigned or left the section.
- **21** of the 32 attorneys in the Section have left the Civil Rights Division or transferred to other sections.

The Record of the Housing and Civil Enforcement Section under the Bush Administration[29]

The Housing and Civil Enforcement Section enforces: the Fair Housing Act, which prohibits discrimination in housing; the Equal Credit Opportunity Act, which prohibits discrimination in credit; Title II of the Civil Rights Act of 1964, which prohibits discrimination in certain places of public accommodation, such as hotels, restaurants, nightclubs and theaters; the Religious Land Use and Institutionalized Persons Act, which prohibits local governments from adopting or enforcing land use regulations that discriminate against religious assemblies and institutions or which unjustifiably burden religious exercise; and the Service-members Civil Relief Act, which provides for the temporary suspension of judicial and administrative proceedings and civil protections in areas such as housing, credit and taxes for military personnel while they are on active duty. [30]

The Department has the capacity as a federal government agency to subpoena where private groups do not and to launch large investigations. The public depends on the department to step in where individuals and private organization do not have the ability to do so.

Although the Housing and Civil Enforcement Section covers an array of laws, its primary focus is housing. Out of the 297 cases on the Section's website (i.e. cases resolved between 1993 and 2007), 275 were housing-related cases.

How the Housing and Civil Enforcement Section Gets Cases

According to the DOJ's website:

> Under the Fair Housing Act, the Department of Justice may start a lawsuit where it has reason to believe that a person or entity is engaged in a "pattern or practice" of discrimination or where a denial of rights to a group of persons raises an issue of general public importance. Through these lawsuits, the Department can obtain money damages, both actual and punitive damages, for those individuals harmed by a defendant's discriminatory actions as well as preventing any further discriminatory conduct. The defendant may also be required to pay money penalties to the United States.
>
> The Department of Housing and Urban Development (HUD) investigates individual cases of discrimination in housing. If HUD determines that reasonable cause exists to believe that a discriminatory housing practice has occurred, then either the complainant or the respondent may elect to have the case heard in federal court. In those instances, the Department of Justice will bring the case on behalf of the individual complainant.
>
> In addition, where force or a threat of force is used to deny or interfere with fair housing rights, the Department of Justice may begin criminal proceedings. Finally, in cases

[29] The LCCR Housing Task force is chaired by the National Fair Housing Alliance and the NAACP Legal Defense and Educational Fund

[30] http://www.usdoj.gov/crt/housing/housing_main.htm

involving discrimination in home mortgage loans or home improvement loans, the Department may file suit under both the Fair Housing Act and the Equal Credit Opportunity Act.[31]

Issues of Concern

Decreasing Number of Cases and Changes in Priorities

In the past four years, the number of cases the Section has filed overall has precipitously decreased (by 29%).

TOTAL CASES FILED

FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06
48	45	53	49	29	38	42	31

One major drop off in case handling has been with race cases. In the past four years, the number of race cases the Section has filed has fallen drastically (by 43%).

RACE CASES FILED

FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06
16	21	20	19	7	8	10	8

By contrast, disability cases have retained their numbers, even though the overall number of cases filed by DOJ has decreased by 29%, as mentioned above. (The number of cases filed in the first four years [FY99 – FY02] is 73 cases, compared to the second four years [FY03 – FY06], which is 74 cases.)

FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06
16	12	24	21	16	23	21	14

Low Number of Testing Cases

In 1992, the Section began its own testing program. As of 2005, 1,000 employees from various Department components nationwide have been trained as testers.

There has been a precipitous decline in the number of testing cases filed in the past 4 years especially. Only 31 cases involving testing have been filed in the past eight years (FY99 – FY06). Of particular note, only 7 of those cases were brought in the last four years.

[31] http://www.usdoj.gov/crt/housing/faq.htm#enforce

TESTING CASES FILED

FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06
10	5	5	4	2	1	1	3

Low Number of Lending Cases

Only five fair lending cases have been filed in the past four years. This is in spite of the fact that numerous studies have shown the link between predatory and subprime lending and race. Here are three such studies, just to name a few:

Bosian, Debbie; Ersnst, Keith; Li, Wei. "Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages," Center for Responsible Lending. May 31, 2006.

Wyly, Atia, Foxcroft, Hammel, Phillips-Watts, "American Home: Predatory Mortgage Capital and Neighborhood Spaces of Race and Class Exploitation in the United States", Geografiska Annales 88B, 2006.

Turner, Margaret Austin, et al., All Other Things Being Equal: A Paired Testing Study of Mortgage Lending Institutions, The Urban Institute, April 2002.

With the ballooning sub-prime market over the years, one would have expected to see an increase in these cases by DOJ.

Loss of Qualified Staff

As with many other sections of the Department, qualified staff have left and/or been pushed out by this administration. Many of these staff people would be available to speak to committee staff and many may be able to testify.

With the loss of qualified staff there is a loss of institutional memory, a loss of individuals familiar with the Fair Housing Act and other laws covered by the section.

Refusal to Take Disparate Impact Cases

In 2003, DOJ announced that it would no longer file disparate impact cases involving housing discrimination (HUD HUB Directors' meeting Rhode Island 2003). DOJ's decision was a sharp break from DOJ's decades-long, bipartisan policy to aggressively litigate these cases.

Disparate impact cases are crucial in the fight against housing discrimination. Many rental, sales, insurance, and related policies are not discriminatory on their face, but have a disparate impact on members of protected classes. Among those that are more subtly discriminatory, some have a discriminatory *intent* and others have a discriminatory *impact.* Even though there may not be any intent in the policy, it can have just as detrimental an effect on individuals and families trying to find housing. Examples of disparate impact include (1) a limit

on the number of persons per bedroom to one has a disparate impact against families with children and (2) a minimum loan or insurance amount has a disparate impact against properties in minority neighborhoods. The federal government is often the only entity with the capacity to investigate and litigate such fair housing complaints.

Refusal to Take HUD Election Cases

In addition, as mentioned on DOJ's own website (as cited above), DOJ is to bring cases referred by HUD on behalf of a complainant. Unfortunately, DOJ has failed to file "election" cases (cases in which a party to a HUD complaint that has been charged has elected to have the case heard in federal court, rather than before a HUD Administrative Law Judge) in a timely manner. They have also dragged out cases much longer than required, requiring more and more investigations.

The Fair Housing Act as Amended (1988) clearly states that DOJ must pursue cases charged by HUD. DOJ has recently taken the stance that it is not required to file these cases but that it may instead perform additional investigations, thereby prolonging and duplicating the process. DOJ has even stated that this provision of the fair housing law is unconstitutional.

There is a case out of Chicago in which DOJ refused to file a federal suit after HUD referred the case. The back and forth went on with DOJ so long, eventually involving Representative Jesse Jackson, Jr.'s request to DOJ to investigate the case. The case eventually settled – but the DOJ's actions served to undercut the relief provided to the complainants in the case.

Poor Case Work

Another case out of Chicago demonstrates DOJ's poor case work. Initially, DOJ would not take the case; the Illinois attorney general had to file a motion to get DOJ to do something. Once DOJ got involved, a settlement was reached between DOJ and the respondent. The housing provider was prepared to include $100,000 in the settlement that would fund programs at the local school for the children against whom the provider had discriminated. The DOJ refused to accept the $100,000 on behalf of the children saying that education had nothing to do with housing. (Fortunately, the complainant was able to settle independently with the housing provider for the additional funding on behalf of the children.

The Record of the Voting Section under the Bush Administration[32]

Enforcement of Section 5 of the Voting Rights Act.

Section 5 of the Voting Rights Act, which was part of the original Act and was reauthorized most recently last year for 25 years, requires jurisdictions with a history of discrimination to demonstrate to the Justice Department or the District Court of the District of Columbia that any voting changes they make do not have a discriminatory purpose or effect. Section 5 is arguably the most influential provision of the Act.

Problems relating to this administration's enforcement of Section 5 are illustrative of the issues in the Voting Section. Many of the Section 5 Unit's most experienced staff members -- the Deputy Chief in charge of Section 5, attorney reviewers, and civil rights analysts – have left the Section in the last 2-3 years. In several instances, particular lawyers were assigned to work on immigration matters and these lawyers left the Section not long after. The turnover in personnel is especially disconcerting as we get closer to the 2010 Census, when the Voting Section's workload expands dramatically as thousands of jurisdictions that are subject to Section 5 engage in their decennial redistricting.

Several decisions have been made where it appears that political considerations may have trumped the Civil Rights Division's obligation to enforce the Voting Rights Act. These decisions also suggest that the Division is no longer following its own Guidance regarding the manner for making Section 5 preclearance determinations. In 2002, the administration intentionally delayed making a determination on a Mississippi Congressional plan drawn by a state appellate court so that a plan that favored Republicans drawn by federal judges would be used instead. In 2003, the political appointees disregarded a recommendation that a Texas Congressional redistricting plan be objected to because it resulted in the retrogression of minority voting strength. That plan was later struck down, on other grounds, by the Supreme Court. In 2005, the administration precleared Georgia's government-issued photo identification law despite numerous comment letters outlining the impact that the law would have on minority voters and over the recommendation of an objection from the majority of the staff who worked on it. The law was later found unconstitutional by both state and federal courts.

Election observing and monitoring

Given Assistant Attorney General Wan Kim's recent acknowledgement of the intimidating effect that prosecutors can have on voters, there is a need to clearly define the contours of the relationship between the Department of Justice and U.S. Attorney's Offices in the execution of the Division's attorney monitoring of elections. In many recent elections, the Division has relied on personnel from U.S. Attorney's Offices to carry out its attorney monitoring program in jurisdictions throughout the country. The use of federal prosecutors inside polling places has blurred the line of separation that has long been maintained between the civil rights and criminal enforcement units of the Department of Justice. Moreover, federal

[32] The LCCR Voting Rights Task Force is co-chaired by the Lawyers' Committee for Civil Rights Under Law and the NAACP Legal Defense and Educational Fund.

prosecutors inside polling places can have an intimidating effect on minority voters.

Although the Department of Justice has both civil rights and criminal enforcement responsibilities with respect to voting, traditionally, the Civil Rights Division has focused on non-criminal aspects of the electoral process. Though the Civil Rights Division and Criminal Division communicate and coordinate, prior to the current administration there was a clear separation. The Civil Rights Division was engaged in extensive pre-election and Election Day observing and monitoring activities. The Criminal Division, on the other hand, is to steer clear of Election Day activity and prosecute, where appropriate, after elections.

Under this administration, the lines have been blurred. In 2002, Attorney General Ashcroft created a Voting Integrity Program that combined the civil rights and criminal efforts for Election Day observing and monitoring. Since then, in many jurisdictions, career prosecutors in the United States Attorneys' Office have played critical roles in the observing and monitoring of elections. This has resulted in the erosion of trust of the Justice Department in many minority communities who are more comfortable working with civil rights lawyers on election issues.

Departure from traditional mission of the Voting Section/Allocation of resources

A major issue throughout the Civil Rights Division in the current administration has been how resources have been allocated. There has been a noticeable decrease in emphasis on bringing cases on behalf of racial minorities. The record of the Voting Section is consistent in departing from the Voting Section's traditional mission.

The Voting Section did not file any cases on behalf of African American voters during a five-year period between 2001 and 2006 and no cases have been brought on behalf of Native American voters for the entire administration. In addition, during the same five-year period, the Department only filed one case alleging minority vote dilution in violation of Section 2 of the Act. Section 2 vote dilution cases are particularly important because the end result – an election system that enables minority voters to have an equal opportunity to elect its candidates of choice – has a significant positive impact on minority voters. The administration rejected several recommendations from the Voting Section to bring particular cases. Conversely, in 2004, the Section brought a case on behalf of white voters in Mississippi.

Furthermore, the Department has gone out of its way to take legal positions that have restricted the franchise, such as filing an *amicus curiae* brief in a 2004 Michigan case involving provisional ballots where the government argued that the Help America Vote Act permitted states to reject provisional ballots solely on the basis that the voter did not cast the ballot in the proper precinct.

Loss of confidence in the Voting Section in the civil rights community

Recently, the Civil Rights Division has come under intense scrutiny from civil rights organizations and community leaders regarding cases that have been filed that appear to extend beyond the Division's historical mandate. Perhaps the most scrutinized of these cases was the Voting Section's recent litigation on behalf of white voters in Noxubee, Mississippi. This case

recently went to trial and a decision is pending. However, the Division must deal with and respond to growing distrust among minority communities who feel increasingly abandoned and marginalized by the Division's litigation choices and priorities. Restoring these ties to the community is essential to the Division's ability to effectively carry out its work. Community contacts have played and continue to play an important role in the Division's ability to effectively investigate and enforce federal civil rights statutes. This is especially important to the work of the Voting Section where Section 5 preclearance determinations are based, in part, on Comments typically provided by local community contacts.