

Testimony of

# Theodore Shaw

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Testimony of Theodore M. Shaw  
United States Senate Committee on the Judiciary  
Hearing on  
"The 50th Anniversary of the Civil Rights Act of 1957 and its Continuing Importance"

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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. Founded under the direction of Thurgood Marshall, the Legal Defense Fund is the nation's oldest civil rights law firm. We have served as legal counsel for African Americans in most of the country's major racial discrimination cases, in many respects LDF is legal counsel for black America on issues of race.

We are pleased to join the Committee in commemorating the 50th Anniversary of the U.S. Department of Justice Civil Rights Division because historically it has played a crucial role in making the promise of Equal Protection under law meaningful, and its mission remains vital. Importantly, the Division was created in the wake of the Supreme Court's landmark decision in *Brown v. Board of Education*, as part of the first civil rights law since Reconstruction. Its courageous and aggressive enforcement of the new civil rights statutes passed in the 1950's and 1960's opened countless doors for African Americans and other racial minorities. While I have spent the bulk of my legal career as an attorney for the NAACP Legal Defense and Educational Fund, Inc. I began the practice of law as a line attorney at the U.S. Department of Justice in the Civil Rights Division. I joined Justice through the Honors Program in the fall of 1979, and was assigned to the General Litigation Section, which had responsibility for school desegregation, housing and credit discrimination cases .

When I enrolled in law school, I had two dream jobs. One was to work as an attorney for the Civil Rights Division of the Department of Justice. The other was to work for the NAACP Legal Defense Fund, Inc. Neither job was easy to obtain. The Civil Rights I was one of the attorneys who investigated housing and school segregation in Yonkers and who worked on the original complaint and initial discovery.

Division was a storied position from which to do civil rights work. Its reputation had been firmly established during the halcyon days of the Civil Rights Movement, when Assistant Attorney General John Doar was a constant presence who identified himself as a Justice Department lawyer before a mob that was threatening violence to civil rights demonstrators seeking to vindicate the right to vote. At least since the days when Attorney General Robert F. Kennedy wrestled with the Justice Department's role in vindicating the rights of black Americans, the Civil Rights Division had built a staff of career attorneys who were dedicated to civil rights enforcement. To be clear, these attorneys fully understood that their role was to represent the United States, and not any individual or any group of individuals. But in representing our federal government, the justice Department at long last had the authority and the inclination to vindicate the rights of individuals who were discriminated against because of their race, color, or membership in a subordinated group. The history and condition of black Americans were the impetus for the Civil Rights Division's creation and much of its work, but its mission extended to all Americans.

Career attorneys were the backbone of the Civil Rights Division. To be sure, each Administration has the prerogative to make political appointees to the Justice Department and by extension, to its Civil Rights Division. Career attorneys

understood that policies and practices might shift as administrations came and went, but there was also a limit on the politicization of the Justice Department. The core mission of the Civil Rights Division was inviolate, and career attorneys' work on cases filed by the Department was insulated from crass political influence. Under multiple administrations, Republicans and Democrats, the Civil Rights Division had pursued enforcement of our nation's anti-discrimination laws and its career attorneys had continued their course.

My training and experience as a young lawyer in the Civil Rights Division was the best anyone could hope for. I had superb mentors. I got into court often, and was given weighty responsibilities. It was a corps of lawyers who were among the best in the nation. We stood up in court to represent the United States of America in support of the civil rights of those who had long been deprived of the equal protection of the law.

Today, I believe that the Justice Department's Civil Rights Division is a very different place. While it still retains some of the career attorneys whose expertise over the years has served Republican and Democratic administrations alike, in recent years too many of those career attorneys have left or been driven out by political appointees with ideological agendas which have been directly at odds with the traditional mission of the Civil Rights Division, i.e. the protection and vindication of the rights of members of racial minority groups, especially black and brown people.

The Justice Department, on behalf of the federal government, has taken positions which have not only abandoned its traditional role, but which have turned it in the opposite direction. Nowhere has this been more apparent than in the recent Supreme Court consideration of the voluntary school integration cases out of Louisville, Kentucky (*Meredith v. Jefferson County Public Schools*) and Seattle, Washington (*Parents Involved in Community Schools v. Seattle School Districts*). Since the *Brown v. Board of Education* cases, in which Justice argued in support of those challenging school segregation laws, the federal government has played a central role in school desegregation cases. Either Justice or LDF or both, has been involved in a majority of the school desegregation cases litigated since *Brown*. The Justice Department argued in opposition to voluntary school desegregation in the Seattle and Louisville cases, as it did against the University of Michigan's efforts to pursue diversity in student enrollment. One can argue the merits of colorblindness vs. race conscious attempts to achieve diversity or integration, but this fact remains: for the first time in fifty-three years, the Justice Department has argued a case in the Supreme Court against public school desegregation.

The shift of Justice and within the Civil Rights Division is not limited to education cases. It has extended to voting right cases, employment cases and other areas. We at the Legal Defense Fund and within the broader civil rights community have come to regard the Civil Rights Division as wary allies, at best; often we are adversaries.

At its inception, the Division was dedicated exclusively to ridding society of the racial segregation and racial discrimination that permeated virtually every societal structure. Sadly today, while racial, and other forms of, discrimination continue to affect our country, the Division has sharply deviated from its original mission, and the impact can be seen across many areas, as I have noted in previous testimony before this Committee. My colleagues may further describe this recent record, which can and should be corrected. What I would like to do is set a more aspirational tone by offering some thoughts for the future work of the Division.

First, it is important for the Division to maintain its continuity and steadfastness of mission. Priorities can be discharged without abdicating core responsibilities. Civil rights enforcement is not and cannot be a zero sum game in our complex and increasingly diverse society. Protecting African Americans is not inconsistent with protecting Latinos, protecting disabled persons is not inconsistent with protecting women, and protecting citizens who are being discriminated against because of their religious beliefs need not be in tension with doing the same for those whose national origin has subjected them to discrimination. Priorities obviously can and will change from administration to administration but the role of the Division as a protector of marginalized citizens and minorities is its core charge. Taking account of new priorities, and of new or intensified discrimination faced by various groups is appropriate but need not be achieved through the wholesale abandonment of longstanding priorities aimed at addressing continuing inequities and injustice. Adjustments can be made even while earlier commitments and priorities are met or addressed.

Discrimination in our nation has proven to be hard to overcome, and it persists in the arenas of education, voting, housing and employment, and criminal justice, among others. Having a department of the federal government that is

focused and motivated to discharge its anti-discrimination mission is critical to enforcement of the civil rights laws, and also has tremendous practical and symbolic significance. The Civil Rights Division is second to none in terms of the time, resources and capacity it has to bring systemic litigation. While the private bar and the civil rights NGOs such as the Legal Defense Fund can have a profound effect on civil rights law, defining its cutting edge, there is no substitute for the Civil Rights Division's role. Very often a case brought by the Division reverberates and can have industry-wide impact in terms of deterrence and reform. The broad-based injunctive relief that the Division can pursue cannot be matched through the efforts of individual or private lawsuits alone because often the pecuniary interests of plaintiffs lead to much more narrow relief and no institutional reform.

Because of these important considerations, the Civil Rights Division in the future should consider several reforms to address some recently expressed concerns, and to enable it to remain true to its critical role as our federal protectors of marginalized citizens of various types.

In our view, it would be extremely helpful to institutionalize and more clearly define the citizen outreach functions of the Civil Rights Division. There is no substitute for the Division having information about issues and matters happening on the ground. A more clearly defined and executed community outreach program will enable Division priorities to be tested by real world problems and create circumstances for a better accommodation of the tension between policy priorities and the needs of citizens outside Washington.

In this vein, it is critical that the Justice Department consider and explore new ways to develop, enhance and improve its relationship with community groups and civil rights organizations. These community contacts are certain to play an increasingly important role in civil rights enforcement going forward. Regular contacts with community groups enhance the quality of federal civil rights enforcement by helping with the development of the kinds of evidence and testimony necessary to enforce and prosecute these cases effectively. In recent years, certain litigation postures and choices taken by the Attorney General have created much distance between the Justice Department and community organizations. It is important that these relationships be repaired and restored going forward. Greater coordination between the Community Relations Service and the Civil Rights Division may be one way to bring about improvement.

The Division should be required to identify and pursue targeted affirmative investigations in core areas to root out large-scale problems and also to monitor progress in areas of previous litigation. These investigatory priorities should be the subject of Congressional oversight and where actions are not initiated for various reasons, reports should be issued if useful information has been collected. The Division is uniquely situated to conduct these investigations in terms of resources and profile, and the investigations themselves could lead to greater compliance.

In the area of voting, equal and unfettered access to the ballot box is an important goal. Going forward, it is important that the Division consider how to use federal statutes that exist and are enforceable but rarely used. For example, Section 11 (b) of the Voting Rights Act bars conduct deemed intimidating, threatening or coercive to voters. Specifically, Section 11 (b) of the Voting Rights Act states that "no person [...] shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." However, since the Act's inception, the Justice Department has used this provision in only three instances. Intimidating acts preceding an election including aggressive challenges by poll watchers, literature containing false or misleading information, police or law enforcement presence, and outright violence, can create an intimidating atmosphere that discourages voters, particularly minority voters, from freely participating in the political process. Enhancing enforcement efforts of Section 11 (b) represents one way that the Civil Rights Division can more aggressively address ongoing acts of racial intimidation in the voting context.

In the area of education, we recommend a focus on the interface between educational systems and local criminal justice authorities --in other words, the school-to-prison pipeline issue. The problem is the abdication by school authorities of their responsibility to have effective school leadership to address incidents of misbehavior internally rather than calling law enforcement. Increasingly, students are turned over to juvenile or adult criminal justice systems that are even less able to deal with them effectively, resulting in their placement into inappropriate incarceration settings that make it impossible for them ever to catch up educationally.

A glaring recent example of this problem arises in Jena, Louisiana, where several African-American youth are now facing lengthy prison sentences for attempted murder and aggravated assault arising out of racial incidents at a high school.

The Division sues juvenile prison authorities but rarely concentrates on the intake end, including the task of ensuring that discrimination does not produce the intake flow. Careful selection of a test case with compelling facts could be the opportunity to develop a model discipline recordkeeping system that would enable the Division to monitor what goes on and, ideally, to stop these things before they snowball into a pattern of exclusion from education. The Division has both investigative resources and the person-power and monetary resources to address this problem, especially since the Division is in the process of closing out scores of old school desegregation suits where unitary status has been achieved.

Additionally, in the area of education, the Division could take a more active role in monitoring school exclusionary practices such as pushouts, dropouts and suspensions.

In the area of housing, racial steering across the real estate industry is alive and well and contributing to the greater segregation we now see across the country. As we prepare for the 40th Anniversary of the Fair Housing Act in 2008, resources should be committed to bringing systemic cases against those various facets of the housing industry whose practices perpetuate racial segregation across this country.

Given the Supreme Court's ruling in the Seattle and Louisville cases, it is even more incumbent upon the Civil Rights Division to reconsider the link between housing and school segregation. The theory underlying the creation of the General Litigation Section -the connection between school and housing segregation and discrimination -merits re-visitation.

The Civil Rights Division, once one of the Justice Department's crown jewels, should be restored to its place as a primary enforcer of civil rights laws. Its career attorneys ought to be hired without an ideological screening test. Its core mission should be expanded, not abandoned, so that the fight against racial discrimination against minority group members remains central to its charge even while it protects against other forms of discrimination within its mandates.

Thank you for the opportunity to testify. I welcome any questions.

<sup>1</sup>The General Litigation Section was created during the Carter Administration in recognition of the link between school and housing discrimination, as well as the link between housing and credit discrimination. In 1980 the Justice Department filed suit against the city of Yonkers, New York, alleging both school and housing discrimination. The suit was reviewed by the Reagan appointees to the Justice Department to determine whether it was "improperly tiled". After the basis of that review was reported publicly in the press, the case was allowed to continue. However, the Civil Rights Division was reorganized and the General Litigation Section was disbanded.