

1998

## Civil Rights Division Association Symposium: The Civil Rights Division at Forty

Howard Glickstein  
*Touro Law Center*, [hglickstein@tourolaw.edu](mailto:hglickstein@tourolaw.edu)

Stephen J. Pollack

Brian Landsberg

Harold Greene

St. John Barrett

*See next page for additional authors*

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>

 Part of the [Civil Rights and Discrimination Commons](#)

---

### Recommended Citation

30 McGeorge L. Rev. 957 (1998-1999)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

---

## Authors

Howard Glickstein, Stephen J. Pollack, Brian Landsberg, Harold Greene, St. John Barrett, Paul F. Hancock, Muriel Spence, Michael Middleton, and James A. Turner

# Civil Rights Division Association Symposium: The Civil Rights Division at Forty

## SYMPOSIUM PARTICIPANTS

Stephen J. Pollak\*

Janet Reno\*\*

Brian Landsberg\*\*\*

Judge Harold Greene\*\*\*\*

St. John Barrett\*\*\*\*\*

Howard Glickstein\*\*\*\*\*

Paul F. Hancock\*\*\*\*\*

Muriel Spence\*\*\*\*\*

Michael Middleton\*\*\*\*\*

James A. Turner\*\*\*\*\*

---

\* Partner, Shea & Gardner, Washington, D.C.; Assistant Attorney General, Civil Rights Division, 1968-69; Past-Chair, Civil Rights Division Association.

\*\* Attorney General of the United States, 1992-present.

\*\*\* Professor, University of the Pacific, McGeorge School of Law, 1986-present; Acting Deputy Assistant Attorney General, 1993; Chief, Appellate Section, 1974-86; Chief Education Section, 1969-74; Attorney, 1963-69.

\*\*\*\* Judge, U.S. District Court, Washington D.C., 1978-present; Chief Judge D.C. Superior Court, 1965-78; Chief Civil Rights Division Appeals and Research Section, 1957-65; Attorney OLC (Little Rock desegregation case), 1956-57.

\*\*\*\*\* Private Practice, Washington D.C.; Deputy General Counsel, DHEW, 1967-77; Second Assistant Civil Rights Division, 1957-67; Department of Justice, Criminal Division, 1955-57.

\*\*\*\*\* Dean, Touro Law School; Director, Notre Dame Center for Civil Rights, 1973-75; General Counsel and Staff Director, U.S. Commission on Civil Rights, 1965-71; Attorney, Civil Rights Division, 1960-65.

\*\*\*\*\* Acting Deputy Assistant Attorney General, 1997-present; Chief, Housing Section, 1988-97; Assistant for Litigation, Voting Section, 1976-88.

\*\*\*\*\* Professor, Temple University Law School; Current Chairperson, ABA Section on Individual Rights and Responsibilities; Attorney, Civil Rights Division Appellate Section, 1979-83.

\*\*\*\*\* Professor, University of Missouri School of Law, currently University Vice Provost for Minority Affairs and Faculty Development; Equal Employment Opportunity Commission Associate General Counsel, 1982-85; Deputy Assistant Secretary for Civil Rights, 1980-82; Equal Employment Opportunity Commission Dir. Office of Systemic Programs, 1979-80; Employment Section Civil Rights Division, 1971-75.

\*\*\*\*\* Deputy Assistant Attorney General Civil Rights Division, 1969-93; Chair, Civil Rights Division Association, 1993-present.

## INTRODUCTION

**Stephen Pollak:** Good morning.

Attorney General Reno, Judge Harold Greene, colleagues, guests and distinguished panelists, I am Stephen Pollak, one of the directors of the Civil Rights Division Association.

Welcome to this, the second of our Symposia. This is the fortieth year of the Civil Rights Division. Our focus this morning will be the Division's past and where it should be going in the future.

You will hear from two panels. The first is composed of leaders of the Civil Rights Division with a total of sixty-five years of experience. As is said, "they've been there." This panel will examine where the Division has been, what have been its challenges, accomplishments and enforcement strategies.

The second panel, four experienced civil rights attorneys, each with more recent experience in the Division, will dissect where the Division is, or should be, going. This panel will address the daunting questions of the Division's priorities and enforcement issues as it approaches the twenty-first century.

Before turning to this exciting program, I want to honor the anniversary of one of the Division's accomplishments. It was thirty years ago this week that John Doar, Bob Owen and U.S. Attorney for the Southern District of Mississippi, Bob Hauberg, with the help of others in the Division, commenced an important trial. The trial was by jury in Meridian, Mississippi, before Judge Harold Cox, of eighteen men, leaders of the police and others from Neshoba County, charged with the slaying on the night of June 21, 1964, of three young civil rights workers.

After the trial and two full days of deliberations, the jury announced the verdict, on October 20, 1967, finding Sam Bowers, a leader in the crime, and six other men guilty of the charges.

I would like to read to you from John Doar's closing to the jury. These words say a lot about the Division's history and mission:

The United States Government felt it was essential that one of its Washington officials be here to speak directly and frankly to you, about the reason for the extra-ordinary effort the Federal Government undertook to solve this crime, and to state to you twelve Jurors why the Federal Government has assumed the role of the prosecutor of this conspiracy involving murder, the crime of which unfurled its criminal law in the State of Mississippi in and for Neshoba County. I am here because your National Government is concerned about your local law enforcement. Local law must work if we desire our liberty and freedom. The machinery of any law in any county, in any state, any police car, the uniform, the badge, arrest, calculated release, re-arrest, murder while in official custody and used to execute a plot to kill. If there is any hope for this land of ours the Federal Government has a duty to eliminate such evil forces that seize local law

enforcement, that seize local law in the county and to rectify the situation so that it can administer Justice. When local law enforcement officials become involved as participants of violent crime and use their position, power, and authority to accomplish this there is very little hope to be hoped for, except with assistance from the Federal Government, but Members of the Jury, exactly what does that mean? It means that the Federal Government is not invading Philadelphia or Neshoba county, Mississippi, it means only that these defendants are tried for a crime under Federal Law in a Mississippi courtroom, assisted by Mississippi courtroom officials before twelve men and women from the state of Mississippi. The sole responsibility of determination of guilt or innocence of these men remain in the hands where it should remain, the hands of twelve citizens from the State of Mississippi.

Members of the Jury this is an important case. It is important to the government. It is important to the defendants, but most important, it is important to the state of Mississippi. What I say, what the other lawyers say here today, what the court says about the law will soon be forgotten, but what you twelve people do here today will long be remembered. Does not everyone see and understand that it was a matter of absolute necessity that you twelve people of Mississippi be asked to sit as jurors and judge this case? These defendants will stand before you on the record in this case and they will beg you for indulgence. In effect they will say as Gloster said of old as he stood over the body of his slain king, he begged, "Say I slew them not." The queen replied, "Then say they were not slain, but they are dead." If you find that these men or that each of them is not guilty of this conspiracy it would be as true to say that there was no night time release from jail by Cecil Price, there were no White Knights, there were no young men dead, there was no murder. If you find that these men are not guilty you will declare the law of Neshoba County to be the law of Mississippi.<sup>1</sup>

Now it is my pleasure to introduce the Attorney General of the United States, Janet Reno.

**Janet Reno:** Good morning. It is a privilege to be here today on the fortieth anniversary of the Association. The Civil Rights Division during the majority of my life, and these last four-and-a-half years in particular, has been the heart and soul of the Department. In the last four-and-a-half years I have had the opportunity to see firsthand the changes that the Division has been able to implement. Also, I am pleased to say that it is composed of people committed to the rule of law and who work so hard for the betterment of all. The last four-and-a-half years go to the heart

---

1. Appendix, Vol. 5, pp. 2324-25, 2363-64, Posey et al. v. United States, No. 25654 (5th Cir.).

of what we try to do. Our goal is to preserve all the improvements that came before and to take additional steps to continue on that path.

At this moment I am particularly pleased to be here to revere John Doar and to praise the people who make up this department. I had the pleasure to meet St. John Barrett who worked tirelessly for the Criminal Rights Division and helped to back the Civil Rights Act. I am also pleased to see that Bill Lee was nominated by President Clinton to be the next Assistant Attorney General for Civil Rights. If you have not met Bill Lee, please introduce yourself. I expect that he will be confirmed.

Today you will hear from a number of veterans on civil rights. The expertise on civil rights in this room is unparalleled. Your ideas and suggestions are important to me, and I will respond to these ideas. It is such a pleasure to be among people who care so fully about civil rights. Thank you for this opportunity to speak with you.

### FIRST PANEL

**Brian Landsberg:** We are very fortunate to have three persons who by virtue of their tenure in the Division, dedication to equal justice under law, and by their achievements have served the Department well. Their biographies appear in the program. We plan on proceeding in three phases by asking each to give brief opening remarks and then we will open it up for questions. So Judge Greene would you like to begin?

**Judge Harold Greene:** I guess I have to if you asked me to. Thank you, Professor Landsberg and a special thank you to Attorney General Janet Reno who could not stay with us. We are honored that she graced us with her presence. I wanted to acknowledge her specially because she has some other pressing matters she must attend to today.

The presence of Jim Turner, St. John Barrett, and John Doar has made the Division even better. "Slim" Barrett is without exaggeration the linchpin of the Civil Rights Division.

Actually "Slim" Barrett was there before any of us. He was part of the Civil Rights Section of the Criminal Division and I am unsure if anyone involved with that Division gave his utmost to make the Division function the way that he did. When we came along in 1967 there were only ten attorneys in the section and a few of us that came from the office of legal counsel and this had some consequences. For example, we did not get parking spaces. We needed parking like everyone else. The Criminal Division, Antitrust Division, and the Civil Division kept their places. The Attorney General decided who would get parking spaces. We also had crummy office space. We had the offices where the FBI did their tours. Constantly, people would talk and we were unable to concentrate. This did not give me a good feeling that the Civil Rights Division was uppermost in the minds of those running the

Department. In any event, the Division was established by statute and Attorney General Rodgers made it a special Civil Rights Division.

However, after getting settled, there was just not much to do. We did enforce Sections 241 and 242 of title 18.<sup>1</sup> Primarily, we represented prisoners and parolees who charged government officials with unauthorized and improper conduct. My first case was to argue an appeal in the Ninth Circuit. It was based on our jurisdiction created through the Voting Rights Act of 1957.<sup>2</sup> I distinctly remember Attorney General Rodgers mentioning to be selective in picking cases to insure that the statute would not be overturned.

The pace changed dramatically with the arrival of John Doar. John took his group of attorneys down South and started agitating. I guess the sheriffs and voting registrars were not happy. The attorneys developed facts that evidence of abuse existed throughout the South. However, after a couple of years a pincer movement began. On the one hand was the district court judges who are now my colleagues. I most certainly did not call them colleagues then. They always ruled against us. On the other side were white government officials that resisted integration.

John Doar and his team learned that many blacks were denied an opportunity to participate in the democratic process. Many were prevented from doing so by underhanded methods and questions that even Professor Tribe could not answer. Whites were asked who was George Washington? Blacks were asked what is the meaning of Section 1 of the Mississippi Constitution? Obviously, they failed every test. Luckily, with the emergence of Judge Skelly Wright, Judge Stallworth, and Judge Carla Fields, decisions started to overturn these practices. These judges and others did manage to see through the stratagem concocted by the officials and judges. It was not the ingenuity of the attorneys, but rather the judges warming to the idea of overturning previous modes of thinking.

We did other things as well. We wrote amicus briefs to the Supreme Court and various appellate courts for landmark cases, such as *Baker v. Carr*.<sup>3</sup> We focused mostly on protecting democratic government and ensuring voting access and equal representation. Our goals became attainable mostly because of the 1964 Civil Rights Act.<sup>4</sup> We gave our full support toward the Act's passage and because of the fertile political soil, we saw our goals take root and flourish.

The highlight of my career in the Civil Rights Section was the day that I went to the Senate to watch them contemplate the passage of an amendment to the Civil Rights Act during which there was an ongoing filibuster. This day was the first successful cloture vote in the history of the Senate.<sup>5</sup> The legal principles at issue in

---

1. 18 U.S.C. §§ 241-242 (1870).

2. 42 U.S.C. § 1971 (1957).

3. 369 U.S. 186 (1962).

4. 42 U.S.C. § 1971 (1964).

5. See 144 Cong. Rec. E1431-04 (1998) (statement of Hon. James L. Oberstar) (providing insight on the debate leading to the cloture vote).

the debate were whether the amendment could be passed pursuant to the Interstate Commerce Clause<sup>6</sup> or pursuant to Section 5 of the Fourteenth Amendment.<sup>7</sup> The Interstate Commerce Clause argument carried the day and was upheld against future constitutional challenges.

Now we have a magnificent Division with hundreds of lawyers, and I expect another influx of one hundred more attorneys. With their arrival I expect a hundred fold increase in productivity. The Division has done very well and I expect them to continue to do very well. Thank you very much.

**St. John Barrett:** The first voting rights case filed under the 1957 Act<sup>8</sup> was *United States v. Raines*<sup>9</sup> in the Middle District of Georgia. The initial complaint came from the Terrell county NAACP. The investigation was conducted by the FBI out of Macon, Georgia, under the direction of attorneys in the new Civil Rights Division.

There was never any question that the investigation, the drafting of the civil complaint, the preparation for trial, and the trial itself would be conducted from Washington. It was a test of the new statute, the new division and new procedures.

Before 1957, the jurisdiction of the Department of Justice in the civil rights area was limited to criminal prosecution under statutes enacted during the Reconstruction Era after the Civil War. These statutes punished deprivation of Fourteenth Amendment rights by persons acting under color of state law, and conspiracy by individuals (whether or not acting under state authority) to deprive persons of peculiar federal rights, such as the right to vote in federal elections, the right to be secure while in federal custody, the right to complain and give information regarding federal law violations, and the like.<sup>10</sup>

Enforcement of these statutes, along with the miscellany of other statutes (such as wiretapping), was supervised by the Civil Rights Section of the Criminal Division. Among its staff were some of the great names in civil rights enforcement: A.B. Caldwell, Maceo Hubbard, Henry Putzel and David Norman, to name a few. The mode of operations, however, was geared to the Department's traditional mode of criminal law enforcement as spelled out in the U.S. Attorney's manual. The U.S. Attorneys were the primary actors. They reviewed the results of the preliminary investigations conducted by the local FBI office (most often of complaints of police misconduct), expressed their views concerning possible violations, conducted later grand jury inquiry and generally tried any resulting case. I might add that the views of the U.S. Attorneys were usually negative about investigations of local police officials. The Civil Rights Section lawyers stayed largely behind their desks in Washington. Their formal role was more as naysayers

---

6. U.S. CONST. art. I, § 8, cl. 3.

7. U.S. CONST. amend. XIV, § 5.

8. Civil Rights Act, 42 U.S.C. § 1971 (1957).

9. 362 U.S. 17 (1960).

10. 18 U.S.C. §§ 240, 241 (1870).



than as initiators. Authorization by the Section was required for a full FBI investigation, a grand jury inquiry or presentation or the filing of a misdemeanor information. Although Washington could preempt a U.S. Attorney, it rarely did. The U.S. Attorney was regarded as having an advantage in getting cooperation from local officials, in convincing local jurors and in dealing with federal judges in his district.

The filing of *Raines* in September 1958 heralded the new era—the era of the 1957 Act and the new Division. It was a shift in emphasis from criminal to civil litigation, a shift in balance from the U.S. Attorney to the Department in Washington, and a shift from inactivity to active involvement by attorneys in investigation of civil rights complaints. These shifts entailed major shifts in relationships between their Department and the FBI, between the Department and the U.S. Attorneys, and between the Department, on the one hand, and citizen complaints and private civil rights organizations, on the other.

The role shifts that I refer to did not spring entirely from the Civil Rights Act of 1957.<sup>11</sup> They were presaged by at least some other developments. In 1956, the Department received a complaint from former governor Jimmie Noe in Louisiana that a white-supremacist organization called the Citizens' Council—a sort of white collar Ku Klux Klan—was purging black voters from the rolls of registered voters in a number of parishes in northern Louisiana—voters whom it so happened, had supported Governor Noe. The Criminal Division asked the FBI to investigate, and, sure enough, members of the Citizens' Council had trooped into the registrars' offices in some fifteen or twenty parishes in northern Louisiana, had demanded that they be given access to the registration records, and had then challenged the qualifications of all black voters but no white voters. The registrars knuckled under and removed virtually all black voters from the rolls.

At the time of the Louisiana investigation, I was a young attorney on the trial staff of the Criminal Division. The Criminal Division did have some trial staff that were used primarily to get U.S. Attorneys off the hook when they had politically sensitive prosecutions, conflicts of interest or government corruption cases. Although I had no experience in civil rights, I was assigned, as a trial attorney, to handle the Louisiana matter, with a penchant for prosecuting any case that might develop. A case did develop, and a federal grand jury was convened in Monroe, Louisiana. After a lengthy and detailed grand jury inquiry in which both the registrars and the Citizen Council members were required to testify, the grand jury no-billed all of the charges.

Several lessons were learned from Louisiana. First, our chances had not been hurt by having an attorney from Washington handle the proceedings. The U.S. Attorney was cooperative and lent his support by his presence and his comments during all grand jury sessions. The grand jurors were courteous and serious, and, on

---

11. 42 U.S.C. § 1971 (1964).

occasion, even came down pretty hard on the Citizen Council members. Second, it helped having an attorney on the scene in connection with any FBI investigation. And the agents, if not the FBI bureaucracy, seemed to like it. Third, in the deep South, a panel of white jurors (all of the twenty-three grand jurors were white, and all but two were male) would not vote against the racial caste system. That was clear. That was a given in the deep South.

The bottom line was that the criminal prosecution was an inadequate tool, and we needed more attorneys to head south. The answer was to develop and file civil suits from Washington.

The Assistant Attorney General in charge of the Criminal Division, Warren Olney, had me draft a civil complaint for an injunction to protect the rights of blacks to vote in federal elections in Louisiana. This had never been done before. I also prepared a legal memorandum supporting the standing of the United States as a party to bring such an action. The legal argument was based largely on the landmark case *In re Debs*,<sup>12</sup> in which the Supreme Court sustained the right of the United States to sue the unions for interfering with interstate transportation through Chicago during the great Pullman strike.<sup>13</sup> It was unlikely at the time of this precedent that *In re Debs* would be used to protect other civil rights or other federally protected rights that were not in the interest of business, property and established power. In any event, Attorney General Brownell asked Mr. Olney to present his proposal at a meeting in the Attorney General's Office with all the Assistant A.G.s—I presume including Warren Burger, then head of the Civil Division, and Wilson White, later to become the first head of the Civil Rights Division. I was told after the meeting that the Attorney General had decided that we would not proceed because the consensus was that the country needed enactment of the Civil Rights Bill, then pending in the Congress, and it would be better to have Congress behind us rather than just the Attorney General and the courts. Although bitterly disappointed at the time, I have since come to agree with that judgment.

I cannot recall why we did not file a civil suit in the Western District of Louisiana promptly after the enactment of the 1957 Act. It took us ten months before we filed *Raines*, and I think it was a long time after that before we filed our second voting rights suit.

With the appointment of Harold Tyler as Assistant Attorney General for Civil Rights towards the end of the second Eisenhower administration, and his selection of John Doar as his first assistant, things changed rapidly. The work of the Division was reorganized along geographic lines, rather than subject matter. This meant that a lawyer might handle all types of civil rights cases from southern Mississippi, rather than educational discrimination wherever it arose. This also facilitated travel,

---

12. 158 U.S. 564 (1895).

13. See *id.* at 580-85 (granting the Justice Department standing to sue striking unions that were inhibiting the shipment of interstate commerce).

and a lawyer would become more familiar with public officials, civil rights activists, and resident FBI agents in a particular area. The lawyers did travel. In fact, my wife still resents the time I spent away from the family, although I never came close to winning the coveted carpet-bagger award given each year to the Division attorney with the most hours on the road. The time away might have been long and difficult, but it was one of the best parts of my life. Thank you.

**Howard Glickstein:** When I spoke to Judge Greene (who was my section chief when I was in the Division) about today's presentation, I told him that I had considered devoting my remarks to extolling my section chief, but decided not to when I realized there could not possibly be enough time to do justice to that subject. Brian Landsberg, in posing some preliminary questions to us, suggested that we might comment on what brought us to the Civil Rights Division. I had been interested in civil rights since my days in high school. People always remember where they were when some major event occurred. I was in law school at the time *Brown v. Board of Education*<sup>14</sup> was decided, and remember just where I was when I heard the news.

I began my career in private practice in a big New York law firm in 1956. Although I am not sure I would have found private practice very gratifying under the best of circumstances, I found myself distracted by the burgeoning civil rights movement. I felt that I had to do something. One possibility was to get involved in the freedom rides and sit-ins, but as an orthodox coward, I knew that route was not for me. Another possibility was to utilize my training as a lawyer. I applied twice for positions with the Civil Rights Division and was rejected both times. In one of those instances someone I knew who had connections with the Department tried to learn why I was being rejected. He was told that there was a feeling in the Division that they did not need to hire a New York Jew to send to the South.

In early 1960, however, Harold Tyler was nominated to head the Civil Rights Division. He was practicing law in New York at the time we met. He assured me that if he were confirmed, I would be hired. He was, and I was. The climate in those days can be illustrated by a conversation Harold Tyler and I had when he offered me the job. He told me that my application showed that I was a member of the American Civil Liberties Union, and that I would have to resign my membership. After waiting briefly for the other shoe to drop, I said to Mr. Tyler, "what about my membership in the NAACP?" He said that would also have to go. I pointed out to him that I was a lifetime member of the NAACP, and was not sure how I could give that up, except by jumping out of a window.

Slim Barrett mentioned there were areas of jurisdiction the Division had carried over from the days as part of the Criminal Division. I recall the first appeal I argued

---

14. 347 U.S. 483 (1954).

was a case involving the Youthful Offender Act.<sup>15</sup> With that appeal, I did not have to worry about heading south. The argument was in San Francisco, as was Judge Greene's first appeal argued for the Division.

Some of what we were assigned to do in those days was rather heady, or at least later became so. One of the first assignments I was given was to recommend whether the United States should file an amicus brief in support of a petition for certiorari in a case called *Baker v. Carr*.<sup>16</sup> Sometimes our work had political overtones. In the midst of the 1960 presidential campaign, Dr. Martin Luther King was arrested and jailed in Atlanta. Both presidential candidates were looking for a way to respond. Our Section was asked to look into the question of whether a writ of habeas corpus could be filed on behalf of the person in prison, rather than by the person himself. If this was possible, the idea was for the Attorney General to file a petition for habeas corpus on behalf of Dr. Martin Luther King. As I recall, some of us thought that it could be done (our section chief did not agree); nevertheless, the possibility of filing such a petition was communicated to Attorney General Rodgers, who was participating in the Nixon campaign. Nothing ever came of this; however, some of you may recall that Senator John Kennedy did call and write to Mrs. Martin Luther King, and apparently this had significant voter impact.

While there was some tension and friction between the department, the FBI, and some U.S. attorneys, this was not universally true. During the New Orleans school desegregation litigation, I had an unrelated appeal to argue in New Orleans. The school litigation, as you may recall, was in Judge Skelly Wright's court. I was asked probably by Slim Barrett, to meet with the U.S. Attorney and get his advice about some of the alternative strategies the department was considering pursuing in the case. I explained the alternatives to the U.S. Attorney; he picked up the phone, dialed a number, and then I heard him say, "Hello, Skelly, there is someone here with me from the Civil Rights Division who wants to know what they should do next and I want to know what you think." So much for the separation between the executive and judicial branches.

I once appeared in federal district court before Judge Mize. I think it was in a case where we were seeking voter records under the Civil Rights Act of 1960.<sup>17</sup> Judge Mize did not wear a jacket in court, but presided in his shirt and suspenders. He also used a spittoon. Every time I was making a point, I heard a clank.

I also was one of a group that was headed by John Doar that went to Montgomery, Alabama after the freedom riders were beaten up in Montgomery and Birmingham on Mothers' Day in 1961. We stayed at the Maxwell Air Force Base because it was apparently not safe to stay in a downtown hotel. A suit was brought against the Montgomery and Birmingham police departments and the Ku Klux

---

15. 18 U.S.C. §§ 5010-5026 (1962) (repealed Oct 12, 1984).

16. 369 U.S. 186 (1962).

17. 42 U.S.C. §§ 1974-1974(e) (1960).

Klan, and John handled the case for the United States. I remember one witness who was being examined by the attorney for the Ku Klux Klan. The witness was a white man who had witnessed the beatings and was testifying about what happened, and the attorney was trying to undermine his credibility. He asked if he was now or ever had been a member of the ACLU? The man answered no. He asked are you now or have you ever been a member of the NAACP? The witness again answered no. And he asked are you now or have you ever been a member of the Communist party? He said no. And then the final question: did you ever go to Harvard? (laughter).

Recently, I received a notice from the State of Mississippi that I could see what was in the files of the Mississippi State Sovereignty Committee that related to me. There was not much, but I was sent one newspaper article that reminded me of a case that was brought by the NAACP involving the freedom riders in Mississippi. The article described one of the days in court and noted, "meantime a warm exchange of remarks between Mississippi Attorney General Joe Patterson and U.S. Justice Department Attorney Howard Glickstein highlighted the three day hearing." The article continued: "Patterson lashes Fed: Patterson and Justice Department Attorney Howard Glickstein of Washington exchanged words after Patterson objected to the court because Glickstein was conferring with attorneys for the plaintiff." The plaintiff's attorney was Constance Baker Motley. The court replied to the objection that the Justice Department had entered the case as a friend of the court and the conference was not improper. "I will be happy to confer with any parties in this hearing," Glickstein told Patterson.

The Attorney General replied, "We prefer to confer with friendly parties."

"The Justice Department is friendly to anyone interested in justice," Glickstein shot back. At this point, the across-the-room conversation halted. I must have been a wise guy in those days.

There was a great deal of idealism in the Division when I arrived in 1960. I think most of us thought that we were attacking problems that eventually could be solved. Our faith at that time was in the right to vote. The Civil Rights Acts of 1957<sup>18</sup> and 1960<sup>19</sup> focused on voting. The theory was that if people could vote, problems in education, housing and employment would be solved. Looking back, this view seems rather naive. We did not seem to recognize that the franchise was uninhibited in New York and Chicago (in fact, in Chicago, you could vote a few times), but there was still extensive discrimination in education, housing and employment in those areas.

My idealism and naiveté were checked on one occasion by Burke Marshall. I met with him to discuss the draft of an amicus brief in the *Goss* case,<sup>20</sup> the first school desegregation case to go to the Supreme Court after *Brown*. The issue

---

18. *Id.* § 1971(a)(1) (1957).

19. *Id.* §§ 1974-1974(e) (1960).

20. *Goss v. Board of Educ.*, 373 U.S. 683 (1963).

involved student transfers. At one point in the brief, I quoted the dissent in *Plessy v. Ferguson*.<sup>21</sup> I extolled the virtues of a colorblind Constitution, and said that color should not be considered, especially when it came to fashioning remedies to deal with past discrimination. And so I was introduced to the concept of affirmative action.

Slim Barrett mentioned that after Harold Tyler became Assistant Attorney General, there was much more field work and an intense focus on particular geographic areas. This approach paid off when the Voting Rights Act of 1965<sup>22</sup> was being considered in the Congress. I assisted Attorney General Katzenbach when he testified before the Senate Judiciary Committee. The Chair of the Committee was Senator James Eastland of Mississippi, who often was a persistent and sometimes hostile questioner. Eastland, however, refrained from asking Katzenbach questions. During a break in the hearings, the Attorney General approached Senator Eastland and asked why he had not been asking more questions. Senator Eastland responded, "Why, Mr. Attorney General, you know more about Mississippi than I ever will."

At times during the early sixties, we seemed to be moving at a snail's pace. I soon realized that Burke Marshall was taking advantage of my impatience. He often asked my views on particular cases or issues and it gradually became clear to me that he did this not out of respect for my legal acumen, but because he wanted to hear the most extreme view on an issue.

One source of my impatience was our approach to the sit-in cases. The civil rights groups challenged the sit-in prosecutions as violations of the Fourteenth Amendment Equal Protection Clause.<sup>23</sup> In virtually every case where we filed an amicus brief, the Department tried to find some narrow approach for invalidating the sit-in arrests and prosecutions. I became an expert in detecting defective informations or indictments or overbroad statutes. I was frustrated that we did not take a sweeping approach for the sit-in cases, but in retrospect I was probably wrong as Slim indicated he was, or should not have felt so bad in the mid-sixties. If the Supreme Court had invalidated the sit-in prosecutions on Fourteenth Amendment grounds, we might never have had the public accommodations provisions of the Civil Rights Act of 1964.<sup>24</sup> In the long run, it probably was better to desegregate places of public accommodation by an act of Congress, rather than through a court decision which might have provoked the same massive resistance as *Brown v. Board of Education*.<sup>25</sup>

---

21. 163 U.S. 537, 557 (1896) (Harlan, J., dissenting); *see id.* at 559 (Harlan, J., dissenting) ("[O]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect to civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.").

22. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

23. U.S. CONST. amend. XIV.

24. 42 U.S.C. § 1971 (1964).

25. 347 U.S. 483 (1954).

The one regret that I have about my years with the Civil Rights Division is that it was so early in my career that I had the best job in my life, and despite other things that I have done, I have never had a job that was quite as exciting. Also, it was a job that gave me the opportunity to work with people such as Harold Greene, John Doar, Slim Barrett, David Rubin, Peter Smith and Constance Battle Rankin. Those were very exciting days, and I know that today the work probably is equally as exciting. Unfortunately, I am afraid that there is also a great deal left to be done. We must remember our past and use these valuable experiences to fashion our approach for the future. Thank you.

## SECOND PANEL

**Paul F. Hancock:** On this panel we are going to try to talk about where we are headed as a division, what issues we need to address, and what our priorities might be. I hope we get some good comments from the audience. You know I need to take notes here so we can work fast. We have got a good group of people to consider this, all of whom are alumni of the division. Muriel Morisey Spence is now at Temple Law School and she is also the chair of the ABA Section on Individual Rights and Responsibilities. She worked in our Appellate Section from 1979 to 1993. Mike Middleton also is in the academic area. He is now serving as the Vice Provost for Minority Affairs and Faculty Development at the University of Missouri, and Jim Turner needs no introduction.

I will give you some idea of where we are today and then we can talk about where we might be going. The Division has grown dramatically in comparison to the early years that we have talked about so far. In 1967, for example, there were 216 staff positions in the Civil Rights Division, sixty of which were attorney positions. Today we have a total staff of 557 people, of which 261 are attorney positions. The budget has grown from about \$2 million in 1967 to more than \$64 million. We still operate with a functional section assignment as we did since we were first established in 1969, and the old section that was the heart and soul of the Division such as the sections that enforced provisions of the 1964 Civil Rights Act.<sup>26</sup> The Education Section and the Employment Section remain in existence. We still have, of course, the Voting Section and since the 1965 Voting Rights Act,<sup>27</sup> the Housing Section that enforces the 1968 Housing and Urban Development Act.<sup>28</sup> The Civil Rights Division led those sections so ably for many years by your peers like Brian, Dave, Frank, Sandy and we still are devoting many resources to those areas. Those sections now have even found new responsibilities. The voting section, for example, not only enforces the Voting Rights Act of 1965, but also enforces the

---

26. 42 U.S.C. § 2000 (1964).

27. *Id.* § 1973 (1965).

28. *Id.* § 3601 (1968).

National Voter Registration Act, the so-called "Motor Voter" law.<sup>29</sup> The Housing Section has changed very dramatically over the years. For example, amendments to the Fair Housing Act of 1988 gave us authority for the first time to bring cases for individual victims of discrimination and to seek money damages in fair housing cases, so that now we are litigating civil rights cases before juries.<sup>30</sup>

Probably some of the most significant changes have involved new areas which reach beyond the traditional area of race discrimination that we talked about so far this morning. For example, a very significant part of our work now is enforcing the Americans With Disabilities Act (ADA)<sup>31</sup> and other statutes in the Fair Housing Act,<sup>32</sup> which, for example, prohibit discrimination on the basis of disability. We are devoting a good portion of our resources, seventy-three staff positions, to work in the Disability Rights Section. That, of course, is the ADA. As we acquired new responsibilities, we maneuvered the Division into utilizing the Civil Rights of Institutionalized Persons Act<sup>33</sup> to challenge the conditions of confinement in state-run prisons, nursing homes, and juvenile facilities. We also enforce the Freedom of Access to Clinic Entrances Act<sup>34</sup> and, similarly, we now have authority because of the Crime Bill of 1994<sup>35</sup> to challenge patterns or practices of policemen conduct for civil remedies of those cases.<sup>36</sup> Some of you may remember that we tried to police many of these areas in years past without statutory authority and we did not have much success, but now we have legislative authority to do it.

While that is good for the Division and for the country, it also presents a very serious challenge for our resources. We have been able to grow over the years and add positions—prior to the authority to enforce the ADA—with the passage of the Fair Housing Act. Today we are facing new challenges because budgets are flat. A flat budget for us means a declining budget because we have to absorb cost of salary increases. As most of you know, part of the budget in the Civil Rights Division goes to paying salaries, thus, when we have a flat budget, it actually hurts us. The challenge we are going to face in the future is what our priority should be in enforcing civil rights laws. I have indicated that when we acquired new authority over the years, we probably dealt with this by creating and staffing new sections to the divisions. In the future, we cannot expect to be able to do that. We might have

---

29. *Id.* § 1973(gg) (1993).

30. *See Five in Cross-Burning Case Face Sentencing*, KANSAS CITY STAR, May 3, 1998, at A10 (reporting that the Department of Housing and Urban Development filed a civil lawsuit against private defendants for violation of the Fair Housing Act of 1988 by "conspiring to burn the cross").

31. 42 U.S.C. §§ 12112-12114 (1990).

32. *Id.* § 3601 (1998).

33. *Id.* § 1997(a) (1998).

34. 18 U.S.C. § 248 (1994).

35. *Id.* § 1084 (1994).

36. *See* Clarence Page, *Police Brutality: Bridging Gaps in Law Enforcement Perception Between Blacks and Whites*, CHICAGO TRIB., Oct. 25, 1998, at 23 (describing the ability of the federal government to create and enforce consent decrees to provide oversight over rogue police departments).



to make some decisions, not only for what we want to do, but what we are not going to do as a result of decisions to engage in particular activities.

We also need to give some thought to what legislative authority we might need to enforce civil rights laws, and to address the important issues in civil rights that the country is going to face in the Twenty-First Century. For example, a recent Gallop Poll released this year indicated that more than forty-five percent of African-Americans who were surveyed reported facing discriminatory treatment within the past thirty days in one of five different areas of daily life. Much of the discriminatory treatment was in retail transactions and obtaining access to public transit. Currently, the Civil Rights Division does not have authority to deal with that type of discrimination. Yet, if someone is denied service in a retail establishment because of their disability, he can bring an action to challenge that discrimination.<sup>37</sup> But, if he is denied service in that same retail establishment because of his race, for the most part, we do not have authority to challenge that type of discrimination.<sup>38</sup> The question that we face in the future is whether there needs to be legislation that gives us more authority to address the problems that we expect in the future. Now let us get the views of Muriel Spence.

**Muriel Spence:** Well, I am really glad to be here. Until I took my current job, I always told everybody that my work in the Civil Rights Division was the best job that I ever had. The other thing is that I feel as though the Civil Rights Division made my career. Although my biography says that I was in the Appellate Section from 1979-1983, which is accurate, the truth is that Drew hired me to be the legislative person. The need for somebody to fill in for legislative issues on behalf of the section was very strong and I was the only one that anybody knew who actually enjoyed the work. So I was hired away from Pat Walton, who headed the Office of Legislative Affairs, to come to the Civil Rights Division. I found out about all of this when John came down to my office and said "Hi, I am John Huerta, and the Civil Rights Division wants to hire you."

It seems to me that, some how or another, in the last twelve to fifteen years—I left the division fourteen years ago so sometime between then and now—we have, as a country, seen a sort of larceny that involves the moral high ground and respect for the promotion of rights and opportunities in this country. People who are very committed to the enforcement of equal opportunity sometimes get cast as the

---

37. Americans with Disabilities Act, 42 U.S.C. §§ 12112-12114 (1990).

38. *But see* Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964) (interpreting the Commerce Clause as a plenary authority to allow the Federal Government to prevent racial discrimination in hotels that have a substantial and harmful effect upon interstate commerce); Katzenbach v. McClung, 379 U.S. 294 (1964) (determining that Ollie's Barbecue, a family-owned restaurant in Birmingham, Alabama, that had sit down eating for whites, but only allowed take-out meals for African-Americans, operated a discriminatory practice that could be remedied by the Federal Government through the Commerce Clause because Ollie's served food that was shipped in interstate commerce).

meanies because of “all of the affirmative action stuff.”<sup>39</sup> The claim goes that affirmative action is having this horrible effect by denying opportunities for many able-bodied white males who really are suffering terribly. Without any disrespect to any able-bodied white males, I just find it a little strange that we now have this very popular notion that the group under threat in society is largely the people who for two centuries or more really controlled everything.

Paul’s comments reminded us a great deal of what makes the Civil Rights Division important: the statutory authority. These authorities arose from the recognition that having Congress enact these laws was a very effective way of making sure we have the legal justification for the enforcement actions that are in place. I think that is still a powerful need. I think that the people I knew in the Division were not passive little enforcement worker bees, but people who were deeply committed to the mission of the Division, and committed to it in a pro-active way.

To this point, the aspect of my career about which I am most proud is the work I did for the enactment of CRIPA.<sup>40</sup> The fact that I was there to be the legislation specialist gave me a terrific opportunity to really see something happen that had been an idea generated from within the Division years before. About eight years before its enactment, a group of lawyers in the Division came up with the idea for “CRIPA” and there was a constant effort with full commitment from everyone that we would get it done. To hear Paul say that it is still a very important part of the enforcement issue is enormously satisfying to me. I do not think there are worker bees in the Division. That is not the way I see it. There are several people in the Division I still stay in friendly contact with, and it seems to me that because we have a Congress that is probably more friendly to the Promise Keepers than to the Civil Rights Division, does not change very much because as we hear from the panel it has always been an uphill battle to get done what was needed to be done. Making the divisions roll as effectively as possible, for the time, has always been difficult for Congress. I also do not believe that having a government job means you cannot be engaged outside of work. People working in the Division currently know much better than I do exactly what the constraints are on being a physical proponent of justice, opportunity and quality. Nevertheless, I think there is some room for the division people to see not just their jobs they are doing, which are enormously important, but also where they stand in the world. If the moral ground is shifted to people who do not believe in affirmative action, who do not think that gender discrimination is wrong, and that women need not be perceived of and treated equally, they are thereby participating in the public debate in a very powerful way.

---

39. See generally *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (determining that a government hiring practice that gives special preferences to Minority Business Enterprises—those owned by Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts—offends the Equal Protection Clause of the Fourteenth Amendment).

40. Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997(a) (Supp. 1998).

They very powerfully represent these messages in Congress. To me that just means everybody who is committed to the mission the Division represents has got to be part of the effort to maintain what the Division stands for. Let me just make a little pitch as an example of that. Apart from the question of defending against retrogressive legislative efforts, of which there are many, there is also, to me, the idea of involvement as lawyers. I will tell you that there is only one reason that I am a member of the American Bar Association, it is the only organization of which I am a card-carrying member; the ACLU membership having lapsed. I am a card-carrying member of the ABA and the reason is because of the Individual Rights and Responsibilities section that I now have the dubious honor of chairing. Dubious because it is taking over space and time I used to spend on a job you pay me to do at Temple University. We got the American Bar Association to adopt a policy supporting affirmative action in August of 1995.<sup>41</sup> We got the American Bar Association to promote needle exchanges for addressing the legal and public health issues associated with the AIDS epidemic.<sup>42</sup> My view is that if our little section, which is the second smallest in the entire ABA, can do that within the ABA then it seems to me that people who stand for the things that the Civil Rights Division represents, and the people who made it happen, can do anything.

We are always astonished at what we accomplish and I think that is part of the reason we manage to present the ABA with a way of looking at our issues as part of justice. In essence, the moral high ground without calling it that. Saying as lawyers you have promised to do some things, and those things relate to the legal system and there are ways in which the legal system can serve people better is an honorable goal. My view is that wherever you are, whether it is working on the Division staff or serving your profession and your commitments as lawyers in another place, it means finding a place to do battle or to engage in the battle for moral ground in this country. I do not think we have lost it yet, but I saw an awful lot of guys this morning who were very nice, who I believe in my heart would probably be part of a national referendum to limit what this division is about if you gave them a chance. There has got to be a way, in my view, to capture the positive things they are talking about while rejecting the idea that in order to carry out those positive roles they have to, for example, make men the lesser gender.

**Michael Middleton:** I have a couple of remarks to make initially before I get into what we came here to say. That is primarily because I am so impressed with this morning's panel. Someone asked—it was someone on this morning's panel—to explain how they got into the Division. As I was sitting in the audience watching

---

41. See *Woman Leads ABA*, PALM BEACH POST, Aug. 10, 1995, at 7A (noting that the first female president of the ABA, Roberta Ramo, began her tenure by urging "lawyers to support affirmative action").

42. See *Soros Pledges Additional \$1 Million for Needle Exchanges in U.S.*, PR NEWSWIRE, Apr. 23, 1998 (discussing the American Bar Association, along with the United States Conference of Mayors, backing the use of federal funds for implementing needle exchange programs).

the panel, they reminded me of how I came to the Division. I grew up in the late 1950s and 1960s in Mississippi and was one of those black kids who saw the Thurgood Marshalls, and the John Doars, and the St. John Barretts and others coming into Mississippi changing things. They so impressed me that I decided I wanted to practice law and do that.

So I got to the Division, I think through the inspiration that was provided by the Civil Rights Division during those early years, ended up getting into a law school, being discovered by Jerry Jones, Voting Rights Section Chief, when he was on a recruiting trip once and I was helping the Civil Rights commission. I was fortunate to be able to meet people like Dave Rose, who I see here. I think it is fair to say respectfully to my law professors, Dave probably taught me everything I know about being a good lawyer. We made good friends. The Civil Rights Division was the best job I have had in my life. Being asked back to remember it is pleasant.

What I want to talk about is another point made this morning and that was the point that the Civil Rights Division was instrumental in the transformation of America. It was; but I caution you to understand that the transformation is not complete. The worry that I hear from my colleague about this shifting of the moral high ground and the use of some of our own civil rights language and concepts to defeat what we had been doing is a serious problem. What I want to do is talk about, in a very practical way, some things that are happening out in the heartland, west of the Potomac, that I think are very impressive. They relate to affirmative action and raised consciousness in the things behind which we have always stood. I want to urge the Division to hold the fort and to fight against that shift in values, that shift in purpose, until that transformation is complete. I am involved in two things out in Missouri. One is that I am co-counsel with Bill Taylor here, all of you probably know him, on the St. Louis school desegregation case. I have been involved in that case since 1985 when I went out to Missouri to teach at the University of Missouri Law School. By the way I am still a professor at the law school although I am acting as an interim administrator at the University. That case has resulted in a situation where today they are educating some 14,000 black city children in suburban St. Louis schools. That case has been going on now for about fifteen years. The case has resulted in significant quality improvements in the black city schools in St. Louis. So the case has resulted in a significant increase in the quality of education provided to those inner city children. By the way, St. Louis schools are populated by children, eighty-five percent of whom are below the poverty level. You can imagine the difficulties that educators have in that type of situation and the benefits to the children who can move themselves, voluntarily I might add, to suburban districts. This is raised consciousness. This is old style civil rights. This is integration. This is happening in St. Louis to the benefit of not only the black kids who are in the programs who remain in integrated schools, but to benefit the suburban white children in the State of Missouri overall because of the diverse education to which all the students are exposed.

We are fighting the Attorney General from Missouri at this very moment on his efforts to get the system declared unitary. The result of that unitary status is that those 14,000 children, who have been removed from the city schools, would be returned to the city schools. The city schools are, in spots, integrated now. I think we all understand that these are virtually all black and underfunded, and unless there are some significant capital improvements involved, which are not part of anyone's plan at the moment, the schools will remain significantly overcrowded. So, buying into this new value of color-blindness at this point would essentially put St. Louis, and, I suggest, most of our schools involved in desegregation at the moment, back where they were in the '40s, '50s, '60s and '70s. Now, that worries me.

The second thing I am involved in as the Vice Provost for Minority Affairs and Faculty Development at the University of Missouri is the University's Diversity Act. I cannot claim credit for this success, and when I call it a success, understand it has to be considered in context. We are talking about middle Missouri, the home of Lloyd Baines, and one old bastion of segregated higher education, and my alma mater, by the way. In 1994, the University of Missouri at Columbia had not had a freshman entering class that had more than a hundred black students in its history. We have got campuses in St. Louis and Kansas City, both urban centers. Those campuses have a higher minority participation rate, but not significantly. We have got a chancellor at the Urban League, Charles Kiesler. Charles had a commitment to doing something about that problem. He made no bones about it. It was not a matter of finding some proxy to race, some scheme that would result in an increase in minority participation. Charles Kiesler would say, "I want to get a whole bunch of African-American students into this university." People would ask him why, and he would say, "Because we need them; because I believe that diversity is valuable in higher education. I do not believe we can call ourselves educating our students if we are excluding a significant number of students. I want them here. I am going to get them." He talked about it in terms of increasing the quality of education at the university, and increasing diversity at the university.

He set a goal of an entering class of 300 African-American students that next year. He targeted African-American students, because of the historic underrepresentation of African-Americans at the university. At that time, the state had about a twelve percent black population and the university had about a four percent black student population. The challenge was that eighty-four percent of the African-American population in Missouri is in St. Louis and Kansas City. Columbia is midway between the two cities, and is known to be a rural, racist town. We were also challenged by the coordinating board's requirement that we increase admissions standards at the university. We also faced increased competition for high quality African-American students around the state. That did not deter Chuck Kiesler. He made specific racial, geographic, and quality targeting decisions, focusing on St. Louis and Kansas City, focusing on black children, focusing on those black high school juniors and seniors who were the top twenty-five percent

of their classes. He analyzed performances on the ACT and determined what level of performance on those exams would produce an appropriate number of qualified potential applicants who, based on a historic yield from that applicant flow, would produce the number of students that he desired. We hired people—recruiters—to go to those cities. We had student groups hosting targeted students on campus, and established some significant scholarship programs directed for African-American students. Under different guises, we put a great deal of money into scholarship programs to attract these students: direct mail programs, follow-ups, and personal contact with parents. The result of this long effort was that in 1994, 97 black freshmen entered. The year after this program was implemented, 334 black students were admitted to the University of Missouri, Columbia. The following years: '95-'96:282; '96-'97:285; '97-98:287. We have managed to maintain about a 300-person entering class of African-Americans since 1994 through targeted, race-conscious efforts for achieving diversity on campus.

Now lest someone decides they want to sue us, we do have the factual predicate justifying this kind of race consciousness.<sup>43</sup> We have a history of exclusion and a record. However, that is not the important point I want to make. We are doing it because we value diversity. So I would urge you, when we get into these affirmative action debates, to understand that in academia there are a lot of good people who truly believe that diversity is valuable. A desire for diversity in higher education can define that compelling governmental interest necessary to justify race consciousness.<sup>44</sup> These efforts, including the willingness to develop a research base for assisting integration, are efforts I really support. There is a need to arm yourselves to deal with the onslaught of opposition to affirmative action that is obviously coming. Besides recruiting these students, we put a great deal of effort into retaining those students—for instance, co-enrollment of black students in high schools. We now even try to make sure they are not isolated in first-year classes. If you have three or four black kids from Beaumont High School in St. Louis, our counselors and admissions people understand and try to keep those kids together so they would register together. Interestingly, Chuck Kiesler used to announce the idea of recruiting what he called “posses” of African-American kids to campus. The idea being to go to the inner city and find there a group of young African-American students and recruit them as a group so there will be support systems when they get there. Well, the idea appeared to mid-Missourians as this guy wanted to bring these

---

43. See *Lidell v. Missouri*, 731 F.2d 1294, 1305-06 (8th Cir. 1984) (relating that, before the Civil War, Missouri prohibited the creation of schools to teach reading and writing to blacks. Act of Feb. 16, 1847, §1 Mo. Laws 103. State-mandated segregation was first imposed in the 1865 Missouri Constitution, Article IX § 2. It was reincorporated in the Missouri Constitution in 1945: Article IX specifically provided that separate schools were to be maintained for white and colored children. In 1952, the Missouri Supreme Court upheld the constitutionality of Article IX under the United States Constitution. Article IX was not repealed until 1976).

44. See generally *University of California Regents v. Bakke*, 438 U.S. 265 (1978) (considering the importance of a diverse school population as a compelling governmental interest).

gangs to our campus. So Kiesler had to modify that idea a bit. Once the students enroll, summer transition programs, summer welcome programs, orientation programs await them. Also, academic monitoring programs for some selective students in which each has a retention specialist who tracks their performance in the first year, finds out if there is a problem, and gives them assistance are examples of the programs that assist African-American students.

I am happy to tell you that the program has not been in place long enough to pinpoint graduation rates for those students admitted, but we have tracked retention. The retention data suggests that the African-American students at our campus have a higher retention rate than the general student body. So not only have we admitted high quality students and set in place programs to keep them, but these programs are working. This version of race-conscious affirmative action is working. So the kids can get better educated through the race conscious school desegregation efforts in St. Louis and Kansas City. The kids are benefitting from that program, and are benefitting from the admissions in the university retention program. As a result, we are giving quality education to kids in Missouri. All of that ends if you buy into this shift in balance and the recent appeals to color-blindness and racial neutrality.

In short I am here to cop a plea. While it might sound good to some people to understand the history and where you have been, and to understand this Division, one must understand the fight is not over. The transition is not complete, and until it is complete I would simply urge you to hold the fort.

One last point, I was at a meeting of student leaders on campus three or four days ago. We gave each student leader an opportunity to stand up and say what concerned him on campus. The President of the Asian Students Association and the President of the Hispanic Student Association both got up and raised the concern that, in their view, affirmative action seemed to be only for African-Americans. They wondered whether the University understood that other issues—other diversity issues—needed to be dealt with on campus. This struck me because most of the talk we did on campus was about our success recruiting black students. We do not talk much about what we do for other groups of people in Missouri. We do not talk much about gender and sexual orientation discrimination in mid-Missouri. I urge us all to recognize that when you move beyond the pure anti-discrimination context and talk about diversity and inclusion you really need to be serious about that and understand that the histories may not be the same. The remedial justification may not be the same for each group, but the value of respecting and making comfortable the diverse groups that we have in society is important to focus on and pay attention to, or we will end up fighting among ourselves and defeating the whole purpose. Therefore, as we hold the fort on these basic issues that we have dealt with we have to understand the need to broaden our focus and keep our goal of ending discrimination against all Americans.

**James A. Turner:** I especially want to thank Michael for his remarks. They have much meaning for me because I am an alumnus of the University of Missouri. I am

disappointed that I graduated in 1952. The long road that he described to the present state of student participation at the University of Missouri really took longer because I am reminded that in 1949, when I was an undergraduate there and a member of the student government, we took a poll and approximately two-thirds of the respondents said they supported admitting black students to the university. I was on the committee that took that message to the state capitol. We were received there by a committee of legislators. They lightly patted us on the head and said that was really nice for you kids to do this and come down here and give us your ideas. Although we really appreciate it, please do not come back. That was the end of that. I do not know what happened after that, but it took a while before we got to the point where Michael describes.

Now, in putting this panel together, in which I act as the Chair of the—or as we used to say, I am acting Chair—Board of Directors I was instructed to include people on the panel that would have contrasting views. Conservative views on all the things that have occurred might be given a different take. However, I have been unable to succeed. I have really tried. As the sports writer Red Smith once said in a different context, “I have really tried to like Howard Cosell, but I have failed.” In my case, the penalty for failing is what you see and you have to sit on the panel and try your best to make some conservative noises. Paul has alluded to the manifest changes in the country, in the law, in the Division from the days when Slim Barrett and John Doar roamed the South and Judge Green and Howard Glickstien feverishly drafted legislation. All of us are very proud to have been associated with that enormously successful change in the way America deals with racial minorities.

Of course, the job is continuing. The first mission that I see for the Civil Rights Division as we go over the Bill Clinton bridge into the next century is to keep on keeping on. We all look to the Division and can preserve and expand the great changes we all worked for. Nonetheless, staying the course is easier said than done. Looking back at the fifties and sixties, the first thing one is struck with is that something has happened to the national consensus that has formed around civil rights principles. In 1963, there was a legendary march on Washington, much better than the one today. One is tempted to say the first, but that would not be accurate. In 1965, the Voting Rights Act was passed quickly because the national conscience was so revolted and finally, after approximately one hundred years, civil rights was an idea whose time could no longer be put off.

I am sure you may have noticed that is not so today. Although the job is still unfinished, the public support has faded. In contrast to those days of bipartisan consensus, the *Washington Post* ABC Poll reported seven percent of whites, and six percent of black respondents think there is a crisis in race relations.<sup>45</sup> That is less

---

45. See generally Carl Rowan, *Clinton's Race Stance Is a Huge Gamble*, BUFFALO NEWS, June 17, 1997, at 3B (discussing recent polls surveying opinions held by African-Americans and Caucasians on the issue of race relations and equality of treatment).



than ten percent of the total population. However, the majority would classify, and actually do classify in this poll, minority issues as a serious problem. When asked to identify the country's most serious problem, only three percent say it is civil rights issues. Not only have we lost the once troubling sense of urgency that fueled the civil rights promises, but the very definition of the term "civil rights" seems to have changed and evolved dramatically. It no longer means dual school systems, deprivation of the right to vote, segregated accommodations and facilities, segregated lines, and unions separated by race. The new "civil rights" concept includes an amazing pantheon of issues. All of them traced back to the struggles of the sixties. Michael has mentioned one of the most raging topics in the major universities. The legal issue now centers on whether we are doing too much to help minorities. The debate is how much reform is constitutional. In the voting area, the issue has changed from the right to register, vote and hold office free of discrimination to whether rigging election districts to guarantee minority seats is legal under the Voting Rights Act.<sup>46</sup> Beyond these core issues about affirmative action, the landscape changes even more. I barely have the time to list some of the emerging issues. As Paul pointed out, the polls show minorities are more interested in pocketbook issues: jobs, loans and retail access. Also, minority no longer automatically means black or African-Americans, it now includes the Hispanics, the Asians, and the list goes on and on. The United States is blessed with a number of different people. Hispanics will soon be the largest minority group in the country, if they are not already. Consider that the largest section in our whole Division does not deal with employment or voting or housing; it deals with the enforcement of the ADA. In just a few years the ADA has changed the face of America. Federal law now mandates kneeling buses and sign language interpreters,<sup>47</sup> accessible dentist offices,<sup>48</sup> parking set asides,<sup>49</sup> and more. The Empire State Building now has a ramp to allow for wheelchair access. Of course it starts in New Jersey.

On the horizon we see a fascinating array of issues: the rights of immigrants to schools, jobs, welfare, and other services. The Division has one small section for dealing with citizenship status and discrimination. I know that because my wife works there. There are issues cropping up concerning the rights of gays and lesbians to be free of discrimination that occurs in their daily lives;<sup>50</sup> the rights of religious

---

46. See generally *Miller v. Johnson*, 515 U.S. 900 (1995) (explaining that a voting district is constitutionally suspect if race was a predominant factor motivating the legislature to place a significant number of voters within or without a particular district); *Shaw v. Reno*, 509 U.S. 630 (1993) (disallowing an attempt to create a gerrymandered district to insure that a larger minority voting base was within a particular district to assist in the election of a minority candidate).

47. 20 U.S.C. § 1401 (1975).

48. 42 U.S.C. § 12181 (1998).

49. 38 U.S.C. § 8109 (1998).

50. See generally *Romer v. Evans*, 517 U.S. 620 (1996) (determining that a Colorado constitutional amendment violated the U.S. Constitution because it was based upon a perceived animus toward homosexuals); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that sodomy is not a fundamental right protected by the U.S. Constitution).

minorities to practice beliefs that may conflict and intersect with others.<sup>51</sup> The rights of women also need defending. For instance, we in the Division are trying to make sure that the thirty-two young women attending the Virginia Military Institute make it through the rat line.<sup>52</sup>

Even without as much public support as we used to have for civil rights issues, we have seen class actions and litigation explode. Denny's was hit for \$45 million, Pepco for \$40 million, and the Department of Labor, \$4.5 million, and Texaco a whopping \$176 million.<sup>53</sup> So even as the courts seem to downplay affirmative kinds of remedies, those companies caught discriminating are really paying through the nose. On the legislative front, Congress is considering new legislation dealing with hate crimes and even some proposals to criminalize certain parts of civil rights violations.<sup>54</sup> On the state level, I think there is clearly going to be more Proposition 209s<sup>55</sup> and more efforts to get things like English to be the official language.<sup>56</sup> I could go on with dozens of other examples, but I think you get the point. What do these changes mean to the Division and how should it approach the future? My answer, as you might imagine, is the traditional one. John Doar and the others developed their total immersion approach to civil rights enforcement that has always been effective. The Division won its cases because its lawyers knew everything there was to know about the federal law, about the federal precedents, and above all, about the facts. They litigated cases and not causes.

The Division has always been most successful when it established its independence, and least successful when its litigation was used as a tool to make some philosophical or political point. I think that civil rights litigation has helped

---

51. See generally *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990) (upholding a general Oregon statute criminalizing peyote use which prevented Indians who used the drug in religious ceremonies from collecting unemployment benefits after being fired because of such use).

52. See generally *United States v. Virginia*, 518 U.S. 515 (1996) (invalidating the Virginia Military Institute policy of denying admission to women because it was predicated on an unconstitutional discrimination against women).

53. See, e.g., Marylynne Pitz, *Couple's Civil Rights Suit Against Denny's Rejected*, PITTSBURGH-POST GAZETTE, June 18, 1997, at B4 (noting that the Denny's restaurant chain settled two class action lawsuits in 1995, one in California and the other in Maryland, for alleged racial discrimination in serving patrons); David E. Rovella, *Texaco Execs' Verdicts Roil Prosecution*, NAT'L L.J., May 25, 1998, at B1 (discussing the massive settlement that Texaco offered because of racist comments by Texaco executives).

54. See, e.g., *State of the Union; Clinton's Speech Looks Ahead to New Millennium*, L.A. TIMES, Jan. 20, 1999, at A15 (quoting President Clinton's State of the Union speech that implored Congress to make "the Hate Crimes Prevention Act the law of the land"); *Assembly Passes Hate Crime Bill*, BUFFALO NEWS, Jan. 20, 1999, at 10A (reporting that, because of the bevy of hate crimes around the country, New York's Assembly passed legislation that would prescribe tougher penalties for bias-related offenses). See generally *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (upholding a Wisconsin law that provides for heightened punishment for criminal acts motivated by racial hatred).

55. See Michelle Locke, *Changing Political Winds May Blow Regents in New Direction*, ASSOC. PRESS, Nov. 19, 1998 (reporting that, "Proposition 209, the California ballot initiative passed in 1996 that bans race-based admissions in all state education, has had an impact on the admissions policies at a number of schools").

56. See generally *Arizonans For Official English v. Arizona*, 520 U.S. 43 (1997) (involving the constitutionality of a state law that makes English the official language of Arizona).

reform America's institutions. Not just by enjoining specific acts of discrimination, but by designing affirmative remedies that make up for past discrimination: by trying to put schools, employment practices and voting rights where they would have been absent discrimination. The courts have rejected the kind of affirmative action that is aimed at some kind of an amorphous ideal balance.<sup>57</sup> The courts, and I think the public, will still approve the reforms that are tethered to institutional reform and to correct the effects of past discrimination. This is the kind of affirmative action that has won judicial approval and I think it is a solid approach to take with us into the next century.

**Paul Hancock:** Do we have any questions or comments? Suggestions? Brian.

**Brian Landsberg:** I am just wondering, with all these different issues that you all have described, how is it possible for one division to do all this without some kind of focus? I am also thinking about the kind of hands-on leadership that we had in the sixties with Burt, John and Steve, and in the seventies Stan and Dave provided that and Drew in the eighties. Actually, Brad Reynolds provides real hands-on leadership. (laughter). In any event, I am just wondering how it is going to be possible for him to manage all of this—it seems to me such disparate issues—between institutionalized persons, disabled persons, gender, race, and motor voter. You know, there was a time when we had the federal custody cases in the Civil Rights Division because it was something to do, but it took us away from our core mission. I am just wondering, does the Division have a core mission, and are these issues diverting us from it?

**Muriel Spence:** I react to the idea that it is an either/or situation. I think that is because I do not agree with you. When I see something I want, I am for it, and I always felt, for example, that when there was a lot of talk that integration of the schools itself was a bad thing, some said, because it was costing black teachers jobs, and I thought that was a little bit like saying, "Well, you can have your right arm or your left arm. Which do you pick?" I still feel that in a way that is what we are being told because part of our dilemma is a resources issue. The resources issue is itself a legislative/political issue. I always get back to that. The question of appropriations and authorizations in the Division is something that I think has to be thought about.

To my mind, the mission is a very unified mission. It happens that we have evolved to the point that we understand there are many different discrete problems and there are groups we did not pay much attention to who are the victims. To me

---

57. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 288 (1986) (understanding that race is involved in many government hiring decisions, but also noting that the government cannot allow race to be used as the predominant factor in making a hiring decision).

the mission has always been a mission that relates to justice, when people were being treated unjustly because of their skin color or gender or ethnic background or disability in some way. I like the idea of leadership that sort of brings it together and says, "We have to do all of this because all the stuff that is unjust we should be addressing, while the injustice is to our authority." If our authority has to be broader, then the resources have to be broader so that we can do that and that those who would cut our resources are in effect saying, "We will put you in the right arm or left arm choice."

I am not saying that the idea of making choices and priorities is not essential, but I think that we have to be really careful when we find ourselves saying, "We cannot do everything that would advance justice and opportunity within our statutory mandate because we do not have the resources." You know we are the guys and the women in the white hats in this story and we need to be supported in doing all of that and not being told, "Make do with less because what you are doing is really too much." I do not think there is too much justice to be advanced. Some people do not want to give. If Ted Turner has a million dollars to give to the United Nations, my feeling is the United States government has some money to give out somewhere.

**Paul Hancock:** If Brian's question sounds a little scholarly it is because he just finished a book. I will now provide a paid commercial. Brian's book is on the Civil Rights Division. It is about civil rights enforcement; in fact it is titled *Enforcing Civil Rights*.<sup>58</sup> It is available from the University of Kansas Press.

**Michael Middleton:** The plug answered his question. (laughter). I need to address Brian's question a little bit. I think there are real issues that you have raised, and one that I think we are struggling with now in the Division because we are going in so many different directions. I think that the affirmative action debate has sidetracked us to some extent. It has sidetracked our enforcement of civil rights laws and we have to respond to that and we have to respond appropriately to it. It has been a challenge in going forward with the enforcement of civil rights laws, but also we are being challenged on other fronts and the Supreme Court has been very unfriendly to us on the enforcement and interpretation of the Voting Rights Act,<sup>59</sup> which has put us in a defensive position to a large extent and we need to work to regain that credibility.

What is happening? I do think that while there were certainly leaders in the past, we now have an Attorney General who is more committed to civil rights enforcement than I have experienced in my twenty-eight years or so in the

---

58. BRIAN K. LANDSBERG, *ENFORCING CIVIL RIGHTS* (1997).

59. See *supra* note 46 and accompanying text (elucidating that the Court has shown a distaste in using the Voting Rights Act to shield potential voting district gerrymandering to enable minority voters to enjoy a voting majority in any particular district).

Department of Justice. Janet Reno is behind us all the way and will do whatever she can to make our programs better. So we do have support. Also, another evident trend is that a lot of these cases are not as unpopular as they used to be. One result of that is that you have the U.S. Attorneys' Office wanting to do civil rights cases. So the issue we are facing is how much of the enforcement effort should be done in local U.S. Attorneys' Offices. That is probably something we are going to see more of because it is going to be, "Are we spending so much money on travel when we have got attorneys around the country who can be litigating these cases?"

You mentioned the Motor Voter Law and I am sure what you are thinking is, "Are we unnecessarily using the resources to enforce laws that are not the old type of civil rights laws that are not designed to address race discrimination?" There is a tie with Motor Voter to race discrimination. We recently, under Section V, objected to the State of Mississippi's plan for implementation of the Mississippi Voting Rights Act (M.V.R.A.).<sup>60</sup> Mississippi is the only state in the country that, implementing M.V.R.A., does not allow persons registered under the federal law to vote in state and local elections. Mississippi, for example, allows people who register at the local DMV when they get their driver's license, to fill out a form that allows them to vote in both federal elections and state and local elections, but when people at social service agencies, such as welfare offices, fill out a form they are only permitted to vote in state elections. The Governor has said he refers to the Motor Voter Law as a "Welfare Voter Law" rather than a "Motor Voter Law", and all of you know what that means in the context of Mississippi.<sup>61</sup>

So there is a tie there and I do think, and I know Brian's thought on this, is that race discrimination remains the most intractable issue we deal with. It is the most difficult issue we face and one that I think we need to address. I hope that we keep focusing on the issue of race in the Civil Rights Division, but that is the problem that we are going to have the most difficulty solving. I see a trend here. While state-imposed segregation and discrimination needs to remain a focus of our division, we need to get into these other new areas. The Urban League had their annual conference and this year's had the title: "Economic Power: The Next Civil Right." That is going to be one of the issues about which we must concern ourselves.

I believe there is a question.

**Audience Question:** Yes, I have two questions. One: a lot of the success of this Division has depended upon a public climate of support for the basic values of an integrated society. The first question is about the role that the Division might play in communicating with the President's Commission on Race, or vice-versa, having that commission play a role in shaping the attitude of the public toward these basic

---

60. MISS. CONST. art. XII, § 244-A.

61. See Kevin Sack, *In the South, the Past is Present*, ST. PETERSBURG TIMES, Mar. 29, 1998, at 1D (noting that Mississippi has yet to enact the National Voter Registration Act of 1993, because Mississippi's Governor Kirk Fordice and others discern the law as inhibiting state sovereignty).

values concerning racial inequality. So, the question really is about, as lawyers who have worked in the trenches on factual matters related to race, what advice would you give to this commission? They have gotten off to what may equate to a stumbling start and my question is, what would you advise the commission to focus on? On race? The second question is one about which you have not talked. I know it is an issue that the Civil Rights Division has considered and that is gay rights. I know most gay rights controversies have focused on the military. What role do you see for the future for gay rights initiatives in this division? Those two things—the President's Commission and gay rights.

**Muriel Spence:** I wanted to pick up on it just because we are in the middle, at Temple Law School, of a struggle concerning our institution and its sensitivity to the issue of sexual orientation. We have had two education seminars initiated by two openly gay students with a number of other openly gay students participating on the panels. It was very painful for me to realize that alienation in this country and lack of feeling safe does not stop at racial or gender borders.

I was sitting there translating everything I was hearing about the pain into things I have experienced growing-up a black female. What came to me was compartmentalizing of the issue, or just thinking I knew how she felt because, well, I know what discrimination is about. I did not know at all how she felt. I was way off. I thought she felt as comfortable as I did because she was a minority person. I did not have a clue what was going on with her. It seems to me part of what we need to do with race discrimination is openly to discuss racism and so on. To me it is so helpful to be forced to bring it together, in the sense that I had to listen to where I could try to empathize with her. Then I realized, we all realized as a faculty, we have to figure out a way to bring these things in even if it means supporting a legislative effort, because as I understand it, the Division's got very little statutory authority for doing anything in the area of gay rights. There may be a way to raise the issue, nevertheless, by advising many people in Congress. I do not know, but it seems to me we need a sort of holistic unified sense of all this, though I agree that traditional civil rights should probably retain its preeminent position.

**Michael Middleton:** I clearly agree with Brian's point about centrality of race discrimination, but I certainly do not want to go back to the sixties. That is, by not paying appropriate attention to the other instances of injustice, irreparable damage is done to one's ability to deal with all instances of injustice. If we are a justice department and we are talking about protecting civil rights, it should mean that a citizen who is disadvantaged, based on irrelevant considerations, deserves our protection and our support. That would include gays, lesbians, Hispanics, Asians, and any group that is disadvantaged. The disadvantage makes it different.

The issues are much more complex than they were when it was a matter of getting somebody out of the schoolhouse door or stopping a lynching. But that does not diminish the importance of this division being involved in trying to correct an

injustice. It is not going to be easy to deal with the wide variety of civil rights issues that are out there—the civil rights issues that were difficult to tackle in the fifties and sixties. I think we simply have to recognize it is a much more complex job nowadays. The job has got to be done. As far as the Commission on Race in the Division goes, I do not know. It does seem to me though, that it can try to communicate the message. I think that a part of our problem is this whole shift in attitude toward the new civil rights issues, the moral high ground that they have raised earlier. We have to turn that around. I think the President's Commission on Race contributes significantly to turning that around, if it is structured and focuses on term reform. Whether we get involved in that kind of activity, I think that probably would be viewed by millions as inappropriate, but somebody has got to take the ball and run with it or we are going to wake up one day and be very much on the outside. We must be already.

**Muriel Spence:** Paul, I would just like to get back to what you discussed. It strikes me that the hostility that the Supreme Court is showing toward the Division and toward those legislatures in Georgia, North Carolina and Louisiana that have tried to comply with the Division's position on increasing primary representation is almost a personal attack.<sup>62</sup> What is left that you see for the appropriate department to do in the voting area?

**Paul Hancock:** Well I think we are going to face challenges in voting and that Congress may have hearings this year. When the Voting Rights Act was renewed in 1982, they said that after fifteen years they could hold hearings and see whether to continue with Section 5. This is the year for that and we may face this challenge. I think there is a real need. Of course, the biggest need for the continuation of Section 5 is that reapportionments are going to follow the decennial census in 2000 and we need to be vigilant and particularly because this will be the first redistricting after the Supreme Court's decision in *Shaw v. Reno*.<sup>63</sup> That case set new standards for what can be considered in creating new plans and those standards are going to present some very difficult issues for Mr. Bill Lee to decide as Assistant Attorney General. The Voting Rights Act is under fire and will continue to be under fire. I think we need to regroup a little bit. I have been involved quite a bit myself in these areas and I do agree with some of the things I heard Jim saying. I would phrase it a little bit differently, however, in that our role needs to be pretty straight forward in this area. In the area of voting, perhaps over the years, we might have taken that a little bit too far in what we did, because of that, the pendulum may swing back

---

62. See *supra* note 46 and accompanying text (describing the Supreme Court's willingness to strike down several state legislative attempts to fashion voting districts to reflect a majority of African-Americans).

63. 509 U.S. 630 (1993).

farther than it would have if we had been more evenhanded to begin with. What do you think?

**Michael Middleton:** I think that is good advice and I could not say it better myself. The other thing is we ought not to be afraid to look at the docket. In the Division there were approximately five hundred school cases that were still active in the sense that they have not been closed. Is there some way we can conserve some of the few dollars that the government does give us and make them go farther by walking away from some of the responsibilities of desegregation in public schools? I think that happened about ten years ago. I think there are still problems and are still going to be problems forever in the public schools and if we wait until all the problems are gone we will never get out of the business. It seems to me, in the lean years that I think are coming, we probably ought to take five million dollars and spend it on some of these other emerging areas.

**James Turner:** I guess I want to add another issue for the future, and that is the rights of indigent criminal defendants. We have a pretty lopsided justice system in most of our states. I think the resources available to prosecutors are probably between five and ten times that of those available to lawyers representing indigent defendants. Congress has cut back on the rights of habeas corpus appeals for death row defendants and has made it more and more difficult for the corporate defense of those folks around the country.<sup>64</sup> It seems to me that the Division might at least think about looking at legislation or other solutions that would require states to meet minimum standards for the defense of indigents in our system. It is not a popular thing to do these days, but it needs to happen. The American Bar Association (ABA) has recommended a moratorium on executions in this country because of the unevenness of the defense of those defendants. We are putting people to death and finding out afterwards that they should not have been convicted, let alone executed. I think that is really something we should think about considering.

**Muriel Spence:** How would we enforce that? I did not mention it initially, but I am awful glad it came up. I think that sometimes there is room for more improvement. I think sometimes people surprise you, but sometimes a surprise is good. The ABA initiated the resolution for a moratorium on the imposition of the death penalty because of the patent injustices.<sup>65</sup> I cannot take much credit. I was sick when that

---

64. See generally *Felker v. Turpin*, 518 U.S. 651 (1996) (deciding that the recent Congressional withdrawal of several statutes that allowed habeas corpus review does not prevent federal courts from granting review via the Judiciary Act of 1798's grant of jurisdiction to hear habeas corpus appeals).

65. See Nan Aron, *On Death Row, Good Defense is Hard to Find*, USA TODAY, Dec. 7, 1998, at 25A (reporting that the ABA has stated that, "the inadequacy and inadequate compensation of counsel at trial are among the principal failings of the capital punishment systems in the States today"); Edwin Haefele, *Bias in Death Penalty*, OMAHA WORLD-HERALD, Jan. 2, 1999, at P18 (discussing the recent moratorium adopted by the ABA against the death penalty).



was happening in San Antonio, but they succeeded in Texas which is execution heaven.

The most shocking thing, in a way, was that it was a lopsided vote. It was presented to lawyers in a solid and measured way. It is sort of like the Civil Rights Division type-measured presentation of this, and notions of justice and equity and all of that in our system of justice are really affronted by this problem everywhere. There is no state that currently meets the guidelines that were set out by the ABA solution. It does not answer the question, for example, of whether the Civil Rights Division or the Administration should be pushing for a substantive state-wide moratorium to meet some federal plan about the death penalty.

The point is that inadequate service is provided to indigent defendants. There are still numerous instances of incompetency of counsel and few lawyers are willing to represent defendants they call "niggers" in the courtroom. It is really a core issue in many ways having to do more with the administration of justice than with race discrimination. It seems to me there is no reason there cannot be a conversation about what, within the parameters of the Civil Rights Division, can be done. There is at least a role to take in that debate and, perhaps, seek legislation. I do not know what the Administration's posture was with respect to the habeas amendments in Congress, but I fear it was not a helpful posture. It was not in stone anywhere. Sometimes administrations help legislation get preserved or help fight legislation in its troubles. I have not written off the possibility that even this administration could be useful in some efforts to improve the defense of indigent criminal defendants.

**Michael Middleton:** I was intrigued by something you said, Paul. You noted that the legislation which says that, now, in the housing field, the Department represents individual clients. Now, of course, I was trained under John Doar and all those people, and they claimed that you are supposed to keep the law enforcement's independence from the interests of individuals. The law enforcement that is best, in the long run, is best for the individuals too. I was wondering, if a Justice Department lawyer represents an individual, does the lawyer owe loyalty to the individual interest or the interest of the United States? There must be circumstances in which those could potentially conflict. Or are there no such conflicts? How does that work, and do you think it is a wise thing to have public attorneys representing individual citizens?

**Paul Hancock:** Well we do not have any conflicts. We bring the cases in the name of the United States on behalf of the individual. You raise good issues and we thought through all of these when we first began implementing the Act and were confronted with some of the very issues you raised. We do not have an attorney-client relationship with the individual. We bring the case on his or her behalf and we represent his or her interest. If there is a diversion of interest between the interest of the United States and the interest of the individual, at that point we

part company with the individual. This has transpired a few times. In fact one of our cases was in Las Vegas where the victim, who alleged a familial status discrimination (another new form of discrimination we can address), had moved to Las Vegas because he was a professional gambler. He wanted close to a million dollars to settle the case that was probably worth about \$5000 and he said we "owed him a duty to take it to the jury." He was willing to roll the dice with a jury and we said no, we are not going to do it, and the court agreed with us on that.

So, I mean, is it wise? I think we have done much better in enforcing Fair Housing law because we have acquired this authority. We have brought as many as 200 cases a year now and even these little cases allow us to reach all areas of the country. They have to start at the Department of Housing and Urban Development (HUD), as you know. The plaintiff has to bring a complaint at HUD, and HUD makes the decision whether to charge individual cases. They can be litigated either before an administrative law judge at HUD or there is the provision to elect to bring it in federal court. Most of the time, the parties elect to have it in federal court, and we litigate all of those cases. They can be important and have impact even in small communities. Individual cases get a lot of attention and the judgments that we get help overall compliance with the Fair Housing Act. So, I know it is a very dramatic change from when you were leading the Section, but I think it has been pretty successful.

**Audience Question:** I just have a question that is sort of an observation. This is the twentieth year since I was in the Division and I have been concerned about the lack of enforcement speed. There is a case going on, which I roped my good friend Mr. Rose into doing. It is now twenty years old and still going on. My issue is, what can the Section do in the future about making these cases move faster to resolution? Obviously, one alternative is dispute resolution. The object is to bring relief to the individuals. What is the Division going to do in the future in that regard? Why should a case take twenty years and still have no prospect of an end in sight?

**Michael Middleton:** I do not know what case you are talking about, nor do I want to know. (laughter). I agree with you that we should move cases and get them over with, and I share Jim Turner's concern that it is in our interest to get rid of cases, because by letting them linger, it just depletes our resources. That, to me, is our biggest challenge today. If we keep working on cases, it means we are not doing other things that we could be doing and should be doing. So, if you want to talk to us later about your case, I would be happy to try and field your question then.

**Audience Question:** No, it is not my personal case. I am just saying this is the idea of what is going on.

**Michael Middleton:** Well, obviously we want to move cases and get them over with. We like to litigate them and litigate fast to get done with them. Now, that does

not always work. Sorry for the terse response, but it appears that time has fled. Well thanks everyone. (applause).

