



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 21, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Assistant Attorney General Wan Kim, before the Committee on June 21, 2007, concerning oversight of the Justice Department's Civil Rights Division. We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. 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,

A handwritten signature in black ink, reading "Brian A. Benczkowski".

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

**Hearing Before the
Committee on the Judiciary
United States Senate
Concerning
“Civil Rights Division Oversight”
June 21, 2007**

**Questions Submitted to
Assistant Attorney General Wan Kim**

Questions Posed by Chairman Leahy:

1. **You testified that the Civil Rights Division has “been vigilant in enforcing the cases where we find them,” and that “I will bring cases where I find the facts and the law to be appropriate.” Yet, under this administration, the Civil Rights Division brought fewer cases overall and failed to bring many if any enforcement actions in several categories. Wade Henderson, President of the Leadership Conference on Civil Rights, testified that “in the area of employment, since January 20, 2001, the Bush Administration has filed just 35 Title VII cases, or an average of approximately six cases per year.” He also testified that “the Voting Section did not file any cases on behalf of African-American voters during a five-year period between 2001 and 2006 and no cases have been brought on behalf of Native American voters for the entire administration. In addition, during the same five-year period, the Department only filed one case alleging minority vote dilution in violation of Section 2 of the Act.” Under President Bush, the Department has brought only a handful of cases alleging discrimination in voting on behalf of Hispanic Americans.**

Aside from merely waiting for cases to emerge, what resources are you devoting to actually investigating civil rights violations and allegations? How many staff attorneys and analysts are tasked with developing cases to be brought or joined by the Division? How high a priority is investigating, as compared with litigating, such cases for the Division?

Answer: During this Administration, the Civil Rights Division has been exceptionally active in enforcing all provisions of the Voting Rights Act (“the Act”) and has set a number of records in enforcement.

As stated in the attached letter from Principal Deputy Assistant Attorney General Richard Hertling to Chairman Leahy dated July 3, 2007, during this Administration, the Voting Section of the Civil Rights Division has filed four cases and successfully litigated a fifth, in addition to interposing thirty-six Section 5 objections, on behalf of African-American

voters in various jurisdictions. The cases filed include *United States v. Crockett County* (W.D. Tenn.); *United States v. Euclid* (N.D. Ohio); *United States v. Miami-Dade County* (S.D. Fla.); and *United States v. North Harris Montgomery Community College District* (S.D. Tex.), which also involved protecting the rights of Hispanic citizens. In addition, we successfully litigated *United States v. Charleston County, South Carolina* (D.S.C.) and successfully defended that victory through appeal to the U.S. Supreme Court.

During this Administration we also have brought a majority of all of the Division's cases on behalf of Hispanic voters in the entire history of the Act. Similarly, the Division has obtained improved and extended consent agreements to better protect Native American voters in many jurisdictions, including Bernalillo, Cibola, Sandoval, and Socorro Counties, New Mexico. The Division also filed a new lawsuit under the National Voter Registration Act to protect Laguna Pueblo and other Native American voters in Cibola County; and we have obtained a Choctaw language program for Mississippi, where nine counties are covered under Section 203.

During this Administration, the Division has brought two thirds of all cases *in history* under the minority language provisions of the Voting Rights Act, with a total of 26 of the 39 cases ever filed by the Division: These have included the first cases ever filed by the Section on behalf of Filipino, Korean, and Vietnamese Americans, and the first two cases ever filed by the Section under Section 4(e) of the Voting Rights Act. The Division also has filed over 75 percent of all cases ever filed under Section 208 of the Voting Rights Act, an important protection against voter suppression through its guarantee that voters may receive assistance in casting their ballots from the person of their choice other than their employer or union officer. The Civil Rights Division has filed seven lawsuits under Section 208 in this Administration, including the first case under the Act on behalf of Haitian Americans. The Division also filed the first case under Section 5 since 1998.

The Civil Rights Division also has been vigorous in its Section 2 enforcement. In the last year, the Civil Rights Division obtained preliminary injunctions against the use of at-large election systems in two cases. There had been no previous comparable preliminary injunctions since 1986, 21 years before, and only four previous such injunctions in the history of the Act. In all, during this Administration, the Civil Rights Division has filed 11 cases under Section 2 and successfully tried additional cases filed in the previous Administration. The Civil Rights Division has filed these 11 Section 2 cases across the country, in Colorado, Florida, Georgia, Massachusetts, Mississippi, New York, Ohio, Pennsylvania, and Tennessee. In addition to challenging discriminatory at-large election systems, the Division also has filed ground-breaking lawsuits in a vigorous campaign against vote suppression. Such lawsuits include *United States v. Long County, Georgia*, where Latino voters were subjected to spurious race-based challenges, and *United States v. City of Boston, Massachusetts*, where ballots were taken from minority voters and marked contrary to the voters' wishes, as well as the many lawsuits under Section 208 filed by the Division, including those noted previously.

The Civil Rights Division has also breathed new life into other statutes it is responsible for enforcing. The Division has filed the first case in decades under the Civil Rights Act of 1960. During this Administration, the Division has surpassed the number of cases filed in the previous Administration under the Uniformed and Overseas Citizens Absentee Voting Act. The Division has filed a majority of all cases under the National Voter Registration Act, including the first Section 7 “agency” cases since 1996. The Division recently filed an NVRA lawsuit in Cibola County, New Mexico, where hundreds of voter registration applications were not processed in a timely fashion, and where Native American voters were removed from the voter lists without the notice required by the list maintenance provisions of the NVRA.

The Cibola County case also involved a claim under the Help America Vote Act (“HAVA”), as Native American voters were not offered provisional ballots as required under the statute. HAVA is a major statute that has required a commitment of considerable resources by the Division. The Division has filed nine lawsuits under HAVA since it was passed in 2002 and has performed extensive outreach to State and local election offices to encourage voluntary compliance with the Act’s complex provisions.

In all, the Civil Rights Division actually has filed substantially more voting cases during this Administration than were filed during the comparable period of the previous Administration.

The Civil Rights Division also remains diligent in combating employment discrimination, one of the Division’s most long-standing obligations. Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Most allegations of employment discrimination are made against private employers. Those claims are investigated and potentially litigated by the Equal Employment Opportunity Commission (“EEOC”). However, the Civil Rights Division’s Employment Litigation Section is responsible for one vital aspect of Title VII enforcement: discrimination by public employers.

Pursuant to Section 707 of Title VII, the Attorney General has authority to bring suit against a State or local government employer where there is reason to believe that a “pattern or practice” of discrimination exists. These cases are factually and legally complex, as well as time-consuming and resource-intensive. During this Administration the Department has in fact approved the filing of four “pattern or practice” race discrimination employment lawsuits on behalf of African Americans.

One recent case highlights our efforts. In *United States v. City of New York*, filed on May 21, 2007, the Division alleged that since 1999, the City of New York has engaged in a pattern or practice of discrimination against black and Hispanic applicants for the position of entry-level firefighter in the Fire Department of the City of New York (“FDNY”) in violation of Title VII. Specifically, the complaint alleges that the City’s use of two written examinations as pass/fail screening devices and the City’s rank-order

processing of applicants from its firefighter eligibility lists based on applicants' scores on the written examinations (in combination with scores on a physical performance test) have resulted in disparate impact against black and Hispanic applicants and are not job related and consistent with business necessity. The complaint was filed pursuant to Sections 706 and 707 of Title VII, and was expanded to include discrimination against Hispanics as a result of the Division's investigation.

In Fiscal Year 2006, we filed three complaints alleging a pattern or practice of employment discrimination – as many as filed during the last three years of the previous Administration combined. In *United States v. City of Virginia Beach* and *United States v. City of Chesapeake*, the Division alleged that the cities had violated Section 707 by screening applicants for entry-level police officer positions in a manner that had an unlawful disparate impact on African-American and Hispanic applicants. In *Virginia Beach*, the parties reached a consent decree providing that the city will use the test as one component of its written examination and not as a separate pass/fail screening mechanism with its own cutoff score. On June 15, 2007, the court provisionally entered a consent decree in the *City of Chesapeake* litigation. Under the decree, the City will create a fund to provide back pay to African-American and Hispanic applicants who were denied employment solely because of the City's use of a math test as a pass/fail screening device. The City also will provide priority job offers for African-American and Hispanic applicants who are currently qualified for the entry-level police officer job but were screened out solely because of their performance on the math test. The City will provide retroactive seniority to such hires when they complete the training academy. In addition, the City agreed that, while it will still use scores on the mathematics test in combination with applicants' scores on other tests, it will not prospectively use the mathematics test as a stand alone pass/fail screening device.

The Division also has enforcement responsibility for the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). USERRA was enacted to protect veterans of the armed services when they seek to resume the job they left to serve their country. USERRA enables those who serve their country to return to their civilian positions with the seniority, status, rate of pay, health benefits, and pension benefits they would have received if they had worked continuously for their employer. In Fiscal Year 2006, the Division filed four USERRA complaints in Federal district court and resolved six cases.

During Fiscal Year 2006, we also filed the first USERRA class action complaint ever filed by the United States. The original class action complaint, which was filed on behalf of the individual plaintiffs we represent, charges that American Airlines ("AA") violated USERRA by denying three pilots and a putative class of other pilots employment benefits during their military service. Specifically, the complaint alleges that AA conducted an audit of the leave taken for military service by AA pilots in 2001 and, based on the results of the audit, reduced the employment benefits of its pilots who had taken military leave, while not reducing the same benefits of its pilots who had taken similar types of non-military leave. Other examples of recent USERRA suits include *Richard White v. S.O.G.*

Specialty Knives, in which a reservist's employer terminated him on the very day that the reservist gave notice of being called to active duty. We resolved this case through a consent decree that resulted in a monetary payment to the reservist. In *McCullough v. City of Independence, Missouri*, the Division filed suit on behalf of Wesley McCullough, whose employer allegedly disciplined him for failing to submit "written" orders to obtain military leave. We entered into a consent decree in which the employer agreed to rescind the discipline and provide Mr. McCullough payment for the time he was suspended. The employer also agreed to amend its policies to allow for verbal notice of military service.

In Fiscal Year 2007 thus far, we have filed 5 USERRA complaints in district court and resolved 5 cases. Additionally, the United States Attorney's offices have resolved three cases this fiscal year. One of these cases we have resolved in the current fiscal year is *McKeage v. Town of Stewartstown, NH*. In that case, the town sent Staff Sergeant Brendon McKeage a letter while he was on active duty in Iraq telling him he no longer had his job with the town. McKeage had been employed as the Chief of Police for the Town of Stewartstown. When the citizens of Stewartstown learned that their Chief of Police had been terminated while serving his country, they voted to censure the Town for its "outrageous and illegal" conduct. Despite this public censure, the Town still refused to reemploy SSG McKeage in his former position. Once we notified Stewartstown that we intended to sue, the employer decided to settle the case. The settlement terms include a payment to SSG McKeage of \$25,000 in back wages.

The Division has proactively sought to provide information to members of the military about their rights under USERRA and other laws. For example, we recently launched a website for service members (www.servicemembers.gov) explaining their rights under USERRA, the Uniformed and Overseas Citizen Absentee Voting Act ("UOCAVA"), and the Servicemembers' Civil Relief Act ("SCRA").

Far from "merely waiting for cases to emerge," the Division has extended and systematized enforcement and outreach to record levels. For example, the Division has undertaken what is by far the most vigorous election monitoring program in history. During calendar year 2004, a record 1,463 Federal observers and 533 Department personnel were sent to monitor 163 elections in 106 jurisdictions in 29 States. This compares to the 640 Federal observers and 110 Department personnel deployed during the entire 2000 presidential calendar year. In 2006, another record was set for the mid-term elections with more than 800 Federal observers and Department personnel sent to monitor polling places in 69 jurisdictions in 22 States on Election Day. The Department's election monitoring program also has been very active in non-Federal election years. In calendar year 2005, for example, 640 Federal observers and 191 Department personnel were sent to monitor 47 elections in 36 jurisdictions in 14 States. The current "off-year" monitoring program is more aggressive than the presidential year program of 2000.

The suggestion that Division resources for investigation and litigation are somehow separate is an error. Attorneys investigate potential cases first, and then they litigate

those cases where appropriate. The same personnel are involved, as has always been the case.

2. **We have learned from recent reports that Hans von Spakovsky, a political appointee in the Voting Section, overrode career attorneys in approving a Georgia photo identification law. The career attorneys had recommended not approving the law because they that it would discriminate against African-American voters. According to a June 8, 2007 article in the *Washington Post*, “around the same time von Spakovsky wrote an anonymous article in a legal journal arguing that every voter should be required to show a photo ID” in order to vote. A federal court struck down the Georgia photo ID law as unconstitutional and called it a modern day “poll tax.”**
 - a. **You testified that about the role of the Justice Department that “what we’re doing is trying to enforce the laws passed by this Congress as effectively as possible” and that the proper role of the Justice Department is to effectuate the will of Congress. How is your description of the Justice Department’s role consistent with the anonymous, pro Voter ID op-ed written by Mr. von Spakovsky while he was simultaneously involved in pre-clearing the same type of law for Georgia? How did his action effectuate the will of Congress?**

Answer: Pursuant to applicable regulations, a Department employee such as Mr. von Spakovsky may publish a law review article without formal Departmental clearance so long as the article does not divulge non-public information and the employee is not identified as a Departmental employee. In particular, pursuant to 5 CFR §§ 2635.703 and 2635.807, Department employees “shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another.” In addition, “[a]n employee who is engaged in teaching, speaking or writing as outside employment or as an outside activity shall not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity” with certain exceptions.

In August 2005, the Department precleared a Georgia voter identification law, which itself amended an existing voter identification statute that had been precleared by the prior Administration. This preclearance decision followed a careful analysis that lasted several months and considered all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of State photo identification and driver’s license cards and the views of minority legislators in Georgia (as well other current and former minority elected officials). The data showed, among other things, that the number of people in Georgia who already possessed a valid photo identification greatly exceeded the total number of registered voters and that there was no racial disparity in access to the identification cards. The State subsequently adopted, and the

Department precleared in April 2006, a new form of voter identification that would be available to voters for free at one or more locations in each of the 159 Georgia counties.

It is important to note that no court decision has called into question the Department's preclearance decisions regarding the 2006 Georgia decision. On September 6, 2007, the Federal district court dismissed the challenge to the Georgia voter ID law noting, among other things, that the plaintiffs had identified no individual who did not have or could not obtain the requisite ID. The court also rejected plaintiffs' data analyses purporting to show problems with the ID law as unreliable and/or irrelevant.

Similarly, Georgia's Supreme Court recently directed that the State case be dismissed for lack of standing. As in the Federal case, no plaintiff actually was harmed by the statute.

- b. Last year, the President signed into law a measure reauthorizing the Voting Rights Act, one of the cornerstones of America's civil rights laws. The reauthorization passed Congress overwhelmingly, garnering votes of 390-33 in the House and 98-0 in the Senate. The text of the statute contains extensive legislative findings supporting the reauthorization and we passed the reauthorization with the support of evidence gathered in nine hearings and thousands of pages of testimony and reports before the Senate Judiciary Committee alone showing the continued need for the remedies contained in Section 5. Do you believe it is consistent with the will of Congress as demonstrated in the initial passage of the Voting Rights Act and subsequent reauthorizations for a Justice Department officials tasked with Section 5 pre-clearance duties simultaneously to draft and publish a pro Voter ID op-ed?**

Answer: Please see response to subpart a above. In addition, the Department is vigorously defending the constitutionality of the Voting Rights Act in ongoing litigation. See *Northwest Austin Mun. Util. Dist. v. Gonzales*, No. 06-1384 (D.D.C.). The three judge panel heard oral argument in this case on September 17, 2007.

- 3. I am disturbed by reports of the decimation of Voting Section staff assigned to review and make determinations on Voting Rights Act Section 5 preclearance submissions. According to the March 22, 2007 House Judiciary testimony of Joe Rich, former Chief of the Voting Section, there were 26 civil rights analysts and six attorneys working on Section 5 issues in 2001 and now that staff has been substantially reduced by almost two-thirds to only ten civil rights analysts and two attorneys. It is difficult to understand how this Administration expects to fulfill its Section 5 duties under the Voting Rights Act with such a reduced staff.**
 - a. How do you account for the reduction of Section 5 staff by almost two-thirds in a six year period? Please explain the motivations for**

such deep staff reductions and explain how the current number of Section 5 staff compares to the number present during the previous administration?

Answer: The statistics cited in the question are incorrect. While four attorneys currently are devoted primarily to Section 5 review, all attorneys, including managers, participate in the review of voting changes under Section 5 as the need arises. In terms of civil rights analysts, in January 2001, the Section had 14 civil rights analysts, compared to 12 in January 2007. As of July 10, 2007, the Voting Section has 10 civil rights analysts and two contract personnel engaged in the analysis of Section 5 submissions, and the Section has advertised three civil rights analyst openings. The Section also has become very energetic in training interns and externs to analyze the more routine voting changes.

- b. Are you confident that the Voting Section can accomplish its very important Section 5 work – particularly with the coming redistricting cycle – with such a reduced staff? Please explain your plan for the future of Section 5 preclearance case work.**

Answer: Please see the response to subpart a above. All current professional staff members, including attorneys, are receiving valuable experience reviewing Section 5 submissions. In addition, the Section also has initiated E-Submissions so that governments can submit voting changes on-line. Among other advantages, this will free significant staff time and resources for more effective review of voting changes.

- c. How are these staff cuts consistent with the will of Congress as expressed in the recent reauthorization of Section 5 of the Voting Rights Act, which passed Congress by an overwhelming margin?**

Answer: Please see the response to subparts a and b above.

- 3. [sic] Last November Joe Rich, the former Chief of the Voting Section, testified before our Committee that, under the Bush Justice Department, “[p]olitical appointees [] intruded into the attorney evaluation process, something that did not happen in the past.” In a March 29, 2007 op-ed in the *Los Angeles Times*, Mr. Rich reports that his predecessor John Tanner ordered him “to change performance evaluations of several attorneys under my supervision.” Even more disturbing, Mr. Rich reports that he was “told to include critical comments about those whose recommendations ran counter to the political will of the administration and to improve evaluations of those who were politically favored.”**

What have you done to determine whether the evaluation of any attorney in the Civil Rights Division has been changed based on their political

affiliation? What are you doing to ensure that this does not continue to occur?

Answer: The *L.A. Times* article does not state that John Tanner ordered Mr. Rich to change performance evaluations. Additionally, John Tanner was Mr. Rich's successor as Chief of the Voting Section, not his predecessor. John Tanner did not supervise Mr. Rich, and was not involved in reviewing performance evaluations during Mr. Rich's tenure in the Voting Section.

The evaluation of career attorneys has historically involved the input and collaboration of *both* career management and political appointees. The form used to appraise the performance of career attorneys in the Civil Rights Division has contained some three to seven performance-related elements (depending on the work of the Section) on which an attorney is evaluated; a brief narrative typically accompanies the actual evaluation. Each rating involves a "rating official" (typically, a career section chief) and the "reviewing official" (typically, a political appointee). As has been true for years, both officials sign the final rating; hence, both are expected to attest to it. The involvement of political appointees in this process – whether in editing the narrative or in changing the actual evaluation – is neither unusual nor unwarranted. Assistant Attorney General Kim worked collaboratively and harmoniously with career management in carrying out this responsibility. Assistant Attorney General Kim worked to ensure that attorneys were evaluated based on their performance and work for the Division, not political affiliation.

4. According to a recent report by the Citizens' Commission on Civil Rights, entitled, "Erosion of Rights," since 2002, seven Chiefs or Deputy Chiefs of the Civil Rights Division "who were considered to have views that differed from those of then political appointees were reassigned or stripped of major responsibilities." In 2005, Albert Moskowitz, Chief of the Criminal Section was removed and given a job in a training program. Shortly after that, Bob Berman, the Deputy Chief in the Voting Section was transferred to the same office.

- a. Did you have any personal involvement in the reassigning, or did you instruct another person to reassign, the Chief of the Criminal Section or the Deputy Chief of the Voting Section to a job training program? Are you aware that this occurred?**

Answer: Assistant Attorney General Kim fully supported the decision that, from a management perspective, the Division would best be served by having Mr. Moskowitz serve as the head of the Professional Development Office. Assistant Attorney General Kim approved the transfer of Mr. Berman to the Professional Development Office.

- b. Were any of these individuals transferred for nonperformance reasons? If not, why were these individuals reassigned or stripped of their duties?**

Answer: Mr. Berman and Mr. Moskowitz were transferred because the Division's leadership concluded that doing so would best serve the needs of the Division.

Mr. Berman requested and received a detail with the Administrative Office of the United States Courts, which he completed from September 26, 2005 to January 27, 2006. Mr. Berman decided to pursue this detail in connection with a program designed to better prepare employees for becoming a candidate for the Senior Executive Service. Since Mr. Berman's return to the Civil Rights Division, he has served in a senior position in the Office of Professional Development.

c. Were any of these individuals reassigned or transferred based on perceived disloyalty to the Division's political appointees?

Answer: Mr. Berman and Mr. Moskowitz were transferred because the Division's leadership concluded that doing so would best serve the needs of the Division.

- 5. Last month, Monica Goodling, a former Justice Department political appointee, testified before Congress that she "crossed the line" in considering the political beliefs of applicants for nonpartisan legal jobs in the Justice Department. And the *Washington Post* reported that Brad Schlozman, former Acting Assistant Attorney General for the Civil Rights Division, directed supervisors to transfer three female minority attorneys to "make room for some good Americans." I understand that the Justice Department Office of the Inspector General has opened an investigation into whether or not political appointees at the Justice Department illegally took party affiliation into account in hiring career attorneys.**

When considering, recommending or approving candidates for appointment to career positions at the Department, have you ever considered applicants' political party affiliation, ideology, membership in a nonprofit organization or loyalty to the President, or otherwise screen potential career hires for political allegiance? If so, please provide details. Are you aware of whether others at the Department ever considered those factors in making decision regarding career hires? If so, whom? Please provide details.

Answer: The Civil Rights Division, like every other component of the Department of Justice, is charged with enforcing the laws passed by Congress. As such, we seek to hire outstanding attorneys with demonstrated legal skills and abilities. The Department considers attorneys from a wide variety of educational backgrounds, professional experiences, and demonstrated qualities, and attorneys from an extremely wide variety of backgrounds have been hired to work in the Division during Assistant Attorney General Kim's tenure here.

All of the attorneys hired by the Civil Rights Division are expected to be able to vigorously enforce the Federal laws prohibiting discrimination. This is why we measure

an applicant's talent, excellence, and commitment to the work of the Division. Every applicant is unique and is treated as such during the hiring process. In general, however, a number of factors may be considered in assessing an applicant's commitment to the work of the Division, including an applicant's reasons for wanting to work in the Division; understanding of the work and mission of the Division; personal background and interests; and demonstrated interest in and understanding of the laws enforced by the Division. During the hiring process, a candidate's stated membership in any group or organization is noted. We are well aware, however, that mere membership in any organization is hardly a reliable method for determining a candidate's legal skills or the personal qualities necessary to being an attorney in the Civil Rights Division.

Finally, the Division's career Section Chiefs play a central role in the hiring of attorneys through both the Honors Program and lateral hiring process, including active participation in interviewing both lateral and Honors Program applicants. We take very seriously the recommendations of Section Chiefs in all personnel matters.

6. At the June 2007 Civil Rights Division Oversight Hearing Senator Whitehouse asked about what actions you are taking to remedy the charges that "the internal administration of your division has been driven by politics, that hiring has been driven by politics, that performance evaluations have been driven by politics, that assignments within the division have been driven by politics."

a. Besides establishing a senior staff retreat, an internal ombudsman, and a Professional Development Office, you failed to fully answer Senator Whitehouse's important question. Now that you have had time to reflect on your answer, what specific actions have you taken to remedy the aforementioned charges levied against your Division?

Answer: During his tenure as Assistant Attorney General, AAG Kim's policy was to make legal decisions based on the outcome as dictated by the law as applied to the facts. A similar philosophy guided his decision-making process as it pertained to the internal administration of the Division, hiring, performance evaluations, and assignments. That philosophy is that the Division should hire attorneys who have a demonstrated record of excellence, who are talented attorneys consistent with that record of excellence, and who share a commitment to the work of the Division. Assignments and other personnel-related decisions are based on merit, not politics. Performance evaluations are intended to reflect as accurately as possible the employee's performance during the rating period. As for additional specific actions that have been taken to assure employees of this standard of fairness, on June 29, 2007, the attached memorandum was distributed to each of the Division's section chiefs and posted on the Division's intranet.

b. You testified that some of the attorneys removed by Mr. Schlozman have been reinstated to the Division since you took over. In particular, you said that "some of the people removed from the

[Appellate] section are back in the section, based upon decisions that I've made starting more than a year ago." Please name the individuals who have been reinstated into the Division after their removals by Mr. Schlozman, and tell the Committee the reasons these individuals were removed or transferred, and the reasons you decided to restore them to their former positions.

Answer: It was AAG Kim's decision to have Tovah Calderon, Teresa Kwon, and Karen Stevens returned to the Appellate Section. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

- c. The June 21, 2007 *Washington Post* article, entitled "Political Hiring in Justice Division Probed," described a Civil Rights Division tainted by politicization of appointments and case assignments by your predecessor Brad Schlozman. At the oversight hearing, you suggested that the allegations in that article were either untrue or that circumstances had changed substantially on your watch. What specifically do you dispute about the charges made about your Division in the June 21 *Washington Post* article? And what specific steps have you taken to ensure that changes have been made?**

Answer: Please see the response to subpart a above.

- 7. Your predecessor, Assistant Attorney General Alex Acosta, sent an unusual letter on the eve of the 2004 elections to Judge Susan Dlott of the U.S. District Court for the Southern District of Ohio. According to a *McClatchy* article from June 24, 2007, entitled "Ex-Justice official accused of aiding scheme to scratch minority voters," Judge Dlott "was weighing whether to let Republicans challenge the credentials of 23,000 mostly African-American voters." At the time, Judge Dlott had a case pending before her involving allegations that Republicans sent a mass mailing to racial minority voters and then used undeliverable letters to compile a list of voters vulnerable to eligibility challenges. The *McClatchy* article reports that AAG Acosta's letter to Judge Dlott "argued that it would undermine the enforcement of state and federal election laws if citizens could not challenge voters' credentials."**

- a. Do you believe that *ex parte* communication by a Justice Department official to a federal judge on a pending voting case is proper conduct on the eve of an election?**

Answer: On October 29, 2004, the Department of Justice filed a three paragraph letter brief, in lieu of a longer pleading, in the matter of *Spencer v. Blackwell*, Case No. 04CV738. This letter brief was properly filed with the court, with notice to parties. It is

proper for the Department of Justice to present its views to courts regarding the application, interpretation, or enforcement of Federal law, as it did in this case.

- b. I am deeply concerned that a letter from Justice Department official to a federal judge on a pending voting rights matter, siding with a partisan scheme to suppress the voting rights of minority citizens, may violate ethical canons and DOJ rules, and may even be criminal conduct. Has the Justice Department opened an investigation into this matter? If not, why not?**

Answer: As an initial matter, it is proper for the Department of Justice to present its views to courts regarding the application, interpretation, or enforcement of Federal law, as it did in this case. Such communications to a court by the Department of Justice do not in any way violate ethical canons or DOJ rules or constitute improper conduct of any kind.

We note, moreover, that the letter brief filed by the Department of Justice in this matter directed the court's attention to provisions of Federal law (HAVA and the Voting Rights Act) that the Department felt the court should be aware of, and that, contrary to the article's suggestion, the letter brief did not recommend to the judge how she should rule, or which parties' arguments she should adopt, after she reviewed the facts as applied in that case. Even if it had, however, it is proper for the Department of Justice to take positions in Federal cases that involve the application, interpretation, or enforcement of Federal law.

- c. Did Hans von Spakovsky, a counsel in the Voting Section at the time, have any role in the discussions, preparation, or drafting of the letter to Judge Dlott? If so, please explain your answer in detail.**

Answer: The Department has substantial confidentiality interests in our deliberative process relating to these matters.

- d. Are you aware of any other such letters written by Department officials around the time of the 2004 election, the 2006 election, or at any other point, that could similarly have influenced or informed the outcome or deliberation of a voting rights case?**

Answer: Yes. On November 2, 2004, Sheldon Bradshaw, Principal Deputy Assistant Attorney General, filed a two paragraph letter brief in a matter before the Hon. Sidney H. Cates, IV, Civil District Court, Parish of Orleans, calling the court's attention to Section 302(c) of HAVA, which states that although HAVA does not require extending the hours that polls are normally open according to State law, it does require that any voters casting ballots pursuant to a court ordered extension must do so by provisional ballot. This letter brief is attached.

8. I am concerned about reports of voter suppression tactics aimed at urban and minority communities that have been used in recent elections to intimidate voters from participating in the political process. According to an October 29, 2004 *Washington Post* article entitled "GOP Challenging Voter Registration," one such scheme, called "vote caging," was used by the Republican National Committee in the 1980s when direct-mailings were sent to predominantly minority communities in New Jersey and Louisiana. If those letters were returned as undeliverable then the Republican National Committee would compile a challenge list to remove these potential voters from the polls. The RNC allegedly ceased the practice following a 1986 consent decree.

Yet, in October 2004, BBC Television Newsnight disclosed that Tim Griffin, then Chief of Communications for the Bush-Cheney campaign, had participated in a vote caging scheme targeting 70,000 voters in Florida for potential challenge as "fraudulent" voters. At least one analysis, conducted by the website tpmmuckraker.com, has shown that on this list "most names were of African-Americans." None of those targeted were found to be fraudulently registered. Mr. Griffin was later appointed, without Senate confirmation, as the interim U.S. Attorney for the Eastern District of Arkansas to replace Bud Cummings.

Your testimony suggests that you did not believe that these charges of "vote-caging," which implicated Mr. Griffin, had been brought to the attention of the Civil Rights Division. You stated "I'd like to have the opportunity to double check that and get back to you." Having had an opportunity to reflect, can you tell us whether anyone at the Civil Rights Division was aware that the Republican National Committee and Mr. Griffin engaged in 'vote caging' during the 2004 elections? If not, why not? And are you concerned that someone at the Justice Department should have been aware of these allegations?

Answer: Please see the attached letter from the Department to Chairman Leahy dated July 3, 2007, confirming that it does not appear that any such information was received by the Division.

During this Administration, the Division has been vigilant and aggressive in its enforcement, outreach, and training efforts across the full breadth of its jurisdiction, including protecting equal access to the ballot box. For example, the Division has undertaken what is by far the most vigorous election monitoring program in history. During calendar year 2004, a record 1,463 Federal observers and 533 Department personnel were sent to monitor 163 elections in 106 jurisdictions in 29 States. This compares to the 640 Federal observers and 110 Department personnel deployed during the entire 2000 presidential calendar year. In 2006, another record was set for the mid-term elections with more than 800 Federal observers and Department personnel sent to

monitor polling places in 69 jurisdictions in 22 States on Election Day. In November 2006, the Department opened multiple phone lines in order to handle calls from citizens with election complaints, as well as an internet-based system for reporting problems. The Department's election monitoring program also has been very active in non-Federal election years. In calendar year 2005, for example, 640 Federal observers and 191 Department personnel were sent to monitor 47 elections in 36 jurisdictions in 14 States. The current "off-year" monitoring program is more aggressive than the presidential year program of 2000.

9. **At last November's Civil Rights Division Oversight Hearing, I asked you about a letter Senator Kennedy and I sent you last October requesting a federal investigation into the activities of Republican congressional candidate Tan Nguyen. Mr. Nguyen admitted that his campaign staffers sent letters to 73,000 households, spreading misinformation about voting requirements apparently designed to suppress Latino voter turnout. In your April 11, 2007 responses to my written questions from the November 16, 2006 Civil Rights Division Oversight hearing, you assured me that an investigation into the Orange County case was ongoing. Can you update me on the status of the Department's investigation?**

Answer: Upon learning of the Orange County mailing, the Division immediately initiated an investigation. In addition, the Division also dispatched Department personnel to monitor the polls in Orange County for the November 7, 2006, elections. The matter remains the subject of an ongoing investigation. It would be inappropriate to discuss the details of an ongoing investigation. The California Attorney General's Office also initiated an investigation into the matter but determined that there was insufficient evidence to bring a prosecution.

10. **You stated in your written testimony that "[f]rom November 9, 2005 to June 12, 2007 the Appellate Section filed 167 briefs . . . [and] ninety three of those filings were appellate briefs for the Office of Immigration Litigation." That means that well over half of the Appellate Section's filings were briefs that have nothing to do with civil rights. Do you share my concern that precious appellate resources have been diverted from protecting the civil rights of Americans to non-civil rights matters? If not, why not?**

Answer: Attorneys in all of the Department's litigating Divisions and every United States Attorney's Office are assisting in handling the extraordinary caseload of immigration briefs. While the Civil Rights Division's Appellate Section shares in these responsibilities as well, the Appellate Section is still doing tremendous work. Overall during FY 2005 and 2006, the Appellate Section filed more briefs than in any fiscal year for which the Appellate Section has maintained such statistics since 1977. During FY 2006, the Division's Appellate Section filed 145 briefs and substantive papers in the United States Supreme Court, the courts of appeals, and the district courts. Excluding decisions by the Office of Immigration Litigation ("OIL"), the Appellate Section had an

overall success rate of 90% during this period, which is the highest success rate the Section has had for any fiscal year since FY 1992. In FY 2006, the Appellate Section filed 17 amicus briefs, an increase over the previous two fiscal years. As of July 31, 2007, the Appellate Section had filed a total of 102 amicus briefs under this Administration.

- 11. The report from the Citizens' Commission on Civil Rights, entitled "Erosion of Rights," reports that "[w]hen drafting briefs in controversial areas, appellate staff were on several occasions instructed not to share their work with the trial sections until shortly before or when the brief was filed in court." Are you aware of any occasion where such instructions were given? If so, please explain all instances in detail. What remedial actions have you taken to eliminate any perception that communication between the appellate and trial sections are discouraged?**

Answer: During his tenure as Assistant Attorney General, AAG Kim fostered active, open communication among the Division's Sections, including the Appellate Section and the trial sections. For instance, AAG Kim instituted a monthly meeting of the Division's Section Chiefs. At those meetings, the Section Chiefs discuss pending matters in each of their Sections. In addition, AAG Kim has encouraged the trial sections to consult with the Appellate Section on difficult legal issues that might arise during the course of litigation. During his tenure, **AAG Kim is not aware of any instructions to Appellate Section attorneys preventing them from discussing their civil rights cases with attorneys in other Sections who served as trial counsel in the same litigation.**

- 12. In 2006, the FBI announced a cold case initiative to identify and investigate racially- motivated murders committed during the civil rights era. I understand that 56 FBI Field offices combed their files searching for cases which may be ripe for investigation. And in February of 2007, the FBI announced a partnership with the Southern Poverty Law Center, NAACP, and National Urban League to assist the FBI in identifying additional cases for investigation.**

- a. Are you confident that the FBI has made available to your Division all of the files it has on unsolved civil rights era murder cases?**

Answer: The Civil Rights Division is working in an ongoing and cooperative manner with the FBI on the "Cold Case" Initiative.

- b. At a Harvard Law School conference last month titled, "Crimes of the Civil Rights Era" former FBI agents, former Justice Department attorneys, and former federal prosecutors all commented that the role of the media would be vital in bringing these cases to the forefront. What efforts, if any, have the Department taken to share information with the media in identifying other unsolved civil rights era cases?**

Answer: The media can play an important role in the unearthing of potential civil rights era cases and the discovery of critical evidence in such cases. With this in mind, the Attorney General, the Director of the FBI and the Assistant Attorney General for Civil Rights held a press conference in February 2007 to announce a partnership with the Southern Poverty Law Center, the National Association for the Advancement of Colored People, and the National Urban League to assist the Department in identifying civil rights era cases that may be prosecutable. The press conference was also designed to raise awareness throughout the nation regarding unresolved civil rights era cases with the hope of encouraging citizens to come forward with any information that might assist the Department in the investigation of these matters.

Moreover, Department officials have appeared on a variety of media outlets to further publicize the Department's efforts to identify, investigate, and prosecute unsolved civil rights era matters.

- 13. In your testimony before this Committee you stated the Emmett Till Unsolved Civil Rights Crime Act would help "facilitate investigations of over 100 civil rights era murders identified by the FBI." Please tell this Committee the exact number of cases that the FBI has identified for investigation and the exact number of cases that the Civil Rights Division has identified for investigation. How many of these cases are actively being investigated? And how many of those cases are currently being prosecuted?**

Answer: In February 2007, the Attorney General and the FBI announced an initiative to identify other unresolved civil rights era murders for possible prosecution to the extent permitted by the available evidence and the limits of Federal law. As part of this initiative, the FBI announced the next phase of this initiative, which includes a more formal partnership with the National Association for the Advancement of Colored People, the Southern Poverty Law Center, and the National Urban League to assist the FBI in identifying additional cases for investigation and to solicit their help. These organizations have already provided the FBI with valuable information from their files, and the Department will follow those and future leads. The FBI has identified 102 cases that merit additional review to determine whether Federal criminal charges could be brought. The Civil Rights Division is working closely with the FBI to determine which of these matters present sufficient evidence and satisfy jurisdictional and constitutional requirements to warrant a Federal prosecution.

Most recently, the Department successfully prosecuted former KKK member James Seale, now 71, for his role in the 1964 abduction and murder of two 19-year-old African-American men, Charles Moore and Henry Dee, in Franklin County, Mississippi. On June 14, 2007, a jury in the Southern District of Mississippi convicted Seale for the Federal crimes of kidnapping and conspiracy. There are no other civil rights era cases under Federal indictment at this time. However, on May 9, 2007, the State of Alabama indicted James Fowler, a former Alabama State Trooper, on State murder charges for the 1965

murder of Jimmy Lee Jackson, who was killed during a civil rights march in Marion, Alabama.

14. **Grace Chung Becker, a Deputy Assistant Attorney General in the Civil Rights Division, testified this month before two subcommittees of the House Judiciary Committee on the Till bill. In her written statement, Deputy Assistant Attorney General Becker contended that Ex Post Facto concerns and federal law will limit the Department's ability to prosecute most civil rights era cases. In particular she stated that "statute of limitations bars federal prosecutions of many of these cases." However, her written statement also maintained that "the Division has used non-civil rights statutes to overcome the statute of limitations challenge." Please inform this Committee of each instance where the Department has brought a prosecution of a civil rights era murder with a non-civil rights statute? When non-civil rights statutes were used, how successful were those prosecutions?**

Answer: Two of the most important statutes that can be used to prosecute racially motivated homicides, 18 U.S.C. § 245 (interference with federally protected activities) and 42 U.S.C. § 3631 (interference with housing rights), were not enacted until 1968. Under the Ex Post Facto Clause, these statutes cannot be applied retroactively to conduct that was not a crime at the time of the offense. Moreover, the five-year statute of limitations on Federal criminal civil rights charges would present another limitation on such prosecutions. Prior to 1994, all Federal criminal civil rights statutes carried a five-year statute of limitations, even in cases where death resulted. In 1994, the statutes were amended to provide the death penalty for civil rights violations that resulted in death. Under 18 U.S.C. § 3281, crimes punishable by death have no statute of limitations. However, the Ex Post Facto Clause again prevents the retroactive application of the 1994 change in penalties, and the resultant change in the statute of limitations.

Despite these constitutional and jurisdictional hurdles, the Department has successfully prosecuted civil rights era murder cases under other Federal criminal statutes. On June 14, 2007, for example, a Federal jury in Jackson, Mississippi, convicted James Seale on two counts of kidnapping (18 U.S.C. § 1201(a)) and one count of conspiracy to kidnap (18 U.S.C. § 1201(c)) for his role in the 1964 abduction and murder of 19-year-old Charles Moore and Henry Dee. Seale was sentenced to three life terms in prison. This prosecution was possible because the evidence revealed that the defendant abducted the victims and transported them across State lines before killing them by throwing them into the Old Mississippi River. The Federal government's jurisdiction was based on the fact that the Federal kidnapping statute was a capital offense at the time of the incident in 1964.

The successful prosecution of Ernest Avants in 2003 is another instance in which we were able to use non-civil rights charges to overcome the statute of limitations problem and bring a successful prosecution. A statute enacted in 1948, 18 U.S.C. § 1111 (murder on Federal land), provides for the death penalty for first degree murder within the special

maritime and territorial jurisdiction of the United States. In 2002 and 2003, the Criminal Section was able to use this statute to investigate and prosecute Avants, a Mississippi Ku Klux Klan member, who murdered an African-American man in 1966 in a National Forest.

The Department also plays an important role and expends significant resources in cases that do not ultimately result in a Federal prosecution. In 1997, the FBI reopened the investigation into the 1963 bombing of the Sixteenth Street Baptist Church in Birmingham, Alabama. Civil Rights Division attorneys worked with the United States Attorney for the Northern District of Alabama in conducting a grand jury investigation. We were able to assume Federal jurisdiction because a predecessor statute to the current arson and explosives statute, 18 U.S.C. § 844, provided that in situations where death resulted from an explosive transported in interstate commerce, the penalty was death, and under 18 U.S.C. § 3281, crimes punishable by death have no statute of limitations. Ultimately, we could not prove that the explosive traveled in interstate commerce, so we released the grand jury investigation to the State of Alabama, which used that investigation as the basis for a successful prosecution of the last two defendants who were involved in the bombing. The United States Attorney for the Northern District of Alabama was cross designated to serve as the lead prosecutor in the State trials. Thus, this case was investigated by Federal agents and a Federal grand jury, and the case was ultimately successfully prosecuted by a Federal prosecutor in State court -- another example of the Department's efforts to find creative ways to pursue civil rights era cases.

The Federal Bureau of Investigation also worked with Mississippi authorities to investigate the 1955 murder of Emmett Till, a 14 year-old African-American teenager, who was kidnapped and killed in rural Mississippi. The investigation showed that there was no Federal jurisdiction. Thus, on March 16, 2006, the Justice Department reported the results of its investigation to the district attorney for Greenville, Mississippi, for her consideration. A State grand jury in Mississippi declined to indict the case.

The Civil Rights Division and the FBI reinvestigated the June 2, 1965, ambush of O'Neil Moore and David Creed, two African-American deputy sheriffs in Washington Parish, Louisiana. The two deputy sheriffs were ambushed while they were patrolling in their police car. Moore was killed and Creed was seriously injured during the attack. The investigation into this incident was reopened in 1988, however, the Department was unable to develop sufficient evidence to bring Federal criminal charges against those involved in the ambush and murder.

The FBI assisted the local law enforcement authorities in the reopened investigation into the 1964 the murder of three civil rights workers in Philadelphia, Mississippi - an incident commonly known today as the "Mississippi Burning" case. At the time of the murders, the Assistant Attorney General of the Civil Rights Division, John Doar, personally led the investigation and prosecution of these murders. He was able to secure the convictions of only 7 of the 18 defendants charged with these murders; and they received sentences ranging from just 4 to 10 years of imprisonment. One of the

ringleaders, Ku Klux Klan member, Edgar Ray Killen, was acquitted because one of the jury members refused to convict a “preacher.” The Department, however, remained committed to ensuring that justice eventually prevailed in that case. The FBI worked with the local law enforcement authorities on the reopened investigation which resulted in the indictment of Killen on three counts of State murder charges on January 6, 2005. Killen was finally convicted for his involvement in the case on June 21, 2005.

15. Last November I asked you about an incident of voter intimidation and suppression in the 9th precinct in Tucson (Pima County), Arizona, an area with a heavy percentage of Hispanic Americans. It was reported that three vigilantes armed with a clip board, a video camera, and a visible firearm stopped only Latino voters as they entered and exited the polls on Election Day, issuing implied and overt threats. You answered that “both the Criminal Division and the Civil Rights Division have opened investigations into the Pima County allegations” and that you could not comment further on an ongoing investigation. When I asked the Attorney General for an update in January, he gave me the same answer.

a. Can you update me on the current status of the Civil Rights Division’s Pima County investigation?

Answer: A Federal criminal investigation was initiated, but it did not produce evidence sufficient to prove a violation of Federal criminal laws beyond a reasonable doubt. The matter has been referred to the Voting Section of the Civil Rights Division for further investigation and assessment. We are prepared to take any legal action that the facts and the law warrant.

b. What steps have you taken to ensure that the type of voter suppression tactics witnessed in Pima County are not repeated in the next election?

Answer: The Civil Rights Division is committed to investigating and prosecuting incidents involving voter suppression. While the majority of all criminal investigations related to voting have been assigned to, and are handled by, the Criminal Division, the Civil Rights Division coordinates with the Criminal Division in examining certain possible violations. See 28 C.F.R. §§ 0.50, 0.55. The determination of which office takes the lead in a case will, in the ordinary course, depend on the nature of the various allegations involved, the evidence available at the outset of a case (when initial assignment is made), the likely availability of additional evidence, the legal elements that need to be proved under relevant statutes, and the penalties available. For example, depending on the evidence developed, multiple criminal statutes may be implicated by the conduct. Subsequent investigation that materially alters the balance of factors may be a basis for reassignment of the investigation.

Where a determination is made that a violation of Federal criminal law cannot be proved beyond a reasonable doubt, the case may be referred to the Voting Section of the Civil Rights Division to determine if a civil remedy may be available.

Questions Posed by Senator Kennedy:

1. **At the June 21, 2007 oversight hearing on the Civil Rights Division, I asked whether you agree that the Division has filed only one case alleging racial discrimination in voting on behalf of African Americans during the current Administration. The case to which I was referring was the United States v. Euclid, Ohio, which was not filed until 2006. You stated that the Division has filed between 5 and 15 cases alleging racial discrimination in voting against African Americans since President Bush took office. Neither the Division's website, your letter on this issue of November 9, 2006, nor your April 11, 2007 answers to written questions support your estimate of the number of cases filed by this administration to protect African Americans from racial discrimination in voting. To clarify this issue, please provide the following information:**
 - a. **For each suit authorized by the current Administration alleging racial discrimination against African Americans under Section 2 of the Voting Rights Act of 1965, as amended, the name of the case and the date on which it was filed.**

Answer: As stated in the attached letter from Principal Deputy Assistant Attorney General Richard Hertling to Chairman Leahy dated July 3, 2007, during this Administration, the Voting Section of the Civil Rights Division has filed four cases and successfully litigated a fifth, in addition to interposing thirty-six Section 5 objections, on behalf of African-American voters in various jurisdictions. The cases filed include *United States v. Crockett County* (W.D. Tenn.; filed April 17, 2001; alleged that the method of electing the county's board of commissioners violated Section 2 because it diluted the voting strength of African American voters); *United States v. Euclid* (N.D. Ohio; filed July 10, 2006; alleged that the method of electing the city council violated Section 2 because it diluted the voting strength of African-American citizens); *United States v. Miami-Dade County* (S.D. Fla.; filed June 7, 2002; alleged that county poll officials effectively prevented Haitian-American voters from securing assistance at the polls from persons of their choice in violation of Section 208); and *United States v. North Harris Montgomery Community College District* (S.D. Tex.; filed July 27, 2006; alleged the district attempted to reschedule its trustee and bond election without obtaining the requisite determination under Section 5 that the change would be free of a retrogressive purpose and effect prior to implementing the change), which also involved protecting the rights of Hispanic citizens. In addition, we successfully litigated *United States v. Charleston County, South Carolina* (D.S.C.; filed January 17, 2001; alleged that the at-large method of electing members of the Charleston County Commission violated Section 2 by diluting the voting strength of African American voters) and successfully defended that victory through appeal to the U.S. Supreme Court. *Crockett County*, *Euclid*, and *Charleston County* are all Section 2 cases. *United States v. Miami-Dade*

County alleges a violation of Section 208 and *United States v. North Harris Montgomery Community College District* alleges a violation of Section 5.

- b. For each suit authorized by the current Administration under Section 5 of the Voting Rights Act of 1965, as amended, which alleges that a proposed voting change is retrogressive and diminishes the opportunity of African Americans to participate in the electoral process because of their race, the name of the case and the date on which it was filed.**

Answer: A claim filed by the Section under Section 5 of the Act would allege that the change in question has not received the requisite clearance from the United States District Court for the District of Columbia or from the Attorney General. It is not necessary or relevant to allege that the change is in fact discriminatory. Judicial determinations as to a discriminatory purpose or effect are reserved for the District of Columbia court. In that court, the Department is a statutory defendant and does not bring the lawsuit.

- c. For any other suit authorized by the current Administration that you believe alleges race discrimination in voting against African Americans, the date on which it was authorized, and the date on which it was filed. In addition, for each such case, please provide a brief factual description. If this case was not identified in your November 9, 2006 letter or your previous answers to written questions, please explain the reasons for that omission.**

Answer: Please see the response to subpart a above.

- d. In your April 11, 2007 answer to question 1(c) of my written questions to you on voting rights enforcement, you referred to a lawsuit filed by the Division in 2006 under Section 5 of the Voting Rights Act to vindicate the rights of African Americans and other voters. Please state the name of the lawsuit, and whether the claims raised on behalf of African Americans were based on race.**

Answer: On July 27, 2006, we filed a complaint in *United States v. North Harris Montgomery Community College District* (S.D. Tex. 2006), alleging a violation of Section 5 of the Voting Rights Act. The complaint alleged that the district attempted to reschedule its trustee and bond election without obtaining the requisite determination under Section 5 that the change would be free of a retrogressive purpose and effect prior to implementing the change. The consent decree, which was entered by a three judge court on August 4, 2006, required the district to refrain from implementing any voting change without first obtaining either administrative or judicial preclearance pursuant to Section 5. The decree also required defendants to reschedule the cancelled election to November 7, 2006.

For the reasons set forth in response to (b), above, the complaint itself did not allege discrimination.

- e. **If the answers to questions 1.a- 1.d. above, confirm that the Division has filed only very few cases alleging racial discrimination against African Americans in voting, please explain the reasons why such cases have received such low priority in this Administration.**

Answer: The Department of Justice brings cases where it finds a violation of the law based upon the facts that would be sufficient for the Division to prove that violation in court.

The Department remains fully committed to the vigorous and even-handed enforcement of the Voting Rights Act on behalf of all Americans and has brought lawsuits on behalf of African-American voters, Hispanic-American voters, Asian-American voters, Native American voters, and white voters. This Administration also has brought the first lawsuits in history to protect the voting rights of citizens of Vietnamese, Filipino, Korean, and Haitian heritage.

After over 40 years of enforcement by the Department, legal advocacy groups, and individual attorneys, the number of at-large election systems that discriminate against African American voters has diminished; once sued, jurisdictions rarely revert to at-large systems. Accordingly, a number of once-vigorous private litigation programs have shifted their focus to policy or to other forms of litigation.

Finally, please see the response to subpart a, above.

2. In your April 11, 2007 answers to written questions you failed to provide a complete response to my questions about the Division's voting rights lawsuit against the City of Euclid, Ohio. Please state:

- a. **The date on which the Department authorized a formal investigation of the City of Euclid Ohio.**

Answer: The investigation was formally opened on December 6, 2002.

- b. **The date on which Department began any investigation of Euclid's method of electing its city council.**

Answer: The investigation was formally opened on December 6, 2002.

- c. **The date on which Voting Section personnel first began contacting the minority community and requesting election returns to determine whether Euclid's method of election violated the Voting Rights Act.**

Answer: This date is not known.

d. The date on which the Voting Section first informed Euclid of its investigation into possible voting rights violations.

Answer: On March 20, 2006, the Department sent the City formal notice of our intent to file suit and an invitation to negotiate a settlement of the case that could be filed simultaneously with the complaint.

3. **According to a December 10, 2005 article in the Washington Post, during this Administration, the Division adopted a policy that career staff who review proposed voting changes submitted under Section 5 of the Voting Rights Act may not include written recommendations in the official memoranda forwarded to the Assistant Attorney General for approval. The Post also reported that under this new policy, career staff's recommendation that the Division object to a 2005 Georgia voter photo identification law was "stripped out" of the Section's memorandum and "was not forwarded to higher officials in the Civil Rights Division." This specific allegation has been reported in several other publications as well. Are the specific written recommendations of all career staff who review Section 5 submissions currently included in the memorandum to the Assistant Attorney General analyzing those submissions? If not, please explain why not and state how long this has been the Division's policy.**

Answer: It is our understanding that each person involved in the Section 5 analysis shares his or her assessment and recommendation with senior career management, and the ultimate recommendation of the Section is made with the full awareness of the views of each staff member involved in the matter. For those Section 5 recommendations that are forwarded to the Assistant Attorney General, see 28 CFR § 51.3, it is our understanding that the Assistant Attorney General is informed whenever a difference of opinion may exist.

4. **As I stated at the oversight hearing, I was appalled to read the article about the Division on the front page of the June 21, 2007 Washington Post, which reported that Bradley Schlozman, a former high-ranking official in the Division, imposed a partisan litmus test on career Division attorneys. You stated that you were shocked by the allegations in that article. Please state specifically which aspects of the article you found shocking.**

- a. **Did you mean to suggest that before the evening of June 20, 2007, you were unaware of the allegations described in the article that attorneys Tovah Calderon, Teresa Kwong, and Karen Stevens had been transferred out of the Appellate Section for partisan reasons?**

- b. **It is my understanding that Ms. Calderon, Ms. Kwong, and Ms. Stevens were allowed to return to the Appellate Section since you became Assistant Attorney General. Is that correct? If so, please explain how you could have been unaware of the concerns about their involuntary transfers out of the Section.**
- c. **Do you now acknowledge the transfers of Ms. Calderon, Ms. Kwong, and Ms. Stevens were improper?**
- d. **Was it your decision to allow these attorneys to return to the Appellate Section?**

Answer: It was AAG Kim's decision to have Tovah Calderon, Teresa Kwong, and Karen Stevens returned to the Appellate Section. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

- 5. **You stated that "you don't agree with a lot of what people have been doing, or have been said to do." Please describe specifically the actions or allegations with which you disagree.**

Answer: There have been a number of allegations recently regarding politicization of hiring and in the decision-making process in the Civil Rights Division. During his tenure as Assistant Attorney General, AAG Kim's policy was always to make legal decisions based on the outcome as dictated by the law as applied to the facts. A similar philosophy guided his decision-making process as it pertained to the internal administration of the Division, hiring, performance evaluations, and assignments. That philosophy is that the Division should hire attorneys who have a demonstrated record of excellence, who are talented attorneys consistent with that record of excellence, and who share a commitment to the work of the Division. During his tenure, assignments and other personnel-related decisions were based on merit, not politics. Performance evaluations have been intended to reflect as accurately as possible the employee's performance during the rating period. To the extent that any of the recent allegations describe practices that deviate from AAG Kim's policies, he disagrees with those practices. Moreover, as he stated in his testimony before the Committee, he believes that some intemperate and inopportune remarks are alleged to have been made in connection with personnel actions previously taken in the Division.

- 6. **You served as a Deputy Assistant Attorney General in the Civil Rights Division for some three years before becoming Assistant Attorney General. Is it your contention that you were unaware that any of the practices alleged in the Washington Post article were taking place?**

Answer: The Department of Justice has substantial confidentiality interest in matters that pertain to personnel decisions. The Department of Justice also has substantial

confidentiality interests in any investigatory and/or deliberative processes that may have underscored these decisions. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

- 7. As a Deputy Assistant Attorney General, did you speak up or in any way attempt to curtail the practices discussed in the Washington Post article of June 21, 2007?**

Answer: It was AAG Kim's decision to have the three attorneys reported in the Washington Post article of June 21, 2007, work in the Appellate Section. The Department of Justice has substantial confidentiality interest in matters that pertain to personnel decisions. The Department of Justice also has substantial confidentiality interests in its internal discussions and deliberations. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

- 8. Mr. Schlozman told this Committee that he had bragged about hiring Republicans for civil service jobs in the Division. Did you ever hear Mr. Schlozman or anyone else in the Division make any comment suggesting that more Republicans should be hired in the Division? Do you agree that those comments would be wholly inappropriate?**

Answer: It would be inappropriate to suggest a violation of law, and the Civil Service Reform Act prohibits hiring on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation. The Department of Justice has substantial confidentiality interest in matters that pertain to personnel decisions. The Department of Justice also has substantial confidentiality interests in its internal discussions and deliberations. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

- 9. According to the Post, Mr. Schlozman said he wanted to replace attorneys in the Appellate Section with "good Americans." When did you first become aware that Mr. Schlozman had expressed such sentiments?**

Answer: It was AAG Kim's decision to have the three attorneys reported in the Washington Post article of June 21, 2007, work in the Appellate Section. The Department of Justice has substantial confidentiality interest in matters that pertain to personnel decisions. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

- 10. If Mr. Berman requests to be transferred back to the Voting Section, will you permit him to resume his former duties?**

Answer: Consistent with AAG Kim's management style and historical practices, any staffing decision would have been made based on the talents and interests of an individual and the needs of the Department. In this process, AAG Kim placed great weight on the judgments of career section management.

11. **WJLA TV recently reported that only 2 of 50 attorneys in the Criminal Section were African Americans. You oversaw the Criminal Section even before you were confirmed to head the Division, so you should be very familiar with that Section. Did you ever have any role in hiring career attorneys in the Criminal Section?**

Answer: Yes.

12. **Do you view the lack of diversity in the Criminal Section's attorney hiring as a problem?**

Answer: The Civil Rights Division has hired a diverse group of attorneys from a wide variety of backgrounds. Over the past five fiscal years, 27% of the new attorney hires in the Civil Rights Division were minorities. This is nearly three times the national average, as reported in a 2004 study by the American Bar Association, which found that minority representation in the legal profession is only about 9.7 %. The ABA study also found that nationally, African Americans represent 3.9% of lawyers, or approximately 1 in 25.

In addition, this Administration has promoted as many minorities to section management positions in the Civil Rights Division in 6 years as the previous administration did in 8 years. Indeed, at the end of the previous Administration, the Civil Rights Division employed no minority Section Chiefs. This Administration has promoted two minority Section Chiefs, including the first Hispanic Section Chief in the Division's fifty year history.

13. **Did you ever discuss with Mr. Schlozman hiring for the Criminal Section? Did he ever say to you that he was seeking to hire Republicans or conservatives for the Section? Do you agree that this would have been inappropriate?**

Answer: It would be inappropriate to suggest a violation of law, and the Civil Service Reform Act prohibits hiring on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status or political affiliation. The Department of Justice has substantial confidentiality interest in matters that pertain to personnel decisions. The Department of Justice also has substantial confidentiality interests in its internal discussions and deliberations. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

14. **Did you ever have any indication that Mr. Schlozman or others were asking the Republican National Lawyers Association to refer candidates to the Divisions? Do you agree that it would have been inappropriate for the Division to conduct its hiring by soliciting applicants from a partisan organization?**

Answer: It would be inappropriate to conduct hiring based on a candidate's political affiliation. The Department of Justice has substantial confidentiality interest in matters that pertain to personnel decisions. The Department of Justice also has substantial confidentiality interests in its internal discussions and deliberations. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of these matters, with which the Division is fully cooperating.

15. **Did you ever receive resumes that came to you from the Republican National Lawyers Association, either directly or through others?**

Answer: We are not aware of having received such resumes for career attorney positions.

16. **I've asked you before about the transfer of Robert Berman, the Deputy who formerly headed the Voting Section unit charged with enforcing Section 5 of the Voting Rights Act. Your answers have not resolved the basic concern that it appears he was involuntarily transferred because he agreed with the recommendations of other career attorneys to object to the Texas redistricting plan and the Georgia photo ID law. After his detail ended, you decided that he would not be allowed to return to the Voting Section. If Mr. Berman requests to be transferred back to the Voting Section, will you permit him to resume his former duties?**

Answer: Mr. Berman was not transferred in whole or in part in retaliation for any role he played in reviewing the Georgia and Texas preclearance submissions. Mr. Berman requested and received a detail with the Administrative Office of the United States Courts, which he completed from September 26, 2005 to January 27, 2006. Mr. Berman decided to pursue this detail in connection with a program designed to better prepare employees for becoming a candidate for the Senior Executive Service. Since Mr. Berman's return to the Civil Rights Division, he has served in a senior position in the Office of Professional Development. If Mr. Berman requested to be transferred to the Voting Section, that decision would have been made based on the talents and interests of Mr. Berman and the needs of the Department, consistent with AAG Kim's management style and historical practices. In this process, AAG Kim placed great weight on the judgments of career section management.

Questions Posed by Senator Feinstein:

1. **You testified that the attrition rate of attorneys in the Civil Rights Division over the past six years is “not markedly different from” the historical attrition rate for lawyers in the Division under the Clinton administration. Many of the recent revelations regarding low morale and politicized personnel decisions, however, relate to the Voting Section in particular.**
 - **What is the rate at which lawyers have voluntarily left the Voting Section during the current administration?**
 - **What is the rate at which lawyers have been involuntarily transferred out of the Voting Section during the current administration?**
 - **What was the rate at which lawyers voluntarily left the Voting Section during the Clinton administration?**
 - **What was the rate at which lawyers were involuntarily transferred out of the Voting Section during the Clinton administration?**

Answer: Forty-seven attorneys left the Voting Section during the previous Administration. As of AAG Kim’s departure in August 2007, forty-three attorneys had left the Voting Section during this Administration and two more were scheduled for departure. The Department does not track numbers of voluntary and involuntary departures.

2. **You testified that your philosophy is “to evenhandedly enforce the law wherever I find violations of that law,” and that prosecutors learn to “take the cases that you find and take the violations where they occur.” Later you added that your job is “to go out there and try to find as many violations that you can prove” as possible.**
 - **How many of the cases that you have authorized as Assistant Attorney General are based on facts that you *personally* found or that initially came *directly* to you, rather than through one of your subordinates?**
 - **Are you aware of each and every potential violation that comes to the attention of your subordinates in the Division?**
 - **Is it fair to say that the staff in the front office acts as a filter for the cases that come to you? What are you doing to ensure that they are equally committed to evenhandedly enforcing the law and prosecuting violations wherever they occur?**

- **Is it fair to say that the career staff in the Division acts as a filter for the cases that come to you? What are you doing to ensure that they are equally committed to evenhandedly enforcing the law and prosecuting violations wherever they occur?**
- **If the current investigation by the Inspector General and the Office of Professional Responsibility finds that career staff in the Division were hired based on improper political considerations, what will be the specific consequences for those staff members? If staff members who were hired for political reasons remain in place, why should the Committee believe that they are committed to evenhandedly enforcing the law?**

Answer: While the Assistant Attorney General has historically been involved in many litigation decisions, the vast majority of work is conducted by the attorneys and professional staff in the Division. It is fair to say that no one individual can be aware of each of the matters investigated or prosecuted by the Division. The talented staff in the Civil Rights Division, both career and political appointees, work diligently and cooperatively to vigorously enforce the Federal civil rights laws. Those efforts are best measured by record numbers of successful cases brought in many areas of the Division's responsibilities. We are committed to cooperating with the current OIG/OPR investigation and will carefully consider the results of its investigation, as well as any recommendations that the investigation may produce.

3. **You testified that with for all litigation decisions and all other decisions in the Division (aside from personnel actions), you have a "full and candid discussion" about the legal issues with "everyone involved." You added that you agree with the staff recommendation on the vast majority of those decisions, although not every single one.**

In a recent report of the Citizens' Commission on Civil Rights, three former Division lawyers (including the former chief of the Voting Section) wrote that when staff recommendations on Section 5 preclearance were overruled in past administrations, political appointees prepared memoranda for career staff to explain the legal rationale for their decisions and to form a complete record of the decisionmaking process. They added that the political staff in the current administration did not prepare those explanatory memoranda in at least two controversial preclearance decisions.

- **In addition to having full and candid discussions, do you prepare a written record of your reasoning in the small minority of cases where you disagree with the recommendations of career staff?**
- **If not, why not? Are you willing to reinstitute that practice with respect to preclearance decisions? Are you willing to follow that practice with respect to other significant decisions?**

Answer: During his tenure as Assistant Attorney General, AAG Kim worked hard to ensure open access and open lines of communications between political appointees and career attorneys. He relied on an informal robust internal decisionmaking process. Career staff was involved in the recommendation and decision-making process of every enforcement action brought during AAG Kim's tenure by the Division under the Voting Rights Act, including the review of every Section 5 submission. Every legal analysis, including recommendations under Section 5, was required to be balanced and to include all relevant information. AAG Kim welcomed opposing views and was available for discussion. AAG Kim was always willing to consider any practice that would enhance the decisionmaking process.

4. In late 2005 you authorized the filing of a lawsuit against the State of Missouri and its Secretary of State, a Democrat. The suit alleged that Missouri was not making a reasonable effort to remove ineligible voters from its voter rolls as required by the National Voter Registration Act. Todd Graves, then the U.S. Attorney in the Western District of Missouri, reportedly was opposed to filing the lawsuit. In April of this year the district court ruled in favor of Missouri, concluding both that DOJ had sued the wrong parties and that DOJ had completely failed to show that any voter fraud had occurred.

- **Were you aware that Mr. Graves was opposed to filing the suit? Do you know why he was opposed?**
- **Please explain in detail the specific factual and legal bases you relied on at the time you overruled Mr. Graves and ordered the suit to be filed.**
- **Did you communicate with anyone else in the Justice Department about the suit before or after filing it? If so, with whom?**
- **Did you communicate with anyone in the White House about the suit before or after filing it? If so, with whom?**
- **How many individuals in Missouri have been convicted for actually voting more than once in the 2004 election?**

Answer: Mr. Graves has testified that he never voiced any opposition to the filing of the lawsuit. Indeed, the United States Attorney's Office for the Western District of Missouri assisted the Civil Rights Division in litigating the case. AAG Kim did not communicate with anyone at the White House regarding this suit before or after suit was filed; prior to the filing of the lawsuit, AAG Kim communicated with other individuals within the Department of Justice, including career members of the Voting Section and other members of his office.

The lawsuit charged that Missouri both improperly removed or suspended eligible voters and failed to remove ineligible voters. The suit did not allege fraud, nor is voter fraud an element of the violations alleged. A few days after the commencement of this lawsuit, Missouri's Secretary of State issued a press release admitting the scope of the problem:

In last year's election, 29 Missouri counties and election jurisdictions had more persons registered to vote than people of voting age living in the jurisdiction. In one Missouri county, over 150% of the voting age population was registered to vote in the 2004 federal election.

Clearly, a problem exists. It defies common sense that we would have more registered voters than people of voting age in any Missouri county.

5. **In your written testimony you note that in one Missouri county the voter rolls were 151 percent of the county's voting age population. Data from the Election Assistance Commission show that in the same election, there was a county in Texas where over 230 percent of the voting age population was registered to vote. And in Utah, 12 of 29 counties had more than 100 percent of the citizen voting age population registered to vote.**

- **How many states in 2004 contained counties where more than 100 percent of the voting age population registered to vote? Which states were they?**
- **How many of those states did the Department sue under the NVRA?**
- **Of the states that were sued, in how many of them was the chief election official a Democrat?**

Answer: The Civil Rights Division has examined similar apparent discrepancies in many other States. According to a report of the Election Assistance Commission and Census data, there are 10 States in which 10 percent or more of the jurisdictions conducting voter registration had more registered voters than citizens of voting age. The complete list of such States is Iowa, Massachusetts, Mississippi, Nebraska, North Carolina, Rhode Island, South Dakota, Texas, Utah, and Vermont.

The States that have been named as defendants in lawsuits brought by the Voting Section under the NVRA during this Administration are as follows: *United States v. State of New Jersey* (D. N.J. 2006); *United States v. State of Maine* (D. Me. 2006); *United States v. State of Indiana* (S.D. Ind. 2006); *United States v. State of Missouri* (W.D. Mo. 2005); *United States v. State of New York* (N.D.N.Y. 2004); *United States v. State of Tennessee* (M.D. Tenn. 2002).

The political affiliation of the responsible officials in each of these States is not a relevant consideration.

6. **As you note in your written testimony, the Department has appealed the district court's ruling in the Missouri lawsuit.**
- **Who made the decision to appeal the district court ruling?**
 - **If you were not the decisionmaker, did you communicate with the decisionmaker about whether to appeal the ruling? If yes, what was the substance of that communication?**
 - **Did anyone at the Department communicate with anyone at the White House about whether to appeal the ruling? If yes, who was involved in that communication? What was the substance of the communication?**

Answer: After receiving authorization from the Office of the Solicitor General, AAG Kim made the decision to appeal the District Court's ruling in *U.S. v. Missouri*. AAG Kim did not communicate with anyone at the White House about whether to file an appeal.

7. **Bradley Schlozman testified on June 5, 2007 that the Department is "issuing a new book" of guidelines on the prosecution of election crimes.**
- **Who made the decision to replace the existing guidelines on the prosecution of election crimes? Why was this decision made?**

Answer: The decision to update the Department's 1995 election crimes manual was made several years ago by the management of the Public Integrity Section of the Criminal Division. There had been a number of significant changes in the laws in this area since the last manual was written, including the enactment by Congress of the landmark Bipartisan Campaign Reform Act of 2002, and particularly its enhanced penal consequences for criminal violations of the Federal Election Campaign Act. In addition, there had been a number of significant court decisions in this area of the law since the last manual was published, including the Supreme Court's decision in *McConnell v. Federal Election Commission*, 543 U.S. 93 (2003).

In short, the existing manual was both incomplete and out of date. Accordingly, in 2004, the Public Integrity Section and its Election Crimes Branch began to update the manual. In early 2007, the redrafting process was completed and the manual was published a few months later.

- **Please explain in detail how the new guidelines will differ from the current guidelines.**

Answer: As an initial matter, it is important to note that the Department's "current guidelines" for investigating and prosecuting election crimes are the guidelines reflected in the 2007 edition of *Federal Prosecution of Election Offenses* – not in the 1995 edition published 12 years ago.

If your question about "new guidelines" is meant to include the entire new manual, this is difficult to answer. The 1995 manual is 135 pages long; the 2007 manual is 241 pages (excluding appendices). There are thus over 100 pages of additional text in the new manual, and this text is spread throughout the entire book.

Two chapters, namely, Chapter Five, which addresses campaign financing crimes, and Chapter Six, which addresses the sentencing of election crimes, received more extensive revision and expansion than other chapters. This additional text was necessary to address effectively the changes to the Federal Election Campaign Act, and in particular the enhancements to the Act's criminal enforcement that were legislated by Congress in BCRA.

- **Will the new guidelines retain the current requirements that the Department "must refrain from any conduct which has the possibility of affecting the election itself," and that "most, if not all, investigation of an alleged election crime must await the end of the election to which the allegation relates"? If not, why not?**

Answer: The Department's noninterference guidelines with respect to the election process have not changed substantively. The text of the guidelines in the 2007 manual has been expanded to offer more explanation, assistance, and guidance developed from the Department's ongoing criminal enforcement efforts in the area of election and campaign finance crimes and the Public Integrity Section and its Election Crimes Branch's increased expertise in this difficult yet important area. The current guidelines are as follows:

Noninterference with Elections

The Justice Department's goals in the area of election crime are to prosecute those who violate federal criminal law and, through such prosecutions, to deter corruption of future elections. The Department does not have a role in determining which candidate won a particular election, or whether another election should be held because of the impact of the alleged fraud on the election. In most instances, these issues are for the candidates to litigate in the courts or to advocate before their legislative bodies or election boards. Although civil rights actions under 42 U.S.C. § 1983 may be brought by private citizens to redress election irregularities, the federal prosecutor has no role in such suits.

In investigating an election fraud matter, federal law enforcement personnel should carefully evaluate whether an investigative step under consideration has

the potential to affect the election itself. Starting a public criminal investigation of alleged election fraud before the election to which the allegations pertain has been concluded runs the obvious risk of chilling legitimate voting and campaign activities. It also runs the significant risk of interjecting the investigation itself as an issue, both in the campaign and in the adjudication of any ensuing election contest.

Accordingly, overt criminal investigative measures should not ordinarily be taken in matters involving alleged fraud in the manner in which votes were cast or counted until the election in question has been concluded, its results certified, and all recounts and election contests concluded. Not only does such investigative restraint avoid interjecting the federal government into election campaigns, the voting process, and the adjudication of ensuing recounts and election contest litigation, but it also ensures that evidence developed during any election litigation is available to investigators, thereby minimizing the need to duplicate investigative efforts. Many election fraud issues are developed to the standards of factual predication for a federal criminal investigation during post-election litigation.

The Department views any voter interviews in the pre-election and balloting periods, other than interviews of a complainant and any witnesses he or she may identify, as beyond a preliminary investigation. A United States Attorney's Office considering such interviews must therefore first consult with the Public Integrity Section. USAM 9-85.210. This consultation is also necessary before any investigation is undertaken near the polls while voting is in progress.

The policy discussed above does not apply to covert investigative techniques, nor does it apply to investigations or prosecutions of federal crimes other than those that focus on the manner in which votes were cast or counted. However, if there is any doubt about whether the policy may apply, we recommend that the Public Integrity Section be consulted.

Exceptions to this general rule of course exist. For example, one exception may be appropriate when undercover techniques are justified and the Department's guidelines for undercover operations have been met. Another exception may apply when it is possible to both complete an investigation and file criminal charges against an offender prior to the period immediately before an election. All such exceptions require consultation with the Public Integrity Section, as they involve action beyond a preliminary investigation.

Federal Prosecution of Election Offenses (Seventh Edition, May 2007), U.S. Department of Justice, Criminal Division, Public Integrity Section, pp. 91-93; see also *Federal Prosecution of Election Offenses* (Sixth Edition, January 1995), U.S. Department of Justice, Criminal Division, Public Integrity Section, pp. 60-61.

Questions Posed by Senator Durbin:

1. **A June 21, 2007 front page article in the *Washington Post* paints a troubling picture of the treatment of career attorneys in the Civil Rights Division's Appellate Section. According to this article, your predecessor, Bradley Schlozman, involuntarily transferred three female minority attorneys out of the Division's Appellate Section because he wanted to make room for "good Americans."**

And at a June 5, 2007 hearing before this Committee, Mr. Schlozman admitted that he boasted of hiring conservatives and Republicans into the Division. The *Washington Post* article also indicates Mr. Schlozman ordered that cases be taken away from certain attorneys in the Appellate Section whom he believed were not "on our team," and the article says Mr. Schlozman, upon learning that an attorney in that section had voted for John McCain rather than George Bush, asked "Can we still trust her?"

- a. **How do you reconcile Mr. Schlozman's comments and actions with your statement in a written answer submitted to this committee on April 11, 2007 that "there is no political litmus test used in deciding to hire attorneys in the Civil Rights Division"?**
- b. **Is there, or has there been, a political litmus test used in deciding to involuntarily transfer or give work assignments to attorneys in the Civil Rights Division?**

Answer: AAG Kim testified that his hiring practices for career attorney positions in the Civil Rights Division is to measure whether candidates have a demonstrated record of excellence, whether they are talented attorneys consistent with that excellent record and whether they share a commitment to the work of the Division. The Division hires outstanding attorneys from an extremely wide variety of backgrounds. AAG Kim did not employ a political litmus test in making personnel decisions for career attorneys. We note that the Office of Inspector General and Office of Professional Responsibility have a joint investigation of such matters, with which the Division is fully cooperating.

- c. **Have you yourself ever made comments along the lines of what Mr. Schlozman is reported to have said, or told anyone that you wanted to hire more conservatives and Republicans into the Civil Rights Division?**

Answer: While the question does not indicate the specific statements reportedly made, AAG Kim does not recall any statement indicating that he wanted to hire career attorneys based on their political affiliation, or in violation of any law, rule, or regulation. The record clearly reflects that AAG Kim was involved in hiring talented attorneys from a

wide variety of backgrounds.

- d. **Do you believe it is appropriate to express doubts about the trustworthiness of a Justice Department attorney based on whom they vote for in elections?**

Answer: No.

- e. **Have you, or any management officials serving under you, involuntarily transferred or terminated any attorneys in the Civil Rights Division since you were confirmed in November 2005? If so, please explain why the transfer(s) were made.**

Answer: Yes. The Civil Rights Division has substantial confidentiality interests in the deliberative process leading to such decisions. Consistent with AAG Kim's management style and historical practices, staffing decisions were made based on the talents and interests of an individual and the needs of the Department. In this process, AAG Kim placed great weight on the judgments of career section management.

- f. **Please provide a list of all Civil Rights Division employees who have been involuntarily transferred or terminated since January 2001, and provide an explanation as to why each transfer or termination took place.**

Answer: Providing the names of these individuals would implicate their privacy interests. In addition, the Civil Rights Division has substantial confidentiality interests in the deliberative process that led to these decisions. Consistent with AAG Kim's management style and historical practices, staffing decisions were made based on the talents and interests of an individual and the needs of the Department. In this process, AAG Kim placed great weight on the judgments of career section management.

2. **In a 2006 newsletter published by Regent University Law School, a 2004 graduate of the school, Bill Condon, discussed his experience in obtaining a job with the Civil Rights Division. Mr. Condon wrote: "During my third year in law school, God opened only one door to employment. That door was to the Civil Rights Division of the United States Department of Justice."**

Mr. Condon discussed the hiring process, which consisted solely of an interview with two political appointees in the Civil Rights Division front office. Mr. Condon wrote that the interview was "intense" and stated: "They caught me a little off guard when they asked me with which Supreme Court decision in the last twenty years I most disagreed." Mr. Condon said he answered: *Lawrence v. Texas*, which struck down state laws that prohibited same-sex sexual relations. He wrote: "When one of the interviewers agreed and said that decision in *Lawrence* was 'maddening,' I knew I correctly

answered the question.”

- a. How do you reconcile Mr. Condon’s statements with your statement in a written answer submitted to this committee on April 11, 2007 that “there is no political litmus test used in deciding to hire attorneys in the Civil Rights Division”?**

Answer: Asking a law school student to name and discuss a Supreme Court decision is a fair way to measure the applicant’s (1) interest in and knowledge of current Supreme Court decisions, (2) critical legal thinking skills, and (3) ability to articulate a sound legal or factual viewpoint. To be clear, there is no “correct” or “incorrect” answer to such an open-ended question. It is designed to elicit a response from the applicant that he or she must then legally explain and defend, regardless of which court decision they chose.

This question, of course, is only one of many possible questions that may be asked of an attorney applicant, and any answer is only a part of the evaluation of an applicant. It is implausible for any applicant to believe that an answer to any single question would be the reason he or she was hired to work at the Department of Justice.

The Department is committed to not discriminating against an applicant for a career position based on political affiliation.

- b. How do you reconcile Mr. Condon’s statements with your statement in a written answer submitted to this committee on April 11, 2007 that “Section Chiefs play a central role in the hiring of attorneys through both the Honors Program and lateral hiring process, including active participation in interviewing both lateral and Honors Program applicants. I take very seriously the recommendations of Section Chiefs in all personnel matters”?**

Answer: The statement is accurate. Since at least November 2005, Section Chiefs have been involved in hiring for vacancies in their respective sections as well as the Honors Program hiring process. Section Chiefs participate fully in these interview processes. Hiring decisions are made with input of both the career section chief and other Division leadership.

- c. Do you think it is appropriate for political appointees to ask career attorney applicants which Supreme Court decisions they most disagree with? Is this a question that is frequently asked of applicants to the Civil Rights Division? Please explain.**

Answer: See response to subpart a, above.

- d. Please identify the names of the political appointees who interviewed Mr. Condon, and indicate whether they are still employed in the Civil**

Rights Division and still involved in hiring career attorneys.

Answer: The Division does not systematically track this information. Based on his date of entry into the Division, Mr. Condon was interviewed, we believe, in 2003. Most of those directly involved in the Honors Program interview process in 2003 no longer work in the Division or even the Department.

- e. How many career attorneys have been hired in the Civil Rights Division since January 2001 after being interviewed only by political appointees or front office officials?**

Answer: The Division does not systematically track the persons who interview applicants for attorney positions. However, in accordance with my policy set forth in response to subpart b, since November 2005 we are not aware of any career attorneys have been hired to work in the Civil Rights Division after being interviewed only by political appointees.

- 3. Joseph Rich, the chief of the Voting Section until 2005, testified at the November 2006 Civil Rights Division oversight hearing that there were instances in which attorneys were hired into his section without his participation. He testified: "There was also an occasion when, without prior consultation, I was informed of the hiring of a new attorney who would be arriving in the office in a matter of days. Similarly, without prior consultation with me and without the normal process of advertising for supervisory positions, I was informed of the appointment of a special counsel to the section only a few days before his arrival in the section."**

How do you reconcile Mr. Rich's testimony with your statement in a written answer submitted to this committee on April 11, 2007 that "Section Chiefs play a central role in the hiring of attorneys through both the Honors Program and lateral hiring process, including active participation in interviewing both lateral and Honors Program applicants. I take very seriously the recommendations of Section Chiefs in all personnel matters"?

Answer: AAG Kim's statement about the role of Section Chiefs in hiring and personnel decisions was an accurate description of his management style. The Division's career Section Chiefs play a central role in the hiring of attorneys through both the Honors Program and lateral hiring process, including active participation in interviewing both lateral and Honors Program applicants. AAG Kim took very seriously the recommendations of Section Chiefs in all personnel matters.

Assistant Attorney General Kim did not supervise the Voting Section during Mr. Rich's tenure there.

- 4. You submitted data to the Committee on April 11, 2007 regarding the**

number of attorneys in the Civil Rights Division over the past 13 years. The data indicate there has been an 8% decline in the number of attorneys working in the Division since 2005. There were 346 attorneys in 2005 and only 319 in 2007.

Please explain the 8% decline in the number of attorneys working in the Civil Rights Division between 2005 and 2007. Do you intend to hire additional attorneys to return to the high-water mark of 349 attorneys that worked in the Division in 2004? If not, please provide an explanation. If so, when do you expect to reach the 349 mark again?

Answer: Between 2005 and 2007, consistent with the authorization by Congress and reprogramming by the Department, funding for 13 attorney positions in the Civil Rights Division was transferred to the U.S. Attorney's Offices. At the present time, Congress has authorized funding for 324 attorneys in the Civil Rights Division. The Division has internally reallocated within this budget to reduce the number of non-attorney positions and create additional attorney positions. As of AAG Kim's departure in August 2007, the Civil Rights Division had 321 attorneys on board and was in the process of hiring 18 additional attorneys.

- 5. Professor Helen Norton's testimony is a stinging critique of the Bush Administration's efforts to enforce our nation's most important anti-discrimination law, Title VII. She discussed how few employment discrimination cases have been brought by this Administration on behalf of African Americans, Hispanics, and women, compared to the Clinton Administration. Even though you have 10-20% more attorneys in the Employment Litigation Section than the previous Administration had, you have brought about half the number of employment discrimination cases that they did.**

Professor Norton also discussed the two significant Supreme Court cases over the past year in which the Justice Department filed amicus briefs that took positions designed to diminish the rights of discrimination victims. Remarkably, in both of these cases the Justice Department fought against the pro-victim position was advocated by President Bush's own EEOC.

Do you dispute any of the data or facts set forth in Professor Norton's testimony? If so, please explain. If not, why has this Administration shown such a lack of commitment to Title VII enforcement?

Answer: The Civil Rights Division remains diligent in combating employment discrimination on behalf of all Americans, one of the Division's most long-standing obligations. Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Most allegations of employment discrimination are made against private employers. Those

claims are investigated and potentially litigated by the Equal Employment Opportunity Commission ("EEOC"). However, the Civil Rights Division's Employment Litigation Section is responsible for one vital aspect of Title VII enforcement: discrimination by public employers.

Pursuant to Section 707 of Title VII, the Attorney General has authority to bring suit against a State or local government employer where there is reason to believe that a "pattern or practice" of discrimination exists. These cases are factually and legally complex, as well as time-consuming and resource-intensive. In Fiscal Year 2006, we filed three complaints alleging a pattern or practice of employment discrimination – as many as filed during the last three years of the previous Administration combined.

One recent case highlights our efforts. In *United States v. City of New York*, filed on May 21, 2007, the Division alleged that since 1999, the City of New York has engaged in a pattern or practice of discrimination against black and Hispanic applicants for the position of entry-level firefighter in the Fire Department of the City of New York ("FDNY") in violation of Title VII. Specifically, the complaint alleges that the City's use of two written examinations as pass/fail screening devices and the City's rank-order processing of applicants from its firefighter eligibility lists based on applicants' scores on the written examinations (in combination with scores on a physical performance test) have resulted in disparate impact against black and Hispanic applicants and are not job related and consistent with business necessity. The complaint was filed pursuant to Sections 706 and 707 of Title VII, and was expanded to include discrimination against Hispanics as a result of the Division's investigation.

In *United States v. City of Virginia Beach* and *United States v. City of Chesapeake*, the Division alleged that the cities had violated Section 707 by screening applicants for entry-level police officer positions in a manner that had an unlawful disparate impact on African-American and Hispanic applicants. In *Virginia Beach*, the parties reached a consent decree providing that the city will use the test as one component of its written examination and not as a separate pass/fail screening mechanism with its own cutoff score. On June 15, 2007, the court provisionally entered a consent decree in the *City of Chesapeake* litigation. Under the decree, the City will create a fund to provide back pay to African-American and Hispanic applicants who were denied employment solely because of the City's use of a math test as a pass/fail screening device. The City also will provide priority job offers for African-American and Hispanic applicants who are currently qualified for the entry-level police officer job but were screened out solely because of their performance on the math test. The City will provide retroactive seniority to such hires when they complete the training academy. In addition, the City agreed that, while it will still use scores on the mathematics test in combination with applicants' scores on other tests, it will not prospectively use the mathematics test as a stand alone pass/fail screening device.

The Division also has enforcement responsibility for the Uniformed Service Employment and Reemployment Rights Act of 1994 ("USERRA"). USERRA was enacted to protect

veterans of the armed services when they seek to resume the job they left to serve their country. USERRA enables those who serve their country to return to their civilian positions with the seniority, status, rate of pay, health benefits, and pension benefits they would have received if they had worked continuously for their employer. In Fiscal Year 2006, the Division filed four USERRA complaints in Federal district court and resolved six cases.

During Fiscal Year 2006, we filed the first USERRA class action complaint ever filed by the United States. The original class action complaint, which was filed on behalf of the individual plaintiffs we represent, charges that American Airlines (“AA”) violated USERRA by denying three pilots and a putative class of other pilots employment benefits during their military service. Specifically, the complaint alleges that AA conducted an audit of the leave taken for military service by AA pilots in 2001 and, based on the results of the audit, reduced the employment benefits of its pilots who had taken military leave, while not reducing the same benefits of its pilots who had taken similar types of non-military leave. Other examples of recent USERRA suits include *Richard White v. S.O.G. Specialty Knives*, in which a reservist’s employer terminated him on the very day that the reservist gave notice of being called to active duty. We resolved this case through a consent decree that resulted in a monetary payment to the reservist. In *McCullough v. City of Independence, Missouri*, the Division filed suit on behalf of Wesley McCullough, whose employer allegedly disciplined him for failing to submit “written” orders to obtain military leave. We entered into a consent decree in which the employer agreed to rescind the discipline and provide Mr. McCullough payment for the time he was suspended. The employer also agreed to amend its policies to allow for verbal notice of military service.

In Fiscal Year 2007 thus far, we have filed 5 USERRA complaints in district court and resolved 5 cases. Additionally, the United States Attorney’s offices have resolved three cases this fiscal year. One of these cases we have resolved in the current fiscal year is *McKeage v. Town of Stewartstown, NH*. In that case, the town sent Staff Sergeant Brendon McKeage a letter while he was on active duty in Iraq telling him he no longer had his job with the town. McKeage had been employed as the Chief of Police for the Town of Stewartstown. When the citizens of Stewartstown learned that their Chief of Police had been terminated while serving his country, they voted to censure the Town for its “outrageous and illegal” conduct. Despite this public censure, the Town still refused to reemploy SSG McKeage in his former position. Once we notified Stewartstown that we intended to sue, the employer decided to settle the case. The settlement terms include a payment to SSG McKeage of \$25,000 in back wages.

The Division has proactively sought to provide information to members of the military about their rights under USERRA and other laws. For example, we recently launched a website for service members (www.servicemembers.gov) explaining their rights under USERRA, the Uniformed and Overseas Citizen Absentee Voting Act (“UOCAVA”), and the Servicemembers' Civil Relief Act (“SCRA”).

The United States filed briefs with the Supreme Court as amicus curiae in *Burlington Northern and Santa Fe Railway Co. v. White* and *Ledbetter v. Goodyear*. In the amicus brief that it filed in *Burlington Northern*, the United States argued that the term “discriminate” in Title VII’s anti-retaliation provision must be read consistently with the statute’s core anti-discrimination provision, which prohibits discrimination on the basis of race, color, sex, national origin, or religion. In the amicus brief that it filed in *Ledbetter*, the United States argued that Supreme Court precedent forecloses Title VII claims that are based on the theory that paychecks issued in the limitations period perpetuate time-barred acts of discrimination. As discussed more fully in both of its amicus briefs, the United States determined that these positions were the correct interpretation after a careful review of Title VII and the case law interpreting it.

The Supreme Court agreed with the position of the United States in *Ledbetter*. The Supreme Court agreed with the result advocated by the United States in *Burlington Northern*, although the Court adopted a different rationale. The Department acknowledges and accepts the Supreme Court’s decisions in both cases, and, as with all decisions of the Supreme Court, will follow the Court’s precedent.

A copy of the United States’ amicus briefs, which set forth fully its positions in these cases, may be found at: <http://www.usdoj.gov/osg/briefs/2005/3mer/1ami/2005-0259.mer.ami.html> (*Burlington Northern*) and <http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2005-1074.mer.ami.html> (*Ledbetter*).

6. **In his testimony, Wade Henderson stated: “The Voting Section did not file any cases on behalf of African American voters during a five-year period between 2001 and 2006 and no cases have been brought on behalf of Native American voters for the entire administration.”**

When you came before this Committee for your nomination hearing in October 2005, I asked you why the Justice Department hadn’t filed a single Section 2 voting rights case on behalf of African Americans other than one previously authorized by the Clinton Administration. You said at that time that you hadn’t worked on voting issues and did not know the answer. I would like to pose the same question now, a year and a half later.

- a. **Other than one Section 2 case that had been previously authorized by the Clinton Administration, why did the Justice Department file no Section 2 complaints to vindicate the voting rights of African Americans until July 2006?**
- b. **What role did Hans von Spakovsky and Bradley Schlozman – both of whom had left the Civil Rights Division by July 2006 – play in the failure to bring Section 2 lawsuits on behalf of African Americans?**

Answer: In this Administration, the Voting Section of the Civil Rights Division has filed cases on behalf of African American voters in many jurisdictions, including: *United States v. Crockett County* (W.D. Tenn.); *United States v. Euclid* (N.D. Ohio); *United States v. Miami-Dade County* (S.D. Fla.); and *United States v. North Harris Montgomery Community College District* (S.D. Tex), which also involved protecting the rights of Hispanic citizens. We also successfully litigated *United States v. Charleston County, South Carolina* (D.S.C.) and successfully defended that victory before the Fourth Circuit. The Department continues to seek out and prosecute cases on behalf of African-American citizens.

The Department, of course, vigorously enforces all of the provisions of the Voting Rights Act. During calendar year 2006, the Voting Section filed 18 new lawsuits, which is double the average number of lawsuits filed in the preceding 30 years. During this Administration, moreover, we have filed two thirds of all cases ever filed under the minority language provisions of the Voting Rights Act, as well as approximately 75 percent of all cases ever filed under Section 208. We also have used Section 2 of the Voting Rights Act to challenge barriers to participation, as in *United States v. Long County* (S.D. Ga.) and *United States v. City of Boston* (D. Mass.). We have filed the first voting rights case in the Division's history on behalf of Haitian Americans; the first voting rights case in the Division's history on behalf of Filipino Americans; the first voting rights case in the Division's history on behalf of Korean Americans; and the first voting rights cases in the Division's history on behalf of Vietnamese Americans. Finally, the Department continues to vigorously defend the reauthorization of Voting Rights Act against a constitutional challenge. We will continue vigorously to protect all Americans from unlawful discrimination in voting.

7. At the June 21, 2007 hearing, Senator Whitehouse asked you if you are familiar with the concept of "caging" as a voter suppression strategy. You testified that you were. According to a June 25, 2007 *McClatchy* article, your predecessor, Alexander Acosta, signed a letter to a federal judge in Cincinnati four days before the November 2004 election in which he defended Ohio Republican Party efforts to challenge the credentials of 23,000 voters, most of whom were African-American.

a. Do you think it was appropriate for Mr. Acosta to send this letter to the federal court four days before the November 2004 election? Please explain.

Answer: On October 29, 2004, the Department of Justice filed a three paragraph letter brief, in lieu of a longer pleading, in the matter of *Spencer v. Blackwell*, Case No. 04CV738. This letter brief was properly filed with the court, with notice to parties. It is proper for the Department of Justice to present its views to courts regarding the application, interpretation, or enforcement of Federal law, as it did in this case.

b. What role did Hans von Spakovsky play in drafting this letter?

Answer: The Department has substantial confidentiality interests in our deliberative process relating to these matters.

- c. **The former chief of the Voting Section, Joseph Rich, said he believed Mr. Acosta's letter constituted an act of "caging." Do you agree? Please explain.**

Answer: Please see the response to subpart a above.

8. **In your April 11, 2007, you indicated the Civil Rights Division's Criminal Section had three matters related to the November 7, 2006 election under investigation, and you briefly identified the facts regarding each investigation.**

What is the status of each of these investigations?

Answer: The investigations regarding the cross burning in Grand Coteau, Louisiana, and the mailing of misleading letters in Orange County, California, are continuing. With regard to the Orange County mailing, the California Attorney General's Office also investigated the matter but determined that there was insufficient evidence to bring a prosecution. The investigation into the presence of armed men at the polls in Pima County, Arizona, did not produce evidence sufficient to prove a violation of Federal criminal laws beyond a reasonable doubt. The matter has been referred to the Voting Section of the Civil Rights Division for further investigation and assessment. We are prepared to take any legal action that the facts and the law warrant.

9. **In his testimony, Wade Henderson stated that the Justice Department announced a new policy in 2003 that it would no longer file disparate impact cases involving housing discrimination. These high impact cases are crucial in effectively combating housing discrimination, and they had been pursued by DOJ for decades.**

Why was this change in policy made? Is this policy still in effect?

Answer: There was no announcement of a new policy. The Housing and Civil Enforcement Section considers and relies upon evidence of "disparate impact" in applicable cases. We are not aware that the Section has ever filed a case based solely upon a "disparate impact" theory.

10. **On June 28, 2007, the Supreme Court issued an opinion striking down the use of race by the Seattle, Washington and Jefferson County, Kentucky school systems.**

What impact will this decision have on the work of the Civil Rights Division's

Educational Opportunities Section? Please provide any written analysis about the decision that has been generated within the Division.

Answer: The Department respects the decisions of the Supreme Court and will faithfully apply its rulings. The plurality opinion expressly recognizes that a school district has a compelling interest in remedying the effects of past intentional discrimination, which is consistent with the longstanding work of the Civil Rights Division's Educational Opportunities Section in enforcing Title IV of the Civil Rights Act. It is premature to determine what impact, if any, this decision will have on that work.

- 11. Your April 11, 2007 response to the Senate Judiciary Committee did not contain a direct response to the following questions I asked you: "Why did the Justice Department bring over three times as many sex trafficking cases as labor trafficking cases? Does the Department receive over three times as many sex trafficking allegations as labor trafficking allegations"?**

Please provide a direct, responsive answer to these questions.

Answer: The Division prosecutes trafficking cases without regard to whether they are labor or sex trafficking cases. We do not treat the cases differently based on whether the underlying allegations are sex or labor trafficking. Nor do we prioritize one type of case over another. We do not track incoming matters based on whether they allege sex or labor trafficking.

- 12. Political appointees in the Civil Rights Division front office have reportedly asserted their authority to handle numerous oral arguments before federal courts of appeal. Many of these individuals had far less oral argument experience than career attorneys in the Division's Appellate Section, who traditionally have handled oral arguments on behalf of the Division.**

Please list all cases since January 2001 in which an oral argument was handled by a member of the Civil Rights Division front office, including the name of the individual who argued the case and a brief summary of the case.

Answer: The Division does not systematically track this information. However, please see the attached list of the cases that have been argued by attorneys who are currently in the Office of the Assistant Attorney General, including the Special Counsel for Religious Discrimination, who is a career attorney in the Office of the Assistant Attorney General.

- 13. You indicated in your April 11, 2007 answers that the Civil Rights Division's Appellate Section continued to file briefs defending decisions of the U.S. government to deport illegal immigrants.**

- a. In the first half of FY 2007, what percent of the briefs filed by the Appellate Section involved such cases?**

- b. In the first half of FY 2007, what percent of the attorney hours in the Appellate Section were spent working on such cases?**

Answer: As of June 30, 2007, there were eight Civil Rights Division attorneys (two in the Appellate Section, two in the Disability Rights Section, one in the Housing and Civil Enforcement Section, one in the Voting Section, one in the Employment Litigation Section, and one in the Educational Opportunities Section) actively working on an OIL case. The vast majority of OIL cases are awaiting scheduling of oral argument, are under submission, or have been decided. From October 1, 2006 to March 31, 2007, the Appellate Section filed 35 briefs, 19, or 54%, of which were on behalf of OIL.

The percentages of total attorney hours per section spent on all OIL cases handled within the Civil Rights Division, dating from October 1, 2006, to March 31, 2007, are approximately as follows:

Section	% of Time Spent on OIL Cases
Appellate	19
Coordination & Review	.04
Criminal	.88
Disability Rights	2.38
Educational Opportunities	1.84
Employment Litigation	3.6
Housing and Civil Enforcement	2.81
Special Litigation	2.17
Voting	.67

The Department will not shirk from its responsibility to enforce the immigration laws passed by Congress. Until OIL has sufficient staff to manage the overwhelming workload, the Department must continue to share this responsibility. The Department is seeking to augment staffing and resource levels such that OIL ultimately will have sufficient staff to assume responsibility for all cases, including the Second Circuit cases formerly handled by SDNY.

- 14. In your April 11, 2007 submission to the Senate Judiciary Committee, you refused to answer several of the written questions that I and other members of this committee asked you following your November 2006 oversight hearing, stating that the Department has a policy against the disclosure of “internal deliberations.” Yet the Department of Justice has turned over**

thousands of internal deliberative documents in connection with the U.S. Attorney investigation.

Why is the Department of Justice willing to turn over such information regarding the U.S. Attorney investigation but unwilling to do so regarding Civil Rights Division enforcement?

Answer: The Department consistently seeks to accommodate requests from Congress in a way that satisfies both the Committee's oversight needs and the Department's interests in confidentiality. The Department has a general and longstanding policy against disclosing internal deliberations that would chill the free flow of information from the Department's career attorneys and would chill the robust internal debate involved in the decision making process. However, we seek to cooperate with Congressional requests as fully as possible, including the extraordinary and virtually unprecedented step of disclosing internal and deliberative materials in connection with the U.S. Attorney investigation.

Questions Posed by Senator Schumer:

1. Protecting the Right to Vote

The right to vote is perhaps our most fundamental civil right, the wellspring of our democracy. Unfortunately, recent elections have been marred by many instances of misleading, threatening, and malevolent behavior that should have no place in our democracy. Much of this bad conduct is not currently barred by federal law.

In January, with Senator Obama, I introduced a bill in the Senate (S. 453) that would criminalize the communication of false information with the intent to prevent another person from voting.

- a. As the head of one of the Justice Department divisions with substantial responsibility for safeguarding civil rights, do you agree that there is a need for legislation to address certain election-related deceptive practices that current Federal statutes do not reach?**

Answer: The Department's views on the substitute to S. 453 are set forth in the attached letter, which was sent to the Senate in October of 2007.

- b. The Obama-Schumer bill would also amend 18 U.S.C. § 594 to increase the maximum penalty for voter intimidation to five years of imprisonment. Given the severity of this crime and the fact that it touches on one of our most cherished civil rights, do you agree that the maximum penalty for voter intimidation, which is currently just one year of imprisonment, should be increased to deter and punish this very serious crime?**

Answer: Yes. As we state in our attached views letter on the substitute to S. 453, we agree that voter intimidation is a serious crime, and we support this amendment. The bill's increase in the maximum penalty for 18 U.S.C. § 594 is particularly appropriate because Section 594's penalty would then match the five-year penalty in the other Federal criminal statute addressing voter intimidation, 42 U.S.C. 1973gg-10(1), which was enacted as part of the National Voter Registration Act of 1993.

2. Civil Rights Division Hiring

During your testimony on June 21, 2007, you confirmed that "there is an ongoing and active investigation by both the Office of Professional Responsibility and the Office of the Inspector General" into whether political considerations were taken into account in hiring decisions by the Department of Justice's Civil Rights Division.

- a. What specific actions, if any, are you taking to ensure that all employees of the Civil Rights Division cooperate fully with this investigation?**

Answer: The staff in the Office of the Assistant Attorney General and in each component Section of the Division has been instructed to provide any information requested by the investigators. We have been in contact with the investigators to make sure that their requests are being honored.

- b. What specific actions, if any, will you take to ensure that any negative findings of this investigation are addressed through improvements in hiring practices? Can you pledge to this Committee that you will respond to any negative findings with concrete improvements?**

Answer: On June 29, 2007, AAG Kim issued a Memorandum of Guidance on Personnel Matters (the June 29 Memorandum), a copy of which is attached. The Department also included a copy of the June 29 Memorandum as an attachment to its letter of July 3, 2007, to Chairman Leahy. The June 29 Memorandum reminds all Division attorneys "that the Department of Justice is an Equal Opportunity/Reasonable Accommodation Employer." It further makes clear that "[c]onsistent with applicable law, Department policies and my own practice, there will be no discrimination based on color, race, religion, national origin, political affiliation, marital status, disability, age, sex, sexual orientation, status as a parent, membership or non-membership in an employee organization, or personal favoritism."

Although it is not possible to offer any specific response to speculations about any future findings of the Office of Professional Responsibility and Office of the Inspector General, the Division is committed to review any recommendations and take whatever appropriate actions may be required.

You also stated in your testimony that you "will abide as closely as possible [by] the rules of the road" when making hiring decisions.

- c. Is the Department's policy against considering political and ideological affiliations in hiring a formal policy, or is it merely informal? If it is a formal policy, please provide the Committee with the pertinent policy documents.**

Answer: See the attached June 29 Memorandum and sources cited therein.

- d. Given the allegations that are now under investigation, what actions, if any, are you taking to make your hiring practices more transparent and less susceptible to inappropriate political considerations?**

Answer: In addition to the attached memorandum, there are several practices in place that foster transparency and fairness in the Division's hiring practices. Since at least November 2005, for example, Section Chiefs review the resumes of all applicants for lateral attorney vacancies in their respective sections, and recommend candidates for interviews. The Section Chiefs participate fully in the interview process. Hiring decisions are made with input of both the career Section Chief and other Division leadership.

- e. **What steps, if any, are you taking to make other personnel decisions, such as transfers and case assignments, more transparent and less susceptible to inappropriate political considerations?**

Answer: The Division offers employees an "open season" in which they are eligible to transfer to another section subject to the approval of the affected career section chiefs. As expressed in the June 29 Memorandum, the Division's commitment to fairness in personnel matters includes, but is not limited to, "appointments, promotions, reassignments, details, pay, awards, and adverse actions."

Shortly after confirmation, AAG Kim created the position of Ombudsman within the Office of the Assistant Attorney General so that all Division staff will have a person to contact (in addition to the Division's Human Resources Office) to express any complaints of unfair treatment. All Division employees were notified that the highest levels of Division management were available to personally address any concerns that they may have. (See June 29 Memorandum.)

Under President Bush, the Justice Department put political appointees in charge of hiring for the Attorney General's honors program and summer intern hiring. This decision was widely criticized for creating an opportunity for partisanship to infect the hiring process. In April, the Justice Department abandoned this experiment and put career employees back in charge of the hiring program.

- f. [Omitted]
- g. **Who made the decision to take the hiring process away from political appointees and give it back to career employees?**
- h. **Why was that decision made?**

Answer: The Attorney General's Honors Program ("HP") is one of the most prestigious and competitive hiring programs in the country. It is administered and promoted by the Office of Attorney Recruitment and Management ("OARM"). This is a career office with administrative oversight of all career attorneys within the Department. OARM manages the applications and conducts the initial screening process to make certain that all applicants are eligible for participation in the HP. Applicants are then referred to

components (such as the Civil Rights Division) based on the applicant's stated preference. The applications are reviewed by each component. This review typically includes the input of both career and political appointees. In the Civil Rights Division, applicants are interviewed by both career employees and political appointees and hiring recommendations are made to the Assistant Attorney General.

In 2002, the Attorney General's Honors Program was revised to modernize the application process to be E-government compliant and to open the program to the broadest possible pool of interested applicants. The changes converted recruitment materials from print to web-based formats; allowed applicants to submit their applications online and track their status as hiring decisions were made; and streamlined automation to achieve an earlier extension of offers and acceptances. Additionally, rather than sending teams of interviewers out to 14 separate locations around the country, the Department brought candidates to Washington so they could see the Department first hand. A Departmental level review was also added in 2002 to meet budget requirements and assure the high quality standards suitable for an Honors program.

On April 26, 2007, the Justice Department issued new guidelines with respect to the hiring process for the Attorney General's Honors Program. (Please see the attached new guidelines.) The new guidelines remove any political appointees from the Attorney General's office, Deputy Attorney General's office, or Associate Attorney General's office from participation in this hiring process. Under the guidelines, the hiring process is now delegated to the individual DOJ components and to a working group that is comprised of career employees from OARM and representatives from the various DOJ components. Among other things, the purpose of these changes was to avoid even the perception of any political influence in the process, provide greater transparency to the programs, and facilitate the goals of assuring the selection of highly qualified candidates from the broadest applicant pool possible. It is important to note that career attorneys have always and continue to participate in the selection process for these programs.



U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

November 2, 2004

VIA FACSIMILE

Honorable Sidney H. Cates IV
Parish of Orleans
Civil District Court
421 Loyola Avenue, Room 200-C
New Orleans, LA 70112

Dear Judge Cates:

We understand that a lawsuit has been filed in your court seeking to extend the hours that the polls shall remain open in your parish. The Department of Justice has responsibility for enforcement of the Help America Vote Act of 2002 (HAVA). While HAVA does not require extending the hours that polls are normally open according to state law, we write to ensure that you are aware of Section 302(c) of HAVA, 42 U.S.C. 15482(c), which provides:

Voters Who Vote After the Polls are Closed: Any individual who votes in an election for Federal office as a result of a Federal or State court order or any other order extending the time established for closing the polls by a State law in effect 10 days before the date of that election may only vote in that election by casting a provisional ballot under subsection (a). Any such ballot cast under the preceding sentence shall be separated and held apart from the other provisional ballots cast by those not affected by the order.

If you have any questions about this provision, you may contact me at 202-532-5610.

Sincerely,

Sheldon T. Bradshaw
Principal Deputy Assistant Attorney General

Donovan v. Punxsutawney Area School Board (Third Circuit) (argued May 14, 2003, by Special Counsel for Religious Discrimination Eric Treene)

Plaintiff Melissa Donovan, a student at Punxsutawney High School and leader of FISH, a student Bible club, brought suit under the First Amendment, Fourteenth Amendment, 42 U.S.C. 1983, and the Equal Access Act (EAA), 20 U.S.C. 4071-4074, based on the school board's policy that religiously-oriented student groups could not meet during the high school's activity period. The Division filed an amicus brief on behalf of Donovan. On July 15, 2003, the Third Circuit reversed the district court's denial of a preliminary injunction and final order denying all relief. The court held that the school's activity period, during which "noncurriculum related groups" such as the ski club and an anti-drug and -alcohol club were permitted to meet, constitutes "noninstructional time" for purposes of the EAA. Consequently, the EAA makes it unlawful for the school board to deny FISH equal access to hold meetings during the activity period based on the religious nature of the club. Acknowledging that the parties agreed that the activity period constituted a limited public forum for purposes of First Amendment analysis, the court held that denying FISH the opportunity to meet because of the group's religious perspective constituted unconstitutional viewpoint discrimination and that the school had no valid Establishment Clause interest that could justify such a violation.

Child Evangelism Fellowship v. Stafford Township School District (Third Circuit) (argued September 11, 2003, by Special Counsel for Religious Discrimination Eric Treene)

Plaintiff Child Evangelism Fellowship (CEF), a non-profit Christian organization, sought to hang promotional posters on school walls; participate in Back-to-School-Night programs; and have teachers distribute promotional flyers/permission slips at the end of the school day, in the same manner as other community organizations. The district court granted CEF a preliminary injunction; Stafford appealed. The Division filed a brief on behalf of CEF, arguing that barring CEF's efforts to promote its after-school activities was impermissible viewpoint discrimination and that permitting CEF to promote its after-school activities would not violate the Establishment Clause. On October 15, 2004, the Third Circuit affirmed the district court's grant of a preliminary injunction. The court rejected Stafford's arguments that the speech at issue in this case was school-sponsored; that Stafford had created "closed" fora that permitted it to exclude CEF's speech; and that excluding CEF's speech was necessary to avoid an Establishment Clause violation. The court held that Stafford engaged in viewpoint discrimination that was not justified by an effort to avoid an Establishment Clause violation. The court reasoned that by permitting CEF's speech, Stafford does not endorse or promote religion and does not coerce anyone to participate in religious activities. The court remanded the case to the district court for entry of permanent injunctive relief.

United States v. Bailey (First Circuit) (argued September 14, 2004, by then Deputy Assistant Attorney General Wan J. Kim)

The defendant, a former guard at the Nashua Street Jail in Boston, was convicted of violating 18 U.S.C. 242 by assaulting (and aiding and abetting the assault of) a pretrial detainee at the jail, thereby depriving him of his civil rights; of obstructing and conspiring to obstruct a federal criminal investigation, in violation of 18 U.S.C. 1512(b)(3); and of perjury, in violation of 18 U.S.C. 1623, for lying to a federal grand jury. He was sentenced to 41 months in prison. On May 3, 2005, the First Circuit affirmed defendant's conviction and sentence. In rejecting each of the defendant's arguments, the First Circuit held: (1) an obstruction of justice conviction under Section 1512(b)(3) does not require proof that a federal investigation was extant or imminent at the time of the misleading conduct; (2) the jury instructions on aiding and abetting were not plain error; (3) the evidence was sufficient to support the jury's finding that the victim sustained bodily injury; (4) a conspiracy charge, on which Bailey and his co-defendants were tried but ultimately acquitted, did not have a prejudicial spillover effect on the other counts; (5) the evidence supported the district court's finding that the victim, who was on suicide watch at the time of the assault, was unusually vulnerable for purposes of United States Sentencing Guidelines § 3A1.1(b)(1); and (6) the defendant failed to establish, under a plain-error standard, that he is entitled to resentencing under *United States v. Booker*, 125 S. Ct. 738 (2005), because he failed to show a reasonable probability that the district court would impose a more lenient sentence if the Sentencing Guidelines were treated as merely advisory.

Saints Constantine & Helen Greek Orthodox Church v. City of Berlin (Seventh Circuit) (argued November 2, 2004, by Special Counsel for Religious Discrimination Eric Treene)

Plaintiff Saints Constantine & Helen Greek Orthodox Church alleged that the City of New Berlin violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) by denying its application to rezone land to build a church. The parties filed cross-motions for summary judgment. The district court granted the City's motion, ruling that the City's actions did not impose a substantial burden on religious exercise and, therefore, did not violate RLUIPA. The Church appealed. The Division argued as amicus curiae in support of the Church that the district court's reading of *Civil Liberties for Urban Believers (CLUB) v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) – as holding that zoning restrictions do not impose a substantial burden on religious exercise if a church can locate elsewhere in the city – is overbroad. On February 1, 2005, the Seventh Circuit reversed, holding that the district court erred in interpreting *CLUB* and that the City's denial placed a substantial burden on the Church. Because there were no disputed facts, the Court remanded with instructions to grant the Church its requested relief, with a stay of 90 days to allow the City and Church to negotiate a restriction limiting the parcel to use as a church.

Guru Nanak Sikh Society v. County of Sutter (Ninth Circuit) (argued October 17, 2005, by Special Counsel for Religious Discrimination Eric Treene)

Plaintiff Guru Nanak Sikh Society, a Sikh religious organization, brought suit under the Religious Land Use and Institutionalized Persons Act (RLUIPA) after Sutter County

denied its application for a use permit to build a temple on its land. The district court granted summary judgment to the plaintiff on its claim under Section 2(a)(1) of RLUIPA, finding that the County's denial of a use permit imposed a substantial burden on the plaintiff's religious exercise and was not the least restrictive means of advancing a compelling government interest. In its summary judgment ruling, the district court also upheld the constitutionality of RLUIPA, which the defendants had challenged. The Division filed a brief as intervenor and amicus curiae, defending the constitutionality of RLUIPA and supporting the merits of the plaintiff's RLUIPA claim. On August 1, 2006, the Ninth Circuit affirmed the district court's decision, agreeing with the United States that the relevant section of RLUIPA is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment. The court also found that the defendants' denial of the plaintiff's application for a special use permit imposed a substantial burden on the plaintiff's religious exercise in violation of RLUIPA.

Barnes Wallace v. Boys Scouts of America (Ninth Circuit) (argued February 14, 2006, by Special Counsel for Religious Discrimination Eric Treene)

Plaintiffs-appellees, a same-sex couple, an agnostic couple, and their minor Scouting-age sons, sued the City of San Diego and the Boy Scouts of America (BSA) over the City's long-term, low-cost leases of two parcels of public parkland to the BSA. One of the leases involves parkland on which the BSA has built its regional headquarters, as well as campgrounds and recreational facilities for use by the general public. The second involves parkland on which the BSA has built a youth aquatic center for use by the general public. Plaintiffs claimed that the leases violate the Establishment Clause, the Equal Protection Clause, and parallel provisions of the state constitution, by endorsing the BSA's discriminatory membership policies. The district court granted summary judgment in favor of plaintiffs on their Establishment Clause claims, and denied as moot their Equal Protection claims. BSA appealed, plaintiffs cross-appealed the denial of their Equal Protection claims, and the City settled with the plaintiffs. The Division argued as amicus in the court of appeals that the district court was incorrect as a threshold matter in finding that the Boy Scouts was a religious organization, such that the Establishment Clause applied to the City's leases with the Boy Scouts. The Division also argued that even if the Boy Scouts is a religious organization, the leases do not violate the Establishment Clause because they are not properly considered aid to a religious organization, or, if they are, such aid does not violate the Establishment Clause because it is made available to nonprofit organizations in a neutral manner, serves a secular purpose, and does not advance religion. Following oral argument, on December 18, 2006, the Ninth Circuit certified to the California Supreme Court three questions relating to the No Preference and No Aid Clauses of the California Constitution. Shortly after the certification order was issued, the Ninth Circuit indicated that en banc review of the order may be warranted and asked the California Supreme Court to delay consideration of the order until any necessary en banc review is concluded. Appellants' petitions for rehearing and rehearing en banc followed and are now pending.

Living Water Church of God v. Meridian Charter Township (Sixth Circuit) (argued September 9, 2006, by Deputy Assistant Attorney General Asheesh Agarwal)

Plaintiff Living Water Church of God sued Meridian Charter Township, alleging a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). The district court held that the Township violated RLUIPA by denying Living Water a special use permit to construct a building in excess of 25,000 square feet. The court held that the denial of the permit imposed a substantial burden on the Church's religious exercise. The court enjoined the Township from preventing the Church from proceeding with the construction of a school and church building on its property, in conformity with its request for a special use permit. The Division argued as amicus that the Township violated Living Water's rights under RLUIPA by denying the Church the special use permit it had requested. The Division argued that denial of the permit operates as a substantial burden on Living Water's exercise of religion, because the Church cannot carry out all its ministries in a smaller building. The case is pending in the Sixth Circuit.

In re Grand Jury (United States v. John Doe) (Fourth Circuit) (argued November 30, 2006, by Deputy Assistant Attorney General Grace Chung Becker)

This case arose out of a federal grand jury investigation of an allegation that a police officer had used excessive force against a restrained arrestee. The grand jury subpoenaed from the police department statements that officers had made regarding this incident during an internal affairs investigation. The district court quashed the subpoena. The United States appealed, arguing that the district court abused its discretion in ruling that the city's interests in preserving the confidentiality of its investigations and protecting the Fifth Amendment rights of its officers outweighed the grand jury's interest in obtaining the subpoenaed statements. On February 22, 2007, the Fourth Circuit affirmed the district court's order quashing the subpoena. The court of appeals held that the district court did not abuse its discretion in concluding that the interests of the police department in keeping its investigation confidential and forestalling possible self-incrimination problems outweighed the grand jury's interest in obtaining these statements at this initial stage of its investigation. In so holding, the court of appeals noted that the grand jury could obtain this information by subpoenaing the interviewed officers directly and that counsel for the United States had conceded in the district court that it was unlikely that this investigation would result in a prosecution.

Colwell v. Department of Health & Human Services (Ninth Circuit) (argued February 13, 2007, by Deputy Assistant Attorney General Asheesh Agarwal)

The plaintiffs, individual physicians and two nonprofit organizations, filed suit challenging the Limited English Proficiency policy guidance issued by the Department of Health and Human Services (HHS) to implement Title VI of the Civil Rights Act of 1964 and its regulations. The policy guidance is intended to assist recipients of financial assistance from HHS in fulfilling their responsibilities under Title VI and its regulations to provide meaningful access to their programs to persons with limited English proficiency. Plaintiffs alleged in their complaint that HHS exceeded its authority under Title VI in issuing the guidance and that the guidance violates their rights under the First Amendment. The government moved to dismiss the complaint. The district court

granted the motion to dismiss, ruling that the plaintiffs lacked standing to bring the action and that the dispute was not ripe for review. The Division argued for HHS as appellee that the district court correctly dismissed the complaint for lack of standing, because, among other things, the relief that the plaintiffs seek – a declaratory judgment and injunction invalidating the guidance – would not relieve them of the obligations they have under Title VI and the regulations. The Division also argued that this dispute is not ripe for review because the issues are not fit for judicial resolution and the plaintiffs will not suffer significant hardship if judicial review is deferred. The case is pending in the Ninth Circuit.

The Lighthouse Institute for Evangelism v. City of Long Branch (Third Circuit) (argued March 27, 2007, by Assistant Attorney General Wan J. Kim)

The Lighthouse Institute for Evangelism, which conducts business as Lighthouse Mission, sued the City of Long Branch, alleging a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). The City denied the Mission's application for a zoning permit to use its property as a church, because that proposed use was not specifically permitted in the zone. In granting the City summary judgment, the district court rejected the Mission's "equal terms" claim under RLUIPA. The Division argued as amicus curiae in the court of appeals that the district court erred in requiring the Mission to prove that the land use regulation at issue substantially burdened its religious exercise, in order to prove a violation of RLUIPA's "equal terms" provision. The Division argued the RLUIPA's plain language and legislative history demonstrate that the statute's "equal terms" provision does not require proof of a substantial burden on a plaintiff's religious exercise. The case is pending in the Third Circuit.



U.S. Department of Justice
Office of Attorney Recruitment and Management

Washington, D.C. 20530

MEMORANDUM

TO: Heads of Offices, Boards, Bureaus and Divisions

FROM: Louis DeFalaise, Director *LW*

SUBJECT: Changes to the Attorney General's Honors Program and Summer Law Intern Program

DATE: April 26, 2007

This memorandum outlines significant changes and highlights Component responsibilities for the 2007-2008 Attorney General's Honors Program (HP) and the Summer Law Intern Program (SLIP). At a meeting on December 5, 2006, Components were invited to submit recommendations to improve the selection process. Based on recommendations made by the participating Components and the review that followed, the Office of the Deputy Attorney General (ODAG) has authorized this office (OARM) to implement the changes outlined below to improve the selection process. Major changes include:

- Clarifying Program standards and providing process guidance for Component use during the initial review process;
- Modifying the AVUE system to allow reviewers to add comments indicating the component specific criteria for individual selections;
- Delegating the Departmental review process to OARM and the Components;
- Providing the reasons for nonconcurrence to the Components for the purpose of reconsideration; and,
- Exempting SLIP selections from Departmental review (subject to audit) and deferring the review to Funnel Offer candidates.

1. **Component Level Review**

Each Component will ensure that its internal selection process is focused on selecting highly qualified candidates with credentials that establish their eligibility to be considered as an Honors level hire by the Attorney General. Initial Component-level review must comply with the review standards guidance and include an internal quality review prior to forwarding the names of candidates for interviews to OARM.

Component Review Standards Guidance

Candidates selected for interviews should have outstanding academic credentials. Reviewers should pay close attention to academic performance (as reflected by class rank, where available), grades, academic accolades, graduation honors and other achievements. Components that select a candidate with less than an outstanding academic record must provide a justification for the selection based on the candidate's skills, background, experience or training in a relevant field of the Component's practice. Suitable skills and experience include: judicial clerkships (particularly at the Supreme Court or Federal Circuit Court level); law review/journal positions and articles; competitive moot court experience demonstrating superior oral advocacy ability; or special education, skills or background directly relevant to the Department's and/or Component's priorities and missions. This list is not exhaustive. The justification should articulate the basis for selecting the candidate for interview, explain how the candidate would positively contribute to the component's mission, and should demonstrate the lack of suitable candidates possessing both the identified qualifications and a strong academic background.

Components should, as a matter of practice, check a candidate's references and review any information about the candidate that is easily accessible to the general public. When considering web-posted information, Components should exercise due caution to ensure correct identification and attribution.

It is also very important that a candidate's overall submission reflect the level of writing skills, organization, and persuasiveness commensurate with selection as an Honors level hire by the Attorney General. The quality of the candidate's overall submission, particularly the structure and content of responses in the "short answer questions" are critical factors that should be considered in assessing the candidate's character, judgment and maturity.

Finally, each Component's internal review should ensure that the selection process identifies candidates that meet Department and Component needs and that selected candidates, when compared objectively to those who were not selected, are, in fact, the best candidates for these positions.

2. Department Level Review

An ad hoc working group composed of representatives from the major participating Components will conduct a Department-level review to ensure that selections comply with the Component Review Standards and that the number of interviews does not exceed budgetary limitations. Each formally participating major Component should designate one individual to participate in this process full-time for approximately two working days. The reviews will be conducted on-site at OARM. After the review is completed, OARM will provide affected Components with a list of candidates that have been identified as noncompliant, as well as the basis for that conclusion. If, after further review, the Component still wishes to proceed with an interview, it may return a candidate's name to OARM with further explanation. If OARM

concur, the interview can proceed; if not, the Component head can elect to request reconsideration of the candidate consistent with the practice in other career personnel matters.

3. SLIP and Funnel Offer Reviews

In order to reduce the burden on the Ad Hoc working group for Department level review and to ensure timely responses to the Components, OARM will instead randomly monitor SLIP selections for compliance with Component Review Standards and notify Components of any discrepancies along with the basis for that conclusion.

Funnel offers are subject to the same Component-level review standards and process that apply to the Honors Program. Components should forward proposed funnel offers to OARM for review and concurrence before issuing offers. OARM will provide the Component with the reason for the nonconcurrence of any proposed funnel offer. The nonconcurrence may be appealed, consistent with the practice in other career personnel matters.

The adoption of these changes, supported by the continued interest and dedication of Component personnel at all levels, should enhance one of the goals of the Attorney General's Honors Program – to continue to attract and hire highly qualified individuals from the broadest base possible.

Your personal involvement, interest in and support of the Attorney General's Honors Program is greatly appreciated. As with these and other past changes, OARM is interested in your comments and suggestions for improving the Honors Program and Summer Legal Intern Program and how we conduct them. Your further ideas and suggestions are always welcome. Thank you again.



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, DC 20530

July 3, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to questions directed to Assistant Attorney General Wan Kim during his appearance before the Senate Judiciary Committee's hearing on "Oversight of the Civil Rights Division" on June 21, 2007.

Senator Kennedy requested that Assistant Attorney General Kim list the number of Voting Rights Act cases filed on behalf of African Americans during this Administration. During this Administration, the Voting Section of the Civil Rights Division has filed four cases and successfully litigated a fifth, in addition to interposing thirty-six Section 5 objections, on behalf of African-American voters in various jurisdictions. The cases filed include *United States v. Crockett County* (W.D. Tenn.); *United States v. Euclid* (N.D. Ohio); *United States v. Miami-Dade County* (S.D. Fla.); and *United States v. North Harris Montgomery Community College District* (S.D. Tex.), which also involved protecting the rights of Hispanic citizens. In addition, we successfully litigated *United States v. Charleston County, South Carolina* (D.S.C.) and successfully defended that victory through appeal to the U.S. Supreme Court.

In addition, the President and the Attorney General strongly supported the Voting Rights Act Reauthorization and Amendments Act of 2006, named for three heroines of the Civil Rights movement, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King. The Civil Rights Division is currently defending the Act against a constitutional challenge in federal court here in the District of Columbia.

The Department continues to seek out, investigate, and prosecute cases on behalf of all Americans, including African American citizens. The Voting Section continues to actively identify at-large and other election systems that violate the Voting Rights Act. Where we find such systems and where the facts support a claim, we do not hesitate to bring lawsuits. We are interested in allegations of possible Voting Rights violations from all sources and have solicited such information widely.

The Honorable Patrick J. Leahy
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The Department, of course, vigorously enforces all of the provisions of the Voting Rights Act. During Calendar Year 2006, the Voting Section filed 18 new lawsuits, which is double the average number of lawsuits filed annually in the preceding 30 years. In Fiscal Year 2006, the Voting Section processed the largest number of Section 5 submissions in its history and interposed important objections to protect minority voters in Texas and Georgia. During this Administration, moreover, we have filed approximately 60 percent of all cases ever filed under the minority language provisions of the Voting Rights Act, as well as approximately 75 percent of all cases ever filed under Section 208. We also have used Section 2 of the Voting Rights Act to challenge barriers to participation, as in *United States v. Long County* (S.D. Ga.) and *United States v. City of Boston* (D. Mass.). We have filed the first voting rights case in the Division's history on behalf of Haitian Americans; the first voting rights case in the Division's history on behalf of Filipino Americans; the first voting rights case in the Division's history on behalf of Korean Americans; and the first voting rights cases in the Division's history on behalf of Vietnamese Americans. We will continue vigorously to protect all Americans from unlawful discrimination in voting.

Senator Cardin requested that Assistant Attorney General Kim send out a written affirmation within the Civil Rights Division, stating that political considerations and affiliations cannot be considered in the hiring of career employees. Attached please find a memorandum that was distributed to each of the Section Chiefs in the Division and posted on the Division's website, reaffirming this standard.

Senator Cardin also requested that Assistant Attorney General Kim provide information on the civil rights background of its hires. On April 11, 2007, the Department provided to this Committee copies of the resumes of all attorneys hired by the Civil Rights Division during this Administration. Senator Cardin also requested information on turnover within the Division. The average rate of attorney attrition in the Civil Rights Division during this Administration is almost identical (less than a 1.5 percent difference) to a comparable period of the prior Administration. During the last six years of the previous Administration, the average rate of attorney attrition was 11.83 percent. During the last six years of this Administration, the average rate of attorney attrition was 13.17 percent. During this Administration, the peak attrition rate for attorneys occurred in 2005, when a number of attorneys accepted a retirement package offered to multiple Justice Department components.

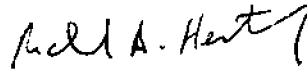
Senator Cardin further requested information on the diversity numbers within the Division. During the past six years, 30 percent of the attorneys hired by the Division were minorities. This rate of hiring far exceeds the national average as reported in a 2004 study by the American Bar Association, which found that minority representation in the legal profession is about 9.7 percent.

The Honorable Patrick J. Leahy
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Senator Whitehouse inquired as to whether the Civil Rights Division received any information alleging participation by Tim Griffin in "vote caging" before his letter of June 18, 2007. Consistent with Assistant Attorney General Kim's testimony, we have confirmed that it does not appear that any such information was received by the Division.

Please do not hesitate to contact this office if we can be of assistance in other matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Hertling". The signature is fluid and cursive, with a large, stylized "H" and a long, sweeping underline.

Richard A. Hertling
Principal Deputy Assistant Attorney General

Enclosure

cc: The Honorable Arlen Specter
Ranking Minority Member



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 29, 2007

MEMORANDUM TO ALL ATTORNEYS

FROM: Wan J. Kim *WJ*
Assistant Attorney General

SUBJECT: Guidance on Personnel Matters

I am fully committed to ensuring that all personnel decisions within the Civil Rights Division are consistent with principles of fairness as well as all applicable laws, rules and regulations. In particular, I wish to remind you that the Department of Justice is an Equal Opportunity/Reasonable Accommodation Employer. Consistent with applicable law, Department policies and my own practice, there will be no discrimination based on color, race, religion, national origin, political affiliation, marital status, disability, age, sex, sexual orientation, status as a parent, membership or non-membership in an employee organization, or personal favoritism. See generally <http://10.173.2.12/jmd/employeeerights.php>.

Notably, each of you should be aware of the requirements of 5 U.S.C. § 2302, which sets forth the following "prohibited personnel practices" applicable to personnel actions, including but not limited to appointments, promotions, reassignments, details, pay, awards, and adverse actions:

A federal employee authorized to take, direct others to take, recommend or approve any personnel action *shall not*:

- (1) discriminate against an employee or applicant based on race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;
- (2) solicit or consider oral or written employment recommendations unless such recommendations are based on personal knowledge or records of job-related abilities or characteristics;
- (3) coerce the political activity of any person or take any action against any employee or applicant as a reprisal for his/her refusal to engage in such political activity;

- (4) deceive or willfully obstruct anyone's right to compete for employment;
- (5) influence anyone to withdraw from competition for any position for the purpose of improving or injuring the employment prospects of any other person;
- (6) give an unauthorized preference or advantage to any employee or applicant for employment for the purpose of improving or injuring the employment prospects of any particular employee or applicant;
- (7) engage in nepotism (*i.e.*, hire, promote, or advocate the hiring or promotion of relatives) within the agency in which the federal employee serves as a public official;
- (8) engage in reprisal for whistle blowing by taking, failing to take, or threatening to take or fail to take a personnel action with respect to any employee or applicant because of any disclosure of information by the employee or applicant that he or she reasonably believes evidences a violation of a law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety (if such disclosure is not barred by law and such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs – if so restricted by law or Executive Order, the disclosure is only protected if made to the Special Counsel, the Inspector General, or comparable agency official);
- (9) take, fail to take, or threaten to take or fail to take a personnel action against an employee or applicant for exercising an appeal, complaint, or grievance right; testifying for or assisting another in exercising such a right; cooperating with or disclosing information to the Special Counsel or to an Inspector General; or refusing to obey an order that would require the individual to violate a law;
- (10) discriminate for or against any employee or applicant based on personal conduct (other than criminal convictions) which does not adversely affect the on-the-job performance of the employee, applicant, or others;
- (11) knowingly take or fail to take, recommend, or approve a personnel action if taking or failing to take such an action would violate a veterans' preference requirement; and
- (12) take or fail to take any other personnel action, if taking or failing to take action violates any law, rule or regulation implementing or directly concerning merit system principles contained in 5 U.S.C. § 2301.

5 U.S.C. § 2302; see also <http://www.usdoj.gov/imd/ps/chpt4-1.html>;
<http://www.usdoj.gov/oarm/attvacancies.html>; <http://www.osc.gov/ppp.htm#q1>.

For more information, please contact the Division's Human Resources Office (202-514-4153) or the Ombudsman. I am also personally available to address any concerns that you may have.



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 25, 2007

The Honorable Richard B. Cheney
President
United States Senate
Washington, D.C. 20510

Dear Mr. President:

This letter presents the views of the Department of Justice on S. 453, the "Deceptive Practices and Voter Intimidation Prevention Act of 2007," as reported by the Committee on the Judiciary. S. 453 seeks to deter the communication of false information regarding Federal elections and candidates in two ways: First, it would provide criminal and civil sanctions for the communication of false election-related information with the intent to discourage individuals from voting (the "Prohibition on Deceptive Practices in Federal Elections" provisions). Second, it would require the Justice Department (a) to provide correct information to voters affected by the false information; and (b) to report to Congress and the public all reported allegations that individuals were discouraged from voting and, in each such instance, what the Department's response was and why (the "Reporting of False Election Information" provision).

We support the overall goal of the bill: Addressing certain election-related deceptive conduct that current Federal statutes do not reach. However, we have serious concerns that the bill, as currently drafted, would give the Federal government unprecedented legal authority to insert itself into the tactics of Federal campaigns. For example, during the critical waning days of a presidential or congressional campaign, the Attorney General would have authority to initiate grand jury proceedings, issue target letters to campaign officials, and seek authority for search warrants to obtain materials stored within campaign headquarters in order to determine whether a particular person provided an "explicit endorsement" of a candidate. We are also concerned about the impact of the bill's investigative delay provisions on the Department's law enforcement efforts.

We appreciate the opportunity the Department has had to meet with Senate staff to discuss previous versions of the bill and recognize that changes have been made in the bill to address the Department's concerns. We believe the reported bill is a stronger bill and welcome the opportunity to continue to work with the Committee to refine provisions of the bill addressing current gaps in Federal criminal law, while ensuring that the bill does not have the unintended consequence of requiring the Executive branch to wade into campaign politics,

inviting allegations that the Justice Department acted or failed to act due to political motivations and tempting political operatives to use the Department to advance partisan ends.

Section 3. Prohibition on Deceptive Practices in Federal Elections

Section 3 of the bill would amend two Federal statutes to address two types of false information communicated to voters. Specifically, it would amend 42 U.S.C. § 1971 and 18 U.S.C. § 594 to provide civil and criminal responses, respectively, to the dissemination of two types of false information to voters. The first type is false information about the time, place, and qualifications for voting, disseminated in order to prevent qualified voters from voting (generally called “voter suppression” schemes). The second type is information communicated in order to mislead voters about the positions or beliefs of a particular candidate, for the purpose of garnering support for or opposition to that candidate (generally called “false campaign rhetoric” schemes or campaign tricks).

Specifically, the proposed amendments to sections 1971 and 594 would sanction behavior that knowingly communicated false election-related information “with intent to prevent another person from exercising the right to vote or from voting for the candidate of such other person’s choice.” Election-related information, as defined in proposed new subparagraphs 1971(b)(2)(C) and 594(b)(1)(C), includes: (a) the time, place, or manner of conducting the election; (b) the qualifications for or restrictions on voter eligibility for the election; and (c) the explicit endorsement by any person or organization of a candidate running for any office voted on in the election.

We generally support the proposed criminal provision that covers false information relating to elections, voting, or voter qualifications. The dissemination of this information is intended to suppress or interfere with the act of voting and therefore warrants criminalization and the creation of civil remedies.

We also support the bill’s increase in the criminal penalty, from one year of imprisonment to five years, for intimidating voters in a Federal election in violation of 18 U.S.C. § 594. We note that the new penalty would match the five-year penalty contained in the voter intimidation provision of the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-10(1).

However, we have serious concerns about the bill application to false campaign rhetoric. We explain these concerns below.

Voter Suppression. An existing Federal criminal law, 18 U.S.C. § 241, arguably covers schemes to prevent voting in a Federal election by misleading voters as to the time, place, and prerequisites for voting. Specifically, section 241 criminalizes conspiracies to injure, oppress, threaten, or intimidate that deprive persons of rights protected by the Constitution or Federal law, including the right to vote for a Federal candidate and not have that vote diluted by fraudulently

cast ballots. *Anderson v. United States*, 417 U.S. 211 (1974). A Federal district judge recently upheld application of section 241 to a scheme to suppress voter turnout in a Federal election by jamming the telephone lines of entities offering transportation to the polls. *United States v. Tobin*, Cr. No. 04-216-01-SM, 2005 WL 3199672 (D.N.H. Nov. 30, 2005). Accordingly, when the suppression activity takes place in a Federal election, it may violate section 241. However, section 241 does not expressly state that it applies to voter suppression activity and thus its coverage of this conduct is left to judicial interpretation. We believe that a clear expression of congressional intent to criminalize corrupt acts that are designed to suppress voting would facilitate enforcement and simultaneously deter some who might consider engaging in such a scheme.

False Campaign Rhetoric. We have several concerns regarding the bill's coverage of false statements regarding "explicit" endorsements of candidates. The Federal Election Campaign Act ("FECA") provides criminal penalties for several types of false, damaging, or misleading statements about Federal candidates. Specifically, 2 U.S.C. § 441d(a) requires that Federal electioneering communications accurately identify the person or entity authorizing and paying for the communication, and 2 U.S.C. § 441h(a) prohibits agents of one Federal candidate or political party from fraudulently misrepresenting authorization to speak on behalf of a rival Federal candidate or party. Violations that are committed knowingly and willfully and involve expenditures aggregating \$2,000 or more in a calendar year are misdemeanors punishable by one year of imprisonment, and knowing and willful violations aggregating \$25,000 or more in a calendar year are felonies punishable by five years of imprisonment. 2 U.S.C. § 437g(d)(1)(A).

Both Congress and the courts have long recognized that clarity in the scope of a criminal statute is essential to effective enforcement and that such clarity is particularly crucial when a criminal provision reaches speech that might be protected by the First Amendment. Thus, other than the two FECA provisions noted above, Federal criminal laws do not attempt to reach the tactics and rhetoric of candidates. For example, the mail fraud statute, 18 U.S.C. § 1341, has never been held to apply to false campaign statements, as the statute is limited to schemes to obtain money or property or to deprive another of someone's "honest services," and campaign statements involve neither. *McNally v. United States*, 483 U.S. 350 (1987); *United States v. Turner*, 459 F.3d 775 (6th Cir. 2006). Moreover, statements by political candidates during an election contest generally do not have the reliance potential of statements made in a fiduciary or commercial setting. Similarly, the Federal statutes criminalizing conspiracies against the deprivation of Federal civil rights, 18 U.S.C. § 241, and the deprivation of Federal constitutional rights, 18 U.S.C. § 242, have never been asserted to criminalize incidents not directly bearing on the voting process itself, and the Federal statute criminalizing certain activities relating to voting and campaigning, 18 U.S.C. § 245(b)(1)(A), is limited to conduct entailing threats or use of force.

We believe that the meaning of "explicit endorsement" may raise constitutional vagueness concerns under the First Amendment, as well as enforcement obstacles. Both

problems occur for the same reason: the difficulty of knowing what is “true” and what is false about explicit endorsements and, therefore, what is permissible to say and what is not during a campaign for a Federal office. This provision might criminalize well-accepted campaign rhetoric and tactics and involve the Department in disputes certain to raise claims of political motivation. For example, it is unclear what manner and degree of support are required to rise to the level of an “explicit endorsement.” Would a candidate violate this provision by showing that a person had approved of the candidate in another setting (as opposed to the pending election)? The meaning of the term is unclear. Additionally, a candidate might give a speech in which he accurately states that he “has the strong support of leading veterans’ organizations.” In fact, he does have the strong support of veterans’ organizations A and B, but he does not have the support of veterans’ organizations C and D. His opponents believe that organizations C and D are the real “leading veterans’ organizations,” and file a complaint alleging that the candidate had knowingly communicated false campaign-related information, falsely claiming the “explicit endorsement” of “leading veterans’ organizations.” Under S. 453, the candidate would be placed in substantial jeopardy of being held liable for civil and criminal penalties merely for making a truthful assertion while exercising his core First Amendment rights in furtherance of his candidacy. As can be seen by the foregoing and other examples, the “explicit endorsement” provision is impermissibly vague and overbroad, and would have a powerful, chilling effect on legitimate political speech.

While the bill would clarify that the endorsement must relate to an upcoming election, that change would address only one aspect of the provision’s ambiguity. The term “explicit endorsement” itself remains unavoidably broad and ambiguous. For example, it would cover a simple statement of support uttered by one person to another in an informal, social setting, as well as a formal, public statement of support for a candidate. We have strong concerns about the use of this terminology in a provision that would criminalize a form of political campaign rhetoric.

The Supreme Court has explained that speech relating to an election is at the core of the First Amendment’s protections:

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order “to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476, 484 (1957). Although First Amendment protections are not confined to “the exposition of ideas,” *Winters v. New York*, 333 U.S. 507, 510 (1948), “there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . of course includ[ing] discussions of candidates . . .” *Mills v. Alabama*, 384 U.S. 214, 218 (1966). This no more than reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust,

and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Buckley v. Valeo, 424 U.S. 1, 14-15 (1976).

The criminal provisions in the bill may chill speech about endorsements immediately prior to an election and this speech is at the very core of the First Amendment. As the Supreme Court stated 30 years ago in its landmark decision addressing the constitutionality of limits on Federal campaign contributions and expenditures, ambiguity in the scope of a provision relating to Federal elections "raises serious problems of vagueness, particularly treacherous, where, as here, the violation by its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise First Amendment rights." *Buckley*, 424 U.S. at 99-100. When *Buckley* was decided, the FECA's criminal penalty was a single year of imprisonment. S. 453 would impose a criminal penalty of five years of imprisonment posing an even greater likelihood of chilling protected speech. Moreover, the uncertainty of the provision's coverage would be compounded in criminal prosecutions, where the Government would be required to prove, beyond a reasonable doubt, not only that the statement was false, but also that the defendant was aware of its falsity.

In sum, we believe that attempts to reach beyond the proposed prohibition on voter suppression to criminalize what amounts to the political dialogue between opposing candidates may raise constitutional issues as well as enforcement concerns. We would be happy to work with Congress to attempt to craft a narrowly drawn provision that would avoid these concerns.

In any event, we initially would suggest clarifying the type of candidates covered by the bill's provisions. On page 7, at lines 8-11, and on page 9, at lines 15-18, the bill would prohibit false statements regarding the "explicit endorsement by any person or organization for the upcoming election of a candidate to any office described in subparagraph (B)." Because subparagraph (B) includes a reference to mixed Federal and State elections, there is an ambiguity as to whether the bill would prohibit endorsements relating to a candidate for State or local office. We recommend revising this to clarify that endorsement must relate to a Federal office described in subparagraph (B). The clarification could be achieved by inserting the word "Federal" before the word "office" in both of these locations.

We have additional, more specific, comments and suggestions on section 3. The first one concerns the bill's treatment of intent. As set forth above, the bill would sanction the knowing communication of election-related information "with the intent to prevent another person from

exercising the right to vote or from voting for the candidate of such other person's choice." In practice, the intent typically is not "to prevent" persons from voting or voting for a candidate of their choice, but rather to deceive them into choosing not to vote or to vote for someone they might not otherwise support. Therefore, the standard "to prevent" might prove difficult to establish in practice and might not effectively address the conduct the bill seeks to counteract.

We also recommend modifying the bill's prohibition of deceptive practices designed with "the intent to prevent another person . . . from voting for the candidate of such other person's choice." While this provision addresses the concern that some deceptive practices are not intended to suppress voter participation, but rather are intended to deceive targeted voters into voting for a candidate, we believe that the bill's language requires further clarification. This is so because, as currently written, the bill could be construed to require proof of victimized voters' original candidate choices *as well as* proof of the defendant's intent to deceive the voters into altering those choices, in order to obtain a conviction. Specifically, the bill's prohibition against using deceptive information to "prevent another person from . . . voting for the candidate of such other person's choice" could be read to suggest that the Government must be able to discern and prove who the voter would have supported absent the misinformation, a requirement that would entail probing the victim of the bad conduct and compromising the confidentiality of the individual's vote. To avoid this concern, we recommend revising the relevant provision to refer, for example, to the defendant's "intent to use deceptive information to influence voter choice." We also recommend for subsection 2(A)(ii) language that captures the full scope of conduct that might be used to suppress or influence another's vote: "has the intent to mislead voters, or the intent to impede, hinder, discourage or prevent another person from exercising the right to vote."

Second, while the terms "time" and "place" are straight-forward and are commonly understood in the election context, the term "manner" may be ambiguous. For example, "manner" may be intended to cover information such as the division of precincts or whether voter assistance is available. However, the term may be interpreted much more broadly to encompass a candidate or community group calling the election a "referendum" on a particular issue.

Third, the proposed criminal provision contains no materiality requirement, which means that individuals could be investigated and prosecuted for a felony for potentially *de minimis* conduct. Without a materiality requirement in a criminal statute such as this, Congress would be authorizing the Department of Justice to divert scarce investigative and prosecutorial resources to pursue technical inaccuracies that had little if any potential to affect electoral decision-making.

Section 4. Reporting of False Election Information

We strongly oppose section 4 of the bill.

Subsection 4(a) provides that any person may report a potential violation of the bill's provisions to the Department of Justice. We oppose this subsection, first, because it is

unnecessary. Under existing law, any person or organization may report a possible violation of Federal law to the Department of Justice, and they routinely do so. Second, the provision is problematic because it would suggest inaccurately that violation of this provision is somehow different from other violations, with respect to the right of citizens to report them to law enforcement authorities.

Subsection 4(b) of the bill provides that, upon the filing of a "report" providing a "reasonable basis for finding a violation," the Attorney General "shall pursue any appropriate criminal prosecution or civil action" and "shall refer the matter to the Civil Rights Division . . . for criminal prosecution or civil action" if the Civil Rights Division has jurisdiction. We strongly oppose this provision. It is unnecessary and a troubling intrusion into the details of how the Department of Justice handles allegations of violations of Federal law.

When the Department receives an allegation of a violation of any law, the allegation is reviewed and handled by the appropriate offices within the Department with jurisdiction over the subject matter. Alleged violations of these new provisions would be handled in precisely the same way and the bill should not suggest that these allegations would be treated differently than all others. The Department already is charged with enforcing the Nation's civil and criminal laws and we are not aware of any other criminal provision that contains a statutory directive that the Department of Justice "shall pursue any appropriate criminal or civil action."

In addition, to the extent that this provision would require the Attorney General to refer to the Civil Rights Division "for criminal prosecution or civil action" any and all complaints that have a "reasonable basis," it raises separation of powers concerns, because it intrudes upon the prosecutorial discretion that stems from the vesting of the Executive power in the President by Article II of the Constitution of the United States. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Although the word "appropriate" in subsection 4(b) might be read to grant the Attorney General discretion to determine whether to pursue — and therefore, whether to refer to the Civil Rights Division — complaints for further prosecutorial action, the phrase "any appropriate" does not appear immediately before "shall refer." To avoid these concerns, we recommend revising subsection 4(b) to state that the "Attorney General shall refer any matter he deems appropriate to the Civil Rights Division"

Finally, subsection 4(c) of the bill would prohibit criminal investigations into alleged deceptive election practices until after the election unless the Attorney General "reasonably believes" prompt action is necessary and "reasonably determines" an investigation or enforcement action would not inhibit voting. We strongly oppose this provision. It would constitute an unprecedented statutory restriction on the ability of the Department of Justice to investigate violations of Federal law. Moreover, it is unnecessary in light of the Department's written and long-standing criminal law enforcement policy of noninterference in the election process. This policy, which is carried out by career law enforcement professionals in the

Department of Justice, is intended to avoid the dangers likely to flow from a criminal investigation during an election campaign:

In investigating an election fraud matter, federal law enforcement personnel should carefully evaluate whether an investigative step under consideration has the potential to affect the election itself. Starting a public criminal investigation of alleged election fraud before the election to which the allegations pertain has been concluded runs the obvious risk of chilling legitimate voting and campaign activities. It also runs the significant risk of interjecting the investigation itself as an issue, both in the campaign and in the adjudication of any ensuing election contest.

FEDERAL PROSECUTION OF ELECTION OFFENSES 91-92 (7th ed. 2007); *see* FEDERAL PROSECUTION OF ELECTION OFFENSES 61 (6th ed. 1995).

Moreover, the facts and circumstances of each case are unique, and the decisions regarding which investigative steps should be taken, and when, should be made by career professionals who are charged with enforcing these complex laws. The Department is very concerned about a statutory restriction on the exercise of this professional and prosecutorial discretion, and particularly concerned about removing these decisions from the discretion of the line attorneys, and placing them exclusively with the Attorney General himself or herself.

Section 5. Corrective Action

Section 5 of the bill is an improvement over earlier versions of the bill, in that it would limit the types of deceptive practices for which the Attorney General would be required to provide corrective information and it would add a materiality requirement. Additionally, the bill would apply only to deception about the time and place of the election and voter eligibility requirements that “could materially hinder any citizen’s right to vote.” Nonetheless, the provision remains fundamentally flawed and, for the reasons that follow, the Department must continue to oppose section 5. Furthermore, the bill would supplement the earlier versions of the bill by adding a provision enabling individuals to seek an order in Federal district court requiring the Attorney General to take action, which the Department strongly opposes.

Section 5 of the bill seeks to provide a mechanism for the Federal government to remedy allegedly false information to voters. However, it contains two mutually exclusive directives: First, it would require remedial action by the Department before the election “to correct” such false information. Second, it would bar any “investigation” of the allegation — presumably by the Civil Rights Division, although this is not stated expressly — unless (1) necessary to determine the need for corrective action and (2) the Attorney General reasonably determines that such investigation “will not inhibit any person from voting.” We cannot conceive how the second requirement for pre-election remedial action ever could be achieved.

By requiring the Department to take corrective action before an election, the first directive inevitably would inject the Department directly into ongoing political campaigns in a manner that is unprecedented and would result in serious consequences adverse to the campaign dialogue that is an essential feature of our democracy. Whether the Department investigates an allegation in contemplation of initiating an enforcement action or taking corrective action, it is not possible to remove the potential danger that the Department's action might interfere with the election. Similarly, it would be impossible to conclude that a contemplated enforcement action would not inhibit anyone's voting activity. Finally, the provision appears to misapprehend the scope of investigation the Department would need to conduct before taking any corrective action.

This misapprehension is clear from the unduly onerous requirements implicit in subsection 5(b). Subsection 5(b) of the bill would permit any individual providing "a reasonable basis" for a complaint under the bill to seek an order in Federal district court directing the Attorney General to take action if the Attorney General had not done so within 72 hours or less of the complaint, depending on the circumstances. In addition to our overarching concern about injecting the Department into political campaigns to an unprecedented degree, this provision is problematic for several reasons.

First, when the Department's attention might be better spent fielding complaints and preparing to monitor elections, valuable time and resources will be spent in court litigating over whether the Attorney General should have acted or at least acted sooner.

Second, setting aside momentarily our concerns about departmental investigations interfering with or influencing ongoing campaigns, 72 hours is just not enough time. The provision permits 72 hours not simply to respond to a complaint by initiating an investigation, but to act "to take corrective action." While the Department appreciates the need to move quickly — particularly in the days before an election — it takes time to assess the validity and basis of a claim, especially when many such claims can be expected. It is reasonable to anticipate that few complaints would present clear-cut cases of violations and that most complaints would require investigation and consideration of the law's application to new factual scenarios. In some cases, the Department would need to dispatch attorneys and other personnel to conduct a preliminary investigation to determine whether further action was warranted.

In addition to the fundamental concerns we have noted above, there are other problems with section 5. First, subsection (a) would require that the Attorney General (1) "immediately" review a reported allegation of false information relating to voter qualifications or the time or place of an election and then (2) determine if there were a reasonable basis for finding that the false information had been communicated or produced with the intent to communicate, and, if so (3) "undertake all effective measures necessary to correct such false information by providing correct information relating to the time or place of the election or the qualifications for or restrictions on voter eligibility to voters affected by false information." Given that the corrective action would be disseminated prior to elections, it can be anticipated that candidates and political

parties would be tempted to use this provision to make complaints designed to cast their political rivals in a poor light. In addition to thrusting the Department into the middle of elections and political gamesmanship, such complaints would make the task of identifying meritorious complaints more difficult amidst the many politically motivated complaints that could be anticipated under this bill in the final days of a Federal election campaign.

Second, under subparagraph (a)(1)(A) the Attorney General also would be required to determine whether allegedly false information, if not yet communicated to voters, was "produced with the intent that such information be communicated." This provision not only would interject the Department directly into a campaign's production of advertisement, but would require the Department to evaluate material that had not been disseminated and then try to determine the "intent" with which it was produced.

Third, this provision would be triggered simply by a "report" of an alleged communication or production of information that violated 42 U.S.C. § 1971 or 18 U.S.C. § 594. It is likely that the Department would be inundated with reports of "possible" misinformation before a Federal election and then required to evaluate all of the reports and disseminate "correct information" to voters affected by the allegedly false information.

Fourth, the bill provides little guidance as to what would constitute "correct information." The bill's provision that the corrective information "shall only consist of information necessary to correct the false information" does little to provide clarification. The content of the corrective information itself would be politically sensitive and thus not appropriate for the Department to determine. There is a fine line between objective and factually correct information and information that could be perceived as favoring or disfavoring one candidate or party.

Fifth, the bill does not provide a threshold standard for the credibility of election-related complaints, and the complaints are not limited to actions by candidates. Thus, this provision not only would require the Department to investigate any election-related allegation of fraud involving candidates, but also those involving organizations, political parties, unions, referendums, issues, and individuals who may be involved in election-related activity. Any follow-up investigation could be expected to have a chilling effect upon voters as well as those under scrutiny. The provision is likely to generate numerous politically motivated complaints, triggering mandated enforcement action that would force the Department to deplete limited resources investigating what, in many cases, would be unsubstantiated claims.

Sixth, the bill does not articulate a standard for assessing whether a complaint requires remedial action. Accordingly, the Department would be thrust into the role of Federal election referee, determining whether election related-information distributed to the public required remedial action, without a clear standard for making such a determination. For example, the bill provides no guidance as to what types of false information "could materially hinder" a citizen's right to vote.

Seventh, the Department of Justice is primarily a law enforcement agency, with expertise in enforcing the civil and criminal statutes within the Department's specifically defined areas of jurisdiction. The bill's provisions relating to the dissemination of corrective information would create an administrative function not well-suited to the Department's mission or its expertise. Indeed, the bill's remedial action function potentially is inconsistent and incompatible with the law enforcement responsibilities spelled out in the bill. Subparagraph 5(c)(2)(A) would require the Department to consult with the Federal Communications Commission and Election Assistance Commission about alternatives for disseminating corrective information, but the ultimate responsibility for providing this information under the bill rests with the Department. Another agency might be better-equipped to serve this function.

Finally, section 5 would create an unusual conflict of interest within the Department. The Department would be tasked with investigating and prosecuting election fraud allegations, while at the same time required to review campaign literature and take remedial action in instances where there was a "report" of a "possible violation" of the voting fraud statutes. This raises the question of whether remedial action would be required in every instance in which the Department opened an election fraud investigation. Furthermore, the provision would place the Department in the untenable position of simultaneously disseminating correct information to the public and ensuring a prospective defendant's right to a fair trial.

Section 6. Reports to Congress

Section 6 of the bill would require the Department, following each Federal general election, to provide information to Congress and to the public concerning voter deception activity. The Department has several concerns about this section.

First, paragraph 6(b)(1) sets forth the contents of reports that the Department would be required to file with the Congress and make available to the public within 90 days of every Federal general election. The reports would be required to include details regarding each allegation of deceptive practice in a Federal primary, run-off, or general election, the Department's response thereto, the status of any investigation of the allegation, and the rationale for not pursuing an allegation. While the bill would exempt information that would infringe the rights of criminal suspects, it does not go far enough to accommodate sufficiently the sensitive nature of criminal investigations, which Congress has found warrants protection from disclosure. *See* Freedom of Information Act, 5 U.S.C. § 552(b)(7).

Second, section 6 would create a burdensome obligation for the Executive branch to report to Congress. Ninety days is not a reasonable time period for the Department to report on the many complaints processed and investigations started in a typical election year. After a general Federal election, the Department may have to process in excess of a thousand reports received through telephone calls, the Internet, Federal observers, Department monitors, and

election monitors for advocacy groups, candidates, and others. For example, during the November 2006 general elections, the Department deployed in excess of 800 Federal personnel to monitor and observe elections around the country; each one of those observers and monitors produced a report of his or her observations at one or more polling places. Those reports would have to be reviewed and processed and, where appropriate, follow-up information might have to be gathered.

Third, the bill would mandate public disclosure of internal Department protocols and potentially privileged information. For example, it would require the Department to explain why it did not pursue a particular complaint or allegation. This type of information is part of the deliberative process and enjoys constitutional protection from mandatory disclosure.

Finally, subparagraph 6(b)(1)(G) would require the Department to report on the "effectiveness of corrective action." It is difficult to imagine how the Department would be able to determine criteria for what constitutes "effective" corrective action, measure (if such a thing is even possible) according to those criteria, and report to Congress within 90 days of each general election for a Federal office.

We appreciate the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. 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,



Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Harry Reid
Majority Leader

The Honorable Mitch McConnell
Minority Leader

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary

The Honorable Richard B. Cheney
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The Honorable Arlen Specter
Ranking Minority Member
Committee on the Judiciary