

Remarks
American Constitution Society
12.18.09

Thank you, Caroline, for the generous introduction and for giving me the opportunity to speak to the American Constitution Society, an organization that has done so much to ensure that our national's legal system reflects the values and principles contained in our Constitution. ACS is very fortunate to have you as its leader during this critical period for our nation, when we face great challenges as well as great opportunities. It's not difficult to figure out why this organization in such a short period of time has done so much in so many areas. I want to thank you. I also want to thank you for your journal, I read it, and I especially read the article regarding the Civil Rights Division from Senator Kennedy

It's a true pleasure to be here marking about 70 days on the job to give you a report on what I've learned and where we're going as a division. It feels right to me that I should be giving my progress report to you, the American Constitution Society. When I consider ACS's own description of its mission – namely, to promote the values underlying our Constitution, including individual rights and liberties, and to being a force for improving the lives of all people, I realize how your mission and ours share a lot in common.

In just 60 days or so, I've had a real opportunity to ponder the state of civil rights in the 21st century. In life, we never stop learning, and I have learned a great deal in these two short months.

I have learned, for instance, that there are some in our nation who believe we no longer need a Civil Rights Division.

There is no denying that, as a nation, we have made great progress in the advancement of civil rights. We elected an African-American President, we have a Latina on the Supreme Court. Some believe that these milestones mean that we can check civil rights off our nation's collective to-do list.

While last year's historic election marked a triumphant moment in our nation's long, complex and often painful history of civil rights, it was not the culmination of our journey, but rather an important mile marker along the way. I would ask those who believe we have indeed reached the ideal of a post-racial society to consider the following set of facts: On the night that Americans elected Barack Obama our nation's first African American president, three men on Staten Island reacted to the news by going out into their community and targeting African-Americans to assault in retaliation. Or consider that while we have a Latina Supreme Court Justice, a source of great pride for everyone, the first press release we issued during my tenure announced a guilty plea from a Louisiana man who could not stand to have three Hispanics living across the street, and so he drove them from their home with gunshots and then burned it to the ground.

Should we tell those victims and their families that we no longer need a Civil Rights Division? Should we tell the residents of Shenandoah Pennsylvania, a community torn

apart by a vicious, fatal attack on a man because he was Latino and a subsequent cover up by members of the police department, that we no longer need a Civil Rights Division? Should we tell the African American and Latino residents of L.A., who were denied apartments in a discriminatory scheme that last month led to the largest rental-related fair housing settlement ever, that the work of civil rights is finished, and we should close our doors and go home? Should we tell high school girls in Florida, some of whom nearly lost their chance to participate in high school sports this summer, that their problems have been solved, and the Civil Rights Division is no longer necessary? Should we tell the young people housed in substandard juvenile facilities in New York, that there is no longer a need for a Civil Rights Division?

As the late Senator Ted Kennedy repeatedly reminded us, Civil Rights remain the unfinished business of America.

I've also learned, in these last 60 days, the heartbreaking truth that the more things change, the more they stay the same.

One of the last cases I worked on before leaving the Division in 1999 was the murder of an doctor who provided reproductive health services, and one of the first incidents on which I received a briefing upon my return was the murder of Dr. Tiller. A decade after my departure, I returned to see that crosses are still burned on lawns in Indiana, that racial profiling still occurs in many of our communities, that mosques, synagogues and churches are still burned. I had assumed, it turns out naively, that we as a nation had all agreed at the very least that inter-racial marriages are acceptable. But I returned to learn that a Justice of the Peace in Louisiana did not think that inter-racial marriages were good for Louisiana, and therefore denied marriage licenses, apparently in the belief that people like our president are never going to get anywhere in live if they are the child of an inter-racial marriage.

I've learned that Hubert Humphrey was right when he said: *"The moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in shadows of life, the sick, the needy, and the disabled."*

And in 2009, despite great gains, many still reside in the shadows.

Individuals with disabilities who still struggle to access the basic services the rest of us take for granted, or find themselves isolated from their communities, are living in the shadows. Our Muslim-American brothers and sisters, who have suffered tremendously from the post 9/11 backlash, live in the shadows. Communities of color, disproportionately affected by the subprime lending epidemic and subsequent foreclosure crisis, are stuck in the shadows. Lesbian, gay, bisexual and transgender Americans, who in the 21st century still have no federal protection from discrimination at work, are living in the shadows.

Many students still lack the quality education all children are guaranteed by law. They're living in the shadows. Many newcomers who came to this nation seeking the same freedom

and opportunities that our parents and grandparents sought find themselves the targets of bigotry and hate. They reside in the shadows.

But perhaps the most troubling thing I've learned, through my service on the transition and in my preparation for this job is the precise facts about what was done, and what wasn't, during the past eight years.

I learned, to my great disappointment, that those who had been entrusted with the keys to the Division treated it like a buffet line at the cafeteria, cherry-picking which laws to enforce.

Consider these facts: During the 8 years of the previous administration:

- The Division pursued very few pattern or practice cases brought in the employment context;
- Despite the subprime meltdown, the Civil Rights Division played no role in holding underwriters, holding servicers, holding other lenders accountable for the discrimination, notwithstanding the existence of the Fair Housing Act and Equal Credit Opportunity act.
- In the Clinton administration, the Appellate Section filed 643 briefs in Courts of Appeal; in the Bush administration, the figure fell to 424. And appellate attorneys in the Division were conscripted into devoting time and resources to defending the Department in immigration appeals, rather than defending the Division's enforcement activities. Appellate lawyers were forbidden from communicating with other sections.
- In the Clinton administration, the Disability Rights Section brought 228 lawsuits, compared with 126 in the Bush administration.
- In the Clinton administration, the Housing Section brought 676 cases, compared with 324 cases in the Bush administration.
- In the Clinton administration, the Voting Section filed 35 Section 2 cases, compared with 15 filings in the Bush administration.
- In Fiscal Year 2006, the Division prosecuted the lowest number (10) of hate crime cases in more than a decade.
- In 1996, there were 51 hate crimes prosecutions, with 82 defendants. In 2006, the Division saw 12 hate crimes prosecutions with 22 defendants. In 2007, the Division saw 14 hate crimes prosecutions with 15 defendants. Look at the data from the Southern Poverty Law Center, and from the Hate Crimes Statistics act. Hate crimes went up, but prosecutions went down. And efforts to pass a new hate crime statute were repeatedly met with threats of veto.

But enough about the past. I'm here to talk to you about the Civil Rights Division's future. I've learned that the next chapter in the Division's long story must be one of restoration and transformation. We do not intend to re-create the Civil Rights Division that existed January 19, 2001. Instead, we are turning the page to a new chapter in our storied history, working to rebuild our core competencies and reinvigorate our enforcement while also

looking toward the horizon to prepare the Division to face the challenges ahead. We are not simply open for business; we are doing business in new, different and better ways.

With the vision of restoration and transformation in mind, I have spent the last 70 days working with my leadership team and with the career professionals in the Division to re-evaluate what civil rights means in the 21st century.

We have restored a non-partisan, merit-based and transparent hiring process for all attorneys, which had been, and once again is, a critical component of the Division's strength and success. Our hiring policy, crafted by career people for career people, is available on our Web site.

We have renewed our commitment to combating hate-fueled violence and are actively working on the implementation of the landmark Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act. Already we've seen measurable progress on this front, and in the last 70 days or so we've seen activity in as many hate crimes cases as the Division did in all of FY 2006, and that was a leap year. We will continue to enforce vigorously human trafficking laws, but will not do so at the expense of hate crime laws.

We recognize that individuals with disabilities have a vast contribution to make to our society that can only be maximized if they have equal access, and we understand that segregating people with disabilities in institutions is every bit as harmful and illegal as segregating children of color in inferior schools. In the last administration, the Disability Rights Section did not litigate any cases or file any briefs enforcing the Olmstead decision; in this administration we have intervened in a significant Olmstead case in New York and filed amicus briefs in three others.

We recognize the fast harm done to communities everywhere, but particularly communities of color, by the lending practices of the last decade. We are playing a lead role in the Financial Fraud Enforcement Task Force, leading a working group on non-discrimination to ensure that lending discrimination is a focus. I am hiring a special counsel for fair lending. In the fair housing context, we've already settled the largest case of discrimination in rental housing in the Division's history.

From 2005 until 2007, a total of 16 cases were brought under USERRA, the statute protecting service-members from discrimination when they return to the civilian workforce. In the first eight months of the Obama administration, 18 such cases were filed.

WE have dusted off the disparate impact theory. If the fact support the use of disparate impact theory, whether it's in the housing context, the voting context, the employment context, we will use the disparate impact theory because every court that has ruled on this has said that it is permissible to do so.

We are ramping up our work in the Voting context. The Voting Section is making preparations to handle the influx of Section 5 submissions following the 2010 Census and

subsequent redistricting process, and we will be ready. We will be actively enforcing Section 5, Section 2, Section 203, Motor Voter, because we must enforce every law in our jurisdiction. The Bush Administration aggressively enforced the language minority provisions of the Voting Rights act, and we will continue to do so. But we will not enforce Section 203 at the expense of our other critically important voting rights laws.

As I said, our vision is one of restoration *and* transformation. We are continuing to combat traditional discrimination and civil rights violations, but we also are confronting emerging civil rights challenges as they arise, and working to ensure that we remain nimble enough to combat those challenges on the horizon.

Transformation means recognizing emerging areas where we must play a role.

We have embraced the recognition that civil rights are human rights, and that the United States must set an example for the world. Two days ago I testified before the Senate Judiciary Committee's Human Rights and the Law Subcommittee on how the Civil Rights Division is fulfilling obligations of several international human rights treaties through our domestic civil rights enforcement efforts.

There are many criminal justice issues that have a civil rights dimension, and I applaud the Attorney General for his leadership in directing components to review the racial profiling guidance that was issued in 2003. We are at the table for discussions on racial profiling. We are at the table for discussions about crack and powder, and addressing the issue of the crack/powder disparity, working closely with the Criminal Division on these issues.

We understand that there are places where our laws fall short in protecting civil rights, and it is our role in the Civil Rights Division to help fill those gaps. I was proud that my first trip to Capitol Hill as head of the Civil Rights Division was to offer the Obama Administration's strong support for the Employment Nondiscrimination Act, which, when passed, will be a critical step toward equality under the law for the LGBT community in this nation. I am confident that 2010 will be the critical year for passage of ENDA.

We recognize how the aftermath of the September 11, 2001 terrorist attacks has subjected the Arab-American and Muslim-American communities to an unjustified backlash, and we are working to be sure we don't fall into the trap of believing that we either protect our national security and safe streets OR safeguard our civil rights and civil liberties. We can and must do both.

While we rebuild our core competencies and return the Division to its position as the nation's premier civil rights litigator, we must also transform ourselves as the nation's civil rights problem solver. We have sections whose primary work is non-litigation in nature, and they do remarkably important things to ensure equal opportunity for communities.

Transformation also means taking partnerships to new levels, working more closely and cooperatively with US attorneys' offices, community organizations and state and local governments, and transforming our relationships with our sister agencies.

Transformation means approaching problems differently, recognizing that many individuals and communities face a number of challenges that raise civil rights concerns, and those problems do not always neatly divide to match corresponding sections of the U.S. Code. We are working to move away from the stovepipe approach to civil rights enforcement, which gets manifested when attorneys from three sections are sent into the same community, but they never exchange information regarding the scope of the problems in that community. Our attorneys have information, knowledge and contacts that they can share, and we will encourage them to do so.

Our vision and our agenda for achieving it are undeniably ambitious. But it is what is required of the Civil Rights Division in the 21st century. You may be asking yourselves how we plan to accomplish our goals.

With tremendous support from the President, the Attorney General and Congress, we saw this week enactment of one of the largest budget increases in the Division's history.

Just this week, Congress passed the Justice Department's 2010 budget into law, and it includes funding for 102 additional positions in the Civil Rights Division. I hope you'll indulge me while I take advantage of this recruitment opportunity: we are looking for attorneys who are committed to justice, and we're taking applications. So please spread the word and look for the job announcements on the Department's website, which you can find www.justice.gov/crt.

As we rebuild our ranks, we will be smarter and work more efficiently to ensure that we maximize our new resources. We will hold people accountable. We will build or reinforce partnerships with US Attorneys' offices and our sister agencies, creating partnerships that will allow us to more effectively combat civil rights violations.

We will restore and transform the Division because there is no other option. That is the charge I have received from the President and from Attorney General Holder, who describes himself as an impatient Attorney General.

If it hasn't dawned on you already, I love my job. I love this job because I've got a great boss in Eric Holder who has called this Division the crown jewel of the Justice Department. I love this job, because we've got a great President who has made civil rights a major part of his agenda of transformation of this nation. I love this job because there are remarkable people in this Division who do remarkable work. I love this job because you read about cases that make you ask yourself "how could this be in the 21st century," and we in the Civil Rights Division bring those cases to justice.

I learned about a case today, a couple in Alabama who adopted a foster child who was HIV positive. They go on a trip to an RV resort, and the owner of the resort learns that the 2 year old foster child is HIV positive, and refuses to allow them to use the facility. A week or so ago, a father and son team pled guilty to hate crimes charges for chasing an African American man out of a convenience store and threatening him with a chainsaw. It is the responsibility of the civil rights division to prosecute these vicious crimes, and this is why I love my job.

Our task is not an easy one. But I am excited about facing – and working to meet – these challenges. I have great faith in the passion and commitment of the dedicated men and women of Civil Rights Division to carry out our mission. But we can't go it alone and will need your help. I've already met with many civil rights organizations here in Washington and throughout my travels around the country. It's the beginning of a robust dialogue that I look forward to continuing and expanding in the months and years ahead. Today represents another important step along the way and I thank you again for the opportunity to appear before you today.