

**Questions from Senator Dianne Feinstein
to Robert N. Driscoll
following the June 21, 2007 Hearing of the Senate Judiciary Committee**

1. You argued in your testimony that there is nothing inherently wrong with the fact that the Assistant Attorney General or his or her staff may disagree with the career staff in the Division. You point out the concerns that would arise if the front office took a rubber-stamp approach to the recommendations of career staff in all cases.

- What indicators can this Committee use to find out whether a front office decision to overrule career staff is the result of politicized decision making rather than good-faith disagreement about the law?

It is always difficult to judge the "intent" behind any particular decision, but it seems to me that a "front office" that was not basing its decision on a good faith interpretation of the law would end up losing a higher number of cases and/or being criticized by Courts for taking positions that were not legally supportable. Thus, one measure of whether decision-making was not grounded in law would be whether Courts have sanctioned the Department for taking legally unsupportable decisions. For example, prior to my tenure at the Department, the Civil Right's Division was sanctioned, and forced to pay substantial fines on several occasions, by Courts that found that the Department had taken positions that were not supported by the law. Of course, there is no way to know whether political factors played a role in the Division's decisions to take such positions, but a finding by a Court that a position taken was so frivolous as to be sanctionable would indicate that good faith application of the law may not have been the motivating factor.

Conversely, a Court's later affirmance of a position taken by the Civil Rights Division (even if the career staff disagreed with the decision) would tend to indicate that the decision was grounded in reasonable legal interpretation. For example, Section 5 "preclearance" decisions of the Civil Rights Division are often reviewed by the Courts. While not every reversal would indicate "political" decision-making, a trend of Court decisions rejecting the legal analysis of the Division might raise concerns that should be inquired about, while a trend of affirmance might allay concerns that certain decisions were not well-grounded in the law.

2. You state in your written testimony that when you served as Justice Department official, the Department entered into memoranda of understanding or reached other resolutions in certain cases, which made it unnecessary to file lawsuits. On this basis, you argue that a “cases filed” analysis is not a good measure of the Division’s enforcement record.

- Do you have any reason to believe that these less formal resolutions, such as memoranda of understanding, are being reached more frequently during the current administration than during past administrations? If yes, please provide all of the evidence on which you base your belief.

My understanding, based on discussions with career staff during my time with the Department (2001-2003), was that less formal resolutions and out-of-court settlements were more frequent during the time of my service. I cannot comment on whether this perceived trend continued after 2003. For some statutes, such as CRIPA (the Civil Rights of Institutionalized Persons Act), the Division files annual reports to Congress listing each lawsuit and out of Court settlements. Also, many of the sections in the Division list out-of-court settlements and resolutions on their websites -- see, e.g. the Special Litigation website at <http://www.usdoj.gov/crt/split/findsettle.htm#congrep>. A review of the Special Litigation website shows numerous out-of-court settlements of police misconduct, prison and juvenile facility cases. The concern expressed in my previous written testimony is that using a metric of "cases filed" would not cover any of these types of resolutions, many of which reflect substantial good work by the Division.