

# Vindicating Civil Rights in Changing Times

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I have been asked to give a general overview of the Justice Department's work and policies as they have developed over the past thirty years. I intend to do that. But first I would like to go back more than thirty years—more than fifty years, in fact—to a century ago, 1883, to make a brief but important point. One hundred and one years ago, the Solicitor General of the United States stood before the Supreme Court and argued that black citizens had a constitutional right to the enjoyment of public accommodations on an equal basis with whites. Those arguments were rejected by the Court in its tragic decision in the *Civil Rights Cases*,<sup>1</sup> a result that was not rectified until Congress passed the public accommodations provision of the Civil Rights Act of 1964.<sup>2</sup> So the government of the United States and the Justice Department are not new to the job of seeking full protection of the laws for blacks and other minorities. During the last one hundred years, despite fits and starts, troughs and peaks, the federal government's finest hours in my estimation have been those when it stood, like Solicitor General Phillips in 1883, unequivocally on the side of efforts to rid this country of its shameful legacy of racism and other forms of discrimination.

Let me stop once more on the way to 1957, at a time almost fifty years ago, when the Justice Department once again made clear where it stood on civil rights and the protection of blacks from discrimination. On February 3, 1939, Attorney General Frank Murphy issued an order creating a civil liberties unit within the criminal division of the Department of Justice. In setting into motion a process that resulted in the creation of the Civil Rights Division nearly twenty years later, Attorney General Murphy said:

In a democracy, an important function of the law enforcement

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1. 109 U.S. 3 (1883). A summary of the Solicitor General's argument appears in *id.* at 5-7.

2. Pub. L. No. 88-352, §§ 201-207, 78 Stat. 241, 243-46 (1964) (codified as amended at 42 U.S.C. § 2000a (1976)).

branch of government is the aggressive protection of fundamental rights inherent in a free people.

In America these guarantees are contained in express provisions of the Constitution and in acts of Congress. It is the purpose of the Department of Justice to pursue a program of vigilant action in the prosecution of infringement of these rights.<sup>3</sup>

Murphy's view that the Department of Justice is responsible for "aggressive protection" of fundamental rights has, at least since 1939, served as the standard against which civil rights enforcement programs of subsequent administrations have appropriately been judged.

The Civil Rights Division as we know it was established as part of the Civil Rights Act of 1957,<sup>4</sup> the first civil rights legislation since Reconstruction. For the next six years, its litigation efforts were directed primarily against voting discrimination and violations of criminal civil rights laws.<sup>5</sup> The Civil Rights Act of 1964<sup>6</sup> greatly expanded the Division's authority to combat racial, ethnic, and, in certain instances, gender-based discrimination by private employers and recipients of federal financial assistance, and in public schools, accommodations, and facilities. Expansion of the Attorney General's authority to enforce civil rights laws in new areas has continued steadily since 1964, with passage of the Voting Rights Act of 1965;<sup>7</sup> the Civil Rights Act of 1968,<sup>8</sup> which is known for its fair housing provisions; the Education Amendments of 1972;<sup>9</sup> and even something called the Overseas Citizens Voting Rights Act of 1975,<sup>10</sup> which ensures that American citizens living abroad can vote in national elections.

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3. R. CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD* 1 (1947).

4. Pub. L. No. 85-315, 71 Stat. 634 (1957); see Dep't of Justice, Office of the Att'y Gen., Order No. 155-57 (Dec. 9, 1957) (establishing Civil Rights Division).

5. The Division's annual reports during this period reflect the relatively narrow scope of its activities. The Division's only specialized "antidiscrimination" section (it also had responsibility for prisoners in federal custody, election fraud, and Hatch Act enforcement) was concerned with voting. With the exception of criminal prosecutions under 18 U.S.C. §§ 241 and 242, this was really the only area in which the Civil Rights Acts of 1957 and 1960 empowered the Division to initiate suits. The Division's role in school desegregation cases was limited to ensuring that federal court decrees were enforced and to participating as an amicus curiae in privately initiated actions, since it had no independent authority to bring suit. See 1962 ATT'Y GEN. ANN. REP. 168-70.

6. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000a-2000h (1976 & Supp. V 1981)).

7. Pub. L. No. 89-110, 79 Stat. 437 (1965). The Act was amended, strengthened, and extended by the Voting Rights Act Amendment of 1970, Pub. L. No. 91-285, 84 Stat. 314; the Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; and the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131. The Act and its amendments are codified at 42 U.S.C. §§ 1971, 1973-1973bb (1976 & West Supp. 1983).

8. Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601-3619, 3631 (1976)).

9. Pub. L. No. 92-318, § 906(a), 86 Stat. 235, 375 (codified at 42 U.S.C. § 2000c-6(a) (1976)).

10. Pub. L. No. 94-203, 89 Stat. 1142 (codified as amended at 42 U.S.C. § 1973dd (1976 & Supp. V 1981)).

More recently, the Civil Rights of Institutionalized Persons Act of 1980<sup>11</sup> has given the Division a major new responsibility—vindicating the rights of the mentally ill, the mentally retarded, prisoners, juvenile offenders, and the aged not to be subjected to inhumane and degrading conditions of confinement.

The Civil Rights Division is the federal government's chief agency for enforcing civil rights laws in the courts.<sup>12</sup> During the 1960's, its litigation efforts were directed primarily at combating blatant forms of racial discrimination against, and intimidation of, blacks. While these problems have not disappeared entirely, they were certainly more flagrant during the 1960's than they currently are. Early employment cases involved such issues as segregated lines of progression, and discrimination in hiring.<sup>13</sup> Public accommodations cases sought to eliminate segregated motels, restaurants, and restrooms.<sup>14</sup> And school desegregation cases addressed the problems faced by students and faculty in officially segregated black and white schools.<sup>15</sup> The criminal cases filed by the Division often involved the prosecution of those involved in violent retaliation against civil rights workers or against others who dared to exercise their constitutional rights.<sup>16</sup> The issues were clear cut, the wrongs were dramatic, and the relief needed was simple to formulate. It was an era devoted to the development of civil rights precepts.

By the 1970's, however, overt forms of discrimination had been replaced in many respects by subtle and sophisticated techniques of discrimination which are often difficult to detect and prove in a court of law. At the time I headed the Division, employment cases, for example, frequently involved complex issues such as employee testing practices and affirmative

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11. Pub. L. No. 96-247, 94 Stat. 349 (codified at 42 U.S.C. § 1997 (Supp. V 1981)).

12. Until 1972, the EEOC, for example, had no power actually to initiate lawsuits against employers that it felt had violated Title VII; instead, it was required to refer such matters to the Civil Rights Division. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103, 105 (codified at 42 U.S.C. § 2000e-5(f) (1976)) (authorizing initiation of suits by EEOC). Even now, however, the Justice Department is the only federal agency empowered by the Equal Employment Opportunity Act to sue employers that are governments, governmental agencies, or political subdivisions. *Id.*

13. *E.g.*, *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971) (racial discrimination in hiring and job assignments); *United States v. Local 189, United Papermakers & Paperworkers*, 282 F. Supp. 39 (E.D. La. 1968) (racial discrimination in promotions, demotions, and selection for training).

14. *E.g.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (hotel accommodations); *United States v. Northwest Louisiana Restaurant Club*, 256 F. Supp. 151 (W.D. La. 1966) (dining facilities).

15. *E.g.*, *Lee v. Macon County Bd. of Educ.*, 221 F. Supp. 297 (M.D. Ala. 1963); *United States v. County School Bd.*, 221 F. Supp. 93 (E.D. Va. 1963).

16. *E.g.*, *United States v. Price*, 383 U.S. 787 (1966) (prosecution for murder of civil rights workers); *United States v. Guest*, 383 U.S. 745 (1966) (prosecution of individuals for conspiring to intimidate blacks who asserted their constitutional rights).

action requirements.<sup>17</sup> Fair housing cases challenged such discriminatory practices as redlining by mortgage lenders, racial steering and block busting by realtors, and sex-based credit policies by lenders who instituted requirements such as demanding that a wife whose income was considered in a loan application provide information about her intention to have children.<sup>18</sup> Racial or sexual animus was difficult to prove in these newer types of civil rights cases. Instead, intentional discrimination often had to be inferred from such evidence as a discriminatory effect, the lack of a legitimate purpose, or a departure from the ordinary pattern of activities.

At the same time that our understanding of what constitutes discrimination expanded, our understanding of who is affected by discrimination also broadened. We now see that discrimination does not just victimize a single minority group—blacks. Indeed, it affects women, Hispanics, Native Americans, Asian Americans, institutionalized persons, and the handicapped. The federal government must therefore respond to these groups' concerns as well, as it has in both Democratic and Republican administrations. For example, the Equal Credit Opportunity Act of 1976<sup>19</sup> authorized the Civil Rights Division to file suits to combat discriminatory practices that emerged during the rapid growth of the credit industry. Starting in 1973, the Division also devoted substantial resources to protecting the civil rights of Native Americans and to combating various discriminatory practices directed at Hispanic citizens on account of their ethnic origin or lack of facility with the English language.<sup>20</sup> The newest and most neglected class of victims of unconstitutional practices for whom the Division has sought meaningful remedies are persons confined in penal facilities<sup>21</sup> or in civil institutions for the mentally ill or retarded.<sup>22</sup> The Division also began in the 1970's to litigate issues arising under recent legislation designed to end discrimination against the handicapped.<sup>23</sup>

In addition, enforcement programs are now national in scope. In areas such as discrimination in places of public accommodation, most litigation

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17. *E.g.*, *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding minority set-asides in federal public works projects); *United States v. Jefferson County*, Civ. Act. No. 75-P-0666 (N.D. Ala. Aug. 18, 1981) (consent decree covering municipality's complex employment and promotion practices).

18. *E.g.*, *Dunn v. Midwestern Indem. Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979) (redlining); *United States v. Jefferson Mortgage Co.*, [Laws, Regs., Decisions] EQUAL OPP'TY IN HOUSING REP. (P-H) ¶ 19,320 (D.N.J. 1978) (consent decree ending practice of requesting information on birth control practices and childbearing intentions of female applicants for credit); *United States v. Real Estate One, Inc.*, 433 F. Supp. 1140 (E.D. Mich. 1977) (racial steering).

19. Pub. L. No. 94-239, 90 Stat. 251 (codified at 15 U.S.C. § 1691 (1982)).

20. *E.g.*, *United States v. San Juan County*, Civ. Act. No. 79-408JB (D.N.M. 1979) (county agrees to provide bilingual assistance to Navajo-speaking voters).

21. *E.g.*, *Ruiz v. Estelle*, 553 F. Supp. 567 (S.D. Tex. 1982).

22. *E.g.*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (mentally retarded); *Rone v. Fireman*, 473 F. Supp. 92 (N.D. Ohio 1979) (mentally ill).

23. *E.g.*, *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980).

is still concentrated in the South. But that has not been the case in the areas of employment, housing, credit, voting, and school desegregation, where Division litigation by the late 1970's was dispersed throughout the northern and western states as well. The Division has brought criminal civil rights prosecutions in all parts of the United States.<sup>24</sup> And after passage of the 1972 Equal Employment Opportunity Act amendments,<sup>25</sup> the Division launched a nationwide program to end employment discrimination by public employers.

The history of the federal government's participation in the struggle to combat discrimination teaches us how essential the participation of each branch of the government is to the enterprise. Without broad congressional authorization to combat discriminatory practices, vigilant executive enforcement of statutory and constitutional rights, and clear judicial commitment to constitutional ideals, it is impossible to eradicate injustice.

While the Civil Rights Division has never received adequate resources under any administration to perform all of the enforcement responsibilities it has been given by federal statutes and executive orders, it has grown substantially over the years. As Judge Norman points out,<sup>26</sup> the Civil Rights Division was not an imposing entity in its early days. For example, in 1958 the Civil Rights Division had 15 attorneys and a budget of \$180,000,<sup>27</sup> and in 1965 it had 105 attorneys and a budget of just under \$2 million.<sup>28</sup> By the time I left the Department, the Division's budget was approaching \$17 million, and the staff exceeded 400 people, about half of whom were lawyers. Judge Norman has pointed out that when he first began working at the Civil Rights Division, it was not a bureaucracy. It has become a bureaucracy. But I am afraid it is a bureaucracy that is not large enough to do the job. One of the things I hope, in commemorating the thirtieth anniversary of *Brown*, is that we all commit ourselves to seeing to it that sufficient resources are provided and that officials dedicated to "aggressive protection" of civil rights are elected or appointed. Only in that fashion can the Division be expected to carry on a tradition that started not in 1957, not in 1954, and not in 1939, but in 1883 and before, when the federal government stood shoulder to shoulder with minorities and other groups who were seeking their rightful place in our society.

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24. During my time at the Division, the Division obtained convictions against individuals in the states of Washington, Michigan, Utah, and Massachusetts, as well as against individuals in the South. See 1981 ATT'Y GEN. ANN. REP. 123; 1980 ATT'Y GEN. ANN. REP. 126-27; 1979 ATT'Y GEN. ANN. REP. 111; 1978 ATT'Y GEN. ANN. REP. 134-36.

25. Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e (1976)).

26. See Norman, *The Strange Career of the Civil Rights Division's Commitment to Brown*, 93 YALE L.J. 983, 983-84 (1984).

27. Telephone interview with John Shaffer, Director, Budget Staff, Justice Management Division, Department of Justice (Apr. 20, 1984).

28. *Id.*