U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

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MATERIAL SUBMITTED FOR THE HEARING RECORD

U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION

WEDNESDAY, JUNE 1, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 11:57 a.m., in room 2141, Rayburn Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Smith, King, Nadler, Quigley, Conyers, and Scott.

Staff present: (Majority) Holt Lackey, Counsel; Harold Damelin, Counsel; Sarah Vance, Clerk; (Minority) David Lachmann, Subcommittee Staff Director; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Subcommittee will come to order.

We just want to welcome everyone to the Subcommittee on the Constitution, particularly Assistant Attorney General Thomas Perez. I will apologize to you for the Committee starting late. We had a meeting at the White House, and all of us were expected to be there. So, we appreciate everybody coming.

We want to welcome everyone to this first Civil Rights Division oversight hearing of the 112th Congress where we have Assistant Attorney General Perez before us to represent the Department of Justice.

This year marks the 150th anniversary of the Civil War. It is a chance not just to reflect on the horror of institutionalized slavery, but to take solace in the redeeming recognition that this Nation fought its bloodiest war to end it.

The Justice Department's Civil Rights Division has the mission of continuing this American virtue of introspection, self-correction, and commitment to civil rights.

In its limited time, an oversight hearing by its nature necessarily focuses on what is being done wrong rather than what is being done right. That should not detract from the core proposition of equality with which we all agree, what I think is a directive to treat everyone, of course, as children of God.

The Constitution adjures the President to take care that the laws be "faithfully executed," and this signifies that the chief executive must execute the laws in a manner that is faithful to the intended meaning given to them by the people's representatives. Instead, there is evidence the division is engaging in a pattern and practice

of straining the meaning of Federal civil rights statutes to further policies far beyond those ever contemplated by Congress.

For example, the Division sent formal letters to two upstate New York schools questioning enforcement of their dress codes against two male students, one who wore a pink wig and makeup and the other who wore a wig and stiletto heels and said he wanted to be able to dress like a woman. These are not top priorities for the Nation's top law enforcement agencies charged with defending our citizens from all enemies, foreign and domestic. There is no obvious injury, and local authorities are sufficient to address these issues or non-issues as the case may be.

In these instances, one might have hoped that the Department would have instead pursued cases involving racial violence, violations of citizens' rights to vote, or other egregious injuries.

Law enforcement is all about prioritization. We cannot possibly address all illegal activity with our limited resources. We must therefore remedy the most serious and grievous offenses to our freedoms. Adolescent cross-dressing is not one of them. And cases like this give the appearance that a political agenda might be the first priority. The Department of Justice is an executive agency charged with enforcing the laws, not making social policy.

Other cases suggest activism as well. For example, the Division forced Dayton, Ohio to lower the passing score on its police recruiting exam because the Department of Justice did not like the overall racial makeup of those who successfully passed the exam. The taxpayers of Dayton paid for this test to be developed at significant cost by an outside company with specific expertise. Instead of straining to show the test was flawed, the Department might have heeded explicit Federal law making it unlawful to "use different cutoff scores for or otherwise alter the results of employment-related test scores on the basis of race." Even the local NAACP criticized the Division's extreme actions as endangering public safety.

Another example is the Division's strained reading of Section 4(e) of the Voting Rights Act, to require bilingual ballots when the explicit bilingual ballot provisions of the VRA would not apply. The Division's construction is inconsistent with the language and legislative history which shows 4(e) was simply concerned with exempting U.S. citizens educated in Spanish in Puerto Rico from then prevalent literacy tests for voters.

The Department's strained construction upon which it levied action recently forced the taxpayers of Cuyahoga County, Ohio to spend $100,000 on translation services that have no basis in Federal law. A variation in filing suits that are unwarranted is failing to file suits that are warranted.

There was sworn testimony from former Voting Section attorneys, Christopher Coats and Christian Adams, corroborated by documents, indicating that Deputy Assistant Attorney General Julie Fernandez has made statements to the Voting Section staff she oversees, suggesting this Administration is not committed to enforcing voting laws in a race neutral manner. She has also told staff that there is no interest in enforcing voting list accuracy requirements in Section 8 of the National Voter Registration Act, opening the door to even worse vote fraud than that which ACORN and others gave us in the last election, permitting the identities of

illegal or dead persons to potentially be used to cancel out the votes of lawful voters. And I am interested in what you have done to acknowledge and address these citizens and these statements.

Rather than faithfully execute the laws, the Division is either not acting or forcing cash strapped jurisdictions to spend money in cases that many Americans would not think represent discrimination of the type it was created to fight. Not only is this not a way to justify budget increases, it actually jeopardizes the legislative process. The delicate compromises on which legislation depends will be impossible if neither side can trust that its understanding of the final product will be respected by the enforcing body after it is passed.

I look forward to hearing your testimony on how the laws have been faithfully executed.

And I would now recognize the Ranking Member of the Subcommittee, Mr. Nadler, for his opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

Today the Subcommittee continues its oversight of the Civil Rights Division of the Department of Justice. With the authority to enforce this Nation's civil rights laws, the Division is the guardian of our fundamental values: freedom of religion, the right to be treated fairly, the right to cast a vote in a free and fair election, the right to a job, the right to a home, the right to an education, and, with the enactment of the Hate Crimes Prevention Act, the right to live one's life free from the threat of violent hate crimes.

As our Subcommittee had documented, the Division was deeply troubled during the Bush years. As with other parts of the Justice Department, career civil rights attorneys were routinely overruled on legal matters by political appointees. Hiring was illegally politicized, enforcement was, in some keys areas, grossly neglected, and morale was as bad as at any time since the Division's establishment. The loss of dedicated career staff was alarming.

President Obama signaled a new era by appointing as Assistant Attorney General Tom Perez, who will testify today. He is a career civil rights lawyer, and he has been working hard to rebuild a division that had lost many of its dedicated career attorneys that had become dangerously politicized.

In addition to the historically challenging work of the Civil Rights Division, he has been rebuilding a decimated and demoralized office, and he has done so while dealing with such monumental tasks as the decennial redistricting.

What is most distressing is that some of the same people who undermined and discredited the Civil Rights Division while they were there have now made a career of making false allegations against the Division from the outside. What is disturbing is that the allegations all seem to have the same subtext, that the Division is being used to favor minorities to the detriment of whites. What they really mean is that the Division is now making an honest effort to enforce in an even-handed manner our civil rights laws, laws which the complainers who were previously in the Division really do not like at all. It is Willie Horton campaign pure and simple.

As soon as each new allegation is debunked, we hear two more false allegations. I would not be surprised if, even after an inde-

pendent investigation that has completely discredited the allegations surrounding the New Black Panther Party, allegations of voter intimidation without any voter ever having complained of being intimidated, I would not be surprised if people still hear that case revived today as it is revived all the time. It is disgraceful.

We actually face some serious civil rights challenges, and I hope to hear from Mr. Perez on how the Division is working to meet those challenges. It would be nice to have a hearing in which we actually discuss civil rights policy and enforcement, but we will see if that is possible in the current environment.

I am pleased to welcome Mr. Perez, and I look forward to his testimony and to the questions and answers from the Members of the Committee.

Thank you. I yield back.

Mr. FRANKS. I thank the Ranking Member. And I now recognize the Chairman of the full Committee, Mr. Smith, for his opening statement.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Perez, thank you for being here. We look forward to your comments.

Congressional oversight is necessary to improve the operation of the executive branch and its responsiveness to the American people. Unfortunately, since 2009, there have been troubling allegations about the conduct of the Civil Rights Division and its personnel.

First, the Department dismissed most of the voter intimidation cases against the New Black Panther Party. Then it was alleged that a deputy assistant attorney general instructed Voting Section staff that the division will only bring cases for the benefit of racial minorities. This person is also alleged to have said that the voting list maintenance requirements of Section 8 of the National Voter Registration Act will not be enforced. Then more recently, comments allegedly were made at a January Voting Section training section indicating that voting rights laws were not to be enforced in a race neutral manner during the current redistricting cycle.

Most troubling about these allegations is that they constitute a clear pattern. If the Administration is choosing whom to protect based on skin color, the American people should know that there is not equal justice under the law.

In January, I wrote Attorney General Holder advising him that I had initiated an inquiry into the Division's enforcement of Federal voting rights laws. This inquiry is focused on whether the Division has adopted a practice of race-based enforcement of these laws. The Attorney General gave me his personal commitment to make available any information necessary for the Committee to perform its oversight function. Unfortunately, I have been disappointed that the Department's actions have failed to live up to the Attorney General's promised cooperation.

Since January, I have made two separate reasonable, straightforward requests for information as part of this inquiry. While the Department has provided some documents of limited relevancy in response, it has withheld a number of other responsive and highly relevant documents based only on a vague assertion of a confidentiality interest. Yet confidentiality is not a recognized privilege.

Transparency is crucial for a government to function properly. The Department appears to have concocted a confidentiality interest to hide important information from the American people.

After the close of business last Friday, and with this hearing looming, the Department offered to make some of the withheld documents available for Committee review. However, the Department placed unacceptable conditions on this offer. It is improper for the Department to dictate to this Committee how it should make use of information that is responsive to a legitimate oversight interest.

I would ask that the Department's May 27 letter and my response dated May 31 be made a part of the record.

[The information referred to follows:]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 27, 2011

The Honorable Lamar S. Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter to the Attorney General dated May 12, 2011, which followed up on your earlier letter, dated February 11, 2011, requesting documents and other materials from the Civil Rights Division's "Redistricting Summit" held on January 18 and 19, 2011.

In response to your February 11 request, the Department produced 70 pages of documents consisting of all handouts that were distributed and PowerPoint presentations that were shown at the Summit, as well as the prepared address of Assistant Attorney General Thomas E. Perez. We also made available for review an additional, smaller number of documents consisting of prepared remarks by individuals who addressed the Summit, but we did not provide the remaining informal documents that were prepared by other speakers in connection with their presentations.

We are concerned that disclosure of the remaining informal documents, including handwritten notes, prepared by career staff for use at a closed training session exclusively for Voting Section personnel could chill the candid exchange of ideas and recommendations of our attorneys. We have discussed these concerns and our interest in accommodating the Committee's oversight needs with your staff. Based upon those discussions, we have agreed to make the remaining materials available for review at the Department with the understanding that their contents will not be disclosed outside of the Committee without prior consultation with us. The documents bear limited redactions to protect nonpublic information about pending matters and other law enforcement sensitive information. As indicated in our previous response, the Division did not make any audio or video recordings of the training.

It is the policy of the Civil Rights Division to enforce the law in a fair, independent, and evenhanded manner. As reflected in materials produced to the Committee, this policy has been communicated by Division leadership to staff on numerous occasions, and has been reflected in the Division's enforcement actions. The Division's enforcement decisions have been – and will continue to be – based on the legal merit of individual matters. In enforcing the federal civil rights laws, the Division has brought enforcement actions on behalf of victims of all races, as well as against defendants of all races. We are unaware of any instructions to Voting Section employees that would be inconsistent with this policy and practice. If you have information relating to any such instructions, we request that you provide it to us with specificity so that we can conduct an inquiry and take any action that may be necessary.

In your May 12 letter, you suggested that the Department might "be eager to put to rest allegations that voting rights enforcement within the Department is not being carried out in a neutral manner." Toward that end, we believe we responded fully to the Committee's inquiry: by addressing at some length, in our January 31 letter, the allegations set forth in the January 6 letter initiating your inquiry; by describing the Division's voting enforcement policies and practices in that same January 31 letter; and by providing to the Committee and making available to its staff over 850 pages of documents responsive to your requests. In addition, toward that same end, on April 6, 2011, at your request we provided you the March 17, 2011, Report of the Office Professional Responsibility (OPR) on its investigation of the New Black Panther Party case.

We hope that this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

May 31, 2011

The Honorable Eric H. Holder
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Attorney General Holder,

I write in response to the Justice Department's Friday, May 27, 2011 letter which I received after the close of business, right before the start of the Memorial Day weekend, and just days before the Committee's Civil Rights Division oversight hearing scheduled to take place tomorrow, June 1st.

In that letter, the Department finally offered to make available for Committee review, certain documents I requested on February 11, 2011, as part of this Committee's oversight inquiry of the Civil Rights Division, which I advised you of on January 6, 2011. The Department has been withholding these documents from the Committee based on a claimed "confidentiality interest."

I previously advised you in a May 12, 2011 letter, that I did not believe that this was a legitimate basis for withholding responsive and relevant documents from the Committee.

The Department's May 27th offer is conditional upon the Committee agreeing in advance not to disclose the contents of the documents outside of the Committee without prior consultation with the Department. This is unacceptable. Just as withholding responsive documents on a claimed confidentiality interest was inappropriate, it is also improper for the Department to attempt to dictate to this Committee how it is to make use of information that is responsive to a

legitimate oversight request. For example, if the Committee accepts the Department's pre-conditions, it would be precluded from questioning Mr. Perez or other witnesses at oversight hearings about the contents of the documents, without first consulting with the Department. This is not how meaningful oversight of the Department is to be conducted.

I am requesting that you make available for review by the Committee the documents that I requested on February 11, without any pre-conditions. However, with regard to any specific documents if the Department wishes to proffer a legitimate, constitutionally-based reason for its contents not being made public we would attempt to reach some type of mutual accommodation.

Sincerely,

Lamar Smith
Chairman

CC: The Honorable John Conyers

Mr. SMITH. It is time for the Department's game of hide and seek to end and for it to respond and cooperate. Its actions have not only been inconsistent, they have contradicted the Attorney General's personal assurances to me.

Congressional oversight is the constitutional duty of Congress. This Committee is conducting a legitimate oversight inquiry into the Department's enforcement of Federal laws. As such, absent a claim of executive privilege, it has an unassailable right to receive the documents responsive to my request that the Department continues to withhold.

Mr. Perez, I hope your appearance today will help the Committee move forward with its inquiry. I also hope that the Department will provide the requested documents to the Committee. And I thank you for appearing.

And, Mr. Chairman, I will yield back.

Mr. FRANKS. And I thank the Chairman.

And I now recognize the Ranking Member of the full Committee, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman.

I want to thank Chairman Smith for making some of his letters to the Attorney General available to us, and I would like to add them to the record, if I might, at this time: a letter to Eric Holder dated May 12, 2011; a letter to Chairman Smith from Assistant Attorney General Ronald Weich dated May 27, 2011; and an earlier letter that Chairman Smith sent to Eric Holder dated February 11, 2011.

Mr. FRANKS. Without objection.

[The information referred to follows:]

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6216
(202) 225–3951
http://www.house.gov/judiciary

May 12, 2011

The Honorable Eric H. Holder
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Attorney General Holder,

In a letter dated January 6, 2011, I wrote to inform you that I was initiating an oversight inquiry into the activities of the Department of Justice's Civil Rights Division ("Division").

As part of this inquiry, it came to my attention that the Division's Voting Section held a "Redistricting Summit" on January 18 and 19, 2011, at the FDIC Conference Center in Arlington, Virginia, and that all Voting Section employees were required to attend.

With regard to this Redistricting Summit, I wrote you on February 11, 2011, requesting the following items and documents be produced:

1. Any audio and/or video recordings made of all, or portions of, the Redistricting Summit;
2. The agenda for the Redistricting Summit;
3. Any written materials distributed at, or in connection with, the Redistricting Summit;
4. A list of all individuals who made presentations during the Redistricting Summit;
5. For those individuals referenced in the previous request, copies of any prepared remarks, outlines, notes or other written materials used in connection with their presentations; and
6. Copies of any PowerPoints, or other slides that were used in connection with any of the presentations.

On April 26, 2011, the Department responded to my February 11 letter by providing 70 pages of documents which, while responsive to my request, were not particularly relevant. As part of the response, I was also informed that:

> We are prepared to make available for staff review at the Department a small number of additional documents reflecting the prepared remarks by individuals who addressed the Summit, but we are not providing other informal documents, including handwritten notes, prepared by other Summit speakers because we have confidentiality interests in those materials (emphasis added).

While not specified in my February 11 letter, the Committee has obtained information indicating that during the Redistricting Summit, various instructions may have been given, or comments made, to indicate that Voting Section employees were not to enforce the voting law in a race neutral way, and/or were to proceed in a manner inconsistent with established legal precedent. This is what prompted my February 11 request for the Redistricting Summit information.

Clearly, the best evidence of what actually took place at the Redistricting Summit would be any audio and/or video recordings of the proceedings, which I specifically requested. The Department's letter states that "we are not aware of any audio and/or video recordings made of the Redistricting Summit." I take that to mean that such recordings do not exist.

The next best evidence of what took place would be what I requested in item 5 of my February 11 letter: "copies of any prepared remarks, outlines, notes or other written materials used in connection with [the] presentations" made at the Redistricting Summit. While the Department has made two such documents available to the Committee for review, and they proved to be relevant, the Department has decided to withhold other similar documents from the Committee claiming a "confidentiality interest" in those materials. A claim of confidentiality is not a recognized privilege, and is not a legitimate basis for withholding responsive and relevant documents from the Committee. Furthermore, I do not understand how the Department can even make a claim of confidentiality when the withheld materials were used by the presenters to make public presentations to all Voting Section employees attending the Redistricting Summit.

During your May 3 testimony before the Committee, in responding to questions from Congressman King, you adopted as your own view the findings of your Office of Professional Responsibility, which concluded that the Department did not enforce the voting laws in a racially biased manner in the New Black Panther Party Case. In light of your stated position, I would think you would be eager to put to rest allegations that voting rights enforcement within your Department is not being carried out in a race neutral manner. I know you would never tolerate such actions, but these allegations persist. I am also sure that you agree that this Committee has a duty to look into such allegations.

I am disappointed that the Department has continuously refused to make available to the Committee certain responsive and relevant documents which are at the core of my requests. I

hope that you will direct the Department to reconsider its decision and make the withheld documents available.

I look forward to your reply.

Sincerely,

Lamar Smith
Chairman

cc: The Hon. John Conyers

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 27, 2011

The Honorable Lamar S. Smith
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter to the Attorney General dated May 12, 2011, which followed up on your earlier letter, dated February 11, 2011, requesting documents and other materials from the Civil Rights Division's "Redistricting Summit" held on January 18 and 19, 2011.

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We are concerned that disclosure of the remaining informal documents, including handwritten notes, prepared by career staff for use at a closed training session exclusively for Voting Section personnel could chill the candid exchange of ideas and recommendations of our attorneys. We have discussed these concerns and our interest in accommodating the Committee's oversight needs with your staff. Based upon those discussions, we have agreed to make the remaining materials available for review at the Department with the understanding that their contents will not be disclosed outside of the Committee without prior consultation with us. The documents bear limited redactions to protect nonpublic information about pending matters and other law enforcement sensitive information. As indicated in our previous response, the Division did not make any audio or video recordings of the training.

It is the policy of the Civil Rights Division to enforce the law in a fair, independent, and evenhanded manner. As reflected in materials produced to the Committee, this policy has been communicated by Division leadership to staff on numerous occasions, and has been reflected in the Division's enforcement actions. The Division's enforcement decisions have been – and will continue to be – based on the legal merit of individual matters. In enforcing the federal civil rights laws, the Division has brought enforcement actions on behalf of victims of all races, as well as against defendants of all races. We are unaware of any instructions to Voting Section employees that would be inconsistent with this policy and practice. If you have information relating to any such instructions, we request that you provide it to us with specificity so that we can conduct an inquiry and take any action that may be necessary.

In your May 12 letter, you suggested that the Department might "be eager to put to rest allegations that voting rights enforcement within the Department is not being carried out in a neutral manner." Toward that end, we believe we responded fully to the Committee's inquiry: by addressing at some length, in our January 31 letter, the allegations set forth in the January 6 letter initiating your inquiry; by describing the Division's voting enforcement policies and practices in that same January 31 letter; and by providing to the Committee and making available to its staff over 850 pages of documents responsive to your requests. In addition, toward that same end, on April 6, 2011, at your request we provided you the March 17, 2011, Report of the Office Professional Responsibility (OPR) on its investigation of the New Black Panther Party case.

We hope that this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

February 11, 2011

The Honorable Eric H. Holder
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Attorney General Holder,

In a letter dated January 6, 2011, I wrote to inform you that I was initiating an oversight inquiry into the activities of the Department of Justice's Civil Rights Division ("Division").

As part of this inquiry, it has recently come to my attention that the Division's Voting Section held a "Redistricting Summit" on January 18 and 19, 2011, at the FDIC Conference Center in Arlington, Virginia, and that all Voting Section employees were required to attend.

With regard to this Redistricting Summit, please produce the following items and documents no later than Friday, February 25, 2011:

1. Any audio and/or video recordings made of all, or portions of, the Redistricting Summit;
2. The agenda for the Redistricting Summit;
3. Any written materials distributed at, or in connection with, the Redistricting Summit;
4. A list of all individuals who made presentations during the Redistricting Summit;
5. For those individuals referenced in the previous request, copies of any prepared remarks, outlines, notes or other written materials used in connection with their presentations; and
6. Copies of any PowerPoints, or other slides that were used in connection with any of the presentations.

Please contact Harold Damelin, Chief Investigative Counsel, at (202) 226-0144 to coordinate these requests.

I appreciate your continuing cooperation, and I look forward to your response.

Sincerely,

Lamar Smith
Chairman

cc: The Hon. John Conyers, Jr.

Mr. CONYERS. Thank you so much.

Now, it is so convenient that the New York Times just today has a great picture of Thomas Perez on page 13: "In Shift, Justice Department Hiring Lawyers With Civil Rights Backgrounds." That is the title. And it goes on to say that under the Obama Administration, as Jerry Nadler has pointed out, the Justice Department's Civil Rights Division has reversed a pattern of systematically hiring conservative lawyers with little experience in civil rights, the practice that caused a scandal over politicization during the Bush Administration.

I ask unanimous consent to put this in the record as well.

Mr. FRANKS. Without objection.

[The information referred to follows:]

May 31, 2011

In Shift, Justice Department is Hiring Lawyers With Civil Rights Backgrounds

By CHARLIE SAVAGE

WASHINGTON — Under the Obama administration, the Justice Department's Civil Rights Division has reversed a pattern of systematically hiring conservative lawyers with little experience in civil rights, the practice that caused a scandal over politicization during the Bush administration.

Instead, newly disclosed documents show, the lawyers hired over the past two years at the division have been far more likely to have civil rights backgrounds — and to have ties to traditional civil rights organizations with liberal reputations, like the American Civil Liberties Union or the Lawyers' Committee for Civil Rights Under Law.

The release of the documents came as a House Judiciary subcommittee prepared to hold its first oversight hearing, on Wednesday, on the Civil Rights Division since Republicans regained the House. It also comes against the backdrop of efforts by conservative activists and media outlets to throw back at the Obama administration the charges of politicizing the Justice Department that were made against the Bush administration.

While it is routine for any administration to hire ideologically sympathetic people to fill the politically appointed positions that are vacated with each new president, civil service laws prohibit taking ideology into account when hiring for the permanent posts known as "career" positions.

The Justice Department's inspector general found that the Bush administration — which changed hiring rules to give its political appointees at the Civil Rights Division greater control

over civil service hiring starting in 2003 — had violated hiring rules by screening out liberals and by actively seeking to fill civil service vacancies with conservatives, referred to privately by one Bush official as "real Americans" and "right-thinking Americans."

As attention to the hiring changes mounted, the Bush administration partly rolled that policy back for the hiring of rookie lawyers in 2007.

President Obama's appointee to supervise the division, Thomas E. Perez, went further in a 2009 policy giving career professionals sweeping authority to choose whom to recommend to fill openings for experienced lawyers, a much larger group. Under the policy, if an assistant attorney general for civil rights wants to overrule a recommendation, he must do so in writing. Mr. Perez has not overruled any recommendations..

"During this administration, the department has restored the career-driven, transparent hiring process that will produce the most qualified attorneys for the job," said Xochitl Hinojosa, a Justice Department spokeswoman.

The New York Times analyzed the résumés — obtained via the Freedom of Information Act — of successful applicants to the division's voting rights, employment discrimination, and appellate sections. The documents showed that the Obama-era hires were more likely to have had experience in civil rights, and they graduated from more selective law schools, than those hired over the final six years of the Bush administration.

Specifically, about 90 percent of the Obama-era hires listed civil rights backgrounds on their résumés, up from about 38 percent of the Bush group hires. (There were about 47 Obama-era hires and about 72 in the last six years of the Bush administration.)

Moreover, the Obama-era hires graduated from law schools that had an average ranking of 28, according to U.S. News & World Report. The Bush group had a lower average ranking, 42.

At the same time, there was a change in the political leanings of organizations listed on the résumés, where discernible. Nearly a quarter of the hires of the Bush group had conservative credentials like membership in the Federalist Society or the Republican National Lawyers Association, while only 7 percent had liberal ones.

By contrast, during the first two Obama years, none of the new hires listed conservative

organizations, while more than 60 percent had liberal credentials. They consisted overwhelmingly of prior employment or internships with a traditional civil rights group, like the NAACP Legal Defense and Educational Fund.

Those findings were amplified by a report on Tuesday by The National Law Journal, which analyzed the résumés of nearly 120 career lawyers hired since 2009 across the entire division. Of that group, it reported, at least 60 had worked for traditional civil rights organizations.

Robert Driscoll, a Bush administration official at the division who left before the hiring scandal, said that a policy of allowing professional civil rights lawyers to make hiring decisions based on civil rights experience was tactically "brilliant" because it would result in disproportionately liberal outcomes without any need for interference by Obama political appointees.

"Career and nonpartisan are not the same thing," Mr. Driscoll said. "And if you have a requirement that you must have worked in civil rights, then most of the people who have full-time jobs in civil rights are with groups like the A.C.L.U. or the NAACP Legal Defense Fund, etc., so then you are going to end up with liberals."

But Joseph Rich, a former voting rights section chief who left during the Bush administration, argued that hiring people to enforce civil rights laws by looking for previous experience working on civil rights matters was not the same thing as looking for a particular political ideology.

"You're not hiring people because they are liberal," Mr. Rich said. "You're hiring them because they have terrific experience in civil rights, and that's what you need."

The politicized hiring practices during the Bush administration corresponded with a significant drop in the enforcement of several major antidiscrimination and voting rights laws, the Government Accountability Office found. After it took office, the Obama administration pledged to repair and reinvigorate the division.

Several civil rights advocates and law professors said the record so far had been mixed. The division has set new records in criminal enforcement — including on matters like human trafficking, hate crimes and police misconduct, while stepping up the enforcement of laws against lending discrimination and preserving access to abortion clinics.

But other areas that require more complicated litigation work have produced fewer results so

far. The department's employment section has brought only three cases under a law that prohibits a "pattern or practice" of racial or gender discrimination, and its voting rights section has brought just one case under a law that prohibits election policies that have a racially discriminatory effect — fewer than many division observers had expected.

Mr. CONYERS. Thank you.

Now, I want to say this to Chairman Smith, with whom I have worked very closely over the last decade or more. This allegation that the Department of Justice is being racially unfair is a disturbing one. I happen to know Eric Holder, and I would appreciate us meeting on this to talk about an important situation. The Civil Rights Division has been literally dormant during the Bush Administration, and I do not mean to be partisan about this. And you have continually implied that there is some race consciousness going on in the way that they conduct their affairs. Now, if that is so, I would like to know about it more than a hearing in which we get 5 minutes to question a witness. This is a very serious matter.

Now, you have been sent over 5,000 pages of material from the Department of Justice.

You raised the question about the Black Panthers, and I have here the letter that found that the Black Panther case, which you wrote the Department of Justice, Chairman Smith, on July 9, 2009. It was referred to the Department's Office of Professional Responsibility, which you got a conclusive response on May 17, 2011, in which the Office of Professional Responsibility found no evidence to support allegations that were raised in their investigation, that the decision makers either in bringing or dismissing the claims, were influenced by the race of the defendants or any considerations other than an assessment of the evidence and the applicable law. That is the Ethics Division of the Department of Justice that has made this claim. And so, we have not heard much about it.

But now we have new claims, and these are very sensitive remarks to me. And I am trying to find out what the basis of them are. And it seems to me this Committee has that responsibility.

Now, generally, Mr. Perez has been receiving commendations for his work in the last 2 years as the leader of the Civil Rights Division. But where is the preferential treatment to minorities being given anybody here? And I think these attacks, especially coming from Members of the Judiciary Committee, are absolutely outrageous.

Mr. SMITH. Will the gentleman yield?

Mr. CONYERS. I certainly will.

Mr. SMITH. Okay.

Mr. CONYERS. Just let me finish. I would like to meet with you to discuss any evidence that you have of any substance that would give a foundation to these allegations, because I think they are subverting the whole idea of the Civil Rights Division in the Department of Justice. And I would be pleased to yield to the Chair.

Mr. SMITH. Thank you for yielding.

First of all, as far as the evidence goes, as I mentioned in my opening statement, as I think the gentleman is aware, there have been two or three individuals who have made statements independent of anything that any Member of Congress has said, that would raise very strong suspicions of decisions being made on the basis of race.

But the reason we had requested the documents is to try to get to the bottom of the matter, and I hope the gentleman would join me in making sure these documents do get to us so that we can

get the facts. I, like you, feel that I have a good working relationship with the Attorney General, and because he has given me his personal assurances, I have been surprised that the documents that we have requested have not been forthcoming. But if we are going to get to the facts, if we are going to get to the point where we can find out whether these allegations are true or not, we are going to need those documents.

And I hope, as I say, that the gentleman would join me in trying to secure these documents, and then we can come to a reasoned conclusion as to where there has been the form of discrimination to which I have alluded or not. And so, let us get those documents, and we can sit down and discuss what is in them, and whether they are helpful or not.

Mr. CONYERS. Well, you have not ever invited me before just now.

Mr. SMITH. Consider this an invitation to help me get those documents.

Mr. CONYERS. I consider it an invitation.

Mr. SMITH. Okay.

Mr. CONYERS. Okay.

Now, I want to conclude, Mr. Chairman. And I would like to just ask my friend, the Chairman of the Committee, one last question. Who are the people that you have gotten this information from?

Mr. SMITH. We will be happy to give you the quotes. They have been in numerous publication articles and in other news reports. We will be happy to get all those to you.

Mr. CONYERS. Well, let me ask you this. How many people are you talking about, one or two or three or 15?

Mr. SMITH. Okay. We have several individuals who have made those comments.

Mr. CONYERS. Okay.

Mr. SMITH. And we can share those individuals' names with you privately. But, again, I am pleased if you are joining me in my request to get these relevant documents.

Mr. CONYERS. Oh, absolutely. And I thank you, Mr. Chairman.

Mr. FRANKS. I thank the Ranking Member.

Without objection, other Members' opening statements will be made part of the record.

I would like to introduce our witness.

Assistant Attorney General Thomas Perez is here today to testify before this Committee. Mr. Perez became the Assistant Attorney General for the Civil Rights Division on October 8, 2009. Prior to becoming the Assistant Attorney General, he served as the secretary of Maryland's Department of Labor, Licensing, and Regulation.

Mr. Perez has spent his entire career in public service, serving as a career prosecutor in the Civil Rights Division and then as a Deputy Assistant Attorney General for the Division. He then went on to serve as director of the Office for Civil Rights at the Department of Health and Human Services.

In addition to his extensive Justice Department service, he has also served as special counsel to the late Senator Edward Kennedy.

Mr. Perez is a graduate of the Harvard Law School and holds a bachelor's degree from Brown University and a master's in public

policy from the Kennedy School of Government. He resides in Maryland with his wife and three children.

Assistant Attorney General Perez, we look forward to hearing your testimony today and welcome you again to today's hearing.

Mr. Perez's written statement will be entered into the record in its entirety. And I ask you, sir, to summarize your testimony in 5 minutes or less. To help you stay within that timeframe, there's a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that your 5 minutes have expired.

So, before I recognize Mr. Perez, it is the tradition of this Subcommittee that a witness be sworn. So, if you would please stand.

[Witness sworn.]

Mr. FRANKS. Thank you, sir.

I now recognize Mr. Perez for 5 minutes.

TESTIMONY OF THE HONORABLE THOMAS E. PEREZ, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

Mr. PEREZ. Good afternoon, Chairman Franks, Ranking Member Nadler, Chairman Smith, Ranking Member Conyers, and the distinguished Members of this Committee. Thank you for the opportunity to testify before you today about the critical work of the Civil Rights Division.

I have great respect for the institution of the Civil Rights Division and the Department. I first entered the Department as a summer clerk in 1986, was hired as a career prosecutor in 1988, started in '89, and held just about every position a lawyer could hold as a career person. And now I have the privilege here of serving as the AAG.

When I had the honor to appear before you just months after being sworn in as AAG, I spoke about our efforts to restore and transform the Division. I promised to ensure aggressive, even-handed, and independent enforcement of all of the laws within our jurisdiction. And in the year and a half since, we have invested a great deal of energy in these efforts, and I am happy to report we have had great success.

The work produced in recent weeks alone illustrates the wide range of efforts of the Division and is typical of our work. You have my full testimony, but I want to give you a snapshot of what has been happening in recent weeks.

Last week, a jury in New York found three men guilty of charges relating to a scheme to compel undocumented Latin American women to come to the U.S. with promises of jobs as waitresses in bars, and then they forced them to engage in commercial sex acts. Human trafficking of this nature robs individuals of their freedom and dignity. And in 2009, we filed a record number of human trafficking cases, only to break that record in 2010.

We recently won the first conviction at trial of a defendant charged under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, a law that has provided us with critical new tools to prosecute hate crimes.

We also announced last week multimillion dollar settlements with Bank of America, Countrywide, and Saxon Mortgage Services to resolve allegations that they wrongfully foreclosed upon active

duty members of the Armed Forces without first obtaining court orders in violation of the Service Members Civil Relief Act.

By way of illustration, during our investigation, we encountered a case involving a servicemember who was severely injured by an IED while serving in Iraq, breaking his back and causing traumatic brain injury. The servicer foreclosed on him, despite receiving notice on multiple occasions that he was serving in Iraq. He returned to the U.S. in a wheelchair with the prognosis that he would never walk again. Courageously, he spent 2 years in recovery, re-learning how to walk and eventually run. However, he still suffers from the effects of traumatic brain injury.

We cannot allow the members of our military who have made great personal sacrifices on our behalf to attempt to transition to civilian life, only to find their credit ruined and their homes in danger of foreclosure.

Combined, these two settlements will provide more than $22 million in monetary relief for at least 178 victims. The men and women who protect and defend our nation deserve to know that we have their backs at home. And these settlements are part of a broader effort in the Division to protect the rights of members of our Armed Forces. These efforts have included ramped up efforts to protect servicemembers' civilian employment rights, as well as an unprecedented effort to enforce UOCAVA and the MOVE Act and protect the voting rights of servicemembers.

We have ramped up our fair lending enforcement, and we recently announced a settlement with Citizen's Bank in Michigan to resolve allegations that the bank discriminated against African-Americans by failing to serve the credit needs of African-American neighborhoods in and around Detroit. It was a classic case of redlining that deprives neighborhoods of the investment needed to thrive. We cannot claim to offer true equal opportunity if we are depriving entire neighborhoods of access to credit.

Just yesterday, we announced a settlement agreement under the Americans With Disabilities Act with Wells Fargo to ensure equal access to credit and other banking services for people with disabilities. This $16 million settlement is the largest monetary agreement ever reached under Title III of the ADA.

Just last week, we charged a Wisconsin man with a violation of the Freedom of Access to Clinic Entrances Act. The affidavit in support of the criminal complaint alleges that while loading his handgun, the defendant discharged a bullet through the door of his hotel room into a room across the hall. He was subsequently arrested, and the evidence uncovered so far indicates that he traveled to Wisconsin with his gun in an attempt to kill doctors to stop them from performing reproductive health services. This was just last week.

We traveled recently to Newark, New Jersey to launch a civil pattern or practice investigation into the Newark police department and to work with them to identify challenges and come up with a blueprint for sustainable reform.

We continue to work with the New Orleans police department to develop a comprehensive blueprint for reform that will reduce crime, ensure respect for the Constitution, and restore much needed public confidence in the New Orleans police department.

Today, in Pennsylvania, sentencing is scheduled for two former police officers from Shenandoah, Pennsylvania who were convicted of charges relating to the cover up of a hate fueled beating death of a Latino man that occurred in that town. Following the beating, the police covered up the incident in an effort to protect the assailants, who were also convicted of hate crimes in a prior trial.

Every day in the Civil Rights Division presents me and my staff and our outstanding team of dedicated career attorneys and professionals with a new opportunity to protect and defend the rights of individuals who might not be able to assert those rights on their own. We are very proud to carry the torch of the great civil rights pioneers who fought for our laws that would ensure equal opportunity and equal access to justice. And we honor their legacy by enforcing those laws aggressively, independently, and even-handedly.

I look forward for the opportunity to talk further about our work, and I look forward to answering your questions.

It is an honor to be here, Mr. Chairman, Mr. Chairman, and Ranking Members.

Thank you for your time, and thank you for your courtesy.

[The prepared statement of Mr. Perez follows:]

Department of Justice

STATEMENT OF
THOMAS E. PEREZ
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

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

PRESENTED
JUNE 1, 2011

Statement of Assistant Attorney General Thomas E. Perez
Civil Rights Division
United States Department of Justice
Before the Subcommittee on the Constitution
House Committee on the Judiciary
June 1, 2011

Good morning, Mr. Chairman and members of the Committee. Thank you for the opportunity to appear before you today to discuss the work of the Civil Rights Division.

President Obama and Attorney General Holder have repeatedly made clear their commitment to civil rights enforcement. In recent remarks outlining his priorities for the Justice Department, the Attorney General committed to "protecting the most vulnerable among us, and those who cannot speak out or stand up for themselves." The President and Attorney General have demonstrated their support for our work by providing resources to the Division – resources that have, over the last two years, allowed us to add a number of talented career professionals to our ranks and make great progress toward our goal of restoring and transforming the Civil Rights Division.

Our mission in the Civil Rights Division has three basic principles:

- We expand opportunity and access for all people – the opportunity to learn, the opportunity to earn, the opportunity to live where one chooses, the opportunity to move up the economic ladder, and the opportunity to realize one's highest and best use.
- We ensure that the fundamental infrastructure of democracy is in place – by protecting the right to vote, and by ensuring that communities have effective and accountable policing.
- We protect the most vulnerable among us so that they can move out of the shadows and into the sunshine – by ensuring that they can live in their communities free from fear of exploitation, discrimination, and violence.

With these principles guiding our work, the Civil Rights Division in the last two years has ramped up enforcement of the nation's civil rights laws, making significant strides in fulfilling its mission to protect the civil rights of all individuals. For example:

- In Fiscal Year 2009, we filed more criminal civil rights cases than ever before, and then exceeded that record in Fiscal Year 2010, filing 125 criminal cases.
- We have trained thousands of local law enforcement officials around the country on the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, and recently secured the first guilty plea under the law.

- We conducted the most extensive review ever of a law enforcement agency, the New Orleans Police Department, and we are now working with city officials, the police department, and the community to develop a comprehensive blueprint for sustainable reform of the police department
- We reached the largest ever settlement under the Fair Housing Act to resolve claims of rental discrimination, as well as the largest monetary recovery for victims ever in a Fair Lending settlement.
- We reached the most comprehensive settlement ever in an *Olmstead* case with the State of Georgia to ensure that thousands of individuals with disabilities will receive services in their communities, rather than being segregated in institutions.
- We issued the most extensive overhaul of Americans with Disabilities Act regulations since the passage of the Act in 1990.
- We have greatly expanded efforts to protect members of the military, and their families, in voting, employment, and the consumer context.

The cornerstone of our efforts is our commitment to fair, vigorous, and evenhanded enforcement of all of the laws within our jurisdiction. The talented, dedicated career attorneys, professionals, and support staff who work in the Division are committed to this principle, and have been indispensible in our transformation and restoration over the last two years. Their efforts are critical to our ability to continue to protect the civil rights of all individuals.

Criminal Enforcement and Law Enforcement Misconduct

Hate Crimes

Regrettably, hate crimes remain all too prevalent in communities across our country. The Division continues its critical work to prosecute hate crimes, and we have worked hard to implement the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009. The Division has helped to plan or participated in dozens of training conferences throughout the country, working with local U.S. Attorney's Offices, the FBI, and the Department's Community Relations Service to bring together federal, state, and local law enforcement, along with community stakeholders, educating them about the law and its implementation.

More than 80 investigations have been opened under the new law and, just last month, the first defendants were convicted under the Act – one pled guilty and the other was convicted at trial by a federal jury – of charges related to a violent attack on five Latino men in which one of the victims sustained life-threatening injuries.

The Division also recently prevailed in a hate crime prosecution of two young men for fatally assaulting Luis Ramirez, a Latino man, because of his ethnicity, in Shenandoah, Pennsylvania. In February 23, the two were sentenced to 9 years in prison for the fatal beating of Mr. Ramirez. In addition, the former Shenandoah Police Chief and a Police Lieutenant were convicted of falsifying information related to the investigation of the fatal beating.

We also continue to prosecute violent acts of hate directed at individuals who are, or are perceived to be, Muslim or Arab. In February, in the 50th prosecution involving post-9/11 backlash violence, the Division secured a guilty plea in a case involving arson at the playground of an Arlington, Texas, mosque. Cases like this one remind us that the post-9/11 backlash continues, and that we must remain vigilant to protect all individuals from such acts of hate.

Human Trafficking

Human trafficking – the equivalent of modern day slavery – is a hidden crime that victimizes the most vulnerable among us and, like drug trafficking or gun trafficking, also frequently involves complex international cartels.

The Civil Rights Division has pushed efforts to combat human trafficking to the highest levels ever, prosecuting a record number of trafficking cases in FY 2009, and then topping that record in FY 2010. These efforts have included cases of unprecedented scope and impact through which we obtained significant sentences of imprisonment. The Division filed 52 sex and labor trafficking cases in FY 2010, charging 99 defendants.

Among those cases was the largest human trafficking case in history, alleging that the defendants forced more than 400 Thai workers to labor on farms across the country. The charges arise from the defendants' alleged scheme to coerce the labor and services of Thai nationals to work on farms across the country under the U.S. federal agricultural guest worker program.

Law Enforcement Misconduct

Policing is difficult work, and police officers perform heroic services in protecting their communities. However, it is important to hold accountable those who abuse their authority, and the Criminal Section of the Division continues to manage a steady docket of cases involving police brutality and misconduct. This work has included a number of cases in New Orleans that occurred both before and after Hurricane Katrina.

For example, last July, the Division charged six New Orleans Police Department (NOPD) officers in connection with the police-involved shooting on the Danziger Bridge in the aftermath of Hurricane Katrina that resulted in the death of two civilians and the wounding of four others. Five additional officers pled guilty to related charges. In December, a federal jury convicted three current and former NOPD officers in relation to the shooting death of Henry Glover, the subsequent burning of Glover's remains, and a related cover up.

Following the spate of criminal cases involving NOPD officers, the Division launched a civil pattern or practice investigation of the New Orleans Police Department. The investigation came at the request of New Orleans Mayor Mitch Landrieu, and was the most extensive in the Division's history. In March, the Department issued an extensive report documenting a wide range of systemic and serious challenges. Our findings included a pattern or practice of unconstitutional conduct or violations of federal law in numerous areas of NOPD activities, including unconstitutional stops, searches, and arrests; use of excessive force; discriminatory policing; and others. The Division is now working closely with the City to develop a comprehensive blueprint for sustainable reform.

The NOPD investigation was just one of several that the Division has launched throughout the country. Most recently, we announced a comprehensive investigation of the Newark, New Jersey, Police Department to examine allegations of excessive force, unconstitutional stops, searches, arrests and seizures, discriminatory policing, and officer retaliation against people who observe and/or record police activity and conditions of confinement.

In each of these cases, we will continue to work with cities, police departments, and community stakeholders to ensure that communities have effective, accountable policing that reduces crime, upholds the law and the Constitution, and earns the respect of the public.

Equal Educational Opportunity

The Division continues its critical work to ensure that school districts are delivering on the promise of *Brown v. Board of Education* so that all students have equal access to a quality education.

For example, last year, the Division reached a settlement with a school district in Louisiana that had two high schools, one that was almost entirely segregated and one that was integrated. The high school that was nearly 100 percent African American was offering no Advanced Placement classes and only five gifted and honors classes, while the other, attended by nearly all of the district's white students, offered more than 70 Advanced Placement, gifted, and honors classes. Such differences deny students of color the educational opportunities to which they have a right, and we will continue to aggressively enforce the law to ensure that all students have access to a quality education.

Meanwhile, as we continue to read disturbing accounts of the ramifications of pervasive harassment of students, the Civil Rights Division has worked to promote the safety of students in their schools and to prevent harassment -- every child has the right to attend school without the fear or threat of violence.

For example, late last year, the Division entered into a comprehensive settlement agreement with the Philadelphia School District to resolve allegations that Asian-American students were subjected to severe and pervasive harassment because of their national origin, including one incident in which more than 30 students were attacked and 13 were sent to hospital emergency rooms. Also last year, the Division entered into a settlement agreement with a school district in New York involving the harassment of a gay teen who failed to conform to gender stereotypes. The lawsuit alleged that the school district failed to meet its obligation to address the harassment. The case marked the first time in nearly a decade that the Division was involved in a Title IX case involving sex-stereotyping discrimination.

In April, the Division and the Department of Education (ED) jointly settled a case against a school district in Minnesota for failing to take steps to combat peer harassment against Somali-American students. In late 2009, complaints were filed with the Division and ED after a fight broke out involving nearly a dozen high school students. We found that the district meted out disproportionate discipline for the students involved in the incident, and that the district's policies, procedures, and trainings were not adequately addressing harassment against Somali-American students.

In addition, the Division continues to work to protect the rights of English Language Learners (ELL) to receive the services they need to ensure their full participation in school. For example, last October, the Division and ED entered into an agreement with the Boston Public Schools that will result in the delivery of services to more than 4,000 underserved eligible students and to thousands of additional students identified as possible ELL students but who were never appropriately tested.

Disability Rights

Among the Division's top priorities is protecting the rights of individuals with disabilities. Last year marked the 20th anniversary of the Americans with Disabilities Act of 1990, a groundbreaking law that has not only dramatically increased access to all aspects of civic, economic and social life for individuals with disabilities, but has forever changed the way our society thinks about people with disabilities. The Justice Department marked the anniversary by publishing its comprehensive final revised regulations for Titles II and III of the ADA, as well as the ADA Standards for Accessible Design. The Standards include new provisions that expand access to recreation facilities, judicial facilities, and a variety of other areas. The revised rules were the Department's first major revision of its guidance on accessibility in 20 years.

Meanwhile, the Division has launched an aggressive effort to enforce the Supreme Court decision in *Olmstead v. L.C.*, a historic 1999 ruling recognizing that the unjustified segregation of people with disabilities in institutional settings is a form of discrimination under the ADA. In the last two years, the Division has joined or initiated litigation to ensure community-based services in more than 25 cases in 17 states. These include cases on behalf of persons with disabilities who had been flourishing in the community but who could be forced into nursing

homes to receive needed services due to state budget cuts. The Division is also investigating other *Olmstead* matters in five states.

In October, the Division reached a landmark settlement agreement with the state of Georgia that will allow thousands of individuals with disabilities to receive services in community settings, and will serve as a model for comprehensive agreements going forward.

In addition, the Civil Rights Division has been actively litigating cases and negotiating settlements that increase public access for people with disabilities in a wide variety of contexts. For example, in 2010, the Division obtained a consent decree on behalf of a family whose two-year-old child, who is HIV-positive, was barred from the pool and other amenities at a family-themed RV resort in Alabama while the father commuted to nearby Mobile, Alabama, for ongoing cancer treatment.

We also recognize the important and continuously growing role technology plays in our day to day lives, and we have worked to ensure that technology does not unintentionally create new barriers for individuals with disabilities. To this end, we settled cases (one jointly with ED) with five universities to ensure that electronic book readers will not be used in classroom settings unless they are accessible to students who are blind or have low vision. We were also a signatory to a settlement with the Law School Admissions Council to ensure that its common application website is accessible to law school applicants who use screen reader technology because they are blind or have low vision.

Civil Rights of Servicemembers

Several statutes enacted specifically to protect the rights of our men and women in uniform and their families fall under the Division's jurisdiction, and we have worked aggressively to enforce these important laws on behalf of those who so honorably serve their nation.

The Veterans' Benefits Act of 2010, which President Obama signed into law in October 2010, amended the Servicemembers Civil Relief Act to provide explicitly that the Attorney General can bring a case against anyone who violates the Act where the violation constitutes a pattern or practice or raises an issue of significant public importance. Among other protections, the SCRA prohibits mortgage lenders from foreclosing on active duty servicemembers without a court order if the mortgage was taken out prior to the servicemember entering active duty, and requires the lender to follow special procedures.

Just last week, we announced two multi-million dollar settlements with servicers to resolve allegations that they violated the SCRA by wrongfully foreclosing upon servicemembers without first getting a court order. One of the settlements requires Bank of America/Countrywide to pay at least $20 million to resolve allegations that the company foreclosed on around 160

servicemembers – the largest SCRA settlement ever reached. Together with the Department of Defense, we have trained attorneys in the military legal assistance program so they are well prepared to answer servicemembers' questions and identify potential violations of the SCRA. Together with the Department of Defense, we have trained attorneys in the military legal assistance program so that they are well prepared to answer servicemembers' questions and identify potential violations of the SCRA.

We have also worked to protect the employment rights of our men and women in uniform so that they do not have to sacrifice their civilian employment in order to serve their country. The Division has aggressively enforced the Uniformed Services Employment and Reemployment Rights Act (USERRA), ensuring that service members returning from active duty are not penalized by their civilian employers.

In the first two years of the Administration, the Division filed more USERRA complaints than were filed in the previous three years combined. For example, the Division won a court order granting back pay and injunctive relief against the Alabama Department of Mental Health for failure to promptly reemploy an employee upon his return from active-duty service in Iraq.

Finally, the Division is committed to ensuring that servicemembers, and other citizens living overseas, are not denied the right to have their voices heard on Election Day. In the 2010 federal election cycle, the Civil Rights Division aggressively enforced the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), as amended by the Military and Overseas Voter Empowerment (MOVE) Act of 2009, to ensure that Americans serving in our armed forces and citizens living overseas received their absentee ballots in time to ensure that they had the opportunity to vote and to have their votes counted.

We obtained court orders, court-approved consent decrees, or out-of-court letter or memorandum agreements in 14 jurisdictions (11 states, two territories, and the District of Columbia). Each of these resolutions ensured that military and overseas voters would have at least a 45-day period to receive, mark, and return their ballots, or ensured that they would be provided expedited mailing or other procedures to provide sufficient opportunity for ballots to be returned by the jurisdiction's ballot-receipt deadline. Our actions in the 2010 election cycle ensured that thousands of military and overseas voters had a reasonable opportunity to cast their ballots. We will continue to aggressively enforce UOCAVA and the MOVE Act to ensure all servicemembers and overseas voters can have their voices heard in future federal elections.

Fair Lending

The nationwide foreclosure crisis has touched nearly every community in our country, but has disproportionately devastated communities of color. In the wake of the housing and foreclosure crisis, fair lending enforcement has been a top priority for the Division. We established a dedicated Fair Lending Unit in the Housing and Civil Enforcement Section, and have worked to strengthen partnerships with the banking regulatory agencies and HUD. In 2010,

the Division received 49 referrals from partner agencies, more than it had received in at least 20 years. Notably, 26 of those referrals were based on race or national origin discrimination, more than we received in any previous year and more than we received in the previous three years combined.

The Fair Lending Unit currently has approximately 60 open matters or investigations, including five authorized lawsuits that are in pre-suit negotiations. This includes the previously disclosed investigation of Bank of America/Countrywide, one of the nation's largest lenders during the mortgage boom.

In 2010, the Division achieved the largest monetary recovery for victims ever in a fair lending case. The $6.1 million settlement with two subsidiaries of American International Group, Inc., (AIG) resolved allegations that the subsidiaries failed to supervise or monitor brokers in setting broker fees and that this practice had a disparate impact on African American borrowers, who were charged higher broker fees than white borrowers.

In addition, the Division late last year reached a $2 million settlement with PrimeLending, one of the largest FHA lenders in the country and the largest FHA lender in Texas. The settlement resolved allegations that between 2006 and 2009, PrimeLending charged African-American borrowers higher interest rates for prime fixed-rate home loans than it charged similarly-situated white borrowers.

Most recently, the Division just last month concluded negotiations and filed with the federal court a settlement with Citizens Bank and Citizens Republic Bancorp to resolve redlining allegations that the lenders have failed to provide their home mortgage lending services in majority African American neighborhoods on an equal basis with white neighborhoods in the Detroit metropolitan area. The settlement will provide more than $3.5 million in monetary relief to the formerly redlined areas. The parties currently are seeking approval of this settlement by the court.

Fair Housing

In addition to its fair lending work, our Housing and Civil Enforcement Section continues a robust docket of fair housing enforcement. Since January 21, 2009, the Section has filed 72 Fair Housing Act lawsuits.

In late 2009, the Division reached a settlement with Los Angeles apartment owner Donald Sterling to resolve allegations that he discriminated against African Americans, Hispanics, and families with children, in violation of the federal Fair Housing Act, at apartment buildings he owns in Los Angeles County. At the time, the $2.725 million settlement was the largest ever monetary settlement secured by the Department in a case alleging discrimination in rental housing.

Last year, the Division also achieved a $2.13 million settlement of claims of pervasive racial discrimination and harassment at an apartment building in Kansas City, Kansas, in a case involving a property manager who placed racially hostile symbols and items on the premises, such as hangman's nooses, and openly made racially derogatory and hostile remarks about African-American residents.

We also continue to see a troubling stream of cases alleging that a landlord or a landlord's agent has engaged in a pattern or practice of sexually harassing female tenants, filing seven such cases in the current administration, including three in the current fiscal year. The similarities in the underlying fact patterns of these cases are striking. The victims are typically low-income women with few housing options who are subjected to repeated sexual advances, and, in some cases, sexual assault, by predatory landlords, property managers, and maintenance workers. For example, in August 2010, a jury in Detroit returned a $115,000 verdict in a case involving a rental agent who subjected six women to severe and pervasive sexual harassment, ranging from unwelcome sexual comments and sexual advances, to requiring sexual favors in exchange for their tenancy. One woman testified that the rental agent refused to give her keys to her apartment until she agreed to have sex with him. In addition, evidence showed that the owner of the properties knew that his employee was harassing tenants but did nothing to stop it. The jury found both the owner and the rental agent liable and awarded a total of $115,000 in damages to six female tenants. On March 3, 2011, the court granted the United States' motion for civil penalties and injunctive relief, ordering the defendants to pay a total of $82,500 in civil penalties to the United States.

Equal Employment Opportunity

The Division continues its work to enforce Title VII of the Civil Rights Act of 1964 to ensure that all individuals have equal access to employment opportunities. Since the beginning of the Obama Administration, the Division has initiated 31 new pattern-or-practice investigations of state or local employers.

In March, the Division reached a consent decree with the Hertford County, North Carolina, Public Health Authority to resolve allegations of pregnancy discrimination. The complaint alleged the Health Authority rescinded an offer of employment and refused to hire a woman for a Health Educator Specialist position because of her pregnancy.

The Division obtained a significant victory for applicants to become New York City firefighters when a court found that the City's use of two written examinations resulted in an unlawful disparate impact on African-Americans and Latinos. In fact, the court ruled that the practices not only constituted discrimination under a disparate impact theory, but also constituted intentional discrimination based on claims asserted by intervenors representing a class of African-American applicants. The Division won class-wide back pay, 293 priority job offers, and retroactive competitive seniority and benefits for those who are hired and complete their

probationary periods. We continue to work to ensure that the city develops hiring policies that give all applicants a fair shot.

Voting Rights

Protecting the voting rights of all Americans continues to be a cornerstone of civil rights enforcement, and the Division continues its work to enforce the nation's critical voting rights laws. The Division is currently engaged in intensive efforts to prepare for the thousands of redistricting plans that will be submitted for review in the current round of redistricting. The Division has made significant substantive updates to its procedures under Section 5 of the Voting Rights Act for the first time since 1987, and has updated its substantive guidance to states and local jurisdictions regarding redistricting for the first time since 2001. These new guidelines reflect practical updates, Congressional changes to the Act, and new judicial decisions.

The Division also continues to review voting changes submitted under Section 5 of the Act to ensure that these changes do not discriminate against voters based on race, color, or membership in a language minority group, and is vigorously defending the constitutionality of Section 5 in the courts. The Division is also conducting reviews of requests from covered jurisdictions for bailout from the requirements of Section 5. We have recently consented in federal court to bailout by several jurisdictions, and anticipate several more bailouts in the near future.

Meanwhile, we continue to work to ensure that voters with limited English proficiency receive the language assistance they need to cast an informed vote. In the first new enforcement action since 1998 that the Department has initiated to protect Native American voters with limited English proficiency, the Division obtained an important settlement in South Dakota involving the provision of language assistance to these voters. The Division also obtained a consent decree to protect the rights of Spanish-speaking Puerto Rican voters in Cuyahoga County, Ohio, which, according to the 2000 Census, was the county that had the largest population of Puerto Rican voters who lacked access to a bilingual ballot in the United States.

We also have launched an initiative to ensure compliance with the National Voter Registration Act (Motor Voter). In March, the Division reached an agreement with Rhode Island to require the state to offer voter registration opportunities at state offices providing public assistance and disability services. The agreement was filed in conjunction with a lawsuit under Section 7 of the NVRA – the first lawsuit the Division has filed to enforce Section 7 in seven years. In April, the first full month after the agreement was filed, agencies covered by the agreement registered 1,038 voters, compared to 661 in March. By contrast, for all of 2005 and 2006, the state reported receiving only 940 voter registration applications from public assistance agencies. The Division is also actively pursuing a number of investigations under Sections 5, 7, and 8 of the NVRA.

Religious Freedom

Our nation has long cherished religious freedom as one of our most basic and fundamental civil rights, and the Division continues to enforce the rights of individuals and congregations to practice the faith of their choosing in a variety of contexts.

We continue to see violence and threats of violence directed at individuals or congregations because of their religion. For example, just last month, a defendant was convicted of federal civil rights charges under the Church Arson Prevention Act in connection with the burning of the Macedonia Church of God in Christ in Springfield, Massachusetts, in the early morning of November 5, 2008. The conviction followed guilty pleas from two co-defendants in the case. In the hours after the election of President Obama, the men doused the predominantly African-American church with gasoline and set a fire that completely destroyed the building. The church was under construction at the time and was 75 percent complete.

In September, the Department marked the 10th anniversary of the enactment of the Religious Land Use and Institutionalized Persons Act (RLUIPA), and we continue to pursue cases involving religious discrimination in land use. In October, for example, the Division filed a friend-of-the-court brief in a Tennessee state court proceeding in which neighbors of a proposed mosque challenged the county's granting of a building permit. The neighbors argued that the county was wrong to treat the mosque in the same manner that it would treat a church. Our brief argued that RLUIPA required such equal treatment. The court agreed in a decision on November 17, 2010. Last summer, the Department obtained a consent decree permitting the continued operation of a "Shabbos house" next to a hospital in a New York village. The facility provides food and lodging to Sabbath-observant Jews to enable them to visit sick relatives at the hospital on the Sabbath.

Meanwhile, we also continue to work to ensure that individuals are not forced to choose between their jobs and the requirements of their faith. In 2010, we settled a case involving a Muslim correctional worker in Essex County, New Jersey who had been fired for refusing to remove her headscarf.

In October 2009, the Civil Rights Division notified the Oregon Attorney General that it was investigating whether a state law banning school teachers from wearing "any religious dress" violated Title VII of the Civil Rights Act of 1964. The law had been on the books since 1923, and was reaffirmed in July 2009. Following receipt of the Division's letter, the state legislature passed and the governor signed into a law a repeal of the ban, ensuring that teachers would no longer be prohibited from wearing religious garb at work. In April 2010, after the law was enacted, the Civil Rights Division notified the State of Oregon that it had closed its investigation.

Finally, in response to the continued backlash against Muslim Americans, we have stepped up our outreach to Muslim communities across America. I have met with local Muslim, Arab, Sikh, and South Asian leaders. These meetings have allowed us not only to learn about

potential civil rights violations that merit further investigation, but also to build bridges to these communities that enhance trust and understanding. We will continue our efforts to reach out to Muslim communities, and all faith communities, to ensure that they know their rights under federal law and understand how to contact us when violations occur.

Partnerships

We know that much of our work can be done more efficiently and effectively when we work collaboratively with our partners across the federal government. For this reason, we have worked over the last two years to establish and strengthen partnerships to improve enforcement. For example, as mentioned above, strengthened relationships with regulatory agencies in 2010 led to more fair lending referrals to the Division than in at least the last 20 years. The President's Financial Fraud Enforcement Task Force has been instrumental in fostering these enhanced collaborative efforts. The Task Force, chaired by the Attorney General, brings together an unprecedented number of federal agencies and state and local partners to share information and resources and ensure aggressive, coordinated enforcement.

In the human trafficking context, last year the Department of Justice joined the Departments of Homeland Security and Labor to launch a nationwide Human Trafficking Enhanced Enforcement Initiative that is designed to streamline federal criminal investigations and prosecutions of human trafficking offenses. As part of the initiative, specialized Anti-Trafficking Coordination Teams will be convened in select pilot districts around the country. The teams, comprised of federal prosecutors and federal agents from multiple federal enforcement agencies, will implement a strategic action plan to combat identified human trafficking threats.

Our community outreach efforts include close cooperation with partners across the federal government. Over the past year, the Department of Justice has worked closely with the DHS Office for Civil Rights and Civil Liberties on regional community engagement roundtables as part of our outreach efforts to Muslim, Sikh, South Asian, and Arab communities. One such interagency meeting with community stakeholders is being held tomorrow.

Meanwhile, in the employment context, the Division has engaged in unprecedented levels of collaboration with our partner agencies in order to more effectively combat pay discrimination and other forms of employment discrimination. The Division established a pilot program to work with EEOC field offices earlier in investigations to ensure the most efficient and effective application of each agency's resources.

In the disability rights context, we recognize that individuals with disabilities can only have true equal opportunity if they have equal access in all aspects of life, such as housing, employment, health care, and education. We have been working closely with the Department of Health and Human Services, the Department of Education, and other partners to establish pathways to opportunity in a host of contexts for individuals with disabilities.

And finally, nearly all of our work benefits from strengthened partnerships with U.S Attorney's Offices around the country. In both the criminal and civil contexts, we have worked to strengthen communication and help U.S. Attorneys offices ramp up civil rights enforcement efforts.

Conclusion

While the considerable accomplishments described above provide a sampling of the work that has occurred over the past two years, it is not an exhaustive account, and there is much more good work being done by the dedicated men and women who work in the Civil Rights Division. The breadth and scope of our work illustrates the continued need for a healthy, sustainable Civil Rights Division. In the year ahead, we will continue our work to expand opportunity for all Americans, to safeguard the fundamental infrastructure of democracy, and to protect the most vulnerable among us.

In 2011, civil rights remains the unfinished business of our country. The Civil Rights Division is responsible for enforcing some of our nation's most cherished laws. We take our obligation to protect the rights of all individuals very seriously, and we will continue to use all of the tools in our arsenal aggressively, independently, and evenhandedly so that all individuals can enjoy the rights guaranteed by our Constitution and our federal civil rights laws.

Five months ago, I was privileged to attend a ceremony in the Justice Department's Great Hall, commemorating the 50th anniversary of Robert F. Kennedy's swearing in as Attorney General. At that event, Attorney General Holder called on us "to commit ourselves to carrying on – and carrying out – [Kennedy's] mission to make gentle the life of this world, and to make good on the promise of our nation." That mission describes what we in the Civil Rights Division seek to do in our work each and every day, and will continue to do in the months and years ahead.

Thank you for the opportunity to testify before you today about the work of the Division. I look forward to answering any questions.

Mr. FRANKS. Well, thank you, Mr. Perez. We thank you for your testimony. And I will now begin the questioning by recognizing myself for 5 minutes.

Mr. Perez, in a 2009 opinion, Northwest Austin, the Supreme Court questioned, but did not decide, whether Section 5 of the Voting Rights Act is still constitutional. After that opinion was handed down, many of the commentators suggested that increased use of the bailout process, through which a covered jurisdiction may seek

exemption from Section 5 coverage, may be the only way to save Section 5 from being declared unconstitutional.

Is the Division encouraging covered jurisdictions to seek bailouts from Section 5 in an effort to bolster its constitutionality or to have it survive constitutional scrutiny?

Mr. PEREZ. The short answer, Mr. Chairman, is absolutely. Following that decision, we, among other things, prepared guidance on what the Northwest Austin decision means. We have been working with jurisdictions across the country on bailout issues. And this year, in this Fiscal Year alone, we have five bailout actions that have been filed in this Fiscal Year alone, which is more than any previous Fiscal Year in the history of the Civil Rights Division. So, we take our bailout responsibilities very seriously. We read the opinion carefully, and we will continue to comply with it. And if jurisdictions are able to satisfy that, we will, of course, accede to it. And that is why we have launched this, I believe, very impressive and successful campaign.

Mr. FRANKS. Mr. Perez, sworn testimony and handwritten meetings notes obtained by the Committee clearly indicate that your Deputy Assistant Attorney General, Julie Fernandes, has told the Voting Section staff under this Administration that Federal voting laws are not to be enforced in a race neutral manner, and that this Administration has no interest in enforcing the voting list maintenance requirements of Section 8 of the National Voter Registration Act.

Specifically, those statements by Ms. Fernandes are as follows: "Equality for racial and ethnic minorities is what we are all about." The next one: "Our goal is to ensure equal access for voters of color or minority language." The next one: "There is no interest in enforcing the list maintenance requirements of Section 8 of the National Voter Registration Act."

As Assistant Attorney General of the Civil Rights Division, what have you done, Mr. Perez, to address these, what are somewhat troublesome statements by Ms. Fernandes?

Mr. PEREZ. I certainly take these allegations seriously. I spoke with Ms. Fernandes, I spoke with others, and we conducted a careful review. And Ms. Fernandes has categorically denied making statements to that nature. We answered a letter from Chairman Smith.

And I would note also that the OPR report that you have a copy of looked at those issues and concluded that the allegations pertaining to Ms. Fernandes were without merit. And so, I would certainly direct the attention to the finding in the report that Ms. Fernandes' comments provided no evidence of an underlying ideological agenda of the Division. And so, I would also direct the Committee's attention to the OPR report in this particular case.

As I have said and as Ms. Fernandes has reiterated, we make our decisions based on an application of the facts to the law. We do so in an even-handed manner. And, frankly, our actions bear that out. We have enforced under the Voting Rights Act cases involving victims who are African-American, defendants who are white. We have enforced cases under our watch involving the opposite. We do not racially bean-count who the defendants are in our Section 2 work.

And in addition, we have other cases across the Division, whether it is our employment work, where we have cases where we have vindicated the rights of African-American victims, and cases where we have vindicated the right of white victims. And we have cases in the education docket where we have vindicated the rights of victims of all races and ethnicities.

Mr. FRANKS. Thank you. The OPR report that you mentioned only dealt with that issue on kind of a peripheral basis. It was more focused on the Black Panther case. But I guess you are assuring us that Ms. Fernandes' ostensible, remarks do not constitute the Division's current operating policy with regard to enforcement of our Voting Rights Act.

And I want to ask you a quick question before my time is gone here.

Mr. PEREZ. Sure.

Mr. FRANKS. In 2009, Congress enacted the MOVE Act, which requires States to mail absentee ballots to military and overseas voters at least 45 days before an election. Its intent was to end the historical disenfranchisement of deployed military servicemembers. Our men and women in uniform safeguard all of our rights, of course, and protecting their right to vote is the least we can do.

Unfortunately, in the 2010 election, the Civil Rights Division was slow to identify jurisdictions that had not complied with the law. As a result, many jurisdictions across the country denied military voters their legal right to a timely absentee ballot.

How will the Civil Rights Division improve the MOVE Act enforcement in the 2012 election so that no military voters are disenfranchised?

Mr. PEREZ. Thank you for your question, sir. With all due respect, I disagree with your characterization of our work there. I am very proud of the work that we did. It was an unprecedented effort.

There have been, for instance, roughly 40 lawsuits that have been filed in the 25-year history of UOCAVA as amended by the MOVE Act. Five of those lawsuits, one-eighth of those lawsuits, were filed in the 2010 cycle alone. We filed cases against 14 jurisdictions where they were either lawsuits, court orders, out of court settlements, letter agreements. And through those actions, we were able to ensure that over 60,000 overseas and military voters, who might otherwise have not had an opportunity to vote in a timely fashion, were in fact able to do so. It was an unprecedented expenditure of time and effort, and it was a very successful one.

Having said that, we were in front of Chairman Lungren and we talked about how we can learn and do even more. And we look forward to working with this Committee and others to talk about the lessons learned from that election and the lessons moving forward to ensure that everybody who is a military or overseas voter can have access to the ballots.

I appreciate your question.

Mr. FRANKS. Thank you, Mr. Perez. I appreciate your answers.

And I will now recognize our Ranking Member for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

Assistant Attorney General Perez, there have been lot of States recently that have been enacting so-called voter ID laws. Do you think that these voter ID laws in general raise serious questions

regarding the denial of access to particular groups and warrant great scrutiny from the Civil Rights Division?

Mr. PEREZ. Well, there have been, as you correctly point out, Congressman Nadler, a number of States that have enacted these laws. In States that are covered by Section 5 of the Voting Rights Act, they will be required to submit those laws to the Department of Justice for pre-clearance, or, in the alternative, to file a complaint in the District Court of D.C.

Mr. NADLER. And the States that are not covered by Section 5, would you review them under Section 2?

Mr. PEREZ. Yes, and that was the second part of my answer. We have authority under Section 2 to address issues that would include the voter ID context if in fact there's a determination that they constitute some form of discrimination in the voting context. And so, those are the two——

Mr. NADLER. Have you reviewed any of them and made determinations yet?

Mr. PEREZ. We are reviewing. We are certainly aware of all of the laws that have been passed, whether it is a covered jurisdiction or a non-covered jurisdiction. And each law is different, and so we apply the facts to the law, and we will do that in those circumstances to make an appropriate judgment.

Mr. NADLER. Has the Department pre-cleared photo ID and citizenship requirements in Section 5 jurisdictions yet?

Mr. PEREZ. There are examples of voter ID requirements that have been pre-cleared, and I would have to get you the full answer of exactly which states. I do not recall off the top of my head. I believe Georgia might be one, and I believe in the prior Administration, there may have been one in Arizona. But I am not sure if that was citizenship or voter ID. But I can get you a full list.

Mr. NADLER. Thank you. Given the fact that most of these laws require that you get a photo ID or a non-photo ID from the Division of Motor Vehicles or something like that, and that getting those in many states requires in turn that you get as a foundation document a passport or a birth certificate, which costs money to get in many states, do you think that that might be a violation of the poll tax?

Mr. PEREZ. Well, we are looking at all of the facts and circumstances of all the laws passed, and each State has a different set of circumstances. And so, it is difficult to give a categorical answer without looking at the specifics of each particular law.

Mr. NADLER. And you are looking at all these laws now?

Mr. PEREZ. Yes, we are.

Mr. NADLER. And recently, one of the States—I think it was Florida—passed a law that not only included voter ID, but essentially made it impossible to conduct voter registration drives by making very onerous restrictions and liability on anybody who conducts a voter registration drive, so much so that the League of Women Voters said they would no longer do voter registration in that State. Are you going to be looking at that?

Mr. PEREZ. Well, there are a number of counties in Florida that are covered under Section 5, so if it constitutes a change to voting, then there would be, again, the pre-clearance requirements that I discussed.

Mr. NADLER. Okay. We passed the National Voter Rights Act back in 1993, which requires social service agencies to provide voter registration opportunities. That has largely been unenforced. Will the Civil Rights Division be concentrating on making sure that that law is enforced?

Mr. PEREZ. We have an aggressive program of enforcement of the NVRA. We have reached a settlement recently. It was the first NVRA Section 7 lawsuit in 7 years. It was in Rhode Island. We have a number of cases that we are taking a look at under Section 7, Section 8. And I agree with you that the Motor Voter law is a critical component of the broad effort to ensure access to the ballot. And so, we will continue to aggressively and independently enforce the NVRA.

Mr. NADLER. Because from where I sit, all of these constitute a very deliberate attempt to disenfranchise minority voters, young voters, older voters who are likely statistically, to a great extent, not to have a voter ID, not to have driver's licenses and so forth. And I would hope that the effects of the malevolently intended laws will be properly examined.

The last question I have, when this Administration launched its version of the faith-based initiative, Administration officials explained that the issue of hiring discrimination on the basis of religion and taxpayer funded social service contracts and grants, which was a central aspect of President Bush's faith-based initiative, would be reviewed by the Department. In December of 2009, you testified before the Subcommittee that, "I think the Department will continue to evaluate these legal questions that arise with these programs."

Is the Civil Rights Division involved with this review, and what can you tell us about this review as of now?

Mr. PEREZ. The review remains ongoing. And, again, we are committed to ensuring that we can partner with faith-based organizations in a way that is both consistent with our laws and with our values, and that we continue to address these legal questions that you have raised.

We are not leading that effort in the Department. Other components are involved in that.

Mr. NADLER. Who?

Mr. PEREZ. I do not recall who is leading that effort right now, but it is not the Civil Rights Division.

Mr. NADLER. Thank you. I see my time has expired. I yield back.

Mr. FRANKS. I thank the Ranking Member.

And I now recognize the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

Mr. PEREZ. Good afternoon, sir.

Mr. KING. Mr. Perez, thank you. I appreciate you being here to testify. And just a couple of things. I would like to start out with some clarification.

I know that we have perhaps a better perspective in the rear view mirror, so I am looking back on that date in 2009. And I am thinking of an exchange that took place between yourself and Mr. Gohmert. And that question that he asked was, did you review or

did you watch the video of the New Black Panthers. Do you recall that question?

Mr. PEREZ. I do not recall the question, but I know the answer to the question. And the answer is yes.

Mr. KING. Okay, thank you. And I would just point out for the Committee that Mr. Gohmert, although he is not able to be here today, asked that question five times before he got that straight answer. And I appreciate the clarity that comes today. I do not think we had it then.

And I would see if we could clarify something else again. On that day, you testified that the maximum penalty was obtained against the, let me say, perpetrator, singular, of the voter intimidation of the New Black Panthers. Do you believe that today, that the maximum penalty was obtained?

Mr. PEREZ. The maximum penalty in that case was injunctive relief, and that is the maximum penalty under Section 11 of the Voting Rights Act. If Congress wants to expand the penalties, we would be happy to have that discussion. So, that was the maximum penalty. And as I recall——

Mr. KING. Would I be naive if I were led to believe that injunctive relief was a clear and concise definition under the law, that everybody else here understands the scope of injunctive relief, or could you describe the full scope of injunctive relief that was available as a means to bring against the defendant?

Mr. PEREZ. The scope of injunctive relief depends on the scope of the violation. And once the national party and the leader of the national party were dismissed from the case, then the scope of the relief had to, by force of law, be appropriately and narrowly tailored to fit the violation.

Mr. KING. Could it have been more narrowly tailored than it actually was then?

Mr. PEREZ. I would have to review that to figure out the narrow tailoring. What I would note is that, again, looking at the OPR report, the OPR looked at this precise question, Congressman, and concluded that the relief sought was indeed appropriate given the application of the facts and law in that particular case. So, OPR looked——

Mr. KING. And so, the definition then of injunctive relief might be narrow or it might be broad. But are you testifying before this Committee that the injunctive relief could not have been more broad? Could it not have gone beyond Philadelphia, for example, into other jurisdictions, perhaps nationwide? Could it have not extended beyond the 2012 election? This injunction is just about ready to expire. After the next election, it is over. So, is it not possible that the injunctive relief could have been greater than that that was achieved?

Mr. PEREZ. Again, as I understand the law, sir, an injunction must be narrowly tailored to the violation. And the key in this particular case was that once the national party and the leader of the national party were dismissed, then the injunctive relief had to be appropriately and narrowly tailored——

Mr. KING. Let me submit that I believe that could have been a nationwide injunction, and that it could have gone on in perpetuity,

and no one should be passed the statute of, let me say, the injunction limitations by a single election being ahead of them.

What about the decision to drop the case against the other alleged defendants that were allegedly involved in that Philadelphia case?

Mr. NADLER. Would the gentleman yield for clarification for a second?

Mr. KING. In a moment. I will yield when my time runs out. It is very close right now. Thank you.

But the decision to drop the cases against the other individuals, you testified, was made not by political, but by career employees. And I think the names were Loretta King and Mr. Rosenbaum. Does that still remain the case, or would you wish to clarify that before the Committee?

Mr. PEREZ. The decision was made by Loretta King and Steve Rosenbaum, two people who are career attorneys in the Division with combined experience of roughly 60 years or so.

Mr. KING. And it was not overruled or reviewed with input from political appointees, Perelli and Hirsch?

Mr. PEREZ. Well, again, as I have described before the commission, any time you make a decision—I have a regular Thursday meeting with the Associate Attorney General and other people on the leadership chain. When you are making a decision, I am about to do something, an issue in case A. We are about to——

Mr. KING. But the question was, it was not overruled by or influenced unduly by political appointees?

Mr. PEREZ. No. And, again, the OPR report concluded, and they did not say that there was scant evidence or insufficient evidence of political interference. They said there was no evidence of political interference.

Mr. KING. Mr. Perez, would you get back to this Committee in response to the question, was it possible under the law to broaden this injunctive relief to jurisdictions beyond Philadelphia and extend it beyond the 2012 election? I think the specificity with that is going to tell us is whether we got the straightest of answers the last time in December of 2009. And I am frustrated that the Department has so many allegations against it that it has focused on issues that have to do with this loading on the side of minorities when equal justice under the law, as you're charged and you testified to that here today, that narratives that come out and the evidence that there is is replete across the country. And so, I am concerned that Lady Justice is and truly blindfolded, and that you address these issues without regard to skin color or ethnicity, national origin.

And so, at this point, I do thank you for your testimony, and I hope you can identify for this Committee some time when you bring a case against someone in a very clear way. And I know you have discussed it, but I would like to have some details about the case that you brought that is part of the package that you brought, which is the race role if you please.

And now, I know the gentleman from New York has asked if I would yield, and I would be happy to do so?

Mr. NADLER. Thank you. I just want to clarify a matter. I am told that the injunction has not in fact expired and will not expire.

The jurisdiction of the court to supervise enforcement of the injunction will expire, but the injunction does not expire.

Mr. KING. Well, I thank the gentleman for his input and yield back the balance of my time.

Mr. FRANKS. Thank you.

And I now recognize the gentleman from Virginia, Mr. Scott, for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Perez, about 70 years ago this month, President Roosevelt signed an executive order, 8802, which prohibited discrimination in any defense contracts. In '65, President Johnson signed an executive order expanding that. So, there has been no discrimination in Federal contracts at all until recently.

Under your administration, is it possible for administrators of Federal programs to discriminate based on religion; that is, to tell somebody they are not qualified for a job paid for with Federal money solely because of their religion?

Mr. PEREZ. Again, sir, I think we have had this conversation a number of times.

Mr. SCOTT. Yeah. Well, the answer yes or no?

Mr. PEREZ. And, again, if there are legal questions that arise with the administration of a program, we will look at the specific individual facts of a particular case to determine whether there is in fact discrimination. And if we find that there is in fact discrimination, we will indeed take appropriate action.

Mr. SCOTT. Does that mean if a program sponsor said we do not hire people of your religion, you would take action?

Mr. PEREZ. Well, again, I need to know the totality of the circumstances, which is why it is difficult——

Mr. SCOTT. If it is a faith-based organization running a federally-funded program and they have an articulated policy of discriminating solely on religion, is that legal under your administration?

Mr. PEREZ. Again, sir, we are committed, as I have said, to ensuring that we enforce these laws that you are describing consistent with the——

Mr. SCOTT. Does the law allow the discrimination or not?

Mr. PEREZ. Again, sir, I need more facts. And that is why——

Mr. SCOTT. Faith-based organization——

Mr. PEREZ [continuing]. When Congressman Nadler asked about——

Mr. SCOTT. Are you telling me——

Mr. PEREZ. When Congressman Nadler asked about the voter ID laws, they are very fact intensive. These particular issues are similarly fact intensive. We are very concerned about the issues that you brought up. I have had, as you know, multiple conversations with you about these issues. And, again, I am more than willing to continue to——

Mr. SCOTT. And you have not acknowledged publicly that it is legal under your administration for a program to discriminate solely on religion. And you just will not acknowledge it. I mean, are you too embarrassed about the policy——

Mr. PEREZ. Sir——

Mr. SCOTT [continuing]. To say, yes, under your administration, there are certain sponsors that can discriminate solely based on religion?

Mr. PEREZ. Sir, what I have said, Congressman, is that I want to look at the totality of the circumstances. If there is——

Mr. SCOTT. I said is it possible.

Mr. PEREZ. It is certainly possible that such discrimination would be there. But I do not like to——

Mr. SCOTT. Well, not there. I said legal.

Mr. PEREZ. I do not want to issue categorical statements, sir, because absent of specifics of a given factual circumstance, it is, I think, ill advised to render broad opinions, just as——

Mr. SCOTT. It is not a broad opinion. I just asked you simply whether it is possible under your administration for any sponsor of a federally-funded program to have an articulated policy discriminating against people solely based on religion or not. Is it possible?

Mr. PEREZ. Sir, again, I will reiterate what I have said today and a few other times.

Mr. SCOTT. If the answer is yes, it is possible, faith-based organizations have the right——

Mr. PEREZ. Yes, it is, sir, it is possible. But, again, I need to understand the——

Mr. SCOTT. Did you say it was possible?

Mr. PEREZ. Sir, could I hear the rest of your question, sir?

Mr. SCOTT. Is it possible for a faith-based organization to tell a job applicant that we do not hire people of your religion, even though you would be paid with Federal money?

Mr. PEREZ. Oh, okay. I thought you asked the opposite question. Is it possible that such activity would constitute discrimination, and I said, yes, it is possible. We would have to look at the totality of the circumstances.

Mr. SCOTT. And the other question is, of course it is discrimination. Is it legal?

Mr. PEREZ. Unlawful discrimination.

Mr. SCOTT. Can it be legal? Can it be legal?

Mr. PEREZ. It is possible that the circumstances you described would constitute unlawful discrimination, which is why I would want to look at the totality of the circumstances.

Mr. SCOTT. It is possible that it could be unlawful, and it is possible that it could be lawful.

Mr. PEREZ. And it all depends on the factual circumstances of the matter. And so, that is why I would want to——

Mr. SCOTT. So, getting back to my original question that you do not want to answer, because I assume you are just too embarrassed to have a declaratory sentence that it is possible under your administration to run a federally-funded program and have an articulated policy of discriminating solely based on religion in employment. Is it possible?

Mr. PEREZ. As a general matter, Congressman—I will see if I can attempt to address your question again—it is unlawful for any employer to have a policy specifically discriminating against employees of a particular religion, such as Catholics or Jews—if you put a sign up, no Catholics need apply. However, qualifying religious organizations may give employment preferences to co-religionists.

And so, the question of whether and under what circumstances a particular religious organization may prefer co-religionists in employment with respect to positions funded by the U.S. is indeed complicated, fact driven, and context dependent. And that is why it is impossible for me to give you a categorical one size fits all answer.

Mr. SCOTT. I did not ask for one size fits all. I asked you to acknowledge that under your administration it is possible to run a program and have an articulated policy of employment discrimination solely based on religion. And all you have given is a bunch of mumbo jumbo avoiding the question. The answer is yes. Yes, you can under certain circumstances tell a job applicant, no, you cannot have a job because we do not hire people of your religion. And that is the answer, and you refuse to give it, I assume, because you are too embarrassed to acknowledge the fact.

Mr. PEREZ. Sir, I have done my best to answer your question. I apologize that it is not good enough for you.

Mr. FRANKS. With that, I want to thank the witness for his testimony. And without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for Mr. Perez, including you, Mr. Scott, which we will forward and ask Mr. Perez to respond promptly so that his answers may be made part of the record.

And without objection, all Members will have 5 legislative days within which to submit any additional materials for inclusion in the record.

And with that, again, I thank the Members, and I thank Mr. Perez and the observers.

And this hearing is now adjourned.

Mr. PEREZ. Thank you for your courtesy.

[Whereupon, at 12:53 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Post-Hearing Questions submitted to the Honorable Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice

June 24, 2011

The Honorable Thomas E. Perez
Assistant Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Assistant Attorney General Perez,

The Judiciary Committee's Subcommittee on the Constitution held a hearing titled "Oversight Hearing on the U.S. Department of Justice Civil Rights Division" on Wednesday, June 1, 2011, at 11:30 a.m. in room 2141 of the Rayburn House Office Building. Thank you for your testimony.

Questions for the record were submitted to the subcommittee within five legislative days of the hearing and are attached. We would appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers to Kelsey Whitlock at kelsey.whitlock@mail.house.gov by August 24, 2011. If you have any further questions or concerns, please contact Harry Damelin, Chief Investigative Counsel, at harry.damelin@mail.house.gov.

Thank you again for your participation in the hearing.

Sincerely,

Lamar Smith
Chairman

Questions For The Record From Chairman Smith

The Dismissal of Most of the Department's Voter Intimidation Lawsuit Against the New Black Panther Party for Self-Defense

1. At the time you testified before this subcommittee on December 3, 2009, did you have any involvement in or personal knowledge of the New Black Panther Party case?

2. In your testimony before this subcommittee on December 3, 2009 you stated that the decision to dismiss 3 of 4 defendants and seek a limited injunction against the remaining defendant was made by two DOJ career attorneys, Loretta King and Steve Rosenbaum, with over 60 years of combined experience. Did you personally speak with them, prior to your testimony before the subcommittee, to confirm the accuracy of your statements?

3. What else did you do to prepare for your December 3, 2009 subcommittee testimony relating specifically to the New Black Panther Party matter? Did you speak with anyone else who had been involved in the matter such as Christian Adams, Christopher Coates, Associate Attorney General Thomas Perelli, or Deputy Associate Attorney General Samuel Hirsch?

4. Despite having no involvement in or personal knowledge of the New Black Panther Party matter, you were adamant in your testimony before this subcommittee, before the Senate Judiciary Committee in April 2010, and before the Civil Rights Commission in May 2010, that only DOJ career attorneys Loretta King and Steve Rosenbaum were involved in the decision to dismiss three of the defendants. What is the basis for your often repeated statement?

5. You testified before this subcommittee that the "maximum penalty was sought and obtained" against the remaining defendant. Isn't that misleading, when the watered down injunction that the government requested and received was, in fact, far from the broader injunction it could have sought and very possibly obtained from the court?

6. When you testified before the subcommittee on December 3, 2009, you said that you had not personally reviewed "the totality of the evidence" in the New Black Panther Party case, but you were looking forward to the OPR report. On March 17, 2011, after taking 19 months to do its investigation, OPR finally issued its report on the dismissals of three of the four defendants in the case. Have you read and are you familiar with the details of the OPR report?

7. Were you aware of Associate Attorney General Thomas Perrelli's involvement in the New Black Panther Party matter in the period leading up to the dismissal of the charges against 3 of the 4 defendants? Before or after you read the OPR Report?

8. How do you explain the extensive communications between Steve Rosenbaum and Deputy Associate Attorney General Samuel Hirsch in the period leading up to the dismissal of the charges against 3 of the 4 defendants which are detailed in the OPR report?

9. After the OPR report was issued did you discuss the New Black Panther Party matter with any DOJ staff?

10. In light of the involvement of Associate Attorney General Perrelli and Deputy Associate Attorney General Hirsch, which is detailed in the OPR report, isn't your prior testimony that the decision to dismiss three defendants was made only by two career DOJ attorneys misleading, when in fact there were influences from the top down regarding the case?

11. The evidence in the New Black Panther Party case is clear, that one of the three dismissed defendants, Jerry Jackson, stood side by side at the polling place in Philadelphia with the fourth defendant, King Samir Shabazz, intimidating voters and poll watchers on Election Day in November 2008. While Shabazz had a weapon (a nightstick secured to his wrist) and Jackson did not, Jackson was clearly acting in tandem with Shabazz. Despite these facts, it was decided that the charge of voter intimidation against Jerry Jackson should be dismissed.

    a. By dismissing the voter intimidation charge against Jerry Jackson, hasn't the Department sent a clear message that as long as a person doesn't actually flaunt a weapon, it is permissible to harass and intimidate voters at a polling place?

b. Since Jerry Jackson was acting in concert with King Samir Shabazz, under established legal precedent, Mr. Shabaaz's use of a weapon should be attributed to Mr. Jackson. Does the Department dispute this?

c. Your Deputy Associate Attorney General, Samuel Hirsch, told OPR that he would not have dismissed the case against Jerry Jackson. Do you agree with him?

d. What is the lasting precedent of the New Black Panther Party case?

e. According to the OPR report, Loretta King and Steve Rosenbaum believed that a voter intimidation case should not have been brought against any of the four defendants. Associate Attorney General Thomas Perrelli made it clear to King and Rosenbaum that he would not support a decision "dismissing all of the defendants, which he referred to as 'doing nothing.'" With this directive coming down from top management and the belief by King and Rosenbaum that a case should not have been filed against any of the defendants, wasn't the ultimate decision to leave just one defendant with a watered down injunction inevitable?

Chairman Smith's Inquiry into Allegations of Race Based Enforcement of Voting Rights Laws

1. The history of the Voting Rights Act and the Fifteenth Amendment clearly indicate that the Voting Rights Act was intended to protect the rights of all voters, regardless of race. Is it the Department's policy to enforce the Voting Rights Act in a race-neutral manner or is it the Department's view that a voting rights case should never be brought to protect the rights of white voters?

2. With regard to Section 8 of the National Voter Registration Act, Christopher Coates has testified that in September 2009, he sent a memo to the Division's front office requesting approval to commence Section 8 list maintenance investigations in eight states and that he never received approval for this project. Furthermore, since January 2009, the Division has not filed a single case under Section 8.

   Isn't this clear proof that, consistent with the directives of Deputy Attorney General Fernandes, in this Administration, the list maintenance requirements of Section 8 of the National Voter Registration Act are not going to be enforced?

3. Were you present at the redistricting training session held in Arlington, Virginia on January 18 and 19, 2011, which all Voting Section employees were required to attend?

   a. Did you stay for the entire two day session?

   b. What, if anything, have you done to ascertain what was said at the training session that might lead to the conclusion that our voting rights laws are not to be enforced in a race neutral manner?

Civil Rights Division Inquiry – Lack of Cooperation by DOJ

1. Since Chairman Smith initiated the inquiry into the Civil Rights Division, the Department has repeatedly withheld numerous requested documents from the Committee.

    a. Is it Department policy to withhold documents that are responsive to legitimate Congressional oversight requests? Is it Department policy to also refuse to produce a log of the withheld documents? What is the Department's authority for doing this?

    b. Is the Committee going to have to butt heads with the Department over every request for information as it attempts to carry out its legitimate oversight responsibility of its Civil Rights Division?

Redistricting Under the Voting Rights Act

1. Under Section 5 of the Voting Rights Act, the Department is supposed to pre-clear changes to voting practices and procedures in covered jurisdictions to ensure that voting changes do not discriminate against racial or language minority groups. Some have expressed concern, however, that the Department may take improper partisan political considerations into account when making preclearance determinations. Can you assure the Committee that the Department will not use the Section 5 preclearance process for partisan political purposes?

2. According to written responses to questions the Division sent the Committee prior to this hearing, the Division has reviewed approximately 10,505 submissions for administrative preclearance under Section 5 of the Voting Rights Act since January of 2009. Of these 10,505 submissions how many were pre-cleared by the Department without any changes?

3. What is an "illustrative plan" and how is it currently being utilized by the Voting Section in the redistricting process?

4. Can you give an example of a "benchmark" and how it factors into the redistricting process?

5. In *Miller v. Johnson* (515 U.S. 900, 911 (1995)), the Supreme Court said "the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." That makes one wonder about the intellectual justification for the idea that voting is a group right rather than an individual right. It's one thing to say you can't locate polling stations far from minority areas, or that you can't have unequally sized voting districts because both those things impair the access to or the relative value of an individual's vote. But what is the intellectual justification for the idea of a majority minority district which by its nature protects not an individual right but a group right?

Bailouts from Coverage Under Section 5

1. The Division has recently defended or is currently defending four cases challenging the constitutionality of Section 5 of the Voting Rights Act. Is the Division concerned, in light of the Supreme Court's indication in *Northwest Austin Municipal Utility District v. Holder* (129 S. Ct. 2504 (2009)) that Section 5 raises "serious constitutional questions" about the exercise of Congress's enforcement power under the Fifteenth Amendment, that Section 5 of the Voting Rights Act may be declared unconstitutional?

2. Some commentators have suggested that the Division is requiring covered jurisdictions that seek to bailout from Section 5 coverage to submit to conditions beyond those provided for in the Voting Rights Act simply to obtain relief to which they are entitled to under the VRA. Has the Department in any case added additional conditions to a covered jurisdiction beyond those listed in 42 U.S.C. § 1973?

Gender, Dress Codes, and Public Schools

1. In late 2009, the Division notified two schools in upstate New York it was investigating them for enforcing their dress codes against two male students; one who wore a pink wig and makeup and the other who wore a wig and stiletto heels and said he wanted to be able to "dress like a woman."

    a. While one would certainly hope that children would treat their peers with kindness and compassion, there is a legal concern that this case may be the beginning of a precedent that expands the reach of the federal government into every decision a school administration might make. It also appears as though this case is expanding protected classes beyond those protected by law. Do you agree that in looking at this issue, however sympathetic, the rule of law, specifically, constitutional limits on federal power must be respected?

    b. In *Jespersen v. Harrah's* (444 F.3d 1104 (2006)), the Ninth Circuit held that a dress code can differentiate between the sexes so long as it does not put unequal burdens on the sexes. Isn't that ample precedent for the federal government to avoid interfering with local school administrative decisions particularly given that federal law does not recognize sexual orientation as a protected class?

Public Safety, Affirmative Action, and Police and Fire Department Hiring

1. The Department recently forced the City of Dayton to lower the passing scores on its police recruiting exams because of its "disparate impact." That is to say there was no intentional discrimination, the exam merely had a disproportionate adverse effect on minorities.

    a. How do you respond to the statement of a local NAACP representative saying "The NAACP does not support individuals failing a test and then having the opportunity to be gainfully employed."

    b. How do you respond to Dayton Fraternal Order of Police President Randy Beane who echoed the NAACP saying "it becomes a safety issue to have an incompetent officer next to you in a life-and-death situation."

2. Under federal law, an exam with disparate impact can still be valid if it is job related and consistent with business necessity.

    a. Pursuant to a 2009 settlement, Dayton had already agreed to stop creating its police exam internally in case that somehow biased the exam in favor of particular groups. Instead, they paid a vendor with particular expertise in police and fire exams around $180,000 to develop a test.

        1. Since the validity of the test was already in question once, did the Division seek to review it for adequacy before it was administered?

        2. If so, why weren't its substantive defects apparent before additional funds and time were spent on its administration?

        3. If there was no prior review, is that because the Division can only detect substantive flaws in exam questions based on whether it produces politically correct outcomes?

    b. The Division told Dayton that its test "did not accurately measure applicants' ability to perform the job." If so, how does lowering the test score solve the problem. If the test is truly flawed shouldn't it be discarded altogether?

3. You have been quoted as looking to aggressively utilize "disparate impact" theory. What do you see as its intellectual justification inasmuch as it requires the more controversial equality of results rather than of opportunity.

    a. For example, a *Harvard Law Review* article noted disparate impact might be explained as simply an evidentiary tool used to 'smoke out,' intentional disparate treatment. (Equal Protection and Disparate Impact: Round Three, 117 Harv. L.Rev. 493, 498-499, (2003)). Is that your view as well? If not, what explanation do you favor?

    b. Dayton's test was developed by an out of state third party vendor specializing in police and fire exams. Would you agree this makes it highly unlikely that there was intentional discrimination in the production of the test that needs to be "smoked out" here?

c. Does the recent Supreme Court case, *Ricci v. DiStefano* (129 S. Ct. 2658 (2009)) holding New Haven could not discard its employment test simply because it feared a disparate impact lawsuit give you any pause in pursuing disparate impact theory too aggressively in similar cases?

4. Given that the exam was developed by outside experts, there is at best only an ambiguous case to be made that it is NOT job related. In contrast, there appears to be an explicit federal statute prohibiting lowering the scores of employment exams based on race. (42 U.S.C. 2000e(L)) How would you respond to the observation that in the name of avoiding what is at best an arguable violation the Division has demanded a clear one?

Racial Profiling Investigations and the Chilling Effect on Immigration Enforcement

1. On March 10, 2009, CRT informed the Maricopa County Sheriff's Office (MCSO) that it was opening an investigation into alleged "patterns or practices" of discriminatory policing.

   Since Maricopa County began participating in 287(g) in April 2007, their officers have turned over more than 40,372 illegal immigrants to immigration authorities for deportation. While the Division must be free to investigate, the specter of an investigation no doubt casts a chill on their immigration enforcement activities in Maricopa and every other jurisdiction trying to help enforce immigration law.

   a. Does the Department have any "minimization procedures" to ensure the investigation's chilling effect on lawful enforcement is limited?

   b. Does the Committee have your assurance that these investigations are being pursued in good faith and not, as some commentators worry, more to placate interest groups?

Increasing Use of Civil Suits against Pro-Life Movement

1. A recent AP article titled, *Feds suing more abortion activists,* revealed that, in the last two years, the Division filed 6 civil cases against pro-life activists, under the Freedom of Access to Clinic Entrances Act (FACE) compared with just 2 such filings in the entire 8 years of the Bush Administration.

a. In many FACE cases, free speech claims are at issue. Would you agree that taking advantage of the lower standard of proof in a civil case increases the danger that protected speech will be chilled?

DOJ's Plodding Enforcement of the MOVE Act

1. In 2009, Congress adopted the Military and Overseas Voter Empowerment Act, or MOVE Act, which requires states to mail absentee ballots to military and overseas voters at least 45 days before an election. Its intent was to end the historical disenfranchisement of deployed military service members. Our men and women in uniform safeguard all of our rights. Protecting their right to vote is the least we can do.

   Unfortunately, in the 2010 election, the Voting Section was slow to identify jurisdictions that had not complied with the law. As a result, many jurisdictions across the country denied military voters their legal right to a timely absentee ballot.

   Will you promise that the Voting Section will contact every county-level jurisdiction to verify MOVE Act compliance within 72 hours of the jurisdiction's deadline for mailing ballots? For example, to save manpower, jurisdictions could be instructed to certify compliance electronically.

Fiscal & Administrative Issues

1. What was the justification to support the increase in the Division's annual appropriation of about 22.3 million dollars between FY 2009 and FY 2010?

2. In FY 2010, the Division was authorized to fill 102 new positions. How many of those positions were allocated to the Voting Section?

3. Within the Voting Section, how many attorneys are currently assigned to the Section 5 Group and how many attorneys are assigned to the Litigation Group?

4. What do the attorneys in the Litigation Group do on a day to day basis?

5. The Committee has received information indicating that a number of the attorneys in the Litigation Group of the Voting Section currently have very little to do. This seems consistent with a June 1, 2011, article in the *New York Times* noting the Voting Rights Section brought fewer cases than "division observers had expected." If that is correct, have you considered reassigning these attorneys to other sections of the Division until the anticipated redistricting litigation actually develops?

6. Given current fiscal realities, government agencies, including DOJ, will inevitably face steep budget cuts. As part of this process, the Civil Rights Division is going to have to make policy choices about those areas that are not critical to its mission. What are your priority areas for cuts?

Oversight Hearing on the U.S. Department of Justice Civil Rights Division

Questions for the Record
Submitted by Ranking Member John Conyers, Jr.
June 15, 2011

Racial Profiling

1. Has your Division studied the impact that Justice Department investigations of some Muslim or Arab groups have had on unconnected Arab or Muslim charities? Would the Division be opposed to such a study conducted by the Office of Professional Responsibility (OPR)?

2. How has the Justice Department responded to allegations suggesting that some local police departments—such as in McHenry County, Illinois, have falsified information in arrest records in order to avoid the appearance of racial profiling?

3. Please outline the Department's protocol for protecting due process safeguards when naming unindicted co-conspirators.

Voting

4. In your opinion, do you believe the Voting Section is less politicized today than it was under previous administration?

5. How many analysts do you have reviewing Section 5 submissions?

6. How many career attorneys do you have reviewing Section 5 submissions?

7. Do you acknowledge that voter identification laws raise serious questions regarding the denial of access to particular groups, and warrant scrutiny from the Civil Rights Division?

8. If so, why has the Voting Section recently pre-cleared photo identification and citizenship requirements for voting in jurisdictions covered by Section 5?

9. Please describe what steps the Division has taken to enforce Section 7 of the National Voting Rights Act and to ensure that covered social services provide voter registration opportunities.

Employment

10. What steps have you taken, and will you take, to ensure vigorous Title VII enforcement?

11. Please share with us your views on the disparate impact test. Do you believe disparate impact cases are a valuable enforcement tool?

Faith-Based Initiatives

12. When the Obama Administration launched its version of the "faith-based initiative" program, Administration officials explained that the Justice Department would review the issue of hiring discrimination on the basis of religion in taxpayer-funded social service contracts and grants. In December 2009, you testified before this Subcommittee that "the Department will continue to evaluate these legal questions that arise with these programs." Is the Civil Rights Division involved with this review? Have there been any preliminary findings? When will the review conclude?

13. Last month, in his appearance before the full Committee, Attorney General Holder said that one key component of this policy—a 2007 opinion by the Office of Legal Counsel—was not, in fact under review. Why is this opinion not part of the overall review of the hiring discrimination policy?

Disability Rights

14. What steps have you taken, and will you take, to ensure vigorous ADA and Section 504 enforcement?

15. What enforcement actions has the Voting Section undertaken to make polling places more accessible to disabled voters?

Limited English Proficiency Enforcement

16. On August 11, 2000, President Clinton signed Executive Order 13166, which calls on federal agencies to implement guiding principles for improved access to federal and federally-assisted programs and activities for persons with Limited English Proficiency (LEP). The relevant agencies are required to issue LEP guidance for recipients of federal financial assistance, and to develop plans to ensure that their programs and activities are accessible for LEP persons. How does the Division enforce this Executive Order?

Immigration

17. In *Chamber of Commerce v. Whiting*, the U.S. Supreme Court decided that an Arizona law that attempts to impose sanctions for the employment of unauthorized aliens through, among other methods, "licensing and similar laws," was not preempted by federal immigration law. Does SB 1070 fall into this exception? Has any party to the SB 1070 litigation made such a claim?

18. In its ruling on SB 1070, the Ninth Circuit addressed the pending decision in *Whiting*, stating that: "Although [Whiting] and the present case both broadly concern the preemptive effect of IRCA, the specific issues in these cases do not overlap. The scope of 'licensing' law . . . in IRCA has no bearing on whether IRCA impliedly preempts Arizona from enacting sanctions against undocumented workers." *United States v. Arizona*, 2011 WL 1346945, *13 n.18 (9th Cir. Apr. 11, 2011). The dissent did not mention *Whiting*. Given the distinction between the employers at issue in *Whiting* and the workers targeted by SB 1070, and given that SB 1070 is predominantly concerned with immigration enforcement outside the employment context, what effect does *Whiting* have on the SB 1070 litigation?

Questions for the Record for Tom Perez, Assistant Attorney General for the Civil Rights Division at the U.S. Department of Justice, regarding the Obama Administration's position on the Faith-Based Initiative

Submitted by Rep. Scott

1. Please provide a breakdown of the race and ethnicity of employees within the Civil Rights Division who are in decision making positions dealing with policy.

2. A document provided by your office that contains a summary of the Civil Rights Division's accomplishments over the past two years states: "The Attorney General issued a memorandum to federal agencies advising them that all Americans – regardless of race, gender, age, national origin, or disability – must receive the benefit of programs funded under the American Recovery and Reinvestment Act of 2009." In order for all groups to receive their share of the funds, businesses within their communities should have received a fair share. Have you reviewed federal contracting with ARRA funds to determine whether minority businesses received a reasonable share? If so, what did you find from that review?

This Administration's position concerning federally funded employment discrimination by faith-based organizations operating federal grant programs.

3. The Bush Administration's Office of Legal Counsel's June 29, 2007 Memorandum[1] concerning faith-based organizations is still in effect and still applies to all federally funded programs. Is this correct?

4. The effect of this memorandum allows faith-based organizations receiving federally funded grants to circumvent, by invoking the Religious Freedom Restoration Act (RFRA), statutory civil rights provisions prohibiting religious discrimination. The result is that a church operating a Head Start grant can hire Head Start teachers based on their religious convictions, all the while using federal funds despite the fact that that there is a statutory provision, many decades old, in the Head Start program that prohibits such discrimination. Is this correct?

5. Is the Department of Justice in the process now of reviewing this memorandum or does it plan to review it in the future? If so, can you please provide a timeline for

[1] Memorandum for the General Counsel, Office of Justice Programs, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Deliquency Prevention Act* (June 29, 2007).

when you anticipate that review will occur and when can we expect a DoJ decision or position on that review? If there is no anticipated timeline for review, can you please explain why it is not under review and how it might come to be under review? Is it this Department's position that the memorandum is good policy and should stand?

6. Has any organization receiving federal funds ever discriminated in the federally funded activity on the basis of religion in either employment or participation? If so, which organizations, what federal funding did they receive (including amounts), under which federal programs, what was the approval process to provide funding to these organizations, who approved it and what was the basis for approval?

An October 2007 publication by the Office of Justice Programs in the U.S. Department of Justice[2] entitled "Effect of the Religious Freedom Restoration Act on Faith-Based Applicants for Grants" contains the criteria needed for granting an exemption to a faith-based organization wishing to discriminate on the basis of religion in hiring of its federally funded staff. [It should be noted that this document is consistent with the OLC Memo.]

7. What agency grants the exemption? Is it DOJ? Or is it the authorizing/funding agency? For example, Head Start is funded and overseen by the Department of Health and Human Services. Does DoJ review and approve the exemption waiver or does HHS? Another example is the Workforce Investment Act (WIA), which is funded by the Department of Labor. Does DOJ or the Department of Labor review and grant the exemption? What entity within DOJ or the authorizing/funding agency reviews and approves the exemption? [Note, both the Head Start and WIA program have statutory provisions specifically prohibiting religious discrimination.]

8. This document[3] further requires that "exemptions should be granted, on a case-by-case basis, to FBO's that certify the following, unless the funding entity has good reason to question the certification..." Again, what entity makes the "case-by-case" determination? Is it DOJ? And if so, what entity within DOJ grants the exemption? Or is it the funding entity (e.g., HHS or the Department of Labor) which makes the "case-by-case" determination? If so, what entity within that funding entity grants the exemption?

9. To date, has anyone in DoJ or a funding entity within DoJ, or has anyone in any other agency or a funding entity within any other agency, approved such an exemption or

[2] "Effect of the Religious Freedom Restoration Act on Faith-Based Application for Grants," U.S. Department of Justice, Office of Justice Programs, October 2007.
[3] Ibid.

exemptions under the OLC Memorandum? If so, please provide this Subcommittee a list of the exemptions granted during this Administration, to which organizations the exemptions were granted, under which federal programs those exemptions were granted, and the specific entities that granted the exemptions.

10. If it is the position of the Department that religious discrimination is permissible, why is an exemption by DoJ or the funding entity even necessary? What is the legal basis that prohibits religious discrimination if there is no exemption by DoJ or the funding entity?

SAMHSA and Self Certification.

11. Is it the Department's position that the OLC Memorandum lays out a process by which funding agencies determine whether a faith-based organization meets the criteria under RFRA to receive an exemption? Would the Department agree with the position that a faith-based organization cannot simply disregard the statutory civil rights requirement without first applying to the funding entity (or DOJ) for "relief" from its requirements? Do regulations[4] governing our nation's substance abuse programs or SAMHSA (Substance Abuse Mental Health Services Act) permit faith-based organizations to merely "self-certify" that they are entitled to the exemption?

12. SAMHSA contains both a charitable choice provision and a statutory non-discrimination provision. The Charitable Choice regulations for SAMHSA were finalized in September 2003, several years before the issuance of the OLC memorandum. Has this Administration taken any action to correct these regulations that appear to allow "self-certification" and if so, what action has been taken?

Intermountain Fair Housing Council v. Boise Rescue Mission.

13. Recently, the Civil Rights Division submitted an amicus brief to the 9th Circuit, on behalf of HUD, in a case called *Intermountain Fair Housing Council v. Boise Rescue Mission*. The issue in the case is whether the Rescue Mission, which runs a residential faith-based drug rehabilitation program, can use the Fair Housing Act's religious exemption to eject a court-mandated attendee from the program—and send the attendee back to jail—for refusing to attend religious activities and convert to Christianity. The DoJ brief took the position that the religious organization should keep its religious exemption under the Fair Housing Act. But, DoJ's analysis did not

[4] Charitable Choice Provisions & Regulations, 60 Fed. Reg. 56436 (September 30, 2003).

even mention the fact that the woman in question was required by a Court order to attend the religious program. Is it the Department's position that the religious exemption of the Fair Housing Act applies to unwelcome indoctrination of persons who reside in a dwelling by force of law? Shouldn't the shelter be treated as a state actor and lose the religious exemption when it accepts court-mandated participants? Or should persons open to religious indoctrination receive preferred treatment by the Court?

14. If a person is given a choice by a court between prison and a program in which that person would be subject to unwelcome proselytizaiton and forced conversion, is the court engaged in religious coercion? If not why not? If it is, does the Department take the position that this judicially imposed religious coercion is permissible? Does the Department take the position that the Establishment Clause requires that a secular alternative be available if the individual does not want to participate in a faith-based program?

Response to Post-Hearing Questions from the U.S. Department of Justice

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 18, 2011

The Honorable Lamar Smith
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Thomas E. Perez, Assistant Attorney General of the Civil Rights Division, before the Subcommittee on the Constitution on June 1, 2011 at a hearing regarding oversight of the Civil Rights Division.

We apologize for the delay and hope that this information is of assistance to the Committee. Please do not hesitate to contact this office if we may provide additional assistance regarding this, or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program there is no objection to submission of this letter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

House Judiciary Committee
Oversight Hearing on the U.S. Department of Justice Civil Rights Division
June 1, 2011

Questions for the Record for Tom Perez,
Assistant Attorney General for the Civil Rights Division
U.S. Department of Justice

QUESTIONS FOR THE RECORD SUBMITTED BY CHAIRMAN SMITH

The Dismissal of Most of the Department's Voter Intimidation Lawsuit Against the New Black Panther Party for Self-Defense

1. **At the time you testified before this subcommittee on December 3, 2009, did you have any involvement in or personal knowledge of the New Black Panther Party case?**

Response:

I did not have any involvement in the New Black Panther case. The case was investigated, filed, and concluded before I joined the Department as the Assistant Attorney General for Civil Rights. As I have indicated previously, I had been briefed on the matter before I testified on December 3, 2009.

2. **In your testimony before this subcommittee on December 3, 2009 you stated that the decision to dismiss 3 of 4 defendants and seek a limited injunction against the remaining defendant was made by two DOJ career attorneys, Loretta King and Steve Rosenbaum, with over 60 years of combined experience. Did you personally speak with them, prior to your testimony before the subcommittee, to confirm the accuracy of your statements?**

Response:

In my December 2009 testimony, I noted that while I had no personal involvement in the matter, I was prepared to answer questions about the matter and that I did the preparation necessary to be able to answer those questions with great confidence as to the accuracy of those answers. The underlying issues raised in

this question, and in questions 3-11 that follow, were thoroughly reviewed and addressed in detail by the Office of Professional Responsibility (ORP) in its March 17, 2011 report, "Investigation of Dismissal of Defendants in *United States v. New Black Panther Party for Self-Defense, Inc., et al.*, No 2:09cv0065 (E.D. Pa. May 18, 2009)." OPR's conclusions, which were based on an extensive review of documents, as well as interviews with all of the Justice Department officials who had any substantial involvement in litigating or reviewing the matter, were entirely consistent with the December 3, 2009 testimony, as well as the other information the Department has provided regarding the disposition of the case, as reflected in multiple letters to Congress, responses to questions for the record, and written information and testimony provided by the Department of Justice to the United States Commission on Civil Rights. The OPR Report was made available to you as Chairman of the Judiciary Committee and, among its findings, the report confirms that the decision to obtain injunctive relief against one defendant, while seeking dismissal of three other defendants, was made by two individuals named in your question, who have a combined 60 years of experience in the Department.

3. **What else did you do to prepare for your December 3, 2009 subcommittee testimony relating specifically to the New Black Panther Party matter? Did you speak with anyone else who had been involved in the matter such as Christian Adams, Christopher Coates, Associate Attorney General Thomas Perelli, or Deputy Associate Attorney General Samuel Hirsch?**

Response:

In preparing for my December 23, 2009 subcommittee testimony, I reviewed a range of written materials and spoke with various Justice Department colleagues, to ensure that I would be familiar with the topics that I deemed likely to arise during the hearing and would be in a position to respond to questions about those matters.

4. **Despite having no involvement in or personal knowledge of the New Black Panther Party matter, you were adamant in your testimony before this subcommittee, before the Senate Judiciary Committee in April 2010, and before the Civil Rights Commission in May 2010, that only DOJ career attorneys Loretta King and Steve Rosenbaum were involved in the decision to dismiss three of the defendants. What is the basis for your often repeated statement?**

Response:

As noted above in the response to question 3, OPR has conducted a thorough and detailed investigation of this matter, which discusses the Department's reasons for the dismissal of certain claims in this case. My testimony is entirely consistent with the Department's repeated statements about this matter, as well as with the OPR Report.

5. **You testified before this subcommittee that the "maximum penalty was sought and obtained" against the remaining defendant. Isn't that misleading, when the watered down injunction that the government requested and received was, in fact, far from the broader injunction it could have sought and very possibly obtained from the court?**

Response:

No. As I testified, an injunction must be tailored to the violation. The dismissal of the national party and the head of the national party from the case was relevant to the scope of relief, which must be appropriately and narrowly tailored to fit the violation. As the OPR Report concluded, moreover, the decision by Ms. King to seek narrowly-tailored relief against the remaining defendant was based on a good faith assessment of the law and the evidence and had a reasonable basis.

6. **When you testified before the subcommittee on December 3, 2009, you said that you had not personally reviewed "the totality of the evidence" in the New Black Panther Party case, but you were looking forward to the OPR report. On March 17, 2011, after taking 19 months to do its investigation, OPR finally issued its report on the dismissals of three of the four defendants in the case. Have you read and are you familiar with the details of the OPR report?**

Response:

Yes.

7. **Were you aware of Associate Attorney General Thomas Perrelli's involvement in the New Black Panther Party matter in the period leading up to the dismissal of the charges against 3 of the 4 defendants? Before or after you read the OPR Report?**

Response:

Associate Attorney General Perrelli's involvement in the matter was examined in detail by OPR, and the OPR Report concluded that he acted within the scope of his supervisory responsibilities.

8. How do you explain the extensive communications between Steve Rosenbaum and Deputy Associate Attorney General Samuel Hirsch in the period leading up to the dismissal of the charges against 3 of the 4 defendants which are detailed in the OPR report?

Response:

These communications were among the matters reviewed by OPR, and the OPR Report found that Mr. Hirsch and Mr. Rosenbaum both acted appropriately in exercising their respective duties in this matter.

9. After the OPR report was issued did you discuss the New Black Panther Party matter with any DOJ staff?

Response:

Yes, I did discuss the report with Justice Department colleagues, consistent with the Department's policies regarding the confidentiality of OPR reports.

10. In light of the involvement of Associate Attorney General Perrelli and Deputy Associate Attorney General Hirsch, which is detailed in the OPR report, isn't your prior testimony that the decision to dismiss three defendants was made only by two career DOJ attorneys misleading, when in fact there were influences from the top down regarding the case?

Response:

On the contrary, as noted above in answers to Questions 7 and 8, my testimony and the Department's stated position are consistent with the OPR Report, which specifically found that Associate Attorney General Perrelli and Deputy Associate Attorney General Hirsch acted appropriately in the exercise of their supervisory duties.

11. The evidence in the New Black Panther Party case is clear, that one of the three dismissed defendants, Jerry Jackson, stood side by side at the polling place in Philadelphia with the fourth defendant, King Samir Shabazz, intimidating voters and poll watchers on Election Day in November 2008. While Shabazz had a weapon (a nightstick secured to his wrist) and Jackson did not, Jackson was clearly acting in tandem with Shabazz. Despite these facts, it was decided that the charge of voter intimidation against Jerry Jackson should be dismissed.

a. By dismissing the voter intimidation charge against Jerry Jackson, hasn't the Department sent a clear message that as long as a person doesn't actually flaunt a weapon, it is permissible to harass and intimidate voters at a polling place?

Response:

No. The Department is committed to enforcing laws prohibiting voter intimidation, and the decision to dismiss the voter intimidation charge against Jerry Jackson had a reasonable basis and resulted, as the OPR Report found, from a good faith assessment of the law and the evidence.

b. Since Jerry Jackson was acting in concert with King Samir Shabazz, under established legal precedent, Mr. Shabaaz's use of a weapon should be attributed to Mr. Jackson. Does the Department dispute this?

Response:

As noted above in response to Question 11a, the OPR report has addressed the appropriateness of the Department's dismissal of claims against Mr. Jackson.

c. Your Deputy Associate Attorney General, Samuel Hirsch, told OPR that he would not have dismissed the case against Jerry Jackson. Do you agree with him?

Response:

See the answer to Questions 11a and 11b, above.

d. What is the lasting precedent of the New Black Panther Party case?

Response:

With respect to the case itself, an injunction was obtained against Samir Shabazz – through 2012 – that prohibits him from appearing at a polling place in the Philadelphia area with a weapon or engaging in other intimidating, threatening or coercive behavior at a polling place.

e. According to the OPR report, Loretta King and Steve Rosenbaum believed that a voter intimidation case should not have been brought against any of the four defendants. Associate Attorney General Thomas Perrelli made it clear to King and Rosenbaum that he would not support a decision "dismissing all of the defendants, which he referred to as 'doing nothing.'" With this directive coming down from top management and the belief by King and Rosenbaum that a case should not have been filed against any of the defendants, wasn't the ultimate decision to leave just one defendant with a watered down injunction inevitable?

Response:

No. As noted above and discussed in detail the OPR Report, the decision to dismiss three of the defendants and to seek narrowly-tailored relief against the fourth defendant was based on a good faith assessment of the law and the evidence and had a reasonable basis.

Chairman Smith's Inquiry into Allegations of Race Based Enforcement of Voting Rights Laws

12. The history of the Voting Rights Act and the Fifteenth Amendment clearly indicate that the Voting Rights Act was intended to protect the rights of all voters, regardless of race. Is it the Department's policy to enforce the Voting Rights Act in a race-neutral manner or is it the Department's view that a voting rights case should never be brought to protect the rights of white voters?

Response:

The Department's policy and practice is to enforce the Voting Rights Act, and all federal civil rights laws within our authority, in a fair, vigorous, and evenhanded manner. In enforcing federal civil rights laws, the Division has brought enforcement actions on behalf of victims of all races, as well as against defendants of all races.

13. **With regard to Section 8 of the National Voter Registration Act, Christopher Coates has testified that in September 2009, he sent a memo to the Division's front office requesting approval to commence Section 8 list maintenance investigations in eight states and that he never received approval for this project. Furthermore, since January 2009, the Division has not filed a single case under Section 8. Isn't this clear proof that, consistent with the directives of Deputy Attorney General Fernandes, in this Administration, the list maintenance requirements of Section 8 of the National Voter Registration Act are not going to be enforced?**

Response:

In June 2010, as part of its overall NVRA enforcement initiative, the Division posted on its website a document designed to provide information and guidance to state and local officials as well as the general public concerning the various provisions of the NVRA, including Sections 5, 6, 7 and 8, and their interaction with the other statutes enforced by the Department. http://www.justice.gov/crt/about/vot/nvra/nvra_faq.php. The Division has likewise initiated a nationwide review of compliance with various provisions of the NVRA, including Section 8, and has opened compliance investigations under Section 8 in a number of states that are currently active and ongoing.

14. **Were you present at the redistricting training session held in Arlington, Virginia on January 18 and 19, 2011, which all Voting Section employees were required to attend?**

    a. **Did you stay for the entire two day session?**

Response:

I provided opening remarks at the January redistricting training, which were provided to this Committee on April 26, 2011. I did not stay for the entire two day session.

b. What, if anything, have you done to ascertain what was said at the training session that might lead to the conclusion that our voting rights laws are not to be enforced in a race neutral manner?

Response:

As the Department explained in our letter to Chairman Smith on May 27, 2011, it is the policy and the practice of the Civil Rights Division to enforce the law in a fair, independent, and evenhanded manner. This policy has been communicated by Division leadership to staff on numerous occasions, and this policy is reflected in the Division's enforcement actions. We are unaware of any instructions to Voting Section employees that would be inconsistent with this policy and practice. Division leadership received positive feedback as a result of the training. If you have information relating to any instructions in contravention of our policy or practice, we request that you provide it to us with specificity so that we can conduct an inquiry and take any action that may be necessary.

Civil Rights Division Inquiry

15. Since Chairman Smith initiated the inquiry into the Civil Rights Division, the Department has repeatedly withheld numerous requested documents from the Committee.

a. Is it Department policy to withhold documents that are responsive to legitimate Congressional oversight requests? Is it Department policy to also refuse to produce a log of the withheld documents? What is the Department's authority for doing this?

b. Is the Committee going to have to butt heads with the Department over every request for information as it attempts to carry out its legitimate oversight responsibility of its Civil Rights Division?

Response:

The Department recognizes the importance of the Committee's oversight and seeks to accommodate the Committee's needs for documents and other information to the extent possible, consistent with our law enforcement and litigation responsibilities. In the past year, we have provided or made available documents, numbering approximately 900 pages, in response to Committee requests regarding the Civil Rights Division, and we remain available to confer with staff about these and other oversight matters at their convenience. In addition, we separately provided the Committee with over 4,000 pages of documents regarding the litigation in the case of *United States v. New Black Panther Party*. The Department has not prepared logs in connection with these oversight matters although our responses to the Committee's requests seek to describe the materials that have not been produced and to explain the confidentiality interests that pertain to them. We have discussed those interests with Committee staff from time to time during the course of the Civil Right Division oversight and remain available for further conversations if they would be helpful. In some instances, the same confidentiality interests also would be implicated by a log.

Redistricting Under the Voting Rights Act

16. **Under Section 5 of the Voting Rights Act, the Department is supposed to pre-clear changes to voting practices and procedures in covered jurisdictions to ensure that voting changes do not discriminate against racial or language minority groups. Some have expressed concern, however, that the Department may take improper partisan political considerations into account when making preclearance determinations. Can you assure the Committee that the Department will not use the Section 5 preclearance process for partisan political purposes?**

Response:

Yes. To this end, I have taken a number of steps to ensure fair, thorough, and independent evaluation of all Section 5 submissions. For example, in January 2011, I issued a memorandum to all Voting Section staff reiterating the policies for Section 5 review that had been restored by the Obama Administration. The prior longstanding processes for Section 5 review were changed in 2005. The current policy requires that all career professionals who works on a Section 5 submission sent to the Front Office for decision state whether or not they concur with the recommendation, and, if they believe it necessary or appropriate, to explain the

grounds for their positions. In addition, the memorandum requires, for the first time, that the political leadership of the Division set forth in writing its reasons when disagreeing with the recommendation of the career professionals in the Voting Section. This memorandum has been previously provided to the Committee.

17. According to written responses to questions the Division sent the Committee prior to this hearing, the Division has reviewed approximately 10,505 submissions for administrative preclearance under Section 5 of the Voting Rights Act since January of 2009. Of these 10,505 submissions how many were pre-cleared by the Department without any changes?

Response:

From January 1, 2009, through June 30, 2011, the Department received approximately 11,098 submissions for administrative review. During that same time period, the Attorney General interposed objections to nine submissions. In addition, 102 submissions were withdrawn by the submitting authority before the Department had reached a determination on them; four followed a written request for additional information sent to the jurisdiction. With regard to 89 submissions, the Department determined that it was not able to complete its analysis because its review uncovered changes affecting voting that were directly related to the changes before us, but which had not yet been reviewed under Section 5. In virtually all of these instances, the submitting authority subsequently submitted the identified changes. Finally, the Department determined that 683 submissions contained at least one voting standard, practice, or procedure that did not constitute a change from prior practice. Accordingly, approximately 10,215 of the 11,098 submissions were not altered prior to the Attorney General's determination that no objection was warranted.

18. What is an "illustrative plan" and how is it currently being utilized by the Voting Section in the redistricting process?

Response:

A jurisdiction seeking administrative review of a redistricting under Section 5 of the Voting Rights Act may assert that, because of shifts in population or other significant changes since the last redistricting (e.g., residential segregation and demographic distribution of the population within the jurisdiction, the physical

geography of the jurisdiction, the jurisdiction's historical redistricting practices, political boundaries, such as cities or counties, and/or state redistricting requirements), retrogression is unavoidable. In those circumstances, the submitting jurisdiction bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn.

In considering whether less-retrogressive alternative plans are available, the Department first looks to plans that were actually considered or drawn by the submitting jurisdiction, as well as alternative plans presented or made known to the submitting jurisdiction by interested citizens or others. In addition, the Department may develop an illustrative plan, utilizing the jurisdiction's specific redistricting criteria, to determine the feasibility of a plan that meets the jurisdiction's stated criteria but is either non-retrogressive or less retrogressive than the submitted plan. In other circumstances, the Department may develop an illustrative plan to inform its determination as to whether the jurisdiction has met its burden under Section 5 as to the absence of a discriminatory purpose.

The Department also devises illustrative plans as an element in its affirmative litigation program under Section 2 of the Voting Rights Act. Under the analytical framework established by the Supreme Court, any party, including the United States, seeking to establish that a method of election violates that statute must establish three preconditions. The first precondition is that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). As a result, the Department must, of necessity, determine that such a district is feasible, prior to any formal enforcement action. In presenting a plan that meets this precondition to the court as part of its case-in-chief, the Department, however, does not claim that any specific illustrative district must be implemented as part of any remedial order upon the finding of a violation. Rather, the case law is clear that, in the first instance, it is the jurisdiction's responsibility to devise a plan that cures any violation. *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978).

19. Can you give an example of a "benchmark" and how it factors into the redistricting process?

Response:

As the Supreme Court has noted, the "purpose of §5 has always been to insure that no voting-procedure changes would be made that would lead to a

retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). For that reason, the appropriate Section 5 analysis of a jurisdiction's proposed redistricting plan includes a comparison of it with the "benchmark" plan to determine whether the use of the new plan would result in a prohibited retrogressive effect. The "benchmark" against which a new plan is compared is the last legally enforceable redistricting plan in force or effect. *Riley v. Kennedy*, 553 U.S. 406 (2008); 28 C.F.R. 51.54(c)(1). Generally, the most recent plan to have received Section 5 preclearance or to have been drawn by a federal court is the last legally enforceable redistricting plan for Section 5 purposes. When a jurisdiction has received Section 5 preclearance for a new redistricting plan, or a federal court has drawn a new plan and ordered it into effect, that plan replaces the last legally enforceable plan as the Section 5 benchmark. *See McDaniel v. Sanchez*, 452 U.S. 130, 150-51 (1981); *Texas v. United States*, 785 F. Supp. 201, 205-06 (D.D.C. 1992); *Mississippi v. Smith*, 541 F. Supp. 1329, 1333 (D.D.C. 1982), *appeal dismissed*, 461 U.S. 912 (1983).

A plan found to be unconstitutional by a federal court under the principles of *Shaw v. Reno* and its progeny cannot serve as the Section 5 benchmark, *Abrams v. Johnson*, 521 U.S. 74, 97 (1997), and in such circumstances, the benchmark for Section 5 purposes will be the last legally enforceable plan predating the unconstitutional plan. An analysis of whether the jurisdiction has met its burden of establishing that the proposed plan would not result in a discriminatory or "retrogressive" effect starts with a basic comparison of the benchmark and proposed plans at issue, using updated census data in each.

As noted above, a proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters' "effective exercise of the electoral franchise" when compared to the benchmark plan. *Beer*, *supra*, at 141. In 2006, Congress clarified that this means the jurisdiction must establish that its proposed redistricting plan will not have the effect of "diminishing the ability of any citizens of the United States" because of race, color, or membership in a language minority group defined in the Act, "to elect their preferred candidate of choice." 42 U.S.C. 1973c(b) & (d). In analyzing redistricting plans, the Department follows the congressional directive of ensuring that the ability of such citizens to elect their preferred candidates of choice is protected. In any particular circumstance, that ability to elect either exists or it does not.

In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on

any predetermined or fixed demographic percentages at any point in the assessment. Rather, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district.

20. **In Miller v. Johnson (515 U.S. 900, 911 (1995)), the Supreme Court said "the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." That makes one wonder about the intellectual justification for the idea that voting is a group right rather than an individual right. It's one thing to say you can't locate polling stations far from minority areas, or that you can't have unequally sized voting districts because both those things impair the access to or the relative value of an individual's vote. But what is the intellectual justification for the idea of a majority minority district which by its nature protects not an individual right but a group right?**

Response:

The Department's enforcement responsibility requires the faithful application of the law to the facts. The Division enforces the Voting Rights Act as it has been interpreted by binding Supreme Court precedent, including, but not limited to, *Miller v. Johnson*, and as it has been amended since its original passage in 1965, including the most recent bipartisan reauthorization, The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577.

Bailouts from Coverage Under Section 5

21. **The Division has recently defended or is currently defending four cases challenging the constitutionality of Section 5 of the Voting Rights Act. Is the Division concerned, in light of the Supreme Court's indication in Northwest Austin Municipal Utility District v. Holder (129 S. Ct. 2504 (2009)) that Section 5 raises "serious constitutional questions" about the exercise of Congress's enforcement power under the Fifteenth Amendment, that Section 5 of the Voting Rights Act may be declared unconstitutional?**

Response:

The Department is confident that Section 5 of the Voting Rights Act is constitutional and is vigorously defending the statute's constitutionality in three pending cases, one from Shelby County, Alabama, another from Kinston, North Carolina, and a third recently filed case from the State of Arizona. On September 22, 2011, the district court in the Shelby County case held that Section 5 is constitutional.

22. **Some commentators have suggested that the Division is requiring covered jurisdictions that seek to bailout from Section 5 coverage to submit to conditions beyond those provided for in the Voting Rights Act simply to obtain relief to which they are entitled to under the VRA. Has the Department in any case added additional conditions to a covered jurisdiction beyond those listed in 42 U.S.C. § 1973?**

Response:

When a covered jurisdiction advises the Department of an interest in exploring whether it would be eligible to bailout from coverage under the special provisions of the Act, the Division works with the jurisdiction to carefully evaluate whether there is full compliance with all of the requirements of Section 4(a) of the Voting Rights Act, 42 U.S.C. 1973b(a). Where deficiencies are identified in those investigations, particularly with regard to the constructive efforts that are required by the statute as an element of the bailout standard, the Department seeks to work with the covered jurisdiction in a reasonable, practical and flexible manner to determine what measures can be worked out to remedy those deficiencies, so that the Division can consent to bailout. This approach implements the Division's obligations under the statutory bailout standard.

Gender, Dress Codes, and Public Schools

23. **In late 2009, the Division notified two schools in upstate New York it was investigating them for enforcing their dress codes against two male students; one who wore a pink wig and makeup and the other who wore a wig and stiletto heels and said he wanted to be able to "dress like a woman."**

a. While one would certainly hope that children would treat their peers with kindness and compassion, there is a legal concern that this case may be the beginning of a precedent that expands the reach of the federal government into every decision a school administration might make. It also appears as though this case is expanding protected classes beyond those protected by law. Do you agree that in looking at this issue, however sympathetic, the rule of law, specifically, constitutional limits on federal power must be respected?

Response:

We respectfully, but strongly, disagree with the characterization of these two New York cases as dress code cases. Rather, they were cases involving threats and physical violence covered by Title IX of the Education Amendments of 1972, Title IV of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, each of which prohibits discrimination and harassment against students based on sex. The Division enforces these statutes, and numerous federal courts have held that discrimination and harassment on the basis of a student's failure to conform with gender stereotypes is a form of sex-based discrimination, including in the context of education. *See, e.g., Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008) ("Discrimination because one's behavior does not 'conform to stereotypical ideas' of one's gender can amount to actionable discrimination 'based on sex.'") (internal citation omitted); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 964–65 (D. Kan. 2005) (noting that gender stereotyping is a viable theory of sex discrimination under Title IX); *Montgomery v. Independent Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090–93 (D. Minn. 2000) (holding complaint alleged viable Title IX same-sex harassment claim under gender stereotyping theory where student was harassed because he did not meet his peers' stereotyped expectations of masculinity). This line of cases incorporates the sex stereotyping theory of discrimination recognized by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), an employment discrimination case that resolved any ambiguity as to whether sex stereotyping is form of sex discrimination. Similarly, the U.S. Department of Education's Office for Civil Rights has issued guidance to school districts that sex stereotyping is a form of sex discrimination prohibited by Title IX. See U.S. Dep't of Educ., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001); U.S. Dep't of Educ., Office

for Civil Rights, Dear Colleague Letter: Bullying and Harassment (Oct. 26, 2010), at 7-8.

Pursuant to its statutory authority and applicable federal case law, the Division has been involved in several cases in which school districts failed to take appropriate action to respond to peer-on-peer harassment against students who did not conform to gender stereotypes. As this question notes, two of those cases are in New York: *J.L. v. Mohawk Central Sch.l Dist.*, in which the Division participated in settlement negotiations, and *Pratt v. Indian River Central Sch, Dist.*, in which the Division submitted an amicus brief, both involved the failure of a school district to take appropriate action to address harassment that escalated to threats and physical violence against the students involved. In the *Pratt* case, for example the harassed student was mocked, spit on, slammed into lockers, and taunted with derogatory names.

b. In Jespersen v. Harrah's (444 F.3d 1104 (2006)), the Ninth Circuit held that a dress code can differentiate between the sexes so long as it does not put unequal burdens on the sexes. Isn't that ample precedent for the federal government to avoid interfering with local school administrative decisions particularly given that federal law does not recognize sexual orientation as a protected class?

Response:

Title IX protects all students, regardless of their sexual orientation, from harassment and discrimination based on sex and sex stereotypes. When the Division investigates a complaint alleging that a school district discriminated against a student based on the student's nonconformity with sex stereotypes, the Division relies on applicable case law in the relevant jurisdiction in determining whether a violation of Title IX occurred.

While *Jespersen* found no impermissible sexual stereotyping in the dress code at issue, in other employment cases, federal courts have found sex stereotyping to be a form of sex discrimination in the employment context under both Title VII and the Equal Protection Clause. *See, e.g., Smith v. City of Salem*, 378 F.3d 566, 573, 577 (6th Cir. 2004); *Glenn v. Brumby*, 724 F.Supp. 2d 1284, 1299-1300 (N.D. Ga. 2010).

Public Safety, Affirmative Action, and Police and Fire Department Hiring

24. The Department recently forced the City of Dayton to lower the passing scores on its police recruiting exams because of its "disparate impact." That is to say there was no intentional discrimination, the-exam merely had a disproportionate adverse effect on minorities.

a. How do you respond to the statement of a local NAACP representative saying "The NAACP does not support individuals failing a test and then having the opportunity to be gainfully employed."

Response:

Both the local chapter and the national NAACP support the efforts of the Department of Justice to ensure that all candidates have a fair opportunity to compete for positions in the Dayton Police Department, regardless of race. As the NAACP stated in a March 29, 2011, column in the Dayton Daily News, the NAACP, and its local chapter, "applauds the DOJ...for working to ensure that every applicant who wants to be a police officer or firefighter is given a fair and equal opportunity to apply and be more thoroughly considered." The NAACP and its local chapter went on to state that "we simply believe that the DOJ has done the right thing" and that "the result will be a more diverse and more highly qualified police force."

More broadly, the Department has had a longstanding commitment to ensuring that police, fire, and other public employers hire the most qualified applicants, and do so in compliance with Title VII. All too often, we encounter departments that utilize hiring procedures, such as examinations, that do not actually test for the core elements of what it takes to be a good police officer, firefighter, or other public safety officer – or that test for skills that are irrelevant to successful job performance.

The Department's case against the City of Dayton was filed in 2008 to address these types of problems. Dayton was using flawed selection procedures for police officer and firefighter positions that did not accurately measure applicants' ability to perform the job, and the tests had an adverse impact on African American applicants.

We agree with the assessment of the prior administration that the test in Dayton was flawed and discriminatory, and we continued the efforts to forge a resolution that will result in the hiring of qualified applicants in a manner that complies with Title VII. Those efforts continue under a consent decree to which the Department and the City of Dayton mutually agreed, and the City has committed to the development of valid tests that accurately reflect the requirements of the police officer and firefighter jobs.

b. How do you respond to Dayton Fraternal Order of Police President Randy Beane who echoed the NAACP saying "it becomes a safety issue to have an incompetent officer next to you in a life-and-death situation."

Response:

The Department of Justice shares Dayton's goal of ensuring that the best qualified applicants are selected to serve in the Dayton Police Department. We agree that it is a safety issue to have competent officers, and our efforts have been directed toward that goal. We continue to work with Dayton to assist the City in developing an exam that effectively selects the most qualified candidates without unfairly eliminating candidates due to their race. In view of the City's exigent need to hire new officers, the Department and the City agreed in the interim to modify use of the existing test so that Dayton could make decisions about applicants' qualifications based on extensive individualized interviews with entry-level candidates.

As the NAACP stated in its column in the Dayton Daily News, "Dayton will be a better and safer place to live because of the U.S. Department of Justice."

25. Under federal law, an exam with disparate impact can still be valid if it is job related and consistent with business necessity.

a. Pursuant to a 2009 settlement, Dayton had already agreed to stop creating its police exam internally in case that somehow biased the exam in favor of particular groups. Instead, they paid a vendor with particular expertise in police and fire exams around $180,000 to develop a test.

1. Since the validity of the test was already in question once,

did the Division seek to review it for adequacy before it was administered?

Response:

The Division engaged in ongoing discussions with Dayton throughout the process of developing the written exam. Before the test was administered, the Division repeatedly raised concerns about the sufficiency of the validity evidence and sought additional information to assess the validity of the test.

2. If so, why weren't its substantive defects apparent before additional funds and time were spent on its administration?

Response:

Test development is an ongoing process that often does – and should – continue after an exam is first administered. A crucial step in assessing the effectiveness of any exam is analyzing the data resulting from its administration to determine whether the exam worked as the test developer planned. In addition, before Dayton administered the exam, the Division could not fully assess whether the exam was likely to accurately distinguish between those candidates who could, and those who could not, perform the job because the test developer and the City did not decide how to weight or score the exam until after it was given.

3. If there was no prior review, is that because the Division can only detect substantive flaws in exam questions based on whether it produces politically correct outcomes?

Response:

The Division does not challenge tests based solely on numbers. Rather, in every investigation into whether an employment examination has unlawful disparate impact, before deciding whether to file suit, it engages in a rigorous assessment of validity. It is only if the Division – often with the assistance of statistical and testing experts – concludes that an examination will not accurately assess qualifications, or that there are less exclusionary approaches that will serve the goal of selecting qualified applicants, that it will challenge the employer's use of the examination.

b. The Division told Dayton that its test "did not accurately measure

applicants' ability to perform the job." If so, how does lowering the test score solve the problem. If the test is truly flawed shouldn't it be discarded altogether?

Response:

Dayton has committed to developing a valid test, and the United States will continue to work with the City in this process. In response to the City's exigent need to hire new officers immediately, the United States agreed as an interim measure to accept a modified use of the current exam. While the exam did not enable Dayton to effectively identify qualified candidates, the United States was satisfied that the interim process would avoid unfair exclusion while enabling Dayton to choose qualified candidates through individualized interviews.

26. You have been quoted as looking to aggressively utilize "disparate impact" theory. What do you see as its intellectual justification inasmuch as it requires the more controversial equality of results rather than of opportunity?

Response:

In 1991, by a broad bipartisan vote, Congress codified the legal standards governing the disparate impact theory that was first recognized by the Supreme Court forty years ago in *Griggs v. Duke Power Company*. The disparate impact standards do not require equality of results. Instead, they are designed to ensure that an employer's pool of job applicants is not artificially limited by unnecessary barriers that bear no relationship to ability to perform the job. As Justice Burger, writing in *Griggs*, stated, "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant." 401 U.S. 424, 436 (1991).

The law - and the Department's enforcement of it - is fully consistent with employers' goal of hiring the best qualified individuals and with the desire of applicants of all races and national origins to be considered for hire based on their ability to perform the job. The Department of Justice has enforced these standards for decades, through both Republican and Democratic administrations. The Department has brought disparate impact lawsuits on behalf of men and women of all races and protected groups. As it is statutorily directed to do, the Department

will continue to vigorously enforce all aspects of Title VII under both disparate treatment and disparate impact standards.

a. **For example, a Harvard Law Review article noted disparate impact might be explained as simply an evidentiary tool used to 'smoke out,' intentional disparate treatment. (Equal Protection and Disparate Impact: Round Three, 117 Harv. L.Rev. 493, 498-499, (2003)). Is that your view as well? If not, what explanation do you favor?**

Response:

Disparate impact theory can in fact be used to smoke out deliberate, intentional discrimination. But as noted in response to Question 26, Congress codified the disparate impact theory as a means to ensure that employers remove barriers to the employment opportunities if those barriers disproportionately exclude members of a protected group and are unnecessary because they are not related to the ability to do the job.

b. **Dayton's test was developed by an out of state third party vendor specializing in police and fire exams. Would you agree this makes it highly unlikely that there was intentional discrimination in the production of the test that needs to be "smoked out" here?**

Response:

The United States has not alleged that either the City of Dayton or the test vendor has engaged in deliberate, intentional discrimination in developing or using the test at issue.

c. **Does the recent Supreme Court case, Ricci v. DiStefano (129 S. Ct. 2658 (2009)) holding New Haven could not discard its employment test simply because it feared a disparate impact lawsuit give you any pause in pursuing disparate impact theory too aggressively in similar cases?**

Response:

The Department's enforcement of the disparate impact provisions of Title VII is fully consistent with *Ricci*. The Department does not bring disparate impact

suits based solely on the fact that a test excludes a disproportionate number of minorities, women or members of any other group. Instead, before filing a disparate impact lawsuit, the Department conducts a thorough investigation, including an inquiry into whether the employer's test is, as the law requires, "job related . . . and consistent with business necessity." It is only if the Department – often with the assistance of statistical and testing experts – concludes that a test will not accurately assess qualifications, or that there are less exclusionary approaches that will serve the goal of selecting qualified applicants, that it will challenge the employer's use of the test. As a result, the Department's enforcement actions meet the strong basis in evidence standard where it applies.

27. **Given that the exam was developed by outside experts, there is at best only an ambiguous case to be made that it is NOT job related. In contrast, there appears to be an explicit federal statute prohibiting lowering the scores of employment exams based on race (42 U.S.C. 2000e(L)). How would you respond to the observation that in the name of avoiding what is at best an arguable violation the Division has demanded a clear one?**

Response:

The Division does not challenge the use of a selection procedure based solely on the fact that it excludes a disproportionate number of minorities, women, or members of any other group. After a rigorous review, with the assistance of an expert in industrial/ organizational psychology, the Division found that Dayton's proposed use of the police officer exam did not meet professional standards regarding validity. Therefore, the proposed use of the exam would not effectively select the best candidates for the position, and would unfairly exclude a grossly disproportionate number of African American candidates from further consideration. Under these circumstances, the Department's actions were consistent with the disparate impact provisions of Title VII and did not violate any other provision of the law.

Racial Profiling Investigations

28. **On March 10, 2009, CRT informed the Maricopa County Sheriff's Office (MCSO) that it was opening an investigation into alleged "patterns or practices" of discriminatory policing. Since Maricopa County began participating in 287(g) in April 2007, their officers have**

turned over more than 40,372 illegal immigrants to immigration authorities for deportation. While the Division must be free to investigate, the specter of an investigation no doubt casts a chill on their immigration enforcement activities in Maricopa and every other jurisdiction trying to help enforce immigration law.

a. Does the Department have any "minimization procedures" to ensure the investigation's chilling effect on lawful enforcement is limited?

Response:

We respectfully disagree with the suggestion that the Division's pattern or practice investigations have any chilling effect on law enforcement. Our investigations of biased policing evaluate whether people are being unconstitutionally targeted by law enforcement because of the color of their skin, or national origin, or other prohibited bases. Biased policing is not only unconstitutional, it also does not promote public safety. On the contrary, it breeds mistrust between police and communities, reduces confidence in the police force, and distracts police from more effective public safety activities.

The Division has a long track record that establishes that our investigations result in better law enforcement agencies and enhance public safety. For example, see the results of our investigations of the Los Angeles Police Department and Pittsburgh Police Department. In New Orleans, with the cooperation of the Mayor and Police Superintendent, we completed the most comprehensive investigation to date in approximately nine months. Those findings have already served as the basis for major reforms in the New Orleans Police Department that will ensure respect for civil rights, improved confidence in the police department, and increased public safety.

b. Does the Committee have your assurance that these investigations are being pursued in good faith and not, as some commentators worry, more to placate interest groups?

Response:

Yes. Our investigations are pursued based on a careful and thorough

examination of the facts and the law only after the Division makes its own first-hand assessment as to whether a full investigation is warranted.

Increasing Use of Civil Suits against Pro-Life Movement

29. **A recent AP article titled, Feds suing more abortion activists, revealed that, in the last two years, the Division filed 6 civil cases against pro-life activists, under the Freedom of Access to Clinic Entrances Act (FACE) compared with just 2 such filings in the entire 8 years of the Bush Administration. In many FACE cases, free speech claims are at issue. Would you agree that taking advantage of the lower standard of proof in a civil case increases the danger that protected speech will be chilled?**

Response:

We respectfully disagree with the premise that the Division, in enforcing this statute, is "taking advantage of the lower standard of proof." Under the Freedom of Access to Clinic Entrances (FACE) Act, as with numerous areas of the law, there are criminal violations and civil violations. Every case that the Division has brought has been based upon an examination of the facts to determine whether a criminal and/or civil violation of the law took place, and we only litigate where the facts and the law demonstrate that a legal violation has occurred. Numerous courts across the country have reviewed the FACE Act and found that neither the criminal nor civil provisions of the statute infringe on protected speech. The United States considers the impact on the First Amendment when determining what remedy to seek and attempts to identify relief that will address the legal violation with the smallest potential effect on speech activities.

MOVE Act

30. **In 2009, Congress adopted the Military and Overseas Voter Empowerment Act, or MOVE Act, which requires states to mail absentee ballots to military and overseas voters at least 45 days before an election. Its intent was to end the historical disenfranchisement of deployed military service members. Our men and women in uniform safeguard all of our rights. Protecting their right to vote is the least we can do. Unfortunately, in the 2010 election, the Voting Section was slow to identify jurisdictions that had not complied with the law. As a result,**

many jurisdictions across the country denied military voters their legal right to a timely absentee ballot.

Will you promise that the Voting Section will contact every county-level jurisdiction to verify MOVE Act compliance within 72 hours of the jurisdiction's deadline for mailing ballots? For example, to save manpower, jurisdictions could be instructed to certify compliance electronically.

Response:

Enforcement of the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA), which was amended by the Military and Overseas Voter Empowerment (MOVE) Act of 2010, is a key priority for the Department of Justice. We respectfully disagree that the Department was slow to identify jurisdictions that had not complied with the law. To the contrary, the Department engaged in an unprecedented enforcement effort in 2010 that resulted in enforcement actions initiated in 14 States, as discussed in more detail below.

In April 2010, just a few months after the MOVE Act's amendments to UOCAVA became law, and six months before the November 2010 general election, the Department sent letters to all covered States reminding them of the MOVE Act's requirements and requesting information about their plans for complying with the law. The Department also formed a team of attorneys to monitor UOCAVA compliance and to track legislation proposed by several States to enable them to meet the Act's requirements. Throughout this time period, and concurrent with our outreach to the States, the Department of Justice also consulted regularly with the Federal Voting Assistance Program (FVAP) at the Department of Defense (DoD) as DoD exercised its statutory role in considering requests for hardship waivers. See 42 U.S.C. §§ 1973ff(a), 1973ff-1(g)(2).

On August 27, 2010, the Department of Justice joined FVAP staff on telephone calls to the six States whose waiver requests were denied by DoD on that day (Alaska, Colorado, the District of Columbia, Hawaii, the Virgin Islands, and Wisconsin), and advised those States that the Assistant Attorney General had authorized litigation against them if necessary to enforce the MOVE Act. This authorization of litigation was based on the conclusion that these States would not be able to comply with UOCAVA in time for the 2010 Federal general election, in light of the States' representations in their waiver requests and in discussions with DoD and the Department of Justice.

Leading up to and after the September 18, 2010 deadline for transmitting timely-requested absentee ballots, see 42 U.S.C. § 1973ff-1(a)(8), and continuing through Election Day, the Department continued actively investigating nationwide compliance with the MOVE Act, including gathering, analyzing, and following up on information from multiple sources regarding when States had mailed or would mail absentee ballots to UOCAVA voters. Information from all of the sources we utilized –state election officials and local election officials, DoD, advocacy groups, media reports, and other sources – was critical in our enforcement efforts. As soon as we learned of a concern from any of these sources, we immediately investigated that concern; and upon learning of any potential violations, the Department entered into immediate discussions with the relevant State to discuss the need for an urgent remedy.

Our fact-gathering and enforcement efforts continue to the present, as we actively monitor compliance with the court orders, consent decrees, memoranda of understanding, and letter agreements we reached with the 14 States in which we acted to remedy UOCAVA violations. Specifically, the Division brought five cases under UOCAVA, as amended by the MOVE Act: *United States v. State of Wisconsin* (W.D. Wis. 2010), *United States v. Territory of Guam* (D. Guam 2010), *United States v. State of New Mexico* (D.N.M. 2010), *United States v. State of New York* (N.D.N.Y. 2010), and *United States v. State of Illinois* (N.D. Ill. 2010). The Division obtained consent decrees in the Wisconsin, New Mexico, New York and Illinois cases, and a court order in the Guam case. By way of comparison, the Division has filed approximately 40 lawsuits to enforce UOCAVA since it was passed in 1986, and five of those lawsuits – or one-eighth of the total number of UOCAVA lawsuits filed by the Division in the past 25 years – were filed by the Division in October and November 2010. In addition, in 2010, the Division obtained out of court settlements or letter agreements in nine additional jurisdictions to enforce the MOVE Act amendments to UOCAVA – the Virgin Islands, Alaska, Hawaii, Colorado, the District of Columbia, Kansas, Nevada, North Dakota, and Mississippi.

Finally, the Department has proposed legislation that would require each state to submit a report to the Attorney General certifying that absentee ballots are or will be available for transmission by 45 days before any Federal election and to submit a second report not later than 43 days before any Federal election certifying whether all absentee ballots have been transmitted by 45 days before the election. Our proposal requires state reports to certify specific ballot information from each unit of local government which will administer the election. We believe our

proposal, if enacted into law, would provide us the tools we need to require the type of information suggested by the second paragraph of Question number 30.

Fiscal & Administrative Issues

31. What was the justification to support the increase in the Division's annual appropriation of about 22.3 million dollars between FY 2009 and FY 2010?

Response:

The Fiscal Year (FY) 2010 program increases were the first increases the Division had received since FY 2001. The President had explicitly stated his desire to strengthen civil rights enforcement efforts that eroded between 2002 and 2009 because of the enactment of unfunded mandates, funding transfers, and realignment of resources to address counterterrorism efforts, among other reasons. The President pledged to staff the Civil Rights Division with qualified civil rights lawyers who will make it a priority once again to lead "the fight against racial, ethnic, religious, and gender discrimination."

The additional resources were designed in large measure to support responsibilities of the Division that had become chronically underfunded. Among these were employment cases involving racial discrimination, hate crime and official misconduct prosecutions, and cases to address violence and intimidation directed against religious houses of worship.

Accordingly, the Division's budget increased from a FY 2009 level of $123,151,000 in FY 2009 to $145,449,000 in FY 2010, which represents an increase of $22,298,000 (18%). The increase is attributed to adjustments-to-base (ATB) funding requirements of $6.6 million, and program increases of $15.7 million. The ATB funding increases supported inflationary adjustments for the annualization of the 2009 pay raise ($0.8M), FY 2010 pay raise ($1.2M), GSA rent lease expirations ($4.3M), and other miscellaneous adjustments of $0.3M for health insurance premiums, retirement, DHS security, etc.

The program increase funding of $15.7M supported 102 additional positions including 60 attorneys to: (1) expand existing initiatives; (2) reinvigorate traditional civil rights enforcement; and (3) address its many areas of expanded responsibilities, which have increased with the enactment of the Servicemembers

Civil Relief Act (SCRA), the MOVE Act, the Emmett Till Unsolved Civil Rights Crime Act of 2007, and the Matthew Shepard-James Byrd, Jr. Hate Crimes Prevention Act – all of which require additional resources to enforce.

In addition, our expanded enforcement responsibilities encompass combating discrimination in fair housing, fair lending and foreclosure; increased investigations and prosecutions of bias-motivated crimes; expanded voting rights enforcement responsibilities associated with the 2010 Census redistricting and defending constitutional challenges to the Voting Rights Act; vigorously pursuing human trafficking crimes and official misconduct by law enforcement personnel; aggressively addressing unsolved civil rights era crimes; meeting its substantial increase in litigation demands for both its pattern or practice and defensive litigation requirements; as well as its increased responsibilities in addressing disability laws, and laws protecting institutionalized persons from unconstitutional treatment.

32. In FY 2010, the Division was authorized to fill 102 new positions. How many of those positions were allocated to the Voting Section?

Response:

The Voting Section received 21 positions (seven attorneys) of the 102 new positions approved in FY 2010.

33. Within the Voting Section, how many attorneys are currently assigned to the Section 5 Group and how many attorneys are assigned to the Litigation Group?

Response:

As of May 11, 2011, the Division has assigned 8 attorneys, 24 professional staff, and 9 clerical staff primarily to administrative review of Section 5 submissions in the Voting Section, and 33 attorneys, 7 professional staff, and 5 clerical staff primarily to litigation matters in the Voting Section. Two additional professional staff in the Voting Section work primarily on administrative management matters. These figures refer generally to each staff member's primary assignment, and all staff may be assigned to litigation or submission review matters in the Voting Section, depending on workload, to address operational need.

34. What do the attorneys in the Litigation Group do on a day to day basis?

Response:

Attorneys in the Voting Section perform a variety of functions. The Voting Section is charged with investigating for violations of, and where approved, with bringing affirmative litigation to enforce, the civil provisions of the federal statutes the Section is charged with enforcing, including the Voting Rights Act, the Uniformed and Overseas Citizens Absentee Voting Act, the National Voter Registration Act, and the Help America Vote Act, and this constitutes a significant percentage of our attorney work. The Voting Section is the only office in the Department that enforces these statutes and thus the office's jurisdiction is nationwide, extending to all states and the territories. Section attorneys investigate and defend constitutional challenges to the statutes the Section enforces around the country. Attorneys in the Section investigate and defend voting cases in which the Attorney General is the statutory defendant, including declaratory judgment cases under Section 4 of the Voting Rights Act seeking bailout from the special provisions of the Act and declaratory judgment cases under Section 5 of the Act seeking judicial preclearance of voting changes. Section attorneys investigate and, where approved, represent the United States as amicus or intervenor in cases brought by private parties around the country that implicate the statutes the Section enforces. Attorneys in the Section investigate the need for, and where approved, perform election monitoring in the field, both with and without federal observers, in jurisdictions all around the country all throughout each year. Section attorneys also may work on preparing guidance regarding the application of statutes and regulations that the Voting Section enforces. Attorneys in the Section are assigned on an as needed basis to administrative reviews of submissions under Section 5 of the Voting Rights Act, typically in matters that are particularly complex.

35. The Committee has received information indicating that a number of the attorneys in the Litigation Group of the Voting Section currently have very little to do. This seems consistent with a June 1, 2011, article in the New York Times noting the Voting Rights Section brought fewer cases than "division observers had expected." If that is correct, have you considered reassigning these attorneys to other sections of the Division until the anticipated redistricting litigation actually develops?

Response:

The time period after release of decennial Census data is one of the busiest times in the work of the Voting Section. The Section is very busy in investigating potential violations of all the statutes it is charged with enforcing, in defending against constitutional challenges of the statutes it enforces, in conducting bailout investigations, in conducting judicial and administrative preclearance reviews, and in preparing for new determinations of coverage under the minority language provisions of the Voting Rights Act, and election coverage work. As of September 22, 2011, the Voting Section has participated in 27 new cases so far in FY 2011. This exceeds the number of cases in any fiscal year over the past dozen fiscal years. Seven of those cases are affirmative (four UOCAVA, two NVRA, and one Section 203). This is more than double the number of affirmative cases filed last fiscal year, and is equal to or greater than the number of affirmative cases filed in half of the fiscal years over the past decade. As of September 22, the Section has also opened 170 investigations so far this fiscal year, compared to 68 last year and 22 the year before. This exceeds the number of investigations opened in any fiscal year of the last dozen years.

In addition to the affirmative work, the Voting Section currently has the busiest defensive litigation docket it has ever had, including two constitutional challenges to Section 5 of the Voting Rights Act pending from FY 2010, and 19 new defensive cases filed in FY 2011, including a new constitutional challenge to Section 5 filed by the State of Arizona. This is more than double the number of defensive cases filed in any single fiscal year of the last decade. The Section has also resolved, by settlement or judgment, more matters in this fiscal year than any other in the last decade. In addition, litigation attorneys have also been deeply engaged in the Section's work to complete three major long-term guidance projects that have been published in the Federal Register in FY 2011 – the revisions to 28 C.F.R. Part 51 (the Section 5 guidelines), the Section 5 redistricting guidance, and the revisions to 28 C.F.R. Part 55 (the language minority guidelines). And, as noted, litigation attorneys are often involved in the analysis of some of the more complex of the more than 4,350 Section 5 submissions that the Section has received so far in this fiscal year, particularly those involving statewide redistricting plans. In some cases, that analysis takes place in the context of litigation, as when the jurisdiction seeks judicial preclearance of their redistricting plan, either instead of, or in addition to, their administrative submission. So far this fiscal year, the Section has been responsible for handing nine new judicial preclearance cases filed by states seeking preclearance for complex voting changes, such as statewide redistricting plans, as well as nine new bailout actions

by covered jurisdictions. In FY 2011, Voting Section litigation attorneys have also been responsible for coordinating the monitoring of 55 elections in 20 states, with more than 800 federal observers and Department staff. In sum, the Voting Section lawyers are among the busiest and most productive in the Division.

36. Given current fiscal realities, government agencies, including DOJ, will inevitably face steep budget cuts. As part of this process, the Civil Rights Division is going to have to make policy choices about those areas that are not critical to its mission. What are your priority areas for cuts?

Response:

The Civil Rights Division enforces some of our nation's most cherished laws, so that our nation can fulfill its promise of true equal opportunity and equal justice. For example, the Division protects the rights of individuals to go to school, make a living, secure housing and credit, access public services, or simply live their lives, without facing discrimination, bigotry and hate. The Civil Rights Division's responsibilities under our nation's civil rights laws are critical to the lives of all Americans, and the Division will continue to do our best to enforce all of the laws under our authority.

QUESTIONS FOR THE RECORD SUBMITTED BY RANKING MEMBER JOHN CONYERS, JR.

Racial Profiling

37. Has your Division studied the impact that Justice Department investigations of some Muslim or Arab groups have had on unconnected Arab or Muslim charities? Would the Division be opposed to such a study conducted by the Office of Professional Responsibility (OPR)?

No, the Civil Rights Division has not studied this question, because it does not possess the authority to investigate federal law enforcement. This also is not a matter that would fall within the responsibilities of OPR.

38. How has the Justice Department responded to allegations suggesting that some local police departments-such as in McHenry County, Illinois, have falsified information in arrest records in order to avoid the appearance of racial profiling?

The Civil Rights Division is aware of and is reviewing these allegations, and has no further comment about them at this time.

39. Please outline the Department's protocol for protecting due process safeguards when naming unindicted co-conspirators.

The Civil Rights Division follows the United States Attorneys' Manual (USAM). The relevant provision, "Limitation on Naming Persons as Unindicted Co-Conspirators," appears at 9-11.130 of the USAM, and provides as follows:

> 9-11.130 Limitation on Naming Persons as Unindicted Co-Conspirators
>
> The practice of naming individuals as unindicted co-conspirators in an indictment charging a criminal conspiracy has been severely criticized in *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975). Ordinarily, there is no need to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty. For purposes of indictment itself, it is sufficient for example, to allege that the defendant conspired with

"another person or persons known." The identity of the person can be supplied, upon request, in a bill of particulars. See USAM 9-27.760. With respect to the trial, the person's identity and status as a co-conspirator can be established, for evidentiary purposes, through the introduction of proof sufficient to invoke the co-conspirator hearsay exception without subjecting the person to the burden of a formal accusation by a grand jury.
In the absence of some significant justification, federal prosecutors generally should not identify unindicted co-conspirators in conspiracy indictments. See USAM 9-16.500; 9.27.760.
[updated August 2002] [cited in USAM 9-16.500]

Voting

40. In your opinion, do you believe the Voting Section is less politicized today than it was under previous administration?

Response:

Yes. Assistant Attorney General Perez and Division leadership have taken a series of steps to restore past practices and institute new policies that protect the judgment of career attorneys from inappropriate political interference. For example, the Division's hiring processes have been reformed to restore the simple principle that we will search for the best qualified candidates, plain and simple. Our hiring process is posted on our website in the interests of transparency, and it is designed to ensure that there is no improper political interference in hiring decisions. As discussed in Chairman Smith's Question 16, the Division has also restored the Voting Section's prior, longstanding processes for Section 5 decision-making. In addition, current Division leadership has restored the lines of communication between the different Sections of the Division. This was necessary because communications between sections and between career and non-career staff, which has been a linchpin to the effective operation of the Division for decades, had waned during the previous eight years.

As a result of these changes, the Division has set new records in federal civil rights enforcement, and the following is just a sample of some of our recent work. In FY 2010, the Civil Rights Division prosecuted a record number of criminal cases (125), topping the previous record set in FY 2009. Three defendants have recently pled guilty in the largest human trafficking case in the Department's

history, in which it was alleged that eight defendants forced over 600 Thai workers to labor on farms across the country. The Division has also secured largest ever monetary settlement secured by the Department in a fair lending case in *United States v. AIG FSB, et al.*, in which two subsidiaries of American International Group, Inc., (AIG) agreed to pay a minimum of $6.1 million to resolve mortgage lending discrimination allegations. Already in two and a half years of the current administration, the Division has authorized more investigations under the Equal Credit Opportunity Act than in the entire eight years of the previous administration, and nearly as many lawsuits. Recently, Wells Fargo will pay up to $16 million to compensate individuals harmed by Americans with Disabilities Act (ADA) violations, making it the largest monetary agreement ever reached under Title III of the ADA. In the largest Servicemembers Civil Relief Act (SCRA) settlement ever reached by the Division, the Division announced on May 26, 2011, two multi-million dollar settlements, including a $20 million settlement with Bank of America/Countrywide to resolve allegations that the servicer unlawfully foreclosed on approximately 160 servicemembers. The Division has aggressively enforced the Uniformed Services Employment and Reemployment Rights Act (USERRA), ensuring that service members returning from active duty are not penalized by their civilian employers. To date in the current administration, 32 cases have been filed under USERRA to protect the employment rights of servicemembers. This is compared to 32 cases filed under USERRA in the entire four years that the previous administration had USERRA jurisdiction.

41. How many analysts do you have reviewing Section 5 submissions?

Response:

As of May 11, 2011, the Division has assigned 8 attorneys, 24 professional staff, and 9 clerical staff primarily to administrative review of Section 5 submissions in the Voting Section, and 33 attorneys, 7 professional staff, and 5 clerical staff primarily to litigation matters in the Voting Section. Two additional professional staff in the Voting Section work primarily on administrative management matters. These figures refer generally to each staff member's primary assignment, and all staff may be assigned to litigation or submission review matters in the Voting Section, depending on workload, to address operational need.

42. How many career attorneys do you have reviewing Section 5 submissions?

Response:

Please see the response to number 41 above.

43. Do you acknowledge that voter identification laws raise serious questions regarding the denial of access to particular groups, and warrant scrutiny from the Civil Rights Division?

Response:

The Division does not prejudge any matters that it reviews under Section 5 of the Voting Rights Act or that it investigates under the various voting rights statutes it enforces. The Division treats each matter as unique and carefully reviews the specific facts with regard to each voting issue and each jurisdiction and gives careful consideration to all available information regarding the purpose and effect of each particular voting procedure.

44. If so, why has the Voting Section recently pre-cleared photo identification and citizenship requirements for voting in jurisdictions covered by Section 57?

Response:

Under Section 5 of the Voting Rights Act, the Department interposes no objection to administrative submissions or consents in declaratory judgment litigation where the jurisdiction has met its burden of proving lack of discriminatory purpose and retrogressive effect.

45. Please describe what steps the Division has taken to enforce Section 7 of the National Voting Rights Act and to ensure that covered social services provide voter registration opportunities.

Response:

In June 2010, the Division has posted on its website a document designed to provide information and guidance to state and local officials as well as the general public concerning the various provisions of the NVRA, including Sections 5, 6, 7 and 8, as well as their interaction with the other statutes enforced by the Division. http://www.justice.gov/crt/about/vot/nvra/nvra_faq.php. The Division has likewise initiated a nationwide review of compliance with various provisions of the NVRA,

including section 7, and has opened compliance investigations under Section 7 in a number of states. As a result of these efforts, the Department thus far has brought suit against Rhode Island and Louisiana under Section 7 of the NVRA. The Rhode Island case was resolved in a consent decree and the Louisiana case is in litigation.

Employment

46. What steps have you taken, and will you take, to ensure vigorous Title VII enforcement?

The Department has taken a number of steps to ensure vigorous enforcement of all provisions of Title VII. For example, we have used our authority under Section 707 to investigate and address situations in which we have reason to believe that a state or local governmental employer is engaged in a pattern or practice of discrimination in violation of Title VII.

We also thoroughly review and, when warranted, bring lawsuits based upon charges of discrimination referred to us by the Equal Employment Opportunity Commission (EEOC) under Section 706 of Title VII. Indeed, we have initiated a pilot program with the EEOC to explore ways to streamline and enhance our Section 706 program.

We are developing partnerships with our other sister agencies to ensure that, collectively, we efficiently enforce the federal prohibitions against employment discrimination. For example, we are working cooperatively on various matters with the Department of Labor's Office of Federal Contract Compliance, as well as the EEOC.

We also engage in robust outreach to stakeholders to provide education and technical assistance on their rights and responsibilities under the law. In addition, when we are contacted by stakeholders who have reason to believe that discrimination has occurred, we provide assistance and/or referrals as appropriate.

47. Please share with us your views on the disparate impact test. Do you believe disparate impact cases are a valuable enforcement tool?

For the reasons stated in response to Chairman Smith's Question 26, above, disparate impact cases brought under the standards codified by Congress in 1991 have been, and continue to be, a valuable enforcement tool.

Faith-Based Initiatives

48. When the Obama Administration launched its version of the "faith-based initiative" program, Administration officials explained that the Justice Department would review the issue of hiring discrimination on the basis of religion in taxpayer-funded social service contracts and grants. In December 2009, you testified before this Subcommittee that "the Department will continue to evaluate these legal questions that arise with these programs." Is the Civil Rights Division involved with this review? Have there been any preliminary findings? When will the review conclude?

Response:

In my December 2009 testimony, I did not testify that there is any Department (or Civil Rights Division) review under way on the issue of hiring discrimination on the basis of religion in taxpayer-funded social service contracts and grants. As a general matter, the Department of Justice does not disclose or opine on pending legal questions that it may be considering. The Department is fully committed, however, to ensuring that the United States fully complies with all relevant constitutional and statutory requirements, including applicable antidiscrimination laws, when providing grants and contracts for criminal justice related services.

49. Last month, in his appearance before the full Committee, Attorney General Holder said that one key component of this policy-a 2007 opinion by the Office of Legal Counsel-was not, in fact under review. Why is this opinion not part of the overall review of the hiring discrimination policy?

Response:

See the answer to Question 48, above.

Disability Rights

50. What steps have you taken, and will you take, to ensure vigorous ADA

and Section 504 enforcement?

Response:

The Division has taken a number of steps to ensure vigorous ADA and Section 504 enforcement. In September 2010, we issued comprehensive final regulations for Titles II and III of the ADA - the first comprehensive update to those regulations since the original ADA regulations were promulgated in 1991. The new regulations expand access to recreation facilities, judicial facilities, and a variety of other areas. The Division also issued Advance Notices of Proposed Rulemaking seeking public comment on the possibility of drafting new regulations governing website accessibility, captioning and video description of movies shown in theaters, next-generation 9-1-1 service, and the accessibility of equipment and furniture.

The Division has been actively litigating cases and negotiating settlements that increase access to the American way of life for people with disabilities. For instance, among other things, in the last two years, we:

- obtained a consent decree on behalf of a family whose two-year old child, who is HIV-positive, was barred from the pool and other facilities at a family-themed RV resort in Alabama;
- reached nationwide settlements with Norwegian Cruise Lines, Hilton Worldwide Inc., QuikTrip, Blockbuster, AMC Entertainment Inc., and Wells Fargo, making thousands of facilities accessible to people with vision, hearing, and mobility disabilities, and
- settled matters with four universities to ensure that electronic book readers will not be used in classroom settings unless they are accessible to students who are blind or have low vision.

The Division has also launched an aggressive effort to enforce the Supreme Court's decision in *Olmstead v. L.C.*, a 1999 ruling recognizing that the unjustified isolation of people with disabilities in institutional settings violates the ADA. The Division has joined or initiated *Olmstead* litigation in 20 states. These cases have included cases on behalf of individuals stuck in institutions as well as individuals with disabilities who have been flourishing in the community and who may be forced into nursing homes to receive needed services due to state budget cuts. The Division has reached landmark settlements with Georgia and Delaware that will transform those states' systems of providing services to people with mental disabilities and provide a model for other states.

51. What enforcement actions has the Voting Section undertaken to make polling places more accessible to disabled voters?

Response:

The Civil Rights Division has undertaken a number of steps to seek to improve the accessibility of the voting process for persons with disabilities. The Disability Rights Section enforces the provisions of the ADA, and the steps taken include issuance of comprehensive guidance regarding polling place accessibility (the ADA Checklist for Polling Places) and improvement of polling place accessibility in particular jurisdictions through Project Civic Access as well as litigation specifically directed towards polling place accessibility. The Voting Section enforces those provisions of the Help America Vote Act (HAVA) that are directed towards the accessibility of voting systems and has undertaken litigation where necessary to ensure jurisdictions deploy and utilize accessible voting systems.

Limited English Proficiency Enforcement

52. On August 11, 2000, President Clinton signed Executive Order 13166, which calls on federal agencies to implement guiding principles for improved access to federal and federally-assisted programs and activities for persons with Limited English Proficiency (LEP). The relevant agencies are required to issue LEP guidance for recipients of federal financial assistance, and to develop plans to ensure that their programs and activities are accessible for LEP persons. How does the Division enforce this Executive Order?

Response:

The Civil Rights Division's Federal Coordination and Compliance Section (FCS) is responsible for government-wide coordination with respect to Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency (LEP). FCS serves as the federal repository for the internal implementation plans that each federal agency is required to develop to ensure meaningful access to its own federally conducted programs and activities. FCS also reviews and approves each funding agency's external LEP guidance for its recipients.

FCS has initiated a program of intra- and inter-agency consultations and actively solicits comments and suggestions from representatives of recipient and LEP individuals on how to identify and address the needs of LEP individuals under Executive Order 13166 in an efficient and cost-effective manner. Through the work of FCS, the Division's enforcement of Executive Order 13166 has focused on overcoming language barriers for LEP individuals accessing both internal Department of Justice (DOJ) and external federal agency programs and activities:

1. External Enforcement of Executive Order 13166 throughout the federal government

On February 17, 2011, the Attorney General issued a Memorandum for Heads of Federal Agencies, General Counsels, and Civil Rights Heads Regarding the Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166. In the Memorandum, the Attorney General expresses the Federal government's renewed commitment to Executive Order 13166. A recommitment is particularly timely given the Government Accountability Office's (GAO) April 2010 report on language access at federal agencies which found significant variations in the extent to which federal agencies are aware of, and in compliance with, principles of language access. The Attorney General directs each federal agency to develop and implement a system by with LEP persons can meaningfully access the agency's services. This memo requests that federal agencies undertake several action items, including but not limited to:

- Conducting an inventory of languages most frequently encountered by the federal agency and identifying the primary channels of contact with LEP community members;
- Establishing a schedule to periodically evaluate and update agency LEP services and LEP policies, plans, and protocols;
- Ensuring that agency staff can identify LEP contact situations and take the necessary steps to provide meaningful access;
- When developing hiring criteria, assessing the need for non-English language proficiency for particular positions in the agency;
- For written translations, standardizing terminology, and streamlining processes for obtaining community feedback on the accuracy and quality of agency language assistance services; and,
- Establishing a Language Access Working Group that is responsible for implementing the federally conducted provisions of EO 13166.

The Attorney General has asked federal agencies to submit updated LEP plans and an anticipated time frame for periodic reevaluation of LEP plans and related documents to FCS by August 17, 2011. For agencies providing federal financial assistance that have not previously drafted guidance for recipients of federal financial assistance, the Attorney General has asked that these federal agencies issue recipient guidance on compliance with language access obligations and submit this to FCS by August 17, 2011.

FCS, in cooperation with the Interagency Working Group (IWG) on Limited English Proficiency, is periodically monitoring these action items. FCS and the IWG has issued technical assistance resources including a Language Access Assessment and Planning Tool for Federally Conducted and Federally Assisted Programs and Frequently Asked Questions about the Protection of LEP Individuals Under Title VI and Title VI Regulations. The Division anticipates reviewing and providing feedback on language access plans and recipient guidance in the coming months.

2. *Internal Enforcement of Executive Order 13166 within the Department of Justice*

Prior to the Attorney General's Memorandum to federal agencies, the Attorney General also sought to ensure internal DOJ compliance with Executive Order 13166. On June 28, 2010, the Attorney General issued a Memorandum for the Heads of Department of Justice (DOJ) Components regarding language access obligations under Executive Order 13166. The Attorney General's Memorandum outlines how the Department will ensure that all DOJ components that have contact with or serve LEP individuals have the ability to communicate effectively with these individuals. Among other requirements, the Memorandum establishes a Departmental Language Access Working Group (DOJ LAWG) co-chaired by Thomas E. Perez, Assistant Attorney General for the Civil Rights Division, and Lee Lofthus, Assistant Attorney General for the Justice Management Division (JMD). As a co-chair for the DOJ LAWG, the Civil Rights Division has primary responsibility for ensuring that all of the approximately 40 DOJ components engage in language access program planning in order to overcome language barriers to the Department's programs and activities. The DOJ LAWG consists of representatives from each component, and representatives from the Attorney General's office and the offices of the Deputy Attorney General and the Associate Attorney General.

The purpose of the DOJ LAWG is to guide and oversee component efforts toward full compliance with Executive Order 13166. The DOJ LAWG assists in implementing the Attorney General's request that each DOJ component create and implement its own language access plan by the end of the calendar year. Component representatives who are participants in the DOJ LAWG are responsible for a number of important tasks, including: (1) serving as the component's language access coordinator; (2) assessing component operations for LEP needs and gaps in service; and (3) creating a component language access plan, along with policies and protocols to implement the plan. Once all plans are submitted to, reviewed and approved by the co-chairs, the Division, in coordination with DOJ LAWG, will monitor the implementation and ongoing assessment of each components' language access plans.

The DOJ LAWG has held three bimonthly meetings and the Division is in the process of reviewing draft DOJ component plans. Since the Memorandum was issued, FCS has fielded hundreds of technical assistance inquiries from various DOJ components, subcomponents, field and district offices. Technical assistance provided included: advice on who to select as a language access coordinator; counsel on how to assess an agency's current language capacity; and, guidance regarding how to begin language access program planning. The Division anticipates submitting a Departmental language access plan by the end of the calendar year.

Immigration

53. In Chamber a/Commerce v. Whiting, the U.S. Supreme Court decided that an Arizona law that attempts to impose sanctions for the employment of unauthorized aliens through, among other methods, "licensing and similar laws," was not preempted by federal immigration law. Does SB 1070 fall into this exception? Has any party to the SB 1070 litigation made such a claim?

Response:

The plaintiffs in *Whiting* argued that the specific Arizona law at issue was preempted by the Immigration Reform and Control Act, which expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for

employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2). Arizona argued (in relevant part) that the challenged statute fell into the exception for "licensing and similar laws" and that it therefore was not preempted.

The United States has not argued that S.B. 1070 is expressly preempted by 8 U.S.C. § 1324(a)(h)(2). Accordingly, the statute's exception for "licensing and similar laws" is not directly implicated by the *United States v. Arizona* lawsuit. No party has claimed that the exception for "licensing and other laws" bears on the issues presented by *United States v. Arizona*.

54. In its ruling on SB 1070, the Ninth Circuit addressed the pending decision in Whiting, stating that: "Although [Whiting] and the present case both broadly concern the preemptive effect of IRCA, the specific issues in these cases do not overlap. The scope of 'licensing' law ... in IRCA has no bearing on whether IRCA impliedly preempts Arizona from enacting sanctions against undocumented workers." United States v. Arizona, 2011 WL 1346945, *13 n.18 (9th Cir. Apr. 11, 2011). The dissent did not mention Whiting. Given the distinction between the employers at issue in Whiting and the workers targeted by SB 1070, and given that SB 1070 is predominantly concerned with immigration enforcement outside the employment context, what effect does Whiting have on the SB 1070 litigation?

Response:

Although *Whiting* generally discusses background preemption principles that are implicated by *United States v. Arizona* (such as the supremacy of federal law), the *Whiting* decision is primarily focused on the scope of the exception in IRCA's express preemption provision for "licensing and other laws." That exemption is not implicated by *United States v. Arizona*. The United States has challenged a provision of S.B. 1070 that sought to criminalize the performance or solicitation of work by unlawfully present aliens – *i.e.*, a provision that targets employees. But the provision at issue in *Whiting* involves sanctions on employers rather than employees. As a result, *Whiting* is not directly controlling over any of the disputed issues in *United States v. Arizona*.

QUESTIONS SUBMITTED BY REP. SCOTT

Questions regarding the Obama Administration's position on the Faith-Based Initiative

55. Please provide a breakdown of the race and ethnicity of employees within the Civil Rights Division who are in decision making positions dealing with policy.

Response:

The Division understands this question to be limited to political appointees and has limited its response to political appointees.

	Race		Ethnicity	
	White	Black	Hispanic	Non-Hispanic
Total	9	2	2	9
%	81.82%	18.18%	18.18%	81.82%

56. A document provided by your office that contains a summary of the Civil Rights Division's accomplishments over the past two years states: "The Attorney General issued a memorandum to federal agencies advising them that all Americans regardless of race, gender, age, national origin, or disability -must receive the benefit of programs funded under the American Recovery and Reinvestment Act of 2009." In order for all groups to receive their share of the funds, businesses within their communities should have received a fair share. Have you reviewed federal contracting with ARRA funds to determine whether minority businesses received a reasonable share? If so, what did you find from that review?

Response:

Various Federal laws prohibit recipients of federal financial assistance from discriminating on the bases of race, color, national origin, disability, and sex (in educational programs) in programs receiving federal financial assistance. Within the Department of Justice, the Civil Rights Division provides coordination among the agencies that provide federal financial assistance to ensure the consistent and

effective implementation of these civil rights laws. Each Federal agency that provides federal financial assistance is responsible, however, for ensuring that its recipients abide by their nondiscrimination obligations. In this regard, individuals who believe that a recipient of such assistance has discriminated against them on a prohibited basis may file a complaint with the federal agency responsible for providing the assistance. For example, an individual who believes that a recipient of DOJ funds has discriminated against him or her may file a complaint with the Civil Rights Division or with the Office of Civil Rights in the Office of Justice Programs.

The Civil Rights Division does not monitor how federal agencies distribute appropriated funds for use in grants, loans, or other forms of federal financial assistance. Rather, the Division's coordination role is to, among other things, provide guidance regarding implementation of Title VI and related statutes and executive orders; offer training to agencies; offer technical assistance, including legal and policy guidance; provide clearance on regulations and other documents to ensure the consistent and effective enforcement of various nondiscrimination statutes; and review agency Implementation Plans, which contain information from each agency on the major components of their civil rights enforcement programs.

This Administration's position concerning federally funded employment discrimination by faith-based organizations operating federal grant programs

57. The Bush Administration's Office of Legal Counsel's June 29, 2007 Memorandum[1]) concerning faith-based organizations is still in effect and still applies to all federally funded programs. Is this correct?

Response:

The Office of Legal Counsel (OLC) opinion to which this question refers was prepared in response to an inquiry by the Department's Office of Justice Programs' (OJP) General Counsel regarding whether the Religious Freedom Restoration Act (RFRA) required OJP to exempt an organization named World

[1] *Memorandum for the General Counsel, Office of Justice Programs, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Deliquency Prevention Act (June 29, 2007).*

Vision from a religious nondiscrimination provision in the Juvenile Justice and Delinquency Prevention Act (JJDPA). OLC concluded that "RFRA is reasonably construed to require that such an accommodation be made for World Vision, and that OJP would be within its legal discretion, under the JJDPA and under RFRA, to exempt World Vision from the religious nondiscrimination requirement" of the JJPDA. Based on this guidance, OJP has granted exemptions to the organizations listed in response to Question #63, provided they submit proper documentation as described in response to Question #65.

58. The effect of this memorandum allows faith-based organizations receiving federally funded grants to circumvent, by invoking the Religious Freedom Restoration Act (RFRA), statutory civil rights provisions prohibiting religious discrimination. The result is that a church operating a Head Start grant can hire Head Start teachers based on their religious convictions, all the while using federal funds despite the fact that that there is a statutory provision, many decades old, in the Head Start program that prohibits such discrimination. Is this correct?

Response:

As stated above, in its opinion OLC concluded that RFRA was reasonably construed to require an accommodation for World Vision, and that OJP could grant an exemption to World Vision under the JJDPA and RFRA. The Department does not administer the Head Start program and has not undertaken an analysis of whether such grants are applicable in the context of the Head Start program.

59. Is the Department of Justice in the process now of reviewing this memorandum or does it plan to review it in the future? If so, can you please provide a timeline for when you anticipate that review will occur and when can we expect a DoJ decision or position on that review? If there is no anticipated timeline for review, can you please explain why it is not under review and how it might come to be under review? Is it this Department's position that the memorandum is good policy and should stand?

Response:

As a general matter, the Department of Justice does not disclose or opine on pending legal questions that it may be considering. The Department is fully committed, however, to ensuring that the United States complies fully with all relevant constitutional and statutory requirements, including applicable antidiscrimination laws, when providing grants and contracts for criminal justice related services.

60. Has any organization receiving federal funds ever discriminated in the federally funded activity on the basis of religion in either employment or participation? If so, which organizations, what federal funding did they receive (including amounts), under which federal programs, what was the approval process to provide funding to these organizations, who approved it and what was the basis for approval?

Response:

The Department of Justice does not have the information necessary to determine the answer to this question. With respect to the grants administered by the Department of Justice, however, be assured that it is unlawful for these grants to be used to discriminate in the provision of services or programs. A DOJ regulation states in relevant part that "[a]n organization that participates in programs funded by direct financial assistance from the Department shall not, in providing services, discriminate against a program beneficiary or prospective beneficiary on the basis of religion or religious belief." 28 C.F.R. §§ 38.1(d), 38.2(d). See also Executive Order 13559 issued on November 17, 2010 ("Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations"), which amended Executive Order 13279 to provide in relevant part: "[t]he Federal Government must implement Federal programs in accordance with the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution as well as other applicable law, and must monitor and enforce standards regarding the relationship between religion and government in ways that avoid excessive entanglement between religious bodies and governmental entities."

In addition, OJP's Office for Civil Rights (OCR) works to ensure that recipients of financial assistance from OJP and its components are not engaged in prohibited discrimination. The primary objective in accomplishing this mission is

to secure prompt and full compliance with all civil rights laws and regulations so that needed Federal assistance may commence or continue. In cases where adverse findings have been made, OCR has worked with grant recipients to remedy the issues that triggered the finding.

61. An October 2007 publication by the Office of Justice Programs in the U.S. Department of Justice entitled "Effect of the Religious Freedom Restoration Act on Faith-Based Applicants for Grants"[2] contains the criteria needed for granting an exemption to a faith-based organization wishing to discriminate on the basis of religion in hiring of its federally funded staff. [It should be noted that this document is consistent with the OLC Memo.]

What agency grants the exemption? Is it DOJ? Or is it the authorizing/funding agency? For example, Head Start is funded and overseen by the Department of Health and Human Services. Does DoJ review and approve the exemption waiver or does HHS? Another example is the Workforce Investment Act (WIA), which is funded by the Department of Labor. Does DOJ or the Department of Labor review and grant the exemption? What entity within DOJ or the authorizing/funding agency reviews and approves the exemption? [Note, both the Head Start and WIA program have statutory provisions specifically prohibiting religious discrimination.]

Response:

For grants administered by the Department of Justice, the funding agency, either OJP, the Office of Community Oriented Policing Services (COPS), or the Office on Violence Against Women (OVW), would have the authority to grant the exemption. Department of Justice components do not administer grants from other executive branch departments and agencies.

62. This document further requires that "exemptions should be granted, on a case-by-case basis, to FBO's that certify the following, unless the

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[2] *"Effect of the Religious Freedom Restoration Act on Faith-Based Application for Grants," U.S. Department of Justice, Office of Justice Programs, October 2007.*

funding entity has good reason to question the certification..." Again, what entity makes the "case-by-case" determination? Is it DOJ? And if so, what entity within DOJ grants the exemption? Or is it the funding entity (e.g., HHS or the Department of Labor) which makes the "case-by-case" determination? If so, what entity within that funding entity grants the exemption?

Response:

For grants administered by the Department of Justice, the funding agency, either OJP, the Office of Community Oriented Policing Services (COPS), or the Office on Violence Against Women (OVW), would have the authority to grant the exemption.

63. **To date, has anyone in DoJ or a funding entity within DoJ, or has anyone in any other agency or a funding entity within any other agency, approved such an exemption or exemptions under the OLC Memorandum? If so, please provide this Subcommittee a list of the exemptions granted during this Administration, to which organizations the exemptions were granted, under which federal programs those exemptions were granted, and the specific entities that granted the exemptions.**

Response:

The chart below lists all of the organizations that have provided the Office of Justice Programs with certificates of exemption. Each of the listed awards were Congressionally directed awards.

OJP Grantee	Date of award	Date on certificate	Amount of award
Detroit Rescue Mission Ministries	9/8/2008	9/25/2009	$ 469,533
Long Island Teen Challenge	9/15/2008	9/28/2009	$ 44,717
Denver Rescue Mission	9/8/2008	11/23/2009	$ 268,305
Straight Ahead	9/17/2008	4/14/2009	$ 89,435

Ministries			
World Impact, Inc.	9/15/2008	9/16/2009	$ 268,305
World Impact, Inc.	9/2/2008	9/16/2009	$ 67,076
World Impact, Inc.	9/18/2009	9/16/2009	$ 200,000
Grace Schools, Inc.	9/11/2008	9/15/2008	$ 1,073,218
Indiana Teen Challenge, Inc.	9/15/2008	9/27/2009	$ 89,435
Indiana Teen Challenge, Inc.	9/16/2009	9/27/2009	$ 50,000
World Vision, Inc.	7/22/2008	6/12/2008	$ 134,152
World Vision, Inc.	9/8/2009	6/12/2008	$ 250,000
World Vision, Inc.	9/7/2010	6/12/2008	$ 275,000

64. If it is the position of the Department that religious discrimination is permissible, why is an exemption by Dolor the funding entity even necessary? What is the legal basis that prohibits religious discrimination if there is no exemption by Dolor the funding entity?

Response:

We do not understand what is intended by the phrase, "Dolor the funding entity. . ." in this question. RFRA establishes the criteria to be applied in determining whether and under what circumstances, if at all, a faith-based organization may be exempt from laws prohibiting religious discrimination in hiring with federal grant funds.

SAMHSA and Self Certification

65. Is it the Department's position that the OLC Memorandum lays out a process by which funding agencies determine whether a faith-based organization meets the criteria under RFRA to receive an exemption? Would the Department agree with the position that a faith-based

organization cannot simply disregard the statutory civil rights requirement without first applying to the funding entity (or DOJ) for "relief" from its requirements? Do regulation[3]s governing our nation's substance abuse programs or SAMHSA (Substance Abuse Mental Health Services Act) permit faithbased organizations to merely "self-certify" that they are entitled to the exemption?

Response:

In response to the OLC opinion referred to in this question, OJP developed a policy under which a funding applicant seeking an exemption under RFRA to enable it to prefer co-religionists in employment is required to submit documentation certifying to each of the following statements:

- The Applicant will offer all federally-funded services to all qualified beneficiaries without regard for the religious or non-religious beliefs of those individuals, consistent with the requirements of 28 C.F.R. Part 38, Equal Treatment for Faith-Based Organizations;

- Any activities of the Applicant that contain inherently religious content will be kept separate in time or location from any services supported by direct federal funding, and, if provided under such conditions, will be offered only on a voluntary basis, consistent with the requirements of 28 C.F.R. Part 38; and,

- The Applicant is a religious organization that sincerely believes that providing the services in question is an expression of its religious beliefs; that employing individuals of a particular religion is important to its religious exercise; and that having to abandon its religious hiring practices in order to receive the federal funding would substantially burden its religious exercise.

66. SAMHSA contains both a charitable choice provision and a statutory non- discrimination provision. The Charitable Choice regulations for SAMHSA were finalized in September 2003, several years before the issuance of the OLC memorandum. Has this Administration taken any action to correct these regulations that appear to allow "self-certification" and if so, what action has been taken?

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[3] Charitable Choice Provisions & Regulations, 60 Fed. Reg. 56436 (September 30, 2003).

Response:

The Civil Rights Division does not administer Substance Abuse and Mental Health Services Act (SAMHSA) programs and therefore is not able to answer this question.

Intermountain Fair Housing Council v. Boise Rescue Mission

67. **Recently, the Civil Rights Division submitted an amicus brief to the 9th Circuit, on behalf of HUD, in a case called Intermountain Fair Housing Council v. Boise Rescue Mission. The issue in the case is whether the Rescue Mission, which runs a residential faith-based drug rehabilitation program, can use the Fair Housing Act's religious exemption to eject a court-mandated attendee from the program-and send the attendee back to jail-for refusing to attend religious activities and convert to Christianity. The DoJ brief took the position that the religious organization should keep its religious exemption under the Fair Housing Act. But, DoJ's analysis did not even mention the fact that the woman in question was required by a Court order to attend the religious program.**

Is it the Department's position that the religious exemption of the Fair Housing Act applies to unwelcome indoctrination of persons who reside in a dwelling by force of law? Shouldn't the shelter be treated as a state actor and lose the religious exemption when it accepts court-mandated participants? Or should persons open to religious indoctrination receive preferred treatment by the Court?

Response:

The concerns you raise are important ones. The brief filed by the Civil Rights Division on behalf of HUD as amicus curiae in *Intermountain Fair Housing Council v. Boise Rescue Mission* did not address these questions, however, because they were not presented in the court of appeals.

The part of the case to which you refer involved a plaintiff who, while in jail on drug-related criminal convictions, applied to and was accepted into the Boise

Rescue Mission's New Life Disciple/Recovery Program, a one year Christian-based residential recovery program for individuals with drug or alcohol dependency. *See Intermountain Fair Housing Council v. Boise Rescue Mission Ministries*, 717 F. Supp.2d 1101, 1106-07 (D. Idaho 2010). She entered the program as a condition of her probation in March 2006, but was required to leave the program later that year. Id. at 1107-08. There was another plaintiff in the case who had resided in a homeless shelter operated by Rescue Mission, but he was not involved with the criminal justice system, and your questions do not apply to his circumstances.

The brief was filed in response to an invitation by the court of appeals for the views of the Secretary of the United States Department of Housing and Urban Development on three questions. Two of those questions pertained only to the claims of the plaintiff who had resided in the homeless shelter. The only question that related to the claims of the plaintiff who had resided in the Rescue Mission's rehabilitation program was this one:

> *Whether, applying the religious exemption in 42 U.S.C. 3607(a) to the facts in this case, the Fair Housing Act exempts the kind of religious discrimination that plaintiffs allege.*

The exemption in question provides that a religious organization that owns or operates housing for a non-commercial purpose is not subject to liability under the Fair Housing Act if it limits the sale, rental or occupancy of such housing to persons of the same religion or gives a preference to such persons. 42 U.S.C. 3607(a). The brief reflected the Secretary's view that, under the particular circumstances of this case, the Boise Rescue Mission's alleged conduct was protected from liability for religious discrimination under the Fair Housing Act by the Act's religious exemption. As with all filings as amicus curiae in the courts of appeal, the brief filed by the Division reflected a careful consideration of the facts and law.

At the same time, the brief did not address questions that were not properly presented, and it would not have been appropriate for us to have done so. You state that the plaintiff was required by the court to enter the rehabilitation program and ask whether the religious exemption should apply when a person resides in a dwelling "by force of law." The question of whether it was appropriate for the court to compel the plaintiff to enter the rehabilitation program as a condition of her probation, however, was not raised by any of the parties, either in the trial court or in the court of appeals. Nor did the plaintiff name the State or the state court

that granted the plaintiff probation on condition of her enrollment in the Rescue Mission program as a defendant in the case. The sole defendant was the Rescue Mission.

You also ask whether the Rescue Mission should be treated as a state actor and lose the exemption when it accepts court mandated participants. Again, the plaintiff did not allege in her complaint or argue on appeal that the Rescue Mission should be treated as a "state actor." Nor did she allege that she was deprived of any rights "under color of law" under Section 1983 or any other federal law. She only alleged that the Rescue Mission had discriminated against her in violation of the Fair Housing Act.

In sum, the United States' brief in this case was filed in response to a specific request by the court of appeals and addressed the issue that was before the court – whether the Rescue Mission's conduct in removing the Plaintiff from the religion-based program was covered by the exemption set forth in 42 U.S.C. 3607(a). It did not address the other issues raised by your question, because they were not issues raised by the parties to the appeal or the court. The role of the United States when submitting a brief as amicus curiae is a limited one. It must only address issues that are properly before the court and not speculate on matters that are not raised by the facts. Under these circumstances, it would have been inappropriate to opine in the brief on the issues raised in this question.

68. If a person is given a choice by a court between prison and a program in which that person would be subject to unwelcome proselytization and forced conversion, is the court engaged in religious coercion? If not why not? If it is, does the Department take the position that this judicially imposed religious coercion is permissible? Does the Department take the position that the Establishment Clause requires that a secular alternative be available if the individual does not want to participate in a faith-based program?

Response:

It appears that your question relates to our position in the *Boise Rescue Mission* case, and I refer you to our answer to 13, above. To the extent you are asking about other situations, we agree that the questions you raise are important ones under the Free Exercise and Establishment Clauses of the First Amendment. While First Amendment questions occasionally are presented in cases involving the Civil Rights Division's statutory enforcement areas, we only address those

issues as they arise in particular cases. As noted above, those issues were not presented in the *Boise Rescue Mission* case. To the extent such an issue arises in the future in one of our cases or matters, we will consider them in the context of the particular facts and circumstances of that case.

Prepared Statement of Sean Bennett

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June 7, 2011

U.S. House Judiciary Committee
Sub Committee on the Constitution
Chair – Rep. Franks

Oversight Hearing on DOJ, Civil Rights Division
Pubic Statement/Testimony for the Record (6-1-11 Hearing)

I have great concerns about the performance, ability and will of the DOJ Civil Rights Division to respond properly and effectively to civil rights complaints. I have suffered from repeated non-enforcement of ADA Title II, Fed. Rehab act and Criminal (241,242) Civil Rights Complaints, no matter how obvious or egregious the offenses. A failure to vindicate my civil rights, and to deter others from so doing ,has been going on for several years, and continues to the present day. Even after summonsing my U.S. Senator to review the Division's performance and nonfeasance, employees of the Division continue to fail to resolve or pursue my complaints which invites more governmental misconduct. A dependable, competent, diligent and effective DOJ Civil Rights Division is essential for the preservation of America's most precious values and greatest duties.

Most recently I discovered, after 6 months of waiting for responses to 3 complaints (sent Sept., Oct. 2010), that the 3 complaints had not even been recorded as being received by the Division (they did not exist), much less had they been successfully resolved as ADA title 2, Fed Rehab complaints. A person or persons involved with in-take corruptly got rid of these complaints after I sent them in. It should be noted that I made sure to call and confirm that the complaints were received at the disability rights section soon after I sent them in. Although the employee[s] guilty of getting rid of my complaints should probably be dealt with as obstructers of justice, they will probably still be there should I suffer another case of disability discrimination. Then after CRD staff finally reviewed the 3 complaints, I am sent letter (May 4,2011) indicating that they have decided to take no action due to limited resources, not due to the merits of the cases.

The Division's prosecution and resolution of criminal cases (18 usc 241,242) is also troubling. I can report that CRD criminal section staff have told me that they would not enforce 241,242 cases unless the victim was a person of color, and I can recall a staffer saying there would be no enforcement unless it was a physical assault on a person of color. While such actions do deserve CRD's attention, should it really be the policy that all other violations should be summarily ignored? While there are certain laws that protect certain classes of citizens, these criminal civil rights statutes are designed to protect all Americans and should be enforced accordingly. The enforcement of 241,242 should be no more limited to select groups than is the Bill of Rights and the 14th Amendment. Moreover the US Supreme Court is clear that 241,242 protect all constitutional rights(not just physical assaults) as well as all citizens. All US citizens should be able to feel secure that if a local or state government employee or official abuses govt. power, betrays the public trust, and violates constitutionally protected rights or liberties , they have a friend at the US DOJ CRD Criminal section to bring the guilty abuser of power to justice, thereby deterring future such abuses. Federal enforcement is also essential to prevent local and state govt. actors from covering for themselves ,since often the guilty parties are inherently govt. insiders against the lone citizen[s]. There can be no doubt that DOJ CRD is now and has long been vastly underfunded. Funding should obviously be commensurate with the preeminent importance of its mission of safeguarding the civil rights of all citizens. However, increased funding will be futile unless the employees and staff can be taught and trained to be loyal, competent, diligent and determined to do their jobs right.

Thank you. Sincerely, Sean Bennett

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