

THE BUSH ADMINISTRATION AND CIVIL RIGHTS: LESSONS LEARNED

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Among the chief tasks of democratic government, none is more basic than securing the equality of all persons before the law. In our constitutional tradition, especially since *Brown v. Board of Education*,¹ we have often looked to the courts to enforce civil rights on behalf of members of historically disadvantaged groups. But our nation's progress on civil rights has not been the work of courts alone. Many of the civil rights laws we take for granted are testaments to the leadership of the political branches, and no political actor in our modern structure of government has greater power to set a robust civil rights agenda than the President of the United States.

In this article, I examine the civil rights record of President George W. Bush to distill some lessons for the proper administration of justice and for the broader framing of contemporary civil rights challenges. My remarks proceed in two parts. In Part I, I discuss the enforcement of civil rights laws by the U.S. Department of Justice. The record of the Bush Administration reveals a shift away from traditional enforcement priorities and, more significantly, a worrisome erosion of institutional norms of impartiality, professionalism, and nonpartisanship in civil rights enforcement. I propose a few recommendations for new safeguards to restore these fundamental law enforcement norms.

In Part II, I discuss events and initiatives outside of the Department of Justice that are associated more closely and personally with President Bush. I examine three issues in particular: the Bush Administration's handling of the University of Michigan affirmative action cases; the President's signature K-12 education initiative, the

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

No Child Left Behind Act; and the government's response to Hurricane Katrina. The primary lesson is that, although our society shares a broad commitment to diversity and inclusion, we have yet to develop the political will or the policy frameworks to address the social dysfunctions arising from the intersection of race and poverty.

I. CIVIL RIGHTS ENFORCEMENT BY THE DEPARTMENT OF JUSTICE

The Civil Rights Division of the Department of Justice is the nation's foremost civil rights enforcement agency. Created in 1957 by legislation signed by President Eisenhower, the Division began with a specific charge to protect voting rights.² Over five decades, its responsibilities have grown to include enforcement of antidiscrimination laws in employment, education, housing, public accommodations, and the criminal justice system. Today the Division consists of ten sections with over 300 lawyers and a yearly budget of \$114 million.³

Throughout our history, the Civil Rights Division has played a prominent and venerable role. Its early challenges to voting discrimination in the South laid the groundwork for the Voting Rights Act of 1965.⁴ During the 1960s, the Division was instrumental in enforcing *Brown v. Board of Education* in recalcitrant states and school districts.⁵ In the 1970s, the Division's aggressive enforcement of Title VII of the Civil Rights Act of 1964 secured employment

2. See Civil Rights Act of 1957, Pub. L. No. 85-315, §§ 111, 131, 71 Stat. 634, 637–38. The legislation also created a federal Commission on Civil Rights charged with investigating alleged deprivations of voting rights and other violations of the constitutional guarantee of equal protection. See *id.* §§ 101–105, 71 Stat. at 634–36.

3. See U.S. DEP'T OF JUSTICE, FISCAL YEAR 2009 PERFORMANCE BUDGET: CIVIL RIGHTS DIVISION CONGRESSIONAL BUDGET SUBMISSION, Exhibits B and I (2008), available at <http://www.usdoj.gov/jmd/2009justification/pdf/fy09-crt.pdf>. For a helpful overview of the origins, organization, and responsibilities of the Civil Rights Division, see BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE (1997) [hereinafter LANDSBERG, ENFORCING CIVIL RIGHTS].

4. See BRIAN K. LANDSBERG, FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT 148–63 (2007).

5. Title IV of the Civil Rights Act of 1964 authorized the Attorney General of the United States to bring suit in federal court to enforce desegregation in public schools. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 407, 78 Stat. 241, 248. Title IX of the Act authorized the Attorney General to intervene in cases “of general public importance” involving a denial of equal protection of the laws under the Fourteenth Amendment. *Id.* § 902, 78 Stat. at 266–67.

opportunities for qualified women and minorities.⁶ Through these efforts and others, the Civil Rights Division has helped establish a legacy of federal leadership in promoting fair opportunity and equal citizenship for all Americans.

During the Bush Administration, enforcement of civil rights laws waned in several key areas as the Division shifted its priorities. This shift has been amply documented elsewhere,⁷ so I will not discuss it in detail here. Among the key changes, the Civil Rights Division under President Bush filed relatively few cases under section 2 of the Voting Rights Act of 1965,⁸ a law that the Division has traditionally used to combat minority vote dilution.⁹ The Division appeared to displace its traditional concern for the voting rights of African-Americans with a predominant focus on Hispanic voters through its choice of section 2 litigation¹⁰ and through its enforcement of the language access provisions of the Voting Rights Act.¹¹

6. See David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1145–47 (1989) (discussing *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), *EEOC v. Am. Tel. & Tel. Co.*, 556 F.2d 167 (3d Cir. 1977), *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826 (5th Cir. 1975), and *In re Trucking Indus. Employment Practices Litig.*, 384 F. Supp. 614 (J.P.M.L. 1974), among other cases).

7. See, e.g., *Changing Tides: Exploring the Current State of Civil Rights Enforcement Within the Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 139–68 (2007) [hereinafter *Changing Tides*] (testimony and prepared statement of Wade Henderson, President and Chief Executive Officer, Leadership Conference on Civil Rights); THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION 12–48 (William L. Taylor et al. eds., 2007) [hereinafter *EROSION OF RIGHTS*]; Senator Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL'Y REV. 211, 217–27 (2008).

8. 42 U.S.C. § 1973 (2006).

9. The Bush Administration filed fifteen cases under section 2, averaging less than two cases per year. See U.S. Dep't of Justice, Civil Rights Division, Voting Section Litigation: Cases Raising Claims Under Section 2 of the Voting Rights Act, <http://www.usdoj.gov/crt/voting/litigation/caselist.php#sec2cases> (last visited May 15, 2009) [hereinafter *Section 2 Cases*]. By contrast, the Civil Rights Division filed thirty-three cases under section 2 during the six and a half years of the Reagan Administration following the 1982 amendments to the Voting Rights Act (over five cases per year); eight cases during the four years of the first Bush Administration (two cases per year); and thirty-four cases during the eight years of the Clinton Administration (over four cases per year). See Joseph D. Rich et al., *The Voting Section*, in *EROSION OF RIGHTS*, *supra* note 7, at 32, 41.

10. Ten of the fifteen section 2 cases filed during the Bush Administration asserted claims on behalf of Hispanic voters, while four asserted claims on behalf of African-Americans. See *Section 2 Cases*, *supra* note 9.

11. The Bush Administration significantly increased the number of suits filed under section 203 and section 4(f)(4) of the Voting Rights Act, which require covered jurisdictions to provide voting materials in the language of each language minority community. See 42 U.S.C. §§ 1973aa-1a, 1973b(f)(4) (2006); Rich et al., *supra* note 9, at 42. Across the nation, there are 370 language minority communities covered by section 203: 60% are Hispanic, 33% are American Indian or

In the area of employment discrimination, the Bush Administration filed fewer complaints under Title VII of the Civil Rights Act of 1964 than its predecessor and, in particular, fewer Title VII complaints on behalf of African-Americans.¹² Moreover, the Bush Administration sought to narrow the reach of Title VII by filing a Supreme Court amicus brief in *Ledbetter v. Goodyear Tire & Rubber Co.*, arguing that the time window for filing a pay discrimination claim is not reset by each discriminatory paycheck and instead expires 180 days after the first discriminatory act, whether detectable by the affected employee or not.¹³ Although a five-to-four majority of the Court adopted this reading of the limitations period,¹⁴ the decision was swiftly overturned by Congress.¹⁵ The Bush Administration also sided with the employer in *Burlington Northern & Santa Fe Railway Co. v. White* in arguing that Title VII's anti-retaliation provision covers only retaliatory acts that relate to the terms and conditions of employment.¹⁶ The Supreme Court squarely rejected that view.¹⁷

Native Alaskan, and 7% are Asian-American. See Voting Rights Act Amendments of 1992, Determinations Under section 203, 67 Fed. Reg. 48,871, 48,872-77 (July 26, 2002). But almost all of the language access suits filed by the Bush Administration asserted claims on behalf of Hispanic voters. See U.S. Dep't of Justice, Civil Rights Division, Voting Section Litigation: Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act, <http://www.usdoj.gov/crt/voting/litigation/caselist.php#sec203cases> (last visited May 15, 2009). The Bush Administration filed no voting rights complaints on behalf of American Indians or Native Alaskans.

12. See 42 U.S.C. § 2000e (2006). The Bush Administration filed sixty-one complaints under Title VII, compared to ninety-two complaints filed by the Clinton Administration. See Richard S. Ugelow, *The Employment Litigation Section*, in *EROSION OF RIGHTS*, *supra* note 7, at 26, 29 (reviewing data "show[ing] that the [Bush] administration has reduced Title VII enforcement, and this is especially true when it comes to bringing actions on behalf of African Americans"); U.S. Dep't of Justice, Civil Rights Division, Employment Litigation Section, <http://www.usdoj.gov/crt/emp/papers.html> (last visited May 18, 2009).

13. Brief for the United States as Amicus Curiae Supporting Respondent at 6-8, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (No. 05-1074).

14. *Ledbetter*, 550 U.S. at 633-43. In reaching this judgment, the Court rejected the contrary view of nine federal courts of appeals and the Equal Employment Opportunity Commission. *Id.* at 654-56 (Ginsburg, J., dissenting).

15. See Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009) (amending various acts relating to employment "to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice"). The *Ledbetter* decision was a prominent Democratic campaign issue in the 2008 election. See, e.g., *Women's Pay Disparity a Growing Campaign Issue*, NPR MORNING EDITION, Sept. 8, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=94377272>.

16. Brief for the United States as Amicus Curiae Supporting Respondent at 9-20, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (No. 05-259). The brief is styled as "Supporting Respondent" because it urges the Court to affirm the judgment below in favor of the respondent. Most of the brief, however, is devoted to arguing for a narrow view of Title VII's anti-retaliation provision.

These actions and others marked a shift in civil rights enforcement priorities. But it is important to acknowledge that the Bush Administration, like any presidential administration, is entitled to set priorities and shape enforcement in accordance with its policy goals. Even if “the ‘take Care’ clause is a duty, not a license . . . impos[ing] an obligation on the President to enforce duly enacted laws,” the executive branch “has the power to set enforcement priorities and to allocate resources to those problems that, in the judgment of the executive, seem most severe.”¹⁸ The Bush Administration did not enforce employment or voting rights as aggressively as its predecessor, but it devoted significant resources to other issues. For example, the Criminal Section of the Civil Rights Division vigorously enforced the prohibition on human trafficking—in particular, sex trafficking—in the Trafficking Victims Protection Act passed in 2000.¹⁹ In addition, the Department of Justice pursued a visible campaign to protect religious liberty and to combat religious discrimination in employment, education, housing, and public accommodations.²⁰ Further, President Bush supported and signed the ADA Amendments Act of 2008, which overruled several Supreme Court decisions in order to broaden the protective reach of the Americans with Disabilities Act.²¹

However, executive discretion in interpreting and enforcing the law, while broad, is conditioned to a large extent upon technical competence and political accountability. In our constitutional system, the delegation of law enforcement discretion is not an authorization

17. See *Burlington Northern*, 548 U.S. at 63 (“An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace.”) (emphasis in original). The Court explained that “the anti-retaliation provision’s objective would *not* be achieved” unless the provision is read to cover “the many forms that effective retaliation can take.” *Id.* at 63–64 (emphasis in original).

18. Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 670 (1985).

19. 18 U.S.C. § 1591 (2006). The Bush administration steadily increased the budget of the Criminal Section, with most of the new resources devoted to prosecuting sex trafficking while traditional enforcement areas, such as labor trafficking, hate crimes, and police misconduct, saw little change. See Seth Rosenthal, *The Criminal Section*, in *EROSION OF RIGHTS*, *supra* note 7, at 18, 20–23.

20. See U.S. DEP’T OF JUSTICE, REPORT ON ENFORCEMENT OF LAWS AFFECTING RELIGIOUS FREEDOM: FISCAL YEARS 2001–2006 (2007), available at http://www.usdoj.gov/crt/religdisc/ff_report.htm.

21. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. The statute overruled the narrow interpretations of the statutory definition of “disability” in *Toyota Motor Manufacturing, Kentucky Inc. v. Williams*, 534 U.S. 184 (2002), and in *Sutton v. United Airlines*, 527 U.S. 471 (1999) and its companion cases.

to act on political whim. It instead assumes a degree of evenhandedness rooted in professional expertise and institutional tradition, as well as the operation of checks and balances that subject enforcement priorities to public scrutiny and that maintain the rule of law. Nowhere are these safeguards more important than in the Department of Justice and especially in the Civil Rights Division. By this measure, there is cause for concern, for the Bush Administration did not merely shift enforcement priorities. It did so within a highly politicized and unaccountable decisional structure.

A. Politicization of Civil Rights Enforcement

Improper politicization of civil rights enforcement occurred in the enforcement area where politics ought to matter least: voting. Until 2006, when the Republican Party lost control of Congress, the Civil Rights Division saw a systemic deterioration of relations between political leaders and career professionals, with the most severe dysfunctions occurring in the Voting Section.²² Failure to respect the professional judgment of career employees led the Division, in several instances, to take positions antithetical to the interests of minority groups where the applicable law or available evidence pointed to a different conclusion.

Perhaps the most troubling incidents occurred in the Department's handling of preclearance submissions under section 5 of the Voting Rights Act. Under section 5, covered state and local jurisdictions (so designated because of their past discriminatory practices) must obtain federal preclearance before implementing any change in voting procedures.²³ The Department of Justice reviews voting changes to ensure that they do not have either a discriminatory purpose or a discriminatory effect.²⁴ As an internal check on partisan influence, the Department has traditionally assigned responsibility for

22. *Changing Tides*, *supra* note 7, at 114–21 (testimony of Joseph D. Rich).

23. 42 U.S.C. § 1973(c) (2006). Covered jurisdictions may obtain preclearance either from the Department of Justice or through a declaratory judgment action in federal district court. Historically, the declaratory judgment action has been rarely used. *See* Rich et al., *supra* note 9, at 34 (“[S]ince 1965, Section 5 jurisdictions have submitted over 440,000 voting changes to the Department of Justice but have filed only sixty-eight preclearance lawsuits involving perhaps several hundred voting changes.”). Congress reauthorized section 5 of the Voting Rights Act in 2006, and the Supreme Court is now deciding whether the current designations of covered jurisdictions exceed Congress’ enforcement powers under the Fourteenth and Fifteenth Amendments. *See* *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, No. 08-322 (U.S. argued Apr. 29, 2009).

24. 28 C.F.R. § 51.52 (2008).

investigating preclearance submissions and issuing recommendations to the career staff of the Voting Section. The staff recommendation is presented to the Assistant Attorney General for Civil Rights in a memorandum analyzing the facts and relevant law. Historically, through Republican and Democratic administrations, the political leadership has rarely disagreed with staff recommendations, and when disagreement has occurred, political leaders have explained in writing their reasons for rejecting staff recommendations.²⁵ In recent years, this process has been undermined.

In December of 2001, the Department of Justice received a preclearance submission for a new congressional redistricting plan ordered by a Mississippi state court. While the submission was pending, the Republican Party persuaded a federal court to order an alternative plan if the state court plan was not precleared by the end of the official sixty-day window for Department of Justice review.²⁶ After reviewing the submission, the career staff unanimously agreed that the state court plan complied with section 5 and recommended that it be precleared. However, the political staff rejected the recommendation and instead extended the review period to seek more information from the state on whether the fact that a state court, not a state legislature, had ordered the plan would affect preclearance, despite no legal basis to think it would. When the sixty-day window passed with no preclearance decision, the federal court put in place the Republican-favored plan.²⁷

Partisan influence also appeared to affect the Department's handling of the Texas mid-decade congressional redistricting plan conceived by House Majority Leader Tom DeLay.²⁸ In a detailed seventy-three page memorandum analyzing the impact of the plan on minority voting strength, a seven-member team of nonpartisan career staff, along with the section chief, unanimously determined that the plan would have retrogressive effect and recommended against preclearance.²⁹ But the Department, without explanation, precleared

25. Rich et al., *supra* note 9, at 38.

26. See *Smith v. Clark*, 189 F. Supp. 2d 529 (S.D. Miss. 2002); 28 C.F.R. § 51.9 (2008); see also *id.* § 51.37 (authorizing the Attorney General to request additional information from the submitting jurisdiction and to reset the sixty-day review period).

27. Rich et al., *supra* note 9, at 36–37; Kennedy, *supra* note 7, at 219 & n.34.

28. Dan Eggen, *Justice Staff Saw Texas Districting as Illegal: Voting Rights Finding on Map Pushed by DeLay Was Overruled*, WASH. POST, Dec. 2, 2005, at A1.

29. Section 5 Recommendation Memorandum (Dec. 12, 2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf>.

the plan in December of 2003, and the Texas Republican delegation gained five seats in Congress in 2004.³⁰ Two years later, the Supreme Court held that the plan violated section 2 of the Voting Rights Act by improperly diluting Latino voting strength.³¹

Further, in August of 2005, the Department precleared a Georgia law requiring government-issued photo identification in order to vote at the polls, just one day after a fifty-one-page staff memorandum had recommended against preclearance.³² The reviewing staff, by a four-to-one vote, determined that “blacks will [sic] disparately impacted compared to whites” based on “the totality of the evidence” and that the state failed to show non-retrogression because it never “conducted any analysis or presented any data regarding . . . racial disparities in access to various forms of photo identification.”³³ After the law went into effect, a federal court enjoined its enforcement on constitutional grounds, finding that it “imposes ‘severe’ restrictions on the right to vote,” “constitutes a poll tax,” and “is most likely to prevent Georgia’s elderly, poor, and African-American voters from voting.”³⁴

The integrity of the preclearance process has also been damaged in other ways. At some point before the Georgia preclearance

30. See Janet Hook, *Ambitious Goals Will Test GOP's New Muscle*, L.A. TIMES, Nov. 23, 2004, at A1 (reporting that “Republicans gained five seats in Texas, thanks to a bold redistricting plan championed by DeLay”).

31. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 427–42 (2006). Justice Stevens took the unusual step of observing that “[n]otwithstanding the unanimous opinion of the staff attorneys in the Voting Section of the Justice Department that [the plan] was retrogressive and that the Attorney General should have interposed an objection, the Attorney General elected to preclear the map, thus allowing it to take effect.” *Id.* at 480 (Stevens, J., concurring in part and dissenting in part). The Court agreed with the staff memorandum that, with respect to Latino voters, the plan “undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive.” *Id.* at 439 (majority opinion). But the Court did not find that the plan diluted black voting strength in violation of section 2, even though the staff memorandum had found retrogression in black voting strength in violation of section 5. See *id.* at 443–47; *cf. id.* at 446 (noting differences between section 2 and section 5 standards).

32. Dan Eggen, *Criticism of Voting Law Was Overruled: Justice Dept. Backed Georgia Measure Despite Fears of Discrimination*, WASH. POST, Nov. 17, 2005, at A1.

33. Section 5 Recommendation Memorandum at 31 (Aug. 25, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504.html>.

34. *Common Cause/Georgia v. Billups*, 406 F. Supp.2d 1326, 1365–66, 1370 (N.D. Ga. 2005). Although the Supreme Court upheld Indiana’s voter identification law in *Crawford v. Marian County Election Board*, 128 S. Ct. 1610 (2008), the Indiana plaintiffs did not make the evidentiary showing of discriminatory disenfranchisement that the Georgia plaintiffs had made. See *Ind. Democratic Party v. Rotika*, 458 F. Supp.2d 775, 831–32 (S.D. Ind. 2006), *aff’d*, *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff’d*, 128 S. Ct. 1610 (2008).

decision, the political leadership barred career staff from making recommendations on section 5 submissions, limiting the staff role to investigation and analysis.³⁵ Moreover, the four staff members who counseled against preclearance of the Georgia law were reprimanded while the one dissenting staff member received a bonus for his work in the case.³⁶ In addition, staff positions within the Voting Section were cut through repeated failures to fill vacated posts during a period of discontent and high turnover, making it difficult for the Department of Justice to carefully review all section 5 submissions.³⁷

Partisan considerations appear to have influenced other voting rights matters. Despite filing few amicus briefs throughout the Bush Administration, the Civil Rights Division opted to file three such briefs on the eve of the 2004 election in the battleground states of Florida, Michigan, and Ohio.³⁸ Each brief argued that there is no private right of action to enforce the counting of provisional ballots under the Help America Vote Act (HAVA).³⁹ In all three cases, the courts rejected the government's position.⁴⁰ Moreover, in enforcing the National Voter Registration Act, the Department devoted far more effort to pushing states and local jurisdictions to remove ineligible voters from the rolls—despite no evidence of fraud—than to protecting the right of eligible voters to have access to registration opportunities.⁴¹

These incidents were part of a broader pattern of undue and, in some cases, unlawful political influence in civil rights matters and

35. Dan Eggen, *Staff Opinions Banned in Voting Rights Cases*, WASH. POST, Dec. 10, 2005, at A3.

36. Kennedy, *supra* note 7, at 220.

37. *Changing Tides*, *supra* note 7, at 118 (testimony of Joseph D. Rich).

38. Kennedy, *supra* note 7, at 225–26.

39. *Id.*

40. *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004) (holding that “[t]he rights-creating language of HAVA section 302(a)(2) is unambiguous” and enforceable under § 1983); *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1078 (N.D. Fla. 2004) (HAVA “clearly creates a federal right enforceable under § 1983.”); *County Democratic Party v. Land*, 347 F. Supp. 2d 404, 426 (E.D. Mich. 2004) (holding that HAVA contains “unmistakable rights-focused language” that “establish[es] a private right of action”).

41. See U.S. Dep’t of Justice, Civil Rights Division, Cases Raising Claims Under the National Voter Registration Act, http://www.usdoj.gov/crt/voting/litigation/recent_nvra.html (last visited May 20, 2009); see also Brief for the United States as Amicus Curiae Supporting Respondents at 28–30, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008) (Nos. 07-21 & 07-25) (supporting the constitutionality of Indiana’s voter identification law on the ground that “the temptation [to engage in voter fraud] is obvious and the consequences of undeterred and undetected violations are enormous,” despite citing no evidence of voter fraud in Indiana).

beyond. Within the Civil Rights Division, the political leadership reassigned many career employees who were seen as insufficiently loyal to the Bush Administration's political views.⁴² Regular channels of communication between political appointees and career attorneys on policy issues were narrowed or eliminated.⁴³ Political leaders also took direct control of hiring decisions, abandoning longstanding hiring practices that relied principally on the professional, nonpartisan judgment of career staff.⁴⁴ The shift resulted in substantially increased hiring of attorneys with strong conservative credentials but little or no background in civil rights enforcement.⁴⁵ After an extensive investigation, the Department of Justice's Inspector General concluded that political appointees in charge of hiring for the Honors Program and the Summer Law Intern Program "took political or ideological affiliations into account in [screening] candidates in violation of Department policy and federal law."⁴⁶ In two additional reports, the Inspector General found that several political appointees violated federal law and Department policy by considering political or ideological affiliations in screening candidates for Assistant U.S. Attorney, immigration judge, and career positions in the Civil Rights Division.⁴⁷

42. U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION 35-45 (2008), available at <http://www.usdoj.gov/oig/special/s0901/final.pdf> [hereinafter OIG CIVIL RIGHTS DIVISION REPORT].

43. Kennedy, *supra* note 7, at 213-15.

44. See Charlie Savage, *Civil Rights Hiring Shifted in Bush Era: Conservative Leanings Stressed*, BOSTON GLOBE, July 23, 2006, at A1. Commenting on the traditional hiring process in which career staff played a central role, Charles Cooper, a former deputy assistant attorney general for civil rights in the Reagan administration, said: "There was obviously oversight from the front office, but I don't remember a time when an individual went through that process and was not accepted. I just don't think there was any quarrel with the quality of individuals who were being hired. And we certainly weren't placing any kind of political litmus test on . . . the individuals who were ultimately determined to be best qualified." *Id.* (internal quotation marks omitted).

45. *Id.*

46. U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING IN THE DEPARTMENT OF JUSTICE HONORS PROGRAM AND SUMMER LAW INTERN PROGRAM 99 (2008), available at <http://www.usdoj.gov/oig/special/s0806/final.pdf> [hereinafter OIG HONORS PROGRAM REPORT].

47. OIG CIVIL RIGHTS DIVISION REPORT, *supra* note 42, at 64; U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 135-38 (2008), available at <http://www.usdoj.gov/oig/special/s0807/final.pdf> [hereinafter OIG GOODLING REPORT].

B. Additional Safeguards Against Improper Politicization

The lesson learned from recent experience is that existing safeguards are not sufficient to protect against the politicization of civil rights enforcement. Many of those safeguards take the form of agency practices and traditions established over the decades to strike an appropriate balance between evenhanded law enforcement and the legitimate prerogative of each administration to set priorities. Hopefully new political leaders will restore and adhere to the traditional safeguards. The problem, however, is that informal safeguards do not provide an adequate check when political leaders are prepared to disregard them. The abuses of the Bush Administration suggest that additional mechanisms are needed to ensure the fair administration of civil rights laws.

1. Congressional oversight

As a starting point, what role might Congress play? In theory, Congress is the President's political rival and the ultimate overseer of policy development and implementation. Congressional oversight is supposed to promote transparency in executive action and to broadly ensure faithful execution of the laws. In practice, however, competition between political parties often displaces competition between the political branches as the primary factor regulating separation of powers between Congress and the President. As Daryl Levinson and Richard Pildes have observed, "[t]he practical distinction between party-divided and party-unified government rivals in significance, and often dominates, the constitutional distinction between the branches in predicting and explaining interbranch political dynamics."⁴⁸

It is unsurprising, then, that Congress exercised virtually no meaningful oversight of the Civil Rights Division between the midterm election of 2002 and the midterm election of 2006, a period in which Republicans controlled both houses of Congress. Neither the House nor the Senate convened an oversight hearing by a full committee to examine the activities of the Civil Rights Division during the four years of one-party rule,⁴⁹ the period in which voting

48. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006).

49. The only oversight hearing I could find between 2002 and 2006 was a brief subcommittee hearing in 2004. See *Civil Rights Division of the U.S. Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H.*

rights enforcement became politicized. After control of Congress changed hands in 2006, legislative oversight became more vigorous.⁵⁰

The erosion of checks and balances during one-party rule has prompted proposals to empower the minority party in Congress, for example, by allowing the minority to conduct oversight hearings or by requiring a supermajority vote to authorize certain executive actions.⁵¹ Such proposals raise concerns about legislative gridlock; some would point to the increasing use or threat of the filibuster as an example.⁵² Nevertheless, the minority party has incentives to use any new checking mechanisms judiciously. Aggressive oversight that is perceived as an unreasonable dilatory tactic or a usurpation of executive discretion not only exposes the minority to loss of public support but also licenses the majority party in Congress to retaliate with procedural tools for limiting minority influence and participation.

Apart from possible gridlock, the more serious hurdle to empowering the minority during one-party rule is practical. Under what circumstances would the ruling majority agree to enact such minority-empowering measures? In periods of divided government, it is unlikely that the legislative majority would opt to strengthen the President's party in Congress. And as we enter another period of one-party rule, the thought of newly elected Democrats enacting safeguards for the benefit of the Republican minority seems fanciful,

Comm. on the Judiciary, 108th Cong. (2004). A similar lack of oversight occurred in many areas beyond civil rights. See U.S. H. OF REPS. COMM. ON GOVERNMENT REFORM—MINORITY STAFF, SPECIAL INVESTIGATIONS DIVISION, CONG. OVERSIGHT OF THE BUSH ADMINISTRATION (2006); Tara M. Sugiyama & Marisa Perry, Note, *The NSA Domestic Surveillance Program: An Analysis of Congressional Oversight During an Era of One-Party Rule*, 40 U. MICH. J.L. REFORM 149 (2006); Susan Milligan, *Congress Reduces Its Oversight Role: Since Clinton, a Change in Focus*, BOSTON GLOBE, Nov. 20, 2005, at A1.

50. E.g., *Oversight Hearing on Voter Suppression Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 110th Cong. (2008); *Civil Rights Division Oversight: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007); *Oversight Hearing on the Voting Section of the Civil Rights Division of the U.S. Department of Justice Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 110th Cong. (2007); *Changing Tides*, *supra* note 7.

51. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2342 (2006); Levinson & Pildes, *supra* note 48, at 2370–72, 2375; cf. Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 J. POL. PHIL. 74, 75 (2005) (arguing that “submajority rules” serve “to enable a minority to force public accountability and transparency upon the majority, rendering decisionmaking more principled and more deliberative”).

52. David Herszenhorn, *How the Filibuster Became the Rule*, N.Y. TIMES, Dec. 2, 2007, Week in Review, at 5.

just as it is naïve to think the Republican majority ever contemplated empowering the Democratic minority between 2002 and 2006. It is unclear how new minority protections could gain traction precisely because our political system is so polarized today.⁵³

Moreover, even if Congress were to authorize minority oversight or to establish, as the Citizens' Commission on Civil Rights has proposed, a new bipartisan committee of the House and Senate to monitor civil rights,⁵⁴ there remains a more basic question concerning the efficacy of congressional oversight. As Eric Posner and Adrian Vermeule have explained, Congress faces a number of institutional obstacles to effective monitoring of executive action: Congress lacks information and expertise that the executive branch has; Congress faces collective action problems that weaken the impetus to protect legislative prerogatives; the monitoring capacities of congressional committees are dwarfed by the sheer scale of executive branch operations; and Congress often suffers a credibility gap vis-à-vis the President in public opinion.⁵⁵ These challenges should induce a sober assessment of what we can expect from the oversight mechanism. That is not to say that vigilant oversight of the Civil Rights Division from 2002 to 2006 would have made no difference. It is to say that reliably curbing or preventing abuses of executive discretion will probably require not only interbranch but also intrabranch solutions.

2. Internal procedures to improve transparency and accountability

The recent politicization of civil rights enforcement suggests that stronger checks are needed within the Department of Justice to

53. A statute occasionally cited as a minority protection is 5 U.S.C. § 2954 (2007), which authorizes seven members of the House Committee on Governmental Operations or five members of the Senate Committee on Governmental Affairs to request from “[a]n Executive agency” any information “relating to any matter within the jurisdiction of the committee.” See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 887 (2007) (citing 5 U.S.C. § 2954 as authorization for oversight by a “partisan minority”). That provision, however, was adopted in 1928 to preserve Congress’ power to request information as part of a housekeeping statute discontinuing certain reports that executive agencies had previously been required to submit to Congress. See H.R. REP. NO. 70-1757, at 6 (1928); S. REP. NO. 70-1320, at 4 (1928); see also Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 362–63 (2002) (discussing history of the statute). Section 2954 had nothing to do with protecting partisan minorities, as evidenced by the fact that the original Senate committee affected by the provision (i.e., the Senate Committee on Expenditures, see Act of May 29, 1928, ch. 901, § 2, 45 Stat. 996) had only seven members. See 69 CONG. REC. 481 (1927) (listing members of Senate standing committees, including the Senate Committee on Expenditures in the Executive Departments).

54. EROSION OF RIGHTS, *supra* note 7, at 8–9.

55. Posner & Vermeule, *supra* note 53, at 884–90.

proceduralize and professionalize the administration of law. There is a risk, however, that moving the pendulum too far in this direction will create undue obstacles to presidential leadership and innovation. Many important changes will need to come from the appointment of new leaders with unimpeachable integrity and from the tone and norms they establish. With that in mind, let me discuss three strategies: first, better insulating the career staff from political caprice; second, enhancing transparency in agency decisionmaking; and third, pushing important decisions up the agency hierarchy in order to foster accountability. None of these measures would directly limit the substantive policy goals that a given administration may wish to pursue, but they would improve transparency and accountability in the pursuit of those goals.

The importance of career staff in the Department of Justice, as in other agencies, lies in the expertise, nonpartisanship, and long-term perspective they bring to executing the law. Friction between career staff and political appointees is not surprising given the different time horizons that shape their approach to law enforcement, the room for reasonable disagreement in interpreting the law, and “the lack of a concrete client.”⁵⁶ Such friction is, by design, an internal check that leavens the Department’s pursuit of administration policy with attention to institutional history and core law enforcement duties. This internal check cannot function properly unless career staff are hired on the basis of merit, not politics, and, once hired, have the practical ability to make professional judgments without fear of reprisal.

The politicization of personnel decisions during the Bush Administration occurred not because of substantive gaps in existing law or Department policy, but because political leaders appear to have violated existing prohibitions. Many recommendations for corrective action now being discussed focus on vigorous and accurate communication of personnel rules to Department employees, job candidates, and the general public, as well as proper training for all supervisors with authority to make personnel decisions.⁵⁷ Although these steps are needed, what is most troubling about the recent period is that improper acts of politicization continued for many years, with the first official accounting of those acts issued in 2008 by the

56. LANDSBERG, ENFORCING CIVIL RIGHTS, *supra* note 3, at 156.

57. OIG CIVIL RIGHTS DIVISION REPORT, *supra* note 42, at 65; OIG GOODLING REPORT, *supra* note 47, at 139; OIG HONORS PROGRAM REPORT, *supra* note 46, at 101–02; Kennedy, *supra* note 7, at 228.

Inspector General. Given the individual toll on the reputations and livelihoods of career employees as well as the institutional toll on the Department's efficacy and credibility, the failure to correct improper personnel decisions in real time raises serious questions about the adequacy of existing mechanisms for complaints, investigations, and remedies.⁵⁸ This concern calls for a careful review of the overlapping jurisdictions of the Department's Inspector General and Office of Professional Responsibility, the United States Office of Special Counsel,⁵⁹ and the Merit Systems Protection Board. Such a review, commissioned either by Congress or by the Attorney General, should aim to clarify the procedure for reporting and timely investigating allegations of misconduct going forward.

Equally important is the need for genuine accountability when misconduct has occurred. Under current law, an employee who has committed a prohibited personnel practice is subject to discharge, demotion, suspension, reprimand, a five-year debarment from federal employment, and a civil fine of \$1,000.⁶⁰ But these disciplinary options do not apply to Senate-confirmed presidential appointees.⁶¹ Further, the recent Inspector General reports on politicized hiring observed that political appointees who have violated the law but who have voluntarily resigned from the Department "are no longer subject to discipline by the Department for their actions."⁶²

In addition to stronger personnel policies, there is a need for greater transparency in the Department of Justice's enforcement decisions. This is perhaps most true with respect to preclearance submissions under section 5 of the Voting Rights Act because, as the Texas mid-decade redistricting controversy vividly demonstrated, "preclearance decisions can directly affect who gets elected to office."⁶³ In this process, the Department's role is essentially

58. See Kennedy, *supra* note 7, at 228–29.

59. See 5 U.S.C. §§ 1211–1219 (2007); cf. ELAINE KAPLAN & TIM HANNAPEL, REVITALIZING THE U.S. OFFICE OF SPECIAL COUNSEL: SUGGESTIONS FOR THE NEXT ADMINISTRATION (American Constitution Society Issue Brief 2008), available at <http://www.acslaw.org/files/Kaplan%20FINAL.pdf>.

60. See 5 U.S.C. § 1215(a)(3) (2007) (authorizing the Merit Systems Protection Board to order disciplinary actions against an employee upon written complaint by the Office of Special Counsel, with due process afforded to the employee).

61. See *id.* § 1215(b) (authorizing the President to take "appropriate action" in such cases in lieu of the Merit Systems Protection Board process).

62. OIG CIVIL RIGHTS DIVISION REPORT, *supra* note 42, at 64; OIG GOODLING REPORT, *supra* note 47, at 138; OIG HONORS PROGRAM REPORT, *supra* note 46, at 99.

63. Rich et al., *supra* note 9, at 36.

adjudicatory and in most cases final. A decision to preclear certifies that a voting change satisfies section 5 and is not judicially reviewable, although it does not bar litigation to enjoin the change under other applicable laws.⁶⁴ A decision to object does not bar the submitting jurisdiction from going to federal court to seek a declaratory judgment that the voting change satisfies section 5,⁶⁵ but this litigation option is rarely used.

Under current law, a decision to object must be accompanied by a written explanation.⁶⁶ However, the Department's traditional practice has been to send "a fairly cursory letter to the submitting jurisdiction, which lacks a detailed account of the facts and law that went into the determination."⁶⁷ Although the staff memorandum informing the decision may be obtained under the Freedom of Information Act, the Department has no policy of voluntarily disclosing the record of decision. This inhibits public understanding of the section 5 process and effectively shields the application of section 5 from careful scrutiny. Just as the litigation option for preclearance typically results in a decision supported by a written record, the administrative preclearance process should do the same in order to foster public confidence that the law is being applied consistently from case to case. Neither confidentiality nor efficiency concerns outweigh the benefits of transparency and accountability that would accompany public disclosure of the reasons underlying the Department's decisions to object.⁶⁸

Moreover, this disclosure requirement should apply not only to decisions to object but also to decisions to preclear any voting change that presents a substantial question under section 5. Under current law, a decision to preclear need not be accompanied by *any* written

64. 28 C.F.R. § 51.49 (2008).

65. *Id.* §§ 51.10, 51.44(c).

66. *Id.* § 51.44(a) (requiring that when the Attorney General interposes an objection, "[t]he reasons for the decision shall be stated").

67. Kennedy, *supra* note 7, at 232 n.80.

68. *See id.* at 232. As for efficiency, a decision to object would, in most cases, require nothing more than releasing the underlying staff memorandum, whose traditionally high quality would tend to build confidence in the decisionmaking process. In the rare case where the Department interposes an objection against the recommendation of career staff, the political leadership would need to provide a public statement of reasons. As for confidentiality, a public statement of reasons for a decision need not disclose the details of the deliberative process. That is analogous to what we expect from adjudication in the courts: we do not insist on knowing what Supreme Court Justices discuss in conference, but we do expect a public statement of the reasons that shape any final decision.

statement of reasons,⁶⁹ and the Texas redistricting case and Georgia voter identification case demonstrate the hazards of this practice. In principle, there is no reason why public disclosure of reasoning should be less important when the Department makes a decision to preclear instead of a decision to object; both are highly consequential. In practice, however, the sheer volume of submissions resulting in preclearance makes it unworkable to require a full statement of reasons in every case.⁷⁰ Thus, Department regulations should limit the disclosure requirement to submissions that present a “substantial question” under section 5.

Of course, we can argue over what constitutes a substantial question,⁷¹ but there is little doubt that the Texas and Georgia submissions meet the standard. Those cases suggest that, at a minimum, a substantial question exists—and a public statement of reasons should be required—when the Department makes a decision to preclear in contravention of a staff recommendation to object. Beyond that, there may be cases that present sufficiently close questions as to warrant public explanation of a decision to preclear, and the Attorney General should have final and unreviewable authority to make those determinations. The exercise of this authority would be checked in two ways. First, in any case where the Attorney General finds no substantial question under section 5, the preclearance submission and any written record of decision (or lack thereof) would still be subject to disclosure under the Freedom of Information Act or a congressional subpoena. Second, although the section 2 vote dilution standard is different from the section 5 retrogression standard, the overlap between the standards means that the substantiality of a question under section 5 may occasionally be revealed by litigation under section 2, as the 2006 redistricting case

69. See 28 C.F.R. §§ 51.41, 51.42 (2008).

70. See Rich et al., *supra* note 9, at 35 (“From 2001 to 2005, Section 5 jurisdictions submitted over 81,000 voting changes to the Department in a total of almost 25,000 submissions.”). For this and other reasons, judicial review of preclearance decisions does not seem a viable reform. See Nathaniel Persily, *The Promises and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 215–16 (2007); Nathaniel Persily, *Options and Strategies for Renewal of Section Five of the Voting Rights Act*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 223, 232 (David L. Epstein et al. eds., 2006).

71. The standard is not unfamiliar in the context of administrative appeals. See, e.g., 30 U.S.C. § 823(d)(2)(A)(ii)(IV) (2006) (authorizing discretionary review by the Federal Mine Safety and Health Review Commission of administrative decisions that present “[a] substantial question of law, policy or discretion”); 33 U.S.C. § 921(b)(3) (2006) (authorizing the Benefits Review Board “to hear and determine appeals raising a substantial question of law or fact” concerning longshore and harbor workers’ compensation).

from Texas demonstrates.⁷² These checks would help keep the Attorney General honest in identifying preclearance submissions that present a substantial question under section 5.

Overall, the disclosure requirement is unlikely to be onerous. In recent times, among the thousands of preclearance submissions reviewed each year, the Department of Justice has objected to an average of ten voting changes per year.⁷³ If the number of submissions that present a substantial question and ultimately gain preclearance is of a comparable magnitude, then the Department of Justice would need to disclose written reasons for only a few dozen section 5 decisions each year. This limited body of administrative jurisprudence would promote transparency and regularity in an important domain of decisionmaking.

Another way to foster accountability is to assign responsibility for key decisions to higher levels of political authority within the Department of Justice. This may seem counterintuitive in light of the earlier discussion on strengthening the role of career staff. But consider an analogy to the idea of “presidential administration,” which Elena Kagan describes as a mode of governance that “enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power,” and that “establishes an electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former.”⁷⁴ Of course, moving decisions up the Department of Justice hierarchy is not the same as moving decisions onto the President’s desk because neither the Attorney General nor his political subordinates have the same visibility or electoral accountability as the President. Moreover, there are good reasons not to subject law enforcement decisions to direct presidential control. But because the Attorney General and other presidential appointees in the Department are publicly identified with the President, decisionmaking by those leaders comes with at least some of the “visibility,” “political responsibility,” and “publicizing of the bureaucracy” that presidential administration entails.⁷⁵

72. See *supra* note 31 and accompanying text.

73. See Rich et al., *supra* note 9, at 35 (noting that the Department of Justice interposed objections to forty-eight voting changes in forty submissions from 2001 to 2005, and to fifty-five voting changes in thirty-two submissions from 1996 to 2000). The vast majority of voting changes precleared by the Department of Justice do not present difficult questions under section 5.

74. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001).

75. *Id.* at 2332–33.

Moving key decisions up the political hierarchy raises two concerns, however. First, there is a practical limit to the number of decisions that the Attorney General or other top officials can meaningfully make. Loading their inboxes with decisions that they must personally “own” may simply lead to indecision and delay. Second, assigning more decisions to top officials may dilute accountability if monitoring mechanisms cannot keep pace. It may be politically difficult, for example, to bring the Attorney General before a congressional committee more than once or twice a year. The time and political bandwidth available in such hearings may be insufficient to probe the full range of decisions for which the Attorney General is personally responsible. If that is the case, it may be better to assign decisions to subordinate officers whom a congressional committee could more easily and regularly call to testify.

The challenge, then, is to establish appropriate filters so that the locus of decisionmaking appropriately calibrates the importance of a given decision with the desired degree of accountability. The current administration should examine whether the current filters are working properly. For example, the Attorney General has delegated responsibility and authority for section 5 determinations to the Assistant Attorney General for Civil Rights, and the authority to preclear a voting change (but not to object) has been further delegated to the chief of the Voting Section.⁷⁶ These delegations work well in most cases. For the few cases of serious controversy and consequence, however, perhaps it makes sense to assign nondelegable authority to the Attorney General. One possible filter is to task the Attorney General with the final decision in the rare cases where the Department ultimately rejects the staff recommendation. As we have seen, those are the cases where transparency and accountability are most needed.

Proposals such as these merit discussion in the new administration led by President Obama. That discussion must begin with recognition that the Department of Justice occupies a special place in the federal government. The American people rightly expect the Department, more than any other agency, to act with integrity, impartiality, and respect for the rule of law. Each administration is entitled to its policy priorities, but no administration is entitled to corrupt the process of law enforcement for partisan ends. This admonition applies with

76. 28 C.F.R. § 51.3 (2008).

special force to the instruments of government charged with protecting the historically disenfranchised members of our society.

II. PRESIDENTIAL LEADERSHIP

Enforcement of the civil rights laws is the bare minimum of executive responsibility. So let me now discuss other activities over the past eight years that speak to President Bush's legacy on civil rights. Because presidential leadership provides a rough barometer of public attitudes and concerns, focusing on actions personally associated with President Bush may help us to interpret the nation's current understandings of civil rights. I will offer some insights in this vein by discussing three high-profile events: first, the development of the Bush Administration's position before the U.S. Supreme Court in the University of Michigan affirmative action cases; second, the passage of the No Child Left Behind Act; and third, the Bush Administration's response to Hurricane Katrina.

A. Diversity

In our history, it is rare for the President to speak at length to the American public about a Supreme Court case. And it is even more rare, perhaps unprecedented, for the President to appear on national television for the specific purpose of explaining his legal position in a pending case. But that is what President Bush did on Wednesday afternoon, January 16, 2003, in a seven-minute address from the Roosevelt Room, discussing the University of Michigan affirmative action cases.⁷⁷

The President's address was mostly devoted to explaining why he thought the undergraduate and law school affirmative action policies amounted to racial quotas. "Quota systems," the President said, "are divisive, unfair and impossible to square with the Constitution." But the most significant aspect of the speech, as it turns out, was what the President did not say. That became clear the next day when, just minutes before the Supreme Court's midnight deadline, the Solicitor General filed the Administration's amicus briefs in the Michigan cases.

77. Remarks on the Michigan Affirmative Action Case, 39 WKLY. COMP. PRES. DOC. 71 (Jan. 15, 2003) [hereinafter Remarks], available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/01/20030115-7.html>.

A decade ago, when I graduated from law school, the law did not bode well for affirmative action in higher education. In 1995, the Supreme Court had consolidated two decades of doctrinal moves toward colorblindness into a toughly worded strict scrutiny standard.⁷⁸ In 1996, California passed a state constitutional ban on affirmative action in public education, employment, and contracting,⁷⁹ and the Fifth Circuit in *Hopwood v. Texas* invalidated the use of affirmative action by the University of Texas Law School, dismissing Justice Powell's opinion in the *Bakke* case as the ruminations of a single Justice.⁸⁰ Moreover, the swing vote on the Supreme Court, Justice O'Connor, had played a leading role in casting constitutional doubt on affirmative action. In 1989, she hinted that affirmative action must be "strictly reserved for remedial settings,"⁸¹ and in 1990, she said that "[m]odern equal protection doctrine has recognized only one [compelling] interest [for using race]: remedying the effects of racial discrimination."⁸² When Barbara Grutter and Jennifer Gratz sued the University of Michigan in 1997, there was every reason to think that the Supreme Court was ready to close the door on using race to achieve an educationally diverse student body.

Ending affirmative action has long been one of the goals of the conservative legal movement, and President Bush appointed two Justices to the Supreme Court who are highly skeptical of race-conscious government action.⁸³ It is notable, then, that neither President Bush's speech nor the Administration's brief in the Michigan cases urged the Court to reject the diversity rationale and put the final nail in the coffin. Instead, the Administration attacked the Michigan policies under the constitutional narrow tailoring requirement while affirming diversity in higher education as a compelling interest. "I strongly support diversity of all kinds, including racial diversity in higher education," President Bush said in his

78. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

79. CAL. CONST. art. I, § 31.

80. *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (discussing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978) (opinion of Powell, J.)).

81. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

82. *Metro Broad. v. FCC*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting).

83. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007) (opinion of Roberts, C.J., joined by Scalia, Thomas & Alito, JJ.) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part, joined by Alito, J.) ("It is a sordid business, this divvying us up by race.").

speech. “America is a diverse country, racially, economically, and ethnically. And our institutions of higher education should reflect our diversity. A college education should teach respect and understanding and goodwill. And these values are strengthened when students live and learn with people from many backgrounds.”⁸⁴

By declining to call for either a categorical prohibition on the use of race or a reconsideration of Justice Powell’s opinion in *Bakke*, President Bush disappointed conservatives who have long insisted that anything short of a blanket rule will invite university officials to engage in more and more creative forms of affirmative action. And it must have been particularly galling to those conservatives that the Supreme Court, in upholding educational diversity as a compelling interest, directly quoted the Administration’s brief: “The United States, as *amicus curiae*, affirms that ‘[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.’ And, ‘[n]owhere is the importance of such openness more acute than in the context of higher education.’”⁸⁵

Critics on the left might say that President Bush was trying to have it both ways: support diversity, but oppose any legal standard that actually advances it. Another interpretation is that the President opted for a narrow argument because he thought it was the most likely approach to convince Justice O’Connor to invalidate the Michigan policies.⁸⁶ Perhaps these explanations are plausible. At the same time, however, there seems to be more to the story.

Does President Bush believe in diversity? It is hard to answer such a question, but we can look for clues in at least one set of important decisions: his Cabinet appointments.⁸⁷ Over eight years, President Bush made forty-seven Cabinet-level appointments: seven were women, and ten were racial or ethnic minorities. By comparison, President Clinton made forty-three appointments: eight were women, and fourteen were racial or ethnic minorities. President Bush’s Cabinet was more diverse than his father’s, and it was far more

84. Remarks, *supra* note 77.

85. *Grutter v. Bollinger*, 539 U.S. 306, 331–32 (2003) (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Grutter*, 539 U.S. 306 (No. 02-241)).

86. Linda Greenhouse, *Bush and Affirmative Action: Muted Call in Race Case*, N.Y. TIMES, Jan. 17, 2003, at A1.

87. See Susan Page, *Bush Is Opening Doors with a Diverse Cabinet*, USA TODAY, Dec. 10, 2004, at 17A.

diverse than the nearly all-white, all-male Cabinet appointed by President Ronald Reagan. Moreover, President Bush appointed racial minorities to the most influential Cabinet-level posts: Colin Powell and Condoleezza Rice as Secretary of State and Alberto Gonzalez as Attorney General. All three individuals counseled President Bush against a broad-gauged attack on affirmative action in the Michigan cases, even as Solicitor General Ted Olson and other conservative Administration lawyers apparently urged a stronger position against using race to achieve diversity.⁸⁸

The briefs that Olson ultimately filed reflect the influence of moderation and compromise to the point of incoherence. In the law school case, the Administration's brief argued that the "use of race-based admissions criteria is not justified in light of the ample race-neutral alternatives" and extensively discussed the "percentage plans" implemented by Texas, Florida, and California to achieve undergraduate diversity.⁸⁹ The obvious problem, as the Supreme Court noted, is that "[t]he United States does not . . . explain how such plans could work for graduate and professional schools."⁹⁰

One might say that Cabinet appointments as well as President Bush's rhetorical endorsement of diversity are largely symbolic. But symbolic of what? Surely it is relevant and encouraging that the Bush Administration continued, across party lines, a practice of elevating qualified women and minorities to the highest ranks of government. One might say that President Bush's position reflects a political calculation concerning the electoral fortunes of the Republican Party. So what if it does? If that means we have reached a point in our national politics where both parties seek the votes of minority citizens, then good for us. If it means the business community and the military, both of which filed briefs in support of Michigan's

88. See Mike Allen, *Rice: Race Can Be Factor in College Admissions*, WASH. POST, Jan. 18, 2003, at A1 (reporting Rice's statement that she opposed the Michigan policies but that "it is appropriate to use race as one factor among others in achieving a diverse student body," and quoting Powell as supporting the Michigan policies); Mike Allen & Charles Lane, *Rice Helped Shape Bush Decision on Admissions*, WASH. POST, Jan. 17, 2003, at A1 (reporting that Olson and other conservative lawyers urged President Bush to adopt a broader argument against affirmative action); Amy Goldstein & Dana Milbank, *Bush Joins Admissions Case Fight; U-Mich. Use of Race Is Called 'Divisive'*, WASH. POST, Jan. 16, 2003, at A1 (reporting that Gonzales "argued for restraint to avoid offending the fast-growing Hispanic population").

89. Brief for the United States as Amicus Curiae Supporting Petitioner at 10, 14-18, *Grutter*, 539 U.S. 306 (No. 02-241).

90. *Grutter*, 539 U.S. at 340.

affirmative action policies,⁹¹ have influenced how conservatives as well as liberals see the value of diversity, then good for us. And if it means the American people, red or blue, no longer consider it unusual and have even come to expect qualified women and minorities to serve at the highest levels of government, then good for us.

President Bush's handling of the Michigan cases provides a lens for interpreting our nation's ongoing struggle with race. That struggle has always engaged both symbol and substance. And today, having inaugurated the nation's first African-American president, it is clear that symbols matter.

B. No Child Left Behind

But what, then, of the substance? Let us put to one side the everyday work of the Department of Justice, which the President supervises only from a distance. If one were to ask President Bush to identify the signature civil rights initiative of his Administration, my guess is that he would say the No Child Left Behind (NCLB) Act, a law he personally championed and helped craft based on his experience as Governor of Texas.

Enacted by bipartisan majorities in the House and Senate, NCLB is rightly labeled a civil rights statute for three reasons. First, NCLB marks the first time in our history that narrowing the achievement gap has been codified as a national priority.⁹² Second, NCLB requires schools and districts to disaggregate student achievement data by race for purposes of public reporting and accountability.⁹³ The concept of unmasking disparities that broad averages tend to hide is what gives the No Child Left Behind law its name. Third, the obligation of states, districts, and schools to close achievement gaps does not depend on

91. Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241); Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241). The influential amicus brief filed by retired military officers was instigated by former President Gerald Ford, a strong supporter of affirmative action in higher education. See Jeffrey Toobin, *Gerald Ford's Affirmative Action*, N.Y. TIMES, Dec. 30, 2006, at A19; Gerald R. Ford, *Inclusive America, Under Attack*, N.Y. TIMES, Aug. 8, 1999, at A15.

92. See 20 U.S.C. §§ 6301, 6301(3) (2006) (identifying “[c]losing the achievement gap between high and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers” as a means of “ensur[ing] that all children have a fair, equal, and significant opportunity to obtain a high-quality education”).

93. See *id.* § 6311(b)(2)(C)(v)(II) (requiring disaggregation of data regarding “students from major racial and ethnic groups,” among other groups).

any finding of discriminatory intent or state action. Where a disparity in achievement exists, there is official responsibility to remedy it.⁹⁴ These developments are noteworthy in light of the general fatigue with race in legal doctrine and our public culture.

Criticisms of NCLB are as vehement as they are numerous: the law is underfunded; it has led states to lower academic standards; it has created a two-tiered curriculum of rich academic offerings for high-achieving kids and insipid test preparation for low-achieving kids; it gives schools an incentive to push out low performers; it does not ensure that all children have effective teachers; it is overly punitive and does not reward success; and the list goes on. Many of these criticisms have some validity, but they are not my focus here. NCLB may soon undergo a makeover that responds to what is known about how schools actually improve and that focuses attention not only on achievement gaps but also on the opportunity gaps that underlie them.

Whatever else might be said about NCLB, however, the law has made a positive contribution to public education by requiring disaggregation of data and directing urgent attention to raising the achievement of disadvantaged children. The transparency brought about by NCLB has won praise from policymakers, researchers, and advocates across the political spectrum, and it will likely endure in the policy approach of any statutory reauthorization.

I fully support this aspect of NCLB and see no reason to change it. But I would like to pose a question: What kinds of schools and school districts was NCLB designed for? Or, to put it another way, what actionable information does NCLB make available that wasn't available before? Racial disaggregation of achievement data is a powerful tool for transparency and accountability, but it assumes that we are dealing with schools that enroll multiple racial groups. If a school enrolls a white majority and a black or Hispanic minority, NCLB ensures that the average performance school-wide does not mask disparities between groups. However, if a school has 70%, 80%, or 90% black or Hispanic enrollment, there is no need to disaggregate data by race in order to learn how minority students are doing. In highly segregated schools, school-wide averages reflect the

94. *See id.* § 6316 (requiring improvement for any school failing to make adequate yearly progress under § 6311(b)(2), which defines such progress without regard to discriminatory intent or state action).

performance of the segregated group. Further, although NCLB requires data disaggregation at the district level in addition to the school level, most highly segregated schools in America are located in highly segregated school districts.⁹⁵ Indeed, this fact also undermines the transfer option under NCLB that entitles children in a low-performing school to switch to a better school in the same district.⁹⁶ When low-performing schools are located in low-performing districts, the transfer option is illusory.

The unfortunate fact is that most racial minorities who live in concentrated poverty attend segregated schools in segregated districts that do not provide high-quality educational opportunities. Consider the public schools of Detroit (90% black), Los Angeles (73% Latino), Baltimore (89% black), Santa Ana (92% Latino), Memphis (86% black), or El Paso (81% Latino).⁹⁷ In those districts, what do we know under NCLB that we did not know before? If “sunshine and shame” are NCLB’s principal contributions to the education landscape, then NCLB has added little to the cause of improving racially isolated, high-poverty schools and school districts. For we already knew, long before NCLB, that those schools and districts are struggling and often lack the essential building blocks for change. NCLB has done little to provide those building blocks, and as a result, we continue to consign our most disadvantaged students to a separate and unequal education in our most disadvantaged schools.

My point is not that NCLB is bad policy. On balance, I think it is a step forward in the evolution of a federal role dedicated to equalizing educational opportunity. My point is that the policy levers in NCLB, such as disaggregation of school and district data and school choice within districts, seem mismatched to the nature and severity of the challenges. Unequal opportunity is rooted in complex policy choices that spatially isolate children racially and socioeconomically, in school finance systems that do not adequately provide for the needs of disadvantaged children, in teacher policies that do not reward performance and too often assign the most inexperienced teachers to

95. See Sean F. Reardon et al., *The Changing Structure of School Segregation: Measurement and Evidence of Multiracial Metropolitan-Area School Segregation, 1989–1995*, 37 *DEMOGRAPHY* 351, 358 (2000) (studying 217 metropolitan areas and finding that two-thirds of school segregation occurs across district lines).

96. 20 U.S.C. § 6316(b)(1)(E) (2006).

97. ANTHONY GAROFANO ET AL., U.S. DEP’T OF EDUC., *CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 2005–06*, at A-20 to -21 tbl.A-9 (2008).

the most challenging schools, and in structures of education governance that tend to preserve the status quo instead of helping the least advantaged. These are among the most important civil rights issues we face today, and the lesson learned from NCLB is that we still have not developed an effective national policy agenda to ensure equal educational opportunity for minority children who live in concentrated poverty.

C. Katrina

Finally, if there was ever an opportunity in recent times to galvanize a national consensus for a new civil rights agenda, it was in the days and weeks after August 29, 2005, when Hurricane Katrina killed over 1,500 people and displaced 700,000 others along the Gulf Coast.⁹⁸ Next to the tragedy of September 11, 2001, Katrina is the single most consequential catastrophic event that occurred during the Bush presidency. The social challenges that affirmative action and NCLB tend to obscure are precisely the ones that Katrina laid bare.

Natural disasters are sometimes said to be great equalizers of society. As Katrina showed, nothing could be further from the truth. A good deal of attention has focused on the incompetent government response to the hurricane and the racially disparate impact of the destruction and ensuing misery.⁹⁹ But far less attention has been paid to why the black citizens of New Orleans were so disproportionately harmed by Katrina. As a junior Senator from Illinois said at the time, “[T]he people of New Orleans weren’t just abandoned during the hurricane. They were abandoned long ago.”¹⁰⁰

The racial history of New Orleans is, in many ways, paradigmatic of the development of many American cities, involving a virulent combination of school segregation, housing segregation, migration of

98. THOMAS GABE ET AL., CONGRESSIONAL RESEARCH SERVICE, HURRICANE KATRINA: SOCIAL-DEMOGRAPHIC CHARACTERISTICS OF IMPACTED AREAS 7 (2005) (reporting that “more than 700,000 people were most acutely impacted by Hurricane Katrina, having lived in neighborhoods that either experienced flooding or significant structural damage”); Michelle Hunter, *Deaths of Evacuees Push Toll to 1,577; Out-of-State Victims Mostly Elderly, Infirm*, TIMES-PICAYUNE (LA.), May 19, 2006, at 1.

99. See, e.g., RICHARD CAMPANELLA, GEOGRAPHIES OF NEW ORLEANS: URBAN FABRICS BEFORE THE STORM 398–401 (2006); GABE ET AL., *supra* note 98, at 14–17; Todd S. Purdum, *Across U.S., Outrage at Response*, N.Y. TIMES, Sept. 3, 2005, at A1; WHEN THE LEVEES BROKE: A REQUIEM IN FOUR ACTS (Home Box Office 2006).

100. Jonathan Alter, *The Other America*, NEWSWEEK, Sept. 19, 2005, at 42 (quoting Sen. Barack Obama).

people and jobs away from minority neighborhoods, inadequate public transportation, and selective indifference to mitigating environmental hazards.¹⁰¹ This has long been a foolproof recipe for racial segregation and concentrated poverty, and Katrina revealed that we lack a coherent social policy to address the intersection of race and poverty.

A few days after the levees broke, a reporter called me to ask whether the government's response to Katrina raised any constitutional questions. I proceeded to explain that our courts generally do not recognize positive rights to government assistance and that the disparities revealed by Katrina were unlikely to be actionable given the difficulties of proving intentional discrimination. Upon reflection, however, I came to feel that my lawyerly answer did not respond to the true angle of her question, which seemed motivated by the common-sense observation that something has gone terribly wrong in our constitutional democracy when the cleavages of race and class play out with such severe consequences.

To my mind, the tragedy of Katrina has four dimensions: first, the devastation caused by the hurricane itself; second, the indignity and suffering caused by the government response; third, the racial and economic disparities in suffering caused by decades of public inattention to, and facilitation of, the underlying conditions that poor African-Americans face; and fourth, the enormous missed opportunity for presidential leadership to renew America's commitment to equality. This last point deserves emphasis, for the nation is seldom forced to confront its own shortcomings so prominently and pointedly. The images of Katrina left us with nowhere to hide; we could not shift our gaze elsewhere. In that brief

101. See CAMPANELLA, *supra* note 99, at 297–314 (discussing the geography of the African-American community in New Orleans from the mid-1800s to 2000); PEIRCE F. LEWIS, *NEW ORLEANS: THE MAKING OF AN URBAN LANDSCAPE* 44–45, 96–101 (1976) (observing that, while New Orleans early on was one of the least segregated American cities, a combination of housing, transportation, and educational policies significantly worsened segregation throughout the twentieth century); Harold A. McDougall, *Hurricane Katrina: A Story of Race, Poverty, and Environmental Injustice*, 51 *HOW. L.J.* 533, 540–44 (2008) (discussing segregation laws that confined African-Americans to the lowest-lying and most flood-prone land in New Orleans, including the Lower Ninth Ward); Martha Mahoney, Note, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 *STAN. L. REV.* 1251 (1990) (discussing racially discriminatory housing policies in New Orleans that segregated African-Americans into areas with few employment opportunities); Daphne Spain, *Race Relations and Residential Segregation in New Orleans: Two Centuries of Paradox*, 441 *ANNALS AM. ACAD. POL. & SOC. SCI.* 82 (1979) (discussing the evolution of racial segregation in New Orleans from the early 1800s through the twentieth century).

moment of rapt attention and genuine empathy, there was an opportunity to unite the nation behind a new agenda to attack poverty and racial inequality.¹⁰² There was a window for bold initiatives and a departure from politics as usual. But the moment passed, and regrettably, so did the opportunity.

III. CONCLUSION

Today, when it comes to galvanizing the American people in support of a national imperative, no institution of government rivals the modern presidency. This was not the intent of our Constitution's Framers, but it is a fact of the nation we have become.¹⁰³ A President can speak directly to the people with one voice. A President can set the agenda and stay the course for a sustained period of time. A President can do the hard work of policy implementation necessary to bring about change. A President can articulate a vision responsive to the nation in its entirety, not just to one of its parts. And a President can translate the Constitution into the language of justice without fear of overstepping his authority. In short, a President can lead—and because he can lead, he must.

102. Cf. ALAN BERUBE & BRUCE KATZ, BROOKINGS INSTITUTION, *KATRINA'S WINDOW: CONFRONTING CONCENTRATED POVERTY ACROSS AMERICA* (2005) (urging a renewed focus on alleviating concentrated urban poverty).

103. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring).