Restoring the Civil Rights Division

*Senator Edward M. Kennedy**

The Civil Rights Division of the Department of Justice has a unique place in the national struggle for civil rights. In both the courts and public discourse, civil rights advocates have long called for the federal government to serve as a defender of civil rights. When I was first elected to the Senate in 1962, the Division was barely five years old. It was created by the Civil Rights Act of 1957,[1] as an initial but limited response to the call for the federal government to protect the civil rights of African Americans.[2] The Division began with the narrow mandate to enforce the Fifteenth Amendment,[3] but it soon became a major force in the battle against Jim Crow segregation laws.[4] Although the lion's share of the credit belongs to the individual women and men, some famous, others unknown, who challenged segregation in their own communities, the Division has played a key role in shaping and enforcing the laws that have helped countless victims of discrimination vindicate their rights and redefine how our nation responds to this call to conscience.[5]

Since then, Congress has expanded the Division's mandate through its enactment of landmark laws such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, Title IX of the Education Amendments of 1972, and the Civil Rights Act of 1991. With each of these measures, Congress enhanced the legal structure that provided a path toward

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* Edward M. Kennedy is the senior United States Senator from Massachusetts and the second longest-serving current member of the Senate. He was first elected in 1962 to complete the final two years of the Senate term of his brother, Senator John F. Kennedy, who was elected President in 1960; thereafter Senator Kennedy has been re-elected to eight full terms. Since 1963, he has served on the Senate Judiciary Committee, which conducts oversight of the Civil Rights Division.

[1] Pub. L. No. 85–315, 71 Stat. 634 (codified as amended in scattered sections of 28 and 42 U.S.C.).

[2] *See generally* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION (Robert Loevy et al. eds., 1997).

[3] *See* BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 10–12 (1997).

[4] Working together with the U.S. Marshals Service, the Division was instrumental in James Meredith's successful enrollment as the first African American student at the University of Mississippi in 1962. In 1963, Division attorneys helped defuse a near riot following the racially motivated murder of Medgar Evers, the head of the Mississippi NAACP. Attorneys in the Division later used their experience in voting rights cases to help draft the landmark Voting Rights Act of 1965. BRIAN K. LANDSBERG, FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT 155 (2007).

[5] Congressman John Lewis, who served during the 1960s as the Chair of the Student Non-Violent Coordinating Committee, has said that civil rights advocates "knew that individuals in the Department of Justice were people who we could call any time of day or night during the sixties. The Civil Rights Division of the Department of Justice was truly a federal referee in [the] struggle for civil rights and civil justice." *The 50th Anniversary of the Civil Rights Act of 1957 and its Continuing Importance: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Rep. John Lewis).

achieving the American ideal of equal justice under the law. These laws also expanded the responsibility of the Civil Rights Division to translate the laws' promise into reality. Today the Division serves as the federal government's public and internal voice on civil rights, representing the United States in the nation's courts and serving as an authority and resource for other government agencies on issues relating to discrimination.

Despite, or perhaps because of, its importance and effectiveness, the Division has always been controversial. Some resisted its creation in 1957, viewing federal involvement in civil rights as a violation of "states' rights," an attitude that is far less prevalent today but has never entirely disappeared. Inevitably, disputes arose over the scope of remedies the Division should seek and its interpretations of these civil rights laws. Over the years, however, a shared commitment to equal opportunity under law has generally produced cooperation between the Division's corps of career employees (including attorneys and other experienced professionals) and its political appointees.

Under the Bush Administration, however, the vital cooperation between political appointees and career civil servants in the Division has broken down, with troubling consequences.[6]

The Civil Rights Division is not the only unit of government to have suffered similar harm under the Bush Administration. On topics ranging from the conduct of the military to environmental protection, from the enforcement of labor laws to unprecedented assertions of executive power, the Administration's hallmark has been an unfailing adherence to a political agenda that elevates ideology over experience and expertise, and a corresponding heavy-handedness in the treatment of career civil service employees by the Administration's political appointees. These failings have produced a series of scandals that have rocked the Justice Department, including the politically motivated firings of at least eight U.S. Attorneys and the production of secret opinions supporting the legality of torture. Nowhere, however, have these problems more consistently harmed the Department than in the Civil Rights Division. The result has been significant damage to the Division's effectiveness, its reputation, and the morale of its career employees.

This Article surveys the damage done to the Division in the years from 2001 to 2008 and suggests steps to repair it. Part I describes how political appointees have circumvented important institutional traditions and long-standing personnel practices in an effort to reshape the Division's corps of career employees to fit a more ideological and partisan mold. Part I also recommends changes in Division procedures that will help prevent future abuses. Part II describes how the Administration's politicized approach to

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[6] *Changing Tides: Exploring the Current State of Civil Rights Enforcement Within the Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2007) [hereinafter *Changing Tides*] (statement of Joseph D. Rich, Director, Fair Hous. Project, Lawyers' Comm. for Civil Rights Under Law).

law enforcement has skewed the Division's priorities and, in some instances, undermined the Division's mission to defend civil rights. Part II argues that enforcement efforts should be returned to their historic focus. Part III offers a summary of what is needed to restore the Division's function as the federal government's voice for civil rights.

I. Politicizing the Division

The root of the Civil Rights Division's current problems is that the Bush Administration has viewed it less as a law enforcement agency than as a means for advancing the Administration's ideological and partisan agenda. The Administration has sought to institutionalize shifts in policy by altering long-standing Division procedures and replacing long-term career professionals with new hires who share the Administration's ideology. Although the most dramatic and visible changes have occurred in the Division's Voting Section, Employment Litigation Section, and Appellate Section, they have affected the entire Division to some degree. The refusal to enforce civil rights in many important areas has led to the departure of numerous experienced Division professionals and has caused insecurity among the remaining career officials. As a result, the Division has largely failed over the past seven years to fulfill its role as the nation's civil rights enforcement agency.

The Administration's efforts to politicize the Civil Rights Division have three related aspects, the combination of which has undermined the reciprocal relationship of trust between career and political staff. First, the Administration's appointees have ignored and sometimes punished career officials for making politically incorrect recommendations. Second, the Administration has changed long-standing hiring practices by injecting partisan considerations into the hiring process. Third, political appointees have interfered with day-to-day personnel matters in the sections.

A. Breakdown in Interaction Between Political Leadership and Career Employees

In the current Administration, the interaction between the Division's political leadership and its career professionals has broken down. Political appointees have lacked the depth of substantive expertise and the institutional knowledge essential to the Division's day-to-day activities and its litigation in federal courts. At the same time, they have distrusted career personnel to an unprecedented degree and have been unwilling to engage with career personnel in running the Division. Because they have refused to cooperate or communicate with career staff, political leaders have failed to perform their roles effectively.

The Civil Rights Division consists of ten substantive sections that perform the day-to-day work of law enforcement.[7] A career attorney—the Section Chief—heads each section, and is assisted by a variable number of Deputy Chiefs, who are also career attorneys. These managers supervise the other career attorneys, who are primarily responsible for conducting litigation and providing legal advice. The career attorneys work with a variety of support personnel and other professionals in each section. They are hired according to civil service laws that require merit selection. It is unlawful to consider political affiliation in hiring career attorneys.[8]

The Division's political leadership consists of an Assistant Attorney General, nominated by the President and confirmed by the Senate, who leads the Division; Deputy Assistant Attorneys General; and a varying number of counsel and special assistants. The Deputy Assistant Attorneys General each supervise the work of one or more sections and are political appointees, with the exception that, traditionally, one Deputy Assistant Attorney General has been a career attorney. Major decisions such as the initiation of a grand jury, the launching of a major civil investigation, or the filing of a lawsuit or an appellate brief, are generally approved by political appointees.

The relationship between career and political officials is one of reciprocal responsibilities. Its success depends on mutual respect for the roles of each and continuing dialogue about the work of the Division.

Career attorneys must respect the authority of the political leadership to make the ultimate decisions, as long as those decisions are ethical and within the bounds of the law. They also have an obligation to give political leaders their best and most thorough advice, protect the confidentiality of that advice, and implement the decisions of the political leadership. The political leadership must understand that career attorneys bring substantive knowledge and institutional wisdom acquired through years of enforcing civil rights laws. At its best, decision making in the Division has traditionally involved considerable back-and-forth discussion between career attorneys and political leaders in working through difficult issues. Political leaders ultimately have an obligation to implement the President's agenda, and they bring the connections and clout to advance that agenda, but the Division benefits when they do so after full and informed dialogue with the career attorneys.[9]

To an unprecedented extent, political appointees in the Bush Administration have chosen to disregard the views of career personnel and discouraged career attorneys from communicating with political officials.[10] The practice of career Section Chiefs meeting regularly with political leadership

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[7] The sections are: Appellate, Coordination and Review, Criminal, Disability Rights, Educational Opportunities, Employment Litigation, Housing and Civil Enforcement, Office of Special Counsel for Unfair Immigration Related Employment Practices, Special Litigation, and Voting. *See* Civil Rights Division Home Page, http://www.usdoj.gov/crt/secsites.html (last visited Apr. 21, 2008).

[8] *See* 28 C.F.R. § 42.1 (2007).

[9] *See* LANDSBERG, *supra* note 3, at 3.

[10] *Changing Tides*, *supra* note 6, at 117 (statement of Joseph D. Rich).

was largely discontinued after President Bush took office,[11] a change that significantly hindered the Section Chiefs' ability to serve their traditional role as intermediaries between their sections and political appointees.[12]

The Administration also undertook a sweeping upheaval of section management, which included not only the transfer of Section Chiefs, but also the removal of Deputy Chiefs.[13] In the Voting Section, many enforcement responsibilities were taken away from the Voting Chief and given to supervisors or other attorneys in the Section who were viewed as loyal to political appointees. Several managers were transferred after expressing a legal position at odds with the views of political appointees.[14] Many of the affected managers had held responsible positions through the Reagan, Bush, and Clinton Administrations, and had established themselves as outstanding public servants. These changes had a devastating effect on morale and sent an unmistakable message to career employees that disagreement with the political leadership would be punished.

B. Changes in the Division's Hiring

In 2002, the Division changed its hiring practices, allowing political appointees to control major hiring decisions, and eliminating the long-standing role of career attorneys in hiring. The Division's political officials used these new practices to ensure that those hired by the Division shared their own ideology and partisan affiliation.

The Division also eliminated the role of career attorneys in interviewing and then recommending applicants for hire into the Honors Program.[15] Instead, the Division placed the process almost entirely in the hands of political appointees, adding to the Honors hiring process a "Department-level

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[11] *Id.*

[12] According to a former head of the Voting Section, "[s]uch meetings had always been an important means of communication in an increasingly large Division that was physically separated in several different buildings." *Id.*

[13] According to a former head of the Voting Section, "it is rare for political appointees to remove and replace career section chiefs for reasons not related to their job performance." *Id.*

[14] For example, Robert Berman, the longtime Deputy Chief of the Voting Section, who supervised enforcement of Section 5 of the Voting Rights Act, was transferred shortly after he concurred with the career staff recommendation to object to a Georgia law requiring voters to produce photo identification. *See* Responses of Assistant Attorney General Wan Kim to Senate Judiciary Committee Questions Concerning Oversight of the Civil Rights Division 44–45 (received April 11, 2007) (on file with author).

[15] Charles Cooper, a former Deputy Assistant Attorney General in the Reagan Administration has said that the system of hiring through committees of career professionals 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 litmus test on . . . the individuals who were ultimately determined to be best qualified.

Charlie Savage, *Civil Rights Hiring Shifted in Bush Era*, BOSTON GLOBE, July 23, 2006, at A1.

review."[16] The Division also changed its procedures for hiring experienced attorneys, so that political appointees would make the key decisions about which applicants to interview or hire for such positions. In many instances, political officials excluded career Section Chiefs from the hiring process entirely. Since the recent public disclosures of these abusive hiring practices, the Division has purported to re-involve career managers, but not line attorneys, in the hiring process. It remains to be seen whether the re-involvement will be meaningful.

The changes in hiring practices quickly altered the make-up of new Division personnel. According to a review of hiring data for the years 2001 to 2006 by the *Boston Globe,* "[h]ires with traditional civil rights backgrounds—either civil rights litigators or members of civil rights groups—have plunged."[17]

At the same time it was making these changes in its hiring processes, the Division was also pressuring attorneys it viewed as liberal holdovers to depart.[18] Senior attorneys were offered buy-outs as incentives to leave, and many accepted.[19] Many of those who stayed were subjected to threats of involuntary transfer, removed from important cases, or assigned to work on non-civil rights matters. These changes diminished morale and convinced many experienced attorneys to leave the Division.

C. Political Appointees' Involvement in Other Personnel Matters

Political appointees also became involved in day-to-day personnel matters of the sections, which had been left largely to career management in previous administrations. This new involvement extended to requiring changes in personnel evaluations and dictating attorney case assignments; such assignments had virtually always been determined by career section managers familiar with attorney caseloads and the section's needs. Such micromanagement ensured that sensitive or controversial cases would be handled by those hired through the politicized process and was used to punish those who expressed dissenting views.

Political appointees ordered the involuntary transfer of career attorneys for political reasons, despite objections by their immediate supervisors.[20]

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[16] *Changing Tides*, *supra* note 6, at 240 (responses of Wan Kim, Assistant Attorney General, to questions from Chairman Conyers and Chairman Nadler).

[17] Savage, *supra* note 15.

[18] *See Changing Tides*, *supra* note 6, at 118 (statement of Joseph D. Rich) ("There has always been normal turnover of career staff in the Civil Rights Division, but it has never reached such extreme levels and never has it been so closely related to the manner in which political appointees have managed the personnel in the Division. It has stripped the division of career staff at a level not experienced before.").

[19] Savage*, supra* note 15 (In 2005, "the administration offered longtime civil rights attorneys a buyout. Department figures show that 63 division attorneys left in 2005—nearly twice the average annual number of departures since the late 1990s."); *see also* Dan Eggen, *Civil Rights Focus Shift Roils Staff at Justice*, WASH. POST, Nov. 13, 2005, at A1.

[20] Former Acting Assistant Attorney General Bradley Scholzman reportedly ordered the involuntary transfer of at least three well-regarded senior attorneys in the Appellate Section

Case assignments were also specifically based on partisan loyalty. One political appointee reportedly asked a supervisor if a career lawyer who had voted for Senator John McCain rather than for George W. Bush in the 2000 Republican primary could still be trusted.[21] In the Appellate Section, political appointees took the highly unusual step of dictating the assignment of cases to particular attorneys.[22] The Appellate Section Chief was ordered to remove sensitive cases from experienced career lawyers and reassign them to recently hired attorneys whose résumés listed membership in conservative organizations.[23] In addition, political appointees stripped some experienced attorneys of all of the civil rights cases on their dockets and assigned them nothing but immigration appeals because they were viewed as insufficiently loyal to the Bush Administration's partisan agenda.[24]

Former Section Chief Joseph Rich has stated that the political leadership asked him to change the performance evaluations of career staff because the leadership disagreed with the attorneys' legal recommendations, not because of the caliber of the attorneys' work.[25] A former Counsel to the Assistant Attorney General, Hans Von Spakovsky, has admitted that he suggested changes to the performance evaluations of career attorneys, subject to the approval of a Deputy Assistant Attorney General.[26]

II. Skewed Enforcement Priorities

A. Voting Section

The Voting Section of the Civil Rights Division has enormous significance in civil rights enforcement. It is charged with enforcing the Voting Rights Act of 1965, Section 5 of which requires jurisdictions with a history of voting discrimination to submit any election-related changes to either the Department of Justice or the United States District Court for the District of Columbia. Covered jurisdictions may not implement a voting change unless they have demonstrated that these changes do not have a discriminatory pur-

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who had been hired as career attorneys in the Clinton Administration, saying that he wanted to "make room for some good Americans." Carol D. Leonnig, *Political Hiring in Justice Division Probed*, Wash. Post, June 21, 2007, at A1.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] A number of Department of Justice components, including the Civil Rights Division, had agreed to handle certain deportation appeals in order to assist with a backlog of such cases. *Changing Tides*, *supra* note 6, at 257–259 (responses of Wan Kim, Assistant Attorney General). However, in the Appellate Section, these cases appear to have been used as a means of preventing attorneys who had not been hired through the Bush Administration's politicized process from handling civil rights matters that might be deemed sensitive or controversial. Leonnig, *supra* note 20. In 2005, almost forty percent of attorney time was devoted to deportation appeals. *Changing Tides*, *supra* note 6, at 118 (statement of Joseph D. Rich).

[25] *Changing Tides*, *supra* note 6, at 114 (statement of Joseph D. Rich).

[26] Letter from Hans Von Spakovsky, nominee to the Federal Election Commission, to Chairwoman Dianne Feinstein and Senator Robert Bennett 3 (June 29, 2007), *available at* http://rules.senate.gov/hearings/2007/Spakovsky1.pdf.

pose or effect and have obtained "preclearance" to implement the change.[27] In addition, the Voting Section observes elections for irregularities affecting citizens' voting rights and provides technical assistance to jurisdictions in complying with federal voting laws.

As recent elections have shown, federal involvement in protecting voting rights is essential. Ensuring that minority voters are not denied meaningful electoral participation is central to the federal government's law enforcement role. Strong recent evidence suggests that racial discrimination in voting persists.[28]

Because of its potential to influence elections, the Voting Section has always maintained strict safeguards to ensure that it does not become an instrument for partisan advantage. Like other Sections in the Division, it has traditionally been headed by a career Chief and career Deputy Chiefs and generally has not included political appointees among its ranks. That tradition was breached early in the Bush Administration. In March 2001, Attorney General Ashcroft took advantage of national concern about the electoral process following the 2000 election to announce the formation of a new election administration unit in the Section, without any consultation whatsoever with career staff. The unit initially consisted of three attorneys, two of whom were hired into career slots, but were selected because of their partisan activities. The use of career slots to stock the Division with political appointees became a pattern throughout the Division, but its effects were particularly severe in the Voting Section, where partisan enforcement of the law can have a direct and devastating effect.

The Voting Section had operated for thirty years according to formal procedures in Departmental guidelines that ensured careful analysis and several layers of review. Section 5 submissions from jurisdictions seeking clearance to implement a voting change were investigated in the first instance by members of a professional unit of civil rights analysts. By 2001, a majority of these analysts had extensive experience, including contacts in local jurisdictions who could provide information about the likely effect of a voting change. These analysts worked with career attorney supervisors to produce carefully researched memoranda analyzing the effect of a proposed change and recommending approval or rejection. The decision was reviewed at several levels. If the analysts' recommendation was to reject the change, it would eventually be reviewed by the Assistant Attorney General. Each step of the process involved careful written analysis. In the rare instances when an Assistant Attorney General rejected a staff recommendation, he or she set forth in writing the reasons for that decision. The process for developing litigation was similarly careful and was also subject to multiple layers of review to ensure that decisions were made on the basis of the law, not politics.

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[27] 42 U.S.C.A. § 1973b(a)(1)(D) (2007).

[28] Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

These safeguards, however, gave way during the Bush Administration. The injection of politically selected attorneys into the Section led to the demise of nonpartisan law enforcement. The Section 5 unit was allowed to atrophy; experienced analysts left and were not replaced. In the past seven years, the Voting Section has taken actions in Section 5 cases that seem intended to advance the electoral prospects of the President's party, rather than protect against discriminatory voting changes.

The Section has also adopted a political approach to enforcement of Section 2 of the Voting Rights Act, which prohibits discrimination in voting based on race, national origin, or language minority status.[29] The result has been almost a complete halt to the Division's use of this provision to challenge discrimination against African Americans. In addition, the Division has sought to use the Help America Vote Act[30] and the National Voter Registration Act[31] primarily to restrict ballot access, although the principal Congressional purpose of both statutes was to enhance citizens' access to the ballot.

1. Section 5 of the Voting Rights Act

Under Section 5 of the Voting Rights Act, the Division reviews voting changes only to determine whether the submitted change was adopted with a discriminatory purpose or would have a discriminatory effect; partisan considerations are irrelevant to the analysis.[32] Numerous reports indicate that the politicization of Section 5 enforcement began soon after the Bush Administration's political leadership took control in the Civil Rights Division.[33]

In 2002, the Division unjustifiably delayed preclearance of a Mississippi redistricting plan drawn by a state court. Because of this delay, a federal court was able to order entry of its own plan, which was more favorable to Republicans.[34]

In 2003, partisan political concerns again appeared to tip the balance in the Division's review of Texas's high-profile and highly unusual mid-census redistricting plan. The Department approved the highly controversial plan, touted by then-House Majority Leader Tom Delay as key to cementing the

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[29] 42 U.S.C. § 1973 (2000).

[30] 42 U.S.C. §§ 15301–15545 (2000).

[31] 42 U.S.C. § 1973gg (2000).

[32] *See* 42 U.S.C. § 1973c (2006). Section 5 was amended in 2006 specifically to prohibit submissions adopted with a discriminatory purpose, and to specify that "[t]he term 'purpose' . . . shall include any discriminatory purpose." 42 U.S.C. § 1973c(c). At the time of the Section 5 submissions discussed here, the standard of review was even narrower, since Section 5 had been held to prohibit only voting changes with a retrogressive effect. *See* Reno v. Bossier Parish II, 528 U.S. 320, 341 (2000).

[33] *See, e.g.*, Dan Eggen, *Politics Alleged in Voting Cases*, WASH. POST, Jan. 23, 2006, at A1.

[34] Rather than accept the recommendation of career attorneys to preclear the redistricting plan submitted by Mississippi, the Division's political leadership stalled the decision by asking the state for further information, thereby allowing a federal court to impose a plan more favorable to Republicans.

Republican majority in the U.S. House of Representatives.[35] The political leadership precleared the plan over the unanimous objection of career staff, who had concluded that the plan violated Section 5 and would harm minority voters.[36]

Perhaps the most dramatic example of the politicization of Section 5 enforcement came in 2005 when the Division approved a controversial law requiring each Georgia voter to produce a government-issued photo identification at the polling place in order to cast a ballot on election day.[37] The Georgia statute had been approved by the state legislature on a party-line vote and was widely viewed as beneficial to Republicans, since many minorities—who tended to vote Democratic—lacked the required identification and were unlikely to be able to obtain it easily. As with the Texas redistricting, the Section's political leadership overruled the recommendation of career professionals and precleared the Georgia law. A career employee who worked on the issue stated that political considerations permeated the review of the matter, and that it was obvious from the start that the political leadership intended to preclear the Georgia law.[38]

After the preclearance of the Georgia law, each of the career professionals who recommended objecting to the Georgia submission was reprimanded.[39] The sole member of the investigating team who had urged approval of the law was a new attorney hired under the Division's politicized hiring procedures. He received a cash award for his work on the Georgia submission.[40] A federal district court later enjoined the 2005 Georgia photo identification requirement, likening it to a Jim Crow era poll tax. A panel of the Eleventh Circuit upheld the injunction,[41] and the state later abandoned the law, replacing it with less severe legislation.[42]

The Mississippi, Texas, and Georgia experiences severely damaged the morale of the Voting Section's Section 5 staff. Each of these instances was a sharp departure from past practice in Section 5 submissions. In particular, the Georgia 2005 preclearance was perceived as a clear signal from the new Voting Section Chief and the political appointees who appointed him that

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[35] Republicans conceded that the only reason for the plan's adoption was to increase Republican voting strength in Texas. *See* League of United Latin American Citizens v. Perry, No. 2:03-CV-00354-TJW, 2007 WL 951684 (E.D. Tex. Mar. 28, 2007).

[36] *See* Citizens' Comm'n on Civil Rights, The Erosion of Rights: Declining Civil Rights Enforcement Under the Bush Administration 37 (Taylor et al. eds., 2007); Section 5 Recommendation Memorandum (Dec. 12, 2003), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf.

[37] Eggen, *supra* note 33.

[38] *Oversight Hearing on the Voting Section of the Civil Rights Division of the U.S. Department of Justice Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 110th Cong. 4 [hereinafter *House Oversight Hearing*] (statement of Dr. Toby Moore, political geographer, Voting Section, U.S. Dept. of Justice, 2000–06).

[39] *Id.* at 7.

[40] *Id.*; *see also Changing Tides*, *supra* note 6, at 50–51, 243–244, 262–265 (responses of Wan Kim, Assistant Attorney General).

[41] United States v. Billings, No. 07-12113, 2008 WL 194912 (11th Cir. Jan. 24, 2008).

[42] H.R. 224, 148th Leg. (Ga. 2005) (enacted).

those who disagreed with the political management would suffer serious consequences.

Substantive enforcement has also suffered because the number of Section 5 submissions has increased at the same time that the overall number of personnel dedicated to reviewing Section 5 submissions has declined.[43] In fiscal year 2006, the Division processed the largest number of Section 5 submissions in its history.[44] Despite this increase in submissions, the staff dedicated solely to reviewing such submissions has been reduced to just two full-time attorney reviewers and ten civil rights analysts, none of whom currently holds a supervisory position and only three of whom are senior analysts.[45] By comparison, in 2001, six attorneys and twenty-six civil rights analysts were employed to review just over half as many submissions.[46] Thus the Section 5 unit is now responsible for completing more submissions with fewer staff, and must do so within the same sixty-day deadline that has always applied under the Voting Rights Act. If the Division fails to act within sixty days, the change goes into effect.[47]

2. *Decline in Race Discrimination Cases Under Section 2 of the Voting Rights Act*

The Division's approach to Section 2 of the Voting Rights Act reflects its changed priorities. Section 2 prohibits any practices and procedures that deny individuals an equal opportunity to participate in the political process on the basis of race, national origin, or membership in a language minority group.[48] Unlike Section 5, Section 2 may be enforced by private litigants as well as the Civil Rights Division. The Justice Department's role is still critical, however, because the Voting Section's resources and expertise make it uniquely suited to litigate the most complex and important Section 2 cases, which typically involve claims of minority vote dilution.[49] Cases alleging discrimination in voting against African Americans and Latinos have traditionally been a significant proportion of the Section's work,[50] but the Bush Administration has turned away from these important cases.

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[43] *Changing Tides*, *supra* note 6 at 115, 118 (statement of Joseph D. Rich).

[44] *Id.* at 242 (responses of Wan Kim, Assistant Attorney General).

[45] *Id.* at 118 (statement of Joseph D. Rich); *but see id.* at 242 (responses of Wan Kim, Assistant Attorney General).

[46] *Id.* at 118 (statement of Joseph D. Rich). The former Voting Section Chief, Joseph Rich, who left the Division in 2005, has testified that he made several requests to fill civil rights analyst vacancies, to no avail. Mr. Rich has also expressed concern about the Voting Section's ability, with its reduced staff, to fulfill its Section 5 responsibilities, especially in the coming redistricting cycle. *Id.*

[47] 42 U.S.C. § 1973c(a) (2006).

[48] 42 U.S.C. § 1973 (2006).

[49] *House Oversight Hearing*, *supra* note 38; CITIZENS' COMM'N ON CIVIL RIGHTS, *supra* note 36, at 32.

[50] *See* Responses of Attorney General Michael Mukasey to Questions to Alberto Gonzales, U.S. Senate Committee on the Judiciary, "Answer #149 Attachment," Voting Section Case List 1–5 (received Feb. 1, 2008) (available from the U.S. Senate Committee on the Judiciary, on file with author) (listing all cases filed by the Civil Rights Division's Voting Section from

The Administration's lack of commitment to Section 2 is startlingly clear from its record. Excluding cases developed during the Clinton Administration, in seven years of the Bush Administration, the Voting Section has filed only ten cases under Section 2. Only one of those cases, *United States v. City of Euclid*,[51] alleged racial discrimination in voting against African Americans. This is the same number of cases that the Division has pursued alleging voting discrimination against white voters. By comparison, the Clinton Administration filed eighteen Section 2 cases on behalf of African American voters, in addition to maintaining other vigorous enforcement activities. Although the number of cases brought in a single area is generally an imperfect measure of enforcement activity, this striking disparity in enforcement between the two administrations is difficult to ignore.

Equally disturbing is the Division's political emphasis on cases designed to encourage states to purge their voter registration lists, rather than on enforcement efforts that would increase ballot access. The National Voter Registration Act was passed in 1993 to make voter registration more accessible.[52] Its central provisions require jurisdictions to provide voter registration through departments of motor vehicles and other government agencies. Provisions were also added to offset the possibility of fraud arising from large increases in registration. The Bush Administration turned the statute on its head by failing to enforce the access provisions and by using the anti-fraud provisions as tools of vote suppression. The Voting Section's most recent cases under the Act allege that states violated Section 8 of the Act by failing to remove ineligible voters from voter rolls. Notably, several of these cases do not allege that the challenged registration procedures harmed the voting process in any way. In fact, the charges were designed merely to remove obsolete information from registration lists.[53] Conversely, the Division conspicuously has failed to enforce provisions that facilitate voter registration.

3. Attrition and Morale

The Section's turn away from its core missions of protecting the voting rights of racial minorities and increasing access to the ballot has devastated morale and produced damaging attrition. The former head of the Voting Section testified in 2007 that "20 of the 35 attorneys in the Voting Section (over 54%) have either left the Department, transferred to other sections (in some cases involuntarily), or gone on details since April 2005."[54] All of the career professionals who worked on the 2005 submission of Georgia's voter photo identification law have left the Voting Section, with the exception of

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1976 to January 2008, and showing that cases alleging discrimination against African Americans and Latinos have been a substantial number of the of Division's Section 2 filings).

[51] 523 F. Supp. 2d 641 (N.D. Ohio 2007).

[52] 42 U.S.C. § 1973gg (2000).

[53] *See* Citizens' Comm'n on Civil Rights, *supra* note 36, at 32.

[54] *Changing Tides*, *supra* note 6, at 118 (statement of Joseph D. Rich).

the single investigating attorney who agreed with the result ultimately adopted by the Division's political leadership.

B. Employment Litigation Section

The Employment Litigation Section enforces Title VII of the Civil Rights Act of 1964, as amended, with respect to state and local employers.[55] Although most employment litigation suits occur in the private sector and therefore fall within the jurisdiction of the Equal Employment Opportunity Commission, the Division's enforcement role with respect to public employers has great practical and symbolic importance. Public employers often provide greater benefits and job security than private companies, and therefore may be a source of economic stability for workers, particularly in times of economic downturn. In addition, it is particularly important that states and localities—which represent all residents and are funded by public taxes—respect the civil rights of the entire community. The Division's federal enforcement authority under Title VII sends the important message that the federal government will hold public employers accountable when they fail to adhere to the Act. The Division's efforts to desegregate police and fire departments have made them more reflective of the communities they serve, which, in turn has made them more effective.

The Employment Litigation Section was the first to see substantive changes in its enforcement priorities and personnel during the Bush Administration. The most significant changes in the Section's priorities have been a dramatic decline in the number of race and national origin discrimination cases brought on behalf of African American and Latino workers, and a reduction in pattern-or-practice cases. This change in priorities is particularly significant because pattern-or-practice cases and cases to remedy discrimination against African Americans and Latinos had long been a core part of the Section's work, in large part because they addressed the most frequent and significant problems of workplace discrimination. The decline in the Section's pursuit of these cases has been accompanied by an increase in cases alleging religious discrimination or racial discrimination against white males.

1. The Reduction in Cases on Behalf of African American and Latino Workers

In recent years, complaints of workplace discrimination against African Americans and Latinos have been by far the largest category of job discrimination complaints filed with the Equal Employment Opportunity Commission, the federal agency charged with receiving reports of discrimination

[55] Title VII divides federal enforcement of its provisions between the Equal Employment Opportunity Commission, which has authority in cases involving private employers, and the U.S. Attorney General, who has authority with regard to state and local employers. 42 U.S.C. § 2000e-5 (2000).

under the major federal job discrimination laws.[56] Nonetheless, such cases have been a relatively small part of the Section's work under the Bush Administration. It has filed only seven cases alleging discrimination against African Americans alone, and two cases alleging discrimination against both African Americans and Latinos.[57] The Section has filed almost as many cases alleging national origin or race discrimination against whites as against African Americans and Latinos combined.[58]

2. Decline in Disparate Impact Cases

Traditionally, one of the Section's most important functions has been to address systematic discrimination through lawsuits that allege a pattern or practice of discrimination. Such suits have special significance because they directly benefit a large number of employees. Many of these cases have involved so-called disparate impact discrimination, in which proof of discrimination is shown by demonstrating that a specific employment practice has a disproportionately negative impact based on race, national origin, gender, color, or religion, and that the practice is not justified by business necessity.[59] However, the Bush Administration has dramatically reduced the number of disparate impact cases the Division pursues under Title VII.

In 2001, Ralph Boyd, then head of the Civil Rights Division, suggested that the Division would not bring disparate impact cases unless it had "additional evidence that is indicative of—or reflects—disparate treatment, that is to say: intentional discrimination."[60]

Although the Section continued to pursue two disparate impact cases that had been filed by the previous administration,[61] it filed no new disparate impact cases until January 2004, after the dearth of disparate impact cases and involuntary transfers of Division managers had sparked widespread criticism from civil rights groups and Members of Congress.[62] Overall, the Em-

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[56] Before filing suit regarding an individual claim of job discrimination under Title VII, the Americans with Disabilities Act, or the Age Discrimination in Employment Act, a plaintiff must file a charge with the EEOC. 42 U.S.C. § 2000e-5(f)(1) (2006); 42 U.S.C. 12117 (2006); 29 U.S.C. 626(d) (2006). In 2006, 71% of the race discrimination charges referred by the EEOC to the Civil Rights Division were filed by African Americans, and 42% of all national origin discrimination charges referred to the Civil Rights Division were filed by Latinos. Equal Employment Opportunity Commission charge filing data (on file with the author).

[57] *See* Civil Rights Division, U.S. Dep't of Justice, Employment Discrimination Cases, http://www.usdoj.gov/crt/emp/papers.html (last visited on May 7, 2008). This number does not include cases that were investigated and filed by one of the U.S. Attorney's Offices or that were investigated during the Clinton Administration.

[58] *Id.*

[59] 42 U.S.C. § 2000e-2(k) (2006).

[60] Citizens' Comm'n on Civil Rights, Employment, http://www.cccr.org/justice/issue.cfm?id=11 (last visited May 9, 2008).

[61] United States v. City of Garland, No. Civ.A.3:98-CV-0307-L, 2004 WL 741295 (N.D. Tex. Mar. 31, 2004); United States v. Delaware, *93 Fair Empl. Prac. Cas. (BNA) 1248 (*D. Del. 2004).

[62] The case filed in January 2004 was *United States v. City of Erie*, 411 F. Supp. 2d 524 (W.D. Pa. 2005), a case which had been recommended for suit years before the Division's political leadership authorized the filing of a complaint. Ironically, *Erie* involved a case very

ployment Litigation Section's litigation of disparate impact claims has been greatly reduced. Of thirteen pattern-or-practice claims filed during this Administration, only four raised disparate impact claims.[63] By comparison, the vast majority of pattern-or-practice cases filed during the Clinton Administration involved disparate impact challenges. The Division resolved only forty-six Title VII cases between January 20, 2001 and June 20, 2007, including only eight pattern-or-practice cases.[64] In contrast, the Division during the Clinton Administration resolved approximately eighty-five Title VII complaints, including more than twenty pattern-or-practice cases.[65]

C. Appellate Section

The Appellate Section also has been severely affected by the Division leadership's focus on political considerations. Because the section handles cases in federal courts of appeals and advises the Solicitor General's office on Supreme Court filings, the political management has sought to control its functions and to ensure that the most sensitive cases are handled by persons hired under political criteria adopted during the Bush Administration.

1. Changes in Substantive Enforcement

The Section's enforcement workload has declined as the litigation activity of the other Sections has slowed. Similarly, the Division's filing of amicus briefs has slowed substantially. The amicus briefs filed by the Division in courts of appeals are an important indicator of the Division's policy choices since they are discretionary. Traditionally, the Division has conducted a vigorous amicus program. The filing of amicus briefs permits the Division to participate in the interpretation of the statutes and constitutional provisions that it enforces. Because of the Division's experience in litigation pursuant to these statutes, its views generally receive careful attention from courts.

The few briefs that the Division has filed reflect the general emphasis seen in other Sections: a priority on religious discrimination and a shift away from cases of racial discrimination against African Americans. Since the Bush Administration's political leadership arrived in 2001, the Appellate Section has filed only two amicus briefs in civil rights cases involving African American victims.[66]

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much like *Lanning*. The United States alleged that a physical test used to screen applicants for firefighter positions had an unjustified discriminatory effect on women.

[63] *Civil Rights Division Oversight: Hearing Before the S. Comm. On the Judiciary*, 110th Cong. (2007) (testimony of Helen Norton, Professor, University of Maryland School of Law), available at http://judiciary.senate.gov/testimony.cfm?id=2837&wit_id=6548 (citing Civil Rights Div., U.S. Dep't of Justice, Employment Discrimination Cases, http://www.usdoj.gov/crt/emp/papers.html (last visited May 9, 2008)).

[64] *Id.*

[65] *Id.*

[66] See Civil Rights Div., U.S. Dep't of Justice, Appellate Briefs, http://www.usdoj.gov/crt/app/briefs.htm (last visited May 9, 2008).

In addition, in the months before the 2004 election, the Division's amicus filings created an appearance that they were motivated by a desire to aid the President's bid for reelection. In the weeks before the 2004 election, the Appellate Section filed briefs on controversial voting issues in Ohio, Florida, and Michigan. Each of these states was expected to be closely contested in the presidential election. In each case, the Division supported the position of the Republican defendants that private citizens had no right to enforce provisions of the Help America Vote Act on counting provisional ballots.[67] The courts soundly rejected the Division's argument that individuals may not enforce the Act's provisions.

The Division's effort to prevent eligible voters from vindicating their right to have their votes counted contradicts its congressionally mandated mission of protecting ballot access.[68] The Division's involvement in these cases contributed to the appearance that it sought to serve partisan interests.

D. School Desegregation and Equal Educational Opportunity

With passage of the Civil Rights Act of 1964, Congress authorized the Division to seek desegregation of the nation's schools.[69] The Division's Educational Opportunities Section has received relatively little public attention during the Bush Administration, and it has apparently been spared from some of the worst political pressures. But it has failed to address the persistent problem of racial segregation in public schools with the vigor that will be needed if the nation is to make progress in overcoming the legacy of racial segregation.

The Section was once the largest in the Division, but it has been allowed to atrophy, and is now one of the smallest. It retains jurisdiction over hundreds of desegregation decrees,[70] but it has far fewer attorneys available to monitor them actively. The Section is not a principal player in efforts to desegregate school systems or offer new solutions to longstanding barriers to equal educational opportunity. The Section has reduced its focus on race

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[67] Brief for the United States as Amicus Curiae Supporting Defendants' Motion to Dismiss and Brief in Support Thereof, Bay County Democratic Party v. Land, 347 F. Supp. 2d 404 (2004) (No. 1:04-cv-10267-DML-CEB); Brief for the United States as Amicus Curiae Supporting Defendant's Motion to Dismiss and Brief in Support Thereof, Florida Democratic Party v. Hood, 342 F. Supp. 2d 1073 (2004) (No. 4:04-cv-00395-RH-WCS); Brief for the United States as Amicus Curiae Supporting Appellant and Urging Reversal, Sandusky County Democratic Party v. Blackwell, 387 F.3d 565 (6th Cir. 2004) (Nos. 04-4265 & 04-4266).

[68] *See* CITIZENS' COMM'N ON CIVIL RIGHTS, *supra* note 36, at 43 ("[T]he Division historically has been in favor of private plaintiffs having access to federal courts in order to vindicate their right to vote, and the Division's briefs went beyond the facts . . . to attempt to restrict *any* private enforcement of . . . HAVA . . . .").

[69] The Civil Rights Act authorized the Department of Justice to initiate desegregation suits in federal court and provided that the Department of Health, Education and Welfare could deny federal funds to segregated school districts. 42 U.S.C. § 2000d-1 (2000); *see also* LANDSBERG, *supra* note 3, at 138–39.

[70] U.S. Comm'n on Civil Rights, Becoming Less Separate? School Desegregation, Justice Department Enforcement, and the Pursuit of Unitary Status xii (2007), available at http://www.usccr.gov/pubs/092707_BecomingLessSeparateReport.pdf.

discrimination and spent its limited resources bringing cases to enhance freedom of religion in educational contexts.[71]

Perhaps most disturbing, the Administration has taken the position that the use of race by school districts seeking to integrate schools voluntarily is unconstitutional—even when consideration of race is the only means of preventing segregation.[72] The Division's position demonstrates the degree to which it has turned away from a constitutional vision that offers a long-term solution to segregation.

These developments have occurred against a backdrop of increasing segregation at the K–12 level in every region of the country.[73] The harms of segregation and benefits of integration are well documented,[74] and there can be no doubt that the nation still needs the Division's active leadership in this area.

III. Rebuilding the Division

Unfortunately, it will not be sufficient simply to eliminate partisan and ideological considerations from the Division's work. The brain drain of the past seven years has reduced the Division's institutional memory and expertise. Nonetheless, despite these challenges, the next Administration will have an opportunity to rebuild the Division, and to institute important systemic changes to safeguard against a repetition of these problems in future administrations.

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[71] While it does not purport to provide a comprehensive list of the Section's cases, the website of the Educational Opportunities Section reflects these priorities. Educ. Opportunities Section, Civil Rights Div., U.S. Dep't of Justice, Cases Sorted by Protected Class, http://www.usdoj.gov/crt/edo/classlist.html (last visited Mar. 17, 2008).

[72] A majority of the Supreme Court rejected this categorical view. *See Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No 1*, 127 S. Ct. 2738, 2792 (Kennedy, J., concurring) ("If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."); *Id.* at 2811 (Breyer, J., dissenting) ("A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it.")

[73] Gary Orfield & C. Lee, Racial Transformation & the Changing Nature of Segregation 11–12 (2006), *available at* http://civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf.

[74] Extensive social science evidence on both sides of this issue was presented to the Supreme Court in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*., 127 S.Ct. 2738, 2775–76; *see also* Nat'l Academy of Educ., Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases (Robert L. Linn & Kevin G. Welner eds., 2007).

A. Safeguards Against Politicization of Personnel Decisions

In past administrations, institutional tradition and the character of Assistant Attorneys General enabled the Division to maintain its professionalism in personnel matters, despite strong disputes over policy and legal interpretation. Assistant Attorneys General understood the importance of maintaining a professional corps of attorneys selected on the basis of merit and commitment to the work of the Division. The Bush Administration has demonstrated that neither tradition nor reliance on the good faith of political leaders is sufficient. The overarching lesson of the Division's experience in the Bush Administration is that there are too few checks against a determined effort to politicize the institution. This fault is particularly severe when the Attorney General's office itself adopts the view that only those loyal to the President and his party should be hired by the Department.[75]

The Division should adopt permanent safeguards against political interference in personnel matters. It should routinely provide all applicants for career positions with a written statement of laws and personnel rules forbidding consideration of political affiliation in hiring, inform them how to report violations, and ask applicants to certify that they have not been asked about their political loyalties during the screening process. This information should also be prominently posted on the Division's website. The Division's website should include clear information about the prohibition against political influence in any personnel decisions, a statement from the Assistant Attorney General that he or she intends to abide by these rules, and clear information on the procedures for employee grievances. Department employees who will be involved in the hiring process should have to complete training in the rules governing the hiring process and should be asked to sign a statement that they will abide by all such rules, including those governing consideration of partisan affiliation.

The process for complaining of misconduct in hiring is inadequate to prevent the injection of partisanship into hiring decisions. Although Department of Justice regulations prohibit considering "political affiliation" in hiring,[76] there is no internal Department process for raising such a claim. The internal Equal Employment Opportunity (EEO) process entertains claims of discrimination based on race, color, religion, national origin, disability, and sexual orientation, but not political affiliation.[77] Claims of discrimination based on political affiliation may be filed with the Office of Special Counsel, which has jurisdiction to receive complaints from some two million mem-

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[75] *The Continuing Investigation into the U.S. Attorneys Controversy and Related Matters: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 16 (2007) (statement of Monica M. Goodling, former Senior Counsel to the Attorney General and White House Liaison, U.S. Dep't of Justice) (acknowledging that she considered political affiliation in the hiring of career attorneys).

[76] 28 C.F.R. § 42.1 (2007).

[77] *See* U.S. Dep't of Justice, Human Resources Order DOJ 1200.1, *available at* http://www.usdoj.gov/jmd/ps/hro_table.htm.

bers of the federal workforce and may take a case to the Merit System Protection Board. There is no recourse from a decision by the Office of Special Counsel against pursuing a matter. Unfortunately, the Office of Special Counsel itself has been tainted by scandal in the Bush Administration and has become an inadequate protector of employee rights. Its jurisdiction is broad, and its existence and functions are little known among career employees.

The Department should undertake a comprehensive examination of the adequacy of its process for remedying politically motivated hiring decisions, since such decisions can so clearly undermine the Department's commitment to the rule of law and the public's confidence that the Department is enforcing the law and not pursuing partisan ends. The Department must commit itself to swift, accessible, and thorough relief for victims of such conduct.

To do so, the Department should establish a group composed of political and career managers, career attorneys, and employees who work in the EEO process to undertake a systematic review of EEO protections and the structure for their enforcement, with particular focus on claims of discrimination based on political affiliation. The review should include evaluation of the effectiveness of the Office of Special Counsel as protector of the rights of Department of Justice employees. The group should examine:

- whether the substantive prohibitions are comprehensive;
- whether the current structure is sufficiently accessible to and understood by Department employees;
- whether the current structure is sufficiently independent of political influence;
- whether the current structure has sufficient resources to complete prompt and thorough investigations and provide remedies; and
- whether the Department should incorporate protection against political affiliation discrimination into the existing EEO process and if so, whether that process should be reformed to strengthen independence from political influence.

The Department should launch this effort immediately.

Because the Administration has also injected partisan and ideological considerations into attorney performance evaluations, awards, assignments, and promotion decisions, the political leadership needs to take an uncompromising public stand against such conduct and establish specific avenues for review of such decisions. At present, the process for challenging an unfavorable performance evaluation runs through the political leadership to the Assistant Attorney General. Although this process predates the Bush Administration, the past seven years have made clear that it is insufficient to protect against abuses by political appointees. It lacks both timelines and the requirement of an official, written response, each of which is essential to ensuring accountability. Too often, appeals of performance evaluations have been allowed to die on the desk of a Deputy Assistant Attorney General.

The Division should impose deadlines on political appointees and require a written response to each appeal of a performance evaluation.

B. Ensuring Productive Interaction Between Career and Political Staff

The leadership of the Division should take concerted steps to foster the necessary dialogue between career and political appointees. Such steps should include regular meetings with Section Chiefs, encouragement of interaction among the Sections, and observance of the tradition of meeting with Section leaders and trial attorneys on complex or controversial recommendations.

Political leaders must be responsive to the recommendations they receive from the Sections. Too often in the Bush Administration, recommendations to file a lawsuit or a brief have been ignored for extended periods of time. It appears that the reduction in case filings during the Bush years occurred in part because investigations were permitted to languish for months without a clear indication of whether they would be approved. Such delays may mean that matters will have to be reinvestigated, and are therefore harmful to the interests of the victims of discrimination, who often await a decision from the Division before deciding whether to file a private suit. Political appointees do not owe career attorneys a positive response, but they always owe a timely response. Nothing is more devastating to the morale of a career attorney than to spend months investigating and developing a lawsuit, only to have the recommendation die through inaction on the desk of a political appointee. The Assistant Attorney General should articulate clear expectations for both political and career staff to ensure a timely process for approving matters for investigation or lawsuit. These expectations should include clear, but flexible, deadlines for advancing matters through the review process, including deadlines for Section Chiefs and political managers to issue decisions. Whenever possible, political appointees should provide a written analysis of the reasons for their actions.

C. Improving the Professional Staff

In addition to providing these safeguards, the Division must begin to rebuild the senior professional staff essential to its mission. The departure of seasoned professionals from the Division and their replacement with persons with relatively little background or interest in civil rights enforcement has undermined the Division's ability to handle some of the most complex cases. The Division has long been one of the few institutions with the resources and expertise to bring complex cases such as those alleging a pattern or practice of disparate impact discrimination or vote dilution or those defending federal affirmative action programs. As a practical matter, many of the attorneys and Deputy Chiefs lack experience in these areas.

Because the hiring process too often de-emphasized merit in favor of partisanship and ideology, it will be necessary for the Division to enforce

clear performance standards to ensure that all career attorneys perform up to the high standards historically expected of Division attorneys. Although many of the newer attorneys were hired because of political connections, as opposed to civil rights backgrounds, some may nonetheless wish to do the work of the Division. Where necessary, they should be assisted in developing the skills needed to succeed.

Similarly, in selecting career section leadership, the Division should return to the model that served it so well before the Bush Administration, which emphasized the selection of individuals who had demonstrated exceptional performance as civil rights litigators, often in the subject matter of the Sections they were selected to lead. Too often, the Administration has selected career leaders who lack basic experience or do not bring records of proven success, and the performance of those sections has suffered. In filling career leadership positions, the Division needs to conduct open and competitive searches and avoid the pre-selection of candidates that is too often a cover for favoritism and not based on merit.

D. Keep Politics out of Voting

The Bush Administration has demonstrated the ease with which the Voting Section can become a powerful engine for partisan political advantage. Both procedural changes and new priorities are required.

The Division's role in enforcing Section 5 of the Voting Rights Act is fundamentally adjudicative and therefore it is particularly important that it remain free from political decision-making. Covered jurisdictions have the burden of demonstrating to the Attorney General that a voting change will not have the purpose or effect of harming minority voters.

As described earlier, the Division's process begins with the work of specialized civil rights analysts who work with career attorneys to produce an analysis and recommendation that will be reviewed by a Deputy Section Chief and Section Chief. If the recommendation is to grant preclearance, the Section Chief has authority to do so without involving any political appointees.[78] Historically, this process has been characterized by written analysis and discussion between career and political officials at every stage. The process has broken down in the Bush Administration, and it needs to be reestablished, institutionalized, and made more transparent.[79]

The Assistant Attorney General should establish a requirement of written analysis at every stage of the process. The Division should also make public its final analysis of all objections and statewide preclearance decisions. A hallmark of this Administration has been its desire to operate in secrecy. Sunshine prevents the abuse of power, and it needs to be restored in the Civil Rights Division.

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[78] Only if the Section Chief recommends objecting to a submission must the Assistant Attorney General approve final action. 28 C.F.R. § 51.3 (2007).

[79] *See supra* text accompanying notes 7–14.

Historically, the Voting Section has produced a careful legal and factual analysis whenever an objection to a voting change has been interposed, but it has resisted public disclosure of this reasoning. Nonetheless, the Division acts as an adjudicating agency pursuant to Section 5, and should therefore produce a public record of its decisions. The past seven years have demonstrated that the need for the public to understand Section 5 decisions outweighs any interest in preserving the confidentiality of the Division's reasoning. The Division need not make public the advice it receives, but it should produce a reasoned and complete statement of the basis for its actions on any matter that reaches the Assistant Attorney General for decision.[80] Such publicly available statements will help to reestablish faith in the legitimacy of the Division's process and help the public to understand the legal and factual reasons for its Section 5 decisions. This requirement should be institutionalized in the Department of Justice Guidelines for the Section 5 process.

As noted earlier, the Division long assigned supervision of the Voting Section to a career Deputy Assistant Attorney General, who served as an institutional check on the temptation to allow partisanship to affect administration of the voting laws. The Division should reinstate and institutionalize that safeguard through Department of Justice regulations that govern the structure and responsibilities of the Division.

E. Establish New Priorities

The Division must return to its historic mission of addressing discrimination based on race in employment, education, housing, and voting. While abandoning the fight against racial discrimination, the Division has put resources into new areas. The Division can continue to pursue these areas, but it must not do so at the expense of racial discrimination and other urgent civil rights issues.

Four areas are in particularly urgent need of renewed emphasis if the Division is to become truly responsive to current civil rights needs. The first is racial integration of the nation's public schools. It is a national disgrace that more than fifty years after *Brown v. Board of Education*,[81] America's schools are becoming more segregated, even as the social science evidence confirming segregation's harms increases. Yet, the Educational Opportunities Section has rejected race-conscious voluntary integration programs and abandoned vigorous monitoring of court-ordered desegregation efforts. Because the recent decision by the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No.1* established new limits on a school district's ability to implement race-conscious voluntary desegregation

[80] The Division has traditionally written a fairly cursory letter to the submitting jurisdiction, which lacks a detailed account of the facts and law that went into the determination.

[81] 347 U.S. 483 (1954).

plans,[82] it is especially important for the Education Section to take a leadership role in formulating effective approaches and strategies to promote integration in light of that decision.

The Division should also revitalize the enforcement of Section 2 of the Voting Rights Act, especially by restoring its traditional focus on combating racial discrimination in voting against African Americans. There is no question that discrimination in voting based on race, national origin, and language minority status remains a critical problem and the Division must do much more to address it.

The Division should also revitalize its approach to police misconduct by reestablishing its Police Misconduct Task Force, which brought together prosecutors from the Criminal Section and attorneys from the Special Litigation Section, the Employment Section, and the Coordination and Review Section to share information and develop coordinated strategies to address unlawful conduct by law enforcement agencies. In conjunction with this effort, the Special Litigation Section should resume its serious commitment to combating police misconduct.

In addition to increasing the areas in which it enforces civil rights, the Division must be willing to use all of the enforcement means at its disposal. It should return to actively pursuing disparate impact and pattern-or-practice cases in employment, as well as pattern-or-practice cases in housing discrimination and lending discrimination to ensure that it has the greatest return on its investment.

Finally, the Division should not spend resources on matters that are either extraneous or incompatible with its mission. The most obvious example during the Bush Administration has been the insistence that the Division's lawyers defend deportation orders obtained by the Office of Immigration Litigation in the Civil Division. At one point, sixty percent of the Appellate Section's filings were in such cases.[83] It is little wonder that the Division's amicus program has withered. The defense of deportation orders is also inconsistent with the mission of the Division. The Division's lawyers are asked to work with the immigrant community to combat discrimination in hiring on the basis of citizenship and national origin. If Division lawyers are viewed as part of the federal government's immigration enforcement effort, they will lose the trust of the people on whose behalf they should be working. Because political appointees recognized that these cases would be anathema to career attorneys, they assigned them as punishment for those attorneys who were viewed as unsympathetic to the administration's partisan or ideological views.

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[82] 127 S. Ct. 2738 (2007).

[83] Responses of Assistant Attorney General Wan Kim to Senate Judiciary Committee Questions Concerning Oversight of the Civil Rights Division 147 (received April 11, 2007) (on file with author).

F. Resources and Oversight

The Division's responsibilities have grown enormously since its creation in 1957. At various times, Congress has asked the Division to take on enforcement of laws such as the Americans with Disabilities Act of 1990, the Freedom of Access to Clinic Entrances Act of 1994, the Violent Crime Control and Law Enforcement Act of 1994, and the Help America Vote Act of 2003, without a commensurate increase in resources. The Division must have the resources to enforce the statutes in its jurisdiction effectively.

It is critical that the Department realistically evaluate the resources needed to accomplish this task and present Congress with a detailed accounting of its needs. In turn, Congress will need to respond promptly by giving the Division the resources to carry out its historic core mission and all of the other assignments it has been given over the years.

Congress has another responsibility. It must engage in careful oversight of the Division. During the years of Republican control of the White House and Congress, there was no meaningful oversight of the Division, and it is no coincidence that those years were the Division's darkest. Since Democrats have regained a majority in Congress and oversight has begun again, improvements have taken place in the Division's operations. There have been positive personnel changes, including a public commitment to eliminating partisanship from personnel decisions. The Division's enforcement activity has improved, including the filing of a case pursuant to Section 2 of the Voting Rights Act and a pattern-or-practice case in employment, both alleging discrimination against African Americans. Nonetheless, much work remains to be done.

G. Leading the Development of Civil Rights Law and Policy

The Civil Rights Division is uniquely suited to take a leading role in the development of civil rights law and policy. In recent years, it has abdicated that role, but it can reassert itself in two ways: through revitalizing its amicus program and renewing its cooperation with Congress.

The Division has had an important role throughout its history as an amicus curiae. Courts have often given its views special attention because the Division speaks from a reservoir of expertise and has traditionally positioned itself as an independent voice that speaks with a broader perspective than the advocates for the individual parties. In recent years, however, the Division has virtually abandoned its amicus program, particularly in the courts of appeals where it can often have the broadest influence. It has filed only a handful of briefs each year since 2001, and a disproportionate number of these filings have focused on religious issues or matters with partisan voting implications. As the world's largest civil rights litigation organization, the Division is charged with an obligation to protect the public interest and should not sit on the sidelines as courts apply the law and establish precedent.

The Division also needs to reassert itself by engaging constructively with Congress. Throughout its history, the Division has been a major participant in congressional consideration of civil rights legislation, and it has worked closely with Congress in drafting nearly all of the legislation it enforces. Yet in recent years, the Division has been missing in action when Congress has taken up key civil rights bills. Congress spent much of 2005 and 2006 examining the need to reauthorize the temporary provisions of the Voting Rights Act. The Senate and House of Representatives held hearings and collected data from around the country on the continuing need for these important protections, yet the Division remained largely on the sidelines. The Division had taken the lead in drafting the original Voting Rights Act, and in previous reauthorizations had taken on much of the burden of developing the record to demonstrate the need for the Act's temporary provisions, particularly Section 5 of the Act. The Division's narrow role in the 2006 reauthorization was a distressing reflection of its failure to demonstrate leadership on one of the most important and effective laws within its purview.

Similarly, Congress has been considering legislation to expand the federal government's jurisdiction to prosecute hate crimes. That legislation has become increasingly important with the increase in racially motivated threats and the incidence of violent attacks because of sexual orientation. Yet, rather than work with Congress, the Division remained silent, then finally expressed its opposition to the legislation at the last minute.[84] Congress is now considering legislation to remedy pay discrimination and employment discrimination on the basis of sexual orientation without the Division's assistance. It will also take up legislation on private actions against discrimination in the use of federal funds. The Division must reengage and help Congress, by focusing its resources and expertise on pressing civil rights concerns, so that we can enact effective legislation. The building of a society founded on equal opportunity must not be a partisan concern, nor should it be a concern for only one of the branches of government. As President Kennedy stated when sending the legislation to Congress that became the Civil Rights Act of 1964, "I would hope that on issues of constitutional rights and freedom . . . there is a fundamental unity among us that will survive partisan debate over particular issues."[85]

IV. Conclusion

In the past half century, America has achieved enormous progress in civil rights. Laws have opened new doors of opportunity in public accommodations, voting rights, and housing. Glass ceilings have been shattered in

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[84] Office of Mgmt. & Budget, Executive Office of the President, Statement of Administration Policy: H.R. 1592—Local Law Enforcement Hate Crimes Prevention Act of 2007, *available at* www.whitehouse.gov/omb/legislative/sap/110-1/hr1592sap-h.pdf.

[85] Special Message from John F. Kennedy to the Congress on Civil Rights, 1963 Pub. Papers 221 (Feb. 28, 1963).

many workplaces. But there have also been backlashes against civil rights progress, which have been felt in court decisions that have rolled back rights, including the recent Supreme Court decision limiting communities' ability to reduce school segregation, and in the political opposition to end-inggender identity.

Despite these challenges, the nation must progress toward greater equality. Throughout most of its history, the Civil Rights Division has been a positive force in this progress. Its performance in recent years has been the exception, not the rule. With sufficient will and proper safeguards, we can repair the damage of recent years and give the Division the institutional protections it needs for the future. As Dr. Martin Luther King reminded us, the arc of the moral universe is long, but it bends toward justice."[86]

[86] Dr. Martin Luther King, Jr., Where Do We Go From Here?, Address to the Eleventh Convention of the Southern Christian Leadership Conference (Aug. 16, 1967).