Testimony of

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TESTIMONY OF ROBERT N. DRISCOLL ON OVERSIGHT OF THE DEPARTMENT OF JUSTICE'S CIVIL RIGHTS DIVISION BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE
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Thank you, Mr. Chairman and members of the Committee for the opportunity to discuss the work of the Civil Rights Division. My name is Bob Driscoll and I am currently a partner at Alston & Bird LLP, here in Washington. From 2001 to 2003, I had the honor of serving as Deputy Assistant Attorney General in the Civil Rights Division. During that time I worked on a variety of issues, including racial profiling guidance to federal law enforcement, desegregation, and police misconduct.

While this testimony was prepared in advance of the hearing, and therefore prior to hearing the issues the Committee discusses with Assistant Attorney General Kim, I testified at the November 16, 2006 hearing before this Committee and think I have some idea of the issues likely to be discussed - in particular the proper working relationship between political appointees and career staff, how enforcement priorities are set within the Civil Rights Division, and whether the Division has performed its enforcement functions with sufficient vigor during the course of this Administration. I will comment briefly on each of these issues prior to answering whatever questions the Committee might have.

Relationship between "Career" and "Political" Employees

There has been a good deal of media attention paid to this issue in recent weeks, but nearly every news story I have seen has focused on allegations that career Civil Rights Division employees were "overruled" or "interfered with" by political appointees when the Division took a particular position in litigation or with respect to a preclearance decision under Section 5 of the Voting Rights Act. While I obviously am familiar only with my own experience in the Division, I sense that these types of stories misperceive the proper relationship between career and political staff.

As in every Division of the Department, in the Civil Rights Division, the career staff carries out the day-to-day operations of the Division, litigates existing cases, and makes recommendations to open new cases. There is no question that the career staff is where the institutional knowledge of the Division generally resides and is a resource that any appointee should draw upon frequently. However, it is the Assistant Attorney General for Civil Rights and the leadership of the Department who are ultimately responsible for the actions of the Division. This is a tremendous responsibility for the AAG and his or her immediate staff - as it is the AAG who will sit before this Committee and explain the Division's position on controversial issues.

Because of this responsibility, the AAG and his or her staff must independently review, and therefore will sometimes disagree with, the recommendations of career staff. There is nothing inherently wrong with this - indeed, I think the Committee would not react well to an Assistant Attorney General who testified that he reached no conclusions that differed in any way from the recommendations presented to him. Such a "rubberstamp" approach would be, and should be, justly criticized.

Similarly, when the Division makes a mistake - as it did in Torrance, California when it was sanctioned nearly 1.8 million dollars for overreaching in an employment case - it would be no excuse for the AAG to say: "I was merely following the recommendations of the career staff." Therefore, it is the responsibility to "get it right" that obligates the AAG and his or her staff to closely scrutinize the recommendations that come before them.

It therefore seems to me that the important question the Committee should focus on is not whether a particular decision to proceed (or not) with a case was made with the political and career staff in agreement, but whether the decision was correct. And from what I have seen, courts have largely agreed with the positions taken by AAG Kim and his predecessors. Members of this Committee may disagree with those positions, and vigorous questioning of Department officials about them is entirely appropriate, but there is little indication from the courts that, on the whole, the positions of the Division have been anything other than well-grounded in both law and fact. And that, it seems to me, is more important that the narrow process question of whether career staff did or did not agree with a given position taken by the Division.

Setting Priorities

A related issue involving the Division's political appointees is the formation of enforcement priorities for the Division. In particular, the Division's emphasis on human trafficking prosecutions and religious discrimination cases has been criticized in some quarters, most recently in the New York Times, as a shift away from "traditional" civil rights enforcement. Once again, I think these criticisms are largely unfounded, and take an unnecessarily cramped view of the role of the Civil Rights Division.

As an initial matter, new statutes passed at the close of the Clinton Administration provided new weapons to combat both religious discrimination and human trafficking, so enforcement in these areas was bound to increase regardless of the administration. More importantly, however, President Bush, and Attorney General Ashcroft, under whom I served, made clear that combating religious discrimination was a priority and that resources should be directed to make sure that enforcement was vigorous. Once again, some may disagree with their view, but it is clearly within the authority of the Department to set priorities for the Civil Rights Division.

While I served in the Division, I and others worked hard to make sure that religious discrimination cases were a priority. The position of Special Counsel for Religious Discrimination was created to coordinate these cases and Eric Treene has done a spectacular job in that role. The Division's success rate in these types of cases is high - unfortunately there is no shortage of governmental entities that lack an understanding of the rights of people of all faiths (and people of no faith) under our Constitution and laws. I think most Americans are pleased to see the Civil Rights Division's vigorous actions in this area, and there is certainly nothing about

the emphasis placed on these cases while I was at Civil Rights, or the specific positions taken by the Department, that I regret.

Some have expressed concern that emphasizing religious discrimination cases necessarily de-emphasizes what they view as "traditional" civil rights cases involving racial discrimination in public employment or voting. My experience is that the structure of the Division makes this unlikely - the Voting and Employment sections have very little, if anything, to do with most religion cases and the resources used to bring these cases are provided from other parts of the Division (generally the Housing and Education sections). If members of this Committee have concerns about what types of cases are or are not being brought by these sections, it is certainly fair to raise them, but any such analysis or discussion should be, in my mind, independent of the religious discrimination and human trafficking cases. If it were true that an increase of emphasis on non-race-based areas of civil rights truly undermined enforcement of racial discrimination statutes, the importance of disability cases, language-minority cases, police misconduct cases, clinic access cases, prison cases, juvenile facility cases, gender discrimination cases and religious discrimination cases would all be de-emphasized. But vigorous enforcement in all of these areas is part of the Civil Rights Division's mission, and we should avoid any suggestion that enforcement of in any one of these areas comes at the expense of any other.

Enforcement Record

I will let AAG Kim defend himself and the Division's record in this regard, as he will have the most recent information for the Committee. I would like to comment, however, on a criticism that I have heard frequently - that the Division only filed "x" number of cases in a particular area. I can think of few worse measures of whether the Division is doing its job in a given area that the number of "cases filed" and would like to provide a few examples.

First, when I was at the Division, I supervised abortion clinic access cases. I don't recall ever approving a new case under that statute - but that was because I was never asked to because the statute had, in effect, worked. Existing cases had the most prolific violators of the statute under injunction already and no new cases were brought to my attention. Thus, one looking at the "cases filed" statistic might conclude that there was some hostility to the statute when in fact, there was not.

Second, during my tenure at the Division we entered into memoranda of understanding or other resolutions achieving reforms in police departments in numerous cities. Because no lawsuit was filed, these successes would never be captured in a "cases filed" analysis.

Finally, "cases filed" is less important than "cases won" or resolutions achieved. If a problematic voting practice or hiring standard is changed without the expense of litigation, the Division deserves credit, not criticism. None of this is to say that this Committee should not probe vigorously if it fears that certain types of cases are being ignored or that discrimination is going unpunished, but, such conclusion cannot be reached merely by referring to the number of cases filed by the Division.

Thank you for the opportunity to appear before the Committee and I look forward to answering whatever questions the Committee may have.