

RENEWING THE CIVIL RIGHTS DIVISION

A Report to the Justice Department Transition Team
From the Association of the Bar of the City of New York
Committee on Civil Rights

1. INTRODUCTION

After the Civil War, the Constitution was amended to guarantee certain rights to former slaves. Around the same time, a group of attorneys founded the Association of the Bar of the City of New York. Through the years, Congress has enacted additional laws to protect the right to equal opportunity regardless of race, sex, age, national origin, religion, or disability. The Association, now numbering over 23,000 members, has long supported the vigorous and fair enforcement of these laws.

Congress created the Civil Rights Division of the Justice Department (the “Division”) in 1957 to enforce civil rights legislation. In the ensuing years, the Division carried out this mission with remarkable success. However, over the past seven years, the Division has strayed from its mission, largely because of an Administration that politicized the Justice Department to serve its partisan interests. As a result, the Division’s credibility has been greatly diminished, the morale of its career staff has plummeted, and civil rights laws have not been effectively enforced. Renewing the Civil Rights Division is one of the incoming Administration’s most important tasks. The Association respectfully offers its suggestions for achieving this goal.

2. THE DIVISION’S HISTORY AND ROLE IN CIVIL RIGHTS LAW ENFORCEMENT

Initially, the Division focused on ending *de jure* discrimination against African Americans in the South “because the racial caste system was viewed as destructive of American ideals of democracy and equality and as undermining our society and economy.”¹ The scope of enforcement grew to include discrimination based on sex, age, national origin, religion, and disability, but ending racial discrimination has always remained a primary mission of the Division.

The Division became an effective and respected voice in the struggle for civil rights because it focused its law enforcement resources on significant targets, its dedicated career attorneys were measured and well prepared, and its political leaders, while sensitive to the policies and priorities of the President who appointed them,

¹ *The Civil Rights Division, An Historical Perspective: Hearing Before Senate Comm. on the Judiciary, 110th Cong (1997)* (statement of Brian K. Landsberg, Professor of Law, Pacific McGeorge School of Law), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=2837&wit_id=6547.

generally consulted career attorneys and respected their expertise. These factors gave the Division credibility. Its lawyers sometimes took unpopular positions, but judges and the public understood that Division attorneys were selected on merit, that they were dedicated to enforcing important national policies, and that their “positions in cases depend upon an objective analysis of the law and the facts.”²

The mission and law enforcement priorities of the Division changed radically over the past seven years. Advancing the Bush Administration’s political aims became the Division’s principal task. The highly politicized leaders of the Justice Department and the Civil Rights Division pursued this goal by appointing persons without civil rights experience to leadership positions based on partisanship or ideology, cutting career lawyers out of policy, litigation, and hiring decisions, offering buyouts to senior members of the career staff, demoting or reassigning line attorneys who were perceived to be at odds with Administration policies and priorities, and using political loyalties to hire new line attorneys.³

The result “has been significant damage to the Division’s effectiveness, its reputation, and the morale of its career employees.”⁴ Many seasoned lawyers have left, depriving the government of their expertise and institutional knowledge. Respect for the credibility and integrity of the Division among the judiciary, civil rights organizations, and the public has diminished because of the perception that political considerations have dominated the enforcement of civil rights laws.⁵

3. RESTORING THE DIVISION’S LEADING ROLE IN THE FEDERAL GOVERNMENT’S ENFORCEMENT OF CIVIL RIGHTS LAWS

Personnel

The Civil Rights Division is led by the Assistant Attorney General (“AAG”), who is appointed by the President and subject to Senate approval. The AAG is assisted by Deputy AAGs, all but one of whom, traditionally, are political appointees. The Division is comprised of ten substantive sections, each headed by a Section Chief and one or more Deputy Section Chiefs, all of whom are senior, career attorneys. Under them serve line attorneys, paralegals, support personnel, and other professionals.

Choosing experienced, effective leaders is the key to restoring the Civil Rights Division. The next Administration’s political leadership should have demonstrated ability as litigators and leaders, strong intellect, political savvy, knowledge of the Division’s mission and history, experience in civil rights law

² *Id.*

³ Sen. Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 *Harvard L. & Pol’y Rev.* 211, 213-27 (2008).

⁴ *Id.* at 212.

⁵ Joseph D. Rich, *The Attack on Professionalism in the Civil Rights Division*, in *THE EROSION OF RIGHTS* 13, 17 (William L. Taylor et al. eds., 2007).

enforcement, and the ability to work with Congress and civil rights organizations. Deputy AAGs should have experience relevant to the sections they will supervise, and some should have special expertise in management and budgeting.

Although top leadership has generally come from outside the Division, undoing the damage inflicted by the Bush Administration would be accomplished most effectively and expeditiously by appointing persons who currently serve or who served the Division in the past with distinction to at least some of the top positions, if only for a limited time period. These persons know the personnel and have the respect of the line attorneys and staff with whom they serve. The Association urges the Transition Team to identify and contact these people immediately and determine which of them are interested and best-suited for leadership positions.

Once the top leaders are selected, they should review the leadership of each section and determine which Chiefs and Deputies should remain where they are and which should be reassigned to lead other sections or to line positions, consistent with Civil Service rules. The persons appointed to these positions should be outstanding litigators who have demonstrated good judgment and dedication to civil rights law enforcement.

The political leaders should also seriously consider rehiring section leaders and line attorneys who left the Division because of its recent politicization and are interested in returning. These attorneys would provide a base of experience and institutional knowledge that are critical to carrying out the Division's mission.

Finally, the new leaders should redeploy line attorneys and staff to their areas of expertise, consistent with the law enforcement priorities set by the incoming Administration.

The incoming Administration has a unique opportunity to blend new talent with seasoned leadership. Adding contemporary experience and perspectives to the Division's core ideals and values will make the Division even stronger.

Priorities

Congress has authorized the Civil Rights Division to enforce a myriad of laws, but the Division has neither the staff nor the budget to give each law equal attention. Priorities must be established, although there should be enforcement in every area in which Congress has given the Division jurisdiction. Setting priorities requires the thoughtful selection of areas of emphasis and the deployment of resources to have the greatest impact.

Combating race discrimination in employment, education, voting, and housing has always been a core priority for the Division. The most blatant instances of discrimination – denial of the right to vote, assignment to low-wage jobs, and *de jure* school segregation – rarely occur now, partly as a result of the Division's efforts.

However, many white Americans wrongly believe that racial discrimination no longer occurs. Many oppose affirmative action as unneeded and discriminatory against whites, and the Supreme Court has even come close to ruling it unconstitutional.⁶ But while many racial minorities have achieved success, the promise of equal opportunity remains unfulfilled for many others. Nearly a quarter of African Americans and over 21% of Hispanics live below the poverty line, compared to only 8% of whites.⁷ The median income of African Americans and Hispanics is less than two-thirds that of whites.⁸ Over twice as many African Americans are unemployed as white Americans.⁹ The unemployment rate of Native Americans living on reservations was nearly triple the national unemployment rate in 2000.¹⁰ As a percentage of the population, seven times the number of African Americans as whites are in prison.¹¹

De jure segregation may no longer exist, but the effects of discriminatory laws, customs, and attitudes persist. For the near future, combating racial discrimination must remain a central priority of the Civil Rights Division's work. At the same time, the Division must emphasize critical 21st century issues of discrimination, especially sex equity, environmental justice, disability rights, and the prevention of hate crimes against Arab, Muslim, Sikh, and LGBT persons. Where intentional discrimination occurs, it should be given priority because these are the most egregious cases, and pursuing them would be an antidote to the public perception that discrimination is no longer a problem. The Division must also promote affirmative action in accordance with criteria the Supreme Court has articulated, rather than oppose it reflexively, as the current Administration has done.

Among the issues requiring renewed attention by the Division are:

Education: Recent Supreme Court decisions have limited a school's ability to implement race-conscious voluntary desegregation¹² and affirmative action programs.¹³ The Division should work with educational institutions and civil rights organizations to fashion effective integration programs that meet the Court's criteria. In addition, the Division should vigorously monitor existing court-ordered desegregation plans.

Employment: The Division should focus on high-impact, pattern-and-practice cases, especially those that involve disparate impact based on sex, race,

⁶ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

⁷ U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2007*, at 13 tbl. 3 (2008).

⁸ *Id.* at 8 tbl. 1.

⁹ National Urban League, *The State of Black America 2007 (Executive Summary)*, at 4 (2008).

¹⁰ Jonathan B. Taylor & Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses* 29 (2005).

¹¹ National Urban League, *supra* note 9, at 4.

¹² *Meredith v. Jefferson County Bd. of Educ.*, 127 S.Ct. 2738 (2007).

¹³ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

national origin, and disability. Disparate impact cases focus on the discriminatory effect of criteria on which employment decisions are based, such as physical performance tests. Evidence of discriminatory intent is not required. Because employment screens are gaining in popularity, and private attorneys and individual plaintiffs generally lack the expertise and resources to litigate them, the Division has an important role to play. Its usefulness is not limited to litigation: The Division can meet with business associations and professional test developers to create nondiscriminatory, business-related criteria. It can also use its litigation leverage to negotiate voluntary compliance by employers.

Sex equity and disability issues deserve special emphasis. In terms of income, the Census Bureau reports that the median earnings for women were 77.5% of the median earnings for men in 2007.¹⁴ EEOC reports that 70% of people with substantial disabilities who nonetheless are ready, willing, and able to work remain unemployed more than a decade and a half after enactment of the Americans with Disabilities Act.¹⁵ The Division should develop litigation strategies and remedies to address these wage and opportunity gaps.

Voting: The Division enforces Section 5 of the Voting Rights Act, which requires jurisdictions that historically denied citizens the right to vote on the basis of race or national origin to submit all new voting procedures to a court or the Division for preclearance to determine whether they have a discriminatory purpose or effect. Preclearance decisions are sensitive because proposed voting changes sometimes reflect and often affect partisan politics. Historically, the Division avoided partisanship with bottom-up decision-making in which career staff investigated and made recommendations that the political leadership generally approved. Under President Bush, when changes that advantaged Republicans were proposed, the political leadership of the Division at first ignored the recommendations of career staff and later barred them from making recommendations and retaliated against career employees with whom they disagreed.¹⁶ Restoring and reinvigorating the old system is essential. The Division also needs to strengthen its enforcement of Section 2 of the Voting Rights Act, which prohibits voting practices that result in discrimination. For the first five years of the Administration, the Division failed completely to enforce section 2 to combat racial discrimination, and it has engaged only in limited enforcement over the past two years. Protecting and promoting the voting rights of minorities is an important part of the Division's historic mission, and assuring full participation in the voting process remains essential to our democracy.

Housing: Housing discrimination remains a significant and often complex problem. The Division should use its authority to bring disparate impact cases

¹⁴ United States Census Bureau, Income, Earnings, and Poverty Data from the 2007 American Community Survey 12 (2008).

¹⁵ U.S. Equal Employment Opportunity Commission, Best Practices for the Employment of People with Disabilities in State Government 1, *available at* http://www.eeoc.gov/initiatives/nfi/final_states_best_practices_report.pdf.

¹⁶ Kennedy, *supra* note 3, at 219-21.

involving race and national origin in lending, zoning, land use, and local government housing programs. It should develop more cases based on testing done by the Division and fair housing groups. The Division has increased its enforcement of laws requiring the accessibility of housing to individuals with disabilities, and that enforcement should continue. Also, in December 2008, the National Commission on Fair Housing and Equal Opportunity, a new group formed by four civil rights organizations and headed by former HUD Secretaries Jack Kemp and Henry Cisneros, will issue a detailed report based on hearings in five cities. The Association urges the Division's new leadership to review the report and carry out its appropriate recommendations.

Criminal: The traditional focus on police misconduct and hate crimes changed in the Bush Justice Department. The Division neglected many traditional areas, primarily pursuing cases involving human trafficking, especially forced prostitution. Trafficking cases are important and should be prosecuted vigorously. However, the Division has the capacity to, and must, pursue police misconduct because local, state, and even federal prosecutors often lack the will to prosecute law enforcement officers with whom they must work. Additionally, prosecuting police misconduct cases is expensive, time-consuming, and resource-intensive, and the Justice Department (and FBI) have more resources and expertise than local and state officials.

The Division should vigorously enforce criminal civil rights laws because police brutality often has a racial tinge. It should investigate and prosecute prison conditions such as overcrowding, brutality, and inadequate medical care, which most severely impact people of color. It should also play a leading role in developing and supporting local law enforcement practices and policies that reduce crime and enjoy community support. For example, in 1999, the Justice Department convened a conference on "Strengthening Police-Community Relations." Police executives, police union representatives, academic experts, community leaders, and civil rights representatives attended. The conference addressed such issues as the use of force, misconduct, and racial profiling. The incoming Administration should follow up on the recommendations of this conference and consider the utility of similar conferences.

The Division should also increase coordination of the several Sections that have authority to enforce laws against police departments, including the Criminal Section, the Special Litigation Section, the Employment Section, and the Coordination and Review Section. Greater coordination will ensure that the Division diminishes the need for law enforcement litigation and carries it out most effectively when it is necessary.

Disability: The Division's enforcement responsibilities under the Americans with Disabilities Act (ADA) include employment discrimination against persons with disabilities (Title I); discrimination against persons with disabilities by

state and local governments in their services, programs, or activities (Title II); and accessibility in public accommodations (Title III).

Congress recently passed legislation that clarified the meaning and scope of the term “disability,” overturning Supreme Court decisions that made it difficult for persons with disabilities who can perform their jobs to sue for discrimination.¹⁷ The Division should seize this opportunity to be more aggressive in enforcing Titles I and II. Under Title II, the Division has devoted substantial resources to Project Civic Access, which focuses on making key programs of state and local governments accessible. The Division should continue to pursue this worthwhile endeavor. Under Title III, the Division appropriately focuses its enforcement efforts on large public accommodations, such as theaters, and critical entities, such as health care facilities. However, it resolves most Title III cases by settlement; an aggressive, well-publicized litigation program might inspire broader compliance by more agencies. Finally, after several years of delay, the Division appears ready to issue new ADA Regulations and ADA Accessibility Guidelines. The incoming Administration should review and, as necessary, revise them to insure a commitment to full accessibility.

Appellate: Historically, the Appellate Section conducted appeals of Division cases and filed amicus briefs stating the federal government’s position on significant civil rights issues. Filing amicus briefs addressing discrimination has always been an important function of the Division, particularly because judges count on the expertise and experience of Division lawyers when deciding important questions of civil rights law enforcement. Under President Bush, the Appellate Section was ordered to file briefs in support of deportation orders obtained by the Criminal Division’s immigration office. Because of this diversion of resources and an ideological retreat from civil rights enforcement, amicus filings dropped by 66%, and the Division filed no amicus briefs promoting school desegregation or opposing employment discrimination. Defending deportation orders is not a civil rights function. The next Administration should get the Division out of the deportation business and back into the amicus business.

Terrorism: The Division is not a key player in preventing acts of terror, but all government agencies have a role to play. By joining with other federal, state, and local law enforcement agencies to vigorously prosecute hate crimes directed at Arabs, Muslims, and Sikhs, the Division can promote trust and develop ties with those communities and their leaders. The communities will feel protected and are more likely to cooperate in providing intelligence, which will greatly benefit the general public.

Coordination with Other Federal Agencies: The Division has authority under Title VI to coordinate the efforts of federal agencies to eliminate discrimination by government agencies and grant recipients. It should use this authority to coordinate and focus the efforts of the myriad Federal agencies on publicizing nondiscrimination requirements. The Division is also uniquely positioned to help

¹⁷ Americans with Disabilities Amendments Act of 2008, Pub. L. No. 110-325 (2008).

coordinate the civil rights enforcement strategies and agendas of the EEOC, DOL, HUD, DOE, and many other federal agencies, as well as state and local civil/human rights agencies.

Hiring

Perhaps the most publicized abuse of the Justice Department during the Bush Administration was hiring new attorneys based on their political and ideological affiliations. This was especially true in the Civil Rights Division, where the hiring of attorneys with traditional civil rights backgrounds plunged, and the hiring of persons with conservative credentials and no civil rights experience (except defending discrimination cases and opposing race-conscious policies) increased.¹⁸

Prior to 2002, the Justice Department hired nearly all its new attorneys through the Honors Program, which was instituted by President Eisenhower's Attorney General in 1954 to keep cronyism, favoritism, partisanship, and graft out of the hiring process.¹⁹ In the Civil Rights Division, line attorneys controlled the Honors Program. Attorneys from each section comprised a Hiring Committee that traveled to law schools to interview interested students. When the interviews were finished, the Committee met and made recommendations to the political leadership on those they considered the best qualified, based on law school performance and a demonstrated interest in the work of the Division. Applicants were not questioned about their political or ideological affiliations. The political appointees almost always accepted the recommendations of the line attorneys. Charles Cooper, a Deputy AAG under President Reagan, said this system worked well:

There was obviously oversight from the front office, but I don't remember a time when an individual went through that process and was not accepted, I just don't think there was any quarrel with the quality of individuals who were being hired. And we certainly weren't placing any kind of political litmus test on . . . the individuals who were ultimately determined to be the best qualified.²⁰

In 2002, Attorney General John Ashcroft abolished the Honors Program, disbanded the Hiring Committees, and designated political appointees to vet job applicants.²¹ The appointees made hiring decisions based on an applicant's politics and ideology, which they determined by asking interview questions and conducting Internet searches. The Inspector General reported that Republicans and members of

¹⁸ Charlie Savage, *Civil Rights Hiring Shifted in Bush Era*, Boston Globe, July 23, 2006, at A1. The Justice Department's Office of the Inspector General is currently completing a report on politicized hiring in the Division.

¹⁹ Rich, *supra* note 5, at 13-17.

²⁰ Savage, *supra* note 20.

²¹ Rich, *supra* note 5, at 15-17.

the conservative Federalist Society were generally hired, while Democrats and members of the liberal American Constitution Society were not.²² The Inspector General concluded that this process violated Civil Service rules, but that the perpetrators were not subject to discipline because they no longer worked for the government. The IG did not address whether their actions violated criminal statutes.

Recently, Attorney General Michael Mukasey announced that he had made it clear to Department employees “that it is neither permissible nor acceptable to consider political affiliations in the hiring of career Department employees.”²³ He rejected criminal prosecutions of the Department officials who had engaged in political hiring because the Inspector General found no evidence of crime.

The Attorney General’s actions are insufficient. He failed to mention reestablishing the Hiring Committees or returning the Honors Program process largely to career attorneys. To insure that the Department hires the best and most dedicated lawyers available, the next Administration should do both.

Finally, questions have been raised about the future of line attorneys hired because of their politics. Civil service laws prevent their discharge, and institutionalizing the actions of the current Administration by pressuring them to quit would be a bad precedent. Some will probably leave rather than follow the new Administration’s law enforcement priorities. The rest should be retained unless they demonstrate an unwillingness or inability to carry out those priorities.

Decision-Making

According to Brian Landsberg, who worked in the Division from January 1964 until June 1986 and again from June 1993 to January 1994, tension between the Division’s political leaders and career staff is normal.²⁴ Political appointees are more attuned to the politics and policies of the administration, while staff attorneys have the legal expertise and institutional knowledge. The tension between the two was generally resolved by discussion, until the current Administration began making top-down decisions by fiat. The Association urges the Division to return to its historic model of discussion and joint decision-making, in which each side understands the role of the other, both understand the importance of continuity for the Division's effectiveness and credibility, and both approach the Division’s law enforcement responsibilities as lawyers, relying on the close reading of statutes, fidelity to binding precedent, and careful development of the facts.

4. NEW LEGISLATION

²² Office of the Inspector General, U.S. Dep’t of Justice, An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program 24, 56 (2008).

²³ Michael Mukasey, Attorney General, Remarks before the American Bar Association (Aug. 12, 2008), available at <http://www.usdoj.gov/ag/speeches/2008/ag-speech-0808121.html>.

²⁴ Brian K. Landsberg, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 164 (1997).

The Association supports the following legislation to enhance the Division's law enforcement mission, as well as private enforcement of civil rights statutes:

First, restore the effective enforcement of the Equal Pay Act by reversing *Ledbetter v. Goodyear Tire & Rubber Co.*²⁵ In that decision, the Supreme Court disregarded a long-standing EEOC Rule, which lower courts had followed, allowing complaints alleging violations of the Equal Pay Act to be filed within 180 days of discovery of the disparity. The Supreme Court held that complaints must be filed within 180 days of the date the first unequal paycheck was issued. As Justice Ginsburg noted in her ringing dissent, this ruling makes enforcement of the Equal Pay Act nearly impossible because the pay disparity is usually not discovered until much later. Since *Ledbetter* involved statutory interpretation rather than Constitutional construction, Congress can and should reverse the decision legislatively by amending the statute.

Second, ensure that every statute protecting civil rights authorizes aggrieved persons to file private actions. This especially pertains to Title VI, which prohibits discrimination in programs and activities that receive federal funds. Legislation is necessary to reverse the Supreme Court's decision in *Alexander v. Sandoval*,²⁶ holding that there is no private right of action to enforce disparate impact regulations issued under Title VI. The Association urges the next Administration to introduce legislation that authorizes private enforcement and expressly permits suits to be based on disparate impact.

Finally, whenever possible, Congress should extend the protection of nondiscrimination statutes to gay, lesbian, bisexual, and transgender Americans. The Association endorses The Employment Nondiscrimination Act (ENDA) and the Hate Crimes bill, both of which provide legal protection to these individuals. The Association, in particular, affirms its support for ENDA in its original form, which prohibited discrimination in employment based on both sexual orientation and gender identity. Transgender and other gender nonconforming persons are among the most vulnerable members of our society, and they should not be denied the basic legal protections they critically need.

5. CONCLUSION

For almost fifty years, the Civil Rights Division faithfully, effectively, and impartially enforced the laws that guarantee every American's right to equal opportunity. The Division's leading role in this endeavor has diminished recently,

²⁵ 127 S.Ct. 2162 (2007).

²⁶ 532 U.S. 275 (2001).

largely because political considerations became paramount in the Justice Department, but also because court decisions have made remedying discrimination more difficult and because public support for affirmative action has declined.

Eliminating discrimination remains unfinished business. Renewing the Division and making it again an effective and respected law enforcement agency are critical steps toward achieving this goal. The Association urges the next Administration to renew the fundamental American promise of equal opportunity by adopting the recommendations proposed in this report.