

**THE 50TH ANNIVERSARY OF THE CIVIL RIGHTS
ACT OF 1957 AND ITS CONTINUING IMPORTANCE**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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WEDNESDAY, SEPTEMBER 5, 2007

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 10:01 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kennedy, Feinstein, Feingold, Cardin, Specter, and Sessions.

**OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S.
SENATOR FROM THE STATE OF VERMONT**

Chairman LEAHY. Good morning. This Sunday our Nation is going to mark the golden anniversary of the Civil Rights Act of 1957. It was the first major civil rights law passed since Reconstruction. I remember it well. It was my first year in college when it passed and I remember the excitement I heard on a small college campus in Vermont. It remains one of the most important pieces of legislation this Committee and the Congress ever considered. Its story has been retold in the award-winning books "Master of the Senate" by Robert Caro and "Parting the Waters" by Taylor Branch.

With this hearing, we examine whether Federal civil rights enforcement has remained faithful to our goal of achieving equal justice for all. We meet with the Nation at a crossroads. Two years after the devastation from Hurricane Katrina and its aftermath and the failure of Government to protect our citizens in the Gulf Coast and to help those displaced from the Lower Ninth Ward of New Orleans and elsewhere, many Americans are beginning to doubt this country's commitment to civil rights.

We have a Justice Department without effective leadership. The Attorney General, the Deputy Attorney General, the Associate Attorney General, the Assistant Attorney General for Civil Rights, and many others have resigned in the wake of the scandals. And we have witnessed what appears to be the abandonment of the founding priorities of the Civil Rights Division. That Division, which has so often served as the guardian of the rights of minorities, has been subjected to partisan hiring practices and partisan litigation practices.

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The flood of recent departures from the Justice Department, culminating in last month's resignation of the Attorney General and the Assistant Attorney General for the Civil Rights Division, underscores the Civil Rights Division's loss of direction and the shaken morale of dedicated career staff. We cannot allow the absence of meaningful enforcement to render our civil rights laws obsolete.

America has traveled a great distance on the path toward fulfilling the promise of equal justice under law, but we still have miles to go. Just last year, this Committee received extensive testimony during the reauthorization of the Voting Rights Act of continuing racial discrimination affecting voting. During last fall's election, we received reports about several efforts to intimidate Latino voters. These civil rights abuses ranged from false campaign mailings in Orange County, California, to intimidation at the polls in Tucson, Arizona. An important legislative initiative is on our Committee agenda this week to try to stem deceptive voting practices and abuses still being practiced against minority voters. As long as the stain of discrimination remains on the fabric of our democracy, the march toward equal justice must continue.

The Civil Rights Act of 1957 created an Assistant Attorney General dedicated solely to civil rights enforcement which led to the formation of the Justice Department's Civil Rights Division. It also provided the Justice Department with a new set of tools to prosecute racial inequality in voting. Although the Department had prosecuted some criminal cases since 1939, this law allowed the Department to bring civil actions on behalf of African-American voters. And with this new authority, the Division worked to correct civil rights violations and helped set the stage for Congress to pass stronger legislation with respect to voting, housing, employment, and other key areas in the decade of the 1960's.

America must remain steadfast in our commitment that every person—every person, regardless of race, or color, or religion, or national origin—should enjoy the American dream free from discrimination. That is something we owe to all Americans, we owe to our children, we owe to our grandchildren. We should continue to expand that dream to fight discrimination based on gender or sexual orientation as well. We should reaffirm our commitment to the promise of the Civil Rights Act of 1957. I hope that today's hearing is a step in doing so, and we are going to have a most distinguished panel of civil rights leaders, and I thank them for being here today. But I will yield first, of course, to the distinguished Senator from Pennsylvania.

**STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM
THE STATE OF PENNSYLVANIA**

Senator SPECTER. Thank you very much, Mr. Chairman, and I commend you on convening this important hearing to commemorate 50 years from the enactment of the 1957 legislation on civil rights. And I welcome Congressman John Lewis, who has such an extraordinary record in civil rights, having been on the front lines of the battleground for decades, and the other distinguished witnesses who will appear here today.

We have come a considerable distance. I do not know that I would go so far as to say we have come a long way, but I do believe we have a long way to go. But there has been noteworthy progress.

In 1957, there were four African-Americans serving in the House of Representatives. Since 1957, there have been 85 new House Members and an additional 5 non-voting House Members. Since 1957, there have been three African-American Senators—candidly, not enough, but some progress.

We have seen the advance of women. In 1980, when my group was elected, only Senator Nancy Kassebaum was in the Senate, representing the only woman in the U.S. Senate. Paula Hawkins was elected that year. Now we have a total of 16 women Senators, adding a great deal in diversity and a different point of view to the U.S. Senate. We have seen legislation on protecting women against violence. We have seen two of the leading contenders for the Presidency of the United States now coming from what had been a minority group—one woman and one African American. Odd that women have been classified as a minority since they are really a majority and in most households are the dominant voice.

But there has been considerable progress. We have made progress on fighting discrimination on sexual orientation. The Bowers case was overruled by *Lawrence v. Texas*. There has been considerable progress made on hate crimes legislation, although, candidly, not enough. Senator Kennedy and I introduced that legislation a decade ago or more. It has had a rough road, but it is not a matter of if but a matter of when that will be enacted.

But we still have substantial discrimination present in America. You find incidents which have an overtone of homosexuality or gay conduct being treated in a manner very, very differently than if it had been heterosexual. It still remains in our country and still a lot of discrimination against African-Americans and the glass ceiling on women and sexual orientation and remaining discrimination against many other minority groups, still discrimination against Catholics and Jews and Italians and the Poles and immigrants, lots of discrimination remaining in this country.

So we can note with some pride the 50 years since we have had the legislation, but we have to focus at the same time on the great deal of work which is yet to be done.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Normally we would go right to the first witness, but, Congressman Lewis, if you do not mind, the person who has been on this Committee the longest of any of us in either party and has been as strong a voice in civil rights as any Senator of either party I have ever served with, as something that also was very similar to his two brothers, is Senator Kennedy. And if you do not mind, I would like to yield to him.

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR
FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. Thank you. Thank you very much, Mr. Chairman. And I join with Senator Specter and the others in congratulating you in having this hearing. I think it is an enormously important hearing, and it is good to see our colleagues who are here

who have joined to listen to some of the really profound and thoughtful and concerned voices that we are going to hear on our witness list, a very distinguished group led by John Lewis.

This hearing is enormously important, I think, and I hope the resonance of what we are going to hear during the course of the morning will be listened to by Americans, and particularly during this time of national discussion about the future direction of our country, because what I see as someone that observed the passage of the Civil Rights Act of 1957 and paving the way for the actions that we had in 1962, 1964, 1968, on through the 1970's and overturning Supreme Court decisions and the rest, I see forces in this country that are using the path and pattern that were brilliantly led by some of those who are concerned about the lack of progress in civil rights during the late 1950's and the early 1960's and using those kinds of pathways in order to reverse the progress that we have made.

I may be wrong, and I hope I am, but I am enormously distressed by the more recent Supreme Court judgments and statements that are made by the courts, the Seattle case, and by the failure of the Department to follow the age-old traditions of professionalism and the law at a very, very crucial and critical period in terms of our country. And I hope that those who are here today can sort of put all of this, where we have been, where we are going, awaken this country to ensure that we are not going to make a misstep or a step backward in what has been this extraordinary march to progress, and has, I think, been invaluable in helping America be America.

I thank the Chair.

Chairman LEAHY. Thank you, Senator.

Senator SESSIONS. Mr. Chairman, could I welcome our guest for 1 second?

Chairman LEAHY. Please.

**STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM
THE STATE OF ALABAMA**

Senator SESSIONS. Congressman Lewis is, of course, one of the most respected Members of the House and one of, I think, America's greatest citizens. He represents Georgia, but he is a native of Alabama, grew up a sharecropper's son near Troy, Alabama. And I know you were back there recently at Troy University speaking. I admire you greatly, and I think it is sort of emblematic of what has happened that Troy University in Montgomery has created the Rosa Parks Museum. It has an interactive museum with a school bus just like the bus she refused to move to the back of, and I think maybe that is emblematic of some of the progress we have made.

Congressman Lewis, thank you for your service to America. Thank you for being one of Alabama's finest sons. And thank you for helping to make this a better country.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, and I apologize. I realize you are both Alabamans, and you should have had the ability to say something, too.

Senator SESSIONS. Thank you.

Chairman LEAHY. John Lewis is a good and dear friend—oh, yes, Senator Specter? Sorry. The short-term memory is falling apart here. Go ahead.

Senator SPECTER. Just a word, Mr. Chairman. The Subcommittee on Labor Appropriations where I am Ranking has a hearing at 10:30 on the Utah mine disaster, and I am going to have to excuse myself to go there. But I will follow closely the testimony here today, and without my saying it, you know you have my total support.

Chairman LEAHY. Thank you. And I would note that the Senator from Pennsylvania always has been in the forefront in this, and—

Senator FEINSTEIN. Mr. Chairman, if I might just say—

Chairman LEAHY. Of course.

**STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR
FROM THE STATE OF CALIFORNIA**

Senator FEINSTEIN. Thank you very much.

Chairman LEAHY. I am the most easygoing Chairman in the Senate, as the former Attorney General used to say.

Senator FEINSTEIN. Thank you. I do not think there is a leader in the civil rights movement that is as respected for his leadership as you, Congressman Lewis. I want you to know that. I think your dignity, your constancy, your consistent advocacy has really been important in these decades, and I want you to know that.

I was not going to come to this hearing because I thought, you know, we are really on the march with civil rights, things are really going to be fine. And then last night I heard on the news where the KKK has now gotten active in Virginia, particularly with respect to the immigration issue. And I began to think that, you know, no matter what the progress we make, there are always people that want to turn back the clock for one reason or another. And it really does cause us, I think, to have a kind of warning that these values we cannot take for granted, that we have to continue the advocacy. And I can think of no one to be in that front row better than yourself.

So I just want to say thank you for the many decades of leadership, and I look forward to your comments.

Chairman LEAHY. Thank you.

Now, as I started to say, Congressman Lewis is one of my dearest friends in the Congress. We have worked together and talked together and plotted together on legislation. He represents Georgia's 5th District, is a nationally recognized civil rights leader. He was an architect and keynote speaker at the March on Washington in 1963. Incidentally, I do remember that speech. He served as Chairman of the pivotal Student Nonviolent Coordinating Committee. He recently addressed the graduating class at the University of Vermont, and he instructed those graduates that they have an obligation, a mission, and a mandate from all of those men and women who sacrificed before their time.

You are right, and I agree with you. We have to do our part for this great democracy, and so I welcome you back to the Senate Judiciary Committee. You honor us with your presence. Please, Congressman, go ahead.

**STATEMENT OF HON. JOHN LEWIS, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF GEORGIA**

Representative LEWIS. Thank you, Chairman Leahy and Senator Specter and other members of the Committee. Thank you for inviting me to testify before the Senate Judiciary Committee today. I thank each and every one of you for those unbelievable remarks. I really appreciate it.

As we approach the 50th anniversary of the Civil Rights Act of 1957, I appreciate having this opportunity to share my thoughts and experiences with you. In particular, I would like to discuss the importance of the Civil Rights Division of the Department of Justice and how we can renew and strengthen the Division in the future.

In the late 1950's, there was a tremendous amount of fear in the American South. People were afraid to talk about civil rights. I would ask my mother, my father, my grandparents, and my great-grandparents, "Why segregation? Why racial discrimination?" And they would say, "That's the way it is. Don't get in the way. Don't get in trouble."

People of color couldn't vote; they couldn't register to vote. They paid a poll tax. Black people could not sit on a jury. Segregation was the order of the day. It was so real. The signs were so visible. People were told to stay in their place.

People were beaten; people came up missing. Emmett Till, a 14-year-old boy, a boy 1 year younger than I, was lynched in 1955, and it shook me to the core. It could have happened to me or any other African-American boy in the Deep South. It was a different climate and environment. In some instances it amounted to police- and state-sanctioned violence against people of color. I remember reading about a man being stopped on the highway, castrated and left bleeding to death. In 1956, in Birmingham, Alabama, Nat King Cole was attacked while performing, and he never returned to perform in the American South. Black people were afraid, and white people were afraid to speak out. It truly was terror.

In September of 1957, I was 17 years old—a child, really. I was just arriving in Nashville, Tennessee, to begin my studies at the American Baptist Theological Seminary. I had not met Dr. Martin Luther King, Jr. I had met Rosa Parks. I had not become involved in Student Nonviolent Coordinating Committee. I had not taken part in the freedom rides or the sit-ins, and I had not walked over the Edmund Pettus Bridge on Bloody Sunday. But the "Spirit of History," as I like to call it—Fate, if you will—was beginning to move in important ways in 1957, both for me and for our Nation.

That September, the Congress had passed and President Eisenhower was signing the Civil Rights Act of 1957—the first piece of civil rights legislation since reconstruction. Some would look back and think that this legislation was mostly ineffective, but it was significant because it created an Assistant Attorney General for Civil Rights, and so began the Civil Rights Division of the Justice Department. It also created the Civil Rights Commissions, which did important and at times dangerous work, hold hearings all across the South, gathering data and information on voter registration and discrimination. The 1957 Act was also significant because, for the first time, it made it a crime to interfere with a person's

right to vote in Federal elections, setting the stage for future legislation.

In the coming years, the Civil Rights Act of 1964 and the Voting Rights Act of 1965 would give substance to the promise of equal rights and formed the basis for the work of the Civil Rights Division.

In 1958, at the age of 18, I met Dr. Martin Luther King, Jr., for the first time—a meeting that would change the course of my life. That year, you could feel the urgency in the air, the need for change and the sense that things were about to change.

Progress would begin slowly. The Supreme Court decision in *Brown v. Board of Education* and the successful Montgomery bus boycott, those threats to the Southern establishment created a backlash, more violence and more fear. But at the same time, young people, white and black, were joining the movement. We were inspired to get in the way, to get in trouble; but it was good trouble, it was necessary trouble.

My involvement in the movement was growing at the same time as the Civil Rights Division was becoming an important tool for protecting the rights of Americans who faced discrimination.

During the Kennedy and Johnson administrations, we knew that the individuals in the Department of Justice were people we could call any time of day or night. The Civil Rights Division of the Department of Justice was a Federal referee in the struggle for civil rights and civil justice.

John Doar, beginning in the Eisenhower administration, for instance, was a Republican from Wisconsin. He was someone that we trusted, we believed in. And he remained during the Kennedy and Johnson years. And we felt during those years that the Civil Rights Division of the Department of Justice was more than a sympathetic referee. It was on the side of justice, on the side of fairness. During the movement, people looked to Washington for justice, for fairness. But today, Mr. Chairman, I am not so sure that the great majority of individuals in the civil rights community can look to the Division for that fairness. The public has lost confidence in our Government, in the Department of Justice, and in the Civil Rights Division. We can and must do better.

The Civil Rights Division was special. It attracted the best and the brightest, and those attorneys stayed with the Civil Rights Division for decades. The civil rights laws were enforced no matter which party was in the White House, and these attorneys were able to do their jobs without political interference. It is not so today.

In the last few years, we have lost more career civil rights lawyers than ever before. The new lawyers are being hired for the first time in the Division's history by political appointees rather than career attorneys. It is not surprising that the Division is hiring fewer lawyers with civil rights or voting rights backgrounds.

There is also a clear shift in the types of cases being brought by the Division. The Division is neglecting the tradition of civil rights cases, and it appears to have given up on enforcing the Voting Rights Act altogether.

Mr. Chairman and members of the Committee, I must tell you that I am particularly disturbed by the way the Civil Rights Divi-

sion handled the Georgia voter ID law in 2005. It takes special people to enforce Section 5 of the Voting Rights Act. There is always the potential for political interference. However, the Voting Rights Section has always been above partisanship, and it has resisted attempts by administrations to influence the outcomes of cases.

However, this was not this case with the Georgia law. The Georgia voter ID law would have required voters to show a photo ID at the polls and would have disproportionately prevented minorities from voting in Georgia.

The career attorneys found that the law violated the Voting Rights Act and recommended that it should be denied pre-clearance. But the career attorneys were overruled by the political appointees. This type of political influence preventing the enforcement of our civil rights laws is shameful and unacceptable. Thankfully, a Federal court saw the law for what it was—a poll tax—and struck it down.

It is clear that the Civil Rights Division of the Department of Justice has lost its way. The Civil Rights Division, once guardians of civil rights, has been so weakened that I do not recognize it.

Congressional oversight could have prevented some of this. Freedom and equality are rights that are not simply achieved; they must be preserved each and every day. But we have not been focused on protecting our rights, and therefore, we are watching them slip away.

The Civil Rights Division is still important, and it has important work to do today, just as it did during the civil rights movement. Yes, Mr. Chairman, we have come a long way, but there is still discrimination in voting, in employment, and housing that must be addressed.

Congress must restore the Civil Rights Division as the champion of civil rights. Congress has a duty to perform strong oversight and to investigate whether our civil rights laws are being enforced. We must reverse the political hiring process and put the decisions back in the hands of the career professionals, who know what it takes to enforce our civil rights laws.

In addition to strengthening the Department of Justice, I also believe that we need to give our citizens a private right of action to challenge federally funded programs that unfairly disadvantage a particular group, whether or not there is discriminatory intent. I am working with Senator Kennedy on legislation that would ensure this private right of action.

We in Congress must do all we can to inspire a new generation to fulfill the mission of equal justice, which is the enduring legacy of the civil rights movement and the Civil Rights Division. I still believe, as Martin Luther King, Jr., believed, that we can create a beloved community, an interracial democracy, based on simple justice that values the dignity and the worth of every human being. We need to let the spirit of history move within us on this 50th anniversary of the Civil Rights Act of 1957. We must rededicate our international Government to justice, to service, to equality. And we must begin by strengthening the Civil Rights Division of the Department of Justice.

Thank you very much, Mr. Chairman.

Chairman LEAHY. Well, thank you, Congressman. You mentioned John Doar. I recall first meeting him when I was a law student and then talking with him in later years when I was a prosecutor. A very, very impressive man.

You know, I am going to save your testimony, and sometime when my grandchildren, all of them, are old enough to read it, I am going to have them read it, and I am going to say, "Listen to what Congressman Lewis said about what life was like," so that they understand what their grandfather and others have done to make sure we do not go back to those days. I think that if we are not always vigilant, we could go back there.

You and I will never be blocked from voting. You and I will never be blocked from going to a restaurant or being on a bus or going to any public event. We will not. But there are others who might, others who still are.

In 1957, when this Act was passed, a member of this Committee filibustered it for 20-some-odd hours. We would not see that today. But it is a different form of filibustering that the Act is not being enforced, it is not being handled right, and I thank you for what you said about the Civil Rights Division.

The next Attorney General, indeed, the next President, should have a mandate to make sure they put the Civil Rights Division back to what it was, to put in good Republicans and Democrats, put in people without thought of what their politics are, and then tell them not to be political. The Civil Rights Division cannot be political. It has to be colorblind. It has to enforce the law. I agree with you it is not doing that. Let us hope we get back to it, because I never want to go back to the days you talked about with your grandparents.

Thank you.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Congressman Lewis, you came of age during a time not too long ago that we had an unfair system in America, particularly in the South, where we had a system that discriminated against a substantial number of our citizens, and it was just maintained by power. We can say whatever we want to, but those who know what happened know it was a powerful force determined to maintain white supremacy, maintain inequality and unfairness and injustice in that system. And it was not right, and you had the courage, one of the very earliest ones. You have suffered personally and physically for the courage you showed, and I want to thank you for it because Alabama and the whole South and the Nation is better for what you did.

Sometimes people tell me, "Well, you know, we have made so much progress and things are better," and indeed they are, as we certainly know. You hear some, I guess, white constituents say, "Well, you know, I am just tired of hearing about that. People are too worried about that. Nobody is going to deny somebody the right to vote." But I have gained an appreciation as I have thought about it that this was not that many years ago. It was not that many years ago that you were acting against a system that was established law and power.

I was a teenager during those years, and I remember those years. We had bathrooms for the separate races—colored bathrooms and white bathrooms. Schools were segregated resolutely.

Would you share with us your thought, to the non-African Americans, how it feels to have such a recent change in historical times and why it is that you feel a special obligation to be vigilant to see that things do not slide back in any form or fashion?

Representative LEWIS. Senator, thank you very much for your comments and for your question. You know, growing up outside of Troy in southeast Alabama and visiting places like Montgomery and Tuskegee as a young child, I saw those signs that said, “White Waiting,” “Colored Waiting,” “White Men,” “Colored Men,” “White Women,” and “Colored Women.”

I remember in 1956, when I was 16 years old, some of my brothers and sisters, we were deeply inspired by Dr. King and Rosa Parks and others. We went down to the public library in the little town of Troy trying to get library cards, trying to check out some books, and we were told by the librarian that the library was for whites only and not for coloreds. I never went back to that library until July 5, 1998, for a book signing of my book, “Walking with the Wind.” And hundreds of blacks and white citizens showed up, and they gave me a library card.

So I think that says something about the distance we have come and the progress that we have made, but a lot of people, a lot of young people of color, were denied an opportunity to go in that library and read, to check out a book.

And I remember in 1957, again, 17 years old when I finished high school, I applied to go to Troy State, now known as Troy University. I submitted my application, my high school transcript. I never heard a word from the school. It was only 10 miles from my home. So I wrote a letter to Martin Luther King, Jr., and told him I needed his help. He wrote me back and invited me to come to Montgomery to talk with him about it.

My folks were so afraid. They did not want to have anything to do with me going to Troy State. They thought our house would be burned or bombed; they thought it was too dangerous. So I continued to study in Nashville.

Years later, after I got elected to Congress, the little school in Brundidge—you know where Brundidge is? About 12 miles from Troy—where I attended high school, had a class reunion and John Lewis Day, and Troy University then led the parade through the town, and the late Senator Heflin came down, and the chancellor said, “We understand you could not go to Troy State. Next year why don’t you come and get an honorary degree from Troy State?” And at the next graduation, they granted me an honorary degree, and Senator Heflin was the commencement speaker.

I think it says something about the distance we have come and the progress we have made in laying down the burden of race. But we still have so far to go. I hear young people say sometimes, “Nothing has changed.” And I feel like saying, “Come and walk in my shoes. Things have changed.” But there are still those invisible signs of discrimination. You still have, in a State like the State of Georgia, an attempt to take us back. To tell people in 2006 you need a photo ID—you must understand that hundreds and thou-

sands of people, African Americans, low-income whites, and others that were not born in a hospital, they do not have a birth certificate. They do not even know what a passport is. So they do not have a State ID, so these people will be denied the right to participate in the democratic process. That is why many of us took the position to say that a photo ID amounts to a poll tax where you have to pay for it.

Senator SESSIONS. Thank you, Mr. Chairman. Thank you, Congressman Lewis.

Chairman LEAHY. Thank you very much.

Senator FEINSTEIN, then Senator Feingold, then Senator Cardin. And I might note that both Senator Feinstein and Senator Feingold have to leave shortly for an Intelligence Committee meeting. Am I correct?

Senator FEINSTEIN. Yes. Thank you.

Chairman LEAHY. Senator Feinstein.

Senator FEINSTEIN. Thank you very much.

Chairman LEAHY. Thanks, Jeff.

Senator FEINSTEIN. I really thank Senator Sessions for asking those questions of you, Congressman Lewis, because I think it gives people an understanding of the deeply personal and personally hurtful part of discrimination, which is a very complex reaction. But when I came down earlier and said hello to you, you mentioned two pieces of legislation, and one of them was the Hate Crimes Act and the other is the D.C. Voting Rights Act. And I wanted to give you an opportunity to speak about those two pieces of legislation and the importance of them at this particular point in time.

Representative LEWIS. Senator, thank you so much. I have taken a very strong position in support of the hate crimes legislation, and I say to people all the time in my district and around the country that I fought too hard and too long against discrimination based on race and color not to stand up and fight against discrimination based on sexual orientation or whatever. There is not any room in our society, it should not be allowed by the Federal Government or local government for people to engage in violent acts against other people because of their religion or their color or sexual orientation.

I think it is a shame and a disgrace that we live in one of the greatest democracies and that people died and fought for the right to vote.

Later you are going to hear from Bob Moses, who was Director of the Mississippi Summer Project in 1964, and three young men that I knew and Bob knew very well went out as part of an effort to get people registered to vote. These three young men died in Mississippi during the summer of 1964. And I tell young people all the time, they did not die in Vietnam or the Middle East or Eastern Europe, in Africa or Central or South America. They died right here in our own country. People died. And then we are going to say to the District of Columbia, where people leave this district, leave this city, they go and fight in our wars, and then they cannot participate in the democratic process. That is wrong, and I think we have a constitutional right to give the District full voting rights. It must be done. It must be done on our watch.

Senator FEINSTEIN. Just a quick followup, if I may. You mentioned in your opening comments about the importance of Congressional oversight of the Civil Rights unit of the Department of Justice and the feeling that it had deteriorated. Can you be more specific on that, exactly what you mean?

Representative LEWIS. Well, I will tell you one thing, Senator. I do not want to be flip about it, but if you ask most of us in the House today who had been the head of the Civil Rights Division, we would not know the person. It is like they do not exist. They are not engaged. And that is a problem. There are problems in America today. It is not just affecting one segment of this society where people are being discriminated against. And I think the Congress, whether we be in the Senate or the House, we have an obligation to hold oversight hearings, to follow through, and say, "What are you doing?"

Young people have been thrown in jail and sentenced to large and long sentences in many parts of the South, and part of it is race, nothing but race. And the Department of Justice is not saying anything. It is just silent. Complete silence.

Senator FEINSTEIN. I actually think the position is vacant now, is it not?

Chairman LEAHY. We just had a resignation, but there are about a dozen resignations ranging from the Attorney General straight down to the head of the Civil Rights unit. We presently have the most dysfunctional Department of Justice in my whole career.

Representative LEWIS. We knew John Doar. We knew Burke Marshall.

Chairman LEAHY. And you could call them.

Representative LEWIS. We could call them any time of day, any time of night.

Senator FEINSTEIN. And there was a discussion that took place.

Representative LEWIS. And they just did not remain in Washington. They came South. They put themselves on the front line.

Senator FEINSTEIN. Hopefully we can change that.

Thank you very much, Mr. Chairman. Thank you, Congressman.

Chairman LEAHY. Incidentally, is there anyone here from the Department of Justice?

[No response.]

Chairman LEAHY. Anyone here from the White House?

[No response.]

Chairman LEAHY. That is interesting because when I have other hearings, they send scores of people up. I hope they will take the time to watch the tape of this hearing and read the transcript. Maybe they could learn something by doing that.

Senator Feingold?

**STATEMENT OF RUSSELL D. FEINGOLD, A U.S. SENATOR FROM
THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you, Mr. Chairman. It is always an honor to be in the presence of Congressman Lewis, but particularly on an occasion like this, and to hear your accounts of the reality that you faced. It is a privilege to be a Member of Congress and to hear that.

Every so often, it is important to look back and celebrate important historic events that still have relevance to the problems we seek to address today in the Senate. The enactment of the Civil Rights Act of 1957 is one such event. The Civil Rights Act of 1957 certainly does not have the fame of the Civil Rights Act of 1964 or the Voting Rights Act of 1965, but it was an extremely important milestone for our country. It was the first civil rights bill passed into law since 1870, finally breaking through the seemingly impenetrable roadblock built by segregationists in the Senate against legislation to protect the rights of African Americans. Lions such as Hubert Humphrey and Paul Douglas, working with the extraordinary then-Senate Majority Leader Lyndon Johnson, passed a bill that the public and the pundits certainly thought would die, just as every other civil rights bill in nearly a century had died. The law's substantive achievements were modest compared with the landmark legislation that followed, but the creation of the Civil Rights Division of the Department of Justice has gained significance over time and is that law's greatest legacy today.

And the symbolic value of the legislative accomplishment was enormous. As Lyndon Johnson biographer Robert Caro writes in "Master of the Senate," which tells the story of Johnson's struggle to pass the bill, "The Civil Rights Act of 1957 made only a meager advance toward social justice, and it is all but forgotten today. But it paved the way. Its passage was necessary for all that was to come."

Because the Civil Rights Act of 1957 was only a beginning, it is fitting that this hearing look ahead as well as back. Obviously, we have come a long way in the past 50 years in the fight for racial equality, but there is much more to be done. Continuing our oversight of the Civil Rights Division is crucial, especially in light of what we have learned in recent months about the improper hiring practices and political interferences in decisions in the Voting Rights Section. The next Attorney General must make putting the Civil Rights Division back on track a very top priority.

We also have to do more legislatively, as you have already been talking about. This week the Committee will take up a bill to prohibit deceptive practices and voter intimidation—the 21st century version, if you will, of poll taxes and registration tests that are used to prevent minority citizens from exercising the right to vote.

Later in this Congress, I hope the Senate will consider the Fair Pay Restoration Act to reverse the Supreme Court's cramped interpretation of Title VII's pay discrimination prohibition. We must end racial profiling and do much more to bring the promise of equality to other racial minorities, the disabled, and gays and lesbians. And, yes, we must get D.C. voting rights, something which I have supported from the very beginning of my time in the Senate.

This is all noble work, Mr. Chairman, which builds on the foundation laid by the Civil Rights Act of 1957. I am proud to stand with those who believe that guaranteeing civil rights for all Americans is one of Congress' most important duties, and I am honored to again be with Representative Lewis and, of course, Dr. Bob Moses, two giants of the civil rights movement, and the other witnesses today. We have much to learn from them, and I appreciate very much the opportunity to speak.

Thank you, Mr. Chairman.
Chairman LEAHY. Thank you very much, Senator Feingold.
Senator Cardin?

**STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. SENATOR
FROM THE STATE OF MARYLAND**

Senator CARDIN. Well, Mr. Chairman, first, thank you for convening this hearing and commemorating the 50th anniversary of the Civil Rights Act of 1957. I must tell you this is a personal pleasure for me to have John Lewis as our witness. Twenty-1 years ago, I was elected to the House of Representatives, which was the single honor in my life, but to be elected with John Lewis in the same class—and the two of us became very good friends and almost soul mates during some very difficult times. And, Congressman Lewis, I just really want to thank you for what you have done not only in the civil rights movement, but what you have done in the Congress of the United States. You have always had that passion. You and I served on the Ways and Means Committee I guess for many, many years. I sort of miss the Ways and Means Committee, but it is really nice to be in the U.S. Senate.

I want you to know that you have always been an inspiration to all of us as far as your passion for these issues and your faith in our country. This is a great country. And we have made progress, as you have pointed out, but we still have much that needs to be done.

You know how to connect with people. You know how to really relate to the problems that we have in our community, and you are effective in getting things accomplished. So I just really want to followup on some of my colleagues and just point out that we have an agenda. The 50th anniversary should not be just a celebration, but it should be to establish where we need to go from here in order to complete the journey, as you so often talk about. And that means as Members of the U.S. Congress, there are some things that we can do. We do have an important role in looking at what is happening in the executive branch of Government, and as our Chairman pointed out, the Civil Rights Division, which was one of the crowning accomplishments of the 1957 Civil Rights Act, where we would have a focus within the Department of Justice on civil rights, has lost that focus.

We had a hearing not too long ago in this Committee that I had the opportunity to chair in which it became pretty obvious that the traditional role of the Civil Rights Division and standing up and fighting for racial discrimination cases has been missing and that the hiring within the Civil Rights Division of career attorneys has been compromised.

So I think we have a responsibility to restore that, and we have a chance to do that in that there now will be new leadership within the Department of Justice, and I think it is very important for this Committee and the Judiciary Committee in the House and each one of us to make sure during this process that we refocus the Department of Justice back on that Civil Rights Division and what it should do within the Civil Rights Division.

My colleagues have pointed out legislation we should be passing. The hate crimes statute should be passed. Tomorrow we are going

to have an opportunity in this Committee to do what you have already done in the House and pass the Voter Intimidation Act, to say once and for all that it is wrong, it is illegal, and we are not going to tolerate campaign strategies that try to win by suppressing the minority vote. That should be off the table. And I agree with my colleague Senator Feingold about the D.C. voting rights. That is something that needs to be done. That is a civil rights issue that needs to be accomplished.

Now, Mr. Chairman, I would also point out I think it is right for us in the confirmation process of judges to make sure judges have a passion for protecting the civil liberties of the people of this Nation, and that is part, I think, of our responsibility to make sure we complete the journey.

So to my friend John Lewis, thank you for coming over and gracing our Committee and for inspiring us to do more, and I just look forward to many more years of working with you in the U.S. Congress so that we can continue to make progress so that every American can truly enjoy the liberties of this great country. It is a great country. We have made a lot of progress. That is why it is so painful when we see the types of detours that have been taken recently. And I think we have the opportunity now to correct that and to move forward so that everyone in this country can enjoy this great Nation.

So congratulations on the work that you have done, and it is good to see you here, and please say hello to my friends in the House of Representatives.

Representative LEWIS. Well, Senator, thank you very much. I am very pleased and delighted to see you. We have been friends and we will remain friends, and it is good to be able to call you "Senator Cardin." Thank you.

I agree with you. We must give up. We must continue to push on. We can legislate, but we can also speak up and speak out. I think there is a great need for leadership, and I think the American people are prepared to make that leap. We just need to get out there. And what I said in the earlier statement, find a way to get in the way. And under the leadership of the Chairman and the members of this Committee, I know you will do the right thing. And I appreciate the opportunity to be here and especially to see the Chairman and to see you, sir.

Senator CARDIN. Thank you.

Mr. Chairman, I might point out, John Lewis was truly reluctant in advising me to run for the U.S. Senate because of our friendship. But then he realized that I had more seniority in the Ways and Means Committee than he did; then he encouraged me to run.

[Laughter.]

Chairman LEAHY. I might say, I am glad you ran. I enjoy having that extra seat. And I am delighted that you were willing in a very weak moment to allow me to convince you to come on the Senate Judiciary Committee. You have been a very, very valuable member.

Senator CARDIN. It has been very rewarding. Thank you, Mr. Chairman.

Chairman LEAHY. We will stand in recess for about 4 minutes while they set up for the next panel. And, Congressman Lewis, that

was some of the most powerful testimony I have heard in all my years here, and I appreciate you doing this.

Representative LEWIS. Thank you, Senator. Thank you, Mr. Chairman.

[The prepared statement of Representative Lewis appears as a submission for the record.]

[Recess 10:54 a.m. to 10:58 a.m.]

Chairman LEAHY. If we might come back, we are going to have a distinguished panel: Wade Henderson, the President and CEO of the Leadership Conference on Civil Rights; Theodore Shaw—I have always called him “Ted”—Director-Counsel and President of the NAACP Legal Defense and Education Fund; Peter Zamora, the Washington, D.C., Regional Counsel of the Mexican American Legal Defense and Educational Fund, or MALDEF; Gail Heriot, Commissioner, United States Commission on Civil Rights, and Professor of Law, University of California at San Diego; Robert P. Moses, who is the President, as we know, of the Algebra Project in Cambridge; and Robert Driscoll is a partner at Alston & Bird in Washington, D.C.

Following the procedure for non-Congressional members who are testifying, would you please all stand and raise your right hand? Do you solemnly swear that the testimony you are about to give before this Committee shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. HENDERSON. I do.

Mr. SHAW. I do.

Mr. ZAMORA. I do.

Ms. HERIOT. I do.

Mr. MOSES. I do.

Mr. DRISCOLL. I do.

Chairman LEAHY. Thank you.

The first witness will be Wade Henderson, as I said, the President and CEO of the Leadership Conference on Civil Rights that works on issues involving voting rights and election reform, Federal judicial appointments, economic justice, educational equity, hate crimes, criminal justice reform, issues of immigration and refugee policy, human rights.

Mr. Henderson, welcome. You are no stranger to this Committee. On both sides of the aisle, we have found your testimony to be extremely important. Please proceed, and what I am going to do is go down through each of you before we go to questions.

STATEMENT OF WADE HENDERSON, PRESIDENT AND CHIEF EXECUTIVE OFFICER, LEADERSHIP CONFERENCE ON CIVIL RIGHTS, WASHINGTON, D.C.

Mr. HENDERSON. Well, good morning, and thank you, Mr. Chairman and members of the Committee. It is an honor to be with you today. Indeed, I am Wade Henderson, President of the Leadership Conference on Civil Rights, the Nation's oldest, largest, and most diverse civil and human rights coalition. I am also honored to serve as the Joseph L. Rauh, Jr, Professor of Public Interest Law at the University of the District of Columbia, and it is a special pleasure to represent the civil rights community before the Committee today and to discuss the important topics at hand.

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 this 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. Yet, recently, many civil rights advocates have been concerned about the direction of the Division's enforcement. In order for the Division to once again play a significant role in the struggle to achieve equal opportunity for all Americans, it must rid itself of the missteps of the recent past, but also work to forge a new path. It must respond to contemporary problems of race and inequality with contemporary solutions. It must continue to use the old tools that work. But when they don't, it must develop new tools. It must be creative and nimble in the face of an ever-moving target.

Today, the Leadership Conference on Civil Rights Education Fund is releasing a new report, "Long Road to Justice: The Civil Rights Division at 50," which outlines the critical role the Civil Rights Division has played over the last 50 years in helping our Nation achieve its ideals. In the report, we also assess the current state of the Division's enforcement efforts and outline some recommendations for a way forward. The following are a few highlights of those recommendations:

First, the Civil Rights Division must restore its reputation as the place for the very best and brightest lawyers who are committed to equal opportunity and equal justice. It is not a question of finding lawyers of a particular ideology; rather, it is a rededication to hiring staff who share the Division's commitment to the enforcement of Federal civil rights law. That is not politics. It is civil rights enforcement.

In the area of voting rights, rather than promoting schemes that deny equal opportunity to citizens to vote, the Civil Rights Division should be focused on ways to increase voter access, such as combating voter ID laws—which John Lewis so eloquently spoke about—that have a disproportionate negative impact on racial, ethnic, or language minorities.

Fresh attention must also be paid to racial and ethnic segregation in housing. Discrimination in real estate sales and racial steering and discrimination in lending that destroys neighborhoods cannot continue to go unchecked. And as long as discrimination based on race, ethnicity, religion, gender, or disability remains a sad, harsh reality in this country, the battle against it must remain a central priority of the Civil Rights Division.

And in the wake of the Supreme Court's decision in the Seattle and Louisville cases, the Division must develop new tools that fight to create and maintain integrated and high-quality schools.

The complete text of "Long Road to Justice" can be found on our new website, www.reclaimcivilrights.org, which is being launched today as an important tool in our public education campaign on the issue of civil rights enforcement.

The 50th anniversary of the 1957 Civil Rights Act and the creation of the Civil Rights Division is a time to take a stock of where we have been, where we are, and where we need to go in the struggle for equal rights and equal justice in America. And we have come a long way, as has been noted—a very long way from legally segregated lunch counters, poll taxes, and whites-only job advertisements. But we are not finished. Today, we face predatory lending practices directed at racial minorities and older Americans, voter ID requirements that often have discriminatory impact on minority voters, and English-only policies in the workplace. So our work continues.

As our report outlines, one of the critical tools to our collective progress in civil rights has been the Civil Rights Division at the Department of Justice, and the heart and soul of the Division has always been its career staff. For 50 years, and regardless of which political party was in power, the staff has worked to help make our country what it ought to be: a place where talent trumps color and opportunity knocks on all doors; where you cannot predict the quality of the local school system by the race or ethnicity of the school's population, where access is a right not a privilege, and where difference is not just tolerated but valued.

We have concerns with the direction of the Civil Rights Division in recent years. The hope is that we can meet those concerns with positive action for our future. This report attempts to begin to map out the way forward, and we look forward to continuing the conversation.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Henderson appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Henderson.

Mr. Shaw is, as I said, the Director-Counsel and President of the NAACP Legal Defense and Education Fund. I would also mention he participates in briefing and oral arguments in the U.S. Supreme Court and litigation of civil rights cases—again, no stranger to this Committee.

Happy to have you here, Mr. Shaw.

**STATEMENT OF THEODORE M. SHAW, DIRECTOR-COUNSEL
AND PRESIDENT, NAACP LEGAL DEFENSE AND EDUCATION
FUND, INC., WASHINGTON, D.C.**

Mr. SHAW. Thank you, Mr. Chairman. I join in what Wade Henderson has said about the career attorneys at Justice, and I would like the Committee's indulgence as I talk personally about my experience.

I started out my legal career at the Justice Department in the Civil Rights Division. It was one of two jobs I longed for as a law student. The other one was to be an attorney for the Legal Defense Fund, and I have been blessed to work in both places.

When I joined the Justice Department, I was part of a cadre of lawyers, many who had been there since the halcyon days of the civil rights movement, who were committed to civil rights enforcement. They were apolitical. Their deepest commitment was to enforcing the civil rights statutes and laws of our Nation.

I think in understanding where we are now, we must recognize that the changes at the Justice Department that many of us lament today did not begin with this administration, although they certainly have been accelerated. In fact, these changes began in 1981, at least that far back, when appointees to the Civil Rights Division leadership began a course of intentionally shifting the direction of the Division, stepping away from school desegregation, stepping away from the class action employment discrimination cases that had been brought on behalf of African-American and Latino men and women and other people of color, and those who suffered both racial and gender discrimination.

The Department, as I understood it when I worked there, had a special role to play, and I think that it has lost its focus on that role. Not only was it the enforcer on behalf of the Federal Government of the Nation's civil rights laws, but it also was the leading entity within the Federal Government in coordinating civil rights. And so, for example, the Civil Rights Division was deeply involved in working with the Department of Education's Office of Civil Rights or Housing and Urban Development with respect to its enforcement of housing policies.

My view today, of course, is that there is a vacuum with respect to those functions, or if there is not a vacuum, there is a complete reversal with respect to the Department's focus and its role. A couple of quick examples.

In the aftermath of the Michigan cases in which the Supreme Court upheld the constitutionality of the consideration of race as a limited factor in college admissions, the Department of Education put out a set of guidelines with respect to interpreting those decisions and applying them that focused on undercutting what the Supreme Court had said was allowable as opposed to taking the basis the Supreme Court had given.

Another more recent example. The two cases that the Supreme Court decided—actually, one case involving two school district, Seattle and Louisville, in June, those two cases were the first time that the Supreme Judicial Court, to my knowledge, has argued against school desegregation or integration of public schools since the Department weighed in on the side of the plaintiffs in *Brown v. Board of Education* in the 1950's. That is a reversal of historic proportions. The Department of Justice, through the Solicitor General, argued a position in support of those who were opposed to voluntary school integration—a deeply disturbing development, made even more disturbing by the absence of the voice of African-American students and their parents at oral argument because the Court did not allow them to have a voice at oral argument.

So where was the Department of Justice? Where was its voice? What did it say? What did it do? I believe that it was a betrayal of the promise of *Brown v. Board of Education*.

Many years ago, in the civil rights movement, there was a saying out of Mississippi: "There's a town in Mississippi called 'Liberty.' There's a Department in Washington called 'Justice.'" It was aspirational, at best.

Finally, I would like to pick up on something that Senator Cardin mentioned. It is so important to the Nation that this Committee continue to exercise even more vigilance with respect to ju-

dicial appointments, because while the Department of Justice needs to recommit itself to civil rights, it is ultimately the judges and the Justices who are confirmed by the Senate who interpret the law. And we look forward to continuing to work with this Committee to ensure not only enforcement of civil rights with respect to the Department of Justice, but to make sure that the judges and Justices confirmed by the Senate are those who are open to the enforcement of civil rights.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Shaw appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Shaw.

Mr. Zamora is the Washington, D.C., Regional Counsel for the Mexican American Legal Defense and Educational Fund, MALDEF, as I mentioned, that works on Federal policy matters—immigration, education, voting rights.

We are glad to have you here. Please go ahead.

STATEMENT OF PETER ZAMORA, WASHINGTON, D.C., REGIONAL COUNSEL, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND [MALDEF], WASHINGTON, D.C.

Mr. ZAMORA. Thank you very much, Chairman Leahy, Senator Cardin. It is a real pleasure to be here today to testify in recognition of the 50th anniversary of the Civil Rights Act of 1957. The Act really remains as important today as it was 50 years ago because it codified the intent of Congress that the Federal Government should play a central role in protecting the civil rights of all Americans.

The Act intended to ensure that all qualified citizens be allowed to vote without distinctions based on race or color, and it specifically prohibited interference with voting rights in the election of any Federal officers. To enforce of these provisions, the Act authorized an additional Assistant Attorney General to initiate Federal civil rights enforcement actions.

The Civil Rights Act of 1957 ensured that voting rights were no longer dependent upon actions brought by private individuals, often at great personal risk and expense. In creating the Civil Rights Division of the Department of Justice, in addition to the U.S. Commission on Civil Rights, Congress provided key investigative and enforcement mechanisms that continue to play a central role in protecting our civil rights.

We currently live in a critical period for the U.S. Latino community, one in which our hard-won civil rights are particularly at risk. Congress' failure to enact comprehensive immigration reform has exacerbated an ongoing civil rights crisis that affects all Americans but falls especially hard upon Latinos.

States and localities have increasingly taken it upon themselves to enact laws that aim to intimidate, destabilize, and displace undocumented immigrants. Prince William County, in fact, right down the road here in Virginia, recently approved such an ordinance.

These laws, which often violate Federal law, may target undocumented immigrants, but they undermine the civil rights of all of those who live in these communities, especially those who allegedly

look or sound “foreign.” To an extent unprecedented in recent years, America’s Latino population has become a focus of hateful and racist rhetoric and violence.

The growing presence of Latinos in local communities across the Nation, including communities that have not historically had a strong Latino presence, will give rise to pressing civil rights issues in the 21st century. In voting, minority communities are often subject to discrimination as they gain political influence. While MALDEF frequently brings legal actions on behalf of Latino voters, private individuals and organizations lack sufficient resources to guarantee free and fair elections nationwide. The growing Latino electorate must be able to depend upon the Voting Section of the Civil Rights Division to enforce Section 2, Section 5, and Section 203 of the Voting Rights Act to ensure that no voter is wrongly disfranchised.

In education, many children in America suffer in schools that are so unequal and inadequate that the programs and conditions violate the students’ Federal civil rights. Latino students, who comprise one in five U.S. public school students, often continue to face significant barriers to fair and equal educational opportunities, including increasingly segregated school sites.

As Federal, State, and local governments respond to the recent Supreme Court decision regarding voluntary school integration plans in Seattle and Louisville, the Educational Opportunities Section of the Civil Rights Division must protect against school resegregation. The section must also enforce the Equal Educational Opportunities Act, which requires schools to take actions to overcome language barriers that impede English-language-learner students from participating equally in school programs.

In employment, the Office of Special Counsel for Immigration-Related Unfair Employment Practices protects against employment discrimination based upon national origin and citizenship status. Nearly 50 percent of OSC’s settlements during fiscal year 2005 involved Hispanic workers.

Finally, the Criminal Section of the Division must prioritize the prosecution of hate crimes. The past several years have seen a growing number of violent assaults and attacks by white supremacists against Latinos, with crimes ranging from vandalism to brutal assaults and murders. In most cases, the perpetrators did not know the victims but targeted them solely based upon their appearance. In 2004, law enforcement agencies reported 7,649 incidences of hate crimes in the United States.

In conclusion, the most lasting effect of the Civil Rights Act of 1957 may be that it fostered a tradition of strong Federal civil rights enforcement in America. Congress has since passed more comprehensive civil rights legislation, but the 1957 Act was a critical catalyst that engaged the Federal Government as the key guardian of Americans’ civil rights. We must use the tools provided under the Civil Rights Act and subsequent legislation to respond to civil rights trends in a Nation that has changed much since 1957, where discrimination may assume different forms now than it did then. And as minority populations increase in size and in proportion of the U.S. population, the proposition that every individual shall receive fair and equal treatment under the law must

continue to be the principle under which we live. If the Federal Government does not meet its obligation to protect 21st century civil rights, our Nation will be much impoverished on the 100th anniversary of the Civil Rights Act of 1957.

Thank you very much.

[The prepared statement of Mr. Zamora appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Professor Heriot is, as I said, Commissioner on the U.S. Commission on Civil Rights, also Professor of Law at the University of California at San Diego.

Professor, thank you very much for being here today. Please go ahead.

STATEMENT OF GAIL HERIOT, COMMISSIONER, UNITED STATES COMMISSION ON CIVIL RIGHTS, AND PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA AT SAN DIEGO, SAN DIEGO, CALIFORNIA

Ms. HERIOT. Well, thank you very much for allowing me this opportunity to participate in the commemoration of the Civil Rights Act of 1957.

Many civil rights scholars like to characterize the Civil Rights Act of 1957 as a “weak act,” and in some respects they are correct. Compared to the ambitious bill that Senator Paul Douglas of Illinois earlier envisioned, the 1957 Act was puny indeed. Senator Douglas hoped that the first civil rights bill passed by Congress since Reconstruction would be a sweeping one—outlawing race discrimination in public accommodations across the country. But it was not to be—not in 1957, anyway.

I prefer to think of the Civil Rights Act of 1957 not as a weak legislative effort but, rather, as a vital building block. Without it, it is not at all clear that the Civil Rights Acts of 1960, 1964, 1965, 1968, and 1972 would indeed have passed. And seen in this light, the 1957 Act is not puny at all but, rather, the beginning of a long overdue journey. It is, therefore, fitting that this Committee should commemorate its passage today.

You will often hear the 1957 Act referred to as a “voting rights act,” and, of course, that is accurate. But the most significant step taken in that Act was probably the creation of these two new arms of the Federal Government that have already been referred to today that are assigned the task of looking after civil rights law, and that is the Civil Rights Division, indirectly created by creating an extra Assistant Attorney General’s position, and the Commission on Civil Rights, which is what I am most familiar with. So that is what I will talk about.

If the value of a Federal agency could be calculated on a per dollar basis, it would not surprise me to find that the Commission on Civil Rights would be among the best investments that Congress has ever made. My back-of-the-envelope calculations show that the Commission now accounts for less than 1/2000th of 1 percent of the Federal budget; back in the late 1950’s, it would have been similar in size. But, nevertheless, it has packed quite a punch, particularly in its early years.

Soon after the passage of the 1957 Act, the then-six-member bipartisan Commission, consisting of John Hannah, President of Michigan State University; Robert Storey, Dean of the Southern Methodist University Law School; Father Theodore Hesburgh, President of Notre Dame University; John Battle, former Governor of Virginia; Ernest Wilkins, a Department of Labor attorney; and Doyle Carleton, former Governor of Florida—they set about to assemble a record.

Their first project was to look for evidence of racial discrimination in voting rights down in Montgomery. But they immediately ran into resistance in the form of then-Circuit Judge George Wallace, who ordered that voter registration records be impounded. Quoting Judge Wallace, “They are not going to get the records,” he declared. “And if any agent of the Civil Rights Commission comes down to get them, they will be locked up. . . . I repeat, I will jail any Civil Rights Commission agent who attempts to get the records.” Again, that is quoting Judge Wallace.

The hearing, nevertheless, went forward with no shortage of evidence. Witness after witness testified to inappropriate interference with his or her right to vote. And the facts gathered by the Commission went into the Civil Rights Acts of 1960, 1964, the Voting Rights Act of 1965, and the Fair Housing Act.

What is important was the revolution in public opinion that occurred during that period, and although the Commission on Civil Rights was certainly not the only institution that helped bring about that change, it was a very significant factor.

In 1956, just before the Act, less than half of white Americans agreed with the statement, “White students and Negro students should go to the same schools.” By 1963, the year before the 1964 Act, that figure had jumped to 62 percent. Similar jumps on other civil rights issues also occurred during that period.

Given the amount of time I have, the one thing I wanted to be sure to talk about is some of the people who were important for passing the 1957 Act. We all know about President Eisenhower’s importance in that. He called for it in his State of the Union Address. Attorney General Brownell, and especially then-Majority Leader Lyndon Johnson.

However, there is an unsung hero that I would like to point out who I first learned about when reading through Robert Caro’s biography of Lyndon Johnson, “Master of the Senate,” and this person, unlike Johnson, Eisenhower, and Brownell, is still very much alive, is 92 years old, and is still an active part of the teaching faculty at the university at which he works.

It seems that the bill was hopelessly hung up over the issue of remedies law, and as a remedies professor, that is a very dear issue to my heart, and a law professor then at the University of Wisconsin proposed a solution. There was some controversy over jury trial issues for contempt of court since the Act authorized the Department of Justice to seek injunctions for violations of voting rights. And some supporters of the bill wanted to have no right to a jury for criminal contempt proceedings. Others were not willing to vote for the bill if it had that in it. And this law professor suggested a compromise: Don’t eliminate the right to a jury trial in those criminal contempt proceedings but, rather, rely on civil sanc-

tions for contempt. Lyndon Johnson latched onto that idea, and he persuaded his colleagues, and as a result, according to Caro, the bill passed.

That law professor was Carl Auerbach, then of the University of Wisconsin, later Dean at the University of Minnesota, and now for over 20 years, my colleague at the University of San Diego. So I would like to honor him today.

[The prepared statement of Ms. Heriot appears as a submission for the record.]

Chairman LEAHY. Thank you.

Mr. Moses is President of the Algebra Project, as I mentioned, an organization dedicated to achieving quality for students in inner-city and rural areas through mathematics literacy. When I read "Parting the Waters," Mr. Moses, you were there, of course, in some detail. You were field secretary for the Student Nonviolent Coordinating Committee and then the Director of the Mississippi Project, and you and John Lewis have testified here, somewhat younger at the time, but equally dedicated. I thank you for being here. Go ahead, sir.

**STATEMENT OF ROBERT P. MOSES, PRESIDENT, THE
ALGEBRA PROJECT, INC., CAMBRIDGE, MASSACHUSETTS**

Mr. MOSES. Thank you, Senator Leahy.

After our Constitutional Convention of 1787, freedom and slavery struggled for the soul of our National workable Government. African slaves became constitutional property, and if they stole themselves as insurgent runaways, the Feds were permitted through Article IV, Section 2, Paragraph 3 to capture and return them as property, across the lines of sovereign States to their slave owners. This way of working worked for about three-quarters of a century.

After our civil wars from 1860 to 1875, slavery was replaced by caste and Jim Crow, constitutional property by constitutional exiles. C. Vann Woodward says that Jim Crow laws were "constantly pushing the Negro farther down."

The last battles of the Civil War were fought by the White Leagues of Mississippi in the fall elections of 1875, and the following summer, a Senate Select Committee, led by Senator George Boutwell of Massachusetts, took testimony all across the State and issued the Boutwell Report. Senator Boutwell concluded that the election of the 1875 Mississippi State Legislature was carried by Democrats by a preconceived plan of riots and assassinations. Mississippi winked and the Nation blinked. Federalism and Federal rights, the Civil War amendments establishing citizenship and the right to vote, were recognized by non-recognition. This way of working worked for another three-quarters of a century.

In the early darkness of a winter evening in February 1963, Jimmy Travis slipped behind the wheel and Randolph Blackwell crowded me beside him in a SNCC Chevy in front of the Voter Registration Office in Greenwood, Mississippi, to take off for Greenville on U.S. 82 straight across the Delta. Jimmy zigzagged out of town to escape an unmarked car, but as we headed west on 82, it trailed us and swept past near the turn-off for Valley State University, firing automatic weapons, pitting the Chevy with bullets. Jimmy cried out and slumped; I reached over to grab the wheel and fum-

bled for the brakes as we glided off 82 into the ditch, our windows blown away, a bullet caught in Jimmy's neck.

After Jimmy caught that bullet in his neck, SNCC regrouped to converge on Greenwood, and black sharecroppers lined up at the courthouse to demand their right to vote. When SNCC field secretaries were arrested, Mississippi was not looking and the FBI could not find the White Leaguers who gunned us down. Burke Marshall, the Assistant Attorney General for Civil Rights under Robert Kennedy, removed our cases to the Federal District Court in Greenville and sent John Doar to be our lawyer. From the witness stand, I looked past John at a courtroom packed with black sharecroppers from Greenwood, hushed along its walls, squeezed onto its benches, and attended to the question put by Federal District Judge Clayton: "Why are you taking illiterates down to register to vote?" A good question.

After the Civil War, as the Nation drove west, built railroads and industrialized, it established an education system to drive its caste system, or as James Bryant Conant discovered to his astonishment, the clearest manifestation of our caste system is our education system.

In Mississippi, the deal went down on that legislature of 1875. Alexander Percy of Greenville entered politics for one legislative session for the express purpose of ensuring that one of the Articles of Impeachment against the Republican-elected Governor, Adelbert Ames, shifted the money and resources Republicans had allocated for the education of the freed slaves to the building of railroads to crisscross the Delta, to support cotton plantations and sharecropping. Sharecropper education has long been the subtext of the struggle in Mississippi in this country for the right to vote.

Sharecroppers, constitutional exiles, were pushing against the constitutional gate, seeking status as constitutional people, using their 15th Amendment rights in an effort to establish their 14th Amendment rights. Three-quarters of a century after our civil wars, the Supreme Court in *Brown v. Board of Education* acknowledged that our education system had left a whole people behind, and this past June, a half-century later, the New York Times spread pictures of all nine Supreme Court Justices on its front page to alert the Nation of its ongoing struggle about the 14th Amendment and what it means to be a constitutional person. In the words of Harvard law professor Laurence Tribe, "There is a historic clash between two dramatically different visions not only of *Brown*, but also the meaning of the Constitution."

It was Amzey Moore, the head of the local branch of the NAACP in Cleveland, Mississippi, who saw that the energy of the student sit-in movement could bring down Jim Crow in Mississippi. The SNCC-led movement for the right to vote in Mississippi called on the whole country to do that, but we have yet to accomplish what Amzie wanted for all the people of the country: first-class citizenship.

[The prepared statement of Mr. Moses appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Moses.

Robert Driscoll is a partner at the Washington office of the law firm Alston & Bird, but from 2001 through 2003, he served as Dep-

uty Assistant Attorney General and Chief of Staff to the Civil Rights Division of the U.S. Department of Justice.

Mr. Driscoll, thank you for taking time to come by.

STATEMENT OF ROBERT N. DRISCOLL, PARTNER, ALSTON & BIRD, WASHINGTON, D.C.

Mr. DRISCOLL. Thank you, Mr. Chairman. I am reluctant to follow the testimony of Mr. Moses. It seems clear in retrospect that he probably should have been the clean-up hitter on this panel with what he had to say, but I will go forth, anyway.

Thank you again, Mr. Chairman and Senator Cardin, for having this hearing. I am Bob Driscoll and I am a partner with Alston & Bird here in Washington. From 2001 to 2003, I was Deputy Assistant Attorney General in the Civil Rights Division, which, of course, was created by the 1957 Act. And during that time I worked on some of the issues that were discussed by previous panelists, including racial profiling guidance to Federal law enforcement, some school desegregation issues, and police misconduct.

Today's panel is distinguished, and I have enjoyed hearing everybody's perspectives on this topic. I believe that every other panelist has, in some way, dedicated their career to the advancement of civil rights, and for that I am grateful, and I would like to thank all of them. My own perspective is that of a working lawyer who has spent several years in leadership of the Division—an institution for which I have great respect. It is my experience doing my best for those 2 years helping manage the Division that provides the basis for my comments.

Essentially, as I reflected on the 50th anniversary of the passage of the Act, I have been struck by several points: first is the progress we have made in this country in the 50 years since the Act was passed; second, how the Act has served as a framework—and I think other panelists have talked about this—for the advances in civil rights legislation that followed; and, finally, how the Act can serve, I think, as inspiration for those of you on the Committee crafting legislation today and how legislation can, in fact, change the Nation.

I think that the Act—and professor Heriot mentioned this—will be remembered for protecting voting rights, but I also think it is important to recognize it as a building block for the 1964 Act and the 1965 Voting Rights Act, which were much broader substantively. And the institutions created by the Act—the Civil Rights Division and the Commission on Civil Rights—really served as the tools through which lots of facts were gathered to pass future civil rights legislation.

When one looks at what going on at the time and listens to the testimony of Representative Lewis and Robert Moses, it is hard not to be struck by the progress that has been made in the 50 years since the passage of the Act.

I am reluctant to speak of progress sometimes for fear of being misinterpreted as someone who thinks that racial discrimination no longer exists—and I can see that it does—or that it is not in many areas in society where we are falling down on our ideals of equality among men and women, because I think certainly we have. Nor do I mean to suggest that the gains that have been made

were not hard fought, or that progress was not resisted by certain circuit court judges and certain other people that were discussed today all the way. But I think there is no escaping that the moral imperative of equal opportunity that has animated legislation such as the 1957 Act has largely taken hold and been internalized by most Americans, and we need to recognize that.

To take an obvious example that was discussed today, to compare the wake of the *Brown* decision and the massive resistance of certain school districts to integrate schools, compare that to today, and I know it is a controversial decision, which Ted Shaw mentioned and I think which members of the Committee have mentioned, being litigated in the Supreme Court in the Louisville and Seattle cases is that there is clearly a disagreement among members of the Court and among people that filed briefs in that case—I filed one on the opposite side of Mr. Shaw—as to what the right answer was. But when you look at what was being litigated, I think there is no question it is a sign of progress. The question being litigated was: Was the school board of Louisville, Kentucky, being so aggressive in its efforts to integrate its school system that it violated the Constitution? And I think we can all disagree in good faith or people can disagree in good faith about whether or not the Court reached the right result in that case. But I think the people that originally were litigating on behalf of the Civil Rights Division, enforcing early desegregation orders, would be very surprised to hear that one of the main points of contention in the Supreme Court would be whether or not the school district had gone too far, and I think that is quite a change from school districts that were massively resisting any attempt at integration in prior years.

Finally, given the time constraints, I would just like to say that I think the 1957 Act—it is interesting to look at as an inspiration for possible future legislation. I think other people have talked on the panel and on the Committee about certain advances they would like to see in the civil rights of the country. And I think when you look back at the 1957 Act, you can say it was a compromise. People have noted it was not an incredibly strong substantive Act, and I think that we can all learn from that and look at that and say that sometimes progress is incremental and sometimes what you view as a first step today ends up being something that in retrospect was a very important building block. And I think when people look at different issues, you know, such as the Committee discussed hate crimes legislation or rights of gays and lesbians, things like that, I think that looking at the 1957 Act, I think sometimes you look at the compromise that it was, and you look at what it did not have—you know, it did not have national prohibitions on public accommodation discrimination; it did not have a particularly strong voting rights provision to it in retrospect when you compare it to the 1965 Act. And so I think that, you know, we look at our controversial and divisive political issues today, and nothing could be as controversial and divisive as this was back in 1957. And so maybe in that regard it can serve as an inspiration to the Committee and to the folks drafting legislation.

Thank you very much.

[The prepared statement of Mr. Driscoll appears as a submission for the record.]

Chairman LEAHY. Thank you, Mr. Driscoll.

I also should have noted that Mr. Driscoll served as a law clerk to a classmate of mine from Georgetown and a very, very good friend, an extremely good friend, the late Fred Parker, who served both as chief district judge in Vermont and then as Vermont's representative on the Second Circuit.

Now, I look at the 2004 report by the Harvard Civil Rights Project, "*Brown* at 50: King's Dream or *Plessy's* Nightmare?" Which shows a major increase in segregation, and the concern the Civil Rights Division has paid insufficient attention to ending housing segregation, which brings about segregation in our schools. There are also reports on the ADA—whether the Americans with Disabilities Act is being enforced. I see such things, again, when a local school board in Louisville sought to integrate public schools, the Justice Department sued the school board, and we seem to be turning things on their head.

I see very few cases being brought about racial discrimination against African-American voters, which makes you think that that does not exist anymore.

MALDEF attorneys found anti-immigrant activists aggressively intimidating Latino voters in Tucson, Arizona. In fact, the Arizona Republic reported that Russell Dove, a local anti-immigrant activist, proudly acknowledged his effort to intimidate Latino voters. Mr. Zamora knows of what I speak. When I hear Mr. Moses talk about John Doar—and I know your work in Mississippi forged a close personal relationship with him. I had the privilege of meeting him the first time when I was a law student at Georgetown. And I think of what you said about his active participation—what many of you have said. But then I see the Urban Institute says 50 percent of African-American 9th graders, 49 percent of Native Americans, 47 percent of Latino Americans do not graduate from high school in 4 years. And in some of the poorest urban and rural areas—and I come from a rural State—dropout rates approach almost 80 percent. Mr. Moses, you are aware of that with the Algebra Project.

So I am going to ask one question. There are a whole lot of questions I could ask, but I know most of you, and you have no hesitation in letting me or my office know your thoughts. Someday—someday—we are going to have a new—I would hope the administration will send up a name of a new head of the Civil Rights Division. He or she is going to have to come before this Committee for confirmation. Now, assume you were sitting where I am as Chairman of the Committee. What would you ask as the first question of a new head of the Civil Rights Division? That may be unfair. Anybody want to start?

[Laughter.]

Chairman LEAHY. I mean, talking about things you want to do when you are in school. I only had two dreams when I was in law school. I hoped someday I might be a prosecutor, and I hoped I might be a U.S. Senator. I thought being a Democrat from Vermont, that would never happen, and I ended up being both. So, Mr. Shaw, do you want to take a stab at it?

Mr. SHAW. Dreams do come true sometimes.

Chairman LEAHY. Sometimes.

Mr. SHAW. Mr. Chairman, I would ask any nominee to head the Civil Rights Division what that nominee's plans were to restore the Division to its full strength and integrity with respect to its carrying out of its mission. I would want to know, for example, in the aftermath of the Seattle and Louisville decision, whether that nominee would consider re-establishing the General Litigation Section, the section I joined when I was at the Division years ago. It was dismantled, but the section existed pursuant to a theory that there was a relationship between school and housing segregation. And in the aftermath of the Supreme Court's decision, I think the Department and the Division should revisit the issue of trying to get at segregation in schools and in housing through that housing focus.

In general, I think the task is to re-establish a core of committed, apolitical line attorneys who will not be subjected to political interference in spite of the recognition that administrations get to set policy. How would that nominee go about re-establishing the integrity of the Division?

Chairman LEAHY. Mr. Zamora? And then we will go to Mr. Henderson. Mr. Zamora?

Mr. ZAMORA. Thank you. MALDEF has very specific criteria by which we evaluate and issue recommendations for nominees. And, you know, we have had experiences recently before this very Committee where we have had nominees to courts who have made representations about their future intentions with respect to enforcing the laws or—

Chairman LEAHY. I recall that.

Mr. ZAMORA. Yes, I am sure that you do.

Chairman LEAHY. With some chagrin. Go ahead.

Mr. ZAMORA. Exactly. And so what we really look at is the life history, the record of the individual, and what that life history shows in terms of the perspective upon civil rights and a real commitment. And I think we have heard from many witnesses today who have demonstrated through their professional experiences, through their careers, that there is that commitment.

Also for MALDEF, certainly diversity is a consideration. It is not the sole consideration, but we do feel that it is important generally that the Federal Government reflect the diversity of the population, and particularly, obviously, for the Assistant Attorney General for Civil Rights, we would appreciate a nominee who has walked in the shoes of individuals who have suffered civil rights violations.

Chairman LEAHY. Mr. Henderson?

Mr. HENDERSON. Mr. Chairman, I had hoped that my colleagues going before me would do as they have done and focus on the importance of career attorneys and the importance of restoring integrity and commitment to the Department.

I wanted to take a slightly deeper dive, though, in an issue that has gotten little attention, but in the wake of the Louisville and Seattle cases deserves a closer review, and that is the topic that Mr. Shaw touched upon—the link between school integration and quality education and housing discrimination.

You know, next year is the 40th anniversary of the Fair Housing Act, first enacted in 1968, and yet housing discrimination remains one of the last frontiers of civil rights enforcement. The link be-

tween barriers of school integration and housing discrimination have been well documented, and the Supreme Court itself has spoken on numerous occasions about that link. The Department of Justice has extraordinary power in this area, the power to use pattern and practice litigation techniques to really look at this question of housing discrimination. And yet, in reviewing the number of cases that have been brought with that extraordinary power, the Department has largely been silent on the sidelines in addressing this important area of our work.

If this country is ever going to get to the point where quality education becomes a universal right, recognized for all students as a part of their citizenship in the United States as a whole, we are going to have to get beyond the point where States have the ability under the guise of federalism to exercise control over the schools within their boundaries in ways that work against extending quality education to all students. And fair housing enforcement in a very aggressive and effective way can be an important tool.

I am hopeful that the next Attorney General and the next head of the Civil Rights Division will make a commitment to using the Nation's fair housing laws to look at cases of real disparate treatment. Unlike other areas that we have talked about, you still see intentional discrimination in the area of housing sales and rental housing that have not been addressed. And so I am hoping that the next Attorney General and head of the Division will make a real commitment to making a deeper dive in that area.

Chairman LEAHY. Mr. Driscoll, you were there. If you were sitting up here, what would you ask?

Mr. DRISCOLL. I think, Mr. Chairman, I would ask the nominee to explain where he or she saw their position in the Civil Rights Division in the Department of Justice, where they saw that position fitting in with the general executive and legislative scheme of civil rights enforcement. And I think what you would want is someone who would pledge to enforce the laws that the Congress passes and that are signed by the President without fear or favor and apolitically, as has been said by other witnesses, that would call balls and strikes on enforcement of the civil rights laws and that would not take upon themselves an ability to set policy, because I think that is very dangerous for a law enforcement position to do, and that if there are going to be extensions of certain statutes or certain legal principles and to argue for them before this Committee and to pledge not to just go do what they want as head of the Division, that the position, while it has policy implications, when you are in the offices over a 950 Pennsylvania, you realize it is pretty circumscribed by the statutes that are passed by Congress and that there are a lot of—sometimes there are some gaps in those statutes, and you look at the options you have. And I think that getting a real sense of where the nominee would draw that line to say what are the limitations on what I can do and what can I do with vigor and pride, and you would want to ask those questions. And I also think it would be entirely appropriate to address some of the other issues that the panel has raised about dealing with some of the recent controversies in the Department and how they would work to restore confidence in the career attorneys.

Chairman LEAHY. Professor Heriot, you get the penultimate question on this, and then we will go to Mr. Moses.

Ms. HERIOT. Actually, all the questions that my fellow panelists have suggested are excellent questions, and that if I were asked what question to ask after those questions, I might be inclined to just wish the nominee good luck and hope that they remember that no matter what they do, someone will criticize them for it.

Chairman LEAHY. Not me.

[Laughter.]

Chairman LEAHY. Mr. Moses?

Mr. MOSES. I guess the simple question is why does that person want that job.

Chairman LEAHY. Yes, I know. You want somebody who wants it because they can do good—or do right, I should say.

Mr. MOSES. Yes, and I guess the question is how do we understand their response to that and how do we gauge their response against their record, against their life.

Chairman LEAHY. I know what you are saying, and I know what I would listen to. I would listen to a lot more than just the words in somebody answering that question.

Senator Cardin? And I apologize. I have impinged on your time. Senator Cardin, as I said before, is one I rely on very much in this office and in this area. Coming from a State with the racial make-up of Vermont, I have to rely very much on somebody like Senator Cardin, who has experienced in his work even before he was in the Congress, has experienced very much in these areas. Senator Cardin?

Senator CARDIN. Well, Mr. Chairman, thank you very much. I do come from a State that has a rich diversity, but it presents challenges. And I appreciate very much your leadership on this hearing. I think this hearing is extremely important, and I thank each of you for your commitment in your careers to civil liberties and civil rights and for being here to help establish a record for this Committee, because we have important decisions to make, whether it is the confirmation process of the next Attorney General or the person who will head up the Civil Rights Division, some important decisions on laws and, as I said earlier, in our confirmation of judges. And I think the record that you all have helped us establish in this Committee points out that we have a lot of work to do.

Mr. Shaw, I listened very carefully about your assessment of historically some of the changes that have been made in the Civil Rights Division and its priorities, and each administration has the right to appoint its political appointees in these positions, subject to confirmation. But this administration has gone beyond just shifting priorities. I think that we have to be very careful that they have not created permanent damage in our ability to deal with the civil rights of the people of this country. And I say that, recognizing that their policy, for example, on dealing with voter fraud for people voting who should not, which has never been documented, is to try to disenfranchise a large number of minority voters. That is just a practice that cannot be tolerated in this country.

And you look at the last decade, with school desegregation becoming more intense, and their answer is to challenge those who

want to have plans to try to have schools more integrated. It turns the traditional role of the Civil Rights Division on its head.

And as we had at our last hearing testimony about the hiring practices—yes, you have the right to make political appointments to the Department of Justice, but you do not have the right to try to interfere in a partisan way with the career attorneys. And this administration, of course, changed the hiring procedures, using political appointees to select the career attorneys. All of that has had incredible damage in the Civil Rights Division.

So I think we have our work cut out for us. I do not want to minimize that. I think we have a tremendous burden in dealing with the Civil Rights Division.

I can tell you, Mr. Chairman, the first question I am going to ask the nominee for Attorney General is his commitment to the Civil Rights Division because I think that is an issue that needs to be addressed by the Attorney General and the President of the United States, and not just the person who heads the Civil Rights Division.

Let me ask one question, if I might. Tomorrow we are going to have a chance, I hope, to improve the tools available to the Department of Justice dealing with voter intimidation and trying to intimidate minority voters in this country by misleading and wrong information.

I don't know whether that bill will ultimately be signed by the President and enacted into law. I hope it is. But my question to you is: Knowing what is happening today, the types of efforts made to disenfranchise minority voters, what should the Department of Justice be doing in order to ensure that every person in this country has the right and opportunity to participate in our political system through the right of voting? What should the Federal Government be doing in order to assist us in helping those who have been disenfranchised?

Mr. ZAMORA. I would jump in and, first of all, thank you for your sponsorship of the voter intimidation and deceptive practices bill, which MALDEF has supported. I think it does become another important set of tools that the Division can use to protect against this kind of disenfranchisement—of course, against the backdrop that it has to be used properly, like any Federal civil rights statute. We have some great laws on the books that have not been properly enforced over the last several years, so this will add to the number of laws that need to be appropriately enforced.

But we have seen an increase of voter intimidation directed against Latinos, and my written testimony cites several very striking examples. But there is still an opportunity in this administration, in this Civil Rights Division, to undertake vigorous outreach, to train local election officials to be prepared to recognize and report incidences of voter intimidation. Then we need for the Civil Rights Division, through the election and beyond, to actually prosecute these individuals. We have reported the incident in Tucson to Voting Section officials who are going to refer it to the Criminal Division. We have not heard the results of that investigation as of yet.

In California, I cited in my testimony to an incident where an actual candidate for the House of Representatives mailed a letter to

14,000 Latino voters that had wrong information. It was trying to drive people away from the polls. The State investigation has concluded, but to my knowledge, the Federal investigation is ongoing, and we have not seen a priority made of the prosecution of these sorts of incidents.

So I think the combination of outreach and training of local election officials along with the vigorous prosecution of the law.

Senator CARDIN. Does the Department of Justice have those tools today, they could use those?

Mr. ZAMORA. Yes, certainly, there are statutes on the books that do protect against certain types of voter intimidation. I think your bill actually expands that which classifies as voter intimidation, I think in very positive ways. But, yes, there are laws on the books that we have not seen vigorous, prioritized enforcement of.

Senator CARDIN. Mr. Shaw? Mr. Henderson?

Mr. HENDERSON. Thank you, Mr. Cardin. I would like to respond going beyond the consideration of the new bill, which I think Mr. Zamora addressed, you know, very effectively. I think enforcing existing law in a meaningful way would make a huge difference. For example, I think John Lewis spoke quite eloquently about the need for the Division and the Department of Justice to look more closely at voter ID laws that do have a disproportionate impact on racial minorities who should be protected by the Constitution, as with all citizens.

Second, the National Voter Registration Act, which has been on the books for now over a decade, does have the ability to make a real difference in registering voters and providing meaningful access through social service agencies, and those provisions have been underenforced and largely ignored by the Department.

And then, thirdly, I think there has in the past existed a real firewall between the Criminal Division in the Department and the Civil Rights Division. And the idea of voter fraud cases being handled in the Criminal Division that bleeds into the responsibilities of the Voting Section it seems to me is problematic and it invites the kind of politicization that you have seen in the way in which some of these cases have been handled.

So I think emphasizing the enforcement of existing laws is also an important part of any serious enforcement scheme.

Mr. SHAW. Senator Cardin, if I may address the question at a little bit more length, Section 11(b) of the Voting Rights Act states that, "No person shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any person from voting or attempting to vote."

Since the Act's inception, to our knowledge, 11(b) has been used only three times by the Department of Justice. Clearly, that is a statutory provision that has been underutilized given the ubiquity of reports with respect to voter intimidation of various types every election cycle. And so in addition to the legislation you are proposing, which we commend you on, we also think that 11(b) should be enforced vigorously by the Justice Department.

I might add that Mr. Henderson and I and others were at a meeting I remember very clearly with the former Attorney General, John Ashcroft, a few years back in which he made clear the Department's priorities with respect to voter fraud, a problem—or,

rather, a solution in search of a problem. And we made it very clear that that priority was misplaced, and we understood it in the context that I believe you described that focus, even though you were not specifically referring to Attorney General Ashcroft.

So we believe that the Department's priorities ought to be reset to protect minority voters who are subjected to intimidation as opposed to this attempt to focus on fraud, which we interpret as an attempt to dissuade minority voters from going to the polls.

Senator CARDIN. Thank you. Thank you all very much again for your careers and for your testimony.

Chairman LEAHY. Thank you. And we will, as we always do, keep the record open. You will certainly have a chance to go through your own testimony. If there is something that you thought you left out or wanted to add or change, feel free to do so. I thank you. It has been a long morning for all of you, but this is a record we wanted to make.

Thank you.

[Whereupon, at 12:02 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses to written questions to Robert P. Moses
Hearing on the 50th Anniversary of the Civil Rights Act of 1957
Submitted by Chairman, Senator Patrick Leahy, September 5, 2007

Senator Leahy, Question #1:

As a former civil rights veteran of the 1960s and organizer of the Mississippi Freedom summer of 1964, you worked with lawyers from the Civil Rights Division during the tumultuous period of the Civil Rights Movement. Can you tell this Committee what role John Doar and other Civil Rights Division attorneys played in advancing the agenda of the Civil Rights Movement and pursuing voting rights for African Americans in the 1960s?

Robert P Moses' response to question #1:

On the plain of the Constitution itself, what was, *and still is*, at stake was nothing less than the reach of the phrase "We the people" in the preamble to the Constitution. Doar himself notes in the opening sentence of the conclusion to his paper on "The Performance of the FBI in Investigating Violations of Federal Laws Protecting the Right to Vote -- 1960 -1967":

The challenge for America in 1960 was the destruction of the caste system itself.

Jim Crow was one place where the Nation housed its caste system and on February 1st, four Negro college students, freshmen at the Agricultural and Technical College in Greensboro, North Carolina, asked politely for coffee at Woolworth's lunch counter and continued to sit in silent protest when refused. The 'sit-in', nemesis of Jim Crow was born. Jim Crow's cultural expression of the Nation's caste system was about to "hit the dust".

The Nation's two major political parties also housed the caste system via a national agreement after the Civil War to exclude freed slaves and their descendents from participation in the political processes of the former Confederate States. Such massive racial exclusion required the complicity of the Nation's executive, legislative and judicial institutions in the non-recognition of the 14th and 15th amendments' demand for equal protection for the right of blacks to vote and set the stage, ninety years later, for the passage of the 1957 and 1960 voting rights acts. However, as Doar notes in the paper quoted above these acts were not intended as strikes against the caste system:

**Responses to written questions to Robert P. Moses
Hearing on the 50th Anniversary of the Civil Rights Act of 1957
Submitted by Chairman, Senator Patrick Leahy, September 5, 2007**

*The laws of 1957 and 1960 protecting the right to vote were not aimed at the caste system – but rather at what the **maj**ority understood at the time to be necessary -- that is, the protection of the right of certain extraordinary, intelligent Negro citizens who, under any standard, were entitled to vote.*

Amzie Moore, a **minority** twice over, did aim the laws. Rooted in the heart of the Delta of Mississippi, Amzie, President of the Bolivar County NAACP, began to collect the data unearthed by Doar and the Division's lawyers with a vision to overturn the Delta's political caste system by massive voter registration of its sharecroppers, day-laborers and domestic workers.

When the sit-in movement broke out in February 1960, I was teaching at the Horace Mann School in Riverdale, New York, and on my spring break took the Greyhound to Hampton Virginia to visit Uncle Bill, my father's older brother and professor of architecture at Hampton Institute, to see them for myself. When I returned I began volunteering at the office, newly opened by Bayard Rustin, to support Martin Luther King and that summer of 1960 arranged to volunteer with King's headquarters in Atlanta. Ella Baker, the executive director of that operation, had engineered the formation of the Student Nonviolent Coordinating Committee (SNCC) as the youth-led network for the sit-in movement, and made room for SNCC in her office. Jane Stembridge, a young white student from Virginia was the Coordinating Secretary for SNCC and she and Ella put together a field trip across Alabama, Mississippi and Louisiana, for me to scout for evidence of Deep South sit-in action. *But it was the evidence Doar and the division generated, and Amzie collected, that proved decisive.* Amzie wedded his vision of black voter registration to the energy of the youth led sit-in movement, a marriage that helped jump start a strategic path to the concept of "One Person One Vote" that took root in the SNCC plans of Chuck McDew, Charles Jones, Charles Sherrod and Tim Jenkins to challenge the executive, legislative and judicial institutions that housed, following Mississippi's plans of 1890 to deny African Americans their voting rights, a *political* expression of the Nation's caste system across the black-belt of Rural Southern America. I returned in the summer of 1961 to work on Amzie's vision and became the first Mississippi field secretary for SNCC's strategic efforts to register blacks to vote.

Against this background, the President (John F. Kennedy), the Attorney General (Robert F. Kennedy), the Assistant Attorney General for Civil Rights (Burke Marshall) and their chief field officer (John Doar) were rethinking the scope and reach of the 1957 and 1960 voting rights acts. John puts it this way in his paper quoted above:

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Some time during 1960 and 1961 – it didn't happen all at once, nor did it happen to each member of the Division at the same time – the Civil Rights Division seized these statutes as their weapon against the caste system.

This thought transformation was seminal and, however it came about, it generated the critical, crucial, and necessary support needed to sustain SNCC's strategies to put into play Amzie's vision, grounded in the Division's documentation, to overturn the Delta's political caste system by massive voter registration of its sharecroppers, day-laborers and domestic workers.

It is difficult to exaggerate the historical importance of this meeting of the minds of Amzie, the SNCC voter registration field secretaries, and the team of lawyers at the Civil Rights Division of the Department of Justice:

In the gritty space of the day-to-day struggle it provided the *legal crawl space* within which SNCC voter registration field secretaries sustained their work. Mississippi locked us up time and again, but they couldn't throw away the jailhouse key; the Division time after time grabbed and turned that key to let us out.

In the historical space of the century-to-century struggle it provided a constitutional basis for the expansion of "We" in the "We the People":

In his "House Divided" speech, one year after the Dred Scott opinion, Abraham Lincoln famously said:

A house divided against itself cannot stand, ... , I believe this government cannot endure, permanently, half slave and half free, ... , it will become all one thing, or all the other.

At the close of the twentieth century, in the years after 1995, the face of America, as Scott L. Malcomson reminds us, was white: "Even though one-hundred and sixty-eight people of "every age and race of American" were murdered in the Oklahoma City bombing, the "national face (of the victims) had been a white face":

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Many of us cast the Oklahoma City bombing as a story in which innocent, childlike white American Christians were victims, a story of Terror in the Heartland. The Heartland was by definition Christian, white, and blameless. The shrine at (the site of the bombing) was spontaneous expression of this idea – not a media spin or a planned commemoration, just America talking to itself. ... Although many of the dead were not white, the pictures of the victims, at the time of my visit all portrayed white people.

Blacks, present at the shrine by their absence, played their traditional “racial role”. “Oklahoma was cobbled from two Choctaw words, for red and people”. The state itself was formed in 1907 from western Oklahoma (Oklahoma Territory) and eastern Oklahoma (Indian Territory). Indian territory was where Elias Boudinot went to be assassinated. In 1831 Boudinot and the Cherokees sought status as a “foreign nation” from the Supreme Court, but Chief Justice John Marshall ruled that the Cherokees were a “domestic dependent nation” and therefore could not sue. In 1832 Marshall ruled, in *Worcester v. Georgia*, that “Georgia could not extend its sovereignty over Cherokee lands in violations of treaties between the Cherokees and the U. S. government”. But President Andrew Jackson removed the Cherokees from Georgia in spite of Marshall’s decision and in 1838 Boudinot traveled the “Trail of Tears” to Indian Territory west of the Mississippi where he was felled within months of his arrival by “seven blows of a hatchet to his head. The assassins were carrying out tribal law, which regarded the selling of tribal land as treason.”

In the years before the “Civil War” the Cherokees and Choctaws traveled with their African slaves to establish Indian Territory, but after the last great westward migration following that war, in the early years of the twentieth century, in that Indian Territory that was to become part of the state of Oklahoma, all three of America’s races, whites, blacks and Indians had “precisely the same goal: a separate state dominated by their own race”. Three separate “We the People”.

For seventy years, from 1787 to 1857, the Nation struggled with runaway Constitutional Properties and the removal of Native Americans to reservations west of the Mississippi. Then came its “Wars of Death” after which it *did not* become “all one thing or all the other”, confounding Lincoln’s declaration. In his speech to accept the Republican nomination for the U.S. Senate in Illinois in 1858, Lincoln mused:

If we could first know where we are and whither we are tending, we could better judge what to do and how to do it.

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Mississippi's Constitution of 1890 laid down for the Nation its "where we are and whither we are tending" and led it into plans of "what to do" (Beat down the Negro) and how to do it (Jim Crow), constructing a caste system that introduced the noose of lynching to replace the whip of slavery.

Thus it came to be that for another seventy years, from 1890 to 1960, the Nation remained a "House Divided", unsure of "what to do" and "how to do it" as it faced the reach of its "We" in its "We the People".

The sit-in of the four Negro College students on Feb. 1, 1960 at the Woolworth lunch counter in Greensboro North Carolina struck a chord with young black students across the Upper South who suddenly knew "where they were and whither they were tending, what to do and how to do it". Their gravitational force woke me up and pulled me South. Amzie had received a letter from C.C. Bryant, the head of the NAACP in McComb, in Pike County, in Southwest Mississippi, and sent me there to work with CC.

John Doar's work was distinguished by his physical presence at times and in places where the tribunal of the Nation's Constitutional conscious confronted the legacy of its historical denial of its Constitutional ideals:

On Sunday September 24, 1961, Doar passed through southwest Mississippi (Walthall, Pike and Amite counties), looking into the case of John Hardy, a Student Nonviolent Coordinating Committee (SNCC) field secretary who, struck in the head with a gun by the registrar in Walthall county when he accompanied Negro applicants to Register to vote at Tylertown, had been arrested by the county sheriff; the Division sought and later won in federal court an injunction preventing Hardy's criminal prosecution. While in the area, John took it upon himself to visit E.W. Steptoe, head of the NAACP in Amite county, at his farm. I was living with the Steptoe's at the time and was watching with E.W. as a lone car pulled off the black top, slowly made its way up the long stretch of dusty road to the front lawn and Doar announced his presence. I was struck by how glad E.W. was to have such a presence of the Federal Government in the small spare living room of his back-in-the-woods farmhouse. While talking with us about our struggles to exercise our voting rights, John was struck by the stitches in my head and wondered aloud why pictures of them had not appeared in the FBI report documenting my beating on the street in Liberty, and incident that made its way into Doar's paper quoted above:

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The second FBI investigation dealt with the beating of Moses on the street in Liberty. The Bureau interviewed Moses, as requested, but failed to note that Moses had three cuts which required a total of nine stitches, or even that Moses had been to a doctor. Furthermore, It was Bureau policy to take photographs of victims' wounds. This was not done. (cf. The Performance of the FBI in Investigating Violations of Federal Laws Protecting the Right to Vote – 1960 -1970, John Doar – Dorothy Landsberg)

John asked E.W. about threats to any of the farmers who were part of the Voter registration effort and wrote down a list of names that were on his desk in Washington, Monday, September 25, when I called to tell him that Herbert Lee, one of the names on his list, had been murdered that morning by Eugene Hurst, a state representative, at the cotton gin in Liberty.

Dr. James Anderson, the sole Negro physician in all of South-West Mississippi, called me that afternoon to report that a body of a Negro farmer from Amite county had been taken from the cotton gin in Liberty and delivered to a funeral home there in McComb and needed to be identified.

The murder of Lee was a wake-up call.

Amzie drove down from Cleveland and we spent the next week traveling after dark, hunting for witnesses to Lee's murder. I took notes by flashlight trying to distill from fragments of frozen conversations in the dark a story that might shed light on what had gone down at the cotton gin and provide some small measure of justice for Lee's wife and seven young children. I sent my hand written notes of names and bits and pieces of information on to Doar at the Division. As it turned out, my sketchy notes at midnight were more forthcoming than reports from the F.B.I., at least that is my conclusion from the paper Doar wrote:

The final incident which the Bureau investigated in Southwest Mississippi in 1961 was the killing of Herbert Lee on September 25, 1961 by a State legislator named Hurst. Lee had been driving Moses around rural Mississippi in connection with his voter activity. An FBI investigation was requested the day of Lee's death, by telephone. A confirming request was sent September 26th and another on September 26th when additional information was available to the Department. A third request was sent on October 19th.

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The Bureau was asked to obtain a copy of the transcript of the coroner's jury proceedings, or to interview the presiding officer for a resume. Mr. McGowan of the Civil Rights desk phoned and objected to this request. The next day a memo appeared on my desk from the Bureau stating that, "upon discussion with Mr. Doar, he advised that no effort should be made to interview the presiding officer, the county attorney or the jury members." Later, the Bureau did interview the Justice of the Peace, who was presiding officer. He revealed that he had taken notes at the inquest, but the FBI did not ask to see them, even though this was exactly what the Division wanted.

A crucial fact was whether Herbert Lee had a tire iron at the time he was shot; how the tire iron got under his body, and when it was discovered. In the third request (10/19) the FBI was asked to "Please re-interview 'Buddy Anderson'. Other than the subject, he is the only witness to suggest that Lee raised his arm just before he was shot. Obtain full details". The Bureau did re-interview Anderson. In this second interview, Anderson said he did not actually see the iron bar prior to the time it was removed from under Lee's body. This is repeated four times in the page and a quarter interview, but at no time did the FBI ask him who removed the iron from under the body.

The October 19th request also stated that, "Sheriff Caston claimed to have found the tire iron under Lee's body, after the coroner's inquest. Town Marshall Bates told Lewis Allen, before the inquest, they had found the tire iron under Lee's body. Lyman Jones says ... that someone, whose name he does not know – not Caston – moved the body and picked up a tire iron when the inquest started. Please re-interview Bates, Caston, Allen and Jones to obtain full details." Thorough investigators should not have merely reported such differences, without doing some re-interviewing on their own.

We had information that Lewis Allen, an Amite County Negro operator of a logging truck, had been pressured by the white law enforcers to testify as he did about the tire iron.

With respect to the gun wound in Lee's head, the second request (September 26th) to the FBI stated that "our present understanding of the assault is that Hurst struck Lee at or above the left eye with some portion of the gun. Simultaneously, the gun fired and the bullet entered at Lee's left temple. Please examine Lee's body and photograph the wounds before burial. If possible, it should be determined on the basis of the examination and photographs whether the blow and the shot occurred as described. Perhaps the angle of the bullet's entry, and the nature and location of powder burns will confirm or refute the witnesses' descriptions. The Bureau did not report information from such an examination, if, indeed, any examination ever took place. Neither did the

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agents interview the doctor who had examined the body. In the third request (October 19th) the Bureau was asked to "interview Dr. Delaney of Liberty, Mississippi who arrived at the scene with Sheriff Caston and immediately examined the body ..."

Neither we nor the Bureau were able to satisfactorily establish a federal criminal violation in the Herbert Lee case. ... Several years later our failure was made all the worse when Lewis Allen was killed in the night time by unknown assailants after being called from his house in rural Amite County.

Doar and the Division were the defense of SNCC voter registration field secretaries against arbitrary arrest by Mississippi local or state officials, but there was no defense against violence and murder by local residents who were not agents of local government and there was to be no cracking Mississippi's "closed society" without focusing a laser of National attention on what was going on.

SNCC in Mississippi was the vital energy driving the marshalling of the forces in Mississippi's black communities needed to magnetize the State so as to attract the young college students from around the country who enabled the Nation to laser its attention on what was going on and demand an end to it. The Division in Washington was the crucial Federal institution guiding the Nation's Constitutional course. As Doar puts it in his paper quoted above:

It must be remembered that at the time no one was with the Division. Neither Congress, Federal Judges, United States Attorneys, the Department of Agriculture and HEW, nor indeed, the American people themselves had yet signed on, ... the FBI had been involuntary enlisted.

When Judge Frank Johnson "determined to test the mettle of the Justice Department under Robert F. Kennedy, early in February, 1961, he set the Macon County, Alabama case for trial for February 20th."

Lacking the kind of proof needed to go to trial, recognizing that since 1958 when the original suit was filed, "no substantial FBI investigations had been conducted", the Division decided to go into the field themselves:

Between the 12th of February and the trial date, four or five young Civil Rights attorneys worked around the clock on the case questioning witnesses in the day time and analyzing records and FBI reports at night. ... At the trial, Robert Owen, one of the Civil Rights Division's young attorneys, proved that highly qualified, educated Negroes had

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repeatedly applied unsuccessfully to register; and that each time they wrote long sections of the Constitution. Illiterate white persons, (whose names we got from the records and who had been interrogated by the FBI) who did not even understand what the word "registration" meant, testified that the registrar came to their homes and registered them.

On March 17, 1960, Judge Johnson ordered the registration of 64 Negroes, required the registrar to file detailed monthly progress reports and fixed the standard to be followed in future registration of Negroes in Macon County as that standard which the registrars had applied to the least qualified white voter in the County. (This was the legislative standard adopted four years later when Congress passed the Voting Rights Act of 1965.)

But citing the abusive use of State standards for voter applicants is a Constitutional mile away from removing from a State its right to establish such a standard at all.

On November 27th, 1963, just five days after President Kennedy was gunned down in Dallas and one-hundred and five years after Chief Justice Taney broke the national compact on slavery, Judge John Minor Wisdom, a judge in the fifth circuit, speaking in Baton Rouge Louisiana for a three judge panel, announced the opinion he wrote for the case of the United States of America v the State of Louisiana: Among the counsel: Robert F. Kennedy, Burke Marshall, and John Doar.

Judge Wisdom wrote:

This wall, built to bar Negroes from access to the franchise, must come down.

Holding history as important as logic Wisdom wrote:

The Louisiana interpretation test and its current variant, the citizenship test, ... , are rooted in the state's historic policy and the dominant white citizen's firm determination to maintain white supremacy in state and local government by denying to Negroes the right to vote.

Judicial decisions by Judges Wisdom and Brown enabled the Division to argue before the House Judiciary Committee that on the critical issue of the right to vote the nation could no longer leave it to the States alone to "know where we are and whither we are tending", that on this issue the Federal government was a better judge of "what to do and how to do it".

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The dramatic 1965 confrontation of Negroes, led by John Lewis of SNCC and Hosea Williams of SCLC, demonstrating for the right to vote at the Pettus Bridge in Alabama against the armed resistance of Alabama law officers, enabled President Johnson to put the right to vote on the Constitutional table and expand the Constitutional reach of "We the People"

Senator Leahy, Question #2:

Recent studies show wide disparities in the graduation rates of white and minority students. According to a February 2005 study from the Manhattan Institute, entitled "Public High School Graduation and College Readiness Rates: 1991 – 2002," in the class of 2002, "about 78% of white students graduated from high school with a regular diploma, compared to 56% of African American students and 52% of Hispanic students." You are currently head of the Algebra Project, a nonprofit that seeks to assist students in the inner city and rural areas achieve mathematical literacy. Given current work with inner city and rural students, what do you think the Civil Rights Division should do to advance equal opportunity for minority children in education?

Robert P. Moses' response to question #2:

Doar makes the crucial point in his paper that while the 1957 and 1960 voting rights Acts were aimed at the "protection of the right of certain extraordinary, intelligent Negro citizens who, under any standard, were entitled to vote", the Division seized these statutes as their weapon against the caste system"

Moreover, James Bryant Conant (*Slums and Suburbs, 1961*) makes the telling point that the Natic caste system finds its plainest manifestation in its education systems.

Given all that has gone down it seems clear that on the plain of the Constitution itself, for education in the 21st Century as for voting in the 20th, what is still at stake is the reach of "We the People" in the preamble to the Constitution:

The struggle for a Quality Public School Education for the children of the Nation, in contrast to the struggle in the South in the 1960s for the right to vote for blacks is best framed as a struggle for **Constitutional rights**. For while it is true that caste in an educational system has pushed down the descendants of the freed slaves, it is also true that caste in education has effectively prevented the formation of a National education policy for all the Nation's children.

Framing this in Lincoln's trenchant language, the Nation has also been a "house divided against itself for purposes of educating all its children. Moreover (as in 1890) it blinked while Mississippi and Southern states winked, taking the initiative, stating their vision of "where we are and whither we

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tending” after the 1954 Supreme Court decision. In 1955, to undermine and overturn *Brown*, Mississippi organized the White Citizen’s Councils at Indianola, the county seat of Sunflower Co a stone’s throw from Cleveland, Amzie’s hometown.

The sit-in movement and its Freedom Riders woke up the Nation sweeping into the state in the sp of 1961 offering an opposite vision. But, on education, the Nation had already blinked when the Supreme Court in its “Brown” of 1955 blindsided its “what to do”, integrate the public schools, w its “how to do it”, *with all deliberate speed*.

Goodwin Liu has argued that the “Fourteenth Amendment authorizes and obligates Congress to ensure a meaningful floor of educational opportunity throughout the Nation” (The Yale Law Journal, November 2006, Volume 116, Number 2). Liu has also argued that the greatest disparities across states in terms of educational standards, resources, and outcomes disproportionately burden children who are poor, minority, or limited in English proficiency. (New York University Law Review, Volume 81, Number 6, December 2006).

Liu calls for a “robust federal role” to advance educational opportunity for all children. Here is an opening for the Division to take the initiative in working with the President and Congress to insure that opportunity structures for minority and poor students as well as for students limited in English proficiency are incorporated into legislation to advance educational opportunity and that such legislation contains enforcement provisions.

**ANSWERS BY THEODORE SHAW TO WRITTEN QUESTIONS
SUBMITTED BY CHAIRMAN PATRICK LEAHY
HEARING ON THE 50TH ANNIVERSARY
OF THE CIVIL RIGHTS ACT OF 1957
U.S. SENATE JUDICIARY COMMITTEE**

1. At last November's oversight hearing of the Civil Rights Division, Bob Driscoll testified that cases of the current Civil Rights Division have been "largely upheld by the Supreme Court, and so you would think if an administration was sailing beyond the markers of any established area of civil rights laws a court would tell it so at some point." What is your response to this statement? In the employment context, does Mr. Driscoll's statement hold up in wake of the Supreme Court's recent decisions *Burlington Northern and Santa Fe Railway Co. v. White* and *Ledbetter v. Goodyear*?

Strong enforcement of our nation's civil rights laws should be motivated and measured by the desire to eliminate discriminatory practices wherever they are found and to provide proper redress to victims of discrimination, within the confines of the law.

Historically, the views of the Civil Rights Division and the entire Department of Justice have greatly contributed to advances in the judicial interpretation of our nation's civil rights laws. With its large docket across subject areas, the Division has traditionally assumed a leadership role in the development of our civil rights jurisprudence.

In recent years, however, the Division has been reticent to enforce aggressively the civil rights laws. It has taken legal positions at odds with the progress we have made in civil rights and, more specifically, has sided against victims of discrimination seeking strong enforcement of civil rights laws. As I have previously testified, in the seminal affirmative action case, *Grutter v. Bollinger*, the Civil Rights Division joined the Justice Department in arguing that the consideration of race in the law school's admissions policy was unconstitutional,¹ a position ultimately rejected by the Supreme Court.² In *Meredith v. Jefferson County Board of Education and Parents Involved in Community Schools v. Seattle School District*, the Civil Rights Division took the position this past term that voluntary race-conscious action to promote integration in public schools violated the Equal Protection Clause.³ This represented a reversal of historic proportions since it is the first time in fifty-three years that the Justice Department has argued against public school desegregation in the Supreme Court. Importantly, the Court's decision in the case did not adopt the arguments advanced by the Department, and permitted school districts to continue to rely on certain race-conscious methods to pursue diversity and/or avoid racial isolation in schools.⁴

¹ Brief for the United States As Amicus Curiae Supporting Petitioner, *Grutter v. Bollinger*, No. 02-241.

² *Grutter v. Bollinger*, 539 U.S. 306 (2003).

³ Brief for the United States As Amicus Curiae Supporting Petitioner, *Meredith v. Jefferson Co. Bd. of Educ.*, No. 05-915.

⁴ 127 S. Ct. 2738 (2007).

In *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006), the Supreme Court squarely rejected the position of the Civil Rights Division in an employment discrimination case. In that case, the Division joined an amicus brief which sided with the employer and urged an exceedingly narrow interpretation of the retaliation provision under Title VII—that only retaliatory actions relating to employment or occurring at the workplace were forbidden.⁵ The Division’s position also contradicted longstanding policy of the Equal Employment Opportunity Commission (“EEOC”) that the anti-retaliation provision is not limited to the same employment-related activity covered by Title VII’s substantive anti-discrimination provision. In an unanimous decision, with Justice Alito concurring in the judgment, the Court rejected the Civil Rights Division’s position and endorsed the EEOC’s established policy. The Court noted specifically that it could not find “significant support” for the Division’s position in the EEOC’s own interpretations.

In the same Supreme Court term, the Civil Rights Division aligned with an employer defendant a second time in arguing against a longstanding EEOC policy and against the interest of a victim of employment discrimination. In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Division contended that an employee cannot recover in a pay discrimination claim if the pay disparity, while still manifested in each paycheck, arose from a decision outside of the statutory limitations period.⁶ This position was contrary to the EEOC’s position in the court below and to longstanding EEOC policy permitting recovery under Title VII as long as the disparate pay is received within the limitations period. Although the Supreme Court held that claims were time-barred unless filed within the limitations period of the original discriminatory act, 127 S.Ct. 2162 (2007), the position of the Division reflected the recent trend of contravening well-established EEOC policy and siding against the person seeking to enforce anti-discrimination laws.

2. **Between 2001 and 2006, the Bush Civil Rights Division filed only three lawsuits under Section 2 of the VRA, the key section that provides a cause of action for discrimination against minority voters. The organization you head, the NAACP Legal Defense Fund, has been a principle defender of the Voting Rights Act and has worked with the Civil Rights Division to enforce its mandates.**

Given the history of voter intimidation of African Americans, what steps should the Justice Department take in the next 12 months to ensure that voter suppression tactics will not disenfranchise African Americans and other minorities in the next election?

We are concerned about barriers to minority voter participation resulting from unlawful purge programs and lack of compliance with voter registration requirements set forth in the National Voter Registration Act (NVRA). We encourage the Justice Department to conduct greater outreach to counties and states to ensure that their voter removal

⁵ Brief for the United States As Amicus Curiae Supporting Respondent, *Burlington Northern and Santa Fe Railway Co. v. White*, No. 05-259.

⁶ Brief for the United States As Amicus Curiae Supporting Respondent, *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074.

programs and voter registration requirements are in line with the NVRA. In recent years, the Department has focused greater attention on states' efforts to establish purge programs that seek to remove ineligible voters from the rolls. While purge programs may serve a legitimate purpose, this focus should not come at the expense of ensuring that states are actively promoting voter registration opportunities and complying with the mandates of the NVRA. In particular, the Department should ensure that NVRA-mandated agencies are making registration opportunities available to eligible voters and that registration applications are timely submitted to and processed by local officials.

In addition, there are a number of local, state and federal elections taking place in covered jurisdictions. In our view, the legacy of past and present voting discrimination illustrates the continuing need for the federal observer provisions of the Voting Rights Act (VRA). Indeed, so long as voting discrimination persists, there remains potential for harassment and intimidation to emerge during the course of an election. The Justice Department's federal observer program provides an effective oversight mechanism to protect minority voters' access to the ballot box. We think it is important that the Justice Department investigate all claims of racial tension and harassment preceding an election, particularly in those jurisdictions certified for federal observer coverage under the Act. In addition, it is important for the Department to focus on schemes used to discourage minority voter participation during elections including, but not limited to, aggressive challenges mounted by groups and/or individuals inside polling places and uneven application of voting rules and requirements. Finally, the Department should ensure that federal observers carry out their responsibilities in a neutral and impartial manner.

The Justice Department should continue to focus resources on identifying problems in jurisdictions covered under Section 5 of the VRA. Congress' recent reauthorization of the expiring provisions of the Act restored Section 5 to its former vitality by addressing the impact of the Supreme Court's rulings in *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000), and more recently in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). These changes now permit the Justice Department to continue making preclearance determinations in a manner that is consistent with both constitutional prohibitions against discriminatory voting practices and the original legislative intent underlying the 1965 enactment of the VRA. It is important that the Justice Department carefully examine and assess proposed voting changes to ensure that jurisdictions satisfy their burden under these restored standards. The Justice Department should continue to conduct outreach to civil rights organizations and advocacy groups to weigh in on review of Section 5 preclearance submissions. Continued outreach and careful review of Section 5 submissions should yield larger numbers of objections.

Finally, there are important vacancies that will soon be filled at the Justice Department including in the Office of the Attorney General and the Office of the Assistant Attorney General for Civil Rights. In our view, it is imperative that the nominees to these positions commit to aggressive enforcement of the VRA. There have been few challenges brought on behalf of African-American voters under Section 2 of the VRA. The nominees must place a high priority on the investigation and development of potential challenges of this kind that have long fallen under the Division's traditional mandate.



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RESPONSES TO WRITTEN QUESTIONS
 SUBMITTED BY CHAIRMAN PATRICK LEAHY
 HEARING ON THE 50TH ANNIVERSARY OF THE CIVIL RIGHTS ACT OF 1957
 September 19, 2007

1. During the recent mid-term elections, MALDEF attorneys witnessed anti-immigrant activists aggressively intimidating Latino voters in Tucson, Arizona. At least one of these individuals wore dark clothing with a badge-like emblem and carried a handgun in a holster, giving the false impression that he was a law enforcement official. The men attempted to question Latino voters, write down their personal information, and videotape them as they went to cast their vote. The *Arizona Republic* reported that Russell Dove, a local anti-immigrant activist, has proudly acknowledged his participation in this effort to intimidate Latino voters. Given these recent events and the long history of voter intimidation of Latino Americans, what steps should the Justice Department take in the next 12 months to ensure that voter suppression tactics targeting Latino communities will not occur in the next election?

Minority communities are often subject to increased discrimination in elections as they gain political influence. The Latino voting population has grown significantly nationwide in recent years, including in areas that have not previously had a strong Latino presence. At the same time, Latino voters are becoming increasingly engaged in the political process and are increasingly able to influence elections. These factors, combined with rising anti-immigrant sentiment in many communities, make Latino voters particularly vulnerable to voter suppression tactics during the 2008 election cycle.

The Civil Rights Division must act vigorously against voter suppression in the next 12 months to ensure that all eligible voters may freely participate in the 2008 elections. The Division should take the following steps in the next 12 months:

1) Outreach to and training for local election officials:

Voter suppression is often caused by local officials' ignorance of federal civil rights protections that cover all voters in elections of federal officials. For instance, election officials who require Latino voters to present additional documentation to verify

their identity and/or voting eligibility may be unaware of federal civil rights statutes that serve to protect all voters against such practices.

Given the reasonable expectation that Latino voters may face increased barriers to voting in the 2008 elections, the Justice Department must engage in outreach to and training for local election officials. The Civil Rights Division must ensure that local election officials themselves comply with all statutes that protect voters from voter intimidation and/or suppression. In addition, local election officials are often the first line of defense against voter suppression by private individuals at the polling place. The Division must train local election officials to recognize and respond to voter suppression and to report suspected incidents to federal and/or state officials for appropriate enforcement actions.

2) **Investigation and Prosecution of Past Incidents of Voter Suppression**

The 2006 election cycle was marred by incidents of voter intimidation directed against Latino voters. As noted above, on November 7, 2006 MALDEF attorneys witnessed anti-immigrant activists aggressively intimidating Latino voters in Tucson, Arizona. In addition, in the weeks leading up to the elections, a major party congressional candidate's campaign in Orange County, California, mailed a letter to 14,000 registered Latino voters that was specifically designed to intimidate them and keep them from voting. MALDEF reported each of these incidents to officials in the Department of Justice, which reportedly initiated investigations. We are unaware, however, of the outcome of either investigation or the prosecution of any of the alleged perpetrators of these apparent voter suppression tactics.

To ensure the security of U.S. elections, the Department of Justice must fully investigate all alleged incidents of voter suppression and vigorously prosecute offenders. The incidents described above occurred over 10 months ago, but the Department has, to MALDEF's knowledge, failed to act to protect affected voters. Prosecuting individuals who unlawfully suppress the Latino vote is essential to preventing these actions in future elections and to ensuring Latino voter confidence in the democratic process.

Further, the Civil Rights Division must prepare over the next 12 months to enforce federal statutes against voter intimidation in the 2008 election cycle. Recent years have seen the exodus of many well-qualified career attorneys and staff from the Division, leaving the Department ill-prepared to respond to incidents of voter suppression in future elections. The Justice Department must re-commit to hiring well-qualified attorneys and staff to investigate and prosecute individuals who engage in voter suppression.

2. According to a 2007 report of the Citizens' Commission on Civil Rights, over ten percent of the total public school population is enrolled in English Language Learner programs. Yet, this same report found that English Language Learners in American public schools often confront significant educational disadvantages and frequently attend "functionally segregated schools." The Civil Rights Division has significant authority to protect language minority rights under Executive Order 13166, which requires recipients of federal funds to provide meaningful access to limited English proficiency speakers.
 - A. You are the author of a chapter called "Policies to Help English Language Learners," in the 2007 Citizens' Commission report entitled "The Erosion of Rights: Declining Civil Rights Enforcement Under the Bush Administration." What do you believe the Civil Rights Division should do to ensure that English Language Learners have equal access to opportunity in education?

To protect and promote the civil rights of English language learners in U.S. schools, the Civil Rights Division's Educational Opportunities Section must vigorously enforce the Equal Educational Opportunities Act (EEOA). The nation's 5.5 million English language learner (ELL) students often face particularly unequal and inadequate educational opportunities. The EEOA requires state educational agencies and school districts to take action to overcome language barriers that impede ELL students from participating equally in educational programs. As the ELL student population continues to grow nationwide, the Civil Rights Division must enforce the EEOA to ensure that these students receive appropriate educational opportunities that allow them to participate meaningfully in U.S. schools and American civic life.

In addition, the Civil Rights Division must assist federal, state, and local governments in responding to the recent Supreme Court decision regarding voluntary school integration plans in Seattle and Louisville. Given the importance of diversity in education and the trend toward increasingly segregated public schools, the Section must review local actions and play an active role in preventing unlawful discrimination and segregation in public schools. The nation's ELL student population is generally concentrated in low-income, non-diverse public schools, so the Division's actions to encourage school diversity will be critical to this student population.

- B. What steps should the Civil Rights Division take to ensure that all citizens, regardless of language, have access to equal opportunity in voting, housing, employment, and other areas of civil rights enforcement?

The Civil Rights Division's ability to carry out its core mission to protect and promote the civil rights of all Americans has suffered greatly in recent years. The recent exodus of qualified career attorneys and staff, combined with the rising influence of political appointees in the Department of Justice, has hindered the Department's ability to respond effectively to the civil rights concerns of Latinos and all Americans.

The Civil Rights Division must restore and expand its capacity to respond to civil rights concerns. The first step in this process is to implement hiring practices that ensure that the Division hires well-qualified civil rights attorneys and staff. In addition, MALDEF supports increased diversity in federal employment and strongly encourages the Justice Department to conduct outreach in the Latino community to develop a diverse applicant pool for career positions in the Civil Rights Division.

Further, political appointees within the Department of Justice must commit to aggressively enforcing all federal civil rights statutes under their authority. Vigorous enforcement of the Voting Rights Act (especially Sections 2, 5, and 203), the Fair Housing Act, the Civil Rights Act of 1964, and, as noted above, the Equal Educational Opportunities Act, are just a few of the critical civil rights statutes that the Division must enforce aggressively. My written statement submitted for the hearing record contains additional information regarding specific areas of civil rights enforcement critical to the Latino community.

Increased tensions around local anti-immigrant ordinances and the integration of the growing Latino population nationwide make it likely that discrimination of all forms against Latinos will increase in coming years. As minority populations increase in size and proportion of the U.S. population, the proposition that every individual shall receive fair and equal treatment under the law must continue to be the principle under which we live. The restoration of the Civil Rights Division as a key guardian of civil rights is necessary to ensure that the federal government meets its obligation to promote a fair and just society for all Americans.

SUBMISSIONS FOR THE RECORD
TESTIMONY OF ROBERT N. DRISCOLL ON "THE FIFTIETH
ANNIVERSARY OF THE CIVIL RIGHTS ACT OF 1957 AND ITS
CONTINUING IMPORTANCE" BEFORE THE COMMITTEE ON THE
JUDICIARY, UNITED STATES SENATE

September 5, 2007

Thank you, Mr. Chairman and members of the Committee for the opportunity to discuss this important topic. My name is Bob Driscoll and I am currently a partner at Alston & Bird LLP, here in Washington. From 2001 to 2003, I had the honor of serving as Deputy Assistant Attorney General in the Civil Rights Division, which was created by the 1957 Civil Rights Act. During that time I worked on a variety of issues, including racial profiling guidance to federal law enforcement, school desegregation, and police misconduct investigations.

Today's panel is a distinguished one, and I look forward to hearing all of the panelists' perspectives on this important topic. I believe that every other panelist has, in some way, dedicated his or her career to the advancement of civil rights and for that I am both grateful and humbled. My own perspective is that of a working lawyer who spent several years in a leadership position in the Civil Rights Division – an institution for which I have the greatest respect. It is my experience doing my best to help manage the Division that provides the basis for comments on the Civil Rights Act of 1957.

As I reflected on the 50th anniversary of the passage of the Act, I was struck by several points. First, I was struck by the progress that this country has made over fifty years in living up to the ideals that inspired the Act. Second, I was struck by the role played by both the Civil Rights Division and the U.S. Commission on Civil Rights in not only carrying out the mandates of the 1957 Act, but eventually in expanding the protections of civil rights laws to persons and situations that would have been inconceivable in 1957. Finally, I was struck by how the 1957 Act can serve as an historical example of the role that can be played by legislation in changing the culture of a Nation for the better.

Progress since the 1957 Act

Although the 1957 Act will likely be best remembered substantively for its provisions protecting Voting Rights, I think it also is properly viewed as a key building block necessary for the passage of the Civil Rights Acts of 1964 and the 1965 Voting Rights Act – much broader pieces of legislation. The institutions created by the 1957 Act helped to document discrimination in voting, public accommodation, and education (to name only a few areas of inquiry) and thus create the record on which future civil rights legislation was grounded. When one looks at the breadth and depth of racial discrimination in America at the time of passage of the Act, it is hard not to be struck by the racial progress that has been made in 50 years. I am almost reluctant to speak of progress for fear of being misinterpreted as saying that racial discrimination no longer exists (it does) or that there are not many areas where we as a society have fallen short of

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our ideals of equality among all men and women (we have). Nor do I mean to suggest that the gains that have been made were not hard fought, or that progress was not resisted every step of the way by some individuals and governments. However, I think there is no escaping the fact that the moral imperative of equal opportunity that animated legislation such as the 1957 Act has largely taken hold and been internalized by the vast majorities of Americans 50 years later.

To take an obvious example, efforts to desegregate school systems in the wake of Brown encountered “massive resistance” and spawned a wave of litigation by the Civil Rights Division and the NAACP Legal Defense Fund against school boards to remedy the prior de jure segregated systems. 50 years later, it is the school boards themselves that are seeking to promote integration and diversity – so much so that the Supreme Court has ruled on the outer Constitutional limits on the steps districts can take to promote integrated settings for students. To be sure, I am certain some on this panel disagree with the Court’s most recent ruling on this question, but I would submit that the fact of the litigation itself is a sign of progress. Litigation over whether school districts have gone so far in their efforts to promote an integrated student body that they have violated the Constitution is very different matter than litigation against recalcitrant school districts that had no intention of implementing Brown. Indeed, I think many of the Civil Rights Division lawyers who served immediately after the passage of the 1957 Act would have never guessed that 50 years later, a question before the Supreme Court would be whether the Louisville, Kentucky school district had been *too aggressive* in its efforts to integrate its schools.

The Role of the Civil Rights Division and U.S. Commission on Civil Rights

As I stated earlier, the creation of the Civil Rights Division at the Department of Justice and the U.S. Commission on Civil Rights were other key components of the 1957 Act. I am sure Commissioner Heriot will discuss the role of the Commission in greater detail, but the creation of institutions focused on civil rights issues has proven to be a great triumph of the Act.

The Civil Rights Division, which I am familiar with, still protects the right to vote, as envisioned in the 1957 Act, and even still enforces desegregation orders entered in the wake of Brown. In addition, however, the institution has grown throughout the years to do so much more. In my view, the existence of a law enforcement body focused on enforcing civil rights statutes has allowed Congress to expand civil rights protections. For example, today’s Civil Rights Division enforces many statutes that were not even on the drawing board in 1957.

Today’s Civil Rights Division enforces the Americans with Disabilities Act, statutes protecting religious freedoms, and a host of laws that prohibit discrimination in education, employment, credit, housing, public accommodations and facilities, and voting. On a daily basis, Civil Rights Division attorneys are engaged in activities such as prosecuting violations of human trafficking statutes; ensuring that places of public accommodation are accessible to disabled persons; and enforcing laws that prohibit acts

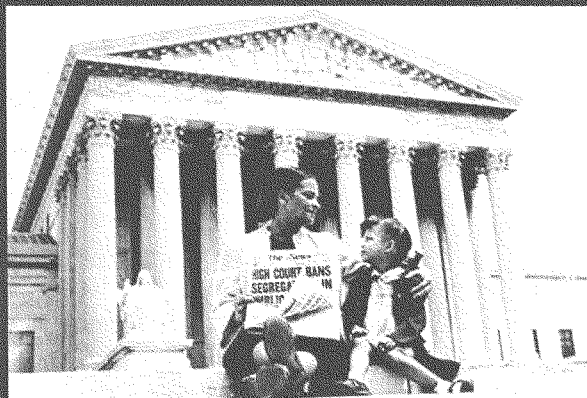
or threats of violence that interfere with federally protected activities, such as voting. Thus, the 1957 Act was critically important because it put an institutional structure in place to address all of these issues. In my view, this paved the way for Congress to enact the broader protections of the Civil Rights Acts of 1964 and the 1965 Voting Rights Act, in addition to all of the other civil rights legislation that has since followed.

1957 Act as Inspiration

Legislation changes the law. It cannot and does not in and of itself, change people's attitudes towards others or what is in their heart. Plenty of citizens were offended by the passage of the 1957 Act and their animosity was undeterred by the statute itself. However, legislation can be an important marker of progress as society grapples with civil rights issues, and those who seek to advance civil rights today can learn, from the 1957 Act, several important lessons. First, the Act was a compromise. It did not cover public accommodation discrimination, it was not as sweeping as some would have wanted, and, as evidenced by subsequent legislation, it was in historical terms, fairly modest. But as we all now recognize, it was an important first step, not a failure. Today's advocates can learn from this perspective as they press for new or expanded rights for fellow citizens and recognize that not all victories will be won in the first battle, nor will the first attempt to address a problem necessarily be comprehensive, but that does not mean even incremental progress is not worthwhile. Second, the Act set in place fact-finding capabilities, through the Commission, that could serve as the basis for future legislation, some of which, in retrospect, can be directly tied to the work of the Commission or the early work in the Civil Rights Division. These institutions, it turns out, were likely of more historical importance than the substantive provisions of the Act. Today's advocates should turn to these institutions to find the intellectual and factual underpinnings that will support tomorrow's legislation. Finally, apart for the mechanics of the legislation, the Act can serve as inspiration that attitudes and perceptions in the Country can be changed. It is hard to imagine, given the opposition by some to the 1957 Act, the unanimity today on the issue of equal rights today. There are issues today that seem just as intractable, just as controversial, and just as divisive as the civil rights struggle must have seemed to those who advocated for legislative change in 1957. The 50 years since the Act's passage serve as a reminder of what is possible.

Long Road to Justice

The Civil Rights Division at 50



September 2007

Leadership Conference on Civil Rights Education Fund
www.reclaimcivilrights.org

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The authors and publisher are solely responsible for the accuracy of statements and interpretations contained in this publication.

The substance and recommendations of the work are dedicated to the career men and women of the Civil Rights Division. For fifty years, they have worked tirelessly to help our nation meet its constitutional ideals of equal justice.

Karen McGill Lawson
President and CEO
LCCREF

Wade Henderson
Counselor
LCCREF

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Foreword

The American people have traditionally shown high national regard for civil rights... But the need for leadership is pressing. That leadership is available in the national government and it should be used.

President Truman's Committee on Civil Rights, *To Secure These Rights*, 1947¹

Momentum for the civil rights struggle has historically emerged from within the people and communities of this nation, but the federal government continually plays a central role in determining the outcome of this struggle. When Congress authorized the creation of the Civil Rights Division at the Department of Justice in 1957, the federal government made a formal and ongoing promise to defend the civil rights of its people. It has honored this commitment over the last fifty years by enforcing anti-discrimination laws and by removing discriminatory provisions from its own policies and programs. In so doing, the Division has strived to reflect some of America's highest democratic ideals and aspirations: equal treatment and equal justice under the law.

We feel honored to have worked with the lawyers and professional staff of the Division during the time that we served as Assistant Attorneys General. We have experienced a strong bipartisan national consensus over the years regarding the need for federal civil rights protections, and we take great pride in the Division's response. It is through the Division's institutional knowledge and dedication to the promise of civil rights that we have been able to affect substantial and continued change. What began as a mission to strengthen the Department's resolve to end racial segregation and Black disenfranchisement in the South, has expanded over the years to include protections from discrimination on the basis of ethnicity, sex, religion, disability, and national origin.

It remains clear that the work of the Civil Rights Division has the bipartisan support of both Houses of Congress and of the American people. This bipartisan approach must continue, and the Civil Rights Division must not falter in pursuing strong enforcement efforts and relief. It was only through the resources of the federal government, and the credibility of the Department of Justice, that many of the more difficult and complicated cases were won.

Though questions regarding the Division's credibility and its precise civil rights agenda may arise throughout different administrations, the Division's fundamental commitment to equal justice and opportunity must remain steadfast. As President Truman's Committee for Civil Rights heralded sixty years ago, it must be the imperative of the federal government to enforce the law and to ensure fair and impartial administration of justice for all Americans. Today, which

¹ President Truman's Committee on Civil Rights, *To Secure These Rights: The Report of the President's Committee on Civil Rights* (1947), 100.

marks fifty years in the life of the Civil Rights Division, we commend its achievements and assess its limitations. We ask that Congress and the American people join us today in renewing our commitment to civil rights enforcement.

Drew Days
Assistant Attorney General
Civil Rights Division
1977-1980

John Dunne
Assistant Attorney General
Civil Rights Division
1990-1993

Deval Patrick
Assistant Attorney General
Civil Rights Division
1994-1997

Bill Lann Lee
Assistant Attorney General
Civil Rights Division
1997-2001

INTRODUCTION

Until the late nineteenth century, African Americans in the United States, particularly in the American South were regarded, both politically and socially, as second-class citizens. Though the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution had been ratified, they were not being implemented with the full force of the law. Moreover, the courts and the federal government had nullified much of the Reconstruction-era Civil Rights Acts.²

In 1939, the Justice Department established a Civil Rights Section within its Criminal Division for criminal prosecutions of peonage and involuntary servitude cases, as well as for prosecutions under the remaining Civil Rights Acts.³ The Section was given limited authority and a small staff. Fighting a World War against Nazism, however, made it increasingly difficult for the United States to defend racial discrimination within its own borders, especially while African-American troops were committed to the struggle for anti-discrimination abroad. The return of Black veterans to the home front provided local leadership and a political framework for civil rights protest that the federal government could no longer ignore.

President Truman established a Committee on Civil Rights in 1946. Its 1947 report, *To Secure These Rights*, recommended comprehensive civil rights legislation as well as the creation of a Civil Rights Division within the Justice Department.⁴ Although President Eisenhower did not embrace civil rights as a political priority within the Administration, Attorney General Herbert Brownell advocated additional governmental efforts. Brownell collaborated with civil rights organizations, including the Leadership Conference on Civil Rights, to propose a civil rights bill that would require both civil remedies and criminal penalties for civil rights violations.

On September 7, 1957, President Dwight Eisenhower signed the Civil Rights Act of 1957, the first civil rights legislation since Reconstruction. While the Act could not implement everything necessary to protect the political, social, and economic rights of African Americans, it did authorize three important features: a position for an Assistant Attorney General for Civil Rights within the Department of

² The Justice Department was limited to criminal prosecutions under these statutes. From the Civil War to 1940, the Justice Department brought only two prosecutions for racial violence, one in 1882 and one in 1911.

³ In addition to civil rights cases, the Civil Rights Section was also responsible for administering the criminal provisions of the Fair Labor Standards Act, the Safety Appliance Act, the Hatch Act, and certain other statutes. It also processed most of the mail received by the federal government relating to civil rights issues.

⁴ The Truman Committee believed that increasing the level of federal civil rights enforcement from a Section within the Criminal Division to its own separate Division "would give the federal civil rights enforcement program prestige, power, and efficiency that it now lacks." President Truman's Committee on Civil Rights, *To Secure These Rights*, 152.

Justice; the creation of the United States Commission on Civil Rights; and the use of civil suits against voting discrimination.

On December 9, 1957, Attorney General William P. Rogers signed AG Order No. 155-57, formally establishing the Civil Rights Division of the Department of Justice. In the fifty years since its creation, the Division has been instrumental in promoting equal justice for all Americans.

The following report discusses the efforts of the Civil Rights Division over the past fifty years to eliminate discrimination in the areas of education, employment, housing, voting, criminal justice, and public accommodations. We provide the historical context for the Division's involvement in each area, outline the Division's landmark achievements, and assess the challenges it currently faces in securing equal and impartial administration of justice under the law. Finally, we provide recommendations for the Division to consider as it sets out to achieve its mission of effective civil rights enforcement over the next fifty years. We invite the Division, Congress, and the public to examine and reflect on this report as a piece of an ongoing dialogue regarding how best to secure and protect the civil rights of the American people.

I. VOTING RIGHTS

This bill will establish a simple, uniform standard which cannot be used, however ingenious the effort, to flout our Constitution. It will provide for citizens to be registered by officials of the United States Government if the State officials refuse to register them. It will eliminate tedious, unnecessary lawsuits which delay the right to vote. Finally, this legislation will ensure that properly registered individuals are not prohibited from voting.

President Lyndon Baines Johnson. 1965

In 2004 and 2005, Secretary of State Condoleezza Rice was ranked the most powerful woman in the world by *Forbes* magazine. The first African-American woman and the second woman to head the United States State Department, Secretary Rice's race and gender are always noted but rarely marveled at. A Phi Beta Kappa at age 19, with a doctorate degree in the politics of the former Soviet Union, she was the first female, first minority, and youngest Provost at Stanford University before serving in President George H.W. Bush's administration as Soviet and East European advisor. She served the current President Bush first as National Security Advisor before becoming Secretary of State.

People may disagree with her policies, but no one questions her legitimacy.

But fifty years ago it would have been impossible for her to hold the position she holds today. African Americans were second class citizens. And the franchise that once empowered them was beyond reach.

Secretary Rice's parents, like the vast majority of African Americans living in the South during the middle of the 20th century, were unable to vote in her hometown of Birmingham, Alabama. Jim Crow laws passed by states after the Civil War took the vote from African Americans and imposed *de jure* segregation that stripped them of most of their citizenship rights. In 1900, of the nearly 200,000 African-American males of voting age in Alabama, only 3,000 were registered to vote. The next year, the state constitution officially barred Blacks from voting. Those who tried to register to vote faced formidable hurdles. Poll taxes. Impossible literacy tests. Economic retribution, physical intimidation, even death. All aimed at keeping suffrage – and the rights emanating from the voting booth – from African Americans.

Americans born after the civil rights era of the 1960s, may find it difficult to imagine that there was ever a period when advocating the right to vote for African Americans provoked hostility and even violence. Yet in 1963, in Alabama, and throughout the South, it did. That was the year Birmingham Police Commissioner Eugene "Bull" Connor used police dogs and ordered fire hoses opened on hundreds of young, non-violent African Americans demonstrating for their civil rights, literally hosing down streets with Black children. Later that year, members of the Ku Klux Klan planted a dynamite bomb in the basement of

Birmingham's 16th Street Baptist Church, a center for those resisting segregation and demanding the vote. The explosion killed four young girls, including one of Secretary Rice's classmates – 11-year old Denise McNair.

Far from intimidating the black community and its many supporters, the deaths of innocent children shocked the nation and the world and helped push passage of the Civil Rights Act of 1964. The Civil Rights Act of 1964 helped end segregation throughout the United States. But it was the passage of the Voting Rights Act in 1965 that transformed the political landscape of the South and our nation.

In both the years leading up to passage of the Voting Rights Act, and for many years afterwards, the Civil Rights Division of the Department of Justice has played a critical role in our nation's work to protect the right to vote.

From 1960 to 1964, Division attorneys traveled throughout the South to investigate voting discrimination and compiled overwhelming evidence of inequity. In a county-by-county and state-by-state campaign in Alabama, Georgia, Louisiana and Mississippi, the Division challenged voting discrimination in the federal courts, where it often met with hostile judges, defiant state and local officials, and widespread violence and intimidation of Black applicants for registration. Even when the Division obtained favorable rulings from some federal judges, the dynamics of state-sponsored suppression of Black registration did not change. Some of the particular discriminatory voting practices being challenged were prohibited, but Black registration did not significantly increase.

In addition to cases against individual counties, the Division brought statewide cases against Louisiana and Mississippi in 1961 and 1962, respectively, arguing that the state constitutions and statutes were designed and had the effect of preventing African Americans from voting in significant numbers. In the Louisiana case, District Judge John Minor Wisdom ruled that parishes could not give Blacks any tests more onerous than those given to Whites in the previous period of discrimination (which generally meant no test at all).⁵ The Supreme Court upheld the decision, ruling that a court not only has "the power but the duty to render a decree which will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future."⁶

In 1965, shortly after the Selma to Montgomery civil rights march, when the world watched on television as the police beat marchers crossing the Edmund Pettus Bridge outside of Selma, Congress passed the Voting Rights Act. Certainly the Act would not have been passed without the stirring words of Martin Luther King, Jr., the daily struggles of the civil rights movement, and the congressional arm-twisting of President Johnson. But, it was also the Civil Rights Division's early cases under the 1957 and 1960 Civil Rights Acts that paved the way, and

⁵ *United States v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963), *aff'd* 380 U.S. 145 (1965)

⁶ *United States v. Louisiana*, 380 U.S. 145 (1965)

ultimately shaped the contents of the 1965 Voting Rights Act.⁷ The limits of the earlier Acts and the inability of the Division's case-by-case litigation to make the needed changes pushed Congress to implement more rigorous, and in some ways, ground-breaking provisions. Civil Rights Division lawyers, particularly Harold Greene (later judge of the D.C. Circuit), drafted the initial proposal and language that was included in the final bill as passed.

On August 6, 1965, the day that the President signed the Voting Rights Act of 1965, he directed the Attorney General to file suit the very next day against the Mississippi poll tax.⁸ That same day, the Attorney General sent letters to every county registrar in the states covered by the Voting Rights Act, noting the Act's suspension of tests or devices for voting. It was these types of state provisions – for example requiring Black applicants for voting registration in Mississippi to copy and interpret provisions of the state constitution to the satisfaction of the White registrars – that allowed the county registrars to summarily deny registration to qualified Black residents. The following week, the Civil Rights Division brought poll tax suits against Texas, Alabama and Virginia, and federal examiners were working in 14 counties registering voters. In that first week, over 15,000 African Americans were registered by federal examiners, and approximately 42,000 new African-American voters were registered in the first month after the Voting Rights Act took effect.⁹

In 1968, after nearly 70 years of disenfranchisement, Black voters elected the first African American to the Birmingham city council, attorney Arthur Shores. There appeared to be a new faith that there was an integrated future for the Deep South, but it didn't come naturally.

In 1971, three years after Shores' election, the Civil Rights Division had to step in and file suit against Jefferson County when it attempted to pass a bill that would have diluted the black voting power that had brought Shores to office. The purpose of the bill, sponsored by Representative Bob Gafford, a long and ardent segregationist, was solely, according to the *Birmingham News*, "to minimize chances of election of Negroes to the council by forcing them to run head-to-head with White candidates for specific places."

One of the central features of the Voting Rights Act is Section 5, the preclearance requirement.¹⁰ While this part of the Act was not an initial focus of

⁷ See Landsberg, Brian K. *Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act*. Lawrence: University Press of Kansas, 2007.

⁸ Twice earlier, in 1937 and in 1951, the Supreme Court had upheld the poll tax as constitutional. It overruled these cases in 1965 in *Harper v. Virginia*, 383 U.S. 663 (1965).

⁹ In the first year after the Act was enacted, the Attorney General designated 43 counties for examiners, and 23 counties for observers. As of June 30, 1966, over 117,000 African Americans were registered by federal examiners in the four states where examiners operated – Alabama, Mississippi, Louisiana, and South Carolina.

¹⁰ Section 5 requires that certain covered jurisdictions submit for review to the Attorney General or the District Court of the District of Columbia any change to voting practices or procedures.

the Division, in 1969 the Supreme Court ruled that all voting changes, including redistricting, reapportionment, and other methods of election changes were subject to Section 5 preclearance.¹¹ From that point on, the Voting Section's objections to changes that had a discriminatory purpose or effect were a powerful lever in prodding many jurisdictions to abandon at-large election systems in favor of single-member districts, and other practices such as discriminatory annexations and gerrymandering.

Within 10 years of passing the Voting Rights Act, Black registration in the Deep South had increased by over one million persons, and the number of Black elected officials in the region had increased from almost zero to 963.¹² There were still discriminatory barriers to making those votes effective. However, in 1973, the Supreme Court ruled that "vote dilution" was prohibited by the Fourteenth Amendment.¹³ While the Court later restricted constitutional challenges to intentional discrimination, Congress amended the Voting Rights Act in 1982 to re-establish the discriminatory "results" test as the standard for bringing a voting rights challenge under Section 2 of the Voting Rights Act.

Starting at the end of the 1970s and extending through the next decade, the Section 5 preclearance requirement and litigation under Section 2 of the Voting Rights Act curbed efforts to dilute minority voting strength. Following both the 1980 Census and the 1990 Census, the work of the Civil Rights Division to ensure that redistricting did not have a discriminatory purpose or effect resulted in remarkable gains in the ability of minority voters to participate in the political process. Voters were increasingly able to elect candidates of their choice at every level of government.¹⁴

The 1970 and 1975 extensions of parts of the Voting Rights Act expanded the Act's geographical coverage to include preclearance protection for minority voters in places in the North and the West, including Arizona, Texas and parts of New York and California that had not previously been covered. The 1975 amendments also added protections from voting discrimination for Hispanic, Asian Americans, and Native American language minority citizens.

In 1993, Congress added another tool to the Division's voting rights arsenal when by enacting the National Voter Registration Act (NVRA) -- also known as the "Motor-Voter" bill. The NVRA requires states to provide voter registration

¹¹ *Allen v. State Board of Elections*, 393 U.S. 544, (1969)

¹² U.S. Commission on Civil Rights, *The VRA, 10 Years After*.

¹³ *White v. Register*, 412 U.S. 775 (1973).

¹⁴ Just some examples include objections to Georgia's legislative redistricting in 1981, see *Busbee v. Smith*, 549 F. Supp. 494 (1982), objections to Mississippi's congressional redistricting that resulted in the first Black Mississippi congressman in 1986, and Section 2 litigation in Los Angeles County that resulted in the creation of a Hispanic majority district and the first Hispanic County Commissioner in 1992, *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990).

materials at departments of motor vehicles and offices that provide public assistance and/or disability benefits.

While some voting enforcement has continued in recent years – most notably to ensure that the minority language provisions of the Act, Sections 203 and 4(f)(4), are vigorously prosecuted – much of the core work of the Voting Section has been significantly diminished. In the last several years, the Section has brought only a handful of Section 2 cases on behalf of African Americans, Hispanics, Asian Americans and Native Americans. In enforcing the NVRA, the Section is pressing states to purge the voter rolls, rather than ensure that states allow registration at social service agencies. Moreover, in pursuing the newest voting legislation, the Help America Vote Act (HAVA), a political appointee in the Division urged the state of Arizona to apply the most cramped interpretation of HAVA. Such a restrictive view would have limited voters' opportunities to use provisional ballots, which defies the position taken by the Election Assistance Commission, the entity with the principle role in implementing HAVA.

Ensuring the voting rights of all Americans in the twenty-first century demands more innovative tactics and approaches than were required during the period of overt segregation and racial discrimination. The Civil Rights Division, in changing its approach, must not stray from its original mission to ensure political equality.

II. EDUCATION

The school bell rings at T.C. Williams High School in Alexandria, Virginia. A group of students from Mr. Harrison's Advanced Placement Government class pours out into the hall, discussing last week's basketball game against West Potomac. The cafeteria boasts a racially, ethnically, and socioeconomically diverse scene. Of the two thousand students enrolled at T.C. Williams, a quarter are Hispanic, a quarter are White, and forty-three percent are Black. Dozens of flags exemplifying the student body's diversity of nationality hang in the school lobby; meanwhile, the city's payment for its students' AP exams and T.C. Williams' initiative to provide every student with a laptop confirm its commitment to leveling the playing field for its students of diverse socioeconomic backgrounds.¹⁵

The diversity of Mr. Harrison's class, while perhaps not typical, was unimaginable fifty years ago in Virginia. Efforts to racially integrate public schools in Virginia have been met with periods of widespread resistance since the Civil War. While many school districts employed tactics to stall integration and to avoid questions as to the racial equality of their facilities, perhaps nowhere was massive resistance more successfully employed than in 1950s Prince Edward County, Virginia. Recounting the story of Prince Edward County sheds light on the progress that has been made regarding issues of educational equality over the past fifty years and, more importantly, the civil rights work in public education that remains our business to resolve.

Prince Edward County is located in a Southside area of Virginia that lay in the region known fifty years ago as the "Black Belt."¹⁶ Stretching from the shores of the Chesapeake Bay down south through the Carolinas and Georgia and west toward East Texas, the counties in that region were predominantly rural and at least one-third Black. Each one embraced stringent laws and social norms enforcing the separation of the races. In 1939, Robert Russa Moton High School was constructed for Blacks in Prince Edward County in an attempt to avoid legal challenge from the NAACP regarding inadequate educational facilities. The new school, however, was overcrowded and underfunded—it lacked a gymnasium, cafeteria, desks, lockers, restrooms, and an auditorium with seats. When the school's repeated requests for additional funds were denied by the all-white school board, students at R.R. Moton took matters into their own hands.

In 1951, some 450 students walked out of the school in protest against the educational conditions in Black Prince Edward schools. Supported by the Richmond NAACP, the students' case, *Davis v. County School Board of Prince*

¹⁵ "T.C. Williams High School Profile," Alexandria City Public Schools (2007); Available at: www.acps.k12.va.us/profiles/tcw.php; www.en.wikipedia.org/wiki/T._C._Williams_High_School

¹⁶ "Prince Edward County: The Story Without An End—A Report Prepared for the U.S. Commission on Civil Rights, July 1963;" Available at www.library.vcu.edu/bc/speccoll/pec03a.html

Edward County, became one of the five cases combined under the name *Brown v. Board of Education* in the 1952-1953 Supreme Court term. This decision, which overturned *Plessy v. Ferguson* (1896) and declared racial segregation to be unconstitutional, was met with massive resistance in Prince Edward County. Since the Supreme Court specified no time frame for desegregation in *Brown I* (1954), local white leadership delayed its implementation and organized plans to underwrite White teacher salaries to insure that quality white education would continue untouched. Following the 1957 decision in *Brown II* that schools must desegregate "with all deliberate speed," the Prince Edward County school board epitomized Virginia's recalcitrant policy of massive resistance in its 1959 decision to close its doors to all public education.

Though the county government refused to appropriate funds for the public school system, various organizations raised money for white families to send their children to private or parochial schools. In 1961, the State of Virginia allocated funds for tuition grants and tax concessions for White children to go to private segregated schools, while Black children were either denied public education or forced to relocate to other counties. It wasn't until 1964 in the Supreme Court case *Griffin v. County School Board* that Prince Edward County's and the State of Virginia's actions were declared unconstitutional. County schools were subsequently ordered to reopen and to integrate.

In 1964, only 1.2 percent of Black students in the entire South attended schools with Whites. In reaction to the dismal state of racial integration throughout the South, Congress passed the Civil Rights Act of 1964. A comprehensive measure mandating nondiscrimination in public education, facilities, accommodations, employment, and federally assisted programs, the Act authorized the Justice Department to intervene in race-based equal protection cases.¹⁷ Though the Civil Rights Division was not a plaintiff in the *Brown v. Board* or the *Griffin* litigation, Title IV of the 1964 Act authorized the Department thenceforth to bring suit against racial segregation. Additionally, Title VI dictates that federal agencies, including the Department of Health, Education, and Welfare, be responsible for ensuring nondiscrimination in federally funded programs—including public schools. The Act also provides for rescinding federal funds for noncompliance.

In 1966 alone, the Civil Rights Division brought fifty-six school desegregation cases under Title IV, Title VI, and Title IX.¹⁸ The Department challenged the legitimacy of dual school systems throughout the South and endeavored to equalize facilities while integrating teaching staff, school activities, and athletics. The decisions resulting from cases brought by the Civil Rights Division required that the school systems not only allow Black children to attend previously all-

¹⁷ Congress also included national origin, sex, and religion in the categories of people to whom equal protection under the Civil Rights Act of 1964 would extend.

¹⁸ Title IX of the Civil Rights Act of 1964 allowed the Justice Department to intervene in private suits.

white schools, but to “undo the harm” created by the segregated system.¹⁹ At the end of 1970, the Division had 214 active school desegregation cases.

Division efforts to secure desegregation included challenges to “freedom of choice” policies that failed to convert dual systems into unified integrated ones, efforts to desegregate Northern and Midwestern public schools,²⁰ and challenges to dual systems in higher education as well.²¹ The Department’s education work over the past fifty years, however, is not limited to securing public school desegregation. The Education Section has committed itself over the years to equal education for students with limited-English proficiency (LEP), to equal access for disabled students through enforcement of the Americans with Disabilities Act, and to equal opportunity for female students to participate in sports programs.

Since the closing of Prince Edward County schools in 1959, the region has made great strides towards integration and racial reconciliation. In 2003, the Virginia General Assembly passed a resolution apologizing for massive resistance, and in June 2003 Prince Edward County granted the students who would have graduated from R.R. Moton High School honorary diplomas. Currently, the largest public high school in the area, Prince Edward County High, is fully integrated with a population that is fifty-six percent Black and forty-three percent White. T.C. Williams High School in Alexandria, while not constructed until after the Civil Rights Act of 1964, has also overcome significant resistance to integration. Though the city’s public schools were desegregated in 1959, the three area high schools were consolidated and subsequently integrated in 1971 to remedy pervasive racial imbalances in the 1960s. While these school districts have made significant local progress, further protections by the Civil Rights Division are necessary nationwide, for schools are more segregated now than they were before *Brown v. Board*.²²

While the Justice Department committed to aggressive desegregation efforts in the late 1960s, those efforts have been consistently scaled back in subsequent decades. The courts have undermined progress in achieving racial equality and diversity by limiting possible remedies for segregation. In *Milliken v. Bradley* (1974), for instance, the Supreme Court outlawed a desegregation plan in Detroit that relied on inter-district busing, arguing that dismantling a dual school system

¹⁹ *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), adopted en banc, 380 F.2d 385 (5th Cir. 1966)(immediate desegregation for all states of the 5th Cir.), 417 F.2d 834 (5th Cir. 1969); see also *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969) (desegregation of faculty and staff required).

²⁰ *Reed v. Rhodes*, 607 F.2d 714 (6th Cir. 1979) (Cleveland, OH); *Liddell v. Bd. of Ed.*, 667 F.2d 643 (8th Cir. 1981)(St. Louis, MO); *United States v. Yonkers*, 837 F.2d 1181 (2nd Cir. 1989)(Yonkers, NY).

²¹ *Ayer and United States v. Fordice*, 505 U.S. 717 (1992).

²² Gary Orfield and Susan E. Eaton, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education*.

did not require any particular racial balance in each school. In outlawing busing and emphasizing the importance of local control over the operation of public schools, the decision exempted suburban districts from assisting in the desegregation of inner-city school systems. Limitations such as this sanction *de facto* segregation as a replacement for the *de jure* system outlawed by *Brown*.

Recent decisions such as that from the *Seattle* and *Louisville* cases, though continuing to endorse diversity as a compelling state interest, may undermine local school districts' voluntary strategies to combat segregation. The work of the Education Section of the Civil Rights Division, which contributed greatly in the early years to fuel the fire of integration, has stalled in recent years. It is the responsibility of the Civil Rights Division to contest efforts to scale back the federal government's promise to ensure equal protection and educational opportunity for all its students.

III. EMPLOYMENT DISCRIMINATION

The terrorist attack on September 11, 2001, was a singular act of horror, not seen on U.S. soil since Pearl Harbor. The quick response of New York City firefighters and law enforcement officers to the tragedy made them heroes. These officers -- White, Black, Latino, Asian, and men and women -- are the best that New York has to offer. They risked their lives for others and did so with honor.

And no one paid attention to their race. No one paid any attention to the diversity of the men and women who did their duty and responded quickly and efficiently to the City of New York. In the 50 years since the Division was created, Americans have become accustomed to this kind of diversity.

Fifty years ago, many of these local heroes would not even have had the opportunity to serve their city and their country as first responders. The doors to professions such as law enforcement and firefighting were all but locked in 1957 to people of color. Fire stations were notoriously segregated in the days preceding the civil rights movement. In San Francisco, for instance, there were no black firefighters at all before 1955, and women were not allowed to apply before 1976.²³

Too often, in the 1950s and 1960s, Blacks were relegated to lower paying and less desirable jobs, and were excluded by many traditionally "white" industries and professions, particularly in the South. In many manufacturing industries, for example, Blacks held the jobs that were more physically strenuous, and often hotter or dirtier, while only Whites could compete for better paying supervisory jobs. Unions at the time also had many restrictions and job hierarchies. Women also were relegated to low paying jobs and earned about half of what men earned in 1960.

Much of the change that we have seen in employment with respect to racial and gender discrimination can be directly attributed to the Civil Rights Division's enforcement of Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment based on race, sex, religion and national origin.²⁴

In July of 1965, Title VII of the 1964 Civil Rights Act became effective, though few cases were brought initially. At that time, the Equal Employment Opportunity Commission (EEOC), which was created by the 1964 Act, had no enforcement authority. It could only investigate, conciliate, or refer cases to the Justice Department to litigate. In the summer of 1967, the Civil Rights Division put a

²³ Matthew Yi, "Minorities Named to Key Posts at SFFD," *Examiner* (26 July 2000), A1; Available at: <http://sfgate.com/cgi-bin/article.cgi?file=/examiner/archive/2000/07/26/NEWS11839.dtl>

²⁴ Also, Executive Order 11,246, issued by President in Johnson in September 1965, gave the Labor Department the responsibility of enforcing nondiscrimination for federal contractors and subcontractors.

higher priority on employment litigation and six discrimination suits were filed. In 1968, 26 cases were filed. The principle issue in those early employment cases was whether Title VII prohibited only purposeful discrimination or whether it also prohibited non-job related practices that appeared neutral, but had a discriminatory impact.

The Justice Department first raised this issue in suits challenging union practices in hiring. In one suit, an all-white asbestos workers union restricted membership to the sons (or nephews raised as sons) of union members. Without union membership, individuals could not get hired in the insulation and asbestos trade. A second suit challenged a seniority system that perpetuated the effects of past discrimination. Both practices were ruled unlawful under Title VII by lower federal courts.²⁵ The Supreme Court took up the issue in *Griggs v. Duke Power*, 401 U.S. 424 (1971), after a divided Fourth Circuit ruled that Duke Power could require new hires for previously all-white jobs to have a high school degree and pass a written "ability" test, even though the criteria were not necessary for the job and had not been used for previously-hired White employees. The Justice Department supported the plaintiffs, who prevailed unanimously in the Supreme Court. The Court held that facially neutral "practices, procedures or tests" that are discriminatory in effect cannot be used to preserve the "status quo" of employment discrimination.²⁶

In 1969, the Division sought back pay for the first time in an employment discrimination lawsuit. The Justice Department also determined at that time that the affirmative action practice of requiring numerical goals and timetables for hiring could be required for federal contractors as part of Ex. Order 11246, which prohibited discrimination based on race, national origin or religion by employers with federal contracts. The Division included goals and timetables in the relief and in settlements it sought in Title VII litigation. Following suits against Bethlehem Steel and United States Steel, the Division brought a nationwide suit against the entire basic steel industry in 1974, covering more than 700,000 employees at that time. A nationwide suit against over 250 trucking companies was brought that same year, resulting in a consent decree with the employers. These suits combined "brought over two million employees under the coverage of consent decrees with goals, timetables, and back pay."²⁷ Another example was a case against the Alabama Department of Public Safety, where the district court in 1972 found that in the 37 year history of the state patrol, there had never

²⁵ *Vogler v. Asbestos Workers* 53, 294 F. Supp. 368 (E.D. La. 1967); *United States v. Local 189 United Papermakers*, 282 F. Supp. 39 (E.D. La. 1968).

²⁶ *Id.* at 430. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. ... [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to measuring job capability. *Id.* at 431.

²⁷ David Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement*, 42 *Vanderbilt Law Review* 1122, 1145 (May 1989).

been a black trooper. The court required a one-for-one hiring of Black and White troopers until a goal of 25 percent black troopers was met.²⁸

In 1974, the federal government reorganized Title VII enforcement and the litigation authority against private employers was transferred to the EEOC. The Division's Employment Litigation Section was tasked with aggressively enforcing the provisions of Title VII against state and local government employers. From 1975 to 1982, the Civil Rights Division brought cases covering recruiting, hiring and promotional practices of local and state governments, predominately against police and fire departments, which opened up their ranks to minorities and women.²⁹ Similar cases were brought against states and counties to include minorities and women in jobs in correctional institutions.

Also, in 1978, the Civil Rights Division worked with the EEOC and other agencies to issue the *Uniform Guidelines on Employee Selection Procedures*. These guidelines provided employers, labor organizations and the courts with uniform federal guidance on the kind of evidence necessary to validate a test or selection device for hiring. These guidelines applied to federal government hiring as well.

The policies and practices of the Employment Section of the Division shifted dramatically in the Reagan Administration. In 1983, the Department filed an *amicus* brief in a private suit against the New Orleans police department arguing that no affirmative action remedies, including racial goals, are lawful under Title VII to correct past discrimination, except for those that assist identified victims of discrimination. The Fifth Circuit rejected that position.³⁰ However, in 1984 the Division began systematically revising its consent decrees with over 50 public employers to eliminate numerical goals. "The cumulative effect of the Justice Department's positions was that the lawyers for the executive branch, who had been in the forefront of advocating the civil rights of blacks, other minorities, and women since the days of President Truman, became the advocates for a restrictive interpretation of the civil rights laws."³¹

One area in which the Division continued equal employment enforcement during the 1980s was in residency requirements. In 1983, the Division brought suit against the city of Cicero, Illinois for requiring that applicants for employment live in the city. Because the city was over 99 percent White, the city work force was

²⁸ *NAACP and United States v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972). Later, the District Court ordered a similar race-conscious requirement for promotions to higher ranks, and the Supreme Court upheld the relief in 1987, despite the United States' reversal of position and opposition to the remedy. *United States v. Paradise*, 480 U.S. 149 (1987).

²⁹ See *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980) (covering 45 municipal police and fire departments in Louisiana), and *Vulcan Pioneers, Inc. v. New Jersey*, 832 F.2d 811 (3rd Cir. 1987) (covering 12 fire departments in New Jersey). Cases were brought during this time against state police agencies in Florida, Maryland, Michigan, New Hampshire, New Jersey, North Carolina, Vermont and Virginia.

³⁰ *Williams v. New Orleans*, 729 F. 2d 1554 (5th Cir. 1984).

³¹ Rose, *supra*, at 1155, 1157.

all white. Twelve similar suits followed in other white suburbs of Chicago. The court ruled that the residency requirements violated the disparate impact standard of *Griggs*, and settlements or summary judgments were entered in all 13 suits. Lawsuits against 18 suburbs of Detroit were also successful.

In the 1990s the Civil Rights Division renewed its efforts to enforce Title VII against public employers through "pattern or practice" cases and individual cases referred by the EEOC. The Employment Section also took on a critical role in equal employment by defending the federal government's programs on affirmative action. In July of 1995, President Clinton made clear that the federal government would "mend, not end" affirmative action, and ensure that federal programs were consistent with the Supreme Court's ruling in the *Adarand* case.³² The Justice Department undertook a meticulous review of all Federal programs to make certain that the programs in place are fair and flexible, and meet the constitutional standard.

In recent years, prosecution of employment cases by the Division has been drastically reduced. A review of the Division's enforcement activity in recent years shows that the number of Title VII lawsuits is down considerably from previous years, particularly "disparate impact" cases. These are cases that seek systemic reform of employment selection or promotion practices that adversely affect the employment opportunities of women and minorities. At the same time, there is strong evidence that the problem of systemic employment discrimination persists. These cases are complex and difficult, and often the Justice Department is the only entity that can bring them.

³² *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

IV. FAIR HOUSING

Even though the housing boom has cooled and the downturn in the subprime market is rippling through the credit markets, home ownership continues to remain at the center of the American Dream. For many prospective homeowners today, their chief concern is whether they can afford their neighborhood of choice or whether they should take out a fixed or variable rate loan.

Fifty years ago, however many families across the country had a much bigger concern. They had to worry that upon moving in their houses could be bombed, as happened to Percy Julian, the famed African-American chemist, when he and his family moved into Oak Park, Illinois, in 1950. The Julian home was fire-bombed on Thanksgiving Day just before they moved in. The attacks galvanized the community, which supported the Julians; but for years afterward, father and son often kept watch over the family property by sitting in a tree with a shotgun.

In 1968, Congress responded to the mounting evidence of intractable housing discrimination by enacting the Fair Housing Act. The Act prohibits discrimination on account of race, color, religion or national origin in the sale and rental of housing, whether public or private. It also allowed money damages to be collected in Justice Department suits for the first time.

The Civil Rights Division quickly took up this new authority and a number of its first cases resulted in negotiated consent decrees. Developers of residential housing, and owners and managers of urban rental apartments, agreed to use objective, nonracial sales and rental criteria, as well as engage in affirmative marketing efforts to seek minority customers. One of the first litigated cases resulted in similar affirmative relief.³³ Other early cases involved racial steering, where real estate agents showed minority applicants for rental or sale properties only apartments or houses in areas that were predominantly minority, and did the opposite for white applicants. Large cases were brought in against Chicago realtors, against the owners of the LaFrak housing complex in New York City, and against Fred and Donald Trump, also in New York City.

Another case of note involved the city of Black Jack, Missouri, just outside St. Louis. In 1969, a community organization in St. Louis began planning for multifamily apartments for low and moderate income residents in the predominantly Black area of St. Louis. It found an area outside the city, in an unincorporated part of St. Louis County called the Black Jack area, which was already designated for multi-family units. Whites in this area (Black residents were less than 2 percent), when they learned of this plan, successfully petitioned the county to incorporate as the City of Black Jack. They then enacted a zoning ordinance prohibiting the construction of any new multifamily dwellings. The Civil Rights Division challenged the zoning ordinance, and the court ruled that the

³³ *United States v. West Peachtree Tenth Corp.*, 437 U.S. 221 (5th Cir. 1971).

racial effect of the zoning ordinance was sufficient to violate the Fair Housing Act, and that the Division did not need to prove racial intent. "Effect and not motivation is the touchstone, in part because clever men may easily conceal their motivation."³⁴

In 1980, the Civil Rights Division and the Yonkers branch of the NAACP filed suit against the city of Yonkers, New York, and the Yonkers School Board, charging that the city had engaged in systematic housing and school segregation for 30 years. This was the first case in which both school and housing segregation were brought in the same lawsuit. After a three month trial, the court found that the city had restricted housing projects to southwest Yonkers, a minority area, for the purpose of enhancing racially segregated housing and intentionally to limit minority children to schools that were predominantly minority.³⁵ In 1988, Congress enacted the Fair Housing Amendments Act of 1988, which provided stiffer penalties, expanded the Act's coverage to include disabled persons and families with children, and established an administrative enforcement mechanism through the Department of Housing and Urban Development. The Act also requires the design and construction of new multifamily dwellings to meet certain adaptability and accessibility requirements. With these amendments, the Housing Section of the Division tripled, and in 1991, the Housing Section established a fair housing testing program. Individuals pose as prospective buyers or renters of real estate to gather information on whether the housing providers are discriminating. Individual testers are non-attorney volunteers from other parts of the Justice Department, and generally the Division will use both Black and white testers with very similar profiles. From 1992 to 2005, the Division filed 79 pattern or practice cases with evidence from the fair housing testing program.

Also in the 1990s, the Division began its Fair Lending program. Discrimination in lending generally involves one of three types of issues; (1) redlining - marketing practices where the availability of loans depends on the racial or ethnic make-up of neighborhoods; (2) underwriting policies and practices where lenders used different standards for assessing the credit worthiness of applicants, and different level of assistance to applicants based on race; and (3) pricing practices where minorities and other protected groups are charged more for credit than other similarly situated borrowers.

The Department's first case, in 1992, related to underwriting practices and stemmed from an Atlanta Journal series on the Decatur Federal Savings and Loan. Black and Hispanic applicants were rejected for mortgage loans at

³⁴ *United States v. City of Black Jack*, 508 F.2d 1179, 1186 (8th Cir. 1975)

³⁵ *United States v. Yonkers Board of Education*, 624 F.Supp. 1276 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2nd Cir. 1987). As a remedy, the court ordered the City to provide for 200 units of public housing in White areas of the city, as well as to allocate its federal housing grants for several years in ways that would advance racial integration. It also ordered the school board to create magnet schools and implement a school assignment program furthering desegregation.

significantly higher percentages than white applicants. Also, bank employees assisted white applicants, but not Black applicants. A consent decree was entered that included fair lending training for loan officers, advertising and marketing to minority neighborhoods, and new branches in minority neighborhoods. In 1993, the Division settled with Blackpipe State Bank in South Dakota, for redlining - refusing to make secured loans to Native Americans living on Reservation lands. Loans to purchase cars, mobile homes, farm equipment were simply unavailable to Native American borrowers. The bank that purchased Blackpipe Bank agreed to set up a fund to compensate victims, establish marketing program for residents of Indian country, conduct financial seminars on Indian reservations, and recruit qualified Native American applicants for job openings at the bank. In 1994, the Department entered into a consent decree with Chevy Chase Bank, after it alleged that the bank was not marketing loans in predominantly African American neighborhoods of D.C. and Prince Georges County because of the racial identity of those neighborhoods. Chevy Chase Bank agreed to pay \$11 million to the neglected areas through a special loan program and through efforts to service those neighborhoods. Other fair lending cases involved allegations of racially discriminatory practices relating to the sale of homeowners insurance (Milwaukee); discriminatory pricing (Brooklyn, Long Beach, CA); and predatory lending (New York City, Washington, D.C.).

The results of these efforts were remarkable, in a short period of time. In part due to the Division's work and its impact generally on the banking profession, the availability of loans to minorities expanded dramatically. Between 1992 and 1995, the number of home loans to minorities grew by more than 100 percent, twice the growth rate for home loans generally.

In recent years, as with many other sections of the Civil Rights Division of the Department, many qualified staff have left and/or been pushed out by this Administration. 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.

The general criticisms of politicization, anemic enforcement and a disregard of mission that affect other civil rights issues also affect the area of housing. In addition, the Division has been charged with poor case work and/or the refusal to take cases .

The Fair Housing Act clearly states that the Department must pursue cases charged by the Department of Housing and Urban Development. But The Department recently took 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.

In one Chicago case, The Department refused to file a federal suit after HUD referred a case to them. The back and forth went on with the Department for so

long, eventually involving Representative Jesse Jackson Jr.'s request to the Department to investigate the case. The case was eventually settled, but the Department's actions served to undercut the relief provided to the complainant in the case.

Home ownership has profound significance in this country and is still at the center of the American dream. Clearly we have greatly advanced in minority home ownership in fifty years. But too many Americans are still kept from that dream when they are denied home mortgage financing or property insurance on account of their race or national origin. In addition, residential segregation continues to plague our cities and suburbs and add to the resegregation of our public schools. The Housing Section has not done enough to right these wrongs. The number of enforcement cases brought by the Division, both "pattern or practice" and HUD election cases, has dropped significantly, and that decrease is most evident in cases alleging racial discrimination. The Division's fair housing testing program and testing cases has also been depleted, and it has not advanced a strong fair lending portfolio. Given the problems evident in the sub-prime market, predatory lending cases should be on the front burner, but they are not.

V. PUBLIC ACCOMMODATIONS

All of Africa will be free before we can get a lousy cup of coffee.
James Baldwin³⁶

Richard and Angela Edmond of Greenville, Mississippi are planning a summer vacation to Daytona Beach with their high-school-aged kids Kevin and Marcus. Heading out on a Friday, they plan to spend a night in Selma, Alabama, to break up the drive and to have dinner with Mrs. Edmond's parents. Having resided in Selma their whole lives, Mr. and Mrs. Hurston are well known within their tight-knit neighborhood, particularly for their ongoing involvement in local civil rights issues. Over dinner, the family discusses the Hurstons' participation in the famous 1965 voting rights march from Selma to Montgomery and the voter registration drives they organized after moving back home from college. It doesn't take much to convince the grandkids to accompany them in the morning to see the A.M.E. Church where Dr. King spoke on voting rights in the 1960s.

On their way to the local Comfort Inn after dinner, the Edmonds are reminded of how differently they navigate public life in Alabama from their parents. Fifty years ago, they would not have been welcomed at most hotel chains in their area, nor would they have been served dinner in a racially integrated environment.

While pockets of injustice in customer service still exist throughout the nation, the law no longer supports them. Fifty years ago, segregation in public accommodations—predominantly in the South—was the norm. Whether in drinking fountains, restaurants, bars, buses, or hotels, African Americans were routinely denied service and relegated in the social realm to second-class citizens. Through local efforts in the early 1960s, such as the sit-in movement in Greensboro, North Carolina, students and civil rights organizations alike forced the issue of segregation into the public arena. Over the course of a year and a half, the sit-in movement had attracted over 70,000 participants and generated over 3,000 arrests in the name of equal protection under the law.³⁷ As a result of these and other civil rights efforts, the Civil Rights Act passed by Congress in 1964 included provisions outlawing discrimination in public accommodations.

Title II of the Act requires that restaurants, hotels, theaters, sales or rental services, health care providers, transportation hubs, and other service venues afford to all persons "full and equal enjoyment of the goods, services, [and] facilities" without discrimination or segregation. Consequently, federal law prohibits privately owned facilities from discriminating on the basis of race, color, religion, or national origin, and the Americans with Disabilities Act extends this provision to include disability. In 1964, including a directive to address

³⁶ Quoted in Stephen Kasher, *The Civil Rights Movement: A Photographic History, 1954-1968* (New York: Abbeville Press, 1996), 35.

³⁷ Clayborne Carson, David J. Garrow, Gerald Gill, Vincent Harding, and Darlene Clark Hine, eds. *The Eyes on the Prize Civil Rights Reader* (New York: Penguin Books, 1997).

segregation in public accommodations was particularly controversial because the 1883 civil rights cases held that equal protection under the law did not extend to privately owned and operated establishments and facilities. In order to pass Title II, Congress used its constitutional authority over interstate commerce to authorize its actions. The provision succeeded, therefore, due to Congress' ability to intercede in the buying, selling, and trading of services. This same year, the Supreme Court upheld Title II as a constitutional application of the commerce clause in *Heart of Atlanta Motel v. United States*. The Supreme Court also upheld the Act in a companion case regarding Ollie's Barbeque—a family owned restaurant in Birmingham, Alabama, that served barbeque and home-made pies.³⁸

The Department of Justice was heavily involved in the *Heart of Atlanta* and the *Katzenbach* (Ollie's Barbeque) cases. Both the hotel and the restaurant had brought declaratory judgment cases against the U.S. in an attempt to have the courts declare Title II unconstitutional. The Department prevailed in these cases, after which it continued a vigorous enforcement program throughout the late 1960s. Subsequently, thousands of hotels, restaurants, bars, pools, movie theaters and transportation facilities were forced to integrate. Though these efforts have been extensive, few cases have ever gone to trial or resulted in reported decisions, as the majority of defendants settle and agree to change their patterns and practices of discrimination. Additionally, the preponderance of public accommodations cases in which the Department intervenes originate as private suits.

While drastic changes in the administration of public services have occurred over the past fifty years, discrimination in public accommodations has weakened but not disappeared. In recent years, the Civil Rights Division has been involved in multiple cases alleging overt racial and ethnic discrimination. In 1994, the Justice Department sued Denny's restaurants for discriminatory service. In *U.S. v. Flagstar Corporation and Denny's*, the Division filed and resolved a Title II action in California alleging that the chain consistently required Black customers to prepay for their meals, ordered them to show identification, discouraged their patronage, and removed them from selected restaurants entirely. On the same day the Department filed a consent decree in the California case, six Black uniformed Secret Service officers assigned to protect President Clinton set out to have breakfast with fifteen other officers and were discriminated against at a Denny's in Maryland. A private class-action suit was filed and won. In the California case, the U.S. entered into a settlement that provided approximately \$54 million to 300,000 customers and required Denny's to implement a nationwide program to prevent future discrimination.

In 1999, the Division investigated the Adam's Mark Hotel chain for discrimination against African-American hotel guests in Daytona, Florida, during the city's Black College Reunion. The Division's settlement included compensation to the

³⁸ See *Katzenbach v. McClung* (1964).

Reunion attendees as well as a substantial contribution to Florida's historically Black colleges to develop scholarships and cooperative education programs in hotel and hospitality management.³⁹ And it was not until the Civil Rights Division filed a complaint against Satyam, L.L.C., which owns and operates the Selma Comfort Inn, that the management and employees officially promised to stop discriminating against African-American guests at their hotel. According to the complaint, employees charged Black guests higher prices than Whites, denied them equal access to hotel services and facilities, and consistently steered them toward the back of the hotel until the Department of Justice intervened in 2001.⁴⁰

Cases such as this remind us that while the landscape of public life today is a far cry from life in 1957, substantial work remains to eliminate the pattern and practice of discrimination in public accommodations. The Division must continue to commit itself to aggressive civil rights enforcement in the area of accommodations so that all Americans are protected equally from the systematic denial of public services.

³⁹ See *U.S. v. HBE Corporation d/b/a Adam's Mark Hotels* (2000).

⁴⁰ See *U.S. v. Satyam, L.L.C. d/b/a Selma Comfort Inn, et al.* (2001).

VI. POLICING THE POLICE and PROSECUTING THE KLAN

The beating of Rodney King by officers of the Los Angeles Police Department on March 3, 1991, captured on videotape and broadcast around the world, shocked America. The tape all but confirmed excessive force by the officers, while exposing to the public the longstanding racial tensions in Los Angeles, with which its residents were all too familiar. The state prosecution of the four officers involved resulted in a complete acquittal. Within hours, riots broke out across Los Angeles that left 55 people dead and over 2000 wounded. In light of what appeared to many to be a wholesale miscarriage of justice, the Civil Rights Division opened a new investigation and initiated a federal prosecution. On August 4, 1992, the same four officers were indicted on two counts of intentionally violating Mr. King's constitutional rights by the use of excessive force.

In the federal trial, there was a racially mixed jury, expert medical testimony regarding King's injuries, and a dismissal of the defense's use-of-force "expert." By prosecuting this case, the Civil Rights Division expressed a commitment to racial justice not shown in the state system. The two-month federal trial of the four Los Angeles police officers ultimately ended with the conviction in April 1993 of two of the four officers, Sgt. Stacey Koon, the supervising officer at the scene, and Officer Laurence Powell, the officer who had delivered the most number of blows to Mr. King. Both defendants were sentenced to 30 months in prison.

Fifty years ago, many people living under Jim Crow could not envision a legal system where equal protection under the law would extend to all Americans. From the Civil War until the 1950s, lynching was accepted as a method of imposing law and order in the South and maintaining a social caste system. An anti-lynching campaign was gradually legitimized and supported by the NAACP through legal challenges, but the law continued to criminalize Black behavior.⁴¹

The Jim Crow system of *de jure* segregation in the South not only relegated Blacks to second-class citizens for whom voting, education, and housing rights were restricted; it also denied Blacks adequate government protection from the racial violence employed to maintain this caste system as the status quo. Black codes, racist statutes, and government unwillingness to protect Blacks from impending racial violence allowed members of the Ku Klux Klan (KKK) to carry out a racist regime of public violence with impunity. Since local officials were not interested in prosecuting White-on-Black violence, police officers could also avoid culpability for abusing the civil rights of Black residents.

The brutal murder of Emmett Till in the summer of 1955 exemplifies the extent to which southern extremists were able to preserve Jim Crow under the guise of law and order. During the initial period following the *Brown v. Board* decision in 1954, the South witnessed tactics of massive resistance that resulted in pockets of

⁴¹ Angela Y. Davis, *Are Prisons Obsolete?*, (New York: Seven Stories Press): 2003, 23.

highly publicized racial violence. In 1955, fourteen-year-old Emmett Till, who traveled from Chicago to visit relatives in Mississippi, was viciously murdered and disposed of in the Tallahatchie River for whistling at a White woman. Although the crime was prosecuted by state authorities, the defendants were acquitted by an all-white jury after deliberating for just over one hour, after which the defendants publicly and shamelessly admitted their guilt.⁴² These and other murders persisted unabated.

In the early years of the Civil Rights Division, criminal cases were limited and had limited effect. While the Division had the statutory authority to prosecute police brutality, the legal systems in the South were not prepared to cooperate. From January 1958 to July 1960, the Division brought 52 prosecutions, but only obtained convictions in four cases and *nolo contendere* pleas in two others. As former Assistant Attorney General for Civil Rights Burke Marshall recalled, "the problem of police misconduct was totally beyond reach" because of little resources, no local cooperation, and total exclusion of minorities from grand juries and trial juries.⁴³ The Division brought few prosecutions for police violence against civil rights volunteers during voter registration drives, sit-ins, or protests.⁴⁴

Widespread publicity for the Freedom Summer bus rides in 1964 began to garner national attention to racial violence in the South. On June 21, 1964, the brutal KKK murder of three civil rights workers – James Chaney, Andrew Goodman, and Michael Schwerner – in Neshoba County, Mississippi, brought the issue of Klan violence to national attention. National outrage over these murders prompted President Johnson to order the FBI to prosecute the perpetrators, and sparked a federal government commitment to respond to Klan violence.⁴⁵

In 1965, the Division obtained its first successful prosecution of a Klansman. It was the case of Viola Gregg Liuzzo, a White civil rights volunteer and mother of five who was murdered by four KKK members after the 1965 march from Selma to Montgomery, Alabama. One of the Klansmen in the car with the shooters was an FBI informant, and the killers were arrested the next day. Because the KKK wielded considerable power, the state's prosecution of this case resulted first in a mistrial and then an acquittal in the second state trial. The Civil Rights Division interceded to bring the case to federal court in Montgomery, Alabama, achieving its first conviction in a civil rights death case in December 1965.

⁴² Stephen F. Lawson and Charles Payne, *Debating the Civil Rights Movement, 1945-1968* (Lanham, MD: Rowman & Littlefield Publishers, Inc.): 1998, 12.

⁴³ "Prosecuting Police Misconduct: Reflections on the Role of the U.S. Civil Rights Division," Vera Institute of Justice, 1998, http://www.vera.org/publication_pdf/misconduct.pdf See, Jay Stewart, *NAACP v. The Attorney General: Black Community Struggle Against Police Violence*, 9 Howard Scroll: The Social Justice Law Review 29 (2006).

⁴⁴ See, Jay Stewart, *NAACP v. The Attorney General: Black Community Struggle Against Police Violence*, 9 Howard Scroll: The Social Justice Law Review 29 (2006).

⁴⁵ Stephen F. Lawson and Charles Payne, *Debating the Civil Rights Movement, 1945-1968* (Lanham, MD: Rowman & Littlefield Publishers, Inc.): 1998, 30-31.

In 1966, after an all-white jury acquitted two members of the Madison County, Georgia KKK in the July 1964 murder of Black U.S. Army Reserve officer Lt. Col. Lemeul Penn, the Civil Rights Division stepped in to federally prosecute and convict the defendants.

In 1967, the Civil Rights Division was able to prosecute and convict some of the Neshoba and Lauderdale County deputy sheriffs who were responsible for the murders of Chaney, Goodman and Schwerner. In 1968, Assistant Attorney General Stephen Pollak instructed Division attorneys to intervene more forcefully in police brutality allegations.

In 1968, Congress broadened the scope of protection afforded by civil rights statutes by making it a crime to interfere by force or threat of force with certain rights (such as employment, housing, use of public facilities, etc.) because of someone's race, religion, color or national origin. This is commonly known as the federal hate crimes statute.⁴⁶ The impetus for the passage of the federal hate crime law was the assassination of Martin Luther King, Jr. on April 4, 1968.

Today, the Civil Rights Division's criminal prosecutions of "color of law" cases remain an important tool to redress wrongful criminal conduct of law enforcement officers. After the Simi Valley, California jury acquitted the officers who beat Rodney King in a 1992 state trial, the Division confirmed the importance of policing the police by prosecuting and convicting the officers in federal court under the federal statute. And the Division's work to prosecute hate crimes has expanded over the years to include an increased number of successful prosecutions of Klansmen in the south and White supremacists across the country that have engaged in racially motivated violence.

Nevertheless, while criminal prosecutions address individual police misconduct, they fail to hold police departments accountable for perpetrating rather than protecting against widespread civil rights violations. Efforts to create federal accountability for patterns or practices of violations of civil rights within state and local police departments were met with resistance for decades. In the late 1970s, a court determined that the Division did not have the authority to bring a civil lawsuit against the Philadelphia Police Department alleging systematic abuse despite widespread evidence of routine brutality, illegal actions, and racist behavior.⁴⁷ However, in response to the Rodney King incident and subsequent L.A. riots, in 1994 Congress authorized the Attorney General to bring civil actions against state and local law enforcement agencies for a "pattern or practice" of police misconduct.⁴⁸

⁴⁶ 18 U.S.C. 245

⁴⁷ *United States v. City of Philadelphia*, 482 F. Supp. 1248 (E.D. 1979).

⁴⁸ Passed as part of the 1994 Crime Act, the provision is 28 USC Section 14141. The types of conduct investigated include excessive force, discriminatory harassment, false arrests, coercive sexual conduct, and unlawful stops, searches or arrests.

In January 1997, the Division brought its first enforcement action under its civil pattern or practice authority against the Pittsburgh, Pennsylvania police department. The Division's investigation found a pattern or practice of officers using excessive force, falsely arresting, and improperly stopping, searching and seizing individuals and evidence of racially discriminatory action. As a result, the Division entered into a consent decree with the police department that spelled out a series of reforms to address its systemic problems. Similar cases were brought against police departments in Los Angeles, Washington, D.C., Detroit, Prince Georges County, Maryland, Cincinnati, Ohio, and against the New Jersey State Police. However, the Division has not entered into a single consent decree or settlement for alleged violation of the civil police misconduct statute since January 2004.

The Division's anemic enforcement of police pattern or practice cases in recent years has weakened the Department's overall effort to protect civil rights while helping police department identify problem practices that undermine, rather than support, their law enforcement work. Without the Justice Department opening new investigations, there is little impetus for police departments to police themselves.

RECOMMENDATIONS

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. As this report outlines, 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.

However, in recent years, many civil rights advocates have been concerned about the direction of the Division's enforcement. Over the last six years, too often, politics appears to have trumped 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.⁴⁹ We have seen whole categories of cases not being brought, and the bar made unreachably high for bringing suit in other cases. We have seen some outright overruling of career prosecutors for political reasons,⁵⁰ and also many cases being "slow walked," to death.

And the problem continues.

In order for the Division to once again play a significant role in the struggle to achieve equal opportunity for all Americans, it must rid itself of the missteps of the recent past, but also work to forge a new path. It must respond to contemporary problems of race and inequality with contemporary solutions. It must continue to use the old tools that work, but when they don't, develop new tools. It must be creative and nimble in the face of an ever-moving target. The following are recommendations for a way forward.

⁴⁹ Savage, Charlie. "Civil Rights Hiring Shifted in Bush Era: Conservative leanings stressed." *The Boston Globe*, 23 July 2006.

⁵⁰ 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.

A. Politicization of the Division

Perhaps the most troubling aspect of the change in the Division in recent years is the extent to which their decision-making has been driven by politics. Changes in Administration have often brought changes in priorities within the Division, but these changes have never before challenged so directly 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 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,"⁵¹ 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 the criteria for hiring career attorneys have become their political backgrounds instead of their experience in civil rights. Longtime career attorneys have left the Division in large numbers. The amount of expertise in civil rights enforcement that has been driven out of the Division will be difficult to recapture.

The Civil Rights Division must restore its reputation as the place for the very best and brightest lawyers who are committed to equal opportunity and equal justice. It is not a question of finding lawyers of a particular ideology. Rather, it is a recommitment to hiring staff who share the Division's commitment to the enforcement of federal civil rights laws. That is not politics; it is civil rights enforcement.

⁵¹ Miller, John J. "Fort Liberalism: Can Justice's civil rights division be Bushified?" *National Review*. 6 May 2002.

B. Voting Rights

The Voting Section at the Civil Rights Division has as its mission to protect the voting rights of racial, ethnic, and language minorities, making it easier for them to access the political process. The voting rights movement was born of a need to promote access as a cure for decades of the denial of access for racial, ethnic and language minority citizens.

However, in recent years the Civil Rights Division has used its enforcement authority to deny access and promote barriers to block legitimate voters from participating in the political process. For example, the Division's failure to block the implementation of Georgia's draconian voter ID law, later held unconstitutional and characterized as a "modern day poll tax" by a federal judge, opened the door for states across the country to pass similar, onerous, laws. Strong evidence exists that requiring a photo ID as a prerequisite to voting disproportionately disenfranchises people of color, the elderly, individuals with disabilities, rural and Native voters, the homeless and low-income people, who are far less likely to carry a photo ID. Up to 10 percent of the voting-age population does not have state-issued photo identification.⁵²

Nevertheless, in recent years the Civil Rights Division has sent a strong message to states that voter ID laws, no matter how restrictive and no matter what the impact on minority voters, will not be challenged by the federal government.

The Division has also recently rejected numerous requests from voting rights advocacy groups to enforce that part of the National Voter Registration Act (NVRA) which requires social service agencies to provide voter registration opportunities, despite the fact that there is substantial evidence that registration at social service agencies has plummeted.⁵³ At the same time, the Division has shifted its enforcement priorities to enforcement of voter purge provisions of the law, which in many cases – as in Florida in 2000 – result in thousands of legitimate voters being taken off the rolls and thus denied their right to vote.

The Division has also pushed states to implement the Help America Vote Act (HAVA) in an exceedingly restrictive way, including advocating for a policy of keeping eligible citizens off the voter rolls for typos and other mistakes by election officials.

And the Department of Justice's voter integrity initiative, established in 2001 by former Attorney General John Ashcroft, has created unnecessary commingling

⁵² Brennan Center for Justice at NYU School of Law & Spencer Overton, Response to the Report of the 2005 Commission on Federal Election Reform 8 (2005), www.brennancenter.org/programs/downloads/%20final%20report.pdf

⁵³ An Election Assistance Commission report from July 2007 concluded that many states continue to ignore the requirements of the NVRA that public assistance agencies offer voter registration to clients, and noted that enforcement of the law by the Division has been virtually non-existent.

between criminal prosecutors in the U.S. Attorneys' offices and Civil Rights Division attorneys. These efforts can, if done improperly, result in a chilling effect on the participation of minority voters, particularly in jurisdictions where there is a history of disfranchisement efforts targeting racial and ethnic minorities.

Rather than promoting schemes to deny equal opportunity for citizens to vote, the Civil Rights Division should be focused on (1) combating voter ID laws that have a disproportionate negative impact on racial, ethnic, or language minorities, like those passed by both the Georgia and Arizona legislatures; (2) ensuring that states are complying with the NVRA's access requirements, such as those that require social service agencies to afford their clients opportunities to register and vote, and making sure that those registrations are processed appropriately; and (3) reinforcing the firewall that exists between the Criminal Division's work to combat voter fraud and the Civil Rights Division's efforts to promote voter access.

C. Fair Housing

The United States Department of Justice's Housing and Civil Enforcement Section has the powerful authority to bring cases involving a pattern or practice of discrimination that violates the Fair Housing Act in federal court. In recent years that authority has been used infrequently to address significant patterns of discrimination based on race and national origin, and almost never to challenge deeply entrenched residential segregation.

Fresh attention is being paid to racial and ethnic segregation in housing because of the recent Supreme Court decisions that refused to permit race conscious school assignment policies in Louisville and Seattle. Although the Court has, over the years, pointed to ending housing segregation as a key way of avoiding racially and ethnically segregated schools, the Justice Department has been looking the other way. The federal government's chief fair housing litigation agency has repeatedly failed to challenge discriminatory housing practices that actually or potentially segregate neighborhoods and other types of discriminatory practices that affect many people of color. Discrimination in real estate sales and racial steering, discrimination in lending that destroys neighborhoods, discrimination in zoning and land use practices that exclude people of color or limit their housing opportunities all continue virtually unchecked by today's Justice Department.

The Civil Rights Division's authority to bring cases involving a pattern or practice of discrimination is found in the Fair Housing Act. In past years it was used to challenge ongoing practices of discriminatory conduct by real estate agents, lenders, and local government officials, sometimes across entire communities. In recent years the authority has not been used in this way. The federal government was given this pattern or practice authority as a powerful federal tool to check the

often longstanding discrimination that so deeply divides our communities. That power lies almost unused today.

The Civil Rights Division's Housing and Civil Enforcement Section also has suffered from the loss of many career employees over the past six years and internal turmoil similar to that which has made headlines in the Division's Voting Rights Section.

D. Disability Rights

In 1990, Congress enacted the Americans with Disability Act (ADA), and the Disability Rights Section is now one of the largest sections within the Civil Rights Division. Since 1990, the Section has: brought suits to remove architectural and other barriers and ensure access to public accommodations (including all hotels, retail stores, restaurants, and places of recreation) and public transportation for person with disabilities; litigated against state and local governments; certified state and local building codes to ensure compliance with the ADA standards for accessible design; and instituted an extensive mediation program to promote voluntary compliance with the ADA.

The disability rights activities of the Division have historically enjoyed bipartisan support under Attorneys General Richard Thornburgh and Janet Reno. In recent years, the Civil Rights Division launched a successful "ADA Business Connection" series of forums designed to bring together business leaders and disability advocates to build a stronger business case for accessibility and disability as a diversity issue.

Moving forward, there will be a strong need for the Department to show leadership in making the judicial and the executive branches of the federal government true models of how to conduct the business of justice and government in a manner that is accessible and welcoming for all people. The federal government can and should do more to measure its compliance with accessibility requirements and to address deficiencies on a systematic basis. Enforcement of civil rights requirements is especially needed in the areas of access to higher education and access to voting, as widespread noncompliance with accessibility requirements exists in both of these important areas. Also, there is a need for stronger leadership on the issue of access to long-term services and supports in non-segregated settings for people with significant disabilities.

In the years to come, disability advocates look forward to strong leadership from the Department of Justice in helping to stem the tide of Supreme Court federalism decisions that have questioned the history of unconstitutional discrimination against people with disabilities by the States and have whittled away at the scope of the protected class in the Americans with Disabilities Act.

E. Employment Discrimination

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.

Combating discrimination against African Americans has remained a central priority of the Division through both Republican and Democratic administrations. Unfortunately, in recent years, enforcement of Title VII's protections for racial and ethnic minorities has fallen off dramatically. In fact, over the past several years the Employment Section has chosen to devote precious resources to a number of controversial "reverse discrimination" cases on behalf of Whites. As long as race discrimination against minorities remains a sad, harsh reality in this country, battling the persistent scourge of workplace discrimination against minorities must remain a central priority of the Employment Section.

Similarly, throughout most of its history, the Employment Section has recognized and fought for appropriate use of race- and gender-conscious relief. In many cases, the Justice Department entered into consent decrees with race-conscious relief provisions aimed at eliminating the last vestiges of this country's shameful legacy of race discrimination. The Employment Section must support the continued use of constitutional affirmative action programs to remedy past discrimination and promote equal employment opportunity. The Supreme Court has given its stamp of approval for many forms of race-conscious measures, including remedial affirmative action programs. Yet, in recent years, the Employment Section has sought to abandon existing consent decrees that included race-conscious relief and have targeted other employers who attempt to achieve true diversity. Such a change in position threatens to set back the progress that has been made since the passage of the Civil Rights Act.

As the face of discrimination has changed, the method by which discrimination is attacked must change as well. While egregious forms of individual employment discrimination persist, much of today's discrimination is buried in a gauntlet of screening and hiring processes. These processes include psychological profiling, written cognitive ability tests, personality inventory assessments, polygraph examinations, background screens, criminal background histories, credit score evaluations, and physical ability tests, just to name a few. Even well-intentioned employers and supervisors must grapple with the very real issue of hidden bias. The Employment Section must be dedicated to rooting out discrimination even where unlawful bias takes a more subtle form. Title VII prohibits not only the type of discrimination that is evident through "smoking gun" proof of malicious intent, but also the more hidden type of discrimination that plays out through facially

neutral policies or practices that disfavor a particular group. The Section must continue to use all of the enforcement tools in its arsenal to address these more subtle forms of discrimination. The most powerful of these tools is the authority to bring pattern or practice cases with the support of statistical evidence. As employers engage in questionable practices like conducting credit checks on applicants and abusing information contained in background checks, the Employment Section should be at the forefront of the effort to ensure that employers utilize valid selection procedures.

The Employment Section is uniquely positioned to tackle widespread discrimination that affects large numbers of public employees. The Section must use its statutory authority effectively to combat the persistent problems of discrimination in the workplace. If the Section returns to vigorous enforcement of the law, it can regain its reputation as a true defender of civil rights.

F. Educational Opportunities

The Supreme Court's opinions in the Seattle and Louisville cases, which limit the discretion of local school boards to take the race of students into account in seeking to voluntarily achieve racially and ethnically diverse learning environments for students, make the work of the Civil Rights Division's Educational Opportunities (EO) Section more crucial than ever before. At the same time, those decisions mean the EO Section must re-order its priorities in a few fundamental ways. First, the United States remains a party in many desegregation cases where there continue to be outstanding orders requiring school districts to eliminate the vestiges of prior discrimination. Currently the Section appears to be seeking to have as many of those districts as possible be declared unitary. Now that it is clear that once declared unitary, as was the Louisville school district, a school district may be forced to dismantle student assignment zones and other policies used to foster integration, the Department needs to stop districts from being declared unitary until it is clear that even post-unitary status, the district will remain integrated. The presence of an ongoing desegregation decree gives a school district more tools at its disposal to eliminate the effects of segregation. The Department needs to evaluate how to use the decrees it has obtained to maintain integrated school systems.

Second, the Department now must devote significant resources to determining how to use its enforcement powers under Title VI of the Civil Rights Act to prohibit discrimination by entities receiving federal funds. Most Local Education Authorities (LEAs) receive some form of federal funding. While Title VI complaints go to the Department of Education for investigation in the first instance, the EO Section has a significant role to play in advising the Department of Education Office of Civil Rights on how to interpret and enforce Title VI, and the Department of Justice is the entity that should be litigating those Title VI cases where the Department of Education finds that a recipient of federal financial assistance has been operating in a manner that has a disparate impact

on minority students. There are numerous policies by school boards, such as zero tolerance disciplinary policies; and practices that lead to the over-representation and mistaken categorization of minority students as having learning disabilities, and under-representation in academically gifted programs; that are ripe for investigation under the disparate impact regulations of Title VI. The EO Section can make a major contribution to the government's responsibility to vigorously enforce Title VI of the Civil Rights Act of 1964.

Finally, by working carefully with all stakeholders, LEAs, parents, teachers and local governments, the Educational Opportunities Section has in the past initiated a number of creative programs to foster integrated schools at the K-12 level, including programs that investigate how segregated housing patterns can be dismantled in order to result in integrated educational opportunities. These and other creative initiatives must be undertaken in order to assist school districts that have the will to create diverse learning environments but are daunted by the Supreme Court's limits on their discretion. The Section is, in many ways, the last hope for parents and children who want to see fulfillment of our nation's commitment to equal educational opportunities for all. The Section must re-order its priorities to achieve this mission.

G. Law enforcement accountability

In 1994, Congress passed 42 U.S.C. 14141, the police misconduct provision of the Violent Crime Control and Law Enforcement Act of 1994, which authorizes the Attorney General to file lawsuits seeking court orders to reform police departments engaging in a pattern or practice of violating citizens' federal rights, as well as the anti-discrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1968 and Title VI of the Civil Rights Act of 1964, which together prohibit discrimination on the basis of race, color, sex or national origin by police departments receiving federal funds.

Starting in the late 1990s, the Special Litigation began to conduct investigations and implement consent decrees and settlement agreements where the evidence strongly suggested a violation of the police misconduct statutes. The decrees require the police departments to implement widespread reforms, including training, supervising, and disciplining officers and implementing systems to receive, investigate, and respond to civilian complaints of misconduct. The decrees have had a widespread impact and are being used as models by other police departments. The Section also has used its police misconduct authority to reform restraint practices in a Louisiana jail and to obtain systemic relief in juvenile correctional facilities. The Section is investigating other systemic problems in law enforcement agencies, including excessive force; false arrest; discriminatory harassment, stops, searches or arrests; and retaliation against persons alleging misconduct. The decrees have had a widespread impact and are being used as models by other police departments. The Section has also used its authority under the Civil Rights of Institutionalized Persons Act (CRIPA)

to reform restraint practices in adult prisons and jails and to obtain systemic relief in juvenile correctional facilities.

However, in recent years, the section has retreated in its enforcement of these important statutes. The results of this rollback in enforcement have been less accountability by police agencies and a retreat in the efforts to make sure that law enforcement and integrity go hand in hand.

Given the lack of enforcement of these statutes by the Department of Justice, it is more important than ever to amend 42 U.S.C. 14141 to allow for a private right of action to enforce the statute. In addition, the Department needs to support an expansion of its authority, as outlined in the End Racial Profiling Act. The End Racial Profiling Act builds on the guidance issued by the Department of Justice in June 2003, which bans federal law enforcement officials from engaging in racial profiling. ERPA would apply this prohibition to state and local law enforcement, close the loopholes to its application, include a mechanism for enforcement of the new policy, require data collection to monitor the government's progress toward eliminating profiling, and provide best practice incentive grants to state and local law enforcement agencies that will enable agencies to use federal funds to bring their departments into compliance with the requirements of the bill. The Justice Department guidance was a good first step, but ERPA is needed to "end racial profiling in America," as President Bush pledged to do.

CONCLUSION

The fiftieth anniversary of the creation of the Civil Rights Division is a time to take stock of where we have been, where we are, and where we need to go in the struggle for equal rights and equal justice in America. And we have come a long way. A very long way from segregated lunch counters, poll taxes, and "Whites only" job advertisements. But we are not finished. Today, we face predatory lending practices directed at racial minorities and older Americans, voter ID requirements that often have a discriminatory impact on minority voters and that one federal judge in Georgia called a modern-day poll tax, and English-only policies in the workplace. So our work continues.

As this report outlines, one of the critical tools to our collective progress in civil rights has been the Civil Rights Division at the Department of Justice. And the heart and soul of the Division is and has always been its career staff. For 50 years, they have worked to help make our country what it ought to be: a place where talent trumps color and opportunity knocks on all doors. Where you cannot predict the quality of the local school system by the race or ethnicity of the school's population. Where access is a right, not a privilege. Where difference is not just tolerated, but valued.

We have concerns with the direction of the Civil Rights Division in recent years. The hope is that we can meet those concerns with positive action for our future. This report attempts to begin to map out the way forward. We look forward to the continuing conversation.

Hearing Before the United States Senate Committee on the Judiciary

**The 50th Anniversary of the Civil Rights Act of 1957
and its
Continuing Importance**

**September 5, 2007
10:00 a.m.**

**Testimony
of the
Honorable Gail Heriot
United States Commission on Civil Rights**

Thank you for this opportunity to participate in the commemoration of the passage of the Civil Rights Act of 1957.

Many civil rights scholars like to characterize the Civil Rights Act of 1957 as a weak act. And in some respects they are correct. Compared to the ambitious bill that Senator Paul Douglas of Illinois earlier envisioned, the 1957 Act was puny indeed. Senator Douglas hoped that the first civil rights bill passed by Congress since Reconstruction would be a sweeping one--outlawing race discrimination in public accommodations across the country. But it was not to be--not in 1957 anyway. That kind of reform had to wait another seven years. Other members of Congress, like Virginia Rep. Howard Smith would have preferred no bill at all. But he didn't get his way either. Congress, after a long period of neglect, was finally taking notice of what would become one of the most important legislative issues of the post-war era; Mr. Smith would soon find himself left behind in the march of history.

I prefer to look at the Civil Rights Act of 1957 not as a weak legislative effort but as a vital building block, which may be what Dean Acheson was thinking when he enthusiastically stated, "I don't think it an exaggeration to say that the bill is among that greatest achievements since the war, and in the field of civil rights, the greatest since the Thirteenth Amendment." In retrospect, Acheson may have had a point: Without the 1957 Act, there may well have been no Civil Rights Act of 1960, Civil Rights Act of 1964, Voting Rights Act of 1965, Fair Housing Act of 1968 or Education Amendments of 1972. Seen in this light, the 1957 Act does not seem puny at all; it was, rather, Congress's first step on a long-overdue journey. It is therefore fitting that we should commemorate its passage today.

What did the 1957 Act do? You'll often hear the 1957 Act referred to as a voting rights act, and that is accurate in the sense that the portions of the Act that affected substantive law did relate to voting. Specifically, the Act prohibited the interference with any individual's right to vote in a federal election. The prohibition was not limited to interference motivated by race or to interference committed under color of law. It authorized the Department of Justice to bring, and federal courts to hear, actions for injunctive relief to prevent such interference.

But perhaps the most significant step taken by the 1957 Act was not the modification of substantive law or even the remedial provisions that backed up that modification, but the creation of two new arms of the federal government dedicated to the protection of civil rights. The first--and the one that I am most familiar with-- was the Commission on Civil Rights.

If the value of a federal agency could be calculated on a per dollar basis, it would not surprise me to find the Commission on Civil Rights to be among the best investments Congress ever made. My back-of-the-envelope calculation is that the Commission now accounts for less than 1/2000th of 1% of the federal budget; back in the late 1950s its size would have been roughly similar. And yet its impact has been dramatic. As then-Senator and Majority Leader Lyndon Johnson put it, the Commission's task was to "gather facts instead of charges" "[I]t can sift out the truth from the fancies; and it can return with recommendations which will be of

assistance to reasonable men.” In civil rights, as in any area of public policy, that is an important task.

Soon after the passage of the 1957 Act, the then-six-member bipartisan Commission—consisting of John Hannah, President of Michigan State University, Robert Storey, Dean of the Southern Methodist University Law School, Father Theodore Hesburgh, President of Notre Dame University, John Stewart Battle, former governor of Virginia, Ernest Wilkins, a Department of Labor attorney, and Doyle Carleton, former governor of Florida-- set about to assemble a record.

Their first project was to look for evidence of racial discrimination in voting rights in Montgomery. But they immediately ran into resistance. Circuit Judge George C. Wallace, who went on to greater notoriety as governor, ordered that voter registration records be impounded. “They are not going to get the records,” he declared. “And if any agent of the Civil Rights Commission comes down to get them, they will be locked up. ... I repeat, I will jail any Civil Rights Commission agent who attempts to get the records.” The hearing nevertheless went forward with no shortage of evidence. Witness after witness testified to inappropriate interference with his or her right to vote. The Commissioners spent the night at Maxwell Air Base, because the city’s hotels were all segregated.

From there, the Commission went on to hold hearings on the implementation of *Brown v. Board of Education* in Nashville and on housing discrimination in Atlanta, Chicago and New York. The facts gathered in these and other hearings along with the Commission’s recommendations were presented not just to Congress and the President but the American people generally, and they become part of the foundation upon which the Civil Rights Act of 1960, the Civil Rights Act of 1964, the Voting Rights Act of 1965 and the Fair Housing Act of 1968 were built.

The revolution in public opinion that occurred during the late 1950s and early 1960s on issues of civil rights can hardly be overstated.. And although the Commission on Civil Rights was not the only institution that helped bring about that change, it was a significant factor. In 1956, the year before the 1957 Act, less than half of white Americans agreed with the statement, “White students and Negro students should go to the same schools.” By 1963, the year before the 1964 Act, that figure had jumped to 62%. In 1956, a healthy majority of white Americans—60%—opposed “separate sections for Negroes on streetcars and buses.” By 1963, the number had grown to 79% opposed—an overwhelming majority. Even in the South, minds were being changed. In 1956, only 27% of Southern whites opposed separate sections on public transportation for blacks and whites. By 1963, the number had become a majority of 52%.

The change in views about the desirability of a federal law was even more dramatic. As late as July 1963, only 49% of the total population favored a federal law that would give “all persons, Negro as well as white, the right to be served in public places such as hotels, restaurants, and similar establishments,” and 42% opposed. By September of the same year, a majority of 54% was in favor, and 38% opposed. In February of 1964, support had climbed to

61% and opposition had declined to 31%.

The other new arm of the federal government established by the 1957 Act was the Civil Rights Division of the Department of Justice. Technically, the Act established a new Assistant Attorney General, who would be appointed by the President and subject to confirmation by the Senate. But it was understood at the time that this new Assistant Attorney General would preside over a new division dedicated to the enforcement of civil rights law, and just two months after President Dwight Eisenhower signed the '57 Act into law, Attorney General Herbert Brownell created the Civil Rights Division.

Would *Brown v. Board of Education* ever have been successfully implemented without a dedicated group of civil rights attorneys acting on behalf of the United States such as that assembled as a result of the 1957 Act? We will never know for sure, but for me the answer is quite possibly not. Similarly, I am not optimistic that the efforts to enforce the Civil Rights Act of 1964, the Voting Rights Act of 1965 and the Fair Housing Act of 1968 would have received the priority that they did in the absence of the Civil Rights Division.

Both institutions—the Commission and the Division—are now celebrating their 50th Anniversaries. And that of course provides a useful opportunity to take stock of where we are and where we are going. Others on this panel will have more to say about the Division, so I will confine my remarks to the Commission, since it is what I know best.

In the 50 years since the 1957 Act, the Commission has been renewed, reconstituted and remodeled several times. But certain things have remained the same. It still tackles controversial issues. And it still is made up of individuals with often sharply differing opinions.

We are particularly proud today of two things. First is our ability to do what might be called the basic research of civil rights policy. Each year, for example, we submit a statutory report to the President and Congress. This year, the report is entitled, "Becoming Less Separate? School Desegregation, Justice Department Enforcement and the Pursuit of Unitary Status." It tracks school districts that have been subject to court supervision for long periods of time as part of their process of desegregation. It attempts to answer questions like: How many school districts continue to be under court supervision? How many have persuaded their supervising courts that they have achieved "unitary status" and should returned to the control of the school board? How many have tried and failed to persuade their supervising court of their unitary status? How many have not tried? What happens to school districts when courts return authority to the school board? Do they re-segregate? What happens to those that remain under court supervision? Why do some school districts seek to get out from under court supervision and others not? All of this is valuable information for policymakers, no matter what their political persuasion. And if the Commission on Civil Rights were not doing it, it is very likely that nobody would be.

Somewhat less elaborate than our statutory report but nevertheless valuable in that they

often bring the research of others to public attention are our briefing reports. Several of these are issued over the course of any given year. Recently, for example, we have issued reports on Affirmative Action in Law Schools, Anti-Semitism on Campus, and Disparity Studies as Evidence of Discrimination in Federal Contracting.

The second thing we believe that we are particularly well-suited to is independence. The civil rights revolution is no longer in its infancy. Both in and out of the federal government, some of the institutions that are dedicated to civil rights are getting a little long in the tooth. Many of these organizations have made great contributions to the country in the field of civil rights—things for which they have every reason to be proud. But along with a large measure of success often can come a certain complacency, an unwillingness to change those things that aren't working and replace them with things that might work. Particularly when people believe that their jobs depend on doing business as usual, they can get a little set in their ways.

We on the commission have day jobs that don't depend on civil rights policy as usual. I for example am a law professor, several members are practicing lawyers, one is a tribal leader and one is a stay-at-home mother. That allows us some independence in outlook that many of those who work for the Civil Rights Division, the Office of Civil Rights at the Department of Education, the Equal Employment Opportunity Commission or any other arm of the federal government concerned with civil rights can sometimes lack. We like to think that on those occasions on which the Emperor has no clothes that we will be among the first to notice.

Finally, I would like to return to the passage of the 1957 Act and recognize the contributions of the many people who made it happen. President Eisenhower and Attorney General Brownell were clearly crucial to its passage. During his 1956 State of the Union Address, Eisenhower had called for the creation of a civil rights commission that would be charged with the responsibility of investigating charges "that in some localities Negro citizens are being deprived of their right to vote and are likewise being subjected to unwarranted economic pressures." Brownell's Department of Justice had drafted the original version of the bill. Senators Barry Goldwater, Hubert Humphrey, Jacob Javits and William Knowland were important supporters in the Senate and Representative Peter Rodino was important in the House. Perhaps most crucial was then-Majority Leader Lyndon Johnson, who earned his reputation as Master of the Senate for his expert political maneuvering to get the bill passed in the Senate. To my knowledge, no one argues that the 1957 Act would have passed without Johnson's hard work.

But right now I would like to honor an unsung or at least a less-celebrated hero of the Civil Rights Act of 1957. Unlike Johnson, Eisenhower, Brownell or I suspect any of the members of the Senate who voted in favor of the Act, this gentleman, at the age of 92 is still very much alive and still part of the active teaching faculty at the university at which he works.

I first learned about his role while flipping through the pages of Robert Caro's biography of Lyndon Johnson, *Master of the Senate*. It seems that the bill was hopelessly hung up over an issue of remedies law. Some of the bill's most enthusiastic supporters were convinced that no

Southern jury would convict anyone accused of interfering with a black man's right to vote. They were therefore adamant that the bill that should eliminate the right to jury trial for anyone accused of being in criminal contempt of an injunction issued pursuant to the Act. Other potential supporters were just as adamant the right to a jury trial in such situations must not be tampered with even if it means a less effective Act. If something wasn't done, there was going to be no bill at all.

Something was done. A law professor wrote a law review article that suggested a compromise: Don't eliminate the right to a jury trial in those criminal contempt proceedings in which it would traditionally have been available. But add a provision allowing the court to impose civil sanctions for contempt, since civil contempt proceedings traditionally do not carry the right to a jury trial. Lyndon Johnson latched onto the idea and persuaded his colleagues in the Senate that it would work.

That law professor was Carl Auerbach, then of the University of Wisconsin, later Dean at the University of Minnesota and now for over twenty years a distinguished member of the faculty at the University of San Diego, where he is my colleague. Professor Auerbach is University of San Diego's own little piece of civil rights history and I would like to pay tribute to him today.

Statement of Senator Edward M. Kennedy
Senate Judiciary Committee
Hearing on the 50th Anniversary of the Civil Rights Act of
1957 and Its Continuing Importance
September 5, 2007

The 50th anniversary of the Civil Rights Act of 1957 is an occasion for special celebration. The Act was a vital milestone in our country's long struggle to realize its highest ideals of liberty and justice for all. It was far from perfect, and at the time many supporters of civil rights were concerned that it did not go far enough. But the Act ushered in an extraordinary new era of legislative progress. It was the first civil rights bill enacted in the United States in nearly a century, and it announced to the country that the Supreme Court was not alone in the battle against segregation, and that Congress itself would finally take action to right the national wrong of Jim Crow.

The Act created both a new division in the Department of Justice, the Civil Rights Division, and the U.S. Commission on Civil Rights -- giving the Executive Branch a major role in attacking discrimination for the first time since Reconstruction.

Following *Brown v. Board of Education* in 1954, the 1957 Act represented an important new step in our government's march of progress, which has led to increased fairness and opportunity for all our people. The Act helped pave the way for the landmark civil rights laws of the 1960s -- the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968 -- followed by Title IX of the Education Amendments of 1972, the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and the Americans with Disabilities Act in the following decade.

Thanks to the progress set in motion by the 1957 Act, the days are long gone when a President or Attorney General has to call in federal troops so that minority students can enroll in public school. People with disabilities have new opportunities to fully participate in our society. The workplace is open to women in ways that were barely imaginable four decades ago. Glass ceilings are being shattered everywhere. Women and girls have far greater equality in the classroom and on the playing field.

Yet our progress, gratifying as it is, should not blind us to the challenges that still exist. The landmark national laws of the past four decades laid a solid foundation, but the true challenge is to see that the promise of these laws is fulfilled.

The anniversary is therefore also a wake-up call and a time to rededicate the nation to its highest ideals. Although we have made great progress over the past 50 years, civil rights is still the unfinished business of America. There are new civil rights challenges that we must confront and, in some areas, disturbing new trends that we must reverse.

I'm deeply concerned that both agencies created by the 1957 Civil Rights Act—the Civil Rights Division and the Commission on Civil Rights—have taken a wrong turn under the present administration. In the early years following passage of the 1957 Act, the Civil Rights Division had a central role in the struggle to guarantee equal justice for all Americans. The Division worked to protect the voting rights of African-Americans, to desegregate educational institutions throughout the South, and to open doors of opportunity for women, minorities, and persons with disabilities.

Today, however, half a century later, partisan politics has replaced legal principle in the Division's enforcement efforts. We've seen the Division's failure to vigorously enforce laws against job discrimination, its rubber-stamping of discriminatory state voter photo identification laws, and personnel practices that privilege ideology over merit.

Though less well-known than the Civil Rights Division, the Commission on Civil Rights has also turned away from the vision that inspired it. It has been years since the agency held a formal hearing, rather than simply an informal briefing, or issued subpoenas as part of an investigation.

Recent decisions by the Supreme Court have also undermined our civil rights laws in ways Congress never intended. This past term, the Supreme Court issued two major decisions that make the goal of equality more difficult to achieve. In the *Ledbetter* case, the Court created new barriers for workers who suffer pay discrimination to obtain relief under our civil rights laws. In the school district case the Court struck down voluntary integration plans in Seattle and Kentucky that sought to achieve diversity in elementary schools.

The Court has also undermined the ability of individuals to challenge practices that have an unjustified discriminatory effect on access to public services. It has limited the ability of workers to hold state employers accountable under the Age Discrimination in Employment Act and other important civil rights laws. We must act to address all of these problems.

Congress also must continue its oversight of the Civil Rights Division, and I commend Chairman Leahy for his active attention to this important issue. It's also long past time for Congress to act to prohibit discrimination on the basis of sexual orientation and gender identity. And we must do all we can to correct the Supreme Court's rulings that undermine civil rights.

In a dramatic address shortly before the passage of the 1957 Act, Martin Luther King, Jr. spoke of the "desperate need" for leadership on civil rights from the federal government. He called for "the president and members of Congress to provide a strong, moral and courageous leadership for a situation that cannot permanently be evaded." He said, "We come humbly to say to the men in the forefront of our government that the civil rights issue. . . is . . . an eternal moral issue which may well determine the destiny of our nation"

Dr. King's words are as true today as they were fifty years ago. Strong, moral, and courageous leadership is urgently needed from Congress today on civil rights. We must reinvigorate the government's civil rights mission and restore the integrity of the Department of Justice. We must amend Title VII to reverse the *Ledbetter* decision. We must help school districts pursue constitutional methods of integration. And we must pass stronger legislation to see that our civil rights laws are effective in protecting our citizens against discrimination in all its ugly forms.

We are fortunate to have a distinguished group of witnesses here today as we consider these issues. We are particularly honored to have in our presence Congressman John Lewis, whose commitment and courage in the cause of civil rights make him a true national hero. I look forward to their testimony.

Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
Hearing on "The 50th Anniversary of the Civil Rights Act of 1957
And Its Continuing Importance"
September 5, 2007

This Sunday our Nation will mark the golden anniversary of the Civil Rights Act of 1957. It was the first major civil rights law passed since Reconstruction, and it remains one of the most important pieces of legislation this Committee and the Congress ever considered. Its story has been retold in the award-winning books Master of the Senate by Robert Caro and Parting the Waters by Taylor Branch.

With this hearing, we examine whether Federal civil rights enforcement has remained faithful to our goal of achieving equal justice for all. We meet with the Nation at a crossroads. Two years after the devastation from Hurricane Katrina, its aftermath and the failure of government to protect our citizens in the Gulf Coast and to help those displaced from the lower Ninth Ward of New Orleans and elsewhere, many Americans doubt our commitment to civil rights.

We have a Justice Department without effective leadership. The Attorney General, Deputy Attorney General, Associate Attorney General, Assistant Attorney General for Civil Rights and many others have resigned in the wake of the scandals. And we have witnessed what appears to be the abandonment of the founding priorities of the Civil Rights Division. That Division, which has so often served as the guardian of the rights of minorities, has been subjected to partisan hiring practices and partisan litigation practices.

The flood of recent departures from the Justice Department, culminating in last month's resignation of the Attorney General and the Assistant Attorney General for the Civil Rights Division, underscore the Civil Rights Division's loss of direction and the shaken morale of dedicated career staff. We cannot allow the absence of meaningful enforcement to render our civil rights laws obsolete.

America has traveled a great distance on the path toward fulfilling the promise of equal justice under law, but we still have miles to go. Just last year, this Committee received extensive testimony during the reauthorization of the Voting Rights Act of continuing racial discrimination affecting voting. During last fall's election, we received reports about several efforts to intimidate Latino voters. These civil rights abuses ranged from false campaign mailings in Orange County, California to intimidation at the polls in Tucson, Arizona. An important legislative initiative is on our Committee agenda this week to try to stem deceptive voting practices and abuses still being practiced against minority voters. As long as the stain of discrimination remains on the fabric of our democracy, the march toward equal justice must continue.

The Civil Rights Act of 1957 created an Assistant Attorney General dedicated solely to civil rights enforcement which led to the formation of the Justice Department's Civil Rights Division. It also provided the Justice Department with a new set of tools to prosecute racial inequality in voting. Although the Department had prosecuted some criminal cases since 1939, this law

allowed the Department to bring civil actions on behalf of African-American voters. With this new authority, the Division worked to correct civil rights violations and helped set the stage for Congress to pass stronger legislation with respect to voting, housing, employment and other key areas in the decade of the 1960s.

Americans must remain steadfast in our commitment that every person – regardless of race, color, religion, or national origin – should enjoy the American dream free from discrimination. We should continue to expand that dream to fight discrimination based on gender or sexual orientation, as well. We should reaffirm our commitment to the promise of the Civil Rights Act of 1957. I hope that today's hearing is a step in doing so.

I welcome our distinguished panel of civil rights leaders and thank them for being with us today.

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Testimony of Congressman John Lewis
Senate Judiciary Committee
Hearing on the 50th Anniversary of the Civil Rights Act of 1957 and its Continuing
Importance
September 5, 2007

Chairman Leahy and Senator Specter, Members of the Committee, thank you for inviting me to testify before the Senate Judiciary Committee today. As we approach the 50th Anniversary of the Civil Rights Act of 1957, I appreciate having this opportunity to share my thoughts and experiences with you. In particular, I'd like to discuss the importance of the Civil Rights Division of the Department of Justice and how we can renew and strengthen the Division in the future.

In the late 1950s, there was tremendous amount of fear in the American South. People were afraid to talk about civil rights. I would ask my mother, my father, my grandparents and great grandparents, "Why segregation? Why racial discrimination?" And they would say, "That's the way it is. Don't get in trouble. Don't get in the way."

People of color couldn't vote; they couldn't register to vote. They paid a poll tax. Segregation was the order of the day. It was so real. The signs were so visible. People were told to stay in their place. Black people could not sit on a jury. People were beaten; people came up missing. Fourteen-year-old Emmett Till – a boy my age - was lynched in 1955, and it shook me to the core. It was a different climate and environment. In some instances it amounted to police- and state-sanctioned violence against people of color. I remember reading about a man being stopped on the highway, castrated and left bleeding to death. In 1956, in Birmingham, Alabama, Nat King Cole was attacked while performing, and he never returned to perform in the South.

People were beginning to stand up. The Montgomery Bus Boycott inspired me. I followed it every day. People who rode those busses every day spoke with their feet; they used their will and dignity to resist the segregation of busses in Montgomery. Even with this show of courage in Montgomery, black people were afraid, they lived in fear and white people were afraid to speak out. It truly was terror.

In September of 1957 I was just 17 years old - a child, really. I was just arriving in Nashville, Tennessee to begin my studies at the American Baptist Theological Seminary. I had not yet met Dr. Martin Luther King, Jr.. I had not become involved in Student Nonviolent Coordinating Committee (SNCC). I had not taken part in the freedom rides, or the sit-ins, and I had not walked over the Edmund Pettus Bridge on that Bloody Sunday. But the Spirit of History, as I like to call it, Fate, if you will, was beginning to move in important ways in 1957, both for me and for the nation.

I'm not sure that I was aware of it as I was moving into my dormitory that September, but the Congress had passed and President Eisenhower was signing the Civil Rights Act of 1957 – the first piece of civil rights legislation in almost a century; the first piece of civil rights legislation since reconstruction.

Later we would look back and think that this legislation was mostly ineffective. However, it was a significant piece of legislation because it created an Assistant Attorney General for Civil Rights, and so began the Civil Rights Division of the Justice Department. It also created the Civil Rights Commissions. I have vivid memories of the Civil Rights Commission hearings all over the South while I was in college. They were so brave. The work of the Commission was dangerous, but so tremendously important. They gathered the data and information on voter registration and discrimination. The 1957 Act also, for the first time, made it a crime to interfere with a person's right to vote in federal elections.

The very next year, in 1958, I would meet Dr. King for the first time. That meeting would change the course of my life. That year, you could feel the urgency in the air, the need for change, and the sense that things were about to change. Progress was beginning slowly – the Civil Rights Act of 1957 and the Supreme Court's decision in *Brown v. Board of Education*. With those threats to the southern establishment, there was a backlash with it came more and more violence. There was also a stirring, a growing commitment of young people – white and black – to this social movement. Change was happening. Martin Luther King Jr. inspired me and thousands of other Americans to get in the way. He inspired us to get in trouble, but it was good trouble, necessary trouble.

At the same time that I was growing into the movement, so too was the Civil Rights Division becoming an important tool for protecting the rights of Americans who faced discrimination. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 gave substance to the promise of equal rights and formed the basis for the work of the Civil Rights Division.

During the Kennedy and Johnson Administrations, the Division certainly had its growing pains. But we knew that individuals in the Department of Justice were people who we could call any time of day or night during the 60s. The Civil Rights Division of the Department of Justice was truly a federal referee in struggle for civil rights and civil justice.

John Doar, beginning in the Eisenhower Administration, for instance, was a Republican from Wisconsin. He was someone that we trusted, we believed in. And we felt during those years that the Civil Rights Division of the Department of Justice was more than a sympathetic referee, it was on the side of justice, on side of fairness. People looked to Washington for justice, for fairness, but today I'm not so sure that the great majority of individuals in the civil rights community can look to the Division for that fairness. The public has lost confidence in our government, in the Department of Justice and in the Civil Rights Division. We can and must do better.

The Civil Rights Division was special. It attracted people with experience in civil rights and those attorneys stayed with the Civil Rights Division for decades and the nation had the benefit of their experience. The civil rights laws were enforced no matter

which party was in the White House, and these attorneys were able to do their jobs without interference of political appointees. It is not so today.

In the last few years we have lost more career civil rights lawyers than ever before, many leaving because of political influences that keep them from doing their jobs. And the attorneys being hired to replace them are no longer hired under rules established by the Eisenhower administration, designed to remove political considerations from the hiring process. Today the division's lawyers are hired by political appointees, rather than career attorneys and, not surprisingly, fewer lawyers with civil rights or voting rights backgrounds are being hired in the Division.

There is also a clear shift in the types of cases being brought by the Division. The Civil Rights Division is bringing many fewer traditional civil rights cases, and appears to have given up on enforcing the Voting Rights Act all together.

I am particularly disturbed by the way the Civil Rights Division handled the Georgia voter ID law in 2005. Enforcing Section 5 of the Voting Rights Act has always had the potential for being politically sensitive, however, the Voting Rights Section has always been above partisanship and has resisted attempts by administrations to influence the outcomes of cases. However, this was not this case with the Georgia law. The Georgia voter ID law would have disproportionately prevented minorities from voting in Georgia by requiring photo identification at the polls. The Division clearly ignored the recommendation of the career voting rights attorneys that the law violated the Voting Rights Act. The law should have been denied pre-clearance, but the career attorneys were overruled by the political appointees. Thankfully a federal court found that the law was a poll tax and struck it down. This type of political influence in enforcing the clear intent of the law is unacceptable.

It is clear that the Civil Rights Division of the Department of Justice has lost its way.

I have no doubt that the majority of line attorneys in the Civil Rights Division are truly dedicated to doing the right thing, but they are being overwhelmed by political pressure. Congressional oversight could have prevented some of this. Freedom and equality are rights that are not simply achieved, they must be preserved each and every day. But, we have been distracted from the fight to protect our rights, and therefore, we are watching them slip away. The Civil Rights Division, once guardian of civil rights, has been so weakened that I do not recognize it.

This Civil Rights Division is still important and it has important work to do today, just as it did during the Civil Rights Movement. We have come a long way, but there is still discrimination in voting and there is still discrimination in employment that must be addressed. Congress has a duty to help restore the Civil Rights Division to the strong champion of civil rights that we all know it can be. Congress has a duty to perform strong oversight and to investigate how and whether our civil rights laws are being enforced and implemented. We must reverse the political hiring process and put the

decisions back in the hands of the career professionals, who know what it takes to enforce our civil rights laws.

In addition to strengthening the Department of Justice, I also believe that we need to give citizens a private right of action to challenge federally-funded programs that unfairly disadvantage a particular group, whether or not there is discriminatory intent. I am working with Senator Kennedy on legislation that would ensure this private right of action.

We in Congress must do all we can to inspire a new generation to fulfill the mission of equal justice, which is the enduring legacy of the Civil Rights Movement and the Civil Rights Division. I still believe, as Martin Luther King Jr. believed, that we can create a Beloved Community based on simple justice that values the dignity and the worth of every human being. Our institutions of government must be re-dedicated to justice, to service, to equality. Congress has the duty to ensure that we reach that promised land together, beginning with a strengthened Civil Rights Division of the Department of Justice.

CONSTITUTIONAL PEOPLE
WRITTEN TESTIMONY SUBMITTED
TO THE UNITED STATES SENATE JUDICIARY COMMITTEE
By ROBERT P. MOSES
TUESDAY, SEPTEMBER 4, 2007

In 1749, A West African boy, nine years old and captured, sailed the middle passage to Virginia and survived. In August of that year, a Scottish born merchant slave trader, twenty-four years old and up and coming, peered into the pluck of that nine year old and bought him. Stewart took Somerset as his personal slave.

Twenty years passed, and twenty-nine year old Somerset accompanied Stewart to London to help care for his sister's family when her husband died. Two years passed and Somerset, while running errands everywhere for his master, meeting blacks on the streets, in the stores, along the docks, crafted a way out of slavery and bondage. He arranged to be baptized as James Somerset, acquired two English Godparents, Thomas Walkin and Elizabeth Cade, and flowed into the "IRS," London's stream of Insurgent Runaway Slaves. Stewart, feeling "betrayed and publicly insulted", posted notices and on Nov. 26, 1771, slave catchers delivered Somerset to a ship bound for Jamaica. Seven days later, Somerset's Godmother, petitioned the oldest and highest common law court in England, for a writ of Habeas Corpus to release James Somerset.

Lord Mansfield, the Chief Justice of King's Court, issued the writ and six days later, on December 9th, 1771, James Somerset appeared before the bench where a Captain Knowles declared:

Charles Stewart, a colonial from America, deposited his slave, Somerset, aboard the Ann and Mary, to be sold in Jamaica. (1)

Lord Mansfield released Somerset pending a hearing.

On June 22nd, 1772, the clerk called the case of "James Somerset, a Negro on Habeas Corpus" and Lord Mansfield mounted the bench, bewigged, and delivered his judgment:

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political ... it's so odious, that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged. (2)

The issue reached across the Atlantic into Colonial Revolutionary America, where colonialists who could not imagine their slaves as Constitutional people would require an explicit declaration of "positive law" to protect the Nation to be.

There is a 'Somerset clause' (3) in the Nation's Constitution: Article IV, Section 2, paragraph 3. At the 1787 Constitutional Convention discriminating men, determined to establish a "workable government", peered through the cataracts on their imaginations to brand the IRS as Constitutional Property:

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor is due. (4)

CONSTITUTIONAL PEOPLE—R.P. MOSES—TESTIMONY TO THE U.S. SENATE JUDICIARY COMMITTEE

The IRS with their insurgencies of independence and freedom shadowed the colonialists with their declarations of independence and freedom into the Constitutional Nation; insurgencies which, over the ensuing decades, sabotaged the “workable government”, helping to induce its destabilization into Civil War.

In 1787, after the Revolutionary War, leaders at the Constitutional Convention established a “workable government” that assumed slavery, but floundered in the mud of Civil War. In 1877, the traditional mid-point of the Nation’s history, leaders of the National Democratic and Republican political parties established a “workable government” that would assume Jim Crow:

Jim Crow laws, unlike feudal laws, did not assign the subordinate group a fixed status in society ... They were constantly pushing the Negro farther down ... Its spirit is that of an all-absorbing autocracy of race, an animus of aggrandizement which makes, in the imagination of the white man, an absolute identification of the stronger race with the very being of the state. (5)

When the Mississippi legislature failed to ratify the Fourteenth Amendment, which welcomed freed slaves all at once as citizens of the Nation and of their respective States, the Republican U.S. Congress placed it in the Fourth Military district under brevet major general Adelbert Ames.

In 1870 the U.S. Congress passed the Fifteenth Amendment establishing the right of citizens of the United States to vote and in 1873, Adelbert Ames was elected governor of Mississippi. But by then the massacre of the Negroes of Colfax Louisiana on April 13, 1873, along the banks of the Red River pointed to the direction the South would lead and the Nation would follow.

The Colfax violence against black elected officials spread into Mississippi in the municipal elections of 1874 in Vicksburg.

In February 1875, a Congressional committee reported on its investigations into the election in Vicksburg in 1874. The minority report filed by Democrats noted:

A little learning is a dangerous thing in its application to Negroes. The educated among them are the most dangerous class in the community, as they exercise a malign and blighting influence over the future prospects of their race. (13) (6)

The majority report, filed by Republicans challenged the Nation directly:

by the exercise of all its power, if needed, secure to every man, black and white, the free exercise of the elective franchise, and punish, sternly and promptly, all who violently invade those rights; (7)a

In 1875, the Democrats took over the State legislature. The following summer the Senate select committee came to Mississippi and took testimony all over the state and issued the Boutwell Report. A quarter of a century later, in his memoirs, Senator George Boutwell of Massachusetts remarked:

“For myself I had no doubt that the election of 1875 was carried by the Democrats by a preconceived plan of riots and assassinations.” (15) (8)

What followed was the national political compromise of 1877:

...the Democrats agreed to let Hayes (The Republican Governor of Ohio) become president and the Republicans agreed in return to remove the remaining federal troops from the South. Reconstruction, which had wound up producing a lower-intensity continuation of the Civil War was over. The South had won. And the events in Mississippi in 1875 had been the decisive battle. (19) (8)

Three decades later, in 1907, Senator Benjamin Ryan "Pitchfork Ben" Tillman of South Carolina took the floor of the Senate to memorialize the execution of Mississippi's plan

It was then that 'we shot them'; it was then that 'we killed them'; it was then that 'we stuffed ballot boxes'; it was a fight between barbarism and civilization, between the African and the Caucasian, for mastery. (16) (9)

In the early darkness of a winter evening in February 1963, Jimmy Travis slipped behind the wheel and Randolph Blackwell crowded me beside him in a Snick Chevy in front of the Voter Registration Office in Greenwood Mississippi to take off for Greenville on U.S. 82 straight across the Delta. Jimmy zigzagged out of town to escape an unmarked car, but as we headed west on 82 it trailed us and swept past near the turn off for Valley State University, firing automatic weapons pitting the Chevy with bullets. Jimmy cried out and slumped; I reached over to grab the wheel and fumbled for the brakes as we glided off 82 into the ditch, our windows blown out, a bullet caught in Jimmy's neck.

After Jimmy caught that bullet in his neck, Snick regrouped to converge on Greenwood and black sharecroppers lined up at the Court House to demand their right to vote. When Snick field secretaries were arrested, Burke Marshall, the assistant attorney general for Civil Rights under Robert Kennedy, removed our cases to the Federal District Court in Greenville and sent John Doar to be our lawyer. From the witness stand I looked out at a courtroom packed with black sharecroppers from Greenwood, hushed along its walls, packed onto its benches, and attended to the question put by Federal District Judge Clayton: "Why are you taking illiterates down to register to vote?" To whom had he put his question? The sharecroppers? Perhaps. But perhaps it was his own silent observation dressed as a rhetorical question:

Constitutional strangers are pressing against the Constitutional gate.

The 1957 Civil Rights act provided the Constitutional space within which we did our work. Mississippi could lock us up, but it couldn't throw the key away. I understand now that we were working in a context of Constitutional permissiveness:

SNCC was permitted to work on Voter Registration
 Terrorists were permitted to gun us down
 Mississippi was permitted to lock us up
 The Civil Rights Division of the Department of Justice was permitted to set us free.
 None of the above was required by the Constitution, or for that matter, forbidden.

Burke passed in the summer of 2004 and his family asked if I would say something at the memorial for him at the Yale Law School that fall. I tracked down a book he published in the summer of 1964,

“Federalism and Civil Rights”. In it Burke quotes a Lincoln County Judge who described Mississippi’s constitutional condition in a speech to the state’s 1890 Constitutional Convention:

“Sir, it is no secret that there has not been a full vote and a fair count in Mississippi since 1875, that we have been preserving the ascendancy of white people by revolutionary methods. In plain words, we have been stuffing ballot boxes, permitting perjury here and there in the state, carrying elections by fraud and violence until the whole machinery for elections was about to rot down.” (12) (10)

At the Delta town of Indianola, in the spring of 1955, in the aftermath of the 1954 Supreme Court School desegregation decision, *Brown vs the Board of Education*, Mississippi launched its second plan: The White Citizens Councils launched the doctrine of massive resistance to the Court’s decision. However, a few years later, in 1960, their plan to maintain Jim Crow met its “nemesis”:

1960 was the year of the massive awakening for the Negroes of the South – indeed Negro Americans generally ... On 1 February of that year four Negro college boys, freshmen at the Agricultural and Technical College in Greensboro, North Carolina, asked politely for coffee at Woolworth’s lunch counter and continued to sit in silent protest when refused. The ‘sit-in’ nemesis of Jim Crow was born. (8) (11)

At a meeting on the campus of Shaw University in North Carolina, Ella Baker helped fashion a space for untapped sit-in insurgents to think for themselves, to make their own plans, to execute their own strategies:

In April the SNCC (Student Nonviolent Coordinating Committee) was formed – small, militant, very youthful, largely Negro, and Negro-led ... Negroes were in charge of their own movement now and youth was in the vanguard. (9) (12)

That summer, Jane Stembridge and Ella sent me on a scouting trip through Alabama, Mississippi and Louisiana. I met Fred Shuttlesworth in Birmingham, Aaron Henry in Clarksdale, Medgar Evers in Jackson and Dr. Gilbert Mason in Biloxi, but it was Amzie Moore in the Mississippi Delta who was waiting with a plan to channel the energy of the Snick insurgents and turn Mississippi around: No one in Mississippi understood Jim Crow better than Amzie.

Amzie’s world was to become my world, but first I had one year to go to complete a three-year contract teaching middle school math at the Horace Mann school. I saved my money and returned to the Delta a “Freedom Rider”. John Lewis, Diane Nash and the Nashville student sit-in movement had carried the sit-in energy into Mississippi on a Greyhound bus and every black hued kid on a dusty Mississippi street could spot a “Freedom Rider” a block away. “Freedom fighters” burned a Greyhound bus carrying sit-in insurgents in Anniston Alabama in the Spring of 1961 and with its measured response the sit-in insurgency created “Freedom Riders”, interstate travelers into terror who landed, of all places, in the Delta at Parchman, Mississippi’s State Penitentiary, just a few miles from Cleveland, Amzie’s home town.

Byron De La Beckwith’s murder of Medgar Evers jolted Allard Lowenstein and Robert Spike into Mississippi. They were both shocked into action. Al eventually led the first delegations of white college students into the state for the 1963 freedom vote in which COFO sponsored Aaron Henry and Ed

King as Governor and Lieutenant Governor in a Freedom campaign, thereby introducing the concept which led to Freedom Summer in 1964. Robert Spike brought the resources of the National Council of Churches into the orbit of the Mississippi movement to support Freedom Summer and direct crucial lobbying efforts in mid-west Republican congressional districts to help pass the Civil Rights bill of 1964. Beckwith may have planned Medgar's murder, but he, and all sat in complicit silence, could not have imagined how quickly events would move because of it. Neither could we, who gathered on Farish street for Medgar's funeral and watched John Doar, his back to an arsenal of Mississippi's law enforcement troops, convince Ida Mae Holland from Greenwood, and all those with her, not to walk into "sure gun-fire", into "things fall apart", "into a national disaster". We were *all* navigating our rafts in the rapids of history's currents and couldn't quite imagine how "things come together":

Hollis Watkins and Curtis Hayes, from Summit just North of McComb; Emma Bell from McComb; Charles McLaurin, James Jones, Jessie Harris, Jimmy Travis, Lavaughn Brown, Colia Lidell, from Jackson; Lawrence Guyot from Pascagoula; Dave Dennis from Shreveport Louisiana; Dorie and Joyce Ladner, Mattie Bivens and Fred Anderson from Hattiesburg; Anne Moody from Wilkerson county; Sam Block and James Bevel from Itta Bena; George Raymond, and Mattheo "Flukie" Suarez from New Orleans; myself; Willie Peacock from Charleston; Anelle Ponder from Georgia; Chuck McDew, James Chaney from Meridian; Diane Nash from Chicago; Freddie and George Green, Euvester Simpson, Mary Lane, June Johnson and Ida Mae Holland from Greenwood, Lafayette Surney from Ruleville, MacArthur Cotton from Koziesko; Charlie Cobb from Washington D.C.; Frank Smith from rural Georgia.

Thirty plus black high school graduates and college students came together in that pressured space-time to work twenty-four seven, to get knocked down and get back up, to steady watch the Feds turn that jail house key; invisible to the Nation at large to this day, ours was the SNCC sit-in energy translated into Amzie's world; we carved out the larger space in which Mickey and Rita Schwerner could operate in Meridian; it was we who called forth that remarkable net-work of black Mississippi matured women: Victoria Adams from Hattiesburg, Fannie Lou Hamer from Ruleville, Annie Devine from Canton, Hazel Palmer from Jackson and Unita Blackwell from the Delta who carried the Mississippi Freedom Democratic Party (MFDP) into the 1964 Democratic Convention in Atlantic City and broke the back of 89 years of white only Mississippi Democrat Party power, clearing the way for the voting rights legislation of 1965 to enable white and black history making Mississippi voters to jointly represent their state at the 1968 National Democratic Convention in Chicago. As the New York times wrote in an editorial on August 27, 1964:

The Freedom Democrats proved that a moral argument, if powerful enough and presented with dramatic force, can cut through the cynicism and frivolity that usually prevail in a convention atmosphere ... The day of the lily-white delegations from the South is over. The Democrats from the rest of the country have finally lost patience with the exclusion of Negroes from party affairs in the South. (35) (13)

Snick was the "heart and soul" of the sit-in insurgency against Jim Crow, and these few dozen, the heart and soul of the Mississippi insurgency, came together and earned the right in 1964 to call on the whole country's common humanity to join Freedom Summer and bring Jim Crow Mississippi down.

Did the Fifteenth Amendment establish for blacks the same rights to the vote as had been established for whites? Or, was the Nation's system of federalism protected since 1875 "by non-recognition of federally guaranteed rights"? (31) (14)

We answered Judge Clayton's question to the 1963 Greenville courtroom packed with sharecroppers: "Why are you taking illiterates down to register to vote?"

We told him, in effect, that the country couldn't have its cake and eat it too. It couldn't deny a whole people access to education and literacy and then turn around and deny them access to politics because they were illiterate. Sharecropper education was the subtext of the struggle in Mississippi for the right to vote.

The voting rights act of 1965 did not include literacy restrictions and John Doar has a picture in his office of himself accompanying Attorney General Nicholas Katzenbach and Thurgood Marshall to defend the literacy provisions of the Voting Rights Act before the Supreme Court, which agreed with decisions by the Fifth Circuit:

The enforcement clause of the fifteenth Amendment gives Congress full remedial powers to prevent racial discrimination in voting. The Voting Rights Act is a legitimate response to the insidious and pervasive evil which has denied blacks the right to vote since the adoption of the fifteenth Amendment in 1870. (33) (15)

All of which set the stage for the twenty first century, and our current national divide over education and the fourteenth Amendment.

On Friday June 29, 2007, the New York Times spread pictures of all nine Supreme Court Justices on the front page to alert the Nation of the "Bitter Division" at the Court over "Brown and the 14th Amendment". In the words of Harvard law professor Laurence H. Tribe:

There is a historic clash between two dramatically different visions not only of Brown, but also the meaning of the Constitution. (38) (16)

Chief Justice Roberts, a protégé of president Ronald Reagan, 'brilliantly' argued in his decision that just *because* of that history the Court, if not the Nation, must be scrupulous in looking (let alone moving) into its post Jim Crow future, and recognize 'non-recognition' of Jim Crow as the *principled* path for the Court's decisions on public schools and the education of the Nation's children:

Tent Lott is watching the results of Mississippi's third plan for the Nation, which he set in motion at the Neshoba County Fair, Reagan's first stop on his way to the presidency in the summer of 1980, which turned out to be Roberts' first stop on his way to becoming the Supreme Court's chief justice. (41) (17)

Lott left Mississippi for Washington in '68, to serve on the congressional staff of William Colmer, a Democrat, who decided to retire in '72; Lott won his open seat and in 1980 launched Ronald Reagan's post convention presidential campaign at the Neshoba County Fair in Philadelphia Mississippi, where Mickey Schwerner, Andrew Goodman and James Chaney were lynched with the help of the Sheriff.

The visual statement on television the next day was a sea of white faces at the Neshoba Fair with Reagan's words floating above them ... he would reorder priorities and 'restore to states and local governments the power that properly belongs to them'. (45) (18)

President Reagan, who had opposed both the Civil Rights and the Voting Rights acts attracted the attention and became the personal hero of John Roberts who joined the Reagan administration in 1981 where he worked to curtail all programs intended to bring minorities into settings where they were once shut out and who, as chief justice, crafted this crafty sentence:

The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.
(19)

At first I thought the chief justice was mimicking a tautology: “The way to do x is to do x.” Then I looked up “discrimination”: Unfavorable treatment based on prejudice. Next I looked up “discriminating”: Observe distinctions carefully; have good judgment. Now our chief justice is nothing if not one who observes distinctions carefully, so what is he telling the Nation to do about its educational caste system? The way to stop unfavorable treatment based on prejudice is to stop observing carefully and having good judgment on the basis of race?

Tent Lott and I are contemporaries. I was sitting in the SNCC office in Greenwood on September 30th of 1962 and Lott was a senior at Ole Miss when the pitched battle of “Redeemers” led by Governor Ross Barnett against U.S. Marshalls and President Kennedy, over the admission of James Meredith, took place. . In 1997, Senator Lott told Time magazine:

The main thing was, I felt the federal government had no business sending in troops to tell the state what to do. (44) (20)

Lucky for Lott and the entire Nation whole troops of Constitutional people worked a strategy from 1961 to 1965 that dismantled Jim Crow in Mississippi without any other ‘federal troops’.

Amzie Moore, Medgar Evers and NAACP ‘race men’, John Lewis, Diane Nash and Freedom Riders, President John F. Kennedy and Attorney General Robert Kennedy, Judge Wisdom and the fifth Circuit Court of Appeals, Snick and the sit-in energy for the right to vote, Dave Dennis and The Congress of Racial Equality (CORE), black Masons and the Council of Federated Organizations (COFO), Larry Still from Jet Magazine, Sharecroppers and the Mississippi Freedom Democratic Party (MFDP), Dr. Beitel and Tougaloo college, Allard Lowenstein and 800 white college students from across the country, Robert Spike and the National Council of Churches, Claude Sitton from the New York Times, Burke Marshall, John Doar and the Civil Rights Division of the Department of Justice, Karl Fleming from Newsweek Magazine, Carl Holman and the United States Commission for Civil Rights, Martin Luther King and the Southern Christian Leadership Conference (SCLC), Dorothy Height and the National Council of Negro Women, Drs. Alvin Poussaint, Bob Smith and James Anderson and the Medical Committee for Human Rights, Marion Wright and the Legal Defense Fund, Bill Minor from the New Orleans Times-Picayune, Arthur Kinoy and William Kunstler and the National Lawyers Guild, Stephen Currier and the Taconic Foundation, Lloyld K. Garrison the N.Y. Field Foundation,

And here’s to the following forty who fell, insurgents in the Civil Rights movement,

Rev. George Lee, Lamar Smith, Emmett Louis Till, John Earl Reese, Willie Edwards Jr., Mack Charles Parker, Herbert Lee, Louis Allen, Cpl Roman Ducksworth Jr. Paul Guillard, William Lewis Moore,

Medgar Evers, Addie Mae Collins, Denise McNair, Carole Robertson, Cynthia Wesley, Virgil Lamar Ware, Rev. Bruce Klunder, Henry Hezekiah Dee, Charles Eddic Moore, James Chaney, Andrew Goodman, Michael Schwerner, Lt. Col. Lemuel Penn, Jimmie Lee Jackson, Rev. James Reeb, Viola Gregg Liuzzo, Oneal Moore, Willie Wallace Brewster, Jonathan Daniels, Samuel Younge Jr., Vernon Dahmer, Ben Chester White, Clarence Triggs, Wharlest Jackson, Benjamin Brown, Samuel Hammond Jr., Delano Middleton, Henry Smith, Dr. Martin Luther King Jr. (27) (21)

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Senator Charles E. Schumer

Hearing on "The 50th Anniversary of the Civil Rights Act of 1957
and its Continuing Importance"

September 5, 2007

Thank you, Chairman Leahy, for holding this hearing to mark the golden anniversary of the Civil Rights Act of 1957.

Our founding fathers said it best when they penned these words in the Declaration of Independence: Government derives its just powers from the consent of the governed. In our democracy, there can be no consent without unfettered access to the voting booth. The 1957 Civil Rights Act did much to protect that access. It gave the Justice Department the power to file lawsuits and seek injunctions to protect voting rights, and it set up an Assistant Attorney General especially to handle these civil rights cases.

While the 1957 Act dealt primarily with voting rights, it was much more than a voting rights bill. It was the first civil rights bill of any kind passed in the long decades since Reconstruction. It was a reassertion of the principle that there can be no just government without the consent of the governed. Even more, it was the first small stream in what became a torrent of civil rights legislation that offered new protections to Americans in all aspects of their lives.

Thus, perhaps the best way to commemorate the passage of the 1957 Civil Rights Act is by asking ourselves: What remains to be done? What further steps must we take to secure voting rights and other civil rights for all? I believe that this Committee can take a decisive step tomorrow by favorably reporting the Deceptive Practices and Voter Intimidation Prevention Act of 2007.

Senator Obama and I introduced this bill in January with the co-sponsorship of many of my Judiciary Committee colleagues. Our bill has benefited greatly from the input and support of the NAACP, MALDEF, the Leadership Conference on Civil Rights, and other civil rights organizations.

Sadly, this legislation is necessary because, in far too many elections now, Americans have seen appalling attempts to keep voters away from the polls through deliberate lies. These lies have been spread, especially in minority and disadvantaged communities, in a clear attempt to prevent people from voting or from casting their votes for their chosen candidates.

Deceptive practices in elections are an outrage to anyone who cherishes democracy. Our bill will stop these practices by imposing serious criminal and civil penalties, and by requiring the Justice Department to distribute corrected information when it is necessary to get voters to the polls.

In fact, the Deceptive Practices and Voter Intimidation Prevention Act will strengthen some of the same provisions that were first passed into law as part of the 1957 Civil Rights Act. As we look backward to commemorate the 1957 Act, we can and must also look forward. It has become clear that we need a new civil rights mandate to confront a new threat to voter access. Access to the polls is not a partisan issue, and I hope that my colleagues from both parties will join me tomorrow in honoring the 1957 Act by updating it to confront the next half-century of civil rights defense.

Of course, much more remains to be done. As Congressman Lewis and others said, with the departure of Alberto Gonzales from the post of Attorney General, this Committee has a responsibility to help restore the historic stature of the Civil Rights Division and the entire Justice Department. Our witnesses today have presented several ideas for pursuing this goal, and I look forward to examining these ideas further.

I welcome the challenge of reinvigorating the Civil Rights Division, and I thank all of our witnesses today for helping this Committee begin our efforts.

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Testimony of Theodore M. Shaw

United States Senate
Committee on the Judiciary

Hearing on
"The 50th Anniversary of the Civil Rights Act of 1957
and its Continuing Importance"

Dirksen Senate Office Building
Room 226

September 5, 2007
10:00 a.m.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

My name is Theodore M. Shaw. I am the Director-Counsel and President of the NAACP Legal Defense & Educational Fund, Inc. Founded under the direction of Thurgood Marshall, the Legal Defense Fund is the nation's oldest civil rights law firm. We have served as legal counsel for African Americans in most of the country's major racial discrimination cases, in many respects LDF is legal counsel for black America on issues of race.

We are pleased to join the Committee in commemorating the 50th Anniversary of the U.S. Department of Justice Civil Rights Division because historically it has played a crucial role in making the promise of Equal Protection under law meaningful, and its mission remains vital. Importantly, the Division was created in the wake of the Supreme Court's landmark decision in *Brown v. Board of Education*, as part of the first civil rights law since Reconstruction. Its courageous and aggressive enforcement of the new civil rights statutes passed in the 1950's and 1960's opened countless doors for African Americans and other racial minorities. While I have spent the bulk of my legal career as an attorney for the NAACP Legal Defense and Educational Fund, Inc. I began the practice of law as a line attorney at the U.S. Department of Justice in the Civil Rights Division. I joined Justice

through the Honors Program in the fall of 1979, and was assigned to the General Litigation Section, which had responsibility for school desegregation, housing and credit discrimination cases¹

When I enrolled in law school, I had two dream jobs. One was to work as an attorney for the Civil Rights Division of the Department of Justice. The other was to work for the NAACP Legal Defense Fund, Inc. Neither job was easy to obtain. The Civil Rights Division was a storied position from which to do civil rights work. Its reputation had been firmly established during the halcyon days of the Civil Rights Movement, when Assistant Attorney General John Doar was a constant presence who identified himself as a Justice Department lawyer before a mob that was threatening violence to civil rights demonstrators seeking to vindicate the right to vote. At least since the days when Attorney General Robert F. Kennedy wrestled with the Justice Department's role in vindicating the rights of black Americans, the Civil Rights Division had built a staff of career attorneys who were dedicated to

¹ The General Litigation Section was created during the Carter Administration in recognition of the link between school and housing discrimination, as well as the link between housing and credit discrimination. In 1980 the Justice Department filed suit against the city of Yonkers, New York, alleging both school and housing discrimination. The suit was reviewed by the Reagan appointees to the Justice Department to determine whether it was "improperly filed". After the basis of that review was reported publicly in the press, the case was allowed to continue. However, the Civil Rights Division was reorganized and the General Litigation Section was disbanded.

I was one of the attorneys who investigated housing and school segregation in Yonkers and who worked on the original complaint and initial discovery.

civil rights enforcement. To be clear, these attorneys fully understood that their role was to represent the United States, and not any individual or any group of individuals. But in representing our federal government, the Justice Department at long last had the authority and the inclination to vindicate the rights of individuals who were discriminated against because of their race, color, or membership in a subordinated group. The history and condition of black Americans were the impetus for the Civil Rights Division's creation and much of its work, but its mission extended to all Americans.

Career attorneys were the backbone of the Civil Rights Division. To be sure, each Administration has the prerogative to make political appointees to the Justice Department and by extension, to its Civil Rights Division. Career attorneys understood that policies and practices might shift as administrations came and went, but there was also a limit on the politicization of the Justice Department. The core mission of the Civil Rights Division was inviolate, and career attorneys' work on cases filed by the Department was insulated from crass political influence. Under multiple administrations, Republicans and Democrats, the Civil Rights Division had pursued enforcement of our nation's anti-discrimination laws and its career attorneys had continued their course.

My training and experience as a young lawyer in the Civil Rights Division was the best anyone could hope for. I had superb mentors. I got into court often, and was given weighty responsibilities. It was a corps of lawyers who were among the best in the nation. We stood up in court to represent the United States of America in support of the civil rights of those who had long been deprived of the equal protection of the law.

Today, I believe that the Justice Department's Civil Rights Division is a very different place. While it still retains some of the career attorneys whose expertise over the years has served Republican and Democratic administrations alike, in recent years too many of those career attorneys have left or been driven out by political appointees with ideological agendas which have been directly at odds with the traditional mission of the Civil Rights Division, *i.e.* the protection and vindication of the rights of members of racial minority groups, especially black and brown people.

The Justice Department, on behalf of the federal government, has taken positions which have not only abandoned its traditional role, but which have turned it in the opposite direction. Nowhere has this been more apparent than in the recent Supreme Court consideration of the voluntary school integration

cases out of Louisville, Kentucky (*Meredith v. Jefferson County Public Schools*) and Seattle, Washington (*Parents Involved in Community Schools v. Seattle School Districts*). Since the *Brown v. Board of Education* cases, in which Justice argued in support of those challenging school segregation laws, the federal government has played a central role in school desegregation cases. Either Justice or LDF or both, has been involved in a majority of the school desegregation cases litigated since *Brown*. The Justice Department argued in opposition to voluntary school desegregation in the Seattle and Louisville cases, as it did against the University of Michigan's efforts to pursue diversity in student enrollment. One can argue the merits of color-blindness vs. race conscious attempts to achieve diversity or integration, but this fact remains: for the first time in fifty-three years, the Justice Department has argued a case in the Supreme Court against public school desegregation.

The shift of Justice and within the Civil Rights Division is not limited to education cases. It has extended to voting right cases, employment cases and other areas. We at the Legal Defense Fund and within the broader civil rights community have come to regard the Civil Rights Division as wary allies, at best; often we are adversaries.

At its inception, the Division was dedicated exclusively to ridding society of the racial segregation and racial discrimination that permeated virtually every societal structure. Sadly today, while racial, and other forms of, discrimination continue to affect our country, the Division has sharply deviated from its original mission, and the impact can be seen across many areas, as I have noted in previous testimony before this Committee. My colleagues may further describe this recent record, which can and should be corrected. What I would like to do is set a more aspirational tone by offering some thoughts for the future work of the Division.

First, it is important for the Division to maintain its continuity and steadfastness of mission. Priorities can be discharged without abdicating core responsibilities. Civil rights enforcement is not and cannot be a zero sum game in our complex and increasingly diverse society. Protecting African Americans is not inconsistent with protecting Latinos, protecting disabled persons is not inconsistent with protecting women, and protecting citizens who are being discriminated against because of their religious beliefs need not be in tension with doing the same for those whose national origin has subjected them to discrimination. Priorities obviously can and will change

from administration to administration but the role of the Division as a protector of marginalized citizens and minorities is its core charge. Taking account of new priorities, and of new or intensified discrimination faced by various groups is appropriate but need not be achieved through the wholesale abandonment of longstanding priorities aimed at addressing continuing inequities and injustice. Adjustments can be made even while earlier commitments and priorities are met or addressed.

Discrimination in our nation has proven to be hard to overcome, and it persists in the arenas of education, voting, housing and employment, and criminal justice, among others. Having a department of the federal government that is focused and motivated to discharge its anti-discrimination mission is critical to enforcement of the civil rights laws, and also has tremendous practical and symbolic significance. The Civil Rights Division is second to none in terms of the time, resources and capacity it has to bring systemic litigation. While the private bar and the civil rights NGOs such as the Legal Defense Fund can have a profound effect on civil rights law, defining its cutting edge, there is no substitute for the Civil Rights Division's role. Very often a case brought by the Division reverberates and can have

industry-wide impact in terms of deterrence and reform. The broad-based injunctive relief that the Division can pursue cannot be matched through the efforts of individual or private lawsuits alone because often the pecuniary interests of plaintiffs lead to much more narrow relief and no institutional reform.

Because of these important considerations, the Civil Rights Division in the future should consider several reforms to address some recently expressed concerns, and to enable it to remain true to its critical role as our federal protectors of marginalized citizens of various types.

In our view, it would be extremely helpful to institutionalize and more clearly define the citizen outreach functions of the Civil Rights Division. There is no substitute for the Division having information about issues and matters happening on the ground. A more clearly defined and executed community outreach program will enable Division priorities to be tested by real world problems and create circumstances for a better accommodation of the tension between policy priorities and the needs of citizens outside Washington.

In this vein, it is critical that the Justice Department consider and explore new ways to develop, enhance and improve its relationship with community groups and civil rights organizations. These community contacts are certain to play an increasingly important role in civil rights enforcement going forward. Regular contacts with community groups enhance the quality of federal civil rights enforcement by helping with the development of the kinds of evidence and testimony necessary to enforce and prosecute these cases effectively. In recent years, certain litigation postures and choices taken by the Attorney General have created much distance between the Justice Department and community organizations. It is important that these relationships be repaired and restored going forward. Greater coordination between the Community Relations Service and the Civil Rights Division may be one way to bring about improvement.

The Division should be required to identify and pursue targeted affirmative investigations in core areas to root out large-scale problems and also to monitor progress in areas of previous litigation. These investigatory priorities should be the subject of Congressional oversight and where actions are not initiated for various reasons, reports should be issued if useful

information has been collected. The Division is uniquely situated to conduct these investigations in terms of resources and profile, and the investigations themselves could lead to greater compliance.

In the area of voting, equal and unfettered access to the ballot box is an important goal. Going forward, it is important that the Division consider how to use federal statutes that exist and are enforceable but rarely used. For example, Section 11(b) of the Voting Rights Act bars conduct deemed intimidating, threatening or coercive to voters. Specifically, Section 11(b) of the Voting Rights Act states that "no person [...] shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." However, since the Act's inception, the Justice Department has used this provision in only three instances. Intimidating acts preceding an election including aggressive challenges by poll watchers, literature containing false or misleading information, police or law enforcement presence, and outright violence, can create an intimidating atmosphere that discourages voters, particularly minority voters, from freely participating in the political process. Enhancing enforcement efforts of

Section 11(b) represents one way that the Civil Rights Division can more aggressively address ongoing acts of racial intimidation in the voting context.

In the area of education, we recommend a focus on the interface between educational systems and local criminal justice authorities -- in other words, the school-to-prison pipeline issue. The problem is the abdication by school authorities of their responsibility to have effective school leadership to address incidents of misbehavior internally rather than calling law enforcement. Increasingly, students are turned over to juvenile or adult criminal justice systems that are even less able to deal with them effectively, resulting in their placement into inappropriate incarceration settings that make it impossible for them ever to catch up educationally.

A glaring recent example of this problem arises in Jena, Louisiana, where several African-American youth are now facing lengthy prison sentences for attempted murder and aggravated assault arising out of racial incidents at a high school.

The Division sues juvenile prison authorities but rarely concentrates on the intake end, including the task of ensuring that discrimination does not produce the intake flow. Careful selection of a test case with compelling facts could be the opportunity to develop a model discipline recordkeeping system that would enable the Division to monitor what goes on and, ideally, to stop these things before they snowball into a pattern of exclusion from education. The Division has both investigative resources and the person-power and monetary resources to address this problem, especially since the Division is in the process of closing out scores of old school desegregation suits where unitary status has been achieved.

Additionally, in the area of education, the Division could take a more active role in monitoring school exclusionary practices such as pushouts, dropouts and suspensions.

In the area of housing, racial steering across the real estate industry is alive and well and contributing to the greater segregation we now see across the country. As we prepare for the 40th Anniversary of the Fair Housing Act in 2008, resources should be committed to bringing systemic cases against

those various facets of the housing industry whose practices perpetuate racial segregation across this country.

Given the Supreme Court's ruling in the Seattle and Louisville cases, it is even more incumbent upon the Civil Rights Division to reconsider the link between housing and school segregation. The theory underlying the creation of the General Litigation Section – the connection between school and housing segregation and discrimination – merits re-visitation.

The Civil Rights Division, once one of the Justice Department's crown jewels, should be restored to its place as a primary enforcer of civil rights laws. Its career attorneys ought to be hired without an ideological screening test. Its core mission should be expanded, not abandoned, so that the fight against racial discrimination against minority group members remains central to its charge even while it protects against other forms of discrimination within its mandates.

Thank you for the opportunity to testify. I welcome any questions.



MALDEF

Mexican American Legal Defense and Educational Fund

Statement of Peter Zamora,
Washington, D.C. Regional Counsel

“The 50th Anniversary of the Civil Rights Act of 1957 and its Continuing Importance”
United States Senate Committee on the Judiciary
September 5, 2007

Chairman Leahy, Members of the Committee, I am Peter Zamora, Washington, D.C. Regional Counsel for the Mexican American Legal Defense and Educational Fund (MALDEF). Founded in 1968, MALDEF is a national nonprofit legal organization that employs litigation, policy advocacy, and community education programs to protect and promote the civil rights of the Latino community.

I am pleased to join my esteemed colleagues in celebrating the fiftieth anniversary of the Civil Rights Act of 1957. The Civil Rights Act of 1957 remains as important today as it was fifty years ago, when it codified the intent of Congress that the federal government should play a central role in protecting the civil rights of all Americans. The Act is not a historical relic, but a catalyst for the active federal role in civil rights enforcement that continues to strengthen our democracy and our civic life. Now, as much as ever, we continue to rely upon federal civil rights protections authorized by the Civil Rights Act of 1957 as we strive to create a fair and equal nation in the 21st century.

I. THE CIVIL RIGHTS ACT OF 1957 AND THE ACTIVE FEDERAL ROLE IN CIVIL RIGHTS ENFORCEMENT

In his 1957 State of the Union address, President Dwight D. Eisenhower urged Congress to approve civil rights legislation that would move the nation closer to the goal of fair and equal treatment of all U.S. residents. Heeding this call, the United States Senate overcame political deadlock and filibuster to join the House of Representatives in passing the first federal civil rights legislation approved by Congress since 1875.

The Civil Rights Act of 1957 intended to ensure that all qualified citizens be allowed to vote without distinctions based on race or color, and it specifically prohibited interference with voting rights in any special, general, or primary election of federal officers.¹ To enforce of these provisions, the Act authorized the U.S. Attorney General to bring civil proceedings on behalf of individuals deprived of their voting rights.² It also authorized an additional Assistant Attorney General and empowered this position with the duty to initiate federal civil rights enforcement actions.³

¹ 71 Stat. 637 (1957), 42 U.S.C. § 1971(b)(1964).

² 71 Stat. 637 (1957), 42 U.S.C. § 1971(c)-(d)(1964).

³ *Id.*

The Civil Rights Act of 1957 ensured that the voting rights were no longer dependent upon actions brought by private individuals at their own expense, and possibly at the risk of physical and economic retaliation.⁴ Rather, Congress, after many decades of inaction, asserted an active federal role in ensuring that America lives up to the guarantees enshrined in our Constitution. In authorizing the creation of the Civil Rights Division of the Department of Justice, Congress provided key federal enforcement mechanisms that continue to play a central role in guaranteeing that all Americans may freely participate in U.S. civil society without fear of unlawful discrimination.

II. THE ONGOING NEED FOR AN ACTIVE FEDERAL ROLE IN CIVIL RIGHTS ENFORCEMENT

We currently live in a critical period for the U.S. Latino community, one in which civil rights are particularly at risk. Congress's failure to enact comprehensive immigration reform legislation has exacerbated an ongoing civil rights crisis that affects all Americans but falls especially hard upon the Latino community. Latinos, who comprise the largest and fastest-growing minority group in the nation, continue to require that the federal government fulfill the vision of the 1957 Civil Rights Act in moving our nation closer to fairness and equality.

In part because the 110th Congress has not approved comprehensive immigration reform at the federal level, states and localities have increasingly taken it upon themselves to enact laws intended to intimidate, destabilize, and displace undocumented immigrants. Localities including Hazelton, Pennsylvania; Farmer's Branch, Texas; and Prince William County, Virginia have recently approved laws that regulate immigration and limit the rights of and benefits available to immigrants. These local laws, which often violate federal law, may target undocumented immigrants, but they undermine the civil rights of all those who live in these communities, especially those who allegedly look or sound "foreign." Debate surrounding these ordinances is often characterized by heated rhetoric directed against the foreign born and those who speak foreign languages and fosters a hostile atmosphere that imperils civil rights and empowers anti-immigrant organizations and individuals.⁵ To an extent unprecedented in recent years, America's Latino population has become a focus of hateful and racist rhetoric and violence.⁶

As the nation's Latino population grows to a projected 24% of the nation's total population by 2050⁷, the increasing presence of Latino citizens in local communities

⁴ Christopher, Warren M., "The Constitutionality of the Voting Rights Act of 1965," 18 Stan. L. Rev. 1 (1965).

⁵ See, e.g., *Extremists Declare 'Open Season' on Immigrants: Hispanics Target of Incitement and Violence*, Washington, DC: Anti-Defamation League (2006) (available at: http://www.adl.org/main_Extremism/immigration_extremists.htm).

⁶ *Id.*

⁷ See <http://www.census.gov/Press-Release/www/releases/archives/population/001720.html>. Nearly 67 million people of Hispanic origin (who may be of any race) would be added to the nation's population between 2000 and 2050. The Hispanic population is projected to grow from 35.6 million to 102.6 million, an increase of 188 percent.

across the nation, including communities that have not historically had a strong Latino presence, will result in pressing civil rights issues. We are rapidly becoming a society in which there will be no single ethnic or racial majority, but the potential for infringing upon the rights of any minority group will be ever present. For this reason, the strong federal role in civil rights enforcement made possible by the Civil Rights Act of 1957 remains as critical to the nation in the 21st century as it was in the 20th century.

III. SPECIFIC AREAS OF FEDERAL CIVIL RIGHTS ENFORCEMENT THAT ARE CRITICAL TO THE LATINO COMMUNITY IN THE 21ST CENTURY

The Civil Right Division enforces anti-discrimination protections in myriad areas of American civic life, from voting and education to housing, employment, and the freedom to exercise religious beliefs. While each of these protections is relevant to the Latino community, I will emphasize select areas of Civil Rights Division activity that particularly affect the Latino population in the United States.

A. VOTING RIGHTS

For American democracy to function effectively, all eligible voters must be allowed to participate in U.S. elections. The Civil Rights Division's Voting Section is responsible for enforcing the Voting Rights Act of 1965, the National Voter Registration Act of 1993, the Help America Vote Act of 2002, and other key federal statutes designed to safeguard the right to vote of all citizens, including racial and language minorities. The Voting Section's vigorous enforcement of Section 2, Section 5, and Section 203 of the Voting Rights Act are essential in ensuring that Latino voters may fully and equally participate in the political process and elect their candidates of choice.

Recent election-related discrimination against Latinos demonstrates the ongoing need for an active Civil Rights Division that is committed to protecting minority voters' ability to elect their candidates of choice.

In the weeks leading up to the November 7 elections, a major party congressional candidate's campaign in Orange County, California, mailed a letter to 14,000 registered Latino voters that was specifically designed to intimidate them and keep them from voting. The letter, written in Spanish, falsely stated that immigrants may not vote (when, in fact, eligible naturalized immigrants may freely participate in U.S. elections). The letter also declared that "there is no benefit to voting" in U.S. elections. MALDEF notified the Attorney General of this voter intimidation effort, and the Civil Rights Division began an investigation.

In another instance, in Tucson, Arizona, at the polls on November 7th, 2006, MALDEF attorneys witnessed anti-immigrant activists aggressively intimidating Latino voters in Tucson, Arizona. One of these activists wore dark clothing with a badge-like emblem and carried a handgun in a holster, giving the false impression that he was a law enforcement official. The men intercepted Latino voters approaching the polling place, pushed a video camera in their faces and asked them to write down their personal

information. MALDEF attorneys referred the matter to Civil Rights Division attorneys for investigation.

In addition, in 2006 the United States Supreme Court found that the 2003 Texas congressional redistricting plan impermissibly used race to discriminate against Latino voters.⁸ MALDEF successfully argued the case on behalf of Latino voters before the Supreme Court on March 1, 2006. In a majority opinion authored by Justice Anthony Kennedy, the Court held that the state's redistricting plan amounted to vote dilution in violation of Section 2 of the Voting Rights Act.⁹ A state or political subdivision violates Section 2 of the Voting Rights Act "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election ... are not [as] equally open to ... members of [a racial group as they are to] other members of the electorate." The Supreme Court sided with Latino voters in finding that the State of Texas removed 100,000 Latino voters from a congressional district on the basis of race alone, thereby impermissibly preventing these voters from electing their candidate of choice to the U.S. House of Representatives.¹⁰

The Voting Section is currently engaged in significant enforcement efforts to protect access to the polls for language minority U.S. citizens. On October 13, 2006, the United States filed a complaint against the City of Philadelphia under Sections 203 and 208 of the Voting Rights Act for failure to establish an effective Spanish bilingual program and for denying limited-English proficient voters their assistor of choice.¹¹ A settlement agreement signed on April 26, 2007, requires, among other things, that the city establish an effective bilingual program, including bilingual interpreters and alternative-language information; allow limited-English proficient voters to utilize assistants of choice; provide alternative-language information; and undertake a program of voter list maintenance. On June 4, 2007, the U.S. District Court for the Eastern District of Pennsylvania entered an order retaining jurisdiction to enforce the terms of the settlement agreement until July 1, 2009.

Minority communities are often subject to discrimination as they gain political influence. Latino voters require a robust Voting Section that is fully staffed with well-qualified attorneys and experts who are committed to protecting minority voters' rights. While MALDEF frequently brings legal actions such as *LULAC v. Perry* on behalf of Latino voters, private individuals and organizations lack sufficient resources to guarantee free and fair elections for all voters nationwide. The growing Latino electorate must be able to depend upon the Civil Rights Division to protect the federal interest in nondiscriminatory elections and to work to ensure that no voter is wrongly disfranchised.

⁸ *League of United Latin American Citizens, et al., v. Perry, et al.*, 538 U.S. 34 (2006).

⁹ 42 U.S.C. §1973(b).

¹⁰ *Id.*

¹¹ *U.S. v. City of Philadelphia*, Civ. Action No. 06-4592 (E.D. Pa. 2007).

B. EDUCATIONAL OPPORTUNITIES

Many American children suffer in schools that are so unequal and inadequate that the programs and conditions violate the students' federal civil rights. Latino children, who comprise 1 in 5 U.S. public school students, often face significant barriers to fair and equal educational opportunities.¹² Because one-third of Latinos living in the United States are under the age of 18, the Latino community is especially concerned by the need for equality in American's public schools.¹³

Through the Educational Opportunities Section, the Civil Rights Division enforces federal statutes that prohibit discrimination in public elementary and secondary schools and public colleges and universities.¹⁴ The Section has litigated to prevent school districts from engaging in discriminatory practices involving decisions of school districts in reorganizing the structure of a district, new methods of assigning students to classes, construction of new schools, and modification of student attendance zones. For example, in *United States v. Board of Education of the City of Chicago*¹⁵, the Educational Opportunities Section filed and won several enforcement motions to ensure that minority students were provided with the opportunity to transfer to better-performing schools, desegregation programs were adequately funded, and English language learner students were given appropriate instructional services.¹⁶

The nation's 5.5 million English language learner (ELL) students¹⁷ often face particularly unequal and inadequate educational opportunities. Over the past fifteen years, ELL student enrollment has nearly doubled, and experts predict that one-quarter of the total U.S. public school population will be made up of ELLs by 2025.¹⁸ Over three-quarters of ELLs are Latino, and nearly half of K-12 Latino students are ELL.¹⁹ Native-born U.S. citizens predominate in the ELL population.²⁰

¹² Source: U.S. Department of Education. See <http://www.ncela.gwu.edu/expert/faq/08leps.html>.

¹³ "Minority Population Tops 100 Million," United States Census Bureau News May 17, 2007. See <http://www.census.gov/Press-Release/www/releases/archives/population/010048.html>.

¹⁴ Specifically, the Section enforces Title IV of the Civil Rights Act of 1964, the Equal Educational Opportunities Act of 1974 (EEOA), and Title III of the Americans with Disabilities Act, as well as other statutes such as Title VI and Title IX of the Civil Rights Act, Section 504 of the Rehabilitation Act, the Individuals with Disabilities Education Act, and Title II of the Americans with Disabilities Act upon referral from other governmental agencies. The Section may intervene in private suits alleging violations of education-related anti-discrimination statutes and the Fourteenth Amendment to the Constitution. The Section also represents the Department of Education in lawsuits. See <http://www.usdoj.gov/crt/edo/overview.htm>.

¹⁵ *United States v. Board of Education of Chicago*, Case No. 80 C 5124 (N.D. Ill. 2006).

¹⁶ See *id.*

¹⁷ Source: U.S. Department of Education. See www.ed.gov/admins/lead/account/lepfactsheet.html.

¹⁸ Source: U.S. Department of Education. See <http://www.ncela.gwu.edu/expert/faq/08leps.html>; <http://www.ed.gov/nclb/methods/english/lepfactsheet.html>.

¹⁹ See <http://www.ncela.gwu.edu/expert/fastfaq/4.html>; see Lazarin, M., *Improving Assessment and Accountability for English Language Learners in the No Child Left Behind Act*, Washington, D.C.: National Council of La Raza (2006), pl.

²⁰ See Capps, R., Fix, M., Murray, J., Ost, J., Passel, J., & Herwanto, S., *The New Demography of America's Schools: Immigration and the No Child Left Behind Act*, Washington, D.C.: The Urban Institute

The Educational Opportunities Section enforces the Equal Educational Opportunities Act (EEOA), which requires state educational agencies (SEAs) and school districts to take action to overcome language barriers that impede English Language Learner (ELL) students from participating equally in school districts' educational programs.²¹ As part of its efforts to enforce the EEOA, the Section investigates complaints that SEAs or school districts are not providing adequate services to ELL students. In June 2003, the Section signed a settlement agreement with the Plainfield, New Jersey School District regarding its obligation to provide appropriate instruction and services to ELLs under the EEOA.²² The agreement includes requirements to identify and serve ELLs; to integrate ELLs with native speakers of English; to make libraries and media centers accessible to ELLs; and to provide academic support to ELLs enrolled in general education classes.²³ In another case, in October of 2003, the Section signed a settlement agreement with the School District of Bound Brook, New Jersey, addressing its ELL-related obligations under the EEOA.²⁴ The agreement requires the district to provide, among other things, timely assessment of all students with non-English speaking backgrounds; quality curricula and instruction for ELLs; adequate teacher training; and careful monitoring and reporting on the academic progress of ELLs who are currently enrolled in the program as well as those who have exited from the program.²⁵

As federal, state, and local governments respond to the recent Supreme Court decision regarding voluntary school integration plans in Seattle and Louisville, a robust Civil Rights Division must protect against school re-segregation. Given the importance of diversity in education and the trend toward increasingly segregated public schools, the Section must review local actions and play an active role in preventing unlawful discrimination. 56% of Latino students are currently educated in majority Latino public schools, so efforts to integrate our schools are crucial for this sector of our nation.²⁶ As the Latino community continues to grow and anti-immigrant sentiment increases in certain areas of the country, the Section's monitoring and enforcement activities must also increase.

C. EMPLOYMENT PROTECTIONS RELATING TO NATIONAL ORIGIN AND CITIZENSHIP STATUS

The vitality of the Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") is also particularly important to the Latino community. OSC protects against employment discrimination

(2005), p18 (finding that 76% of elementary school and 56% of secondary school ELLs are citizens, and that over one-half of the ELLs in public secondary schools are second- or third-generation citizens.

²¹ 20 U.S.C. § 1703(f).

²² <http://www.usdoj.gov/crt/edo/documents/bbrookag.pdf>.

²³ *Id.*

²⁴ <http://www.usdoj.gov/crt/edo/documents/plainfieldag.pdf>.

²⁵ *Id.*

²⁶ See Fry, R., *The Changing Racial and Ethnic Composition of U.S. Public Schools*, Washington, D.C.: Pew Hispanic Center (2007) (available at: <http://pewhispanic.org/files/reports/79.pdf>).

based upon national origin and citizenship and immigration status, unfair documentary practices during the employment eligibility verification process, and retaliation. It also acts to prevent unlawful discrimination through outreach and provides advice and counsel on policy issues affecting the civil rights of U.S. citizens and immigrants.

Congress created OSC primarily to address discrimination against individuals who allegedly look or sound “foreign” or who are not U.S. citizens.²⁷ During fiscal year 2006, OSC received 346 charges of alleged discrimination and directly handled more than 7,567 calls on its worker and employer hotlines.²⁸ Specific allegations included unlawful citizen-only hiring policies; refusals to employ naturalized citizens, immigrants granted asylum, and lawful permanent residents because of discriminatory documentary practices; termination of documented immigrants because participating employers did not follow proper employment eligibility verification guidelines; and improper termination of work-authorized immigrants granted temporary protected status.²⁹

Latino workers are particularly vulnerable to this type of workplace discrimination because they are more likely to bear innate characteristics that correlate with national origin and perceived immigration status. Nearly 50% of OSC’s settlements during FY 2005 involved Hispanic workers.³⁰ A robust Office of Special Counsel for Immigration-Related Unfair Employment Practices is essential to ensure that the vast majority of U.S. Latinos who are citizens or work-authorized are not ensnared in overbroad or discriminatory immigration-related employment actions.

For example, Latino workers are often singled out for greater scrutiny of their work documentation or required to produce work authorization documents that are not legally required for employment in the United States. In March 2006, for example, OSC entered into a settlement agreement with a national retail chain to resolve a charge filed by a lawfully present asylee. The charge alleged that the retailer chain committed document abuse during the employment eligibility verification process when it discharged the individual for failure to produce one specific document to verify her work authorization. Although the asylee produced other legally accepted documents, the employer rejected them. OSC’s investigation revealed that three other noncitizens were discharged for similar reasons, and that the employer required non-citizens to present specific types of documents to verify work eligibility while allowing citizens to present a variety of documents. Under the settlement agreement, the retail chain agreed to provide back pay ranging from \$2,100 to \$13,800 (totaling more than \$22,000) to the four wrongfully-terminated employees, to pay a civil penalty of \$14,000, and to injunctive relief, including the training of its personnel in proper employment eligibility verification procedures.³¹

²⁷ See <http://www.usdoj.gov/crt/activity.html#osc>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

As the Department of Homeland Security enacts a planned increase in the enforcement of U.S. employment eligibility guidelines, we expect for the number of immigration-related unfair employment practices such as those described above to increase significantly. Employers who are intimidated by increased federal immigration enforcement in the workplace are likely to single out workers who allegedly look or sound "foreign." Therefore, Civil Rights Division enforcement actions will increase in importance as a necessary counter to the effects of stepped-up federal immigration enforcement, and the operations of a well-qualified Civil Rights Division staff dedicated to this function will become increasingly important.

D. LANGUAGE ACCESS

Limited English proficiency (LEP) is a significant barrier to full participation in U.S. society. Civil Rights Division implementation and oversight of federal legal requirements relating to language access and its efforts to combat language-based discrimination are essential civil rights concerns for the Latino community. Because language is often closely correlated with race and national origin, it is frequently used as a proxy for race and national origin discrimination.

The Civil Rights Division maintains significant authority to protect language minority rights and benefits under Executive Order 13166, which requires all recipients of federal funds, including federal agencies and federally assisted programs and activities, to provide meaningful access to those with limited English proficiency (as required by Title VI of the Civil Rights Act of 1964 and its implementing regulations). Through its Coordination and Review Section, the Civil Rights Division is responsible for the implementation of these requirements through the provision of technical and legal assistance, training, interagency coordination, and regulatory, policy, and program reviews. Actions taken thus far by the Section include: (1) an active outreach program which regularly communicates with affected communities; (2) the creation of a Federal Interagency Working Group on limited English proficiency; and (3) the development of "Know Your Rights" materials describing civil rights protections for LEP individuals.³²

Spanish speakers constitute nearly 1 in 8 U.S. residents, as over 32.2 million U.S. residents ages 5 and older speak Spanish at home.³³ As these individuals, the vast majority of whom are U.S. citizens or legal residents, learn English, the federal government must protect and promote their civil rights in critical areas of civic life. As the Latino population continues to grow in the 21st century, language access is a civil rights issue that will increase in importance. The Civil Rights Division must maintain and expand its role in ensuring that English language learners may access vital federal and federally-funded programs and be free from language-based discrimination as they learn the English language skills necessary to fully integrate into U.S. society.

³² See <http://www.usdoj.gov/crt/activity.html#coord>.

³³ Source: 2005 American Community Survey. Among all those who speak Spanish at home, more than one-half say they also speak English very well.

E. HATE CRIMES

The past several years have seen a growing number of violent assaults and attacks by white supremacists against Latinos, with crimes ranging from vandalism to brutal assaults and murders.³⁴ In most cases the perpetrators did not know the victims, but targeted them solely because of their appearance.³⁵ In 2003, 7,489 hate crime incidents were reported to the FBI by 11,909 law enforcement agencies in 49 states and the District of Columbia; 3,844 of these crimes were motivated by racial bias, and 1,026 were motivated by ethnicity/national origin bias.³⁶

On April 22, 2006, for example, David Ritcheson, a Latino teenager from Spring, Texas (a suburb of Houston) was a victim of extreme bias-motivated violence based upon his Hispanic heritage. Ritcheson was beaten nearly to death by self-professed Skinheads, who cut him, burned him, poured bleach over him, and sodomized him with an outdoor umbrella pole while yelling anti-Hispanic slurs.³⁷ He was hospitalized for more than three months and endured 20-30 painful surgeries in the months following the attack.³⁸ Two men were convicted of aggravated sexual assault in the attack.³⁹

On April 17, 2007, Mr. Ritcheson displayed great courage in testifying before a Subcommittee of the U.S. House Judiciary Committee about his experience as a victim of a hate crime and his support of the Local Law Enforcement Hate Crimes Prevention Act. Apparently overwhelmed by the continuing effects of the vicious hate crime of which he was a victim, however, Mr. Ritcheson committed suicide on July 1, 2007.

The Criminal Section of the Civil Rights Division prosecutes incidents of bias-motivated violence, a function that continues to be a top priority for Latinos in the 21st century. The Division must prioritize the prosecution of hate crimes, especially in incidents in which local officials do not fully protect the civil rights of hate crimes victims. A Criminal Section that is fully staffed by experienced and well-qualified investigators and prosecutors is essential to ensuring that the tragedy of David Ritcheson is not repeated.

³⁴ See *Extremists Declare 'Open Season' on Immigrants: Hispanics Target of Incitement and Violence*, Washington, DC: Anti-Defamation League (2006) (available at: http://www.adl.org/main_Extremism/immigration_extremists.htm); see also "South Boston assault probed; stabbing may have been a hate crime," Boston Globe, April 6, 2007.

³⁵ See http://www.adl.org/PresRele/Extremism_72/4904_12.htm.

³⁶ See <http://miami.fbi.gov/hate.htm>.

³⁷ See http://www.adl.org/Civil_Rights/Ritcheson.asp.

³⁸ "Teen Survivor of Hate Crime Attack at Texas Party Jumps from Cruise Ship, Dies," Associated Press, July 2, 2007. See <http://www.foxnews.com/story/0,2933,287721,00.html>.

³⁹ *Id.*

IV. CONCLUSION

The Civil Rights Act of 1957 codified important voter protections, but its most lasting effect may be that it fostered a tradition of strong federal civil rights enforcement. Congress has passed more comprehensive civil rights legislation since 1957, but the first civil rights act since Reconstruction is uniquely responsible for first engaging the federal government as the key guardian of Americans' core civil rights.

This anniversary is not merely as an occasion to reflect upon the great civil advancements of the 20th century, however, but a time to evaluate our nation's continuing civil rights needs. We must not rest on our laurels but respond effectively to civil rights enforcement trends in a nation that has changed very much since 1957, where discrimination may assume different forms than it did 50 years ago.

Increased tensions around local anti-immigrant ordinances and the integration of the growing Latino citizen population across the country make it a very real possibility that, without an active Civil Rights Division that enforces key anti-discrimination protections and prosecutes bias-motivated crime, we will see a continued increase in discrimination of all forms, up to and including extreme violence, against Latinos.

As minority populations increase in size and in proportion of the U.S. population, the proposition that every individual shall receive fair and equal treatment under the law must continue to be the principle under which we live. If the federal government does not meet its obligation to protect our civil rights in the 21st century, our nation will be much impoverished when we commemorate the 100th anniversary of the Civil Rights Act of 1957.

