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Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on Oversight of the Civil Rights Division of the Department of Justice

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Good morning, Chairman Cohen, Ranking Member Johnson and members of the Subcommittee. My name is Sherrilyn Ifill, and I am the President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. ("LDF"). Thank you for the opportunity to testify this morning regarding the ongoing need for oversight of the Civil Rights Division of the Department of Justice.

LDF was founded in 1940 by Thurgood Marshall, the trailblazing lawyer whose groundbreaking litigation created the field of civil rights law. Marshall later became the first Black justice to sit on the United States Supreme Court. LDF has been an entirely separate organization from the NAACP since 1957. LDF was launched at a time when the nation's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality. Through litigation, advocacy, and public education, LDF seeks structural changes to expand democracy, eliminate disparities, and achieve racial justice in a society that fulfills the promise of equality for all Americans. LDF has always been a pioneering force in our nation's quest for greater equality and will continue to advocate on behalf of African Americans, both in and outside of the courts, until equal justice for all Americans is attained.

The Civil Rights Division of the Department of Justice was created by the Civil Rights Act of 1957, the first federal civil rights statute enacted since Reconstruction. The division's formation in the early days of the Civil Rights Movement proved critical to ensuring protection for civil rights demands for equal citizenship emerging in southern states. Among its most important provisions, the Act empowered federal prosecutors to seek injunctions for the protection of voting rights. Since its formation, the Division's lawyers have played a powerful leadership role in enforcing the nation's civil rights laws. The leaders of the Division have often been drawn from the top ranks of civil rights law organizations, bringing a wealth of experience and commitment to the robust enforcement of key civil rights statutes that prohibit discrimination on the basis of race, sex, disability, religion, familial status and national origin. LDF is particularly well suited to speak about the work the Civil Rights Division of the Justice Department. Four former LDF staff attorneys have served as the Assistant United States Attorney General for Civil Rights, leading the Civil Rights Division in its work during critical periods in the Division's history. They include Drew S. Days III (1977-1980), Deval Patrick (1994-1997), Bill Lann Lee (1997-2001), and, most recently, Vanita Gupta (2014-2017).

The work of the Civil Rights Division is advanced through 11 sections or issue areas, they are:

Appellate Section	Federal Coordination and Compliance
Criminal Section	Housing and Civil Enforcement Section
Disability Rights Section	Immigration and Employee Rights Section

Educational Opportunities Section | Policy and Strategy Section

Employment Litigation Section | Special Litigation Section

Voting Section

For most of its history, the Division has been at the forefront of civil rights protection in each of these areas. Since 2017, however, we have seen a drastic change. The current Civil Rights Division is largely absent from leadership in civil rights enforcement. Even worse, the Division has used its resources to take positions that stand in opposition to core civil rights principles, betraying the history and vital role the Division was created to play protecting our most historically vulnerable citizens from practices, laws and policies that violate the constitutional guarantee of "equal protection of laws."

Voting Rights

Protecting voting rights for racial minorities was perhaps the most important charge given the Civil Rights Division in the Civil Rights Act of 1957. The Civil Rights Division has previously played an active role in the enforcement of voting rights by bringing cases raising claims of violations of Section 2[1] and various other provisions of the Voting Rights Act of 1965. Section 2

[1]. See, *United States v. City of Eastpointe*, 378 F. Supp. 3d 589 (E.D. Mich. 2019); *United States v. North Carolina*, No. 1:13CV861 (M.D.N.C. Feb. 6, 2014); *United States v. State of Texas*, Case 5:11-cv-00360-OLG-JES-XR (W.D. Tex. Sep. 25, 2013); *United States v. State of Texas*, Case 2:13-cv-00263 (S.D. Tex. Aug. 22, 2013); *United States v. Town of Lake Park*, Civil Action No. 09-80570-MARRA (S.D. Fla. Oct. 26, 2009); *United States v. Euclid City School Bd.,* 632 F. Supp. 2d 740 (N.D. Ohio 2009); *United States v. Salem County and the Borough of Penns Grove*, Civil Action No. 1:08-cv-03276-JHR-AMD (D.N.J. Jul. 24, 2008); *United States v. School Board of Osceola County*, Civil Action No. 6:08-CV-582-ORL-18DAB (M.D. Fla. Apr. 23, 2008); *United States v. Georgetown County School District*, Civil Action No. 2:08-889 DCN (D.S.C. Mar. 21, 2008); *United States v. City of Philadelphia*, Case 2:06-cv-04592-PBT (E.D. Pa. Jun. 1, 2007); *United States of America v. Village of Port Chester*, No. 7:2006cv15173 - Document 124 (S.D.N.Y. 2010); *United States v. City of Euclid*, 580 F. Supp. 2d 584 (N.D. Ohio 2008); *United States. v. Long County*, Case No. CV 206-040 (S.D. Ga. Feb. 10, 2006); *United States v. City of Boston*, 497 F. Supp. 2d 263 (D. Mass. 2007); *United States. v. Osceola County*, Case No. 6:05-cv-1053-Orl-31DAB (M.D. Fla. Jun. 26, 2006); *United States. v. Brown*, Civil Action No. 4:05CV33TSL-LRA (S.D. Miss. Aug. 27, 2007); *United States v. Berks County*, 250 F. Supp. 2d 525 (E.D. Pa. 2003); *United States v. Osceola County*, 6:02-cv-00738 (M.D. Fla. Jul. 22, 2002); *United States v. Alamosa County*, 306 F. Supp. 2d 1016 (D. Colo. 2004); *United States v. Crockett County*, No. 1-01-1129 (W.D. Tenn. 2001); *United States v. Charleston County*, 318 F. Supp. 2d 302 (D.S.C. 2002); United States v. City of Hamtramck Michigan, Civil Action No. 00-73541 (E.D. Mich. Jan. 29, 2004); *United States v. Upper San Gabriel Valley Mun. Water Dist.*, CV 00-7903 AHM (BQRx) (C.D. Cal. Sep. 8, 2000); *United States v. Morgan City*, Civil Action No. 6:2000cv01541 (W.D. La. 2000); *Grieg v. City of St. Martinville*, Case 6:00-cv-00603-RFD-MEM (W.D. La. 2000); *United States v. City of Santa Paula*, CV 00-03691-GHK (SHx) (C.D. Cal. 2000); *United States v. Roosevelt County*, Civil Action No. 00-50-BLG-JDS, (D. Mont. Mar. 24, 2000); *United States v. Town of Cicero*, Civil Action No. 00C-153 (N.D. Ill. Mar. 13, 2000); *United States v. Benson County*, Civil Action No. A2-00-30 (D.N.D. 2000); *United States v. Blaine County, Montana*, 157 F. Supp. 2d 1145 (D. Mont. 2001); *United States v. Passaic City*, No. 99- 2544 (D.N.J. 1999); *United States v. Day County*, No. 99-1024 (D.S.D. June 16, 2000); *United States v. City of Lawrence*, No. 1:98-cv-12256 (D. Mass. Nov.

of the Voting Rights Act is the provision that authorizes private actors and the U.S. Department of Justice to challenge discriminatory voting practices in the federal courts. Section 2 applies nationwide and is one of the main protections available to people of color after the devasting *Shelby County v. Holder* decision in 2013 which gutted a key provision of the VRA that for nearly 50 years, required jurisdictions across the country, though primarily in the American South, to (a) provide notice of *every* voting change that they proposed implementing[2] and (b) satisfy their burden to receive approval from the federal government *before* they implemented any voting change and show that it would not worsen the ability of people of color to participate equally in the political process. The Supreme Court decision in *Shelby County* loosened the reins of protection and allowed state and local governments to unleash discriminatory voter suppression schemes virtually unchecked. While section 5 was severely weakened, Section 2 of the VRA remains intact and is often used to seek redress for harmful and discriminatory actions related to voting. In August of 2013, civil rights groups, including LDF, and other advocates challenged the Texas photo ID law, SB14 in a case called *Veasey v. Perry*. Texas implemented this strict and prohibitive photo ID law within hours of the *Shelby* decision. While the previous Administration's Department of Justice intervened in that case as a Plaintiff-Intervenor, the current Administration subsequently withdrew from the matter.

Similarly, the Civil Rights Division of the Department of Justice also filed a section 2 case against the State of North Carolina in 2013, alleging that provisions in House Bill 589 illegally resulted in a denial of the right to vote on the basis of race, color or membership in a language minority. That litigation was successful in striking down the North Carolina law with the decision of the Fourth Circuit Court noting that the law was "the most restrictive voting law North Carolina has seen since the era of Jim Crow"[3] and that the provisions of the law targeted African Americans with "almost surgical precision."[4]

Of course, until 2013, the Department played a vital role in enforcing the preclearance provisions of section 5 of the Voting Rights Act. As noted above, the Supreme Court in its *Shelby County* decision struck down the formula used to implement section 5.[5] The 2006 congressional record amassed for the reauthorization of the Voting Rights Act reveals that the department denied preclearance for 700 changes between 1982 and 2006.[6] The Shelby County decision

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5, 1998); *United States v. Cibola County*, Civil Action No. 93-1134-LH/LFG (D. N.M. 1993); *United States v. Sandoval County*, No. 88-CV-1457-BRB-DJS (D. N.M. 1988).

[2] The Department of Justice reports that in just the three years before the *Shelby* decision, between 2010-2013, it considered 44,790 voting changes under Section 5. Section 5 Changes By Type and Year, Total Section 5 Changes Received By The Attorney General 1965 Through 2013, https://www.justice.gov/crt/section-5-changes-type-and-year-2 (last visited June 24, 2019).

[3] N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016)

[4] Id.

[5] *A Review of the Operations of the Voting Section of the Civil Rights Division*, Office of the Inspector General, Department of Justice, page 81 (March 2013) https://www.oversight.gov/sites/default/files/oig-reports/s1303.pdf.

[6] H. R. REP. NO. 109-478, at 21 (2006) https://www.congress.gov/109/crpt/hrpt478/CRPT-109hrpt478.pdf.

ended the preclearance process, but voting changes that result in discrimination continued, and indeed increased, since 2013.[7]

With voter suppression intensifying each, and every year, at the local, state, and federal levels, the right to vote for African American people and other people of color, is facing its greatest threat in decades. Yet, the current Administration has not filed a single Section 2 Voting Rights Act case to challenge clearly discriminatory voting changes which would have been caught and denied preclearance under section 5. This dearth/insufficiency of VRA enforcement was captured in the 2018 Statutory Report of the U.S. Commission on Civil Rights entitled "An Assessment of Minority Voting Rights Access in the United States" which examined the Trump Administration's record on voting rights[8]. The report sets forth many findings on issues related to voter access, voter discrimination and various barriers to voting. A key conclusion/recommendation in the report is that "[T]he DOJ should pursue more VRA enforcement in order to address the aggressive efforts by state and local officials to limit the vote of minority citizens and the many new efforts to limit access to the ballot in the post-Shelby County landscape. "[9]

Criminal Justice/Policing

The Civil Rights Division has similarly abdicated its responsibility for enforcing civil rights laws in the area of criminal justice. One of the key areas in which the Division has followed an explicit policy against using its power in this area is its failure to aggressively prosecute "patterns and practices" of unconstitutional policing, which the Department is empowered to do under the Law Enforcement Misconduct Act.[10] That statute was passed by Congress in 1994 in response to the shocking video of the beating of Black motorist Rodney King by officers of the Los Angeles Police Department and the acquittal of the officers in a state prosecution. The law empowers the Attorney General to address systemic discrimination by law enforcement and to prosecute individual law enforcement officers engaged in unconstitutional policing practices.[11] Since its enactment, various administrations have taken a measured approach to utilizing this authority opening approximately 69 investigations and resolving findings of civil rights violations with 40 agreements between 1994 and 2017.[12]

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[7] See NAACP Legal Defense and Educational Fund, Inc., *Democracy Diminished: State and Local Threats to Voting Post-Shelby County v. Holder (*Aug 2017) https://tminstituteldf.org/wp-content/uploads/2017/08/Democracy-Diminished-State-and-Local-Voting-Changes-Post-Shelby-v.-Holder_4.pdf

[8] https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf

[9] Id at page 14

[10] 42 U.S.C. § 14141.

[11] 34 U.S.C. § 12601.

[12] Civil Rights Division, U.S. Dep't of Justice, *The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present*, 3, Jan. 2017, https://www.justice.gov/crt/file/922421/download.

Yet, the Trump Administration has abdicated its authority to investigate police departments. When U.S. Attorney General Jefferson Sessions initially took office in 2017, he sent a memo to Justice Department officials stating that:

> The Federal government alone cannot successfully address rising crimes rates, secure public safety, protect and respect the civil rights of all members of the public, or implement best practices in policing. These are, first and foremost, tasks for state, local, and tribal law enforcement. By strengthening our longstanding and productive relationships with our law enforcement partners, we will improve public safety for all Americans.[13] (Emphasis added).

However, instead of supporting the Illinois Attorney General and Chicago elected officials who spent a year negotiating the terms of a proposed consent decree— which sought to protect and respect the civil rights of Chicago residents—the DOJ decided to spend taxpayers' dollars opposing an agreement that was fully consistent with the objectives set forth in its memo noted above because it does not agree with consent decrees[14].

This was not the first time the current DOJ tried to hinder local efforts to advance policing reforms, despite local residents and law enforcement executives supporting those reforms. In 2017, prior to the approval of the consent decree in Baltimore, the DOJ attempted to delay and restart the process. In that instance the DOJ was a party and the Judge denied its 11th hour request.[15]

The abandonment of the use of pattern and practice investigations and consent decrees was institutionalized in a memo from Attorney General Jeff Sessions dated November 7, 2018 wherein he severely restricted the use and duration of consent decrees.[16] The current administration has only opened one narrow investigation focusing on a single unit of the Springfield Police Department in Massachusetts. The prior Administration opened 25 investigations of police departments.[17]

Education

The Justice Department has similarly abandoned its roll of protecting and enforcing civil rights laws in Education. In 2018, the Justice Department joined the Education Department in

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[13] Office of Attorney General, Memorandum for Heads of Department Components and United States Attorneys, March 31, 2017, available at https://www.justice.gov/opa/pressrelease/file/954916/download.

[14] See Merrick J. Bobb, Jeff Sessions thinks consent decrees increase crime. He's just plain wrong, LOS ANGELES TIMES, Apr. 25, 2017, http://www.latimes.com/opinion/op-ed/la-oe-bobb-consentdecrees-work-20170425-story.html; see also Andrew Kaczynski, Attorney General Jeff Sessions: Consent decrees 'can reduce morale of the police officers,' Apr. 14, 2017, https://www.cnn.com/2017/04/14/politics/kfile-sessions-consent-decrees/index.html.

[15] 4 See U.S. v. Police Department of Baltimore, Case No. 17-cv-0099, Doc. No. 23 (D. Md.) (denying the DOJ's Motion for Continuance of Public Fairness Hearing and noting that the DOJ's efforts were "highly unusual")

[16] https://www.justice.gov/opa/press-release/file/1109621/download

[17] https://www.washingtonpost.com/outlook/2020/06/09/trump-pattern-or-practice/

rescinding Title VI of the Civil Rights Act of 1964 guidelines regarding the administration of school discipline in K-12 schools. The guidance was created as a response to evidence which demonstrates that students of color receive harsher punishments and are punished at higher rates— despite the fact that they do not misbehave more than their white peers. Research shows that Black K-12 students are 3.8 times more likely to receive an out of school suspension and 2.2 times more likely to be subjected to a school-based arrest.[18] Students of color are often disciplined for subjective infractions when their white peers are not. Advocates from across the country urged the Administration to maintain this critical protection for students of color, which does not create any new requirements for schools and is intended to help them comply with existing civil rights laws.

Additionally, the Justice Department has attacked the affirmative action efforts of higher education institutions. In every case challenging affirmative action to reach the Supreme Court since 1979, the Court has upheld the constitutionality of the practice with strict protections and safeguards.[19] The most recent was in *Fisher v. University of Texas* in 2016. Nevertheless, in 2018 the Division's lawyers filed a statement of interest opposing affirmative action in a case challenging affirmative action in admissions at Harvard. After a federal district court found that Harvard's affirmative action program did not violate the constitution, the Division's lawyers filed an amicus brief on appeal in that case in 2020. Just months ago the Division threatened to sue Yale University for its use of affirmative action in admissions. And just a week ago, the division made threatening moves towards Princeton University, after the university undertook to proactively address the history and contemporary reality of discrimination on campus.[20]

Department of Justice focused on tearing down civil rights laws and encouraging harmful behavior

Rather than protecting and advancing civil rights for the citizens of this country, the current Department of Justice often takes positions and promotes actions which violate civil rights laws. Instead of investigating unlawful policing, this Administration has incited unlawful policing by encouraging police to abuse those who are arrested by allowing them to hit their heads as they are seated in police cars;[21] and, U.S. Attorney General Barr warned that if people of color who protest police violence do not show respect for law enforcement, then they may

[18] https://indrc.indiana.edu/tools-resources/pdf-disciplineseries/disparity_newresearch_full_040414.pdf

[19] *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. University of Texas*, 579 U.S. ___ (2016).

[20] Anemona Hartocollis, *Princeton Admitted Past Racism. Now It Is Under Investigation*, New York Times (Sep. 17, 2020) https://www.nytimes.com/2020/09/17/us/princeton-racism-federal-investigation.html

[21] Associate Press, *WATCH: Trump to police: Don't worry about people in custody hitting their heads on squad cars*, July 28, 2017, nhttps://www.pbs.org/newshour/politics/watch-trump-police-dont-worry-people-custody-hitting-heads-squad-cars.

not receive protection from officers.[22] Recently even as demonstrators peacefully protested police violence in Washington, D.C. in the aftermath of George Floyd's death, President Trump and Attorney General Barr, ordered federal law enforcement to disperse crowds by throwing smoke canisters and pepper balls.[23] Furthermore, instead of fighting injustices in voting, the Department has abandoned its use of section 2 litigation to challenge pernicious voting suppression.

Conclusion

The Department of Justice's abdication of its role to protect and ensure compliance with civil rights laws has caused a need for organizations such as LDF to increase their own efforts to litigate cases, investigate violations, collect & disseminate data and provide leadership in the enforcement of the nation's core civil rights laws . This is not a model that can be sustained. The Department of Justice, Civil Rights division was established for a particular purpose. Congress should use its oversight powers to ensure that the Department fulfills its stated purpose "to uphold the civil and constitutional rights of all Americans" and to "enforce federal statutes prohibiting discrimination on the basis of race, color, sex, disability, religion, familial status and national origin."[24]

[22] Owen Daugherty, *Barr warns that communities that don't show respect to law enforcement may not get police protection: report*, Dec. 4, 2019, The Hill, https://thehill.com/homenews/news/472946-barr-warns-that-communities-that-dont-show-respect-to-law-enforcement-may-not.

[23] Ben Gittleson and Jordan Phelps, *Police use munitions to forcibly push back peaceful protesters for Trump church visit*, ABC News, https://abcnews.go.com/Politics/national-guard-troops-deployed-white-house-trump-calls/story?id=71004151.

[24] https://www.justice.gov/crt/about-division