Testimony of Prof. Samuel R. Bagenstos
before the House Committee on the Judiciary

April 16, 2013

Thank you Chairman Goodlatte, Ranking Member Conyers, and members of the Committee. I am pleased to have the opportunity to testify on the achievements of the Justice Department's Civil Rights Division in the past four years. I have had the privilege to serve two tours of duty in the Civil Rights Division—first as a career attorney at the beginning of my own legal career in the mid-1990s, and then as a senior political appointee from July 2009 to August 2011. Beginning in January 2010, I had the honor to serve as the Principal Deputy Assistant Attorney General for Civil Rights.

The last four years has been one of the most productive periods in the Civil Rights Division's illustrious history. Across a range of substantive areas, the Division has stepped up its enforcement efforts—and with demonstrable results. Let me just discuss a few.[1]

- In the past four years, the Division's Criminal Section brought 40 percent more human trafficking cases than in the previous four years, and convicted nearly 75 percent more defendants in hate crimes cases.

- In the disability rights area—one especially close to my heart—the Division in the past four years has conducted an unprecedented effort to enforce the Supreme Court's *Olmstead* decision, which requires states to serve people with disabilities in the setting that is most integrated for them as individuals.[2] The Division has participated in over 40 *Olmstead* matters in nearly half of the States of the Union, and it has reached landmark settlements with the States of Georgia, Delaware, North Carolina, and Virginia, which will provide appropriate community-based services to thousands of individuals with disabilities.

- In the education context, the Division in the past four years has reached agreements with 16 school districts to guarantee services to English Language Learners—increasing by a factor of four over the

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[1] Data are drawn from U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, ACCOMPLISHMENTS 2009-2012, available at http://www.justice.gov/crt/publications/accomplishments/crtaccomplishment09_12.pdf (hereinafter "Civil Rights Division Accomplishments 2009-2012").
[2] Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).

previous four-year period—and it has reached agreements with 10 school districts to address the problem of discriminatory harassment that impedes opportunities to learn.

- In the fair housing and fair lending context, the Division obtained more in monetary relief in the 2012 fiscal year than in the previous *23 years combined*. In the past four years, the Division has reached record-setting settlements in cases involving landlords sexually harassing tenants and in cases challenging discriminatory lending practices. The fair lending settlements themselves have resulted in more than $600 million in monetary relief for more than 300,000 borrowers and their communities.

- The Division has engaged in aggressive efforts to protect the rights of those who serve in our Nation's military. In the past four years, it has obtained more than $50 million in relief under the Servicemembers Civil Relief Act, which protects our soliders and sailors from such conduct as their houses being foreclosed upon or their cars repossessed while they are away on active duty. And, in conjunction with the U.S. Attorneys' offices, it has stepped up enforcement of the employment rights of returning servicemembers by bringing nearly 40 percent more cases under the Uniformed Services Employment and Reemployment Rights Act than in the previous four years. And, as I discuss below, the Division has vigorously protected the voting rights of our men and women serving overseas.

- The Division has also reached settlements of unprecedented breadth and depth in the policing, corrections, and juvenile justice areas, including landmark settlements with the New Orleans Police Department and the Shelby County, Tennessee, juvenile justice system.

- And the Division's Appellate Section, in which I had the honor to start my career, and which I had the honor to supervise in my recent tour of duty, has stepped up its role of representing the United States in important cases as *amicus curiae*. In the past four years, it has filed more than 50% more *amicus* briefs than in any other four-year period in its history.

But perhaps the best illustration of the success of Assistant Attorney General Tom Perez's efforts to restore and transform the Division's work comes from the voting rights area—though similar stories could be told throughout the Division. When Tom Perez and his leadership team arrived

in the summer and fall of 2009, the Division's Voting Section was in disarray, and its career staff was demoralized. Both the Inspector General's recent report on the Voting Section and its 2008 joint report with the Office of Professional Responsibility on politicized hiring within the Division document this fact.[3] The recent Inspector General report found that the section had lost 31 trial attorneys from 2003 to 2008—massive turnover for a section that averaged only 36 trial attorneys during that period.[4] Among those who left were highly experienced attorneys on whom the Division relies to lead trial teams in major cases.

The 2008 joint report of the Inspector General and the Office of Professional Responsibility provides crucial context for understanding what had happened. That report found that Bradley Schlozman—who served as Deputy Assistant Attorney General, Principal Deputy Assistant Attorney General, and Acting Assistant Attorney General from 2003 to 2006—had violated federal personnel laws by improperly injecting political considerations into hiring decisions for career attorneys.[5] The report found that politicized hiring was pervasive in the sections Schlozman supervised—including the Voting Section—as well as in the hiring for entry-level Honors Program attorneys across the Division, a process that Schlozman also supervised.[6]

For those who are interested in the management challenges that Tom Perez and his senior leadership team confronted, I urge you to read and carefully consider the 2008 OIG/OPR joint report. As that report shows, Schlozman's politicized hiring did not stand on its own. Rather, it was part and parcel of a highly politicized culture, centered on (but hardly limited to) the Voting Section. And that culture, the report demonstrates, came from Schlozman himself. As the report documents, Schlozman referred to career Voting Section attorneys as "mold spores."[7] As the recent OIG report notes, under Schlozman's leadership the section broke from past precedent in

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[3] See U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION (March 2013), available at http://www.justice.gov/oig/reports/2013/s1303.pdf (hereinafter "OIG Report"); U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL AND OFFICE OF PROFESSIONAL RESPONSIBILITY, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION (July 2, 2008), available at http://www.justice.gov/opr/oig-opr-iaph-crd.pdf (hereinafter "OIG/OPR Joint Report").

[4] OIG Report at 194-195.

[5] See OIG/OPR Joint Report at 64.

[6] See OIG/OPR Joint Report at 33-35.

[7] OIG/OPR Joint Report at 20 n.13.

Section 5 preclearance matters by excluding the recommendations of career line attorneys from the memoranda sent to the Assistant Attorney General.[8]

Schlozman told the section chiefs he supervised to keep particular career attorneys he perceived as liberals on a short leash. In one instance, he told the chief to keep an attorney "under a watchful eye" and to assign that attorney nothing but "no-brainer crap."[9] In another instance, he described a career attorney as a "pinko" and asked the section chief, "So why is she leading this impt [important] case?"[10] In yet another, Schlozman told a section chief "not to assign any important cases to an attorney whom Schlozman had heard had an anti-Bush bumper sticker posted in her office."[11]

Perhaps most perniciously, he encouraged the career attorneys he hired to think of themselves as part of a political "team." In an email to one newly hired career attorney, Schlozman wrote: "Just between you and me, we hired another member of 'the team' yesterday. And still another ideological comrade will be starting in one month. So we are making progress."[12]

Such pervasive politicization of the career civil service—fomented from the very top—is a culture that cannot be changed overnight. But Tom Perez realized that he had to begin right away to restore the culture of nonpartisanship, transparency, and professionalism to the Division. And that is precisely what he did. After taking office in October 2009, he quickly moved to restore a career-driven, merit-based hiring process. Under that process, formalized in memoranda from the Assistant Attorney General to Division staff issued in December 2009, January 2010, and July 2010, career employees have the principal role in hiring attorneys. Each section must set up a hiring committee, made up entirely of career employees, to vet, select for interviews, and interview applicants for each vacancy. Based on the deliberations of the committee, the section chief—who is also a career employee—makes a hiring recommendation to the Assistant Attorney General. If the Assistant Attorney General overrules that recommendation, he must do so in writing—and I am not aware of any instance in which Tom Perez has overruled any of the hiring recommendations made by a section chief under this policy. The new policy also limits interviewers from asking questions that could be construed as seeking information about an applicant's

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[8] OIG Report at 86, 153 n.135.
[9] OIG/OPR Joint Report at 33 n.28.
[10] OIG/OPR Joint Report at 44.
[11] OIG/OPR Joint Report at 44.
[12] OIG/OPR Joint Report at 55. As the report documents, Schlozman repeatedly expressed concern whether particular career employees were members of what he called "the team." See *id.* at 21, 34, 35, 36, 42, 44, 51-52.

politics, and it imposes mandatory human resources training requirements for employees involved in hiring.[13]

As the recent report of the Inspector General demonstrates, those changes have been successful in restoring merit-based hiring in the Voting Section. When the section hired nine experienced attorneys under the new policy, the report found, "the hiring committee was keenly focused on the candidates' voting litigation experience and substantive knowledge of voting rights"[14]—exactly as they should have been. The report found that the nine new attorneys had "a high degree of academic and professional achievement."[15] Five of the new attorneys, or 56 percent, had eight or more years of litigation experience, compared to 23 percent of the rejected applicants—and seven of the new attorneys, or 78 percent, had two or more years of *voting* litigation experience, compared to just 3 percent of rejected applicants.[16]

Tom Perez also restored the role of career line staff in the Section 5 preclearance process. Under a policy instituted in 2009, "each staff member who works on a Section 5 submission [must] state whether they concur with the Voting Section's recommendation," and "when Division leadership disagrees with Voting Section staff recommendations, it sets forth the reasons for such disagreements in writing."[17] As he explained to the Inspector General, this policy appropriately respects "the importance of hearing a full range of views in making [preclearance] decisions."[18]

Culture change takes time, of course. As the recent Inspector General's report highlights, these and other reforms[19] have not yet fully extirpated the legacy of division within the Voting Section that Tom Perez confronted when he assumed office as Assistant Attorney General. But the Voting Section has made major progress.

The proof is in the results.[20] In each of the past two fiscal years, the section has set a record for the largest number of new litigation matters it

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[13] OIG Report at 192-193.
[14] OIG Report at 203.
[15] OIG Report at 204.
[16] OIG Report at 211.
[17] OIG Report at 86 n.70.
[18] OIG Report at 86 n.70.
[19] See OIG Report at 133-134 (describing anti-harassment training put in place by Assistant Attorney General Wan Kim in 2007 after Schlozman left the Division, and additional steps taken by Assistant Attorney General Perez to ensure that employees treat each other with respect and professionalism).
[20] Data are drawn from Civil Rights Division Accomplishments, 2009-2012.

has handled. The 43 new cases the section handled last year far outstrips the prior record of 27, set the previous year. The section has also defended judicial preclearance actions in four major cases since 2009. In three of those cases, involving Texas's state house and congressional redistricting plans, Texas's stringent new voter identification law, and Florida's reduction in early-voting opportunities, the United States District Court for the District of Columbia largely agreed with the Division's position and denied preclearance.[21] In the fourth, involving South Carolina's voter identification law, the court granted preclearance for future elections only after the state articulated a new interpretation of the law's affidavit bypass provision in direct response to the Department's objections.[22] And the Division has vigorously defended challenges to the constitutionality of Section 5, including in the *Shelby County* case that is before the Supreme Court this Term.

Although the preclearance process always takes on an outsized role in the years surrounding the decennial redistricting, the Voting Section has done vigorous work outside of the Section 5 context as well. In the last four years, the section has filed and obtained settlements in seven cases to enforce the language minority provisions of the Voting Rights Act, including the first case brought on behalf of Native American voters under those provisions since 1998. It has filed new lawsuits under Section 7 of the National Voter Registration Act, including a major settlement with the State of Rhode Island. And the section has vigorously enforced the MOVE Act to ensure that our men and women in uniform and other citizens overseas have their voting rights protected. On 21 occasions since the statute took effect, it has litigated or reached settlement agreements with jurisdictions that have violated the statute—including filing lawsuits and obtaining consent decrees or preliminary injunctive relief against six states and the Virgin Islands in the 2012 election alone.

As I said, similar stories could be told throughout the Division. Tom Perez arrived at a Civil Rights Division that was itself divided and demoralized. And thanks to his leadership and management skills—and the very hard work of an extraordinarily dedicated corps of career attorneys—

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[21] Texas v. Holder, 888 F. Supp.2d 113 (D.D.C. 2012) (three-judge court) (voter identification law); Texas v. United States, 887 F.Supp. 2d 133 (D.D.C. 2012) (three-judge court) (redistricting); Florida v. United States, 885 F. Supp.2d 299 (D.D.C. 2012) (three-judge court) (early voting). Florida subsequently adopted an early-voting plan that addressed the concerns articulated by the court in denying preclearance, and the Attorney General administratively precleared the early-voting changes taken in conformity with that plan.

[22] South Carolina v. United States, ___ F. Supp.2d ____, 2012 WL 4814094 (D.D.C., Oct. 10, 2012) (three-judge court).

things have turned around. The Civil Rights Division has restored itself to its rightful place as the preeminent enforcer of civil rights in the United States. It has also been aggressive in confronting new civil rights challenges.

The Division has a rightfully proud history, and the Division's achievements in the past four years are more than worthy of that history. I am pleased to be able to discuss those achievements with you today.

Thank you.