Testimony of

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The Civil Rights Division: An Historical Perspective
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Chairman Cardin and distinguished members of the committee, thank you for inviting me to testify and provide an historical perspective on the Civil Rights Division of the United States Justice Department.

I was a lawyer in the Division from January 1964 until June 1986 and again from June 1993 to January 1994. I served under Attorneys General from Robert Kennedy to Ed Meese and then for six months as acting Deputy Assistant Attorney General under Attorney General Janet Reno. Since 1986 I have been Professor of Law at the University of Pacific, McGeorge School of Law, in Sacramento. I have written two books about the work of the Division, Enforcing Civil Rights, and Free at Last to Vote: The Alabama Origins of the Voting Rights Act. I am a founding member of the Civil Rights Division Association, a group of former and current Division employees which sponsors periodic conferences about the work of the Division.

I am very proud of the accomplishments of the Civil Rights Division in combating racial and other forms of discrimination in voting, housing, schools, employment, public accommodations, and federally assisted programs. The Division's work has helped make significant inroads, but much remains to be done.

Although the history is familiar, I think it important to begin with a reminder about the role of the Department of Justice during Reconstruction. The federal government first enforced civil rights during Reconstruction. Southern white resistance to rights for the newly freed slaves led to adoption of the 14th & 15th amendments, a series of civil rights acts, enforcement by DOJ, and military occupation that thwarted backsliding. With the end of Reconstruction, however, the troops were withdrawn, the Supreme Court issued decisions narrowing the scope of civil rights, and Congress repealed many civil rights protections. The Court and Congress stripped the Department of Justice of most of its enforcement responsibility. Plessy v. Ferguson in 1896 effectively shifted from protecting the rights of African-Americans to protecting the rights of whites to be free from unwanted association with them. The country missed an opportunity to put the legacy of slavery behind us, and instead tolerated the growth of a racial caste system, in which, through law and custom, whites subordinated blacks in American society. The result of that history is an understandable fear by many that the second Reconstruction, of the 1950's and 1960's, will meet the same fate as the first.

From roughly 1876 to 1956 there was minimal federal enforcement of civil rights, based on the small criminal law remnants from Reconstruction. Civil rights were treated like contracts, torts, domestic relations, property disputes, and other private civil disagreements, as were civil liberties.

The second Reconstruction arguably began with Brown v. Board of Education, but it could not take full effect until Congress joined the effort. A bipartisan Congress joined with President Eisenhower in empowering the Department of Justice to enforce civil rights. The 1957 Act was deemed necessary because private litigation had failed to eradicate the racial caste system that infected much of the country, especially the Deep South.

The Division, as created by the Civil Rights Act of 1957, had a very narrowly defined mandate: enforce the Fifteenth Amendment=s ban on race discrimination in the voting process and enforce criminal civil rights laws. Congress considered and rejected a broad grant of authority that would have allowed the Department Of Justice to bring suit to redress all violations of the Fourteenth Amendment. The law did not authorize federal enforcement against private racial discrimination, or against state and local government discrimination in education, housing, employment, or federally assisted programs.. Nor did it authorize the Department to sue to redress violations of such rights as the freedom of speech. The scope of federal enforcement responsibility has expanded greatly in the years since 1957. But Congress has never legislated that every violation of civil rights or liberties can be redressed by a government agency; even today, many such violations can be redressed only through private suit.

When Congress authorizes federal enforcement of a law, it is in effect saying that violation of that law undermines the public interest and that private enforcement alone is inadequate. Private enforcement is aimed primarily at redressing wrongs to individuals; DOJ enforcement does that, but, more important, it upholds important national policies. So one question one must ask as we explore the federal role in civil rights enforcement is what are the important national needs. What issues rise to the level of requiring federal, rather than private, enforcement? Passage of a law authorizing DOJ litigation to secure specified rights normally helps answer these questions. However, each administration also addresses that question when it allocates resources within the Civil Rights Division. Since the enforcement responsibilities today extend so broadly, the Division must make choices among competing priorities.

For its first ten years, from 1957 to 1967, virtually all the Division=s resources were devoted to combating racial discrimination against African-Americans in the deep South, not because they were considered DOJ=s clients, but because the racial caste system was viewed as destructive of American ideals of democracy and equality and as undermining our society and economy.

The Division developed proactive enforcement techniques starting in 1960, under Assistant Attorney General Harold Tyler and his deputies, John Doar and St. John Barrett. Doar and Barrett, both Republicans, were retained by President Kennedy who appointed a corporate lawyer, Burke Marshall to replace Tyler as Assistant Attorney General. Marshall added lawyers and retained the enforcement techniques:

i. CRD lawyers were no longer desk lawyers; they traveled to the South and came to know its people, black and white.

ii. Given the failure of the FBI in the 1950's and 1960's to discover discrimination that was staring it in the face, Division lawyers became investigators and developed the facts of their cases.

iii. Once a lawyer developed the facts, the lawyer wrote a memorandum either recommending that the matter be closed or that DOJ sue.

iv. That memorandum, the "Justification memorandum" or "J memo," then became the basis of review by supervisors, up to the Assistant Attorney General or even the Attorney General. Often dialogue ensued over the facts and theory of the case. Although theoretically all that was involved was applying the law to the facts, the legal principles were not well developed, so the Division lawyers and leadership had to develop and agree on legal arguments.

v. This method led to iron-tight cases, so that when Southern district judges ruled against the government, it would almost invariably prevail on appeal.

In sum, the Division was formed to eradicate the racial caste system; it took a proactive approach to this mission; and despite the inevitable tensions between political appointees and civil service lawyers, the two groups worked closely together.

The responsibilities assigned to the Division have expanded since those early years, but the basic structure remained in place at least until the current administration. Changes in administration have always been accompanied by changes in priorities and policies, but eliminating race discrimination has always been a high priority, as has elimination of sex and national origin discrimination. Congress has repeatedly reaffirmed the need for strong enforcement of antidiscrimination laws, most recently by its bipartisan extension of the Voting Rights Act.

There has always been a period of adjustment when the presidency shifted between parties, as the career attorneys and the new political appointees learned to work together, and occasional flare-ups of policy-based resignations of career lawyers. Curiously, each administration regards the career employees as holdovers from the prior administration. For example, I recall that Lawrence Wallace joined the Solicitor General=s office under President Lyndon Johnson and played a key role in developing the government=s Supreme Court brief in Green v. County School Board in 1968. That brief strongly supported the complete dismantling of the racially dual school systems. Yet, Joe Califano=s memoir describes Wallace as a Nixon administration holdover. Later, the Reagan administration considered him a Carter administration holdover. I worked with him for almost twenty years and can only say that he was a consummate professional, as were most of the Civil Rights Division career staff. One further personal note: I disagreed with some of the civil rights policies of the Reagan administration. I worked for Assistant Attorney General William Bradford Reynolds, the administration's foremost spokesperson on civil rights. We engaged in many heated discussions of what position to take in cases. We listened to one another, and occasionally one or the other of us would change his mind. I respected the fact that he represented the President the people had elected and that the Senate had confirmed his nomination. He respected my knowledge of civil rights law and my ability to analyze cases.

The work of the Division has been marked by several characteristics that have contributed to its mission of securing equal justice under the law. First, the Division staff and leaders have been sensitive to the fact that it is a law enforcement agency. It is not an administrative agency and it does not exist to serve special interest groups. Its job is to pursue the public interest as set forth in the laws Congress has given the Division to enforce, and to do so in an appropriate manner. John Doar taught us that Division lawyers must be the epitome of rectangular rectitude. He turned around the famous Holmes phrase, AMen must turn square corners when they deal with the Government,@1 and insisted that CRD attorneys always turn square corners. Central to turning square corners is following fair and established procedures. As Justice Frankfurter noted, procedural regularity generates Athe feeling, so important to a popular government, that justice has been done.@2 Equally important is honest evaluation of the law and the facts, and the courage to say no to political pressures. Attorney General Kennedy refused to base the public accommodations provisions of the 1964 Civil Rights Act on the Fourteenth Amendment, because he determined that the case law would not support that ground; instead, and in spite of criticism from members of Congress, he insisted on relying on the Commerce Clause. In 1981, Solicitor General Rex Lee resisted great pressure to change position in a case involving sex discrimination against teachers, even when Department of Education lawyers argued, Abut we won the election.@ In 1977, Solicitor General Wade McCree refused to make an all-out defense of affirmative action in the Bakke case, despite enormous pressure from cabinet secretaries and civil rights groups. In 1973, Solicitor General Erwin Griswold refused to sign a patently frivolous antibusing Supreme Court paper. In 1975, Attorney General Edward Levi likewise refused to file a brief opposing busing in Boston, despite great pressure to do so. All these decisions were made after careful consideration of the competing arguments about facts, law and policy.

A related characteristic of the CRD is that it has largely filled its career attorney positions through the Attorney General=s Honors program. Attorney General Brownell instituted this program in 1954 in order to end perceived personnel practices Amarked by allegations of cronyism, favoritism and graft.@ The Honors program is supposed to operate without consideration of ideology or partisan affiliation. This exclusion of ideological or partisan connections goes well beyond the restrictions in the Hatch Act. The result has been a highly professional staff, chosen based on merit and on commitment to equal justice.

Related to the tradition of a professional, non-partisan, highly qualified staff is a tradition of interchange between career staff and political appointees. This is a system established by Congress in the civil service laws, and it is a good system. The two tend to operate as checks and balances on one another. The interaction between career staff and political appointees has checked each from carrying out an improper agenda. New administrations come in full of ideas for change, but if they fail to pay serious attention to career staff, they will make bad mistakes. The most well-known example, perhaps, is the Bob Jones case in 1981, where the incoming Reagan administration reversed longstanding positions of the Department and the Internal Revenue Service withholding tax exempt status from educational institutions that engaged in racial discrimination. The Supreme Court strongly rejected the Department's new position.

These characteristics form the basis for something every lawyer must have: credibility. Division lawyers must often make unpopular arguments. If the judges and the public believe that the Division turns square corners, that its lawyers are fairly chosen public servants, that the positions

in cases depend upon an objective analysis of the law and the facts, its lawyers will have credibility. Without those characteristics, credibility will be lost, and it will be far more difficult for the Division to do its job of enforcing the civil rights laws.

Finally, in this fiftieth year since the adoption of the first modern federal civil rights law, how should the Division determine its priorities? The Civil Rights Division's responsibilities have become so diffuse that it would be easy for the Division to spend all of its resources on issues other than those that led to its creation. According to Assistant Attorney General Kim, however, over half the briefs filed by the Appellate Section were on behalf of the Office of Immigration Litigation, a branch of the Civil Division. Look at the Division=s website. There is now a special counsel for religious discrimination; there is a comprehensive and impressive report on efforts to combat human trafficking. However, there is little on the site about efforts to combat racial discrimination against people of color. Yet the core responsibilities Congress has assigned to the Division relate to discrimination based on race, national origin, sex, and disability in voting, schools, housing, public accommodations, federally assisted programs, and employment. The black poverty level continues to be more than twice the white poverty level; housing segregation persists, reinforcing school segregation. In my view racial discrimination is a core disease in this country, and the future of civil rights enforcement requires that combating racial discrimination continue to occupy a central priority in the Division's work.

Thank you for the opportunity to present this testimony. I will be happy to answer any questions the Committee may have.

1Rock Island, Ark. and La. R.R. v. United States, 254 U.S. 141, 143 (1920).
2Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 172 (1951).