Testimony of

Mr. Ted Shaw

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NAACP Legal Defense and Educational Fund, Inc. (LDF)
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NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.
TESTIMONY OF
THEODORE M. SHAW
DIRECTOR-COUNSEL AND PRESIDENT
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
OVERSIGHT HEARING
ON THE CIVIL RIGHTS DIVISION
U.S. SENATE JUDICIARY COMMITTEE
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My name is Theodore M. Shaw. I am the Director-Counsel and President of the NAACP Legal Defense & Educational Fund, Inc. (the "Legal Defense Fund"). The Legal Defense Fund is the nation's oldest civil rights law firm and has served as legal counsel for African Americans in most of the country's major racial discrimination cases.

The Legal Defense Fund is very familiar with the mission and work of the Civil Rights Division. As Assistant Attorney General Wan Kim has noted, the Division "was born of the Supreme Court's landmark decision in Brown v. Board of Education,"1 which was litigated by my predecessor, Thurgood Marshall. Several of our lawyers, including Drew Days, Deval Patrick and Bill Lann Lee, have headed the Division. Personally, I began my career as a lawyer in the Division, hired through the Honors Program. The Legal Defense Fund has worked with the Division on countless cases over the years.

Next year, the Division will celebrate its 50th Anniversary. Established as part of the first civil rights law since Reconstruction, the Division has grown from a handful of lawyers to 350 lawyers--a number which civil rights organizations can only envy. During the 1960s, the Civil Rights Division led the federal government's fight for racial justice. We all know the history of how Harold Tyler, Burke Marshall and John Doar relied upon the Division's moral stature and resources to insist on equal opportunity in the face of massive public resistance.

Above everything else, it is important for the Civil Rights Division today to retain its leadership role in the prosecution of injustice. Even now, there is simply no matching the power of the federal government behind a civil rights case. It is a position that we admire and respect. Over the years, the Legal Defense Fund has considered the Civil Rights Division a true partner--capable of a unique contribution--in our collective quest for justice.

In order to maintain this stature, it is critical that the work of the Civil Rights Division not be subjected to the vagaries of politics. While every administration has the right to establish its priorities, we, like many others, are deeply concerned that the current Division is unduly influenced by political considerations. Respectfully, we believe that this trend is not good for the Division, the Justice Department, civil rights enforcement generally, or indeed the country. As the nation's top enforcer of civil rights laws, the
Division must at all times inspire confidence that its actions are based on the law and the facts.

Recent disclosures about political appointees overriding well-founded recommendations of career attorneys in the Voting Section, concerning Section 5 enforcement matters in Georgia and Texas, undermine the credibility and reputation of a Division that has long been held in high esteem.

Career attorneys strongly objected to preclearing a Georgia voting statute requiring voters to produce photo identification at the polls, on the ground it would likely discriminate against African-American voters.2 The very next day, political appointees at the Division overrode the recommendation and precleared the retrogressive voting change. Although the specific legal rationales have varied, five court rulings in total--three by federal courts3 and two by state courts4--have subsequently enjoined two iterations of the Georgia photo identification law on constitutional, among other grounds. Significantly, the first ruling compared the law to a poll tax from the Jim Crow era.5 Indeed, these court rulings were entirely foreseeable, and the Legal Defense Fund signaled as much to the Division when we submitted our comment letter urging a denial of preclearance under Section 5 of the Voting Rights Act.6 It is also noteworthy that the record before the
Division was, at best, inadequate to determine the impact of the law on Georgia's African Americans, which also should have weighed against preclearance under Section 5, and in favor of a request for more information.

In another closely watched case from Texas, the Division precleared a controversial redistricting plan after six career lawyers, including the head of the Voting Section, and two analysts unanimously recommended that the Division interpose an objection under Section 5 and concluded that Texas "has not met its burden in showing that the proposed congressional redistricting plan does not have a discriminatory effect."7 Subsequently, the Supreme Court, applying Section 2 of the Voting Rights Act, found that the plan diminished the opportunity of Latino voters to participate effectively in the political process and "bears the mark of intentional discrimination."8 The holding of the Court effectively shows that the plan worsened the position of Texas' minority voters and that its passage raised serious questions of purposeful discrimination. Either of these rationales should have been enough to ensure that the plan was denied preclearance under Section 5 review.

These two examples illustrate the problems with the Division's recent civil rights enforcement. First, the role of the career staff is being diminished in favor of political appointees; and second, that shift is leading to outcomes that provide less vigorous civil rights protection for our nation.

There are good reasons for respecting the role of the career attorneys. Indeed, it appears that the extremely low number of objections interposed to voting changes over recent years is attributable, at least in part, to the disregard of careful and thorough work performed by attorneys

and analysts, many of whom have significant experience with the preclearance provisions of Section 5. As the Section 5 process calls for a fact-intensive examination of a particular voting change (with more complicated voting changes taking
up to 60 days to complete), the analysis performed by Section attorneys and analysts should be given tremendous deference as in the past.

The work of the Division is also undermined when the hiring of its lawyers is said to be motivated primarily by politics, instead of experience in civil rights litigation. The people of the United States--whom the Division represents--need to be assured that their interests in seeking justice will always be paramount. Similarly, it is important for the Division to ensure that it retains career lawyers and analysts with expertise and institutional knowledge throughout the various enforcement areas.

Enforcement of our nation's civil rights laws by the Division must be rigorous, and it must be constant. Enforcement by the Division should also be as even as possible, in order to represent all persons falling within the ambit of its protection. Regretfully, over the past six years, there has been a dearth of cases filed by the Division on behalf of African Americans across issue areas.

For example, during this period, the Civil Rights Division has filed only a handful of cases addressing employment discrimination against African Americans.9 Remarkably, it was not until this year that the Division brought a case alleging that employment practices had a discriminatory impact on African Americans.10 Unfortunately, this coincides with a dramatic decrease in enforcement of Title VII generally. Nearly half of the employment cases filed in the last two years have addressed discrimination against uniformed servicemembers.11 And, while the Division has decreased the number of cases filed on behalf of African Americans, it has increased filings of claims alleging discrimination against white persons.12

We find these developments to be extremely troubling. They do not reflect the unfortunate reality that race discrimination still pervades many of our social structures. The Division's only two adverse impact employment cases--filed just this year--originated within miles of one another in Southern Virginia. This begs the question of how many more must exist elsewhere in the country.

While individual claims have a place on the Division's docket, it is imperative that the Division continue its longstanding tradition of bringing pattern and practice cases that otherwise will likely not be prosecuted by the private bar or civil rights organizations with limited resources. Litigation of systemic discrimination claims is costly, complicated and protracted, but this is precisely the type of case in which the federal government should bring to bear its extraordinary resources. Moreover, discrimination that adversely
impacts a particular racial group is also actionable under the law; the Division need not only file cases requiring proof of intentional discrimination. The reluctance on the part of the Division to bring systemic cases makes our job that much harder. Not only does the burden fall upon organizations and private attorneys to fill the void, but it signals to employers that they face reduced scrutiny of their practices and even gives fuel to the argument by some that certain forms of race discrimination may no longer exist.

We share similar concerns about the docket in the Voting Section. The Civil Rights Division was initially established as part of the 1957 voting rights statute, and the Division's first lawyers prosecuted voting rights violations against African Americans. Throughout its history, securing the right to vote for African Americans and having that vote count have been important priorities for the Division. While the Division under the Bush Administration has brought a record number of cases involving language provisions of the Voting Rights Act, it has approved only one case alleging voting discrimination against African Americans under Section 2 of the Voting Rights Act, again just this year.13

As an organization with a substantial voting rights docket, we know only too well that violations against African Americans continue to exist. The recent reauthorization of the Voting Rights Act made clear that racial minorities continue to be denied full participation in the political process.

The Civil Rights Division must remain true to its original charter, and be a leader in prosecuting these cases to the fullest extent of the law. Any move by the Division to focus instead on criminal fraud by voters is misguided, not in keeping with the separation of responsibilities between the Civil Rights Division and other divisions within the Justice Department, and risks alienating and intimidating the very communities the Division is charged with protecting. And, while the Division continues to monitor elections, as we witnessed just last week, it is important for the Division to maintain strong community ties in these jurisdictions so that its monitoring efforts can be maximized.

We also add a cautionary note concerning the enforcement priorities of the Criminal Section. While the Section has a much-publicized new focus on prosecuting human trafficking cases, we hope that this does not come at the expense of resources allocated to cases fulfilling the core mission of the Section. Specifically, we urge the Civil Rights Division not to abandon its traditional emphasis on law enforcement misconduct and racial bias crimes.

As the Legal Defense Fund is acutely aware, racial equality in the criminal justice system remains elusive. We must all remain vigilant in order to bring about a fair and just system.

Finally, we are troubled by Division efforts to narrow the interpretation of civil rights laws through amicus briefs, which the government may file as "the principal enforcer of the civil rights laws."14 While the Division and the civil rights community are not always going to agree, it is a very different matter for the Division to advocate frequently against strong civil rights protections on the most important issues of the day. Unfortunately, there are numerous examples. Most recently, in two cases pending before the Supreme
Court, Meredith v. Jefferson County Board of Education and Parents Involved in Community Schools v. Seattle School District, the Division took the position that voluntary race-conscious action to promote integration in public schools violates the Equal Protection Clause, a reversal of historic proportions.15 In the seminal affirmative action case, Grutter v. Bollinger, the Division argued that the race-based admissions policy was unconstitutional,16 a position with which the Supreme Court ultimately did not agree.17 In a recent employment retaliation case, Burlington Northern & Santa Fe Railway Co. v. White, the Division joined the employer in arguing for a narrow interpretation of Title VII, contradicting longstanding policy of the Equal Employment Opportunity Commission ("EEOC").18 Again, the Supreme Court rejected the Division's

position.19 Just last month, the Division joined the employer in arguing against an EEOC policy in the Supreme Court, this time involving the statute of limitations for discrimination in pay.20

In closing, we take this opportunity to urge the Civil Rights Division to make its entire docket available to the public. We see no reason why the public agency charged with enforcing our nation's civil rights laws should not make this information readily available to all. It is only through complete transparency in its work that the Division may be fully accountable to the people it purports to serve.

Thank you for the opportunity to testify. I would be happy to answer any questions.

1 The Department of Justice's Civil Rights Division: A Historical Perspective as the Division Nears 50,
Remarks by Wan Kim, Mar. 22, 2006, available at
http://www.usdoj.gov/crt/speeches/historical_perspective.pdf
2 Criticism of Voting Law Was Overruled, WASH. POST, Nov. 17, 2005.
3 Common Cause/Georgia v. Billups, Civ. A. No. 4:05-CV-0201-HLM (N.D. Ga. Sept. 15, 2006); Common
Cause/Georgia v. Billups, 439 F. Supp.2d 1294 (N.D. Ga. 2006); Common Cause/Georgia v. Billups, 406F.
Supp.2d 1326 (N.D. Ga. 2005).
4 Lake v. Perude, 2006-CV-119207 (Ga. Super. Ct., Sept. 19, 2006); Lake v. Perdue, 2006-CV-119207 (Ga.
Super. Ct., July 7, 2006).
5 Common Cause/Georgia v. Billups, 406 F. Supp.2d 1326, 1366-70 (N.D. Ga. 2005).
6 Comment Letter from Theodore M. Shaw to John Tanner, Chief, Voting Section, Aug. 3, 2005.
7 Justice Staff Saw Texas Districting as Illegal, WASH. POST, Dec. 2, 2005.
8 League of United Latin Am. Citizens v. Perry, 126 S.Ct. 2594, 2622 (2006).
9 Complaints Filed, U.S. Department of Justice, Civil Rights Division, Employment Litigation Section,
available at http://www.usdoj.gov/crt/emp/papers.html
10 Id.
11 Id.
12 Id.
13 Litigation Brought by the Voting Section, U.S. Department of Justice, Civil Rights Division, Voting
Section Home Page, available at http://www.usdoj.gov/crt/voting/litigation/caselist.htm
14 See, e.g., Brief for the United States As Amicus Curiae Supporting Respondent, Burlington Northern and
Santa Fe Railway Co. v. White, No. 05-259, at 1.
15 Brief for the United States As Amicus Curiae Supporting Petitioner, Meredith v. Jefferson Co. Bd. of
Educ., No. 05-915.
16 Brief for the United States As Amicus Curiae Supporting Petitioner, Grutter v. Bollinger, No. 02-241.

17 Grutter v. Bollinger, 539 U.S. 306 (2003).
18 Brief for the United States As Amicus Curiae Supporting Respondent, Burlington Northern and Santa Fe
Railway Co. v. White, No. 05-259.
19 Burlington Northern and Santa Fe Railway Co. v. White, 126 S. Ct. 2405 (2006).
20 Brief for the United States As Amicus Curiae Supporting Respondent, Ledbetter v. Goodyear Tire &
Rubber Co., No. 05-1074.