



**TESTIMONY FOR THE HEARING ON THE CIVIL RIGHTS DIVISION OF
THE DEPARTMENT OF JUSTICE TO BE HELD BEFORE THE HOUSE
JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS
AND CIVIL LIBERTIES ON DECEMBER 3, 2009**

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My name is Joe Rich. Since May, 2005, I have been Director of the Fair Housing Project at the Lawyers' Committee for Civil Rights Under Law. Previously, I worked for the Department of Justice's Civil Rights Division for almost 37 years. From 1999 to 2005, I was Chief of the Division's Voting Section. Prior to that, I served as Deputy Chief of the Housing and Civil Enforcement Section for twelve years and Deputy Chief for the Education Section for ten years.

I want to thank the Committee for the opportunity to testify at this hearing concerning the Civil Rights Division. In preparation for this hearing, I have concentrated on reviewing the GAO report entitled "Information on Employment Litigation, Housing and Civil Enforcement, Voting and Special Litigation Sections' Enforcement Efforts from Fiscal Years 2001-2007." On several prior occasions, I have testified and written about the Civil Rights Division during this same period. Most pertinent to this hearing is testimony I presented on March 22, 2007 before this Committee at an oversight hearing for the Division.

I. SUMMARY OF PREVIOUS TESTIMONY AND ARTICLES

My March 22, 2007 testimony coincided with the release of a report by the Citizens' Commission on Civil Rights entitled "The Erosion of Rights: Declining Civil Rights Enforcement During the Bush Administration," which I helped edit. It includes articles focusing on two areas by myself and four other former career Division attorneys. First was the unprecedented politicization of the Division during the Bush Administration, particularly (1) the hostile attitude of Bush Administration political appointees toward career staff which resulted in severe damage to the morale of career staff - the longtime backbone of the Division that had historically maintained not only a deep commitment to civil rights enforcement, but also built an expertise and institutional

knowledge of how to enforce our civil rights laws tracing back to the passage of our modern civil rights statutes; (2) the alarming exodus of career attorneys resulting from that hostility; and (3) the major change in hiring procedures which virtually eliminated career staff input into the hiring of career attorneys, resulting in the hiring of new staff attorneys with 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. Second was a careful analysis of the enforcement record of the Bush Administration from January, 2001 through the beginning of 2007.

A. The Politicization of the Civil Rights Division During the Bush Administration

The most disturbing facts in the report concerning the politicization of the Division and its effects on career staff are the following:

- Starting in April, 2002, longtime career supervisors who were considered to have views that differed from those of the political appointees were reassigned or stripped of major responsibilities. Four section chiefs, two deputy chiefs, and a special counsel were either removed or marginalized because they were disfavored for political reasons or perceived to be disloyal.
- In the Voting Section, of the five persons in section leadership at the beginning of 2005 (the chief and four deputy chiefs), only one deputy chief remained in the section at the time of the report. Similarly, 20 of the 35 attorneys in the section (over 57%) had either left the Department, transferred to other sections (in some cases involuntarily), or gone on details from from April 2005 until March, 2007. At the professional level, the number of civil rights analysts responsible for reviewing over four to five thousand submissions received every year pursuant to Section 5 of the Voting Rights Act, dropped by almost two-thirds from 26 to 10.
- 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. And, 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, over that period, 21 of the 32 attorneys in the section in 2002 (over 65%) left the Division or transferred to other sections.
- The change in Division hiring procedures plainly politicized that process. A July, 2006, report in the *Boston Globe*, based on the resumes of persons hired and other hiring data for successful applicants to the voting, employment, and appellate sections from 2001 to 2006, indicated that: (1) only 19 of the 45 [42%] lawyers 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 (2) the conservative credentials of those hired sharply increased, with seven hires listed as members of the Republican National Lawyers Association, including two who volunteered for Bush-Cheney campaigns. Eleven were members of the conservative Federalist Society.

- Most disturbing was evidence laid out in “The Erosion of Rights” about substantive decision-making by political appointees on the basis of partisan political factors with respect to Section 5 consideration of redistricting plans in Mississippi and Texas and the Georgia voter identification law. By allowing partisan political concerns to influence the Division’s decision-making, the Bush administration damaged the Section 5 process, undermined the credibility of the Justice Department and the Civil Rights Division, and approved discriminatory voting changes.

B. The Enforcement Record of the Civil Rights Division from 2001-2007

Discussion of the Bush Administration’s enforcement record in “The Erosion of Rights” focuses on the enforcement programs of the Criminal, Employment, and Voting sections. Because the GAO report did not examine the Criminal Section’s work, I summarize here the review of the enforcement record of the Employment and Voting sections in “The Erosion of Rights. This review focused on two major shortcomings in this record: (1) the reduction in systemic enforcement actions in both sections; and (2) the major reduction in the number of cases brought alleging illegal discrimination against African-Americans. These failings are demonstrated by the following:

1. Employment Section

- Through mid-2006, the Bush Administration filed 32 Title VII employment discrimination cases, an average of approximately five cases per year. By comparison, the Clinton Administration filed 34 cases in its first two years in office and, by the end of its term in office, had filed 92 employment discrimination complaints or more than 11 cases per year.
- Of the 32 Title VII cases brought by the Bush administration in this period, only nine were pattern or practice cases. Pattern or practice employment discrimination cases are the most important and significant cases brought by the Employment Section 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 Justice Department is actively enforcing Title VII.
- Of the nine pattern or practice cases, five raised allegations of race discrimination. Two of the race discrimination cases were “reverse” discrimination cases, alleging discrimination against whites, and another case alleged discrimination against Native Americans. Of the two cases filed alleging discrimination against

African-Americans, one 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 exactly *one* pattern or practice case in five years that alleged discrimination against African Americans, and that case was not filed until February 7, 2006, more than five years into the Bush Administration. In its first two years alone, the Clinton Administration filed 13 pattern or practice cases, eight of which raised race discrimination claims.

2. Voting Section

- Section 2 cases brought pursuant to the Voting Rights Act, particularly vote dilution cases challenging discriminatory methods of election, are almost all cases which attack systemic discrimination and are the most important and complex litigation brought by the Voting Section. From 1982, when Congress amended Section 2 to its current form, until 2001, such cases were a priority of both Republican and Democratic administrations. The Bush administration, however, deviated significantly from this consistent policy and brought fewer Section 2 cases, bringing them at a significantly lower rate than any other administration since 1982.
- In the six years reviewed in the "The Erosion of Rights," the records show that the Bush Administration's enforcement of Section 2 came to a virtual standstill and reflected a decision by the administration that developing these cases was no longer a priority. For example during the Reagan Administration, 33 Section 2 cases were filed (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; during the 48 months of the Bush I Administration, eight Section 2 cases were brought; during the 96 months of the Clinton Administration, 34 were brought. During the first six years of the Bush II Administration, however, only 10 Section 2 cases were brought. Thus, the overall rate of Section 2 claims per year for the Bush Administration was the lowest of 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.
- Vote dilution cases are the most important Section 2 cases, yet it is clear that the Bush administration significantly de-emphasized this kind of enforcement. During the first six years of the Bush Administration filed only 10 Section 2 cases of any type, and only five involved vote dilution claims. By contrast, during the final six years of the Clinton Administration, 22 Section 2 cases were filed (a rate of 3.67 cases per year), 14 of which raised vote dilution claims.
- The review of Section 2 enforcement reflected that the de-prioritization of Section 2 enforcement by the Bush Administration was especially apparent in Section 2 cases brought on behalf of African-American and Native American voters. 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 were filed by the Bush Administration on behalf of African-American citizens and none were filed on behalf of Native American citizens.

- Furthermore, attributing the filing of five Section 2 vote dilution cases to the Bush Administration is, if anything, overly charitable because two of these five cases filed after January 20, 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. Moreover, the only Section 2 vote dilution case on behalf of African-Americans fairly attributed to the Bush Administration - *United States v. City of Euclid, Ohio* – was not brought until July 10, 2006.

II. THE GAO REPORT

The Government Accountability Office reports released today are pursuant to a June 14, 2007 request by Chairman Conyers and Chairman Nadler asking the GAO to examine the enforcement priorities, and data collection through case management information system of the Civil Rights Division. The first report, entitled “*DOJ’s Civil Rights Division: Opportunities Exist to Improve its Case Management System and Better Meet its Reporting Needs*,” focuses on the Division’s case management system, and my testimony is not directed at that report. Rather, I am providing observations about the second report, entitled *U.S. Department of Justice: Information on Employment Litigation, Housing and Civil Enforcement, Voting and Special Litigation Sections’ Enforcement Efforts from Fiscal Years 2001 through 2007*. Because the analysis done in “The Erosion of Rights” does not include sections on the Housing and Special Litigation sections, my comments are directed primarily to information in the report about the enforcement records of the Employment and Voting sections. It also includes information about the time and personnel resources available and expended by each section as well as charts demonstrating the attrition rates for each section.

The GAO report is an objective recitation that focuses primarily on the number and types of matters opened and closed and includes a review of the cases filed by each section from FY 2001 through FY 2007. There are conclusions or observations about this data, but there is no data available to permit a comparison of the enforcement record of the Bush Administration to that of previous administrations. Indeed, because part of the period covered includes the last three and one-half months of the Clinton Administration (October 1, 2000, the beginning of FY 2001, through January 20, 2001), the data in the report includes information about enforcement in both the Clinton and Bush

Administrations. Nonetheless, a careful reading of the GAO report confirms the data and observations made in the “The Erosion of Rights,” as set forth below:

First, the data in the GAO report is consistent with data in “The Erosion of Rights” demonstrating a decline in cases brought by the Employment section.

- The GAO found that the Employment Section brought only 11 cases claiming a pattern or practice or systemic discrimination under Title VII during the seven year period.¹ It noted that seven of these cases alleged race discrimination. But closer examination of these cases in “The Erosion of Rights” reflects that only three of the pattern or practice cases brought during the Bush Administration alleged discrimination against African-Americans, the first of which was not brought until April, 2006. Furthermore, prior to the filing of these three cases, two reverse discrimination cases were brought on behalf of whites. By comparison, 13 pattern or practice cases were brought during the first two years of the Clinton Administration alone, of which eight concerned racial discrimination, all against minorities.
- The GAO found that, over the seven year period it examined, only 44 lawsuits were brought by the Employment Section to enforce Title VII. As noted above, data in “The Erosion of Rights” indicate that, under the Clinton Administration, 92 such cases were filed during its eight years, an average of 11 per year.
- The GAO found that the Employment Section brought only 33 cases claiming Title VII discrimination against individuals during the seven year period. According to “The Erosion of Rights,” there were 73 such cases filed under the Clinton Administration, more than double the number from 2001 to 2007.
- The GAO found that over the seven year period, only 44 lawsuits were brought by CRD to enforce Title VII, which prohibits race and gender discrimination in employment, about 6 per year. By comparison, CRD under the Clinton Administration brought 92 such cases over its eight years, an average of 11 per year.
- The GAO found that the Employment Section brought only 33 cases claiming Title VII discrimination against individuals during the seven year period. Yet there were more than 3,200 referrals of such complaints sent by the EEOC to CRD from 2000 to 2006, and there were 73 such cases filed under the Clinton Administration, more than double the number filed in the FY 2001-2007 period.

Second, the GAO Report confirms the problems catalogued in “The Erosion of Rights” concerning enforcement by the Voting Section during the Bush Administration:

¹ Furthermore, an examination of the Employment section website indicates that one of these eleven cases was filed on January 10, 2001 during the Clinton administration.

- The GAO found that the Voting Section brought a total of 13 cases pursuant to Section 2 of the Voting Rights Act during the seven year period examined,² including only one that can be attributed to the Bush Administration alleged discrimination against African-Americans.³ By comparison, “The Erosion of Rights” report found that during the last six years of the Clinton Administration, 22 Section 2 cases were brought, eight of which concerned discrimination against African-Americans.
- The GAO found a significant drop-off in Section 2 activity during the seven year period. Of the 162 Section 2 inquiries or matters initiated by the Voting Section during that time, 121 or 75% were started during 2001-03.
- The GAO also found a drop-off during the seven year period in the enforcement of Section 5 of the Voting Rights Act, under which the Voting Section reviews proposed voting changes in states and municipalities with histories of discrimination and can prevent the implementation of those with discriminatory purpose or effect. Statistics in the report indicate that 75% (31 of 42) of objections to changes by the CRD were during 2001-03 and 88% (37 of 42) were before 2005, even though the number of proposed changes was higher during 2006-07 (over 40,000) than in any other two year period. GAO figures also show that the amount of time spent on Section 5 matters also decreased, even though the number of submissions did not.
- While the GAO report does not address the issue of politicization of the Division during the period examined, there is material in the report that confirms this phenomenon. At the outset, it should be noted that there were four reports issued by the Inspector General of the Department of Justice in 2008 and 2009 which confirmed how politicized the hiring process in the Department was. Furthermore, one of the most damaging and revealing of these reports was that concerning hiring practices in the Civil Rights Division.

Indications of the impact of this politicization on the Division can be found in the GAO Report. There was a press report in the September 20, 2009 *New York Times* that documented close to 70% attrition in Division staff during the period from 2003-2007, an especially shocking statistic which reflects the devastating impact of the politicization on career Division staff. The GAO report has data setting forth the attrition rates that is consistent with this newspaper report. These statistics indicate that (1) in the Employment Section, shortly after the section chief and longtime deputy were removed in 2002, the attrition rates was 23% in 2003, 35% in 2004, and 22% in 2005; (2) in the Voting Section, after the section chief and one deputy left the Division in April 2005 because of the

² According to the Voting Section website twelve, not thirteen, Section 2 cases were initiated in the FY 2001-2007 period.

³ The GAO found three race discrimination cases filed during the period examined. But one of those cases -- *United States v. Charleston County* -- was filed during the Clinton Administration; and, as noted above, another -- *United States v. Crockett County, Tennessee* -- grew out of an investigation completed during the Clinton Administration.

hostility of political appointees and the stripping of many responsibilities, the attrition rate was 31% in 2005, 27%, in 2006 and 21% in 2007. In the same years in the Special Litigation Section, the attrition rate was 31% in 2005, 24% in 2006, and 18% in 2007.

III. CONCLUSION

The damage to the Civil Rights Division from eight years of politicization during the Bush Administration was extremely serious. The GAO report, while neutral in its presentation, contains data that confirms the extensive evidence of politicization set forth in “The Erosion of Rights” report by former Division employees. I know I speak on behalf of most former employees who left during this period in expressing our fervent hope that this and other reports will be vigorously addressed by the Obama Administration.

And, the signs are very hopeful. Already, the new Attorney General and Assistant Attorney General for Civil Rights have declared that the restoration and transformation of the Division is a top priority, and they are determined to enforce all the civil rights laws. As Attorney General Holder stated at the installation of Assistant Attorney General Perez on November 13th:

“The Civil Rights Division that Tom leads today is stronger than it was nine months ago, but there is much more work to be done. The Civil Rights Division may be “back open for business,” as I often say but that cannot be enough. We must commit ourselves not just to restoring the Civil Rights Division. We must commit ourselves to making the Division stronger and better than it has ever been before and ready to confront the 21st century issues that have already begun to present themselves. This will take time – but not too much time. The quest for justice must be an impatient thing – for we all know what happens when justice is delayed. So I am an impatient Attorney General.”