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CONGRESSIONAL TESTIMONY

A Time to Reform: Oversight of the Activities of the Justice Department's Civil, Tax and Environment and Natural Resources Divisions and the U.S. Trustee Program

Testimony before Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary

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My name is Hans A. von Spakovsky.[1] I appreciate the invitation to be here today to discuss oversight problems and reforms inside the U.S. Department of Justice (DOJ) where I used to work. The views I express in this testimony are my own, and should not be construed as representing any official position of the Heritage Foundation.

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I am a Senior Legal Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation. Prior to joining The Heritage Foundation, I was a Commissioner on the Federal Election Commission for two years. Before that I spent four years at the Department of Justice as a career civil service lawyer in the Civil Rights Division, where I received three Meritorious Service Awards (2003, 2004, and 2005). I started as a trial attorney in 2001 and was promoted to be Counsel to the Assistant Attorney General for Civil Rights, where I helped coordinate the enforcement of federal voting rights laws, including the Voting Rights Act and the National Voter Registration Act.[2]

I am going to concentrate on three matters involving the Civil Division and the Environment and Natural Resources Division (Environment Division) that should be of great concern to this Committee. To date, I am not aware of any steps that have been taken to correct these problems.

Professional Misconduct at the Civil Division

The duty of the Civil Division is to defend the government. As its own webpage says, it "represents the United States, its department and agencies, Members of Congress, Cabinet Officers, and other federal employees in any civil matter." It works with client agencies "to head off potential litigation and to prevent unfavorable outcomes should cases proceed in court." [3] Rule 1.3 of the Rules of Professional Conduct of lawyers practicing in the District of Columbian also require a lawyer to "represent a client zealously and diligently within the bounds of the law." A lawyer "shall not intentionally fail to seek the lawful objectives of a client through reasonably available means permitted by law." Most importantly, lawyers may not intentionally "prejudice or damage a client during the course of the professional relationship."

Thus, Civil Division lawyers have a professional obligation and ethical duty to defend the actions of federal agencies unless there are absolutely no circumstances under which they can be defended – a situation that occurs only very rarely.

Yet in a recent case involving the U.S. Election Assistance Commission (EAC), lawyers for the Division violated their professional obligation to defend the EAC. In a lawsuit involving the decision of the EAC to change the instructions for use of the federal voter registration form in states that require proof of citizenship, Civil Division lawyers took the side of the plaintiffs

[2] I was also a member of the first Board of Advisors of the U.S. Election Assistance Commission. I spent five years in Atlanta, Georgia, on the Fulton County Board of Registration and Elections, which is responsible for administering elections in the largest county in Georgia. In Virginia, I served for three years as the Vice Chairman of the Fairfax County Electoral Board, which administers elections in the largest county in that state. I formerly served on the Virginia Advisory Board to the U.S. Commission on Civil Rights. I am a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981. I am the coauthor of *Who's Counting? How Fraudsters and Bureaucrats Put Your Vote at Risk* (2012) and *Obama's Enforcer – Eric Holder's Justice Department* (2014).

[3] https://www.justice.gov/civil/about.

and refused to defend the agency![4] The Chair of the EAC, Christy A. McCormick, sent a letter to former Attorney General Loretta Lynch complaining about this misbehavior.[5]

Commissioner McCormick also complained in a letter to Judge Richard Leon, who was assigned to the case, expressing her "grave concerns regarding the potential conflict of interest and failure of the Department of Justice to provide" the EAC with proper representation. The pleadings filed by the Civil Division and the "performance of the DOJ attorney" assigned to the case made it clear to her that the agency would not "receive the full and zealous representation it deserves."[6] She noted in her letter to Lynch that Judge Leon criticized DOJ because the Civil Division lawyers "performed poorly both in their written submissions and in argument." Further, they "provide no defense of the agency whatsoever and took the side of the Plaintiffs over the interests of the EAC," their client.

The Civil Division's erroneous claim that it could not defend the EAC's action were belied by the fact that Judge Leon ruled in favor of the EAC on Feb. 23, 2016, denying the requested temporary restraining order. In his order, Judge Leon commented on the misbehavior of DOJ, noting that the Division had taken "the extraordinary step of consenting to plaintiffs' request – not for TRO but for a *preliminary injunction*!"[7] So he ruled for the EAC despite DOJ's failure to defend the Commission. In fact, at the hearing on this matter, Judge Leon said he had never seen such behavior by a government lawyer in his entire experience as a lawyer or a judge.[8]

Judge Leon even allowed the Kansas Secretary of State and the Public Interest Legal Foundation to intervene in the case to defend the EAC, because of the Justice Department's refusal to do so. There was also evidence in the case that the Justice Department had a serious conflict of interest because of the involvement of other DOJ lawyers from the Civil Rights Division in taking over the decision-making regarding the main issue in the case, thus usurping the independent policy-making function of what is supposed to be a bipartisan commission.

It would have been a serious violation of conflict of interest rules if DOJ lawyers were acting as policy-makers (and thus were potential witnesses) in a case in which other DOJ lawyers were acting in a legal capacity to defend (or in this case not defend) the agency. The

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[4] *The League of Women Voters v. Newby*, Civil Action No. 1:16-00236-RJL (D.D.C.); Hans A. von Spakovsky, "In Light of DOJ Malfeasance, EAC Seeks Outside Counsel in Noncitizen-Voting Case," National Review Online (Feb. 24, 2016), http://www.nationalreview.com/corner/431841/noncitizen-voting-case-eac-seeks-outside-counsel.

[5] Letter of February 23, 2016, from Chairwoman Christy A. McCormick, U.S. Election Assistance Commission, to Loretta Lynch, Attorney General, U.S. Department of Justice.

[6] Letter of February 23, 2016, from Chairwoman Christy A. McCormick, U.S. Election Assistance Commission, to Judge Richard J. Leon, District Court for the District of Columbia.

[7] *Newby*, Memorandum Order, Feb. 23, 2016, page 4, footnote 1.

[8] Hans A. von Spakovsky, "An Extraordinary Beat-Down for the DOJ," National Review Online, Feb. 22, 2016. It is true that a three-judge panel of the Court of Appeals for the District of Columbia Circuit later reversed Judge Leon in a 2 to 1 decision. But it is clear that a federal district court judge and a dissenting court of appeals judge believed that the actions of the EAC were entirely defensible. This shows how faulty the judgment of the Civil Division was that it could not defend the EAC. In fact, its actions violated the long-time practice of the Justice Department to defend federal agencies even if DOJ political appointees might disagree with a particular policy or agency decision from a political standpoint. It is very clear from the opinions issued in this case that the EAC's actions were entirely defensible, constitutional, and reasonable under the applicable law. See *League of Women Voters v. Newby*, Case No. 16-5196 (D.C. Cir. Sept. 26, 2016).

Civil Division was apparently so concerned over evidence of this conflict becoming public that it asked for the deposition of Commissioner McCormick to be sealed in the case.[9]

To my knowledge, none of the lawyers involved in this dereliction of their professional obligations have been investigated by the Office of Professional Responsibility at the Justice Department or disciplined in any way. The deposition that could reveal other wrongdoing by DOJ also remains sealed. I would urge this Committee to investigate this case and the potential professional misconduct of Civil Division lawyers, and to obtain the deposition from the court or from the Justice Department – under its constitutional oversight authority, this Committee has a right to examine all of the pleadings and other documents filed in this case.

Judgment Fund – Lack of Transparency

One of the little known costs that taxpayers unwittingly pay through the actions and decision made by the Civil Division and the Environment Division in their handling of lawsuits against the government and its various agencies is the Judgment Fund housed at the U.S. Treasury Department. This fund is used to pay "judicially and administratively ordered monetary awards against the United States" when it loses lawsuits. But it is also used to "pay amounts owed under compromise agreements negotiated by the U.S. Department of Justice in settlement of claims arising under actual or imminent litigation."[10]

The Judgment Fund is a permanent, indefinite appropriation that literally pays out tens of millions of dollars for mistakes, errors, and violations of federal law committed by federal agencies and federal employees with little notice.[11]

The Treasury Department does file a yearly report with Congress and maintains a webpage that can be searched. But the cryptic and limited information available in the report and the webpage (like "Control Number") is not sufficient to identify what it was that the government did wrong and who is benefitting from these government payments.

The name of the federal agency that was a defendant in the litigation or claim is identified, but not the plaintiff or the attorneys that brought the action. The statute that was the basis of the litigation or claim is listed, but there is not even a brief description of what exactly the dispute was or what violation was committed by the federal government.

No copy of the complaint, judgment against the government, or settlement agreement is made available. This could easily be supplied through a hyperlink that would allow anyone to click on these documents and obtain the details of the acts that gave rise to the government's liability and who is receiving taxpayer funds to pay off the government's mistakes or intentional wrongdoing.

[9] Hans A. von Spakovsky, "Does the Justice Department Want to Enable Noncitizen Voting? National Review Online, March 1, 2016.
[10] Judgment Fund, Bureau of the Fiscal Service, U.S. Department of the Treasury, https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/judgementFund_home.htm.
[11] The statutory authority for the Judgment Fund is 31 U.S.C. §1304.

All of this information and documentation could easily be supplied by the Justice Department's various divisions to the Treasury Department for posting. That would exponentially increase what taxpayers and members of Congress are entitled to and should insist on: complete transparency in the litigation process handled by the Justice Department that results in payments from the Judgment Fund.

We deserve to know all of the details of how the Judgment Fund is being spent, who is receiving the money, the names of the specific attorneys and legal counsel involved, and the specific details of how and why taxpayer funds are being paid to settle or otherwise satisfy a judgment in a lawsuit.

That is not currently possible. There is no ability, for example, to determine whether government agencies are engaging in collusive litigation with certain plaintiffs and advocacy organizations, settling claims that should not be settled, refusing to settle claims that should be settled, and making payments to plaintiffs and their attorneys that are not reasonable under the applicable law and facts.

As I outlined in a 2014 book on the Justice Department, the Environment Division alone has cost the American taxpayer millions of dollars in attorneys' fees in unnecessary litigation. One of the lawyers who successfully fought the Division in land eminent domain cases said he was aware of at least twenty cases that Environment Division lawyers lost in which they made "essentially the exact same losing argument" each time.[12]

A 2011 GAO report showed that just three environmental groups, Earthjustice, the Sierra Club, and the Natural Resources Defense Council, received 41 percent of the attorneys' fees paid to litigants in cases handled by the Environment Division, which in 2013 was headed by Robert Dreher, a former Earthjustice employee.[13] There is evidence that many of these settlements were in collusive "sue and settle" lawsuits with advocacy groups that were political allies of the administration, with the Judgment Fund being used to fund the litigation budgets of these private organizations.

Bills have been introduced in Congress to require more information such as the Judgment Fund Transparency Act of 2017, H.R. 1096. However, this is something that the Justice Department, working with the Treasury Department, could do on their own without Congress passing a law requiring them to do so. DOJ could easily provide the Treasury Department with all of the information and documentation needed to provide full and complete transparency. This should include:

- The name of the plaintiff or claimant making liability claims against the federal government and their counsel, as well as any intervenors (and their counsel) in the lawsuit;
- A complete description of the facts that give rise to liability;

[12] John Fund and Hans von Spakovsky, *Obama's Enforcer: Eric Holder's Justice Department*, Broadside Book (2014), page 33.
[13] "Environmental Litigation: Cases Against the EPA and Associated Costs Over Time," U.S. Government Accountability Office, GAO-11-650 (Aug. 2011); see also *Obama's Enforcer*, pages 34-35.

- The amount of taxpayers' funds paid by the government for principal and ancillary liability, including attorney fees, costs, and interest;
- A summary of any other actions that the government agrees to take in addition to monetary compensation;
- A copy of the complaint or written claim and any answer or defense made by the government;
- A copy of the final judgment of a court or the settlement agreement;
- The names of government lawyers and the specific division, section or office that handled the judgment or settlement, as well as a statement of any current or former personal or business relationship between any government lawyers involved in the case and any of the other parties and their lawyers; and
- The name of the federal agency that submitted the claim.

This is not and should not be a partisan issue. Regardless of their party affiliation, members of Congress and the occupants of the White House should be interested in requiring greater transparency of payments made by the federal government to cover liability arising from the actions of federal employees and federal agencies when they violate federal law. Taxpayers (and journalists) have a fundamental right to such information – and it should be readily and easily available.

Fighting "Global" Injunctions

An important issue that the Justice Department is litigating in *International Refugee Assistance Project v. Trump,*[14] the case involving Executive Order 13,780, is the issuance of injunctions by federal district courts with limited geographic jurisdiction that apply nationwide or globally to individuals who are not even parties to a suit. This is a problem that the Civil Division must focus on in all of its litigation and spend more resources fighting as a general matter.

As the Solicitor General points out in the Petition for Certiorari filed with the U.S. Supreme Court on June 1, the district court injunction is improper because "[c]onstitutional and equitable principles require that injunctive relief be limited to redressing a plaintiff's own cognizable injuries."[15] Rather than providing injunctive relief to the individual plaintiffs who filed suit on behalf of themselves and/or their family members, the courts have instead enjoined enforcement of the Executive Order "as to thousands of unidentified aliens abroad."[16] And they have done so without following any of the procedures set out under federal law and the Federal Rules of Civil Procedure to certify a class action.[17]

But the Civil Division also needs to be more forceful in asserting the precedent of *U.S. v. Mendoza* in this and other cases to stop judges from asserting their jurisdiction beyond their

[14] 2017 WL 2273306 (4th Cir. May 25, 2017, amended May 31, 2017).
[15] Petition for Certiorari, *Trump v. International Refugee Assistance Project,* Case No. 16-1436 (U.S. June 1, 2017), page 31. *See also Lewis v. Casey*, 518 U.S. 343 (1996); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); and *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994).
[16] Petition for Certiorari, page 14.
[17] Rule 23, Federal Rules of Civil Procedure, https://www.law.cornell.edu/rules/frcp/rule_23.

authority and providing relief beyond what that U.S. Supreme Court decision allows.[18] In *Mendoza*, a Filipino national and veteran of the battle for the Philippines during World War II petitioned for naturalization in 1978 under a statute that by its own terms had expired 32 years earlier.

The lower courts refused to allow the government to contest the case because of a prior decision against the government, *In re Naturalization of 68 Filipino War Veterans*, on the same issue by a different federal district court that the government did not appeal.[19] The prior case involved 68 other Filipino veterans, and the Ninth Circuit Court of Appeals held that the government was "collaterally estopped from litigating the constitutional issue" because of the earlier decision.[20]

In a precedent setting decision, the Supreme Court held that the doctrine of collateral estoppel, which applies to private parties, does not apply to the federal government. As Justice William Rehnquist explained in the opinion for a unanimous court, under the doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation."[21] However, the Supreme Court has broadened that principle "by abandoning the requirement of mutuality of parties."[22] Thus, the Ninth Circuit believed that the prior decision involving 68 Filipino veterans collaterally estopped the government from defending a similar claim by Mendoza in the new lawsuit. But that was not the case.

The Supreme Court held instead that the government is not in the same position as private litigants "both because of the geographic breadth of government litigation and also, most importantly, because of the nature of the issues the government litigates."[23] As Rehnquist said:

> *Government litigation frequently involves legal questions of substantial public importance; indeed, because the proscriptions of the United States Constitution are so generally directed at governmental action, many constitutional questions can arise only in the context of litigation to which the government is a party. Because of those facts the government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues.*[24]

Thus, applying collateral estoppel to the government "would substantially thwart the

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[18] 464 U.S. 154 (1984).

[19] 406 F.Supp. 931 (N.D.Cal. 1975). That case was not appealed because of a change in administrations; the newly appointed INS commissioner said that not appealing "would be in keeping with the policy of the [new] Administration." Thus, as the Supreme Court says in *Mendoza*, "courts should be careful when they seek to apply expanding rules of collateral estoppel to government litigation" because "such policy choices are made by one Administration, and often reevaluated by another Administration." 464 U.S. at 161.

[20] 464 U.S. at 155.

[21] 464 U.S. at 158.

[22] 464 U.S. at 158. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

[23] 464 U.S. at 159.

[24] 464 U.S. at 160

development of important questions of law by freezing the first final decision rendered on a particular legal issue." Allowing "only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."[25]

The importance of this doctrine cannot be overemphasized. The Supreme Court said that the government "is not further bound in a case involving a litigant who was not a party to the earlier litigation."[26] Thus, the government has the ability to continue to apply the Executive Order to individual aliens who are not parties to the current lawsuits that have been filed throughout the country over the immigration issues being contested in the Executive Order, in the very same way the government was not bound in the *Mendoza* case by the prior decision in *In re Naturalization of 68 Filipino War Veterans.* That is the position the Civil Division and other Division in the Justice Department should be taking in all litigation against the government.

One possible reform should be considered by Congress. As the public and the members of this Committee are aware, there have been numerous lawsuits filed over the president's Executive Order in various federal district courts, and some of the decisions issued by judges have been in direct conflict. At the very same time that a federal district court judge in the Western District of Washington issued an opinion enjoining the original, unrevised Executive Order temporarily suspending entry of aliens from various terrorist safe havens in Africa and the Middle East, a federal district court judge in the District of Massachusetts came to the exact opposite conclusion, finding no constitutional or statutory violations.[27]

One way to prevent these types of conflicts with multiple lawsuits over the same issues and to ensure an orderly, efficient litigation process would be for Congress to require all lawsuits contesting the legality or constitutionality of an executive order signed by a president to be filed in the District of Columbia federal district court. There is precedent for such a requirement. For example, Section 5 of the Voting Rights Act of 1965 required any lawsuits over the preclearance of changes in voting laws made by any state, county, or city to be filed in the U.S. District Court of the District of Columbia.[28]

This would eliminate the procedural chaos that we currently have with many different federal courts in different parts of the country looking at the same issues and issuing separate opinions. On the other hand, it would impose the inconvenience of requiring plaintiffs and their counsel to come to the nation's capital. This is an issue that Congress should consider in order to determine if there is a solution that would resolve the problems caused by multiple and duplicative litigation involving the government, and specifically actions taken by the president.

Thank you once again for affording me the opportunity to testify at this oversight hearing.

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[25] 464 U.S. at 160.
[26] 464 U.S. at 162.
[27] Hans von Spakovsky, "Trump's Executive Order on Immigration Is Both Legal and Constitutional," Daily Signal, Feb. 6, 2017, http://dailysignal.com/2017/02/06/trumps-executive-order-on-immigration-is-both-legal-and-constitutional/.
[28] 52 U.S.C. 10304(a).

I look forward to your questions.