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

BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

STATEMENT OF

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

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

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

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

History of Enforcement of Title VII by the Employment Litigation Section

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

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

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

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

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

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

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

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

Types of Cases Brought By the Employment Litigation Section

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

Theories of Liability Under Title VII

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

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

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

Unlike cases brought under a disparate treatment theory, as reinforced by the Civil Rights Act of 1991, cases brought under a disparate impact theory pursuant to the Attorney General's pattern or practice authority do not require evidence of intentional discrimination or discriminatory motive. In disparate impact cases, the focus is on the effects of the employment practice or the criteria on which the employment decision was based.

Pattern or practice cases are the most important and significant cases brought by the Department of Justice because they offer the opportunity to make the greatest change. Not only do pattern or practice cases affect a large number of employees, they often break new legal ground. The number of pattern or practice cases filed sends a very powerful message that the Department of Justice is actively enforcing Title VII.

Pattern or practice suits are critically important vehicles for meaningful and far reaching reform of employment practices that unjustifiably limit employment opportunities for minorities and women -- and the Department of Justice is the only organization that is equipped to bring them. Pattern or practice suits are expensive and require substantial expertise. Litigation of a pattern or practice suit typically requires the use of expert witnesses, such as industrial organization psychologists, statisticians, exercise physiologists, and labor economists. It can cost many thousands of dollars to retain experts for litigation, a cost that most private litigants can not bear. Few private parties or organizations have the expertise or resources to bring these suits. Thus, there are no other organizations available to fill the void if the Department of Justice fails to bring such suits.

Reduced Enforcement Efforts by the Department by Justice

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

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

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

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

While the Department has become more active in the last two years, likely as a result of Congressional prodding, its enforcement record is hardly stellar. Since January 20, 2001, the Bush Administration has filed only 47 Title VII cases, or an average of less than seven cases a year.[2] This number includes five cases in which the DOJ intervened in ongoing litigation and two cases initiated by the U.S. Attorney's Office for the Southern District of New York.[3] By comparison, the Clinton Administration filed 34 cases in its first two years in office. By the end of its term in office, the Clinton Administration had filed 92 complaints of employment discrimination or more than eleven cases per year. Standing alone, the lack of Title VII enforcement by the ELS is grave cause for concern. A close look at the types of cases reveals an even more disturbing fact, which is a failure to bring suits that allege discrimination against African-Americans and Latinos.

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

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

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

[3] Three of these cases are interventions in ongoing litigation filed by three Jane Does against the District of Columbia. Each case raises an identical issue -- the lawfulness of a pregnancy policy. See *Jane Doe and the United States v. Dist. of Columbia*, No. C.A. 02-2338(RMU) (D.D.C. filed Aug. 5, 2004); *Jane Doe II and the United States v. Dist. of Columbia*, No. C.A. 02-2339(RMU) (D.D.C. filed Aug. 5, 2004); and *Jane Doe III and the United States v. Dist. of Columbia*, No. C.A. 02-2340(RMU) (D.D.C filed Aug. 5, 2004). These cases raise a single issue, so the number of filed cases has arguably been inflated.

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

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

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

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

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

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

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

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

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

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

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

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

Future Congressional Oversight

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

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