

**Written Follow-Up Questions of Sen. Dick Durbin
to Grace Chung Becker
Nominee to be Assistant Attorney General for Civil Rights
May 15, 2008**

1. In question 2, I asked you whether you stood by the Civil Rights Division's August 2005 decision to pre-clear the Georgia photo ID law. You indicated that you did, stating: "The decision took into account 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."

Your statement is contradicted by Dr. Toby Moore, the former career geographer/statistician in the Division's Voting Section. On October 30, 2007, Dr. Moore gave the following testimony to the House Judiciary Committee: "as staff prepared the preclearance letter, Georgia officials informed us that critical data it had submitted earlier regarding ownership of photo IDs was invalid. In fact, the state had overstated the number of people who had licenses or ID cards by some 600,000. This came as no surprise, as we had informed John [Tanner] earlier in the week that the state's data appeared to be flawed. *Despite our pleas to be given a few days to analyze this data – which would have required no extension of our deadline, and which we had previously taken an extension to obtain – we were denied the opportunity.*"

- a. **How do you justify your statement that "the most recent data available from the State of Georgia" was taken into account, given Dr. Moore's testimony?**
- b. **Why weren't Dr. Moore and his career colleagues who reviewed the Georgia photo ID law permitted to have a few days to analyze the newly received data? Why was the Civil Rights Division in such a rush to pre-clear this law?**
- c. **Is it your belief that the Georgia photo ID law – pre-cleared by your Division in August 2005 and struck down as an unconstitutional poll tax two months later – had no discriminatory impact on African-American voters? Please provide a yes or no answer.**

Answer: As I stated previously, the Georgia identification law was precleared before I came to the Civil Rights Division, and I was not involved in the decision in any way. It is my understanding that the Division made the proper decision under the facts. No court decision has called into question the Department's decisions to preclear the Georgia Voter ID submissions. In Georgia, both state and federal courts have dismissed lawsuits challenging the imposition of the ID requirement.

2. In question 5(a), I asked you to provide summaries of investigations that have been pursued by the Civil Rights Division under Section 11(b) of the Voting Rights Act of 1965 and Section 1971(b) of the Civil Rights Act of 1957 since January 2001. You indicated there have been 37 such investigations but you declined to provide summaries. Please provide summaries.

Answer: In addition to the 37 investigations mentioned in the prior response, the Division has opened two additional matters, bringing the total since January 2001 to 39 investigations into allegations of voter intimidation, threats, or coercion. These investigations implicated multiple statutes, including Section 11(b) and Section 1971(b). Of the 39 matters, we cannot comment on eight matters due to pending law enforcement concerns. With respect to the remaining 31 investigations, 12 were on behalf of African Americans in Texas, Mississippi, South Carolina, Louisiana, Arkansas and New York; 16 were on behalf of Hispanics in California, Illinois, Texas, Georgia, Florida, North Carolina, Pennsylvania, Washington, Arizona, New Jersey and New York; four on behalf of Asian Americans in California and Massachusetts; and one on behalf of Caucasians in Mississippi. Two of the 31 investigations were on behalf of multiple protected classes. Eighteen investigations were closed after the matter had been resolved or a thorough analysis of the facts and law indicated that further law enforcement action was not appropriate.

Of the 31 investigations, the following 13 became cases or settlements:

United States v. Kane County, IL (N.D. Ill 2007)
United States v. City of Walnut, CA (C.D. Ca. 2007)
United States v. Galveston County, TX (S.D. Tex. 2007)
United States v. City of Rosemead, CA (C.D. Cal. 2005)
United States v. Ector County, TX (W.D. Tex. 2005)
United States v. Long County, GA (S.D. Ga. 2006)
United States v. City of Boston, MA (D. Mass. 2005)
United States v. Ike Brown and Noxubee County (S.D. Miss 2005)
United States v. Berks County (E.D. Pa. 2003)
United States v. Yakima County (E.D. Wash. 2004)
United States v. Cochise County, AZ (D. Ariz. 2006)
United States v. San Diego County (S.D. Cal. 2004)
United States v. Westchester County (S.D.N.Y.)

Summaries and relevant court documents are on the Division's website at <http://www.usdoj.gov/crt/crt-home.html>.

3. In question 7(b), I asked you to indicate how many career attorneys hired under your watch had been interviewed by one or more political appointee in the Civil Rights Division. You declined to provide an answer, indicating that the Division does not track this information. Whether or not that is the case, the information is readily attainable. For example, in response to a question I submitted to your predecessor in June 2007, the

Department of Justice stated in a February 2008 response to Congress that “since November 2005 we are not aware of any career attorneys have been hired [sic] to work in the Civil Rights Division after being interviewed only by political appointees.” Please provide a complete answer to question 7(b).

Answer: Since I began working in the Civil Rights Division in March 2006, as far as I am aware, all attorneys who have been hired to work in the Division have been interviewed by career attorneys within the Division. As my predecessor indicated and as far as I am aware, “since November 2005 we are not aware of any career attorneys have been hired [sic] to work in the Civil Rights Division after being interviewed only by political appointees.” Honors Program hires, interns, and some other attorneys hired in the Civil Rights Division since I was appointed to be Acting Assistant Attorney General were interviewed only by career attorneys. Non-career supervisory attorneys have also participated with career attorneys in the hiring interview process of some non-Honors Program attorneys. The exact number is not readily attainable.

4. In question 15(a), I asked you to provide summaries of the 14 “pattern or practice” investigations that you testified were pending in the Civil Rights Division’s Employment Litigation Section. You declined to do so. Please provide summaries of these investigations, redacting the specific identity of the targets if necessary, but indicating other relevant information such as the basis of each investigation (and specifying the race, national origin, etc. of the victims).

Answer: As I stated previously, it is my understanding that these 14 ongoing investigations include alleged discrimination on the basis of race, color, national origin, and sex. As these are ongoing investigations, I cannot comment further.

5. In June 2007, I submitted a written question (number 12) to your predecessor and requested summary information regarding civil rights appellate oral arguments handled by Civil Rights Division political appointees since January 2001. In its February 2008 response to this question, the Department of Justice provided a listing only of arguments conducted by current members of your staff, and indicated: “The Division does not systematically track this information.” Whether or not that is the case, this information is readily attainable.

- a. **Please provide a complete answer to question 12 submitted in June 2007, indicating the name of all political appointees in the Civil Rights Division since January 2001 who argued an appellate case, and provide a brief summary of the case.**

Answer: In addition to the cases my predecessor listed in his response to your previous question, I have identified the following additional civil rights cases have been argued by OAAG attorneys since January 2001. I note that OAAG attorneys may be either political appointees or career employees; for example, the Special Counsel for Religious

Discrimination is a career lawyer detailed to OAAG from the Civil Rights Division's Appellate Section.

***Sherbrooke Turf, Inc. v. Minnesota Department of Transportation and Gross Seed Co. v. Nebraska Department of Roads* (Eight Circuit) (submitted May 15, 2003, argued by Counsel to the Assistant Attorney General Matt Michael Dummermuth)**

Two non-minority landscaping contractors filed separate suits against the Minnesota Department of Transportation and Nebraska Department of Roads, challenging the states' implementation of a federal highway program requiring that a portion of federal highway construction funds be paid to small businesses owned and controlled by socially and economically disadvantaged individuals. The contractors argued that this program violated the Fourteenth Amendment's equal protection clause. The federal government intervened as an additional defendant. The district courts in Minnesota and Nebraska granted summary judgment in favor of the government. The contractors appealed. The Eighth Circuit affirmed, holding that: the program served compelling government interest; the landscaping contractors failed to meet the ultimate burden of presenting affirmative evidence, sufficient to rebut the government's initial showing of the existence of a compelling government interest; the regulations governing states' implementation of the federal highway program were narrowly tailored to serve a compelling government interest; and the individual states' implementation of the program were narrowly tailored to serve compelling government interests.

***United States v. May* (Fourth Circuit) (decided March 4, 2004; argued January 23, 2004, by Assistant Attorney General R. Alexander Acosta)**

In this criminal case, defendant-appellant was convicted of two offenses related to his involvement in burning a cross for purposes of racial intimidation. The district court departed downward from the Sentencing Guidelines range of 18 to 24 months' imprisonment and sentenced defendant-appellant to one month in custody (with credit for time served for bond violations) followed by two years of supervised release, with five months of home detention. The government appealed the sentence. The Fourth Circuit vacated and remanded for resentencing, holding that the downward departure based on victim conduct was not warranted; the downward departure based on aberrant behavior was not warranted; and the downward departure based on acceptance of responsibility was not warranted.

***United States v. Bradley* (First Circuit) (argued August 6, 2004, by Deputy Assistant Attorney General Bradley J. Schlozman)**

In this criminal case, the defendants-appellants were convicted of forced labor and related crimes based on their abusive treatment of several Jamaican seasonal workers whom they recruited in Jamaica and then kept in the United States by threats and other means. On appeal, the First Circuit affirmed the defendants-appellants' convictions and sentences, holding that in this prosecution under the forced labor statute, 18 U.S.C. 1589, for obtaining services by "threats of serious harm," the district court's failure to give a limiting instruction that the statute applied only to improper threats, and not to warnings of adverse but legitimate consequences, was not plain error. The district court also held that a jury instruction advising jurors that they could consider immigrants' special

vulnerabilities was not improper; that the fact that the immigrants might have had an opportunity to flee was not determinative on the question of forced labor; that certain other bad acts evidence was admissible as going to motive and pattern; and that the defendants-appellants' base offense levels under the sentencing guidelines could be enhanced on the ground that the immigrants were held more than 30 days. The defendants-appellants filed a petition for *certiorari*. The Supreme Court vacated and remanded the case for reconsideration in light of *United States v. Booker*, 543 U.S. 220 (2005), which had been decided after the First Circuit's decision but before the time for seeking certiorari had expired. On remand, the First Circuit held that a remand for resentencing was required because the district court had treated the sentencing guidelines as mandatory at the original sentencing.

***Midrash Sephardi, Inc. v. Town of Surfside* (Eleventh Circuit) (decided April 21, 2004; argued by Assistant Attorney General R. Alexander Acosta)**

Two synagogues sued the town of Surfside, Florida, alleging that a zoning ordinance excluding churches and synagogues from the business district, where private clubs and lodges were permitted, violated the Religious Land Use and Institutionalized Person Act (RLUIPA). The town counterclaimed, seeking an injunction prohibiting the synagogues from continuing to operate in the business district. The district court granted summary judgment for the town. The synagogues appealed. The Eleventh Circuit reversed and remanded, holding that the synagogues had standing to challenge their exclusion from the business district and that the zoning ordinance failed to meet the requirements of strict scrutiny because it was not narrowly tailored to advance the town's stated interest in retail synergy.

***United States v. Harris* (Fifth Circuit) (decided April 27, 2005; argued by Principal Deputy Assistant Attorney General Sheldon Taylor Bradshaw)**

The defendant-appellee, a police captain, was convicted of federal civil rights violations for excessive use of force with a police baton on an intoxicated suspect. On appeal, the conviction was affirmed in part and vacated and remanded in part, and on remand, the district court granted the defendant-appellee's motion under 28 U.S.C. 2255 to vacate his conviction and sentence. The government appealed. The Fifth Circuit reversed, holding that defense counsel's decision not to call available character witnesses was not objectively unreasonable and that defense counsel's decision not to call the defendant-appellee to testify on his own behalf did not prejudice the defendant-appellee.

***Conley v. United States* (First Circuit) (argued May 6, 2005, by Deputy Assistant Attorney General Bradley J. Schlozman)**

In this criminal case, the defendant-appellee, a police officer, was convicted of perjury and obstruction of justice, arising from his testimony before a grand jury investigating the alleged beating of a plainclothes police officer by other officers. After several appeals and remands, the district court granted a motion to vacate sentence, ruling that the prosecution's wrongful withholding of evidence deprived the defendant-appellee of a fair trial. The government appealed. The First Circuit affirmed, holding that that a *Brady* violation warranting a new trial occurred when the government withheld a FBI memorandum indicating that the key witness had expressed uncertainty about his

recollection of the incident, and rejecting the government's argument that the *Brady* violation did not prejudice the defendant-appellee because the memorandum was cumulative of other impeachment evidence in his possession prior to trial.

United States v. Tennessee (Sixth Circuit) (decided June 23, 2005; argued by Counsel to the Assistant Attorney General Gordon Dwyer Todd)

The federal government brought an action, pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997, against the State of Tennessee, alleging that the state failed to provide humane conditions to mentally retarded residents of a state-operated care facility. After judgment was entered in the federal government's favor, underlying findings were adopted for a related putative class action, and the class action plaintiffs and intervenor were named as intervenors in the federal government's case. The parties moved for entry of a mediation settlement agreement. The district court denied the motion. On appeal, the Sixth Circuit held that the district court improperly had relied on testimony not on the record in its decision to reject the parties' settlement agreement, and vacated and remanded the case to the district court with instructions to reconsider the settlement agreement and a new settlement agreement the parties had since created.

United States v. Serrata and United States v. Fuller (Tenth Circuit) (decided October 6, 2005; argued by Deputy Assistant Attorney General Bradley J. Schlozman)

In this criminal case, three correctional officers were convicted of offenses related to an assault on an inmate at a county correctional facility in New Mexico and obstruction of justice. The correctional officers appealed their convictions and sentences. The government cross-appealed to challenge the district court's grant of downward departures to all three officers. The appeals were consolidated for disposition. The Tenth Circuit held that the evidence was sufficient to support the officers' convictions for deprivation of rights under color of law and obstruction of justice. On the sentencing matters, the Tenth Circuit ruled that the district court abused its discretion in granting a downward departure based on extraordinary family circumstances, employment records, and community service and clearly erred in sentencing the officers based on facts found by a preponderance of the evidence. The Tenth Circuit also noted that the record indicated that the district court mistakenly believed that the sentencing guidelines were mandatory. Accordingly, the court of appeals affirmed the convictions but remanded for resentencing.

George v. Bay Area Rapid Transit District (Ninth Circuit) (argued February 13, 2006, by Deputy Assistant Attorney General Bradley J. Schlozman)

Two Bay Area residents brought suit under the Americans with Disabilities Act (ADA), the Rehabilitation Act, and California state law, claiming that certain Bay Area Rapid Transit (BART) stations were not accessible to persons with disabilities. BART responded that its compliance with the ADA regulations, promulgated by the Department of Transportation (DOT), constituted compliance as a matter of law. The district court granted summary judgment in favor of the plaintiffs, holding that the DOT regulations on which BART relied were arbitrary and capricious and therefore invalid. BART appealed. The United States had not been a party nor participated in the case prior to appeal, but

filed a brief as *amicus curiae* before the Ninth Circuit, arguing that the DOT regulations were not arbitrary and capricious. The Ninth Circuit vacated the district court's order and remanded so that the United States could defend the validity of the DOT regulations. The Ninth Circuit did not express any view on the merits.

***Digrugilliers v. Consolidated City of Indianapolis* (Seventh Circuit) (argued September 12, 2007, by Special Counsel for Religious Discrimination Eric W. Treene)**

In this case under the Religious Land Use and Institutionalized Persons Act (RLUIPA), the plaintiff-appellant, a church pastor, sued the city of Indianapolis alleging that the requirement under the city's zoning code that the church obtain a variance to make religious use of the land in the city's commercial office-buffer districts violated RLUIPA, as nonreligious institutions were not required to obtain a similar variance. The pastor moved for a preliminary injunction, which the district court denied. On appeal, the Division argued as *amicus curiae* in support of the pastor that RLUIPA forbids a local government to impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution. Subsequently, the Seventh Circuit concluded that the RLUIPA claim in this case had sufficient merit to require the district court consider the other factors germane to a decision on whether to grant or deny preliminary injunction, and reversed and remanded for such consideration.

- b. **Please also indicate the name of all other political appointees in the Justice Department who argued an appellate civil rights case since January 2001, and provide a brief summary of the case.**

Answer: Since January 2001, other political appointees in the Department of Justice have argued the following cases:

***United States v. Ferreira*, 105 Fed. App. 198, 2004 WL 1559206 (9th Cir. 2004) (Counselor to the Attorney General D. Kyle Sampson)**

Defendant, a former prison guard, was convicted, in the United States District Court for the Central District of California, David O. Carter, J., of willfully depriving an inmate of his constitutional right to be free from excessive force under color of law, and making false statements to FBI officers. Defendant appealed. The Court of Appeals held that evidence was sufficient to find that prison guard specifically intended for an inmate to inflict unreasonable force on the victim inmate.

***United States v. Ballinger*, 395 F.3d 1218 (11th Cir. 2005) (Assistant Attorney General for the Criminal Division Christopher A. Wray)**

Defendant was convicted in the United States District Court for the Northern District of Georgia, William C. O'Kelley, J., 153 F.Supp.2d 1361, of destruction of religious property on account of its religious character, and he appealed. The Court of Appeals, 312 F.3d 1264, reversed and remanded. On rehearing en banc, the Court of Appeals, Marcus, Circuit Judge, held that: (1) Congress' commerce authority includes the power

to punish a church arsonist who uses the channels and instrumentalities of interstate commerce to commit his offenses, and (2) defendant's use of channels and instrumentalities of interstate commerce to carry out arson spree in which he crossed interstate borders six times to set fire to 11 churches in four states within a month met statutory requirement that the offense be "in interstate commerce."