

**Senate Judiciary Committee Hearing  
"Executive Nomination" – Grace C. Becker  
Tuesday, March 11, 2008**

**Responses to Questions Submitted by U.S. Senator Russell D. Feingold  
to Grace C. Becker**

1. At your nomination hearing, you were asked several questions about the Civil Rights Division's hiring process – a process that you said has "worked very successfully" and that you "do not see any need to change." You responded to these questions with general statements that political considerations are not taken into account and that the process is "collaborative." Given the widespread reports of the politicization of hiring within the Department, more specific answers are necessary.
  - a. Are there, in fact, established procedures for hiring within the Civil Rights Division, or does hiring proceed on an ad hoc, case-to-case basis?
  - b. If there are established procedures:
    - i. Do the procedures vary from section to section, or is there a uniform set of procedures for the Division?
    - ii. Have the procedures been put in writing? If so, please provide any written statement(s) of the procedures along with your answers. If the procedures have not been put in writing, please detail the means by which the relevant people have been made aware of them, and explain how the Division ensures that the procedures are accurately and consistently communicated in the absence of written direction.
    - iii. To the extent not covered in any written statement(s) of the procedures that you provide, please specify each of the steps that occurs in the hiring process, from the advertising of an open position to the making of an offer. For each step, please identify the participants (e.g., line attorneys, deputy chiefs, chiefs, deputy assistants, etc.) and state whether they are career employees or political appointees. If there are steps in which career employees may participate at their option (as you suggested in the hearing), please state whether and how the relevant career employees are informed of this option.

**Answer (a – b):** Throughout my tenure, candidates for career attorney positions have been hired through a collaborative process. They are interviewed by career attorneys (including, but not limited to, career Section Chiefs) and the Deputy Assistant Attorney General responsible for supervising the relevant section on behalf of the Office of the Assistant Attorney General. A Deputy Assistant Attorney General can be either a career or a non-career Senior Executive Service attorney. On March 31, 2008, I initiated a

review of the Division's hiring policies that were in place prior to my tenure to determine whether any revisions are necessary.

Soon after I became Acting Assistant Attorney General, I issued a memorandum (a copy of which was posted on the Civil Rights Division's intranet and is attached to these responses) in which I adopted and pledged to enforce the Guidance on Personnel Matters previously issued in 2007 by then-Assistant Attorney General Wan J. Kim. This memorandum was a reminder that "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 employment organization, or personal favoritism."

In addition, Attorney General Mukasey has instituted a new practice which requires that all new political appointees (Presidential Appointees with Senate Confirmation, Senior Executive Service Noncareer Appointees, and General Schedule C Appointees) receive detailed briefings on prohibited personnel practices and merit system principles. These briefings are conducted during the standard personnel orientation process. To ensure that current political appointees at all levels received this information, the Attorney General issued a memorandum mandating that all appointees review the materials and confirm their understanding of prohibited personnel practices and merit systems principles.

The Attorney General's Honors Program is another process through which the Civil Rights Division hires career attorneys each year. The Honors Program is Department-wide, and it is administered and promoted by the Office of Attorney Recruitment and Management (OARM). It is my understanding that in 2007, the applications of prospective Honors Program attorneys who stated an interest in the Civil Rights Division were reviewed only by career attorneys, and the selected applicants were interviewed by career employees of the Division. A committee of career employees determined which candidates received offers of employment.

Paid summer interns are hired through the Attorney General's Summer Law Intern Program (SLIP), which is also administered by OARM. The process for hiring SLIP candidates is administered in much the same way as the Honors Program. It is my understanding that in 2007, career attorneys in the Civil Rights Division reviewed, interviewed, and selected SLIP interns.

Since I have been at the Division, unpaid student interns have been interviewed only by career attorneys in the sections. In the past, resumes of recommended student interns were sent to the Office of the Assistant Attorney General. I have notified the Section Chiefs that they no longer need to forward these resumes. On March 31, 2008, I initiated a review to determine whether a written policy would be helpful in clarifying the process of hiring unpaid student interns.

2. You testified that you are not aware of the 2002 change in the Division's hiring practices. It was widely reported that this change resulted in the near total exclusion of career employees from hiring decisions. Department employees also

report that upper-level career attorneys, such as section chiefs, were brought back into the process in 2007, but that line attorneys' role in the process has remained much smaller than it was before 2002. Many current and former employees of the Department have called for an increase in participation by line attorneys in order to restore their pre-2002 role. Will you agree to implement this change?

**Answer:** On March 31, 2008, I initiated a review of the Division's hiring policies that were in place prior to my tenure to determine whether any revisions are necessary.

3. I understand that there are separate procedures for hiring attorneys for the Honors Program. In April 2007, the Washington Post reported that, in response to complaints by career attorneys and increasing scrutiny by Congress and the media, the Justice Department was "removing political appointees from the hiring process" for Honors Program Attorneys, and would "return[] control of the Attorney General's Honors Program and the Summer Law Intern Program to career lawyers in the department after four years during which political appointees directed the process." This planned change in procedures was reportedly announced through an internal Department memorandum.

- a. Did the Justice Department implement the change reported by the Post? Specifically, are political appointees currently involved in the hiring of Honors Program attorneys?

**Answer:** On April 26, 2007, the Department of Justice 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 comprises career employees from the Office of Attorney Recruitment and Management (OARM), which has administrative oversight of all career attorneys within the Department, and representatives from the various DOJ components.

- b. If the hiring process for Honors Program attorneys differs from the hiring process for lateral hires, please provide the information requested in Question 1.b.iii for the Honors Program hiring process.

**Answer:** The Attorney General's Honors Program is administered and promoted by OARM, which manages the applications and conducts the initial screening process to make certain that all applicants are eligible for participation in the Honors Program. 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. It is my understanding that in 2007, the applications forwarded to the Civil Rights Division were reviewed only by career attorneys, and the selected applicants were interviewed by career employees of the Division. A committee of career employees determined which candidates received offers of employment.

4. At your nomination hearing, Senator Schumer asked you whether you discussed the Indiana voter ID case with Assistant Attorney General Alice Fisher, who heads the Criminal Division. You responded that you “can’t get into pre-deliberative discussions.”
- a. Is it your contention that this information is protected from disclosure by the deliberative process privilege? If so, please substantiate the assertion of privilege with the information specified in *Landry v. F.D.I.C.*, 204 F.3d 1125 (D.C. Cir. 2000). If not, please explain the basis for your refusal to answer the question.

**Answer:** The Department has a longstanding process in place for determining what position, if any, it will take in all cases pending before the Supreme Court. That process includes review by all interested components of the Department. That process was followed in this instance.

*Landry* applies to the assertion of privilege in civil litigation. My attempt to answer the Committee’s questions in a manner consistent with Executive Branch confidentiality interests does not entail an assertion of privilege in the context of civil litigation.

- b. Even assuming that the deliberative process privilege could apply to factual information such as the identity of participants in agency deliberations, the case law is clear that qualified executive privileges, including the Presidential communications privilege and the deliberative process privilege, must yield in the face of Congress’s need to do its job. Do you agree that Congress has a legitimate interest, as part of its duty to offer advice and consent on nominees for top executive positions, in knowing the basis for your decision to sign and submit an amicus brief in this controversial case?

**Answer:** I appreciate the opportunity to supplement the oral response I provided at the hearing. The U.S. Supreme Court recently rejected a facial constitutional challenge to the Indiana photo identification law. *Crawford v. Marion County Election Bd.*, Nos. 07-21 and 07-25, 2008 WL 1848103 (U.S. Apr. 28, 2008). The lead opinion, written by Justice Stevens, determined that Indiana’s interests in furthering election modernization, preventing voter fraud, and safeguarding voter confidence justified the burdens imposed on the right to vote. As stated in that opinion: “There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters.” *Id.* at \*8. The concurring opinion stated: “The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation[.]” *Id.* at \*13 (Scalia, J., concurring). “The universally applicable requirements of Indiana’s voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not even represent a significant increase over the usual burdens of voting. And the State’s interests are sufficient to sustain that minimal burden.” *Id.* at \*15 (internal citations and quotation marks omitted).

At the hearing, I indicated that this case could affect the Department's ability to enforce the Help America Vote Act, which requires voters to provide proof of identification (including, but not limited to, photo identification) before registering or casting their first ballot. *Crawford* concerns a facial challenge to a state law that requires those who vote in person in federal elections to present a government-issued photo identification and, more generally, the appropriate constitutional standard for reviewing such a law. Congress has enacted numerous requirements, including registration and identification requirements, designed to "increase the number of eligible citizens who register to vote" while simultaneously "protect[ing] the integrity of the electoral process." 42 U.S.C. 1973gg(b)(1), (3). In 2002, Congress enacted the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (42 U.S.C. 15301 *et seq.*), to establish and modernize various minimum election administration standards for federal elections. Among other things, HAVA requires voters to provide proof of identification before registering or casting their first ballot, see 42 U.S.C. 15483(a)(5)(A), (b)(2)(A), (3)(A). The Attorney General is responsible for enforcing those provisions, 42 U.S.C. 1973gg-9, 15511, and *amicus* briefs filed by certain Senators and Members of Congress specifically put the proper interpretation of HAVA and its effect on state laws before the Supreme Court. The Attorney General also has authority to prosecute voter fraud in federal elections. See, e.g., 42 U.S.C. 1973i(c), (e), 1973gg-10. Voter fraud itself dilutes the right to vote. See *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006). Legitimate efforts to detect or deter voter fraud therefore promote the right to vote and protect the integrity of the process. As stated in Justice Stevens' lead opinion in *Crawford*, the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." 2008 WL 1848103, at \*9 (quoting Commission on Federal Election Reform, Report, Building Confidence in U.S. Elections § 2.5 (Sept. 2005), App. 136-137). The lead opinion discussed HAVA as well as another federal statute that the Civil Rights Division enforces, the National Voter Registration Act of 1993 (NVRA). It found that "[b]oth [HAVA and the NVRA] contain provisions consistent with a State's choice to use government-issued photo identification as a relevant source of information concerning a citizen's eligibility to vote." *Id.* at \*7.

The Department's *amicus* brief discusses the context in which Indiana enacted its voter identification law. As more fully set forth in that *amicus* brief:

Indiana determined that it faced a serious problem of actual and potential election fraud. In 2004, the Indiana Supreme Court invalidated the 2003 East Chicago mayoral primary based on evidence of rampant absentee-ballot fraud, which included the use of vacant lot or former addresses and casting of ballots by nonresidents. *Pabey v. Pastrick*, 816 N.E.2d 1138, 1145, 1153. The Indiana Supreme Court found that the widespread fraud had rendered the election results "inherently deceptive and unreliable." *Id.* at 1151.

At the same time, the State discovered that its voter registration rolls were highly inflated, thus creating a risk of further voter fraud. A report conducted for the State indicated that at least 35,000 deceased individuals were on the rolls State-wide, and that, in 2004, the list of registered voters was inflated by some 41%,

including well over 200,000 duplicate voter registrations. On April 7, 2005, the United States Department of Justice informed the Indiana Secretary of State that numerous counties had registration totals that exceeded their voting age populations and noted the State's obligations under federal law to maintain accurate voter registration lists. J.A. 312-313.

Shortly thereafter, Indiana responded to those and other concerns by enacting a number of election reforms. In particular, Indiana enacted Senate Enrolled Act No. 483 (Voter ID Law), Pub. L. No. 109-2005, which, in order to deter voter fraud, requires those who vote in-person to present photo identification, issued either by the United States or the State of Indiana. See Ind. Code 3-11-8-25.1(c) and 3-5-2-40.5; Pet. App. 106. On the same day, the legislature also placed new restrictions on absentee voting and how absentee ballots are handled, prohibiting the practice of pre-printing the absentee ballot application with certain information, such as the address (if different from the applicant's), party affiliation, or reason for voting absentee. Ind. Pub. L. No. 103-2005 § 4; Ind. Code 3-11-4-2(c), (d).

Brief for the United States as Amicus Curiae Supporting Respondents at 3-4, *Crawford v. Marion County Election Bd.*, No. 07-21 & *Indiana Democratic Party v. Rokita*, No. 07-25 (U.S. Dec. 10, 2007).

In addition, the facial nature of the challenge in *Crawford* is itself significant. As the lower courts stressed, the plaintiffs in *Crawford* failed to "introduce[] evidence of a single, individual Indiana resident who will be unable to vote as a result of [the Voter ID law,] or who will have his or her right to vote unduly burdened by its requirements." *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006). Likewise, as stated in the Department's brief, "[f]or the 99% of voters in Indiana who already have a photo ID, the law requires no more than that the voter present the ID at the polls. For the less than 1% of Indiana voters who do not yet have an ID, the State offers them such an ID free of charge. And for those who are most likely to find it difficult to obtain even a free ID, state law provides alternative methods of voting that do not require presenting identification." Brief for the United States as Amicus Curiae Supporting Respondents at 9, *Crawford v. Marion County Election Bd.*, No. 07-21 & *Indiana Democratic Party v. Rokita*, No. 07-25 (U.S. Dec. 10, 2007). If the mere possibility that some unspecified voter may not possess the requisite form of identification were enough to invalidate a statute on its face, then it would obviously be more difficult to defend HAVA. It may be that certain Indiana voters could establish that they are nevertheless in fact burdened by the Indiana law. As the Department made clear in its brief, any such individuals could bring an as-applied challenge to the law in such circumstances. *Id.* at 11. Nothing in the Department's position in *Crawford* would preclude the law from being declared unconstitutional on an as-applied basis in a concrete setting where the requisite elements of the constitutional claim are met.

Let me emphasize that this decision was made after careful consideration after hearing from all interested components within the Department, in accordance with the

Department's longstanding practice for determining whether to file an *amicus* brief in a case. Given our country's history, it is important for the Civil Rights Division to carefully scrutinize voter identification laws when they implicate the federal statutes we enforce. Independent of the United States' position in *Crawford*, the Civil Rights Division will investigate, and take any appropriate enforcement action, if evidence suggests that a voter identification law is being applied in a discriminatory or otherwise illegal manner.

5. At your nomination hearing, I asked you whether the Civil Rights Division's efforts to vitiate settlements reached under the previous Administration were appropriate. You responded that you were not aware of this happening during your tenure as a manager, but that any reversal in Department policy should be an "exceptional situation."

- a. Given that different administrations inevitably take different positions on many issues, I assume that your reference to an "exceptional situation" implies something more than mere disagreement by one administration with a position taken by a prior administration. Is this assumption correct?

**Answer:** I am committed to ensuring that the Division's law enforcement decisions are guided by the facts and the law. In evaluating whether a particular settlement should be modified, the Department conducts a thorough analysis of the facts and any applicable law, including any changes in the facts or the law that may have occurred since the time the settlement was reached. I am prepared to take any appropriate action to ensure that all federal civil rights laws are enforced on behalf of all Americans.

- b. The Department of Justice has attempted to vitiate civil rights settlements intended to benefit women or minorities, or has otherwise reversed position on a civil rights issue in a manner adverse to women or minorities, in the following high-profile cases (among others):

- *University of Michigan diversity in admissions cases.* In 1999, in two cases challenging the University of Michigan's use of race as a factor in admissions, the Department filed amicus briefs in district court in support of the University. The briefs argued that the University "should have the flexibility to develop and implement admissions programs that consider an applicant's race or ethnic background," and asserted, citing the analyses of three experts, that "[w]ithout consideration of racial or ethnic diversity in higher education admissions . . . it would not be uncommon to have college or university classrooms with few, if any, minority students." In 2003, when these same cases were before the Supreme Court, the Department filed another set of amicus briefs, this time in support of the plaintiffs. In these briefs, the Department argued that the University was required to employ "race-neutral" means, and that "[t]he district court's conclusion that '[i]f race were not taken into account, the probability of acceptance for minority applicants would be cut dramatically'" – the very

same conclusion that the Department had urged upon the court in 1999 – “is plainly mistaken.”

- *United States v. New York City Board of Education*. In 1996, the Justice Department filed suit against the New York City Board of Education for discriminating against women and minorities in recruiting and hiring custodians in public schools. In 2000, the case was settled through a court-approved consent decree that required the City to extend various job benefits to approximately 60 victims of discrimination. White male custodians challenged the settlement, and in 2002, the Civil Rights Division – now under a new administration – not only refused to defend the settlement awards with respect to the majority of beneficiaries, but actively sided with the challengers.
- *USA v. City of Buffalo*. Three decades ago, the City of Buffalo was found liable for discrimination in hiring for its police department. Under an order that the Department of Justice drafted, the City was required to fill 50% of new positions with minorities until the composition of the police force matched the City’s labor force. When that point was reached, a new order was entered in 1989 requiring the City to adopt an “applicant flow” hiring model that would ensure the continued absence of discriminatory impact. For thirteen years, the Department supported the “applicant flow” order and opposed employment tests that the City had not shown to be valid. In 2002, however, the Department reversed position. It argued that the continued use of applicant flow hiring was unconstitutional because “[t]he effects of the City’s past hiring discrimination were long ago remedied,” and it asked the court to dismiss the lawsuit even though the City had admittedly not demonstrated the validity of the employment test it would be using instead.
- *Adam’s Mark settlement*. In 2000, the Justice Department entered into a consent decree with the Adam’s Mark hotel chain designed to remedy the chain’s discriminatory practices. The consent decree and the requirements it imposed were to remain in place until November 2004, but in March 2002, the Justice Department announced that the Assistant Attorney General for the Civil Rights Division had offered to terminate the consent decree early if the hotel chain complied with the requirements of the Consent Decree over the following nine months – a meaningless prerequisite, since the hotel chain was already obligated to comply with these requirements. After a torrent of negative publicity, the hotel chain announced it would not pursue the offer.

Please familiarize yourself with the Department’s filings in these cases, and then answer the following question for each case: Do you believe that an “exceptional situation” existed that justified the reversal of position, and if so, what was the exceptional situation?

**Answer:** I am committed to ensuring that the Division's law enforcement decisions are guided by the facts and the law. In evaluating whether a particular settlement should be modified, the Department conducts a thorough analysis of facts and any applicable law, including any changes in the facts or the law that may have occurred since the time the settlement was reached. Although I did not work on these cases, I am prepared to take any appropriate enforcement action to ensure that all federal civil rights laws are enforced on behalf of all Americans.

6. The Department of Justice is charged with enforcing Section 7 of the National Voter Registration Act, which requires states to designate all offices that provide public assistance as voter registration agencies. Last August, the Department sent letters of inquiry to 18 states regarding their compliance with the NVRA.

a. What actions have been taken to follow up on those letters?

**Answer:** It is my understanding that last year, the Section sent letters to approximately 18 states regarding their compliance with Section 7. We continue to monitor the compliance of all covered states with the NVRA and will gather additional information from states and take action as appropriate. Our efforts have, in some instances, resulted in compliance without the need to resort to litigation. For example, the State of Nebraska recently took action to comply with Section 7 as a result of the Department's inquiry. In a letter to the State last year, the Department suggested that Nebraska may have to take steps to comply with Section 7, and on March 10, 2008, Nebraska's Governor signed into law a bill designating additional selected State offices as "voter registration agencies" under Section 7 of the NVRA. In addition, officials from the State of Iowa recently reported that a similar bill was introduced in response to the Department's enforcement efforts and is currently pending in the State legislature.

b. While it is encouraging that these letters were sent, the fact remains that the Department has brought only one Section 7 case since 2001, despite reports of widespread Section 7 violations. Will you ensure that the Civil Rights Division actively and robustly enforces Section 7 of the NVRA if you are confirmed?

**Answer:** I am committed to vigorously enforcing all of the statutes within the Division's jurisdiction.

Let me clarify that, in addition to the voluntary compliance described in Question 6.a., the Department has brought two lawsuits under Section 7 since 2001: *United States v. State of Tennessee* (2002) and *United States v. State of New York* (2004).

7. Section 2 of the Voting Rights Act prohibits practices that result in a denial or abridgement of the right to vote based on race, color, or membership in certain language-minority groups. In the last five years, the Voting Rights Section has filed only seven Section 2 cases. By comparison, during the last two years of the Clinton

administration, the Voting Rights Section filed fourteen Section 2 lawsuits. Attorney General Mukasey testified before this Committee that he would vigorously enforce Section 2. If you are confirmed, what specific steps will you take to make good on the Attorney General's pledge?

**Answer:** I am fully committed to vigorous enforcement of the Voting Rights Act on behalf of all Americans.

In the time that I have been overseeing the Voting Section, I have approved the filing of two cases under Section 2 of the Voting Rights Act, one on behalf of African-American voters and the other on behalf of Hispanic voters. In March 2008, the Voting Section filed and resolved a lawsuit under Section 2 against the Georgetown County, South Carolina, Board of Education on the grounds that the at-large method of electing school board members unlawfully diluted the voting strength of African-American voters in Georgetown County. No African-American candidate has won a school board election during the last three election cycles. The current school board is all white, although African Americans comprise approximately 38% of the population of Georgetown County. The consent decree creates seven single-member districts and two at-large seats on the nine-member school board, and in three of the new single-member districts, African Americans will constitute a majority of the citizen age-eligible population. This settlement ensures that African-American voters in Georgetown County will have the opportunity to elect school board members of their choice.

In a separate matter, the Department filed a complaint and a consent decree against the Osceola County, Florida, School Board on April 16, 2008, alleging that the existing district boundaries for electing members of the school board violate Section 2 by discriminating against Hispanic voters. The consent decree provides for new district lines in which Hispanics are a majority of the registered voters in one district. This is the third lawsuit regarding Osceola County, Florida, brought by the Voting Section during this Administration. The first alleged the County violated Sections 2 and 208 by discriminating against Hispanic voters through hostile treatment at the polls, failing to provide adequate language assistance, and not permitting Hispanic voters to bring assistants of their choice into the polling places. The second lawsuit alleged the County's method of electing its Board of Commissioners violated Section 2 by diluting the voting strength of Hispanic voters.

Additionally, on February 21, 2008, the United States filed a brief as *amicus curiae* in *Riley v. Kennedy*, which is pending in the Supreme Court of the United States on direct appeal from the U.S. District Court for the Middle District of Alabama. The Civil Rights Division previously had interposed an objection on behalf of African Americans pursuant to Section 5 of the Voting Rights Act regarding a change in the method of filling vacancies on the Mobile County Commission from special election to gubernatorial appointment. The district court confirmed that this voting change was subject to preclearance by the Department of Justice. On appeal, the United States continues to maintain that this change cannot be implemented unless it is precleared.

Also during my time overseeing the Voting Section, the Section has interposed an objection under Section 5 of the Voting Rights Act on behalf of Native Americans. On February 11, 2008, we objected to a proposed plan submitted by Charles Mix County, South Dakota, where 28.3% of the residents are Native American, on the ground that the proposed change had a discriminatory purpose. Specifically, the Voting Section's preclearance review of this submission revealed that the voting changes were proposed to intentionally dilute the voting strength of Native-American voters. Moreover, the Section's review found a history of voting discrimination against Native Americans in Charles Mix County and evidence of conduct and comments by local elected officials that showed a racially discriminatory intent, all of which formed the basis for interposing an objection in this case.

8. In a recent report, the United Nations Committee on the Elimination of Racial Discrimination expressed concern that racial, ethnic and national minorities in the U.S. are disproportionately concentrated in poor residential areas which provide sub-standard housing conditions. An important tool for remedying these conditions is the ability to bring a "disparate impact" claim under the Fair Housing Act. Yet, in 2003, DOJ informed the Department of Housing and Urban Development that it would not pursue disparate impact cases involving housing discrimination. Furthermore, in the past four years, the number of fair housing enforcement cases filed overall has decreased by 29%, while the number of cases brought to combat discrimination based on race has decreased by 43%.

- a. Will you discontinue the current policy against pursuing disparate impact housing cases? If not, please provide in detail the reason(s) why you intend to support the continuation of this policy. If you take the position that disparate impact claims are not authorized under the Fair Housing Act, please explain how you justify this position, given that all the U.S. Circuit Courts of Appeal to address the issue – including the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits – have reached the opposite conclusion.

**Answer:** The Civil Rights Division does not have a policy against pursuing disparate impact discrimination cases. The Housing and Civil Enforcement Section, the component of the Division responsible for enforcing the Fair Housing Act, considers and relies upon evidence of "disparate impact" in applicable cases. I am not aware that the Section has ever filed a case based solely upon a "disparate impact" theory.

- b. What additional (or alternative) steps do you intend to take, if any, to improve the Department's record on combating race-based housing discrimination?

**Answer:** If I am confirmed, I intend to continue vigorously enforcing the Fair Housing Act on behalf of all Americans. Altogether, in Fiscal Year 2007, the Housing and Civil Enforcement Section filed 33 lawsuits and obtained over \$7 million in monetary relief.

The Division, under my supervision, has been actively looking for housing discrimination cases. Under Operation Home Sweet Home, an Attorney General initiative started two years ago to expose and eliminate housing discrimination, the Division conducted more than 500 paired tests in FY 2007. This is an all-time high number of tests, surpassing the prior record by approximately 20%. As a result of this initiative, in September 2007, the Division filed its first case ever on behalf of Asian victims in Lowell, Massachusetts, based upon evidence developed through its fair housing testing program. The matter was settled in January 2008 for \$158,000. In January 2008, we also filed a complaint against an apartment complex in the Detroit area that our testing program showed was discriminating against African-American renters.

In addition to the cases that we bring, Operation Home Sweet Home has had a deterrent effect on housing discrimination. We have found that some landlords, after receiving repeated visits from our testers, alter their behavior to conform to the fair housing laws. Thus, as public awareness of our fair housing testing program grows, it has discouraged housing discrimination by those who might otherwise engage in it.

The Division enjoyed significant success in Calendar Year 2007 in its pattern or practice race discrimination cases under the Fair Housing Act. For example, on March 30, 2007, a court issued an order in *United States v. Matusoff Rental Company* (S.D. Ohio) finding that the defendant had engaged in a pattern or practice of discrimination on the basis of familial status and race against African Americans and requiring him to pay a total of \$405,000 in compensatory damages and \$130,000 in punitive damages to 26 individual victims of discrimination. On August 29, 2007, a court entered a consent order for \$725,000 resolving *United States v. General Properties Company, LLC* (E.D. Mich.), in which the Division alleged that the owners and operators of an apartment complex in Livonia, Michigan, had discriminated against African-American prospective tenants.

9. In 2000, Attorney General Reno publicly issued a nearly 400-page report with every conceivable piece of data about federal death penalty-eligible cases, down to the district level. This included, by district, a breakdown of what the U.S. Attorney and Capital Case Review Committee recommended and what the Attorney General decided. It also included breakdowns by race of the defendant and of each of the victims in a case. This comprehensive report was extremely helpful back in 2000, and revealed possible racial disparities in the implementation of the federal death penalty.

I have asked Department officials repeatedly over the past year to consider issuing a similarly detailed report covering the time period since 2000. This would give the Judiciary Committee and others an opportunity to understand how the federal death penalty is being implemented, and it would give the Department an opportunity to demonstrate its commitment to transparency about its death penalty work. I have yet to receive an answer. Given the clear civil rights implications of possible racial disparities in the implementation of the federal death penalty, will you advocate within the Justice Department for the public release of a follow-up report to the 2000 Reno report?

**Answer:** This is an issue that is handled by other components of the Department of Justice. I appreciate the civil rights implications and, if confirmed, will take appropriate action in my role as Assistant Attorney General for the Civil Rights Division.



## U.S. Department of Justice

### Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

December 12, 2007

#### MEMORANDUM TO ALL ATTORNEYS

FROM: Grace Chung Becker  
Acting Assistant Attorney General

SUBJECT: Guidance on Personnel Matters

I adopt and will enforce the principles announced by former Assistant Attorney General Wan J. Kim in the *Guidance on Personnel Matters* memorandum he issued on June 29, 2007. I too 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/jmd/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 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.