MISMANAGEMENT AT THE CIVIL RIGHTS DIVISION OF THE DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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CONTENTS

APRIL 16, 2013

Page

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

MISMANAGEMENT AT THE CIVIL RIGHTS DIVISION OF THE DEPARTMENT OF JUSTICE

TUESDAY, APRIL 16, 2013

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to call, at 10:08 a.m., in room 2141, Rayburn Office Building, the Honorable Bob Goodlatte (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Coble, Chabot, Issa, King, Franks, Gohmert, Jordan, Poe, Marino, Gowdy, Labrador, Farenthold, Conyers, Nadler, Watt, Lofgren, Jackson Lee, Chu, Gutierrez, Bass, Richmond, DelBene, and Garcia.

Staff present: (Majority) Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff and Chief Counsel; Allison Halataei, Parliamentarian & General Counsel; John Coleman, Counsel; Kelsey Deterding, Clerk; (Minority) Perry Apelbaum, Staff Director & Chief Counsel; Danielle Brown, Parliamentarian; and Aaron Hiller, Counsel.

Mr. GOODLATTE. Good morning. The Judiciary Committee will come to order, and without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone to today's hearing on "Mismanagement of the Civil Rights Division of the Department of Justice." I will recognize myself for an opening statement, and then the Ranking Member.

Today the Judiciary Committee examines a report released on March 12 by the Inspector General regarding the politicization, polarization, and mismanagement occurring at the Civil Rights Division of the Department of Justice, specifically, the Division's Voting Section.

The findings of this report include evidence of inappropriate conduct by political appointees, harassment of employees because of their political views, selective enforcement of voting laws, and misleading testimony by the Division head, Assistant Attorney General Thomas Perez. These findings point to a deep ideological polarization giving rise to internal disputes and mistrust, which has harmed the efficacy of this Division.

The Inspector General's report in part concludes, "The cycles of actions and reactions that resulted from this mistrust were in many instances incompatible with the proper functioning of a component of the Department."

The Division is entrusted with the authority to protect the civil and constitutional rights of all Americans and to enforce laws prohibiting discrimination on the basis of race, color, sex, disability, religion, familial status, and national origin. The report, however, describes a division tainted by partisanship in unfairly favoring one group over another, both in its enforcement of the laws and in its workplace culture.

As the Inspector General's report states, "The high partisan stakes associated with some of the statutes that the Voting Section enforces have contributed to polarization and mistrust within the Section." The report, however, makes clear that other components within the Department with enforcement authority over equally controversial subject matter do not appear to suffer from the same degree of polarization and internecine conflict. "The difference, according to the report, is a function of leadership and culture."

The report covers the time period between 2001 and the end of 2012. It is clear, however, that little has changed since then at the Division. For example, just a few months ago we found this Facebook post. It may be a little hard to read over there, but this is a Facebook by Dan Freeman, a lawyer in the Voting Section of the Department of Justice, who proudly announced that he "started the crowd booing when Paul Ryan came out at the presidential inauguration in January." His actions suggest that a climate of open and unabashed partisanship still prevails at the Division. To our knowledge, Mr. Freeman has not been disciplined in any way.

Other examples of this kind of unacceptable conduct include blatantly partisan political commentary found in emails sent by the Voting Section employees on Department computers, Section employees posting comments on widely-read Websites concerning Voting Section work and personnel, and in one instance, an employee writing a comment to an article concerning an internal Department investigation of potential misconduct by a Section manager that read, "Geez, reading this just makes me want to go out and choke somebody. At this point, I'd seriously consider going in tomorrow and hanging a noose in someone's office to get myself fired, but they'd probably applaud the gesture and give me a promotion for doing it."

One overarching question leaps from this report: with this sort of palpable dysfunction at the Division, what, if anything, has Assistant Attorney General Tom Perez done to remedy it? With this nomination by President Obama to be the next Secretary of Labor, the American people deserve to know whether Mr. Perez is capable of properly managing a government agency.

The perception alone of partisan or racial bias undermines the core goals of this Division. I agree with the Inspector General's statement that, "Division leadership seems to promote impartiality, continuity, and professionalism as critical values in the Voting Section," and that, "Leadership and career staff alike must embrace a culture where ideological diversity is viewed as beneficial."

These and other incidents we will hear about today are a disservice to the American people who rely on the Civil Rights Division to protect them by enforcing our Nation's anti-discrimination laws in a professional and unbiased manner. The IG report we will discuss today is simply another example of the questionable man-

agement practices of Thomas Perez, who has now been nominated by President Obama to be the next Secretary of Labor.

Just 2 days ago, Chairman Issa, Ranking Member Grassley, and I released a joint report on Thomas Perez's involvement in a secret deal with the City of St. Paul that ultimately cost the taxpayers as much as $200 million. We intend to continue our investigation into this troubling matter.

I look forward to hearing from all of our witnesses today.

And it is now my pleasure to recognize the Ranking Member of the Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman. Our hearts go out to the people of the City of Boston and to the families and loved ones of all those who were injured in yesterday's attacks. This tragedy is a sobering reminder of the need to set aside partisan politics and to work together in the common cause for the good of the Nation.

I find it necessary to point out that the title of this hearing, "Mismanagement at the Civil Rights Division of the Department of Justice," is unnecessarily provocative and demeans the seriousness of the work we do on the Committee. Our job is to uncover the facts and then draw conclusions, not the other way around. In this case, the misleading title also is designed to obscure the facts rather than to make them clear to the public. It is intended to harm the reputation of a champion for civil rights and a decent public service.

Two days from now, of course, we know that the Assistant Attorney General, Tom Perez, will sit before the Senate as the President's nominee to lead the Department of Labor. His tenure as the head of the Civil Rights Division of the Department of Justice has been successful by any measure. To suggest otherwise to me is both inaccurate and unfair.

Let us look at the record. The recent report of the Office of the Inspector General entitled, "A Review of the Operations of the Voting Section of the Civil Rights Division" suggests mismanagement, but the mismanagement did not occur under today's leadership. Under the Bush administration, the Civil Rights Division was an agency in crisis. Political appointees marginalized the voices of career attorneys. Those attorneys abandoned the Voting Section at an alarming rate.

The perception in the civil rights community and often within the Division was that the political preferences of the Administration had taken precedence over the impartial enforcement of civil rights law. That suspicion was confirmed in 2008 in a series of three reports issued jointly by the Office of the Inspector General and the Office of Professional Responsibility. And those reports concluded that the political leadership of the Division had violated Federal law by politicizing the hiring process and other personnel decisions.

The recent Inspector General's report paints a similar picture of that time, from 2003 to 2007. The report notes "polarization and suspicion in the Voting Section became particularly acute as Bush appointees illegally recruited new attorneys into the Voting Section and other parts of the Division based on their conservative affiliations." That is a quote. And I will be putting parts of this into the record.

[The information referred to follows:]

CHAPTER SEVEN
CONCLUSION

This review examined several issues: the types of cases brought by the Voting Section and any changes in the types of cases over time; any changes in Voting Section enforcement policies or procedures over time; whether the Voting Section has enforced the civil rights laws in a non-discriminatory manner; and whether any Voting Section employees have been harassed for participating in the investigation or prosecution of particular matters. We focused on the period since 2001, addressing enforcement decisions made during the last two administrations and allegations of harassment during the same period. Our review was subsequently expanded to address allegations about how the Voting Section processed information requests, and about hiring practices in the Voting Section from 2009 to 2011.

As detailed in Chapter Three, our examination of the mix and volume of enforcement cases brought by the Voting Section revealed some changes in enforcement priorities over time, but we found insufficient support for a conclusion that Division leadership in either the prior or current administration improperly refused to enforce the voting rights laws on behalf of any particular group of voters, or that either administration used the enforcement of the voting laws to seek improper partisan advantage. Although we had concerns about particular decisions in a few cases, we found insufficient evidence to conclude that the substantive enforcement decisions by Division leadership in Voting Section cases were made in a discriminatory manner. Our conclusion encompasses our review of some of the more controversial enforcement decisions made in Voting Section cases from 2002 through 2011, by Division leadership in both the prior and current administrations.

Notwithstanding this conclusion, our investigation revealed several incidents in which deep ideological polarization fueled disputes and mistrust that harmed the functioning of the Voting Section. As detailed in Chapter Four, these disputes arose at various times both among career employees in the Voting Section and between career employees and politically appointed leadership in CRT. On some occasions the incidents involved the harassment and marginalization of employees and managers.

We believe that the high partisan stakes associated with some of the statutes that the Voting Section enforces have contributed to polarization and mistrust within the Section. Among other things, the Voting Section reviews redistricting cases that can change the composition of Congressional delegations and voter ID laws that have actual or perceived impacts on the composition of the eligible electorate. Moreover, the Division's leadership makes choices on Voting Section enforcement priorities – such as whether to

give greater emphasis to provisions intended to increase voter registration or those intended to ensure the integrity of registration lists and prevent voter fraud – that are widely perceived to affect the electoral prospects of the political parties differently. We found that people on different sides of internal disputes about particular cases in the Voting Section have been quick to suspect those on the other side of partisan motivations, heightening the sense of polarization in the Section. The cycles of actions and reactions that we found resulted from this mistrust were, in many instances, incompatible with the proper functioning of a component of the Department.

Polarization within the Voting Section has been exacerbated by another factor. In recent years a debate has arisen about whether voting rights laws that were enacted in response to discrimination against Blacks and other minorities also should be used to challenge allegedly improper voting practices that harm White voters. Views on this question among many employees within the Voting Section were sharply divergent and strongly held. Disputes were ignited when the Division's leadership decided to pursue particular cases or investigations on behalf of White victims, and more recently when Division leadership stated that it would focus on "traditional" civil rights cases on behalf of racial or ethnic minorities who have been the historical victims of discrimination.

The scope of our review did not permit us to trace the source of mistrust and polarization within the Voting Section back to a single event or decision, if that were even possible. One significant event, and the earliest one we address in this report, was the decision by the outgoing Division leadership during the transition period in December 2000 and January 2001 to greatly accelerate the hiring procedure for new attorneys in the Section and elsewhere in the Division. We were told that this surge in hiring took place in the context of a longer-term increase in Division resources made available by Congress. However, as we discuss in Chapter Five, we concluded that the acceleration of this activity during the 2000-2001 period at a minimum created the perception, both among long-time senior career professionals who were involved in the process and among the political appointees in the incoming Division leadership, that it was done in order to hire attorneys perceived to favor the enforcement philosophy of the outgoing administration and to limit the ability of the incoming administration to make its own hiring and resource allocation decisions. We found that these actions generated mistrust between the incoming political leadership in the Division who discovered that the hiring campaign had occurred and the holdover career leadership who participated in the hiring effort.

The polarization and suspicion became particularly acute during the period from 2003 to 2007, including when Bradley Schlozman supervised the Voting Section in his capacity as Principal DAAG and Acting AAG. As detailed in a prior report by the OIG and OPR, Schlozman illegally recruited new

attorneys into the Voting Section and other parts of the Division based on their conservative affiliations. As was evident from the e-mails we cited in our earlier report, Schlozman's low opinion of incumbent career attorneys in the Voting Section was based in significant part on their perceived liberal ideology and was not a well-kept secret. During this review, we found that Schlozman's decision to transfer Deputy Section Chief Berman out of the Voting Section in 2006 was motivated at least in part by ideological considerations.

We also found that some career employees in the Voting Section contributed significantly to the atmosphere of polarization and distrust by harassing other career employees due at least in part to their political ideology or for positions taken on particular cases. As detailed in Chapter Four, some career staff assigned to the Georgia Voter ID Section 5 preclearance matter in 2005 behaved in an unprofessional manner toward one attorney who was perceived to be ideologically close to Division leadership. The behavior included outward hostility, snide and mocking e-mails, and accessing the attorney's electronic documents on the Voting Section shared drive without his permission. In 2007, some career employees made offensive and racially charged comments to and about a student intern who volunteered to assist the trial team in the controversial Noxubee matter, which was the first Section 2 case brought against minority defendants on behalf of White voters. Division leadership reprimanded one career attorney and counseled two others for this conduct. We also found that some Voting Section employees criticized and mocked the trial team in e-mails to each other at work, sometimes using inappropriate and intemperate language.

In 2007, three male attorneys who were widely perceived to be conservatives were counseled for making highly offensive and inappropriate sexual remarks about a female employee, together with remarks that she was "pro-black" in her work. Later that year, during a period of high tension in the Section, at least three career Voting Section employees posted comments on widely read websites concerning Voting Section work and personnel. Some of the postings included a wide array of inappropriate remarks and attacks, as well as highly offensive and potentially threatening statements. The postings included non-public information about attorneys, managers, and internal Department matters. They reflected exceptionally poor judgment and may have constituted a violation of Department regulations or policies. We do not believe that Voting Section or Division managers responded adequately to some of these incidents. We were especially troubled that a non-attorney Voting Section supervisor, who knew of a subordinate's improper conduct, not only suggested that the employee disregard counseling and admonishment from Section leadership, but also encouraged the subordinate to continue the improper conduct.

The functioning of the Voting Section and the relationship between political appointees in the Division's leadership and career employees was

further undermined by unauthorized disclosures of confidential information about internal deliberations and debates in several controversial matters, including the Mississippi and Texas redistricting matters and the Georgia Voter ID matter, which we also discuss in Chapter Four. Managers responded to the threat of further disclosures by limiting career staff access to information and imposing stricter secrecy on more sensitive projects. Despite these efforts, unauthorized disclosures of sensitive and confidential Voting Section information, apparently for political purposes, have continued to the present time. We believe that these disclosures and the responses to them came at a cost to trust, collegiality, and cooperation, and increased the appearance of politicization of the Voting Section's work. While it was beyond the scope of our review to determine the specific source of these unauthorized disclosures, the impact that they had on the relationship between Division leadership and career staff and the operation of the Voting Section was readily apparent to us.

In January 2009, a new President was inaugurated and, soon after, new leadership took office in the Department and the Division. A transition team memorandum that was provided to the incoming Department leadership advised them that, in reviewing the career leadership in the Division, "care should be taken to insure that any changes will protect the integrity and professionalism of the Division's career attorneys and will not be perceived as the politicization pendulum just swinging in a new direction." Despite this admonition, we found that the polarization in the Voting Section continued, as evidenced by several events.

For example, we found that starting in April 2009, there were serious discussions among senior leadership in the Division and the Department about removing Christopher Coates as Chief of the Voting Section, at least in part because of a belief that Coates had a "very conservative view of civil rights law" and wanted to make "reverse-discrimination" cases such a high priority in the Voting Section that it would have a negative impact on the Section's ability to do "traditional" cases on behalf of racial and language-minority voters. However, we found no evidence that Coates had declined to implement the decisions or policies of the new administration at the time of this effort, despite his admittedly conservative views and his acknowledged willingness to pursue "reverse-discrimination" cases. Division leaders also believed, based in part on complaints from career employees, that Coates was a flawed manager and a divisive figure whose removal would improve the functioning and morale of the Voting Section. After career officials in JMD told Division leadership that the then-existing record would not support a performance-based removal, an effort was then undertaken by Division leadership to document Coates's performance deficiencies. Ultimately, however, Coates requested and was granted a transfer out of the Division. We found the manner in which the Coates matter was handled further increased the appearance of politicization of the Voting Section.

We also found that in 2009, then-Section Chief Coates placed a career Section manager on the Honors Program Hiring Committee in order to "balance" the political views of a different committee member who Coates considered to be liberal. Almost immediately thereafter, DAAG Fernandes explored removing the manager from the committee due at least in part to his perceived conservative ideology, although she abandoned this effort. We found that considering the political or ideological leanings of employees in determining the composition of a hiring committee was inappropriate.

The continued polarization within the Voting Section also came into focus during "brown bag" meetings between Section personnel and DAAG Fernandes in 2009. During one meeting about Section 2 enforcement, in September 2009, Fernandes made comments about Division leadership's intention to prioritize "traditional civil rights enforcement" on behalf of racial or ethnic minorities. Some career staff interpreted her comments to signal that Division leadership had a blanket policy of not pursing Section 2 cases against Black defendants or on behalf of White voters. At another meeting later in 2009, Fernandes made comments about Division leadership's intention to focus on enforcing the "voter access" provisions of the NVRA that some career staff interpreted to mean that the administration would take no steps to enforce the "list-maintenance" provisions of the statute, the former of which are perceived to be supported by liberals while the latter are perceived to be favored by conservatives. Fernandes told the OIG that her comments at both meetings were not intended to convey the absolutist positions that some witnesses attributed to them, but rather reflected her understanding of Division leadership's legitimate enforcement priorities. At a minimum, these incidents reveal that the politically charged atmosphere and polarization within the Voting Section continued even after the 2009 change in the Division's leadership.

During the course of our investigation, we received additional allegations about the unfair treatment of perceived liberals by Section or Division management from 2003 to 2008, and additional allegations about the unfair treatment of perceived conservatives by Section or Division management from 2009 to the present. These included allegations that career attorneys received undesirable assignments or unfavorable performance reviews and that Division leadership refused to approve cases that the attorneys proposed because of political or ideological bias. We could not investigate many of these allegations, but we were struck by the perception within the Voting Section that this sort of conduct has continued across administrations. Again, we believe that the perception that some career employees are disfavored by management due to their political views is unusual in the Department, and that it hampers Section operations and undermines the perception of impartial law enforcement.

We did not find sufficient evidence to substantiate allegations about partisanship in hiring. As detailed in Chapter Five, our review did not

substantiate allegations that the Voting Section considered applicants' political or ideological affiliations when hiring experienced trial attorneys in 2010. Nevertheless, we found that the primary criterion used in assessing the qualification of the 482 applicants, namely prior voting litigation experience, resulted in a pool of 24 candidates selected to be interviewed (9 of which were ultimately hired) that had overwhelmingly liberal or Democratic affiliations. Although we found that the composition of the selected candidates was the result of the application of objectively neutral hiring criteria, this result contributed to the perception of continued politicization in the Section. We recommend steps that the Section should take to avoid creating perceptions of ideologically biased hiring.

Our investigation also found no support for allegations that partisan allies of the current administration received preferential treatment in the Voting Section's responses to requests for records, including FOIA requests. As detailed in Chapter Six, we found that differences in the time it took for the Voting Section to respond to records requests were attributable to variance in the time-sensitivity of the requests, the complexity and size of the requests, and the difficulty of locating responsive documents. We found that the Voting Section regularized and strengthened its procedures for responding to records requests in 2003 and since 2006, and that these procedures have helped protect against favoritism in responding to records requests. Nevertheless, we are concerned about the increasing backlog of requests in the Voting Section, which may be contributing to the appearance of politicization in responding to such requests, and we made a recommendation to address the issue.

Although we did not conclude that substantive enforcement decisions in the Voting Section during the period of our review were infected by partisan or racial bias, we believe that the perception remains that enforcement of the voting laws has changed with the election results. Much of this perception is a byproduct of legitimate shifts in enforcement priorities between different administrations. However, some of it has been fed by the incidents of polarization, discord, and harassment within the Voting Section described in this report. It is precisely because of the political sensitivity of the Voting Section's cases that it is essential that Division leaders and Voting Section managers be particularly vigilant to ensure that enforcement decisions – and the processes used to arrive at them – are, and appear to be, based solely on the merits and free from improper partisan or racial considerations.

In the highly controversial NBPP matter, we found that the decisions that were reached by both administrations were ultimately supportable on non-racial and non-partisan grounds. However, we also found that the manner in which the outgoing administration filed the case without following usual practice and the new administration's dismissal of Jackson as a defendant at the eleventh hour, particularly viewing the latter in the context of the contemporaneous discussions about removing Coates as Section Chief, both

risked undermining confidence in the non-ideological enforcement of the voting rights laws.

We do not believe that ideological polarization and bitter controversy within the Section are an inevitable consequence of the high political stakes in some Voting Section cases. Other Department components – including components that specialize in subject areas that are also politically controversial, such as environmental protection – do not appear to suffer from the same degree of polarization and internecine conflict. We believe the difference is largely a function of leadership and culture, and that steps must be taken to address the professional culture of the Voting Section and the perception that political or ideological considerations have affected important administrative and enforcement decisions there.

Given the troubling history of polarization in the Voting Section, Division leadership needs to promote impartiality, continuity, and professionalism as critical values in the Voting Section, and leadership and career staff alike must embrace a culture where ideological diversity is viewed as beneficial and dissenting viewpoints in internal deliberations are welcomed and respected. We also believe that leadership and career staff must be continually mindful of the need to ensure the public's confidence in the Voting Section's impartiality. We were surprised and dismayed at the amount of blatantly partisan political commentary that we found in e-mails sent by some Voting Section employees on Department computers. We recognize that Voting Section employees, no less than other Department employees, are entitled to their individual political views. However, the importance of separating such views from Section work is paramount. Government e-mails are readily forwarded and reproduced, and political commentary that is intended to be private may quickly become public, which could further exacerbate the appearance of politicization in the Section and undermine the public's confidence in the Department.

The Department's leadership also should avoid the use of direct communications with staff attorneys with the explicit or implicit understanding that intermediate supervisors who are not trusted by management will not be included in or informed about the communications. We saw this practice during the prior administration in the Georgia Voter ID case in 2005 and during the current administration in the exclusion of Section Chief Coates from some voting-related projects in 2009. We believe that communications of this type between Division or Department leadership and career personnel that intentionally exclude the career employees' supervisors are indicative of a dysfunctional management chain and can only feed mistrust and polarization.

Employees in the Voting Section have a critical role to play in improving the Section's culture. Employees must appreciate the importance of public confidence in the impartial enforcement of the voting rights laws. They must also be prepared to implement legitimate enforcement priorities set by Division

management even if the employees disagree with them. The pattern of undermining Division management and other career employees through personal attacks in blog posts and the unauthorized disclosure of confidential and privileged information must stop. Department employees have several options for addressing instances of actual or perceived misconduct or mismanagement, including reporting them to the OIG and OPR.

Many of the career and political employees who were involved in the most troubling incidents described in this report have left the Department and are no longer subject to administrative discipline. However, several of the incidents involved conduct by current Department employees and we are referring those matters to the Department for a determination of whether discipline or other administration action with respect to each of them is appropriate.

The conduct that we discovered and document in this report reflects a disappointing lack of professionalism by some Department employees over an extended period of time, during two administrations, and across various facets of the Voting Section's operations. In the Department, professionalism means more than technical expertise – it means operating in a manner that consciously ensures both the appearance and the reality of even-handed, fair and mature decision-making, carried out without regard to partisan or other improper considerations. Moving forward, the Department's leadership should take steps consistent with the findings and recommendations contained in this report to ensure that the actions and decisions of the Section and its employees meet the standards of professionalism and impartiality that are rightly expected and demanded by the public of the Department of Justice.

Mr. CONYERS. The report also finds that the Division leadership acted at times inappropriately or unfairly with career attorneys. Changes to longstanding Division policy that appeared to be designed to shield conservative attorneys from criticism only further undermined morale. That is true mismanagement, marginalizing

the career experts, politicizing the decision making process, and ultimately breaking the law.

If the purpose of this hearing was to look back at the conditions of the Division between 2001 and 2008, then today's title would be more appropriate. But the timing and title of this hearing are no coincidence. They are intended to disparage the reputation of the Associate Attorney General as he stands for confirmation.

Fortunately, his record can withstand this partisan attack. Although he inherited a division in disarray, Mr. Perez has righted the ship. In fact, to the extent the Inspector General's report mentions Perez only once, and it is to clear him of wrongdoing and credits him for his management processes.

Under his leadership, the Division obtained $660 million in lending settlements, including the three largest lending discrimination settlements in the Department's history, $128 million. The Division obtained the largest recovery rewarded in an employment discrimination case. The Division secured $16 million as part of a settlement to enforce the Americans with Disabilities Act in more than 10,000 banks and other financial offices across the country. And in last year alone, the Division has opened 43 new voting rights cases, more than twice the number in any previous year, and filed 13 additional objections to discriminatory voting practices under Section 5 of the Voting Rights Act.

Mr. Perez has accomplished these tasks, and he has restored confidence and effectiveness of his career staff. There may be some who disagree with his policy objectives, but even critics should be impressed by his achievements. And I have, over the course of the past 2 years, made several requests for hearings in this Committee on matters including the wave of changes in State voting laws, various Voting Rights Act pre-clearance cases, and the Division's enforcement of the National Voter Registration Act. And to date, we have not held a single substantive hearing on any of these topics. My colleagues and I have held forums on these issues across the country. The public's interest in these matters is overwhelming.

And unfortunately, I suspect that much of today's discussion will cover long discredited accusations. Instead of attacking Perez, we ought to get back to the work of strengthening civil rights and voting rights laws in this country.

I submit the rest of my statement and thank the Chairman for the additional time that I was granted.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

Mr. Chairman, once again, I must object to the title of this hearing: "Mismanagement at the Civil Rights Division of the Department of Justice."

Unnecessarily provocative language demeans the seriousness of the work we do in this Committee. Our job is to uncover the facts, and then draw conclusions—not the other way around.

In this case, the title is also misleading. It is designed to obscure the facts, rather than to make them clear to the public. And it is intended to harm the reputation of a champion for civil rights and a decent public servant.

Two days from now, Assistant Attorney General Tom Perez will sit before the Senate as the President's nominee to lead the Department of Labor. His tenure as head of the Civil Rights Division of the Department of Justice has been successful by any measure. To suggest otherwise is both inaccurate and unfair.

Let us look carefully at the record.

The recent report of the Office of the Inspector General, titled "A Review of the Operations of the Voting Section of the Civil Rights Division," does, in fact, suggest that there has been mismanagement at the Civil Rights Division.

But that mismanagement did not occur under today's leadership.

Under the Bush Administration, the Civil Rights Division was an agency in crisis. Political appointees marginalized the voices of career attorneys. Those attorneys abandoned the Voting Section at an alarming rate. The perception in the civil rights community, and often within the Division, was that the political preferences of the Administration had taken precedent over the impartial enforcement of civil rights law.

That suspicion was confirmed in 2008 in a series of three reports issued jointly by the Office of the Inspector General and the Office of Professional Responsibility. Those reports concluded that the political leadership of the Division had violated federal law by politicizing the hiring process and other personnel decisions.

The recent Inspector General's report paints a similar picture of that time. From 2003 to 2007, the report notes, "polarization and suspicion" in the Voting Section became "particularly acute" as Bush appointees "illegally recruited new attorneys into the Voting Section and other parts of the Division, based on their conservative affiliations."

The report also finds that Division leadership "acted at times inappropriate or unfairly" with career attorneys. Changes to longstanding Division policy that appeared designed to shield conservative attorneys from criticism only further undermined morale.

That, Mr. Chairman, is true "mismanagement": marginalizing the career experts, politicizing the decision-making process, and ultimately breaking the law. If the purpose of this hearing was to look back at conditions in the Division between 2001 and 2008, then today's title would be appropriate.

But the timing and title of this hearing are no coincidence. They are intended to disparage the reputation of the Associate Attorney General as he stands for confirmation.

Fortunately, his record can withstand this partisan attack. Although he inherited a Division in disarray, Mr. Perez has righted the ship. In fact, to the extent the Inspector General's report mentions Mr. Perez at all, it clears him of wrongdoing and credits him for his management practices.

Moreover, under his leadership:

- The Division has obtained $660 million in lending settlements, including the three largest lending discrimination settlements in the Department's history.
- The Division obtained $128 million in the largest recovery ever awarded in an employment discrimination case.
- The Division secured $16 million as part of a settlement to enforce the Americans with Disabilities Act at more than 10,000 banks and other financial retail offices across the country.
- And in the last year alone, the Division has opened 43 new voting rights cases—more than twice the number than in any previous year—and filed 13 additional objections to discriminatory voting practices under Section 5 of the Voting Rights Act.

Mr. Perez has accomplished these tasks and more, and he has restored the confidence and effectiveness of his career staff. There may be some who disagree with Mr. Perez's policy objectives, but even his political opponents should be impressed by his achievements.

I have, over the course of the past two years, made several requests for hearings on matters including the wave of changes in state voting law, various Voting Rights Act preclearance cases, and the Division's enforcement of the National Voter Registration Act. To date, we have not held a single substantive hearing on any of those topics. My colleagues and I have held forums on these issues across the country—the public's interest in these matters is overwhelming.

Unfortunately, I suspect that much of today's discussion will cover long-discredited accusations of wrongdoing at the Justice Department. Instead of attacking Mr. Perez, we ought to get back to the work of strengthening civil rights and voting rights laws in this country. How many times will we discuss the New Black Panthers case, or the theoretical possibility of voter fraud, or the idea that the Civil Rights Division responds selectively to records requests, before we hold a hearing about making it easier for citizens to vote?

Before any of my colleagues accuse the Assistant Attorney General for Civil Rights of injecting politics where politics do not belong, I urge them to think hard about the evidence, about the conclusions of the Inspector General, and about the context for this hearing today.

I hope my colleagues will put aside this partisan rhetoric and return to the people's business.

Mr. GOODLATTE. I thank the gentleman for his remarks. And I now turn to the Chair of the Constitution and Civil Justice Subcommittee, the gentleman from Arizona, Mr. Franks, for his opening statement.

Mr. FRANKS. Well, thank you, Mr. Chairman. I want to express gratitude for allowing me this statement. And I also want to echo both yours and the Ranking Member's expression of condolence and concern on behalf of the victims of the attacks in Boston.

Mr. Chairman, last month the Inspector General at the Justice Department released a report that exposes serious mismanagement issues within the Department's Civil Rights Division. Some of these management issues span two or three presidential administrations. Others are limited to the present Administration. Unfortunately, it appears that nothing has been done by leadership within the Civil Rights Division to correct this mismanagement, including by its current leader, Assistant Attorney General, Tom Perez.

The mismanagement uncovered by the IG's report takes several forms. One of the more disturbing mismanagement issues identified in the IG's report is a culture of harassment and mistreatment of conservative employees within the Division. For example, Mr. Chairman, according to the IG report, "At least three career Voting Section employees posted comments on widely-read liberal Websites concerning Voting Section work and personnel, including a wide array of inappropriate remarks ranging from petty and juvenile personal attacks to highly offensive and potentially threatening statements."

Mr. Chairman, nothing has been done to end this harassment and treatment of Division career employees. Employees who engaged in this hostile, racist, and inappropriate behavior are still employed by the Department, including one who admitted lying to the Inspector General. This would be shocking except for the fact that it appears that the Division's senior leadership also participated in some of the harassment in at least one instance involving the removal of a career attorney, Voting Section chief, Chris Coates. Mr. Coates was harassed and eventually, with Assistant Attorney General Tom Perez's approval, was reassigned outside the Division because of his conservative views. Moreover, the IG determined that political appointees within the Division provided misleading information to the Attorney General as rationale to remove Mr. Coates.

Other mismanagement issues under the current Administration include "incidents in which Voting Section career staff shared confidential Section information with outside civil rights attorneys, some of whom were working on matters where they were adverse to the Department;: hiring practices that the IG determined risk "future violations of merit system principles as well as for creating perceptions that the Division engages in favoritism based on ide-

ology and politics;" and finally, "widespread and vehement opposition among career employees to race neutral enforcement of voting laws."

Mr. Chairman, it appears that the Assistant Attorney General, Tom Perez, tried to cover up Division employees' opposition to race neutral enforcement of the laws by providing misleading testimony to the U.S. Commission on Civil Rights, despite specifically being briefed on the problem.

Some have claimed that the Obama administration ushered in a new era at the Civil Rights Division. The IG reports demonstrate conclusively that such a claim is far from reality. It appears that instead of correcting problems that may have existed within the Civil Rights Division during previous Administrations, that the current leadership within the Department has only exacerbated them. Indeed, it appears that the Attorney General was more concerned with manipulating the rule of law and pushing the limits of justice to strike a secret deal with the City of St. Paul to preserve a questionable legal theory than he was with cleaning up the Civil Rights Division. Moreover, he either allowed pervasive, hostile, and inappropriate actions to occur, or was willfully ignorant of what was happening in the Division he is charged with running.

Mr. Chairman, the Justice Department is one of the Federal Government's most powerful agencies, and the Civil Rights Division is one of the Department's largest components. The Civil Rights Division needs just and competent leadership to correct the egregious and dysfunctional operation of the Division uncovered in the IG report. Hopefully by combining this IG report with strong congressional oversight, reform can finally come to the Civil Rights Division in the United States Justice Department.

And I would yield back the balance of my time.

Mr. GOODLATTE. The Chair thanks the gentleman, and is now pleased to recognize the gentleman from New York, the Ranking Member of the Subcommittee on the Constitution and Civil Justice, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. Let me begin by also expressing my obvious outrage at the terrorist attack in Boston, and also extend my condolences, as we all do, to the victims.

Mr. Chairman, this hearing is not about legitimate oversight of the Civil Rights Division. That is perfectly clear from its inflammatory title, its timing, and the invitation of two witnesses with long histories of leveling unfounded partisan claims against this Administration's Civil Rights Division.

Any serious oversight effort would have invited testimony from the Office of Inspector General, whose report is the alleged subject of this hearing, and from a representative of the Department of Justice. Apparently, however, scheduling to ensure their presence would have interfered with efforts to tarnish Assistant Attorney General Perez's leadership on the eve of his Senate confirmation hearing as President Obama's nominee for Secretary of Labor.

Instead, we get two witnesses who were very much a part of the problem in the last Administration. Mr. von Spakovsky was counsel to the Civil Rights Division when its leadership was breaking the law by politicizing hiring and personnel practices. Mr. Adams misrepresented facts when testifying before the Civil Rights Com-

mission to bolster his allegation that the Division is hostile to race neutral enforcement of the Voting Rights Act.

As the OIG report that we examine today found, "Polarization and suspicion in the Voting Rights Section became particularly acute during the period from 2003 to 2007," which is the time frame during which these two witnesses served in the Division. And their ongoing posting on the Internet of confidential and deliberative Voting Section information, information that they apparently receive from current employees, continues to foment partisan rancor and calls into serious question the legitimacy and credibility of anything they say today.

We unquestionably will hear plenty of heated rhetoric and baseless allegations of mismanagement by the current Administration from these witnesses today. But the actual evidence paints a very different picture. It shows that Assistant Attorney General Perez is an effective leader who has restored the tarnished professionalism, integrity, and effective civil rights enforcement of the Civil Rights Division. Under his leadership, the Division has increased enforcement efforts and obtained unprecedented monetary and policy settlements across a broad range of substantive areas.

For example, his Division obtained a $660 million in settlements of lending discrimination lawsuits. It brought several cases to enforce the Supreme Court's Olmstead decision, and ensured that Americans with disabilities are not left languishing in large institutions.

His Division increased the number of human trafficking cases by 40 percent over the prior 4-year period and convicted nearly 75 percent more defendants in hate crime cases. It acted aggressively to protect the rights of military members, working to eliminate discrimination in housing and lending, and to ensure the voting rights of our men and women serving overseas.

This is not mismanagement. It is effective leadership, and that is exactly why Assistant Attorney General Perez has been targeted for criticism in this hearing and elsewhere. Those who do not share his commitment to enforcing this Nation's civil rights laws are unquestionably unhappy with him, but there is no legitimate legal, ethical, or professional responsibility basis for their complaints. Rather, this is partisan politics plain and simple to tarnish the reputation of someone who ought to be commended for restoring the honor of the Civil Rights Division of the Justice Department.

This hearing and the Inspector General report of the Voting Rights Section upon which it rests are stark confirmation of this fact. The 258-page OIG reports finds absolutely no evidence that this Administration and, more specifically, Assistant Attorney General Perez, has made hiring personnel or law enforcement decisions for racial or political reasons, no evidence whatsoever in this OIG report. Yet even in the face of the facts, my colleagues and the panelists that they have invited to be here today continue to allege otherwise.

There is no question that the Obama administration inherited a Voting Rights Section in crisis. A prior 2008 Joint Office of Inspector General and Office of Professional Responsibility Report documented unlawful misconduct of political appointees in the Bush administration, who, from 2003 to 2007 made personnel and hiring

decisions in an aggressive effort to pack the Section with employees who shared their political ideology.

During this time, 31 trial lawyers left the Section, including many experienced trial attorneys. Workplace culture and employee morale was severely damaged. Perhaps unsurprisingly, the vast majority of the troubling and unacceptable incidence of workplace harassment recounted in the Inspector General's report that we examine today came during this time frame, from 2003 to 2007. Yet problems that may have been fostered and took place prior to Assistant Attorney General Perez's leadership of the Division will go largely unexamined by my colleagues.

As the recent OIG report confirms, however, Assistant Attorney General Perez made several changes to ensure that the problems recounted in the OIG report remained in the past. These reforms are working, with the OIG report confirming that there was no evidence that recent hiring was influenced by political or ideological bias. Career and merit-based hiring has been restored so that politics and ideology no longer have any place in the hiring of individuals entrusted with enforcing our Nation's civil rights laws.

While broader efforts to restore a workplace culture of respect, collegiality, and professionalism will unquestionably take time, those efforts are ongoing and appear to be taking hold. Assistant Attorney General Perez has worked quickly and effectively to address the wrongs that he inherited when he took the helm of the Civil Rights Division. He should be thanked for his service, and we should all look forward to his stewardship of the Department of Labor.

As to the Civil Rights Division, this Committee should stop chasing the unsubstantiated allegations of political activists, whose prior claims repeatedly have been proven false, only after the expenditure of tremendous resources and taxpayer dollars. It is long past time to end the smear campaign against the Obama administration's Civil Rights Division and allow its devoted employees to spend their full time and energy enforcing the Nation's laws.

I thank you, and I yield back the balance of my time.

Mr. GOODLATTE. The Chair thanks the gentleman from Michigan, Mr. Conyers, for his observations about the tragedy that occurred in Boston yesterday. And I believe it would be appropriate that we have a moment of silence in remembrance of those who have lost their lives and those who have suffered severe injuries, some of whom are fighting for their lives, and the families, and the citizens of Boston, and the citizens of America who have rallied to support them. And we will now observe a moment of silence.

[Moment of silence.]

Mr. GOODLATTE. Thank you.

Mr. CONYERS. Good idea.

Mr. GOODLATTE. We will now welcome our distinguished panel today. And before I introduce them and swear them in, I do want to mention that the Assistant Attorney General, Mr. Perez, and the Inspector General have been invited to testify. And given the ongoing nature of this and the fact that both Chairman Issa, and myself, and Ranking Member Grassley in the Senate have indicated that we intend to pursue the matter, particularly as it relates to the case before the Supreme Court and the matter with the City

of St. Paul, Minnesota, that I suspect that they will be afforded additional opportunities to testify.

At this time, we would welcome our distinguished panel, and ask that they all rise and be sworn in.

[Witnesses sworn.]

Mr. GOODLATTE. Thank you very much. Please be seated. Let the record reflect that all the witnesses responded in the affirmative.

Our first witness is Mr. Hans von Spakovsky, Senior Legal Fellow in the Center for Legal and Judicial Studies at the Heritage Foundation, and Manager of the Civil Justice Reform Initiative. He has published extensively on elections, voting, and civil rights issues, including the management of the Civil Rights Division and the handling of its enforcement responsibilities.

Prior to his time at The Heritage Foundation, Mr. von Spakovsky was a Commissioner on the Federal Election Commission and a career civil service lawyer in the Civil Rights Division of the Department of Justice. As a Counsel to the Assistant Attorney General for Civil Rights, he helped coordinate the enforcement of Federal laws that guarantee the right to vote.

Our second witness today is Mr. Harry Mihet, Senior Litigation Counsel with Liberty Counsel, an international nonprofit litigation, education, and policy organization dedicated to advancing religious freedom, the sanctity of life and the family. Liberty Counsel is associated with Liberty University, which I am proud to say is in Lynchburg, Virginia, a part of the 6th District that I represent.

Mr. Mihet grew up in communist Romania, where his father pastored 17, mostly underground, churches. Because of this, his family suffered great persecution. At the age of 12, he participated in the Christmas Revolution of 1989, which overthrew Romania's oppressive communist regime. Once he immigrated to the United States, Mr. Mihet received his undergraduate degrees in Political Science and Criminology from the University Florida and graduated *magna cum laude* from Duke University School of Law.

The third member of our witness panel is Mr. Bagenstos, a professor of law at Michigan Law School. Mr. Bagenstos specializes in civil rights law, public law, and litigation.

From 2009 to 2011, he was a political appointee in the U.S. Department of Justice, where he served as the Principal Deputy Assistant Attorney General for Civil Rights, the number two official in the Civil Rights Division. He has been widely published in law journals, and remains an active appellate and Supreme Court litigator in civil rights and federalism cases.

He clerked for Judge Steven Reinhardt on the 9th Circuit Court of Appeals and for Justice Ruth Bader Ginsburg of the United States Supreme Court.

Our final witness is Mr. J. Christian Adams, the founder of the Election Law Center. In addition, Mr. Adams, also serves as legal editor of PJMedia.com, an Internet news publication.

Previously, Mr. Adams served in the Voting Section at the U.S. Department of Justice from 2005 to 2010, where he brought a wide range of election cases to protect racial minorities in South Carolina, Florida, and Texas. Mr. Adams successfully litigated the landmark case of *United States v. Ike Brown* in the Southern District of Mississippi, the first case brought under the Voting Rights Act

on behalf of a discriminated against White minority in Noxubee County.

Mr. Adams has received the Department of Justice Award for Outstanding Service and numerous other Justice Department performance awards.

I thank all of you for joining us, and we will begin with Mr. von Spakovsky. Each witness has written statements that will be entered into the record in their entirety. I ask that each of you summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

We will now proceed under the 5-minute rule. And, Mr. von Spakovsky, welcome.

TESTIMONY OF HANS A. von SPAKOVSKY, SENIOR LEGAL FELLOW AND MANAGER, CIVIL JUSTICE REFORM, THE HERITAGE FOUNDATION

Mr. VON SPAKOVSKY. Thank you. I appreciate the invitation to discuss the mismanagement of the Civil Rights Division and its toxic culture where I spent 4 years as a career lawyer.

The IG report is a sad commentary on a dysfunctional division torn by polarization and unprofessional behavior, where career employees who do not tow liberal views are subjected to racist comments, harassment, bullying, and threats of physical violence. It is engaged in discriminatory hiring practices and has pursued meritless cases based on ideology rather than the law.

Perhaps the most disturbing problem is the hostility toward race neutral enforcement of Federal voting laws. The IG report details the ostracism of employees who believe in race neutral enforcement by those who do not think that racial minorities who discriminate should be discriminated.

This culminated in the mistreatment of Christopher Coates, the chief of the Voting Section who has received numerous awards for his outstanding work, including from the NAACP. This Administration drove Coates out because they disagreed with his proper race neutral view of the law that individuals who violate Federal law should not be given a free pass because of their race. This is one of the most shameful revelations in the IG report.

The Division also ordered Christopher Coates and Christian Adams not to respond to subpoenas from the U.S. Commission on Civil Rights, which was investigating the dismissal of the New Black Panther voter intimidation case. Apparently this Division does not believe it has to abide by the rule of law like everyone else.

The head of the Division, Thomas Perez, misled the U.S. Civil Rights Commission in his testimony about the New Black Panther case. He was specifically asked whether "any political leadership was involved in the decision not to pursue the case." Perez said no, yet a Federal judge has said that DoJ's internal documents contradict that testimony. The IG said Perez should have sought more details about this before his testimony. Being uninformed on the

correct answer to this question was the result of either incompetence or deliberate ignorance.

Further, Perez was specifically asked whether he knew about the hostility toward race neutral enforcement of his staff. Perez said there were "no people of that ilk in the Division." Yet Coates and Adams briefed Perez the day before his testimony about that disgusting attitude.

Perez was also specifically asked whether he believed in the race neutral enforcement. He told the Commission he did, yet the IG report says that Perez informed the IG that he does not believe that White voters are protected under Section 5 of the Voting Rights Act.

The Division also abuses its power through radical claims and filing meritless suits. In the Hosanna-Tabor case before the Supreme Court, Mr. Perez signed onto a brief arguing that the religious freedom clause of the First Amendment did not extend to the hiring decisions of a church. This was such an extreme position that all nine justices of the Supreme Court found the arguments of the Justice Department untenable.

In addition to the FACE Act cases, which Mr. Mihet is going to talk to you about, the Division was forced to pay Arkansas $150,000 last year when a case under the Civil Rights for Institutional Persons Act was dismissed by a Federal court after the judge found almost no evidence to support the Division's claims.

The Division has tried to twist Federal discrimination laws to go after school districts for having dress codes that prevent boys from going to school in drag. The Administration also has engaged in biased hiring, setting up criteria that "resulted in a pool of select candidates that was overwhelmingly Democratic liberal in affiliation," according to the IG. The IG report notes that "The Voting Section passed over candidates who had stellar academic credentials and litigation experience with some of the best law firms in the country." The Division might as well have put up a sign that said "conservatives need not apply."

Let me conclude by talking about an issue that shows just how bad the situation is in the Division that is a personal issue.

The IG report describes the nasty postings made by career staff on "widely-read liberal Websites concerning Voting Section work and personnel." The highly offensive comments included suggestions that the parents of one former career Section attorney were Nazis. Those comments were directed at me. My mother grew up in Nazi Germany, and she was arrested by the Gestapo when she was a teenager. That she survived is a testament to her courage and the grace of God. My father fled communist Russia and fought as a partisan against the Nazis in Yugoslavia during World War II.

It is shameful that such cruel, untrue comments were made publicly about my parents by fellow employees because of my personal views and my belief that the Voting Rights Act protects all voters from discrimination. Believing in equal enforcement of the law makes you a pariah in the Division and subject to being called a Nazi.

Some of these same employees are no doubt sitting in their offices at 1800 G Street watching this hearing today. Employees who

bragged to the IG about their harassment and cyber bullying of conservative employees are still employed by the Division as is another unapologetic employee who admitted committing perjury. The Division is filled with biased and unprofessional behavior that is unacceptable from a government lawyer, and conservative employees continue to be marginalized.

The Division must enforce the law equally and fairly in a manner that meets the highest ethical and professional standards and protects all Americans from discrimination. That is not being done in the Civil Rights Division today.

Thank you.

[The prepared statement of Mr. von Spakovsky follows:]

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LEGISLATIVE TESTIMONY

MISMANAGEMENT AT THE CIVIL RIGHTS DIVISION OF THE DEPARTMENT OF JUSTICE

Testimony before the Committee on the Judiciary

U.S. House of Representatives

April 16, 2013

Hans A. von Spakovsky
Senior Legal Fellow
The Heritage Foundation

My name is Hans A. von Spakovsky.[1] I am a Senior Legal Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation and Manager of the Civil Justice Reform Initiative.

I appreciate the invitation to be here today to discuss the mismanagement of the Civil Rights Division of the Justice Department and the toxic culture inside the Division. I cannot overstate the importance of this issue given that the Division is not only one of the largest in the Justice Department, but also is the enforcer of our federal antidiscrimination laws. There is no more important principle in our constitutional republic than equal protection under the law and the Civil Rights Division's foremost responsibility is to make sure that all Americans are treated equally regardless of their race or other characteristics. The Division has failed in this responsibility in both its outside enforcement and its internal operation.

Prior to joining the Heritage Foundation, I was a Commissioner on the Federal Election Commission for two years. Before that I spent four years at the Department of Justice as a career civil service lawyer in the Civil Rights Division. I started as a trial attorney and was promoted to be Counsel to the Assistant Attorney General for Civil Rights, where I helped coordinate the enforcement of federal laws that guarantee the right to vote. I was privileged to be involved in dozens of cases on behalf of Americans of all backgrounds to enforce their right to register and vote in our elections.[2]

The Report on the Civil Rights Division and particularly the Voting Section released in March by the Inspector General of the Department of Justice, Michael Horowitz, is a disturbing, sad commentary on the misbehavior of that Division. The Report describes a dysfunctional Division torn by polarization, a Division beset by unprofessional and unethical behavior, a Division in which career civil employees who were perceived by other employees as conservatives or who believed in the race-neutral enforcement of federal voting rights laws were subjected to racist comments, harassment, intimidation, bullying, and threats of physical violence. It is a Division that has experienced other misbehavior by career employees such as misuse of government credit cards[3] and perjury that has gone unpunished. It has engaged in

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[1] The title and affiliation are for identification purposes. The staff of The Heritage Foundation testify as individuals discussing their own independent research. The views expressed here are my own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees, and do not reflect support or opposition for any specific legislation. The Heritage Foundation is a public policy, research, and educational organization recognized as exempt under § 501(c) (3) of the Internal Revenue Code. It is privately supported and receives no funds from government at any level; nor does it perform any government or other contract work. Heritage is also the most broadly supported think tank in the United States, with nearly 700,000 supporters in every state, 81% of whom are individuals, 14% are foundations, and 5% are corporations. The top five corporate givers provided The Heritage Foundation with 2% of its 2012 income. A list of major donors is available from The Heritage Foundation npon request.

[2] I was also a member of the first Board of Advisors of the U.S. Election Assistance Commission. I spent five years in Atlanta, Georgia, on the Fulton County Board of Registration and Elections, which is responsible for administering elections in the largest county in Georgia, a county that is almost half African-American. In Virginia, I was Vice Chairman of the Fairfax County Electoral Board for three years, which administers elections in the largest county in that state. I formerly served on the Virginia Advisory Board to the U.S. Commission on Civil Rights. I have published extensively on elections, voting, and civil rights issues, including the management of the Civil Rights Division and the handling of its enforcement responsibilities. I am a 1984 graduate of the Vanderbilt University School of Law and received a B.S. from the Massachusetts Institute of Technology in 1981.

[3] Chuck Neubauer, *Taxpayers Financed Justice Official's Romantic Travel*, WASHINGTON TIMES (Oct. 5, 2011).

discriminatory hiring practices intended to ensure a staff with a particular ideology and has pursued meritless cases, seemingly working not on behalf of the American public as it has a duty to do, but on behalf of outside advocacy groups.

Perhaps the most disturbing and troubling problem in the Division, which has affected the handling of its enforcement duties, is the marked hostility towards race-neutral enforcement of federal voting laws. The IG Report details the harassment and ostracism of employees who believe in the race-neutral enforcement of the Voting Rights Act, including Section 5, and particularly because of their work on a case called *U.S. v. Brown*, which was the first case filed by the Division under Section 2 of the Voting Rights Act for racial discrimination against black local officials.[4] The Division won the suit and the appeal in the Fifth Circuit Court of Appeals despite the opposition of numerous employees within the Voting Section who did not believe the Voting Rights Act protects white voters from discrimination or that racial minorities who engage in discrimination should be prosecuted. See *U.S. v. Brown*, 494 F.Supp.2d 440 (S.D. Miss. 2007); *U.S. v. Brown*, 561 F.3d 420 (5th Cir. 2009).

This culminated in the mistreatment of Christopher Coates, the most experienced voting rights trial attorney in the entire Division and the Chief of the Voting Section; someone who has received numerous awards for his outstanding work, including from the NAACP. This unfair and malicious treatment was because he had won the *Brown* case, had approved the filing of the New Black Panther Party voter intimidation case, and because he insisted on the race-neutral enforcement of federal voting rights laws. In other words, unlike other lawyers and political appointees inside the Division, he did not believe that some individuals who violate federal law should be given a free pass because of their race.

Coates was subjected to "overt hostility" and slurs for his belief in the equal protection of the law, even being called a "Klansman" according to page 123 of the IG Report. After the Obama administration came into office, he was called to the Front Office of the Division and chastised for asking applicants whether "they would be capable of enforcing the Voting Rights Act in a race-neutral manner" (page 160-161) and was ordered to stop such questioning. The leadership of the Division, with the express approval of Attorney General Eric Holder and other senior Department leadership (IG Report, pages 163-169), set out to drive Coates, who was a protected SES civil service employee, out of the Division because they did not approve of the *Brown* case and disagreed with his proper, race-neutral view of the law. They wanted to ensure, as one email cited on page 163 of the IG Report said, that "the Section be free from enemy hands." The IG Report is clear (page 178) that Coates's "ideology was a factor in the discussions among senior Department and Division officials about removing or reassigning Coates." He was driven out as the Chief of the Voting Section because he believes in the equal protection of the law. That is one of the most shameful revelations in the entire IG Report.

Another related example of the Division's mismanagement is Division lawyers being ordered to violate the law. That is exactly what happened when the Division ordered Christopher Coates and Christian Adams, another Voting Section trial attorney, *not* to respond to subpoenas for their testimony

[4] I was involved in getting approval for opening the investigation of this matter while still at the Justice Department.

before the U.S. Commission on Civil Rights when it was investigating the dismissal of the New Black Panther Party voter intimidation case. The Commission's highest duty is to investigate federal civil rights enforcement agencies like the Civil Rights Division, and Congress has commanded such agencies to "cooperate *fully*" with the Commission's official investigations (emphasis added).

If the Division believed that the subpoenas were improper, it should have moved to quash the subpoenas. But the Division simply ignored the subpoenas, knowing that the Commission was dependent on the Justice Department to enforce the subpoenas. Federal agencies, especially those that enforce the law, should comply with the law, and there was no lawful excuse provided to the Commission not to comply with the federal law that required the Division to "cooperate fully" with the Commission's requests and subpoenas for witnesses.

The Division's willingness to break the law and put its employees in the untenable position of either disobeying the direct orders they had been given not to comply with the subpoenas or violating their ethical duty as attorneys to comply was unforgiveable and is another sign of the contempt for the rule of law that has been exhibited too often in this Division. If the target of a Division investigation had ignored a subpoena from the Division, there is no question that the Justice Department would seek all means to enforce the subpoena and have the target held in contempt by a court for ignoring it. But this Division apparently does not believe it has to live by the rules and laws that apply to everyone else.

Christian Adams finally resigned to comply with the subpoena and Christopher Coates defied the unethical, unlawful directive he had been given and also testified at the risk of being terminated by the Division.

There is substantial evidence in the IG Report and a federal court decision in a Freedom of Information Act lawsuit filed by Judicial Watch that the head of the Division, Thomas Perez, misled the Commission in his testimony before it. Perez was specifically asked on May 14, 2010, by Commissioner Peter Kirsanow whether there was "any political leadership involved in the decision" not to pursue the New Black Panthers Party voter intimidation case. Perez said "no." As Judge Reggie Walton of the U.S. District Court of the District of Columbia said, DOJ's internal documents "appear to contradict Assistant Attorney General Perez's testimony [before the Commission] that political leadership was not involved" in the decision to dismiss the NBPP case. *Judicial Watch v. U.S. Dept. of Justice*, 878 F.Supp.2d 225, 236 (D.D.C. 2012).

Even the IG Report faults Perez, though it concludes that he did not commit perjury. The report makes the obvious point that he was testifying as a Justice Department witness and obviously "should have sought more details ... about the nature and extent of the participation of political employees in the NBPP decision in advance of his testimony." This very question had been a controversial issue for quite some time and Perez told the IG "he expected questions about it would arise during his testimony." As a former counsel to three different assistant attorneys general whose job included briefing and preparing the AAG's for hearings, I find it hard to believe that Perez did not solicit and receive an answer to this question. Our briefings always included complete information on cases and on

every question we anticipated would be asked. Being uninformed on the correct answer to this question (that Perez admits he expected) is the result of either incompetence or deliberate ignorance.

Further, Assistant Attorney General Perez was specifically asked at the Commission hearing about sworn testimony that his subordinate, Julie Fernandes, had informed Voting Section staff that the Division had no interest in enforcement cases against defendants who were racial minorities (no matter how blatant their discrimination) and that the Division would only bring so-called "traditional" civil rights cases on behalf of minorities. Commissioner Todd Gaziano asked Perez whether he had heard of this hostility towards race-neutral enforcement of the law by staff. Perez responded that there were no "people of that ilk" in his Division. Yet, as reflected in the Report, the IG encountered that attitude throughout his investigation, and Christopher Coates and Christian Adams have testified that they briefed Perez the day before his testimony about this disgusting attitude. Not only was Perez's testimony incredible when he gave it, but he has never corrected his testimony or taken any action to reverse this racialist enforcement position within the Division.

The Civil Rights Commission also heard testimony that Ms. Fernandes informed the Voting Section staff that the Division had no interest in enforcing the provisions of Section 8 of the National Voter Registration Act, which requires states to periodically clean up their voter registration lists by removing ineligible voters who have died or moved away. This is confirmed on page 100 of the IG Report, which cites thirteen witnesses who told the IG that "Fernandes stated that she 'did not care about' or 'was not interested' in pursuing Section 8 cases." Yet Perez denied that any such policy existed.

Christopher Coates testified to the Civil Rights Commission that he had recommended eight states for investigation for noncompliance with Section 8; yet no action was taken in response for a year and a half. No investigations were opened until this non-enforcement policy became the subject of public criticism, and no lawsuits have *ever* been filed by the Division during the present administration to enforce Section 8. This despite the fact that a recent study by the Pew Trust found 1.8 million dead voters on registration lists across the country and almost three million voters registered in more than one state, imperiling the integrity of the election process that the Division is charged with protecting.

Additionally, Mr. Perez was specifically asked whether he believed in the race-neutral enforcement of federal voting rights laws. He told the Commission that he did. Yet the IG Report discloses on pages 89-90 that the "Division's current leadership has stated that it interprets ... Section 5 not to be applicable to White voters who are in the numerical minority in a particular jurisdiction." Assistant Attorney General Perez told the IG in an interview and in a letter that he does not believe in the equal enforcement of Section 5 of the Voting Rights Act. This is a position at odds, according to the IG Report on page 91, footnote 76, with "at least three AAGs from the previous administration" who said the Division leadership "did not have a policy to interpret Section 5 ... such that it would not cover White citizens."

This policy is completely contrary to the race-neutral language of Section 5. Yet, the Division applied this racialist theory in rejecting a voting change in Kinston, North Carolina. As explained on pages 87-88 of the IG Report, though white voters are the racial minority in Kinston (black voters make up 65 percent of registered voters in Kinston), the Division objected to a 2008 referendum that changed town elections from partisan to nonpartisan. Despite the fact that black voters overwhelmingly approved the change, the Division filed a patronizing objection that, in essence, claimed that the black voters didn't know what they were doing and would be hurt by the change they had approved. The Division later withdrew its objection based on supposedly "changed circumstances" just two weeks before a lawsuit by residents was set to be heard by the District of Columbia Court of Appeals. But the only "changed" circumstance was an infinitesimal change in the black voter registration level from 65 to 65.4 percent. The Division ignored the effect of the referendum on the actual racial minority in Kinston in violation of the provisions of Section 5 and clearly withdrew the objection to avoid full judicial review.

The type of abusive internal behavior and mistreatment of employees described in the IG Report is supplemented by the Division's abusive external behavior, which goes back decades, but which has, unfortunately, continued during the current administration. During the Clinton administration, the Division was forced to pay over four million dollars in attorneys' fees and costs in eleven meritless cases the Division filed that were thrown out by federal courts. One of these cases, *U.S. v. Jones*, 125 F.3d 1418 (11th Cir. 1997) demonstrates "the disappointing lack of professionalism" (to quote the IG Report on page 258) in the Division that still is present today according to the IG. According to the 11th Circuit:

> "A properly conducted investigation would have quickly revealed that there was no basis for the claim that the Defendants were guilty of purposeful discrimination against black voters...Unfortunately, we cannot restore the reputation of the persons wrongfully branded by the United States as public officials who deliberately deprived their fellow citizens of their voting rights. We also lack the power to remedy the damage done to race relations in Dallas County by the unfounded accusations of purposeful discrimination made by the United States.
>
> We can only hope that in the future the decision makers in the United States Department of Justice will be more sensitive to the impact on racial harmony that can result from the filing of a claim of purposeful discrimination. The filing of an action charging a person with depriving a fellow citizen of a fundamental constitutional right without conducting a proper investigation of its truth is unconscionable...Hopefully, we will not again be faced with reviewing a case as carelessly instigated as this one."

Who was the Division lawyer responsible for this troubling case? A former, long-term, management-level career lawyer named Gerald Hebert, who is listed as the Division's counsel in the district court opinion (846 F.Supp. 955 (S.D.AL. 1994)). It happens that this former Division lawyer is the same lawyer referred to on page 137 of the IG Report who three separate witnesses say was the "outside counsel" who tried to convince Voting Section lawyers to violate their professional code of conduct by giving him the confidential, privileged, internal DOJ legal opinion in a major Section 5 case in Texas, telling them that "the document had substantial monetary value."

None of these employees reported this unethical solicitation by a former Division manager. And, sadly, the IG Report concludes that other internal, privileged information and documents *were* given to outside civil rights attorneys, thereby establishing that some employees within the Voting Section had no compunction about violating one of the highest ethical obligations of an attorney – keeping privileged legal opinions and communications confidential.

The same type of embarrassing and costly misbehavior by Division lawyers as occurred in the *Jones* case has happened again under the current administration. For example, the Division has launched a series of abusive cases under the Freedom of Access to Clinics Entrances (FACE) Act. This federal law was intended to prevent physical obstruction, intimidation, or the use or threat of force outside of abortion clinics. But the statute specifically protects the right of "expressive conduct," including peaceful demonstrations. In 2011, a federal judge in Kansas refused to grant DOJ's request for an injunction against a pro-life activist, saying her activities were protected by the First Amendment.

Last year, a federal judge in Florida dismissed another FACE Act prosecution against Mary Susan Pine who was engaging in peaceful protests (*U.S. v. Pine*, Case No. 10CV80971 (S.D. Fla. Jan. 13, 2012)).

The almost total lack of evidence of any violation of the law and the "negligent and perhaps even grossly negligent" behavior by Division lawyers (and those who should be managing them) led the federal judge to wonder whether the prosecution of Ms. Pine was the "product of a concerted effort between the government and the [abortion clinic], which began well before the date of the incident at issue, to quell Ms. Pine's activities" rather than enforce the statue. In other words, the judge believed that Ms. Pine may have been targeted for her political beliefs. "The Court is at a loss as to why the Government chose to prosecute this particular case in the first place," the judge wrote at the conclusion of his ruling. American taxpayers were forced to pay $120,000 in attorneys' fees and costs to Ms. Pine when the Division agreed to settle her motion for fees. It is very clear that a pro-abortion ideology is driving enforcement of the FACE Act, not the objective, unbiased, nonpartisan interests of justice and equal protection under the law.

In a similar vein are the Division's legal arguments in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 695 (2012), which represent a war on religious freedom completely at odds with the Division's prior history of protecting religious freedom. As head of the Division, Thomas Perez signed onto a brief to the Supreme Court arguing that the religious freedom clause of the First Amendment did not extend to the hiring decisions of a church, claiming there should be no ministerial exception for religious institutions. This was such an extreme position that all nine justices of the Supreme Court disagreed, finding the arguments made by DOJ "untenable." The Court could not accept "the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers." Indeed, the Obama administration's former Solicitor General, Elena Kagan, joined a particularly powerful concurring opinion with Justice Samuel Alito rebuking the legal position advanced by the administration.

In another example of the mismanagement of its enforcement responsibilities, the Division was forced to pay the state of Arkansas $150,000 in attorneys' fees and costs last year when it had a case dismissed by a federal court in another failed prosecution under the Civil Rights for Institutionalized Persons Act (*U.S. v. Arkansas*, 794 F.Supp.2d 935 (E.D. Ark. 2011)). Once again, the judge found almost no evidence to support the Division's claims against the Conway Human Development Center, an institution for developmentally disabled individuals operated by the state of Arkansas. The Division claimed a pattern and practice of deviating from the applicable standard of care that violated the constitutional rights of the residents despite the lack of a single complaint by residents of the Center or their families.

The federal judge was harsh in his criticism of the Division's case, calling into question the basis for the lawsuit and assailing the caliber of the government's witnesses – calling them "unpersuasive...[and] not qualified." Concerned parents and guardians opposed the Division's lawsuit and the judge found that the government was "in the odd position of asserting that certain persons' rights have been and are being violated while those persons – through their parents and guardians – disagree." This meritless lawsuit was dismissed with prejudice and followed another lawsuit filed by the Division against Arkansas's entire mental health system that was also dismissed in 2011 because of the Division's failure to comply with the statutory prerequisites to file suit.

While the Division, with an increase of more than 25 percent in its budget since 2008, has only found time to file one Section 2 lawsuit under the Voting Rights Act, it has tried to twist federal discrimination laws to go after the Mohawk Central School District in upstate New York for having a dress code that prevents boys from wearing makeup, nail polish, wigs and high heels – that is supposedly sex discrimination according to the Division. This administration apparently believes that it is a violation of federal law designed to prevent gender discrimination for high schools to have a dress code that makes distinctions between what is appropriate dress for males and what is appropriate dress for females. Obviously, schools should not allow bullying or violence of any kind. But it is mismanagement of the resources of the Division to launch federal investigations of schools for having dress codes that differentiate between males and females or to equate such dress codes with sex discrimination.

This administration has also engaged in biased hiring in the civil service ranks. Two years ago, Christian Adams and I engaged in a research project to analyze the resumes of 113 lawyers hired in the Division since 2009. They were obtained through a Freedom of Information Act request by Pajamas Media, which were only released after Pajamas Media went to court to force the Division to release those resumes. Our analysis, which was confirmed in the IG Report on page 222, is that the current leadership set up criteria for hiring that "resulted in a pool of select candidates that was overwhelmingly Democratic/liberal in affiliation." Even their outreach was almost exclusively to "liberal organizations" (IG Report page 216).

Our analysis showed that 100 percent of the individuals hired were "Democratic/liberal" and that the Division might as well have put up a sign that said "conservatives need not apply." In another

instance of such political discrimination, the IG Report found that at the request of Julie Fernandes, a Voting Section deputy chief compiled a list of former Section lawyers "in part for recruiting purposes" that specifically excluded the names of eight former career lawyers "who were widely perceived to be conservatives" (pages 195, 218).

In fact, the IG Report notes on page 220 that the "Voting Section passed over candidates who had stellar academic credentials and litigation experience with some of the best law firms in the country, as well as with the Department;" instead, 56 percent of those hired came from only five advocacy organizations identified by the IG Report (Appendix C) as "liberal": the ACLU, La Raza, the Lawyers' Committee for Civil Rights, the NAACP, and the Mexican American Legal Defense Fund. This has resulted in the hiring of biased and partisan lawyers like Dan Freemen in the Voting Section, a former ACLU attorney with no experience in the voting area, who boasted on Twitter that he had started the crowd booing Rep. Paul Ryan at President Obama's recent inauguration. Such public displays of political bias are extremely damaging to the reputation of the Division and its ability to maintain the appearance of impartiality. The Division has done nothing publicly to disavow Mr. Freemen's conduct.

This is a long term problem with liberal career staff who completely dominate the management positions within the Division, making sure that qualified lawyers who are Republicans or conservatives are not hired, in violation of applicable civil service rules. There have never been any consequences for that misbehavior in all of the decades that the Division has been in operation.

I have spoken in general terms about the conditions inside the Division as outlined by the IG Report, but I would like to talk about one personal issue that involved me as well as other attorneys in the Division, because it shows just how bad the situation is there. I am a first-generation American. My mother grew up in Nazi Germany and my father was a Russian who fled the Soviet Union when the Communists took control. He was part of the resistance movement against the Nazis in Yugoslavia during World War II. They met in a refugee camp in the American-occupied sector of Germany in 1946 and immigrated to the U.S. in 1951. My mother was arrested by the Gestapo in 1945 when she was a teenager and the fact that she was not killed but survived is a testament to her courage and the grace of God.

I was shocked at the hostility with which I was greeted when I was hired as a career trial lawyer in the Voting Section. I was made to understand that because of my conservative political views, which had nothing whatsoever to do with my professional work as an experienced lawyer in the area of voting and elections, I was considered unqualified to be a career lawyer in the Division. If you look on page 127 of the IG Report, it describes in great detail the nasty postings and comments made by career staff on "widely read liberal websites concerning Voting Section work and personnel." These postings:

> "included a wide array of inappropriate remarks, ranging from petty and juvenile personal attacks to highly offensive and potentially threatening statements. The comments were directed at fellow career Voting Section employees because of their conservative political views, their willingness to carry out the policies of the CRT division leadership, or their views on the

Voting Rights Act. The highly offensive comments included suggestions that the parents of one former career Section attorney were Nazis."

The IG Report does not say who the Nazi comments were directed at, but those comments were directed at me. Given my parents' terrible experiences, I can't tell you how angry it makes me to know that such comments were made publicly about me and my parents by fellow employees who didn't like me because of my personal views, my involvement in approving the *U.S. v. Brown* case and Georgia's voter ID law, and my belief that the Voting Rights Act protects all voters from discrimination, no matter what their race. Believing in equal enforcement of the law makes you a pariah in this Division.

This was in line with the mistreatment of another lawyer identified in the IG report as Arnold Everett (an alias), a former clerk for the chief justice of a state supreme court, who was called a "hand-picked Vichyite" and was subjected to unremitting hostility because his legal opinions on particular cases such as the Georgia voter ID case, as outlined in the IG Report, differed from those of some other lawyers, and because of his willingness to work on cases that other staff disfavored like *U.S. v. Brown*. He even had his computer system breached by those same lawyers snooping through his work. He was harassed by liberal employees because of his Christian religious beliefs, which is a symptom of the hostility to traditional religion of too many of the employees who work there. As the IG Report concluded, other employees made "unprofessional and disparaging remarks about Everett to each other and to other employees in the Section, mocking his intelligence, his legal acumen, and his personal beliefs" (page 121).

As a friend and former fellow co-worker, Everett told me of the terrible conditions and the hostile environment in which he was forced to work, which affected his health and his family, and which finally drove him out of the Division. This shows the viciousness, pettiness, meanness, and unprofessionalism of employees within the Division, all of which was noted by the Inspector General.

Some of these same employees are no doubt sitting in their offices at 1800 G Street watching this hearing today. Employees who bragged to the IG about their harassment and cyber bullying of conservative employees are still employed in the Division. As the IG Report outlines on page 129, a current employee, identified under the alias of Karen Lorrie, who is actually an employee named Stephanie Celandine Gyamfi, even committed perjury when she "denied under oath" that she had publicly posted comments on websites "concerning Voting Section personnel or matters" (page 129). She finally admitted her behavior to the IG investigators when confronted with evidence that she had done so, but she told the IG that "she did not regret posting comments online, except to the extent that it resulted in questioning from the OIG."

According to Sen. Chuck Grassley (Press Release, March 12, 2013), the unapologetic Ms. Celandine Gyamfi "is still employed" at the Division and has apparently been neither disciplined nor terminated by the current leadership of the Division for her outrageous behavior. In fact, she has been treated as a hero inside the Voting Section for her public criticism according to other employees in the Division with whom I have spoken. When she expressed on Facebook her contempt for residents of

Mississippi after they passed a voter ID statute, calling them "disgusting and shameful," the Division defended her and refused to remove her from cases involving Mississippi despite her plain bias that would make the public question the impartiality of any decision made by the Division in which she is involved.

I am proud of my work at the Civil Rights Division during the four years I was there. I worked with some dedicated and professional attorneys such as Christopher Coates and Christian Adams. But I also encountered unremitting hostility from other lawyers and the "internecine conflict" recognized by the IG Report on page 257. I saw what I considered to be unfair, biased, partisan, and unprofessional behavior that should be unacceptable from government lawyers and that continues today. According to my friends inside the Division, conservative employees continue to be marginalized.

There will be no improvement unless the current administration takes steps to discipline, reassign, or terminate those employees who have engaged in this type of behavior but who are still employed in the Division.

Most importantly, the purpose of the Division is to enforce the law equally and fairly in a manner that meets the highest ethical and professional standards. Too many of the employees there do not, as the IG Report says, "appreciate the importance of public confidence in the impartial legitimate enforcement priorities set by" the Division. The Division's enforcement responsibilities must be enforced in a race-neutral manner that protects all Americans from discrimination.

I agree emphatically with the conclusion of the IG Report on page 258 that professionalism means "operating in a manner that consciously ensures both the appearance and the reality of even-handed, fair and mature decision-making, carried out without regard to partisan or other improper considerations." We do not have that today in the Civil Rights Division of the U.S. Department of Justice.

Mr. GOODLATTE. Thank you, Mr. von Spakovsky.
Mr. Mihet, welcome.

TESTIMONY OF HORATIO G. MIHET,
SENIOR LITIGATION COUNSEL, LIBERTY COUNSEL

Mr. MIHET. Chairman Goodlatte, Ranking Member Conyers, and Members of the Judiciary Committee, thank you for inviting me to testify before you today. My name is Horatio Mihet, and I am Sen-

ior Litigation Counsel at Liberty Counsel, a nationwide nonprofit firm dedicated to protecting our first freedoms.

Having grown up under a totalitarian regime, I have seen firsthand what happens when the very government agency charged with protecting civil rights becomes complicit in violating them. Unfortunately, that is precisely what the Civil Rights Division under the leadership of Thomas Perez has done with Liberty Counsel's client, Susan Pine, a 61-year-old American from Florida.

Susan has for over 20 years spent her free time outside of an abortion clinic peacefully counseling expectant mothers about alternatives to abortion. In 2009, after trying unsuccessfully for years to silence Susan, the abortion clinic began to entreat the DoJ to eject her from that public square. Mr. Perez readily agreed, and he assigned seven of his top litigators, including himself, to file a lawsuit against Susan under the Freedom of Access to Clinic Entrances Act, or FACE.

Now, before filing this lawsuit, Mr. Perez flew several of these taxpayer-funded lawyers from Washington, D.C. to Florida in November 2009 to have a taxpayer-funded stakeout outside this clinic, to see if by chance Susan might violate the law while these lawyers are hiding in the bushes watching her. In its lawsuit filed 9 months later, the DoJ then claimed that on the same day that its lawyers were descending upon West Palm Beach, Susan obstructed one vehicle attempting to enter the clinic's parking lot.

Now, there were many clear signs indicating to every reasonable observer that this was nothing more than a political prosecution not grounded in any fact or law. First, there was no victim. No one actually came forward to complain of being obstructed. Instead, the lawsuit was filed entirely based on what one police officer claimed that he saw from the bushes 300 feet away. This officer conveniently forgot to record the license plate of this phantom vehicle, and he forgot to identify this mystery driver that was allegedly obstructed, so that all we had was his word.

Second, Mr. Perez did not file his lawsuit in November 2009. He waited over 9 months to file it, just long enough for the clinic to conveniently destroy the videotapes from its surveillance cameras, as well as its patient sign-in sheets. The court found that the DoJ was "negligent" and "even grossly negligent" in its failure to preserve this critical evidence.

Third, the DoJ claimed that Susan "stopped and stood in front of a vehicle in the pedestrian crosswalk." Now, this allegation was entirely made up by the DoJ because its own witness, the police officer hiding in the bushes, testified under oath that once this phantom vehicle stopped, Susan "immediately got out of its path." The officer himself admitted that she did not stop and stand in front of any vehicle.

And so, after almost 2 years of litigation against Mr. Perez and his legal dream team, the court concluded that the DoJ suit did not even warrant a trial, and granted us summary judgment. Judge Ryskamp said, "The court is at a loss as why the government chose to prosecute this particular case in the first place." He concluded that the DoJ's position was inconceivable and absurd, and he suspected a conspiracy was afoot between the DoJ and the clinic to deprive Susan of her First Amendment rights.

We asked the Court, based on its findings, to sanction Mr. Perez and his legal team for filing a frivolous lawsuit. Rather than await the results of that motion, Mr. Perez and his team quietly paid $120,000 out of the public treasury and then moved on to their next target.

So throughout this litigation and several others like it, the leadership at the Civil Rights Division has demonstrated that it cannot be trusted to follow the law whenever it conflicts with their ideology. We, therefore, would urge this Committee to exercise its constitutional authority and oversight, and to take whatever steps are necessary to restore the public's trust in the institution that is charged with safeguarding and protecting our most basic and cherished freedoms.

I thank you for inviting me, and I look forward to answering any questions that you might have.

[The prepared statement of Mr. Mihet follows:]

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Statement of Horatio G. Mihet of Liberty Counsel to

The Committee on the Judiciary

United States House of Representatives 113th Congress

April 16, 2013

"Mismanagement at the Civil Rights Division of the Department of Justice"

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Chairman Goodlatte, Ranking Member Conyers and Members of the Judiciary Committee:

Thank you for inviting me to testify before you today regarding my recent experience with the Civil Rights Division of the Department of Justice, under the management (or mismanagement) of Attorney General Eric Holder and Assistant Attorney General Thomas E. Perez.

My name is Horatio Mihet, and I am Senior Litigation Counsel at Liberty Counsel, a nonprofit litigation, education, and policy organization dedicated to protecting our First Freedoms. I grew up in communist Romania, where I watched my dad and others like him constantly harassed and jailed by the government because of what they said and did in leading the Underground Church. Therefore, I know what happens when the very government agency charged with safeguarding the civil rights of its citizens becomes complicit in violating those rights.

Unfortunately, that is precisely what the DOJ Civil Rights Division has done with Liberty Counsel's client Susan Pine, a sixty-one-year-old American from West Palm Beach, Florida. Susan works for a charity that assists people with special needs, where she earns $10 per hour to support herself. She has for over 20 years spent her free time outside the Presidential Women's Center, an abortion clinic (the "Clinic"), where she peacefully exercises her First Amendment rights by counseling expectant mothers about alternatives to abortion.

The Clinic has long considered Susan's protected speech to be a thorn in its side, and for many years tried, unsuccessfully, to have her arrested, fined, jailed and permanently ejected from the public square outside its premises.[1] In 2009, after those efforts failed, the Clinic began to entreat Mr. Perez and his staff at the Civil Rights Division of the DOJ to assist them with their Pine problem.

Coincidentally, the DOJ, under the leadership of Messrs. Holder and Perez, had expressed an interest in increasing prosecutions of pro-life Americans under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 ("FACE"). Indeed, a September 1, 2011 report of National Public Radio indicated that, within just the first two years of the first Obama Administration, FACE prosecutions increased an astounding 800% as compared to the entire eight-year span of the previous administration.[2]

By November 2009, Clinic personnel and DOJ officials had met, talked on the telephone and exchanged emails and written correspondence about Susan so frequently that they were on a first name basis.[3] The written communications and court testimony revealed that Mr. Perez' legal team and Clinic personnel planned a taxpayer-funded stakeout for November 19-21, 2009, whereby multiple DOJ lawyers would fly from Washington, D.C. to West Palm Beach and "just hang out outside the clinic and observe" Susan.[4]

By sheer Providence, or so the DOJ claimed, on November 19, 2009 – the exact same day that the DOJ lawyers were descending into West Palm Beach for this surreptitious surveillance – West Palm Beach police officer Sanjay Raja also took a detour from his "routine patrol," "hid" himself in "the bushes" outside the Clinic, and "took an opportunity to see" what Ms. Pine and her friends do when "they don't know that the police are watching." Officer Raja, who was himself on a first name basis with Clinic staff, then met with the just-arrived DOJ lawyers, and reported his observations of Ms. Pine. Importantly, **Officer Raja did not consider Susan's conduct that day to warrant arrest or even a citation**.[5]

Nevertheless, **nine months later**, the DOJ filed a federal lawsuit against Ms. Pine, alleging that she violated FACE **on a single occasion**, November 19, 2009, when she supposedly stepped out in front of a car in the Clinic's driveway, thereby blocking access.[6]

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[1] *See, e.g., Pine v. Presidential Women's Center, Inc., Mona Reis, et al.*; No. 9:04-cv-80123-WJZ (S.D. Fla. 2007); *Halfpap, et. al. v. City of West Palm Beach*, 9:05-cv-80900-DMM (S.D. Fla. 2008).

[2] *See Justice Department Tougher on Abortion Protesters*, NPR News, September 1, 2011, available at http://www.npr.org/2011/09/01/140094051/obama-takes-tougher-stance-on-abortion-protesters?ft=1&f=1001, last visited April 13, 2013.

[3] *See* e-mail from DOJ Sr. Trial Attorney Julie Abbate to Clinic President Mona Reis, November 4, 2009, copy attached hereto as **EXHIBIT A**.

[4] *See id.*

[5] *See* Deposition of Sanjay Raja, pp. 49, 69-70, 89-90, 94, excerpts attached hereto as **EXHIBIT B**.

[6] *Holder v. Pine*, Case No. 9:10-cv-80971-KLR (S.D. Fla.), Complaint attached hereto as **EXHIBIT C**.

The Clinic has an expensive surveillance system, with video cameras pointed at the exact spot where this violation supposedly took place. However, by the time the DOJ filed its suit, the videotapes had all been conveniently destroyed. Even though the DOJ lawyers were meeting with Clinic staff on the exact day when these tapes were being recorded, to discuss the filing of a lawsuit against Susan, not one of the DOJ lawyers advised the Clinic of the need to preserve that critical evidence. The Clinic had previously attempted to use videotapes from its surveillance system against other pro-life Americans, but on this occasion it did not think that evidence was good enough to warrant saving. The Court eventually found that the DOJ's astounding omission was "indeed negligent, and perhaps even grossly negligent."[7]

Without the videotapes that would have easily disproven Officer Raja's supposed observations from the bushes, the DOJ alleged in its initial Complaint that Susan "obstructed a car," "by stepping in front of the car as it was attempting to enter" the Clinic.[8] Conveniently, Officer Raja failed to record the license plate of this phantom vehicle, and he failed also to record the identity of the mysterious driver and occupants of the vehicle.[9] And, along with the surveillance videotapes, the Clinic had also conveniently destroyed the patient sign-in sheets, which might have identified this mystery driver, and his or her purpose in visiting the Clinic (*e.g.*, to deliver sandwiches, fix a leaky toilet, make a u-turn, or have an abortion).[10] Thus, since **no victim had ever come forward to complain** of being "obstructed," the DOJ had premised its entire case solely on Officer Raja's supposed observations of an unidentified vehicle, and his unconfirmed suspicion that an unidentified driver must have felt "obstructed" by Susan.[11]

Susan moved to dismiss the DOJ's Complaint. We argued that her alleged "stepping in front of the car" causing it to stop **momentarily**, even if it actually took place, which we vigorously disputed, could not violate FACE as a matter of law. Susan was in a marked pedestrian crosswalk. Her alleged interaction with this vehicle would have been no different than millions of other pedestrians who take the right of way at crosswalks every day in this country.

Undeterred, the DOJ's response was to voluntarily amend its Complaint on the eve of the hearing on our motion to dismiss. In its Amended Complaint, the DOJ now claimed that Susan didn't merely step out in front of a vehicle in a marked, public, pedestrian crosswalk, but rather that she "**stopped and stood in front of the car** as it was attempting to enter the driveway."[12] The Court accepted the DOJ's newly invented factual allegation as true, as it was required to do on a motion to dismiss. On the basis of this new allegation, the Court denied our renewed motion to dismiss, and allowed the case to proceed to discovery.

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[7] *See Order Granting Defendant's Motion for Summary Judgment, Holder v. Pine* dkt. no. 96, pp. 5, 9-10, attached hereto as **EXHIBIT D**.

[8] Exhibit C, p. 2, ¶ 10.

[9] Exhibit D, p. 5.

[10] *Id.*

[11] *Id.* at pp. 5-6.

[12] *Holder v. Pine*, Amd. Compl., dkt. no. 30, p. 2, ¶ 12 (emphasis added), attached hereto as **EXHIBIT E**.

The extensive discovery that followed revealed that the DOJ did not have a basis for its newfound factual allegation. Specifically, Officer Raja, **the DOJ's sole eyewitness**, testified under oath at his deposition that Susan did **not** "stop and stand" in front of the phantom vehicle. Instead, Officer Raja testified that "**once** the car stopped, she **immediately** went to the driver's door and window." Officer Raja consistently and repeatedly refuted any notion that Susan "stood" in front of any vehicle, testifying numerous times that she "quickly darted" out of the way.[13]

Officer Raja obviously had all of these observations at the time he initially met with the DOJ's lawyers, nine months before the lawsuit was filed, so he must have shared them with the DOJ when the alleged events were still fresh in his mind. Furthermore, the conveniently destroyed videotapes would have settled beyond any doubt whether the DOJ's new version of the facts had any merit. But rather than accept and disclose this evidence, which would have dismantled its case out of the starting gate, the DOJ manufactured a new set of facts out of whole cloth, and used them to defeat Susan's motion to dismiss, forcing her to engage in protracted litigation.

Despite the dearth of facts to substantiate its political persecution, or perhaps because of it, the DOJ spared no expense in prosecuting Susan, assigning no fewer than **seven** of its top attorneys to her case. In addition to Mr. Perez himself – who led the charge and headlined every signature page of every pleading filed with the Court – the DOJ's litigation dream team also included the Chief and Deputy Chief of the "Special Litigation Section" within its Civil Rights Division, two additional Trial Attorneys from Washington, D.C., and the U.S. Attorney and Assistant U.S. Attorney from Miami, Florida.[14] Indeed, so impressive was the DOJ's show of force against Susan, that its attorneys' signatures sometimes could not even fit on a single signature page. And, while the winter weather differential may have accounted for at least some of the eagerness of multiple Washington, D.C. attorneys to attend depositions and hearings in West Palm Beach (at taxpayer expense), that fact was easily lost upon Susan, while her freedom and fortune were imperiled by the most powerful government on Earth.

Ultimately, after almost two years of litigation, the DOJ's tour de force was not enough to overcome the Constitution and the law. Based in part upon the unequivocal testimony of Officer Raja – the DOJ's own witness – the Court determined that the case did not even warrant a trial, and instead granted summary judgment to Susan. The Court specifically found that Susan did not block any vehicle, and then methodically dismantled the DOJ's "case" piece by piece, holding that:

- "The Government has failed to create a genuine issue for trial on all three elements of its FACE claim";
- "The [DOJ's] evidence could not lead a rational jury to find that Ms. Pine's conduct constituted a physical obstruction within the meaning of FACE";

[13] Exhibit B, pp. 32, 35, 39, 59.

[14] *See, e.g.*, Exhibit C, p. 4; Exhibit E, p. 5; Exhibit F, p. 2.

- "The Government has ... failed to set forth sufficient evidence that Ms. Pine intended to restrict the passenger's freedom of movement";

- The DOJ's interpretation that FACE prohibits a pedestrian from walking in front of a vehicle in a marked crosswalk is **inconceivable, defies "common sense,"** and **"yields an absurd result"**; and

- The DOJ's "absurd" interpretation of FACE, and the manner in which it sought to apply it against Susan, "would violate Ms. Pine's right to free speech guaranteed by the First Amendment of the United States Constitution."[15]

In light of these deficiencies, the Court declared that the DOJ lacked **any** justification to bring and maintain the action against Susan: **"The Court is at a loss as to why the Government chose to prosecute this particular case in the first place."**[16] Indeed, the DOJ's lack of any evidence, coupled with its "grossly negligent" failure to preserve critical evidence, the lack of a "victim," and its "curious" meetings with "[Clinic] staff and police officers the very next day after the alleged violation occurred," caused the Court to suspect a conspiracy between the DOJ and the Clinic to deprive Ms. Pine of her First Amendment rights:

> "The Court can only wonder whether this action was the product of a concerted effort between the Government and [the Clinic], which began well before the incident at issue, to quell Ms. Pine's activities rather than to vindicate the rights of those allegedly aggrieved by Ms. Pine's conduct."[17]

Based upon the Court's findings, Liberty Counsel asked the Court to impose a fee and cost sanction upon the DOJ, for filing a federal lawsuit without justification. Rather than await the Court's ruling on this motion, the DOJ agreed to pay (with taxpayer funds) $120,000 to partially reimburse Liberty Counsel for its fees and costs in the litigation.[18]

Some might point to the final outcome, and conclude that no further action is necessary because the system of justice worked as designed. Such conclusion would miss the point entirely. The Civil Rights Division of the DOJ is charged with the critical task of safeguarding the civil rights of all Americans, not concocting political prosecutions against those who peacefully exercise their First Amendment rights. When the Department of Justice targets a United States citizen and brings the full weight of the federal government against her, it must have a solid case based on the facts and the law. The DOJ must not allow ideology to bias its prosecutorial judgment. From the moment this case against Susan was filed, until it was concluded, it was clear to all objective observers that the Civil Rights Division was motivated by pure ideology, and that its absurd position was not supported by either the law or the facts.

---

[15] *Order Granting Summary Judgment*, Exhibit D, pp. 17-20 (emphasis added).

[16] *Id.* at p. 20 (emphasis added).

[17] *Id.* at p. 10, n.6.

[18] *Joint Notice and Stipulation, Holder v. Pine*, dkt. no. 106, attached hereto as **EXHIBIT F**.

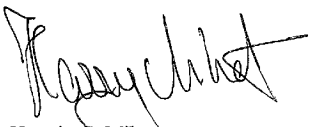
As the Ninth Circuit has recently pointed out in another case involving similar misconduct, the Department of Justice under its current leadership has seemingly forgotten its *raison d'être*:

> "The Department of Justice has an obligation to its lawyers and to the public to prevent prosecutorial misconduct. Prosecutors, as servants of the law, are subject to constraints and responsibilities that do not apply to other lawyers; **they must serve truth and justice first. Their job is not just to win, but to win fairly, staying within the rules**. That did not happen here."[19]

We welcome this Committee's oversight into the misconduct and mismanagement of the Civil Rights Division of the Department of Justice, and pledge our full support in taking whatever steps are necessary to restore the public's trust and confidence in the institution charged with safeguarding constitutional rights.

I look forward to answering any questions you might have, and thank you again for the opportunity to appear before you today.

Very Truly Yours,



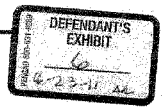
Horatio G. Mihet
Senior Litigation Counsel
Liberty Counsel

[19] *United States v. Lopez-Avila*, 11-10013, 2012 WL 450314, *9 (9th Cir. Feb. 14, 2012) (emphasis added).

EXHIBIT A

E-mail from DOJ Sr. Trial Attorney Julie Abbate to Presidential Women's Center President Mona Reis, November 4, 2009.

Abbate, Julie (CRT)



From: Mona Reis [s[redacted]r]
Sent: Thursday, November 05, 2009 10:41 AM
To: Abbate, Julie (CRT)
Cc: Trainor, Cathleen (CRT)
Subject: RE: Tentative plans

Below are links to the two local ordinances related to protecting access and reducing harassment at our Center:

Sec. 34-38. SOUND LIMITATIONS FOR HEALTH CARE FACILITIES.

http://library8.municode.com:80/default-test/template.htm?view=browse&doc_action=setdoc&doc_keytype=tocid&doc_key=44c37df1b9481685780ef6f8a686a4e5&infobase=10017

ARTICLE XIV. OBSTRUCTION OF PUBLIC STREETS, HIGHWAYS AND ROADS

http://library8.municode.com:80/default-test/template.htm?view=browse&doc_action=setdoc&doc_keytype=tocid&doc_key=5171b1238ed4739b66525b5b672e6d2b&infobase=10017

-----Original Message-----
From: Abbate, Julie (CRT) [mailto:Julie.Abbate@usdoj.gov]
Sent: Wednesday, November 04, 2009 2:16 PM
To: Mona Reis
Cc: Trainor, Cathleen (CRT)
Subject: Tentative plans

Hi, Mona -- I just wanted to follow up on our discussions today -- As I said, we're hoping to be able to come visit your center on Friday, November 20 and Saturday, November 21, and I just wanted to give you an idea of what to expect if we do. We would arrive in West Palm Beach on Thursday evening, so we would be able to meet at the center as early as you would like on Friday. We would be happy to meet with you and anyone else for a general informational meeting to let you know who we are, what we do, what we're looking for, etc., as well as to answer any questions anyone may have. After that, we'd like to interview any staff or volunteers to discuss their observations of the protesters to get an idea of what's going on there, as well as to gauge our pool of potential witnesses if we file a FACE case. We can be at the center as long as we need to on Friday. On Saturday, we'd plan to observe the protesters. Usually, we just hang out outside the clinic and observe, as well as chat with the escorts. We'd plan to leave on Saturday afternoon.

Also, as I mentioned, I will be out of the office for the rest of the week and all of next week, and will likely not have access to email. My next day in the office will be Monday, November 16. I'll give you a call early that week as soon as I know whether we'll be able to travel as planned. Cathy Trainor, another attorney in our office, will likely accompany me on any trip to your center, and she may contact you next week if there are any questions about anything. Also, feel free to contact Cathy at (202) 616-9009 next week if you need to.

And, finally, I have a copy of the court decision regarding the buffer zone, so no need to send that.

And I think that's it . . .

We'll talk soon!

Julie

Julie Abbate
Senior Trial Attorney
U.S. Department of Justice
Civil Rights Division
Special Litigation Section
(202) 353-4637

Abbate, Julie (CRT)

rom: Mona Reis [redacted]
Sent: Monday, January 25, 2010 11:33 AM
To: Abbate, Julie (CRT)
Cc: Helen Reid
Subject: Re: Update

Thanks so much for the update- please let me know if there us anything else you need from us.
I am delighted that you were made aware of the letter and that their was a personal note from your boss! I sincerely hope u know Joe much your interest has meant to us- we are beginning to talk about having a celebration in november for our 30th year- certainly I will hold the dream of justice as a possibility to toast !
Be well and send my best to Cathy
M

Sent from my iPhone

On Jan 25, 2010, at 11:10 AM, "Abbate, Julie (CRT)" <Julie.Abbate@usdoj.gov> wrote:

> Hi, Mona – I just wanted to thank you, again, for your extremely kind words to Eric Holder about me & Cathy! I just this morning received a copy of the letter with a notation on it from Mr. Holder. So, thanks again – I still can't believe you were able to do that!!
>
> Also, Cathy and I got in touch with Office Raja last week and will start drafting up our documents today and hopefully get them in the pipeline soon. We'll do our best to keep you in the loop, and please don't hesitate to contact either of us with any questions or concerns.
>
> Thanks again,
>
> Julie

EXHIBIT
MR
467
6-23-11

EXHIBIT B

Excerpts from sworn deposition testimony of West Palm Beach Police Officer Sanjay Raja, taken on June 22, 2011.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

ERIC H. HOLDER, Attorney General of the United States of America	)	CIVIL ACTION
Plaintiff,	)	
vs.	)	No. 9:10-cv-80971-KLR
MARY SUSAN PINE,	)	
Defendant.	)	

DEPOSITION OF

OFFICER SANJAY RAJA

Wednesday, June 22, 2011
West Palm Beach, Florida
8:48 a.m. - 11:32 a.m.

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:

U. S. DEPARTMENT OF JUSTICE
Civil Rights Division
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
202/616-9009
BY: CATHLEEN TRAINOR, ESQ.

U.S. DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY'S OFFICE
99 Northeast 4th Street
Miami, Florida 33132
305/961-9327
BY: VERONICA HARRELL-JAMES, ESQ.

ON BEHALF OF THE DEFENDANT:

LIBERTY COUNSEL
100 Mountain View Road
Lynchburg, Virginia 24502
434/592-7000
BY: CYNTHIA N. DUNBAR, ESQ.

ON BEHALF OF THE WITNESS:

CLAUDIA M. McKENNA, CITY ATTORNEY
CITY OF WEST PALM BEACH
401 Clematis Street
West Palm Beach, Florida 33401
561/832-1350
BY: KIMBERLY L. ROTHENBURG, ESQ.

ALSO PRESENT: Mary Susan Pine
Mona Reis

so big -- and was trying to make a right-hand turn into this complex, into the parking lot when Ms. Pine was pacing back and forth previously throughout her time there.

And as the car was approaching and she noticed the car was turning, she quickly started to walk faster towards the car to impede its flow so to cause it to stop. Once the car stopped, she immediately went to the driver's door and window and was giving a pamphlet and soliciting the occupants.

Q And just to clarify, you showed the car was traveling east or moving to the right on your sketch on Northpoint Parkway and was attempting at that time, according to your testimony, to turn right into what is marked as the exit on the sketch. And when you said it stopped, where would the car have been located in relation to Northpoint Parkway and the exit?

A Three-quarters of the vehicle was sticking out into Northpoint Parkway, and the rest of the nose of the vehicle was almost up to the sidewalk to enter into the Women's Center. So it was blocking the flow of traffic. In fact, it did stop a vehicle that was behind it and had to go around it.

Q It stopped one vehicle, and that vehicle went around. How many lanes are on Northpoint Parkway?

Pine immediately went to the driver's side. Did you witness her, according to your testimony, having conversation with the driver?

A Yes, saw them talking.

Q And where was she standing when they were talking?

A At the window, with her hand in the window.

Q So what was her movement as you were -- what point did you first notice this interaction? Where was the car when you first noticed Ms. Pine, watching the interaction between the car and Ms. Pine?

A I noticed the car coming towards the intersection. It slowed down and started to make a right-hand turn, at which time Ms. Pine was only at this edge, and she was at her normal pace that she does back and forth.

As soon as she saw the car turning, she did a quick pace towards -- on the sidewalk towards the vehicle, at which time the car stopped because obviously it would have hit her. As soon as the car stopped, she quickly darted to the driver's door. And at the driver's door, she engaged in dialogue. I saw her talking, and the male driver and the female passenger were looking at her, and she had her hand in the window with paperwork.

going back, she saw the car coming, and as it was making a turn, she was basically at this corner where the asterisk is. Once when she saw the car coming, she paced, had a quicker pace, a faster walk down the sidewalk, forcing the car to stop. Then once when the car stopped, this is when she darted to the driver.

Q And just to clarify for the record, you started at the asterisk which is furthest to the right, following the arrows to the left on the sidewalk. And then the last arrow takes her to the driver's side and puts her actually in Northpoint Parkway. So is that an accurate reflection then at the time you approached her where she was standing --

A In the street.

MS. HARRELL-JAMES: Objection.

MS. DUNBAR: You want to clarify your objection?

MS. HARRELL-JAMES: (Shakes head.)

BY MS. DUNBAR:

Q So she was standing in the street. And in looking at this, is there any possibility from your drawing that she could have been in some other location than what you saw, or do you feel this is an accurate reflection of her route and where she ended up?

A That's the best I can do.

Q But your recollection at this time is that you were just doing a directed patrol under your own initiative?

A Yes.

Q In your report you also say "from a distance." I think you've somewhat clarified, but could you confirm again about how far away you were in your hidden location?

A Approximately two to 300 feet.

Q If you were hidden, what was it that was hiding your location?

A Cars and bushes.

Q Would any of that have impeded your view of that intersection?

A No.

Q And you also state that "caused the car to block the driveway," meaning Ms. Pine's actions caused the car to block the driveway, "as well as traffic." So just to clarify, your picture that you drew on Exhibit 2, Defendant's Exhibit 2, shows the extent that she would have been -- the car would have been blocking the driveway?

A Yes.

Q And when you say traffic, can you confirm from your previous testimony how many cars that constituted

Q And from this sketch, you do not show her ever standing in front of the front part of the vehicle.

A Directly in front, no.

Q So before, after or during. You don't have her there before, and then you show her moving to the driver. Was there any point after that where she moved in front of the car?

A No.

Q And you said immediately. I need you to define what immediately is, that as soon as the car stopped, she immediately went to the driver's side. How quickly would immediately be?

A Immediately.

Q So no delay of time. What would your understanding be? I know you're saying immediately is immediately, but any delay of time? What would constitute immediate?

MS. HARRELL-JAMES: Objection.

THE WITNESS: As soon as the car stopped, the eye contact was already there. Went straight to the door to talk to him.

BY MS. DUNBAR:

Q All right. How long had you been in the location where you were witnessing the vehicle prior to this incident taking place?

violation of the -- the pedestrian violation and the ordinance chapters. She acknowledged that, and she just went on with her yelling at me and yelling at the young male, asking if he got that.

Q So when you said she acknowledged that, what --

A "Yes, I know," she said.

Q And when you said she was yelling at you and the young man, explain yelling. How would you define that?

A A loud tone of voice.

Q Whom have you talked to in relation to this case?

A Who have I talked to in relation to this case?

Q In relation to this incident report, who are the persons with whom you've discussed it?

A These women here, and Mona as well.

Q So you're referencing Ms. Trainor, Ms. Harrell, H-a-r-r-e-l-l --

MS. HARRELL-JAMES: Harrell.

BY MS. DUNBAR:

Q -- and Ms. Reis have been noted for the record. Anyone else?

A I believe I spoke to my sergeant about it.

Q Sergeant Olsen?

A Correct.
Q Anyone else?
A Not that I recall.
Q Has anyone provided you with additional information pertaining to this incident beyond what you've given me in the sketch and in this deposition?
A No.
Q Now, you stated in your report that you then contacted Mona.
A Yes.
Q What type of normal procedure do you do after an incident like one of these areas where you talked about directed patrol and all of that? Is it routine after you have noticed some kind of suspicious behavior in relation to the actual location?
A You document it with a report.
Q And do you normally contact someone outside of the Police Department to advise them of the activity? Do you have any kind of obligation, and if so, what kind of obligation do you have in relation to the directed patrol area?
A Because the Women's Center has always been a directed patrol issue, so therefore, I gave it a case number. And that's why I notified Mona, to let her know that there is a case, an information, a report for the

car and go over and intervene?
A At the time?
Q At some point while you were observing Ms. Pine's activities in the driveway, did you make a decision to get out of the car and go intervene?
MS. DUNBAR: Objection as to form.
THE WITNESS: Yes.
BY MS. TRAINOR:
Q And how long did you observe her before you got out of the car?
A How long did I observe her as she was talking to the person in the car?
Q No. From the minute you -- I'm asking from the time you were parked there and started looking at her, how long did it take for you to get out of the car?
A It wasn't long. I wasn't there for a significant amount of time, as I explained to her. It was maybe not more than 15 minutes.
Q And why did you decide to get out of the car and go over there?
A To keep the peace in that area, because Mona always has -- you know, she has complaints of them coming onto the property when we're not there and so on and so forth. So I just took an opportunity to see for myself if I'm not seen, rather than -- if I'm in an

obscure area where I'm not seen, to see what happens when the police are not there, they don't know that the police are watching.

Q And then what happened?

A I just saw her, what she was doing, her pacing. As a car was coming, she presented herself in a situation to check the vehicles out so maybe she could engage in conversation.

Q Then what did she do?

A In front of me, then I explained to her I had the chapters of the violations. And there was the person hiding in the bushes. So then I decided, because of the situation, I didn't want anything else to escalate, so let me just show some presence at this time for things to calm down and make sure no one goes on the property, and also for their safety as well.

Q I just wanted to ask you: Do you have any artistic background or --

A As in drawing?

Q Yes.

A No.

Q You haven't taken any drafting classes or any other --

A No.

MS. DUNBAR: Objection as to relevance.

Q Was it hazardous to Ms. Pine or --

A Yes, I put that as well. It was all aspects. It could be for her, it could be for the vehicle. You know, in my work a lot of things have happened. Anything could happen, from a speeding motorcycle, a speeding car, even to the protesters across the street. They're in the swale. To avoid the car, it could swerve and go into the swale and hit the crowd of people.

Q Do you know how many other protesters were present at the time of this incident?

A I don't recall. I just knew that it was about average; it was either average to a little bit above average that's normally there, which would consist of, average, I would say, would be ten. That would be the average. So it could have been anywhere from 10 to 15 on that day.

Q You say you didn't issue any citations in this case.

A Yes.

Q Why not?

A I thought that the best way for me to handle the situation is by writing an informational report rather than giving her a citation. One thing, I have come across her before, but it's always been just on a cordial, this is a warning; both sides just keep the

CERTIFICATE OF ADMINISTRATION OF OATH

THE STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I, Susan S. Kruger, the undersigned authority, hereby certify that OFFICER SANJAY RAJA personally appeared before me and was duly sworn.

WITNESS my hand and official seal this 27th day of June, 2011.

SUSAN S. KRUGER
MY COMMISSION # EE 040490
EXPIRES: November 8, 2014
Bonded Thru Budget Notary Services

Susan S. Kruger
Notary Public, State of Florida
Commission Number: EE040490
Expires: November 8, 2014

C E R T I F I C A T E

THE STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I, Susan S. Kruger, do hereby certify that I was authorized to and did stenographically report the foregoing deposition, and that the transcript is a true and correct transcription of the testimony given by the witness.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 27th day of June, 2011.

Susan S. Kruger

EXHIBIT C

Initial Complaint filed against Susan Pine on August 18, 2010 by DOJ Civil Rights Division in *Holder v. Pine*, Case No. 9:10-cv-80971-KLR (S.D. Fla.).

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
MARY SUSAN PINE,	:	No.
Defendant.	:	

COMPLAINT

Eric H. Holder, Jr., Attorney General of the United States of America (the "United States Attorney General"), by the undersigned attorneys, asserts a civil cause of action under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (1994), enacted into law May 26, 1994, as follows:

1. In bringing this action, the United States Attorney General has reasonable cause to believe: (1) Defendant, Mary Susan Pine, has committed, and is likely to continue to commit, violations of FACE; and (2) various persons are being, have been, and will continue to be injured by Defendant's conduct.

JURISDICTION, STANDING, AND VENUE

2. This Court has jurisdiction over this action pursuant to FACE, 18 U.S.C. § 248(c)(2), and 28 U.S.C. § 1345.

3. The United States Attorney General has standing to bring this action pursuant to FACE, 18 U.S.C. § 248(c)(2).

4. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b)(1) and (b)(2), in that Defendant resides in this judicial district, and all the events giving rise to this complaint occurred in this judicial district.

DEFENDANT

5. Defendant, Mary Susan Pine, is a regular and vocal anti-abortion protester at the Presidential Women's Center, located at 100 Northpoint Parkway in West Palm Beach, Florida.

6. On information and belief, Defendant resides in West Palm Beach, Florida.

FACTUAL BACKGROUND

7. The Presidential Women's Center provides women's reproductive healthcare services.

8. Defendant has engaged in anti-abortion protest activity outside the Presidential Women's Center for several years.

9. Defendant is one of two protesters who typically conducts her protest activity on the south side of Northpoint Parkway, which includes walking back and forth in the Presidential Women's Center's driveway.

10. On November 19, 2009, Defendant physically obstructed a car by stepping in front of the car as it was attempting to enter the driveway to the Presidential Women's Center to access the parking lot.

11. The driver of the approaching car stopped to avoid striking Defendant.

12. Defendant attempted to, and did, interfere with the driver's access to the Presidential Women's Center.

CAUSE OF ACTION UNDER 18 U.S.C. § 248

13. The United States incorporates herein the averments of paragraphs 1 through 12 hereof.

14. Defendant's conduct as described in paragraphs 10 through 12 hereof constitute a physical obstruction which interfered with a person who had been seeking reproductive health services.

15. On information and belief, unless Defendant is restrained by this Court, Defendant will continue to engage in the illegal conduct averred herein.

16. The United States Attorney General is authorized under 18 U.S.C. § 248(c)(2)(B) to seek and obtain temporary, preliminary, and/or permanent injunctive relief from this Court for Defendant's violation of FACE.

17. The United States Attorney General is further authorized under 18 U.S.C. § 248(c)(2)(B)(i) to assess a civil penalty against a respondent no greater than $10,000.00 for a nonviolent physical obstruction.

WHEREFORE, the United States Attorney General respectfully requests judgment in his favor and against Defendant, Mary Susan Pine, in the form of:

A. An Order prohibiting Defendant, Mary Susan Pine, from entering any driveway leading into the Presidential Women's Center parking lot;

B. An Order prohibiting Defendant, Mary Susan Pine, and her representatives, agents, employees and any others acting in concert or participation with her, from violating the Freedom of Access to Clinic Entrances Act; and

C. A civil penalty assessment in the amount of $10,000.00.

Respectfully submitted,

WIFREDO A. FERRER
United States Attorney
Southern District of Florida

By: VERONICA HARRELL-JAMES
Assistant United States Attorney
99 N.E. 4th Street
Miami, FL 33132
Fla. Bar No. 644791
(305) 961-9327
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THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

JUDITH C. PRESTON
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JULIE K. ABBATE
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United States Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Ave., N.W.
Washington, DC 20530
(202) 616-9009
(202) 514-0212 (fax)
cathleen.trainor@usdoj.gov

EXHIBIT D

Order Granting Defendant's Motion for Summary Judgment, Holder v. Pine, **Case No. 9:10-cv-80971-KLR (S.D. Fla.), dkt. no. 96, entered on January 13, 2012.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No.: 10-CV-80971-RYSKAMP/VITUNAC

UNITED STATES ATTORNEY GENERAL *Eric H. Holder, Jr.*,

Plaintiff,

v.

MARY SUSAN PINE,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court on defendant Mary Susan Pine's motion for summary judgment **[DE 66]** filed on September 9, 2011. The Attorney General filed a response in opposition **[DE 75]** on October 7, 2011. Ms. Pine replied **[DE 82]** on October 24, 2011. A hearing was held on November 8, 2011. This matter is ripe for adjudication.

I. Facts

United States Attorney General Eric H. Holder, Jr. initiated the instant action against Ms. Pine on August 18, 2010. *See* **[DE 1]**. The amended complaint **[DE 30]** asserts a civil cause of action under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, based on events which occurred on November 19, 2009. The relevant facts are summarized as follows:

A. Background

Ms. Pine is a pro-life advocate who believes, based on her past unfortunate experience with abortion, that women who are considering abortion should be made aware of the available alternatives and assistance programs. *See* Pine Dep. **[DE 66-1]** at 5-14. In order to accomplish

her mission, Ms. Pine founded a non-profit organization called "F.A.C.E." which stands for Faith, Action, Counseling and Education.[1] *Id.* at 5. Ms. Pine, through F.A.C.E., organizes and participates in pro-life demonstrations and projects such as setting up "truth booths" which show the different stages of a child's development. F.A.C.E. also offers services such as free pregnancy testing and sonograms, as well as post-pregnancy assistance to mothers. *Id.* at 5-13, 19. Ms. Pine also engages in what she refers to as "sidewalk counseling" at the Presidential Women's Center (the "PWC") located in West Palm Beach, Florida. *Id.* at 16-17, 20-21. The PWC is a clinic which provides reproductive health services to women, including abortions, gynecological exams, sterilization procedures, and pregnancy testing. Reis Dep. **[DE 66-5]** at 20-21. The PWC also provides non-pregnancy related services such as HIV testing. *Id.* Additionally, women often enter the PWC to obtain information about the services available to pregnant women in the community. *Id.* at 42-43.

Ms. Pine has consistently conducted her sidewalk counseling on the public sidewalk in front of the PWC every week since it moved to its current location on Northpoint Parkway in or about 2001. **[DE 66-1]** at 16, 34. Ms. Pine's sidewalk counseling generally consists of approaching vehicles and pedestrians entering and exiting the PWC's parking lot, engaging in conversations about abortion, and offering information and literature about "life-affirming" alternatives to abortion and the resources available to pregnant women. *Id.* at 19, 21-25. Ms. Pine uses this method instead of holding up protest signs because she believes that being friendly and offering help to people is a more effective means of changing people's minds about abortion. *Id.* at 18. Sometimes people stop and accept her literature; many people do not. *Id.* at 21, 30. Vehicle passengers who do not wish to receive Ms. Pine's literature generally continue to drive

[1] According to Ms. Pine, the name "F.A.C.E." is merely coincidental and has nothing to do with the FACE legislation. *Id.* at 10.

past her without stopping. *Id.* at 18-19, 21, 33, 35. According to Ms. Pine, aside from holding out literature in her hand and motioning vehicles toward her, she does not attempt to stop oncoming vehicles, and she ceases her efforts once the person indicates he or she does not wish to receive Ms. Pine's information. *Id.* at 18-23. It is undisputed that Ms. Pine has never used obscenities or physical threats while conducting sidewalk counseling at the PWC. **[DE 66-5]** at 22-23.

Vehicles are able to enter and exit the PWC's parking lot through two driveways. *See* Pine Decl. **[DE 66-6]**. The designated entrance, which is marked with an "Entrance" sign, is accessible from a private service road which also services other businesses such as restaurants and stores. *See id.*; Pleasant Dep. **[DE 66-12]** at 5. Sidewalk counseling is not permitted at this entrance because the access road is private property. Ms. Pine therefore conducts her counseling activities on the public sidewalks near the PWC's designated exit driveway which leads onto Northpoint Parkway. **[DE 66-1]** at 21, 22, 37. Despite the fact that the exit driveway, which is approximately thirty-six feet wide, is clearly marked with a "Do Not Enter" sign and a sign directing drivers to the designated entrance, drivers sometimes use the exit as an entrance. *Id.* at 38; **[DE 66-12]** at 5; **[DE 66-8, DE 66-9]**. Ms. Pine is thus able to approach vehicles both entering and exiting the PWC from this location.

In addition to those seeking services at the PWC, the exit driveway is also used by people delivering food and mail, as well as people seeking directions to other businesses. *Id.* at 29-30, 35; Willoughby Dep. **[DE 66-13]** at 2. According to Ms. Pine, she approaches and solicits all vehicles which pass through, regardless of their purpose, including police officers and the food delivery man. **[DE 66-1]** at 27-28, 35-36; **[DE 66-13]** at 4-6. She does this because "she does

not always know why they are there but she wants everyone to know about the life-affirming resources and information she offers." **[DE 66]** at 9.

B. The Conduct at Issue

On November 19, 2009, Ms. Pine was engaged in sidewalk counseling at the PWC. **[DE 66-1]** at 33. This day was significant to Ms. Pine because it marked the anniversary of the abortion she had many years ago. *Id.* West Palm Beach Police Officer Sanjay Raja was on patrol that day, and he had positioned himself so that he could observe Ms. Pine from a distance of approximately 200-300 feet. Raja Dep. **[DE 66-14]** at 6, 10. According to Officer Raja's deposition testimony and his written investigation report **[DE 66-15]**, a green sedan began to enter the PWC premises through the exit driveway. As soon as Ms. Pine noticed the sedan, she "quickly started to walk faster towards the car" and stopped at the front side, causing the vehicle to stop. **[DE 66-14]** at 2-3; **[DE 66-15]** at 3. Immediately after the vehicle came to a stop, Ms. Pine approached the driver's window. The driver rolled the window down, and Ms. Pine proceeded to solicit the male driver and the female passenger. **[DE 66-15]** at 3. At some point during the conversation, Ms. Pine handed the passengers a pamphlet through the open driver's side window. **[DE 66-14]** at 3, 23. Although Officer Raja could see that Ms. Pine was speaking to the passengers, he could not hear what she was saying. *Id.* at 16.

According to Officer Raja, the stopped sedan was blocking the flow of traffic on the exit driveway as well as traffic traveling on Northpoint Parkway. *Id.* at 2-3. Officer Raja noticed one vehicle which had to drive around the sedan in order to continue on Northpoint Parkway. *Id.* at 2, 12. Officer Raja approached the sedan and instructed the driver to proceed into the parking lot.[2] *Id.* at 12-14, 23. The driver immediately took the pamphlet from Ms. Pine and proceeded

[2] Officer Raja did not specify how long Ms. Pine spoke with the passengers before he intervened. He merely testified that the conversation was "not long," and that "[i]t wasn't a significant amount of time." *Id.* at 16.

to park. *Id.* at 12-14, 23. Ms. Pine yelled at Officer Raja, insisting that she was within her rights. *Id.* at 14. Officer Raja responded by informing Ms. Pine she was violating city and state traffic laws which prohibit impeding traffic entering a medical facility. *Id.* No citations were issued to either Ms. Pine or the driver. **[DE 66-14]** at 19. Rather, Officer Raja wrote an incident/investigation report and informed the President of the PWC, Mona Reiss, of the situation. *Id.* at 20-22; **[DE 66-5]** at 35; **[DE-66-15]**. Officer Raja did not obtain the identities of the passengers or note the vehicle's license plate number in his report, and neither Ms. Pine nor Officer Raja noticed whether the passengers actually entered the PWC building.

The PWC is equipped with a video surveillance system which covers the exit driveway area where the incident occurred. **[DE 66-5]** at 35. The PWC's patient records consists of a computer database which stores information for patients who have undergone surgery, as well as a daily sign-in sheet for patients who have scheduled appointments to receive services. *Id.* at 31-33. However, certain patients such as those seeking only information or pregnancy testing are not required to sign in. *Id.* The sign-in sheets are destroyed each week, and the video surveillance tapes are destroyed every three weeks pursuant to PWC policy. *Id.* at 29, 31-32.

The day after the incident, November 20, 2009, representatives from the Department of Justice met with the PWC staff, Officer Raja, and another police officer to discuss the incident and determine whether Ms. Pine was in violation of FACE. **[DE 66-5]** at 26-27. The Government concedes that at no time during or after this meeting did it request the PWC to produce any documents or preserve evidence. *Id.* at 26-27; Ford Dep. **[DE 66-17]** at 3. The sign-in sheets and video surveillance tapes from date of the incident were thus destroyed pursuant to the PWC's document maintenance policy, making Officer Raja the only witness

(aside from Ms. Pine) to the events at issue. The passengers' identities and their purpose for entering the PWC premises remain unknown.

II. Standard on Motion for Summary Judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)(1)(A)). Where the non-moving party bears the burden of proof on an issue at trial, the movant may meet its burden by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

After the movant has met its burden under Rule 56(c), the burden shifts to the non-moving party to establish that there is a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). Although all reasonable inferences are to be drawn in favor of the non-moving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), he "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. The non-moving party may not rest upon the mere allegations or denials of the adverse party's pleadings, but instead must come forward with "specific facts showing that there is a *genuine issue for trial*." *Id.* at 587 (citing Fed. R. Civ. P. 56(e)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* "A mere scintilla of evidence

supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). If the non-moving party fails to make a sufficient showing on an essential element of his case on which he has the burden of proof, the moving party is entitled to a judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 323.

III. Analysis

FACE was enacted by Congress in 1993 as a response to nationwide violence arising from protests and demonstrations on the highly controversial topic of abortion. S. Rep. No. 103-117, at 3-12 (1993), *available at* 1993 WL 286699; H.R. Rep. No. 103-306, at 2-3 (1993), *reprinted in* 1994 U.S.C.C.A.N. 699, *available at* 1993 WL 465093; *Cheffer v. Reno*, 55 F.3d 1517, 1518 (11th Cir. 1995). FACE protects a person's right to obtain or provide "reproductive health services," including abortions, by providing civil and criminal remedies to those who have been aggrieved by the prohibited conduct. 18 U.S.C. § 248. To prevail on a FACE claim, the plaintiff must prove that the defendant (1) by force or threat of force or by physical obstruction; (2) intentionally injured, intimidated or interfered with or attempted to injure, intimidate or interfere with any person; (3) because that person is or has been obtaining or providing reproductive health services, or in order to intimidate such person or any other person or any class of persons from obtaining or providing reproductive health services.[3] *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 680-81 (11th Cir. 2001) (quoting 18 U.S.C. §§ 248(a)(1)[4]).

[3] Other cases separate FACE into four elements by splitting the second element in two. *See, e.g., Lotierzo v. Woman's World Med. Ctr., Inc.*, 278 F.3d 1180, 1182 (11th Cir. 2002) (FACE plaintiff must prove (1) force, threat of force, or physical obstruction; (2) done with the intent to; (3) injure, intimidate, or interfere with a person or attempt to do so; (4) because that person has sought or provided, or is seeking or providing, or will seek or provide, reproductive health services.). *See also United States v. Mahoney*, 247 F.3d 279, 282 (D.C. Cir. 2001).

[4] FACE provides civil remedies and criminal penalties against anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or

Ms. Pine argues that summary judgment should be granted in her favor on grounds that the Government has not met its burden of proving: (1) that Ms. Pine physically obstructed or interfered with the passengers in the sedan; and (2) that the passengers were seeking reproductive health services at the PWC. With respect to the latter argument, the parties vehemently disagree as to whether a FACE claim requires such proof at all. According to the Government, it is only required to prove that Ms. Pine, the accused, acted with the requisite intent; whether or not the passengers were in fact seeking reproductive health services is irrelevant. Ms. Pine argues that a valid FACE claim exists only upon proof that the persons allegedly aggrieved are members of the statute's protected class.

Ms. Pine further argues for an adverse inference against the Government for violating its duty to preserve critical evidence relating to this case, namely the PWC's video surveillance tapes and sign-in sheets from the date of the incident. Finally, Ms. Pine argues that FACE's civil penalties are unconstitutional on its face, and that FACE as applied to the facts of this case violates the First Amendment of the United States Constitution. The Court will address each argument in turn.

A. Spoliation of Evidence

District courts have considerable discretion in imposing sanctions based on a spoliation theory. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 943 (11th Cir.2005). A party seeking sanctions "must establish ... that the destroyed evidence was relevant to a claim or defense such that the destruction of that evidence resulted in prejudice." *Eli Lilly and Co. v. Air Exp. Intern. USA, Inc.*, 615 F.3d 1305, 1318 (11th Cir. 2010) (citing *Flury*). In order to obtain an adverse inference, the moving party must also "establish that the missing evidence is *crucial* to their

interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services[.]" 18 U.S.C. § 248(a)(1).

ability to prove their prima facie case," *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, No. 09-61166-CIV, 2011 WL 1456029, at *1 (S.D. Fla. Apr. 5, 2011), and that the opposing party's failure to preserve the evidence was "predicated on bad faith." *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997). Mere negligence is insufficient. *Id.*

In this case, the surveillance tapes and the sign-in sheets were destroyed pursuant to the PWC's routine document maintenance policies. Even assuming that the Government had a duty to preserve the evidence at issue, which was created and controlled solely by the PWC,[5] Ms. Pine has not set forth evidence establishing that the Government was aware of the PWC's policies, or that the evidence even existed prior to its destruction. Although one might suspect that the Government was in fact aware of such facts, and that it purposely neglected to prevent destruction of the sign-in sheets and surveillance tapes because they were detrimental to its FACE claim, mere speculation is insufficient to support a finding of bad faith. The Government's failure to take the necessary steps to prevent the destruction of potentially critical evidence was indeed negligent, and perhaps even grossly negligent. Absent a showing of bad faith, however, an adverse inference is not warranted.

Furthermore, Ms. Pine has failed to demonstrate that the missing evidence was necessary to her case. With respect to the surveillance tapes, assuming the cameras actually captured the incident in question, the videotapes would not have provided much information beyond what is already in the record. At most, they would have revealed exactly where Ms. Pine's body was located with respect to the vehicle, how long the vehicle was stopped before she approached the driver to initiate conversation, and how long the conversation lasted before she was interrupted

[5] It is well-established that parties have a duty to preserve evidence upon anticipation of litigation. For evidence which is owned or controlled by a third party, some circuits impose a duty to give the opposing party notice of access to the evidence or of its possible destruction. *See, e.g., Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001). Ms. Pine has not provided, nor is the Court aware of, any authority indicating that this Circuit imposes such a duty.

by Officer Raja. As discussed in further detail *infra*, these facts, though relevant, are not determinative. With respect to the PWC sign-in sheets, the absence of the passengers' names would not necessarily prove that they were not seeking reproductive health services at the PWC. The passengers very well could have been seeking reproductive health services which do not require sign-in, such as pregnancy testing. In any event, as discussed at length *infra*, the Government is not required to prove that the passengers were in fact seeking reproductive health services. Although such proof may have relieved the Court from its lengthy discussion of this issue, it is not necessary to Ms. Pine's case. Based on the foregoin reasons, the Court denies Ms. Pine's request for an adverse inference.[6]

B. Standing

The parties' disagreement about whether the Government is required to prove that the passengers entered the PWC premises in order to obtain reproductive health services, though couched in terms of the Government's *prima facie* case, also implicates issues with respect to standing. The question arises as to whether a valid FACE claim presupposes a victim who is a member of the statute's protected class, *i.e.* whether the Government's standing depends on proof that aggrieved person is a provider or obtainer of reproductive health services. In light of the various other reasons the passengers may have had for entering the PWC premises (e.g. to ask for directions), if the Court finds that such proof is required then the Government lacks standing and the remaining issues become moot.

[6] It is rather curious that the Department of Justice was able to meet with the PWC staff and police officers the very next day after the alleged violation occurred. It is also curious that the Government failed to make any efforts to obtain the identities of the passengers who are the alleged victims in this case—the Court finds it hard to believe that the Government was completely unaware of the existence of the sign-in sheets and video surveillance system. The Court can only wonder whether this action was the product of a concerted effort between the Government and the PWC, which began well before the date of the incident at issue, to quell Ms. Pine's activities rather than to vindicate the rights of those allegedly aggrieved by Ms. Pine's conduct. If this is the case, the Court would be inclined to sanction the Government with, at a minimum, an adverse inference. Given the absence of further evidence substantiating the Court's suspicions, the Court is not authorized to do so.

The general rule is that an individual seeking protection under federal civil rights laws must allege and prove that he is a member of the statute's protected class. *See, e.g.*, App. to 29 C.F.R. Pt. 1630, App. ("As with other civil rights laws, individuals seeking protection under these anti-discrimination provisions of the ADA generally must allege and prove that they are members of the 'protected class,'" which typically means they must meet the statutory definition of "disability.") There are, however, exceptions to this general rule. For example, the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601 *et seq.*, one of the statutes on which FACE was modeled,[7] provides a private right of action to an "aggrieved person." *See* 42 U.S.C. § 3613. "Rather than define 'aggrieved person' as a protected class under the act, the statute defines 'aggrieved person' as 'any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.'" *Wasserman v. Three Seasons Ass'n No. 1, Inc.*, 998 F. Supp. 1445, 1447 (S.D. Fla. 1998) (quoting 42 U.S.C. § 3602(i)). Any person who fits within this definition has standing to bring a FHA claim regardless of whether that person is a member of the statute's protected class. *Id.*

FACE's legislative history reveals that not only was it was designed to protect patients and physicians directly involved in the provision of reproductive health services, but it was also was also intended to protect clinic staff, persons assisting patients or staff, family members of patients, physicians, and clinic staff, as well as mere bystanders. S. Rep. No. 103-117, at 26. Unlike the FHA, however, FACE carves out from the general category of aggrieved persons a subcategory of those entitled to initiate a private action. Private rights of action under FACE are

[7] FACE was modeled after several existing civil rights laws, including section 3631 of the FHA which prohibits the use of force or threats of force to willfully injure, intimidate, or interfere with a person's housing opportunities because of his or her race, color, religion, sex or national origin. H. Rep. No. 103-306, at 10.

limited to those "involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services."[8] 18 U.S.C. § 248(c)(1)(A). It is clear that if the passengers had initiated the instant action against Ms. Pine, they would in fact have to prove that they were involved in seeking or providing reproductive health services.

This action, however, was initiated by the United States Attorney General, in which case FACE provides different requirements for standing. The Attorney General has standing to bring a civil action under FACE where he has "reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section." *Id.* § 248(c)(2)(A). Noticeably absent from this section is the limiting language contained within the section regarding private rights of action. The Attorney General may bring a FACE claim on behalf of any aggrieved person, regardless of whether such person is involved in providing or seeking reproductive health services. As such, the Government has standing in this case despite its lack of evidence regarding whether the passengers were seeking abortion services at the PWC.

C. The Government's *Prima Facie* Case

1. Motive

The question remains as to whether the Government must prove that the passengers were involved in seeking or proving reproductive health services as part of its *prima facie* case. Motive is covered by the final element of a FACE claim, which courts consistently refer to as that of the *defendant's* motive. *See, e.g., Roe*, 253 F.3d at 681. This element is satisfied upon proof that the defendant was "motivated by a desire to 'prevent [a person] from obtaining reproductive health services.'" *Id.* "That is all the intent that the statute requires." *United States*

[8] This limitation applies only to actions such as this which are brought under subsection (a)(1). 18 U.S.C. § 248(c)(1)(A).

v. Weslin, 156 F.3d 292, 298 (2d Cir. 1998). *See also United States v. Balint*, 201 F.3d 928, 932 (7th Cir. 2000); *United States v. Lynch*, 104 F.3d 357 (2d Cir. 1996). This interpretation is also consistent with FACE's legislative history,[9] as well as other civil rights laws which focus solely on the motive of the defendant. *See, e.g., Latrece Lockett v. Choice Hotels Int'l, Inc.*, 315 F. App'x 862, 868-69 (11th Cir. 2009) (focus of Title VII retaliation claim is on the beliefs of the defendant/employer rather than that of the plaintiff/employee); *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 565 (3d Cir. 2002) (Because Title VII forbids an employer from "taking adverse action against an employee for discriminatory reasons, it does not matter whether the factual basis for the employer's discriminatory animus was correct and that, so long as the employer's specific intent was discriminatory, the retaliation is actionable."). Where the defendant acted with the requisite motive, a FACE violation may occur regardless of whether the offending conduct was directed toward a person seeking or providing reproductive health services. For claims involving physical obstruction, as is the case here, there need not even be a victim at all. *See Balint*, 201 F.3d at 933.

Though the viability of a FACE claim ultimately depends on the motive of the defendant, under certain circumstances the Court may also consider the motive of the aggrieved person. For example, in *Roe v. Aware Woman Ctr. for Choice, Inc.*, *supra*, one of the issues before the Eleventh Circuit was whether the plaintiff, a patient at a reproductive health clinic, adequately pleaded the motive element of her FACE claim.[10] The plaintiff's claim was based on allegations that the defendant physicians refused her requests to stop her abortion and call an ambulance,

[9] *See* H.R. Rep. No. 103-306, at 11 ("[FACE] requires that the offender be motivated by the involvement of the victim or others in obtaining or providing reproductive health services"); S. Rep. No. 103-117, at 24 (a FACE violation occurs "only if the offender has acted with the requisite motive").

[10] The facts of *Roe* are decidedly unique and inapplicable to the instant case. However, the Court would be remiss not to discuss *Roe* as it is one of the few Eleventh Circuit cases which discuss the motive element of FACE and is heavily relied on by both Ms. Pine and the Government.

and instead restrained her in order to complete the procedure. The court considered both of the plaintiff's possible reasons for wanting to leave the clinic, either to save the pregnancy or to have the abortion completed at a hospital, and found that if the physicians restrained plaintiff to prevent her from seeking either of these services, then they had acted with the requisite motive because both services are "reproductive health services." *Roe*, 253 F.3d at 682. However, the court declined to draw this inference and upheld the dismissal of the plaintiff's complaint because it was also possible that the physicians were motivated by a desire to protect the plaintiff's life and health and to prevent further injury. *Id.* at 682-84.

Contrary to Ms. Pine's interpretation, *Roe* does not hold that proof of the aggrieved person's motive or intent is a separate element of a FACE claim. Rather, *Roe*'s holding demonstrates that the failure to include specific allegations regarding the defendant's motive is fatal, which lends further support to the principle that a FACE claim ultimately depends on the motive of the defendant rather than the aggrieved person.[11] The Court does not necessarily disagree that requiring proof of aggrieved person's motive or intent would serve to more narrowly tailor the statute to achieve its purpose of protecting women's right to obtain reproductive health services. However, the Court is not authorized to impose requirements beyond those contained within the statutory text. The Court need only determine whether the Government has set forth sufficient evidence that Ms. Pine, the accused, acted with the requisite intent.

[11] Ms. Pine also relies on *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996), wherein the Eighth Circuit, in dicta, concluded that the defendant's physical assault of a clinic's maintenance supervisor constituted a FACE violation. The court based its conclusion on the finding that a maintenance supervisor is a provider of reproductive health services within the meaning of FACE. Ms. Pine argues that the fact that the *Dinwiddie* court found it necessary to determine this issue means that a FACE claim requires proof that the aggrieved person is a member of the statute's protected class. However, *Dinwiddie* involves allegations of force and threats of force which require an actual victim, whereas this case involves a claim of physical obstruction. In any event, *Dinwiddie* is not conclusive on this issue, nor does its dicta outweigh the significant authority, including that of the Eleventh Circuit, demonstrating that a FACE claim requires proof of only the defendant's motive.

It is undisputed that Ms. Pine holds deeply-rooted personal beliefs against abortion, and that her mission is to provide women with information about the available pro-life alternatives to abortion and pregnancy assistance programs. Although Ms. Pine also concedes that she was conducting sidewalk counseling at the PWC on the day of the incident, the Government has offered no evidence regarding the actual contents of Ms. Pine's conversation with the passengers. In fact, Ms. Pine's deposition transcript reveals that the Government did not even bother to ask what was said. The record merely reveals that Ms. Pine's sidewalk counseling generally consists of attempts to provide "life-affirming" information to anyone willing to receive it, including the mailman, delivery men, police officers, and others who obviously are not seeking abortion services, and that Ms. Pine does not press on once she realizes her solicitation efforts are not welcome. It is evident from these facts that Ms. Pine's ultimate goal is to change the minds of women considering abortion. However, attempting to influence people by peacefully sharing information about abortion alternatives with the general public hardly amounts to a desire to stand in the way of a person from obtaining reproductive health services, and the Court is not authorized to make any assumptions which are not substantiated by evidence in the record. The Court thus finds that the Government has failed to provide evidence sufficient to prove that Ms. Pine acted with the requisite motive.

2. Physical Obstruction[12]

With respect to the first element of a FACE claim, Ms. Pine asserts several arguments that her actions do not constitute a physical obstruction as a matter of law, none of which have been squarely dealt with in this Circuit. First, Ms. Pine asserts that the passengers did not have a

[12] It is undisputed that Ms. Pine did not use either force or threat of force against the passengers. It is also undisputed that Ms. Pine neither injured nor intimidated the passengers. The issue is whether Ms. Pine's conduct constitutes an interfering "physical obstruction."

legal right to enter the PWC parking lot through the exit driveway, citing certain provisions under Florida state traffic law which makes it a non-criminal moving violation for a driver to disobey a traffic control device such as an "Exit only" sign. Ms. Pine further asserts that the passengers could have entered the PWC through the designated entrance rather than the exit driveway. Finally, Ms. Pine argues that her actions cannot constitute a physical obstruction because her interaction with the occupants of the sedan was "consensual."

FACE provides that "[t]he term 'physical obstruction' means rendering impassable ingress to or egress from a facility that provides reproductive health services..., or rendering passage to or from such a facility...unreasonably difficult or hazardous." 18 U.S.C. § 248(e)(4). When interpreting a statute, the Court "must always yield to plain and unambiguous statutory text," *Polkey v. Transtecs Corp.*, 404 F.3d 1264, 1268 (11th Cir. 2005), which reveals that FACE contains no exception for ingress or egress constituting a moving violation under state law or where alternate methods of ingress or egress are available. Neither does FACE contemplate the subjective mind state of the persons allegedly obstructed. Rather, the physical obstruction element requires an objective analysis of the defendant's conduct and its effects on the alleged victims. *See* 18 U.S.C. § 248(e)(4); *New York ex rel. Spitzer v. Operation Rescue Nat'l*, 273 F.3d 184, 194 (2d Cir. 2001). Furthermore, other courts have declined to read additional limitations or exceptions into to the definition of physical obstruction. *See, e.g., Mahoney*, 247 F.3d at 284 ("The statute does not distinguish between frequently used and infrequently used means of egress, and we decline to write in such a distinction."); *United States v. Soderna*, 82 F.3d 1370, 1377 (7th Cir.1996) (broadly construing FACE so as to preclude arguments that a physical obstruction cannot occur where only one entrance is blocked). Based on these principles, the fact that the passengers sought entry through the PWC's exit driveway rather than

the designated entrance, and the fact that the passengers were not upset by or may have even been receptive to Ms. Pine's solicitation, does not defeat the Government's FACE claim as a matter of law. These facts are merely relevant to overall determination of whether the passengers' ingress was rendered unreasonably difficult or hazardous.[13]

The Government primarily relies on the Second Circuit case *Spitzer v. Operation Rescue National* in support of its argument that Ms. Pine's temporary stoppage of the sedan is sufficient constitute a physical obstruction under FACE. This case is analogous only to the extent that the protestors in *Spitzer* walked across driveways in order to stop the progress of oncoming cars. Unlike Ms. Pine, the *Spitzer* defendants engaged in other protest activities such as shouting at and standing in front of pedestrians approaching clinics, standing directly in front of clinic doors in order to block entry and communicate with patients entering and exiting the building, and threatening clinic workers, including one defendant who told clinic employees that they would die before the day ended. In upholding the preliminary injunction issued against the defendants, the court noted that their behavior was apparently "so extensive that it rendered building access unreasonably difficult." *Spitzer*, 273 F.3d at 194.

Here, although the parties dispute the exact location of Ms. Pine's body with respect to the vehicle, the record reveals that Ms. Pine approached the driver side window *immediately* after the vehicle stopped, and engaged the passengers in a seemingly consensual conversation. Within a matter of seconds, Officer Raja intervened and the driver was able to immediately proceed through the PWC driveway. This hardly rises to the level of extensive conduct engaged in by the *Spitzer* defendants. Ms. Pine's conduct was no more obstructive than if Officer Raja

[13] The Court also rejects Ms. Pine's argument that her actions do not constitute a physical obstruction because other vehicles had room to drive around the stopped sedan. The relevant issue in this case is whether Ms. Pine's actions physically obstructed the passengers of the sedan, and not anyone else.

himself had stopped the sedan and instructed the driver to turn around and enter through the designated entrance rather than the exit driveway. Moreover, the Court cannot conceive that such an innocuous incident is the type of obstruction Congress had in mind when it enacted FACE. The Court's interpretation of the law is guided "not just by a single sentence or sentence fragment, but by the language of the whole law, and its object and policy." *Balint*, 201 F.3d at 933. Moreover, courts must use common sense and should not interpret the law in a way which yields an absurd result. *See United States v. Haun*, 494 F.3d 1006, 1010 n.3 (11th Cir. 2007). Based on these principles, the Court finds that the evidence could not lead a rational jury to find that Ms. Pine's conduct constituted a physical obstruction within the meaning of FACE.

3. Interference

To the extent that Ms. Pine's arguments with respect to the physical obstruction element also apply to the second element of the Government's FACE claim (whether Ms. Pine intentionally interfered with a person), the Court finds that her arguments fail for the same reasons. FACE provides that the term "interfere with" means "to restrict a person's freedom of movement." 18 U.S.C. § 248(e)(2). Just as with physical obstruction, FACE's definition of interference does not provide for any exceptions, nor does it require evidence related to the subjective mental state of the person interfered with.[14] A FACE plaintiff need only prove that the "defendant intended to restrict the person or persons' freedom of movement." *Roe*, 253 F.3d at 681. In fact, the defendant's efforts do not even need to be successful, as FACE also prohibits attempts to interfere with a person. 18 U.S.C. § 248(a)(1).

[14] Unlike cases such as this which are based on allegations of interference by means of physical obstruction, FACE claims based on allegations that the defendant either injured or intimidated a person through force or threats of force generally require evidence of the aggrieved person's subjective mental state. *See Spitzer*, 273 F.3d at 196 (proof of statement's effect on its recipient is relevant to determining whether the statement is a threat); *Dinwiddie*, 76 F.3d 913 (considering testimony regarding victims' reaction to defendant's statements in order to determine whether they were intimidated). *See also* 18 U.S.C. § 248(e)(3).

In this case, it is undisputed that Ms. Pine approached the sedan in order to speak with and provide information about pro-life abortion alternatives to the passengers, and that the sedan stopped. Ms. Pine has provided testimony that she does not try to stop vehicles or pedestrians who are not interested in receiving her information, and the Government has not provided any evidence to the contrary. The Government has therefore failed to set forth sufficient evidence that Ms. Pine intended to restrict the passengers' freedom of movement, and the interference element of its FACE claim fails as well.

In sum, the record almost entirely devoid of evidence that Ms. Pine acted with the prohibited motive and intent or that Ms. Pine engaged in any unlawful conduct. The Government has failed to create a genuine issue for trial on all three elements of its FACE claim, and Ms. Pine is entitled to judgment as a matter of law.

D. Consitutional Implications

The Court further finds that a contrary holding would violate Ms. Pine's right to free speech guaranteed by the First Amendment of the United States Constitution. Congress, undoubtedly aware of FACE's potential First Amendment implications, specifically provided that FACE shall not be construed "to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 248(d)(1). The legislation has been upheld in spite of its incidental burdens on expressive conduct because it furthers the important government interest of protecting a woman's constitutional right to obtain reproductive health services such as abortion.[15] *Dinwiddie*, 76 F.3d at 923-24. Although facially constitutional,

[15] Intermediate scrutiny applies to a content-neutral law which incidentally burdens expressive conduct. *Dinwiddie*, 76 F.3d at 923. "A statute survives intermediate scrutiny 'if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that

Courts must remain mindful of the fact that an "erroneous application of [FACE] threatens to impinge legitimate First Amendment activity," which may even include aggressive forms of protest activity such as yelling and approaching persons. *Spitzer*, 273 F.3d at 195. A person is entitled to express his or her views on abortion so long as by doing it does not interfere with another's right to obtain an abortion.

In this case, Ms. Pine was on a public driveway conducting a peaceful demonstration on an important topic of public concern, which is precisely the type of conduct Congress excepted from FACE's reach. Stretching the terms of FACE to apply to this case so that delaying a vehicle for a matter of seconds constitutes an unlawful physical obstruction, or so that a desire to provide people with information about alternatives to abortion constitutes an unlawful motive, would unjustifiably impinge on Ms. Pine's First Amendment rights. This is especially true in light of the complete absence of evidence that the passengers, who were seemingly receptive to Ms. Pine's solicitation, were seeking reproductive health services at the PWC. There is thus no competing constitutional right to justify the burden placed on Ms. Pine's right of expression and hold her liable for a hefty civil penalty of up to $10,000.[16] The Court is at a loss as to why the Government chose to prosecute this particular case in the first place.

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interest.'" *Id.* at 923-24 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). "FACE easily passes this test," *id.* at 924, and has survived numerous First Amendment challenges. *See, e.g., U.S. v. Wilson*, 154 F.3d 658, 662 (7th Cir. 1998) ("the conduct prohibited by FACE is not protected by the First Amendment"); *Unterburger*, 97 F.3d 1413; *Cheffer*, 55 F.3d 1517; *Soderna*, 82 F.3d 1370; *Am. Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995); *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

[16] Ms. Pine also argues that the civil penalties authorized under 18 U.S.C. § 248(c)(2)(B) are facially unconstitutional because they criminal rather than civil in nature, and therefore deprive individuals of the constitutional protections afforded to criminal defendants. Having already concluded that the Government has failed to establish its *prima facie* case, and that FACE as applied would violate Ms. Pine's First Amendment rights, the Court declines to analyze the constitutionality of FACE's civil penalties.

IV. Conclusion

In conclusion, the Court finds that the Government has failed to set forth *prima facie* evidence on all three elements of its FACE claim—that Ms. Pine's conduct created a physical obstruction, that Ms. Pine intended to interfere with the passengers' freedom of movement, and that Ms. Pine was motivated by a desire to prevent a person from obtaining reproductive health services. Further, imposing liability upon Ms. Pine under the circumstances of this case would unjustifiably burden Ms. Pine's rights under First Amendment of the United States Constitution. For these reasons, Ms. Pine is entitled to judgment as a matter of law.

The Court has carefully considered the motion, response, reply, applicable law, and pertinent portions of the record. For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that defendant Mary Susan Pine's motion for summary judgment **[DE 66]** is **GRANTED**. Final judgment will be entered by separate order.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 13 day of January, 2012.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

EXHIBIT E

Amended Complaint filed against Susan Pine on November 8, 2010 by DOJ Civil Rights Division in *Holder v. Pine*, Case No. 9:10-cv-80971-KLR (S.D. Fla.), dkt. no. 30.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
MARY SUSAN PINE,	:	No. 9:10-cv-80971-KLR
Defendant.	:	

AMENDED COMPLAINT

Eric H. Holder, Jr., Attorney General of the United States of America (the "United States Attorney General"), by the undersigned attorneys, asserts a civil cause of action under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (1994), enacted into law May 26, 1994, as follows:

1. In bringing this action, the United States Attorney General has reasonable cause to believe: (1) Defendant, Mary Susan Pine, has committed, and is likely to continue to commit, violations of FACE; and (2) various persons are being, have been, and will continue to be injured by Defendant's conduct.

JURISDICTION, STANDING, AND VENUE

2. This Court has jurisdiction over this action pursuant to FACE, 18 U.S.C. § 248(c)(2), and 28 U.S.C. § 1345.

3. The United States Attorney General has standing to bring this action pursuant to FACE, 18 U.S.C. § 248(c)(2).

4. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b)(1) and (b)(2), in that Defendant resides in this judicial district, and all the events giving rise to this complaint occurred in this judicial district.

DEFENDANT

5. Defendant, Mary Susan Pine, is a regular and vocal anti-abortion protester at the Presidential Women's Center, located at 100 Northpoint Parkway in West Palm Beach, Florida.

6. On information and belief, Defendant resides in West Palm Beach, Florida.

FACTUAL BACKGROUND

7. The Presidential Women's Center provides women's reproductive healthcare services.

8. Defendant has engaged in anti-abortion protest activity outside the Presidential Women's Center for several years.

9. Defendant is one of two protesters who typically conducts her protest activity on the south side of Northpoint Parkway, which includes walking back and forth in the Presidential Women's Center's driveway.

10. Defendant has also intentionally stepped in front of cars as the drivers attempt to enter the driveway to the Presidential Women's Center to access the parking lot.

11. On November 19, 2009, Defendant physically obstructed a car by stepping in front of the car as it was attempting to enter the driveway to the Presidential Women's Center to access the parking lot.

12. Defendant then stopped and stood in front of the car as it was attempting to enter the driveway to the Presidential Women's Center to access the parking lot.

13. The driver of the approaching car stopped to avoid striking Defendant.

14. A West Palm Beach Police Officer, who was in his vehicle conducting routine patrol in the area, observed Ms. Pine step in front of the car and stop, blocking it from entering the clinic parking lot.

15. During the time the car was standing still, in the driveway, no other cars could enter the driveway, and other cars on Northpoint Parkway had to drive around it, into the oncoming lane, to be able to proceed down the street.

16. When it became apparent to the police officer that the defendant was not going to move out of the driveway, the police officer parked his vehicle, got out, approached the driveway, and intervened so that the driver could enter the Presidential Women's Center parking lot.

17. The vehicle then proceeded into the Presidential Women's Center parking lot.

18. Ms. Pine then yelled at the officer, and told him "it was her right to do what she is doing."

19. The officer told Ms. Pine that she was in violation of Florida State Statute 316.2045(1)(2) (obstructing public, streets, and road) and of City Ordinance Chapter 78-1 and 78-427 (prohibiting impeding traffic flow entering a medical facility).

20. Defendant intentionally attempted to, and did, interfere with access to the Presidential Women's Center, by interfering with the driver's freedom of movement and making access to the clinic unreasonably difficult.

21. Defendant intentionally attempted to, and did, interfere with access to the

Presidential Women's Center, by making the driver's access to the clinic hazardous.

22. Defendant intentionally attempted to, and did, interfere with access to the Presidential Women's Center by causing the car to stop in the clinic driveway, which blocked the driveway to any other cars whose drivers or passengers may have wished to enter the clinic driveway or parking lot.

CAUSE OF ACTION UNDER 18 U.S.C. § 248

23. The United States incorporates herein the averments of paragraphs 11 through 22 hereof.

24. Defendant's conduct as described in paragraphs 11 through 22 hereof constitute a physical obstruction which interfered with a person who had been seeking reproductive health services.

25. On information and belief, unless Defendant is restrained by this Court, Defendant will continue to engage in the illegal conduct averred herein.

26. The United States Attorney General is authorized under 18 U.S.C. § 248(c)(2)(B) to seek and obtain temporary, preliminary, and/or permanent injunctive relief from this Court for Defendant's violation of FACE.

27. The United States Attorney General is further authorized under 18 U.S.C. § 248(c)(2)(B)(i) to assess a civil penalty against a respondent no greater than $10,000.00 for a nonviolent physical obstruction.

WHEREFORE, the United States Attorney General respectfully requests judgment in his favor and against Defendant, Mary Susan Pine, in the form of:

A. An Order prohibiting Defendant, Mary Susan Pine, from entering any driveway leading into the Presidential Women's Center parking lot;

B. An Order prohibiting Defendant, Mary Susan Pine, and her representatives, agents, employees and any others acting in concert or participation with her, from violating the Freedom of Access to Clinic Entrances Act; and

C. A civil penalty assessment in the amount of $10,000.00.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Veronica Harrell-James

Veronica Harrell-James

SERVICE LIST

ERIC H. HOLDER, Jr., ATTORNEY GENERAL OF THE UNITED STATES
v.
MARY SUSAN PINE
Case No. 9:10-CV-80971-klr
United States District Court, Southern District of Florida

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EXHIBIT F

Joint Notice of Withdrawal of Fee Petition and Stipulation for Resolution of all Pending Matters, Holder v. Pine, **Case No. 9:10-cv-80971-KLR (S.D. Fla.), dkt. no. 106, filed March 23, 2012.**

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

HOLDER, ERIC H., JR., U.S. ATTORNEY GENERAL,	:	**CIVIL ACTION**
	:	**9:10-cv-80971-KLR**
Plaintiff,	:	
	:	**JUDGE KENNETH L. RYSKAMP**
v.	:	
	:	
MARY SUSAN PINE,	:	
	:	
Defendant.	:	

JOINT NOTICE OF WITHDRAWAL OF FEE PETITION AND STIPULATION FOR RESOLUTION OF ALL PENDING MATTERS

The parties hereby notify the Court that they have reached a compromise of all pending matters in this litigation, as follows:

1) Defendant Mary Susan Pine ("Defendant") hereby withdraws her Fee Petition (dkt. 102), without prejudice of the right to re-file in the event the United States does not perform its obligations set forth in paragraphs 2 and 3.

2) Within sixty (60) days of the filing of this Stipulation, the United States shall deliver to Defendant, c/o Liberty Counsel, P.O. Box 540774, Orlando, FL 32854, the sum of $120,000.00 (one hundred-twenty thousand dollars and no cents), via check, electronic funds transfer, or bank draft payable to "Liberty Counsel, Inc.," as and for reasonable attorneys fees and costs incurred by Defendant in this action. This payment shall fully resolve and settle all of Defendant's claims for attorney's fees and non-taxable costs in connection with this case. The United States enters into this Stipulation as an expedient and cost-effective alternative to continued costly litigation, and thus makes no admission of liability.

3) On today's date, the United States shall withdraw and/or dismiss, with prejudice, its appeal of this matter now pending at the Eleventh Circuit Court of Appeals, via stipulation filed in this Court pursuant to Fed. R. App. P. 42(a).

4) This Stipulation reflects the parties' entire agreement on this subject matter, and replaces all prior discussions and agreements.

Respectfully submitted,

/s/ Samantha K. Trepel

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on March 23, 2012. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Horatio G. Mihet
HORATIO G. MIHET
One of the attorneys for Defendant

SUPPLEMENT

Abbate, Julie (CRT)

rom: Mona Reis [redacted]
Sent: Monday, January 25, 2010 11:33 AM
To: Abbate, Julie (CRT)
Cc: Helen Reid
Subject: Re: Update

Thanks so much for the update- please let me know if there us anything else you need from us.
I am delighted that you were made aware of the letter and that their was a personal note from your boss! I sincerely hope u know Joe much your interest has meant to us- we are beginning to talk about having a celebration in november for our 30th year- certainly I will hold the dream of justice as a possibility to toast !
Be well and send my best to Cathy
M

Sent from my iPhone

On Jan 25, 2010, at 11:10 AM, "Abbate, Julie (CRT)" <Julie.Abbate@usdoj.gov> wrote:

> Hi, Mona – I just wanted to thank you, again, for your extremely kind words to Eric Holder about me & Cathy! I just this morning received a copy of the letter with a notation on it from Mr. Holder. So, thanks again – I still can't believe you were able to do that!!
>
> Also, Cathy and I got in touch with Office Raja last week and will start drafting up our documents today and hopefully get them in the pipeline soon. We'll do our best to keep you in the loop, and please don't hesitate to contact either of us with any questions or concerns.
>
> Thanks again,
>
> Julie

EXHIBIT
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Mr. GOODLATTE. Thank you very much.
Professor Bagenstos, welcome.

TESTIMONY OF SAMUEL R. BAGENSTOS, PROFESSOR OF LAW, THE UNIVERSITY OF MICHIGAN LAW SCHOOL

Mr. BAGENSTOS. Thank you. Thank you, Mr. Chairman, and thank you, Ranking Member Conyers, and Members of the Committee for inviting me to testify today. I have had the privilege in

my life of serving twice in the Civil Rights Division of the Justice Department, first at the beginning of my career as a career attorney where I really learned how to be a lawyer from the excellent career attorneys who had been civil servants throughout many Administrations in the Civil Rights Division, and then as a member of the senior leadership team in the Division as a political appointee from mid-2009 to mid-2011. And I began service as Principle Deputy Assistant Attorney General in January of 2010, which was one of the great honors of my career.

Now, I discuss in my written testimony the many, many achievements, and only a subset of the many, many achievements, of the Division in the last 4 years. Let me just note a few here because they are extremely notable: 40 percent more human trafficking cases; nearly 75 percent more hate crimes convictions than the previous 4 years; an unprecedented effort to enforce the Supreme Court's Olmstead decision for people with disabilities, including 44 matters in 23 States with major settlements with North Carolina, Virginia, Georgia, and Delaware; 16 agreements to guarantee services to English language learners; 10 agreements to address the serious problem of discriminatory harassment that keeps kids from learning; record setting settlements for sexual harassment by landlords of their tenants; and more than $600 million in settlements for violations of the Fair Lending Laws.

More than $50 million in relief for our soldiers and sailors under the Service Member Civil Relief Act; nearly 40 percent increase in the number of cases brought to enforce the employment rights of our returning veterans; and landmark settlements with the New Orleans Police Department and the Shelby County, Tennessee juvenile just system, in addition to many, many others.

But perhaps the best illustration of the success of the Assistant Attorney General Perez's effort comes from the voting rights area. When Tom Perez arrived in 2009, in October of 2009, the Division's Voting Section was in disarray, and his career staff was demoralized. Both the IG's recent report and its 2008 joint report with the Office of Professional Responsibility document this fact extensively. Those reports show massive turnover among career attorneys from 2003 to 2008, and a pervasive atmosphere of politicization in the Voting Section, an atmosphere that stemmed—unfortunately I hate to say this—but an atmosphere that stemmed directly from the reports found to be the unlawful politicized hiring decisions made by a former Acting Assistant Attorney General, Brad Schlozman.

Details are in my written testimony, but the 2008 joint report really bears careful reading for anyone who wants to understand the management task that Tom Perez was confronting when he took over.

Now, this kind of pervasive politicization of the career civil service from the very top is a culture that cannot be changed overnight, and nobody thinks it can. But Tom Perez realized he had to begin right away to restore the culture of nonpartisanship, transparency, and professionalism to the Division, and that is exactly what he did.

After taking office in October of 2009, he quickly moved to restore a career-driven, merit-based hiring process, and the recent

OIG report demonstrates that this process has been successful. In making hires under the new policy, the report found, the Voting Section "was keenly focused on the candidates' voting litigation experience and substantive knowledge of voting rights." That is exactly what they should have been focused on.

The report found that the new attorneys had "a high degree of academic and professional achievement, and that the hired attorneys had substantially higher achievement than the people who were not hired." Now, of course, culture change takes time, but the Voting Section has made major progress, and the proof is in the results.

In each of the past 2 Fiscal Years, the Section set a record for the largest number of new matters in litigation it has handled: 43 last year, 27 the year before. These include major, major cases defending judicial preclearance actions and defending the constitutionality of Section 5 of the Voting Rights Act. In the last 4 years, the Section has filed and obtained settlements in seven cases to enforce the Voting Rights Act's language minority provisions, including the first case brought on behalf of Native Americans 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 it has vigorously enforced the MOVE Act, which ensures that our men and women in uniform and other citizens overseas have their voting rights protected. Twenty-one litigations or settlements since the act took effect, all in this Administration, including filing lawsuits and obtaining consent degrees or preliminary injunctive relief against six States and the Virgin Islands in the 2012 election alone.

Now, similar stories could be told throughout the Division. When Tom Perez arrived at the Civil Rights Division, it was divided and demoralized. The work is not done, but thanks to his leadership and management skills and the very hard work of extraordinarily dedicated career attorneys, things have turned around, and I am very pleased to testify about that today.

[The prepared statement of Mr. Bagenstos follows:]

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

[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

[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

[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—

[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.

Mr. GOODLATTE. Thank you very much.
And our final witness, Mr. Adams. Welcome.

TESTIMONY OF J. CHRISTIAN ADAMS, FOUNDER, ELECTION LAW CENTER

Mr. ADAMS. Thank you, Mr. Chairman, Ranking Member Conyers, and Members of this Committee.

While at the Department, I was fortunate to serve with dedicated attorneys and staff who had profound respect for the rule of law and placed integrity at the center of their personal and professional life.

Unfortunately, over the last few years, the Civil Rights Division of the Justice Department has seen instances of embezzlement, employee abuse, harassment, theft, and perjury. Little to nothing has been done by Division management in response. In some cases, Division management has defended, or promoted, or given awards to the wrongdoers.

Tragically, the Civil Rights Division has also pursued abusive and meritless cases against Americans exercising free speech rights, as well as States enacting voter integrity measures. So meritless, courts have imposed cost sanctions against the Division. Simply, the Civil Rights Division under the current management have pervasively abused the civil rights of Americans, abused the fiscal trust of the taxpayers, and abused the rule of law.

Perhaps worst of all, Thomas Perez, the Assistant Attorney General for Civil Rights, has repeatedly provided inaccurate testimony under oath to this Committee, as well as the Civil Rights Commission on multiple matters, including whether or not he knew that this corrosive and abusive atmosphere existed inside his Division toward employees willing to enforce the voting laws in a race neutral fashion.

This hostility toward enforcement of voting laws in a race neutral has festered into name calling, harassment, racial attacks on DoJ employees, both Black and White, who were willing to enforce the law race neutrally. For example, the IG report documents vile racial harassment against an African-American paralegal, who served on the New Black Panther case with me and another similar matter. This dedicated and hardworking paralegal, as well as his mother, who is a long-time DoJ employee, was subject to cruel racial harassment by other DoJ employees for working on the New Black Panther case. When Mr. Perez testified in May of 2010 before the U.S. Commission on Civil Rights that he had never heard of this sort of hostility, he testified falsely.

My written testimony details multiple instances of harassment of an employee also for his evangelical Christianity.

There is a false perception that the Division has vigorously protected minority voting rights more than the prior Administration. The current Administration has failed to initiate a single Section 2 Voting Rights Act case investigation which resulted in enforcement action since the inauguration in 2009. Voter rolls nationwide are filled with millions of ineligible and dead voters, yet the Division is deliberately refusing to enforce Section 8 of the National Voter Registration Act, and require States to purge their voter rolls because Division leadership, as detailed in the IG report, has a

philosophical disagreement with this purging statute. Hundreds of counties across the country now have more voters registered than people alive, and this Division leadership spiked investigations into these places.

A Washington Times story headlined, "Taxpayers Finance Justice Officials' Romantic Travel," reported that a Division employee embezzled at least $30,000 in money and travel, including hotel rooms in Miami, and according to Senator Grassley—excuse me, and cash advances. Current Division leadership oversaw this fiasco, yet according to Senator Grassley, did absolutely nothing about it. The whistleblowers in this case have been treated more poorly by Division leadership than was the person who took the money.

Division leadership has overruled career lawyers who recommended South Carolina voter ID be pre-cleared in 2011 under Section 5 of the Voting Rights Act. Their recommendation was overruled. An expensive, costly, and ultimately meritless objection was interposed. South Carolina was forced to spend over $3.5 million to obtain approval of South Carolina voter ID. The Federal taxpayers almost certainly also wasted millions.

As I have already testified, the hostility in the Division toward equal enforcement of civil rights laws was open and pervasive. The IG report confirms all of my testimony in that regard. Former Voting Section Chief Christopher Coates was subject to harassment, and many of those employees who engaged in this conduct are still employed by the Division.

Coates was targeted for removal by the Division and political appointees specifically because of his willingness to enforce the law equally. The Attorney General was even aware of this and did not instruct Division leadership that it could be illegal to target Coates in this way. The IG report documents many other details.

In a few decades, America will look very different. The founding documents presume that all Americans should be treated equally before the law, and it is time that the Civil Rights Division act accordingly.

[The prepared statement of Mr. Adams follows:]

Testimony of

J. Christian Adams

House Judiciary Committee

Mismanagement at the Civil Rights Division of the Department of Justice

April 16, 2013

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Chairman Goodlatte, Ranking Member Conyers, and members of the Committee:

Thank you for the opportunity to testify in this important matter. Fair, impartial and measured enforcement of the nation's civil rights laws are an admirable goal we all share. I served for five years as a career attorney in the Voting Section at the United States Department of Justice from 2005 through 2010. There, I investigated and brought a range of cases to protect minority rights under the anti-discrimination and minority language provisions of the Voting Rights Act, and also cases to enforce obligations under National Voter Registration Act/ Help America Vote Act. I reviewed preclearance submissions under Section 5 of the Voting Rights Act. I was fortunate to serve with dedicated attorneys and staff who had profound respect for the rule of law and placed integrity at the center of their personal and professional life.

Unfortunately, over the last few years, the Civil Rights Division at the Justice Department has seen instances of embezzlement, employee abuse, harassment, theft, and perjury. Little to nothing has been done by Division management in response. In some cases, Division management has defended, promoted or given awards to the wrongdoers. The Division has implemented hiring practices which, according to the Justice Department Inspector General, have created the perception of an ideologically lopsided workforce. Division management has rejected the recommendations of the Inspector General and resisted making changes to ensure non-ideological hiring at the Division.

Tragically, the Civil Rights Division has also pursued abusive and meritless cases against Americans who are exercising free speech rights, as well as states enacting voter integrity measures – so meritless that courts have imposed cost sanctions against the Division. The Division has once again returned to the unsavory practice criticized by federal courts over the

years by acting as advocates and partners of outside interest groups instead of behaving as a neutral and detached law enforcement agency.

Simply, the Civil Rights Division under the current management has perversely abused the civil rights of Americans, abused the fiscal trust of the taxpayers and abused the rule of law.

False Testimony of Assistant Attorney General Thomas Perez

Perhaps worst of all, Thomas Perez, the Assistant Attorney General heading the Division, has repeatedly provided inaccurate testimony under oath to Congress as well as to the United States Commission on Civil Rights. This is not an accusation I make lightly. Nor do I make it alone. Christopher Coates, a former ACLU voting lawyer and former Voting Section Chief at the Justice Department corroborates this assessment and would do so under oath before Congress given sufficient notice of your interest to hear his testimony. Other current Department of Justice attorneys could further corroborate that Mr. Perez provided false testimony under oath and I am happy to work with the Committee on this point.

Mr. Perez has repeatedly provided false or inaccurate testimony under oath on two important matters: First, *which Justice Department officials were involved* in the decision to dismiss the voter intimidation case against the New Black Panther Party; and, second, *whether or not he knew that a corrosive and abusive atmosphere existed inside his Division toward employees willing to enforce voting laws without regard to the race of the victims*. On both counts, Mr. Perez provided wholly inaccurate testimony under oath.

The recent report by the Justice Department Inspector General raises serious questions about Mr. Perez's forthrightness and completeness in providing testimony regarding who at the Department was involved in the dismissal of the New Black Panther voter intimidation case. In

his testimony before the United States Commission on Civil Rights, the following exchange occurred.

"COMMISSIONER KIRSANOW: Was there any political leadership involved in the decision not to pursue this particular case any further than it was?

ASST. ATTY. GEN. PEREZ: No. The decisions were made by Loretta King in consultation with Steve Rosenbaum, who is the Acting Deputy Assistant Attorney General." (Cited in, Review of the Operations of the Voting Section of the Civil Rights Division, U.S. Department of Justice, Office of Inspector General, March 2013, at p. 64)("IG Report").

His testimony proved to be inaccurate as the IG Report documents a wide range of individuals who were "consulted" about the New Black Panther dismissal before it occurred, including Attorney General Eric H. Holder, Jr. Id, at 71. While the report of the Inspector General concludes that Perez did not commit perjury on this point, it notes however:

> Nevertheless, given he was testifying as a Department witness before the Commission, we believe that Perez should have sought more details from King and Rosenbaum about the nature and extent of the participation of political employees in the NBPP decision in advance of his testimony before the Commission. The issue of whether political appointees were involved in this matter had already engendered substantial controversy, and Perez told us he expected questions about it would arise during his testimony.

IG Report at 73.

The IG Report goes further, and describes a strained and incomplete accounting by Mr. Perez in his testimony before this Committee on June 1, 2011:

> In his OIG interview, Perez said he did not believe that these incidents constituted political appointees being "involved" in the decision. We believe that these facts evidence "involvement" in the decision by political appointees within the ordinary meaning of that word, and that Perez's acknowledgment, in his statements on

> behalf of the Department, that political appointees were briefed on and could have overruled this decision did not capture the full extent of that involvement.

Id, at 73.[1]

The Inspector General omitted entirely from the IG Report a second and far more serious instance of Mr. Perez's inaccurate testimony – namely his false testimony under oath about an open and pervasive hostility toward race neutral enforcement of the law throughout the Civil Rights Division.

This hostility toward race neutral enforcement of civil rights laws – namely that the race of the victim and defendant should have no relevance in enforcement decisions – went far beyond mere policy decisions. The pervasive hostility festered into abuse, name calling, harassment, and racial attacks on DOJ employees – both black and white – who were willing to enforce the law in a race neutral fashion.

For example, the IG Report documents vile racial harassment against an African-American paralegal who served on the New Black Panther case and in the case of *United States v. Ike Brown* in the Mississippi (a Voting Rights Act case where the wrongdoer was black and the victims were white).

This dedicated and hardworking paralegal, as well as his mother who is a longtime DOJ employee, were subjected to cruel racial harassment by other DOJ employees for his work on these two cases. The sum and substance of the harassment was premised on the belief that he

[1] See also, "The documents reveal that political appointees within the Department were conferring about the status and resolution of the New Black Panther Party case in the days preceding the Department's dismissal of claims in that case, which would appear to contradict Assistant Attorney General Perez's testimony that political leadership was not involved in that decision." *Judicial Watch, Inc. v. U.S. Dept. of Justice*, --F. Supp. 2d ----, 2012 WL 2989945, D.D.C. July 23, 2012.

should not have worked on the cases because he was black. Many of the wrongdoers are still employees of the Division. AAG Perez has taken no steps, as far as I know, to terminate or otherwise discipline the wrongdoers described in the IG Report. In my view, Perez's inaction says much about his capacity to manage the Division in a racially fair way and raises the profound question for all Americans whether they can rely on equal treatment by the Justice Department when their civil rights are deprived.

When Perez testified in May of 2010 before the U.S. Commission on Civil Rights that he had never heard of this type of hostility toward race neutral enforcement of the law by Division employees, he testified falsely.

Former DOJ Voting Section Chief Christopher Coates and I have penned a joint editorial at the *Washington Examiner* saying:

> His testimony was false. We should know. We detailed this problem to Perez in his office the day before his testimony. We described the long and detailed history of hostility by many DOJ employees toward race-neutral enforcement of the voting rights laws if the victims of discrimination were white. Yet when Perez was pressed by Civil Rights Commission member Todd Gaziano on whether he was aware of such rancid attitudes toward protecting white victims, he replied: "We don't have people of that ilk, sir." Perez knew that wasn't true. The inspector general's report documents people "of that ilk," stacked from top to bottom at the Civil Rights Division, most still working there. The report reveals that even Perez is "of that ilk."

Washington Examiner, March 24, 2013. (http://washingtonexaminer.com/perez-should-not-become-secretary-of-labor/article/2525249).

The IG Report is entirely silent about this second and far more serious instance of Mr. Perez not providing accurate testimony under oath, and three current or former Justice Department lawyers can corroborate that he testified inaccurately. The report's ommission is

perplexing because in my experiences with the line attorneys in the Inspector General's office, they took these issues very seriously.

Harassment of Division Employees for their Faith and Beliefs

The Division has been characterized by open and unashamed harassment of certain employees who are perceived to be *overly Christian* or conservative. The IG Report documented multiple instances of harassment by Division employees based on beliefs. "In one posting, one of the employees that we identified characterized the ideal neighborhood of one reportedly conservative career Section attorney as 'everyone wears a white sheet, the darkies say 'yes'm,' and equal rights for all are the real 'land of make believe.' . . . Another post by a career Section employee asserted that "a good, ethical Republican" is a "seeming oxymoron.'" (IG Report at 128). Obviously no conservative lawyer believed these absurd racialist stereotypes.

Another employee was harassed for his evangelical Christian beliefs. The IG Report describes multiple instances of harassment against this employee: "The new attorney was ostracized and ridiculed, and had his work product copied from his computer files and distributed without his knowledge or permission, at least in part because of the perception that he was conservative and because of the legal positions he advocated while working on the submission." IG Report at 134. The IG Report also notes that this employee was harassed for his "personal beliefs." IG Report at 120-121. I can testify from firsthand experience the "personal beliefs" that resulted in him being mocked and despised were his evangelical Christianity.

While the instances of harassment of employees described in the IG Report are too voluminous and lengthy to replicate here, one additional example demonstrates an unprofessional and disturbing situation:

> The second individual who admitted to the Internet postings was Gerald Crenshaw, another non-attorney employee in the Voting Section. Crenshaw stated that he and other employees constituted a "cyber-gang" that was engaged in "cyber-bullying." He told the OIG that, for his Internet postings, he selected as his alias the name of the protagonist of a well-known novel because he represented "the archetype angry black guy." According to Crenshaw, he understood that the character had killed at least one person in the novel and stated that the fact that others who were familiar with the character might be afraid of the name could have played a "small part" in his selection of that pseudonym.

IG Report at 129.

People involved in the campaigns of harassment described in the report *remain employed at the Division* and handle sensitive matters such as the review of submissions under Section 5 of the Voting Rights Act by covered jurisdictions such as Texas, South Carolina, North Carolina, Alabama, Virginia, California, Arizona, Georgia and Florida. Finally, current Division leadership has essentially solved the problem of harassment of evangelical Christians and conservatives by effectively ensuring that they are no longer hired.

DOJ Collusion With and Financing of Outside Liberal Interest Groups

Unfortunately, the Division has deliberately allowed old bad habits to return by colluding with outside liberal interest groups. The Justice Department is not a public sector outpost of the ACLU or Project Vote. DOJ should be a neutral and detached law enforcement agency. Unfortunately, the Division is improperly colluding with outside liberal interest groups as well as behaving as if the groups are a partner, not a detached third party.

For example, when a submission is made under Section 5 of the Voting Rights Act to the Voting Section by a covered jurisdiction, Division management has instructed staff to fax the submissions to outside liberal interest groups such as the Southern Poverty Law Center, the ACLU and the Lawyers Committee for Civil Rights Under Law. DOJ staff are instructed to telephone these groups and "just have them fax us a freedom of information request when they

get the chance." Other non-liberal groups who might be interested in the submission are not given such special treatment by the Division.[2]

The reason this renewed collusion is important is because of the long history of abuse and unfairness it engenders, as documented by federal courts. In *Johnson v. Miller* (864 F. Supp. 1354, 1364 (S.D. Ga. 1994)), the United States District Court sanctioned the Voting Section $594,000 for collusive misconduct by DOJ Voting Section lawyers. A federal court noted that the ACLU was "in constant contact with the DOJ line attorneys." Pronouncing the communications between the DOJ and the ACLU "disturbing," the court declared, "It is obvious from a review of the materials that [the ACLU attorneys'] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities." After a Voting Section lawyer professed that she could not remember details about the relationship, the court found her "professed amnesia" to be "less than credible."

The collusion with outside groups is not just limited to *Johnson v. Miller*. More subtle and inappropriate collusion affected *Glasper v. Parish of East Baton Rouge* resulting in a reassignment of DOJ lawyers on the matter. Case No. 93-537 (M.D. La.), Document Nos. 183 and 187.[3]

The Division's collusion resulted in outside activist groups benefiting from a large cash fund in a settlement engineered by the Division. Instead of reimbursing the supposed victims of

[2] Presumably, the Committee could obtain government documents corroborating this testimony such as fax FOIA requests by the interest groups, email FOIA requests, or even fax transmission records from the two separate fax lines used by the Voting Section.
[3] I discuss in greater detail the reasons behind the attorney reassignments in *Glasper* in my book *Injustice* (Regenery, 2011), pp 88-89.

housing discrimination, the Division pushed a settlement requiring the defendant to set aside $1,000,000 for a "qualified organization to provide credit counseling, financial literacy, and other related educational programs targeted at African-American borrowers." (*United States of America v. AIG Federal Savings Bank and Wilmington Finance, Inc.*, No. 10CV178-JJF, http://www.justice.gov/crt/about/hce/documents/aigsettle.pdf.) The Division is empowered to approve which "qualified organization" will be the beneficiary of the fund. Naturally, the beneficiary of this fund will be aligned ideologically and politically with the administration. This type of arrangement in the past helped fund the now-defunct ACORN group. The million dollar AIG fund was no isolated incident. In 2009, the Division created another money pot in the settlement of *United States v. Sterling*, a housing discrimination case. (*United States v. Donald Sterling et al.*, Case Nos. 06-4885 DSF, 06-7442 DSF, and 07-7234 DSF, http://www.justice.gov/crt/about/hce/documents/sterlingsettlefinal.pdf.).

Voting Rights Act Section 2: Zero Cases in Four Years

There is a false perception that the Division has more vigorously protected minority voting rights than in the prior administration.

The Division is woefully lacking in enforcement of Section 2 of the Voting Rights Act. Section 2 of the Voting Rights Act is the broad prohibition on discrimination in elections, and frequently manifests as lawsuits against at-large electoral systems. While the prior administration vigorously enforced Section 2, enforcement under the current administration has been essentially dormant. In fact, the current administration has failed to initiate a single Section 2 investigation which resulted in an enforcement action since January 20, 2009.

Consider the critics of the prior administration, including Wade Henderson of the Leadership Conference on Civil Rights. On March 22, 2007, he complained to this Committee about the purported lack of Section 2 cases brought by the prior administration, complaining: "the [Civil Rights] Division must deal with and respond to growing distrust among minority communities who feel increasingly abandoned and marginalized by the Division's litigation choices and priorities." When Henderson made this complaint, the Division was in the process of litigating two Section 2 cases: *United States v. Osceola County, FL* (M.D. Fla 2005) and *United States v. Village of Port Chester, NY* (S.D.N.Y. 2006). In preparing this testimony, I could find no complaints to the media from Mr. Henderson about the fact the current administration has not brought a single Section 2 case since I filed *United States v. Town of Lake Park, FL* (S.D. Fla. 2009), when I was a lawyer at the DOJ in March of 2009. The investigation of the *Lake Park* case was approved by the prior administration. Thus, the current administration has not initiated then brought a single Section 2 lawsuit.

In December 2009, Assistant Attorney General Thomas Perez criticized the prior administration Voting Section before the American Constitution Society: "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."[4] The enforcement record three years removed from Perez's 2009 bravado at ACS paints a very embarrassing portrait of the Division's voting rights enforcement record.

In response to criticism for failing to enforce Section 2, last year the Division adopted a curious new public position – that it is conducting a "record number" of Section 2 investigations.

[4] Cited in Serwer, The Battle for Voting Rights, *The American Prospect*, January 8, 2010. http://prospect.org/article/battle-voting-rights-0.

AAG Perez told the National Secretaries of State in 2012 that the DOJ has opened "almost 100" Section 2 investigations. He testified on July 26, 2012 before this Committee about a record number of voting cases and investigations "handled" by the Division. In the nine months since his testimony to you, not a single Section 2 case has been filed.

National Voting Registration Act Section 8

Voter rolls nationwide are filled with millions of ineligible and dead voters.[5] Yet the Division is deliberately refusing to enforce Section 8 of the National Voter Registration Act and require states to purge rolls because leadership of the Division has philosophical disagreement with the purging statute. Hundreds of counties across the country have more voters registered than people alive. Sworn testimony by Voting Section Chief Christopher Coates said that the Division spiked his recommendation to investigate eight states which had counties with serious noncompliance with Section 8.[6] The IG Report further documents instructions given by a Division political appointee to stop enforcement of Section 8 because of philosophical disagreement with the law. For example, the IG Report states:

> ***Thirteen witnesses*** told the OIG that [Division DAAG] Fernandes stated that she "did not care about" or "was not interested" in pursuing Section 8 cases, or similar formulations. For instance, Chris Herren, who was later promoted by current Division leadership to Section Chief, told the OIG that Fernandes made a controversial and "very provocative" statement at this brown bag lunch. In particular, Herren stated that Fernandes stated something to the effect of "[Section 8] does nothing to help voters. ***We have no interest in that***."

IG Report at 100 (emphasis added).

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[5] See, Pew study: 2 million dead Americans on active voter rolls, *The Hill*, February 14, 2012. http://thehill.com/blogs/ballot-box/other-races/210327-pew-study-2-million-dead-americans-on-active-voter-rolls#ixzz2QOucxHOj

[6] Written testimony of Christopher Coates before the U.S. Commission on Civil Rights at pp 14-15. Found at: http://www.pjmedia.com/files/2010/09/christopher_coates_testimony_9-24-10.pdf.

Unfortunately, the Justice Department has not brought a single case under Section 8 of the National Voter Registration Act for over four years. With hundreds of counties across the nation with more voters on the rolls than could possibly be eligible to vote, the outright refusal to enforce Section 8, a provision that was part of a carefully crafted compromise by this Congress in 1993, threatens the integrity of American elections.

Electronic Surveilance and Section 7 of the NVRA

In contrast to the abandonment of enforcement obligations under Section 8 of the NVRA, the Division has aggressively pursued actions against states under Section 7 of the NVRA. Section 7 is the public welfare public service agency voter registration requirement of Motor Voter. The IG Report reveals, (as do various freedom of information requests by groups such as Judicial Watch), that liberal interest groups have aggressively lobbied the Division for these cases. (IG Report at 103, n. 82).

In response to this lobbying effort, the Division adopted unprecedented investigative tactics for a Voting Section case. *The Division used clandestine electronic surveillance of state officials*, for certain in Louisiana and quite likely in Georgia, Alabama and Rhode Island. Division employees were *wired with recording devices and sent into state welfare offices* to ascertain if state officials affirmatively pushed voter registration on the DOJ employees. The equipment was borrowed from the Housing Section testing program. The Voting Section had never done this before in any prior administration. The clandestine electronic recording marked a rather dramatic investigative turn given that no Voting Section employees conducting the investigation had any experience with these techniques and had never litigated a case in which undercover electronic eavesdropping was used to collect evidence.

Division Employee Embezzlement

The *Washington Times* reported that a Division employee embezzled at least $30,000 in money and travel. "The charges include hotel rooms in Florida and the District, cash advances, gasoline and other charges apparently unrelated to his work." Taxpayers financed Justice official's romantic travel, *Washington Times*, October 5, 2011. (http://www.washingtontimes.com/news/2011/oct/5/justice-official-financed-romantic-travel-with-tax/?page=all). Current Division leadership oversaw this fiasco, yet according to Senator Grassley, did nothing about it: "Sen. Chuck Grassley, in a Sept. 28 letter, asked Mr. Holder to explain why the supervisor, . . . apparently did not have to reimburse the government for money he spent on trips to meet with the Miami woman, including hotels and rental cars. . . . The fact that he was apparently being asked to justify the charges suggests that his supervisors were aware this was taking place." Id.

Current Division Housing Section Chief Steven H. Rosenbaum directly supervised the conduct of the employee who committed the wrongdoing, and Rosenbaum is supervised by AAG Perez. Rosenbaum retained his position throughout this scandal. Even after this scandal was on the front page of the *Washington Times*, the Department saw fit to give Steven Rosenbaum one of the highest possible DOJ awards, the John Marshall Award in October 2012. (See, Attorney General Awards, The Full List of 2012 Honorees, Main Justice, October 17, 2012, http://www.mainjustice.com/2012/10/17/attorney-general-awards-the-full-list-of-2012-honorees/).

South Carolina Voter Identification Loss

Division leadership overruled career lawyers who recommended that South Carolina photo voter identification be precleared in 2011 under Section 5 of the Voting Rights Act. AAG Perez and DAAG Matthew Colangelo rejected the recommendation of the career Voting Section Chief and his deputy that South Carolina's voter identification law neither had a retrogressive effect nor purpose.[7] Their career recommendation was overruled and an expensive, costly and ultimately meritless objection was interposed.

In short, Division leadership have adopted a *de minimis* standard in Section 5 reviews of election integrity laws. This means that unless states can prove an absolute absence of the slightest trace of disparate impact, then DOJ will object. For example, in the South Carolina voter ID law, 90% of African-Americans were shown to have photo ID, and 91.6% of whites. Political leaders in the Division found this *de minimis* difference of 1.6% to be enough to object to the law.

The United States District Court ultimately agreed with South Carolina that the law did not discriminate, but not before South Carolina was forced to spend $3.5 million dollars in a prolonged court fight with the Division. South Carolina also faced aggressive intervenors who drove up the cost of obtaining preclearance through their own discovery and court filings.

If this Congress ever considers amending Section 5, *it should prohibit all intervention by third parties in Section 5 preclearance cases.* The Division has never provided an accounting as to how many millions of federal tax dollars it spent on this wasted and unnecessary litigation –

[7] Perversely, this is the precise conduct which some have alleged occurred in the preclearance of Georgia Voter ID in 2005 – except the IG Report says that didn't occur. Career attorneys recommended preclearance of Georgia's Voter ID law and political leadership adopted their recommendation. Nobody was overruled. See, IG Report, 85-87.

including experts, attorney time (all of which is kept in the ICM time tracking system and could be obtained by this Committee), travel, deposition transcripts and costs. This Committee should demand a full accounting from the Division. Every penny spent was a penny wasted because the career professionals recommended that the South Carolina law be approved, a outcome which would have cost all involved the price of a postage stamp.

Litmus Tests for Jobs in the Division

In 2009, Division leadership implemented a new hiring criteria: experience with a civil rights group. While it might seem to be a logical requirement, it really isn't. For starters, an attorney could gain expertise in the laws enforced by the Division through prior representation of adverse parties or defendants. Indeed, some might argue those attorneys are *more* qualified because they know intimately how to defend a case. Moreover, many of the attorneys hired by the Division had experience with a civil rights group, but not experience at a group germane to their Section. For example, many attorneys hired by the Voting Section had absolutely no experience with voting matters, but instead experience with a liberal civil rights group who handled GITMO detainee defenses.

The new hiring criteria imposed by the Division ensured a lopsided ideological character to every single one of the attorneys hired after 2009. Indeed, *PJ Media* examined the resumes of every single one of the new hires by the Division and found every single one came from a liberal, leftist or Democratic Party background. The report by *PJ Media* provides details about the individual resumes of each attorney hired. See, 'Every Single One': PJ Media's Investigation of Justice Department Hiring Practices, http://pjmedia.com/every-single-one-pj-medias-investigation-of-justice-department-hiring-practices/.

In November 2009, Voting Section Deputy Chief Rebecca Wertz compiled for Division leadership at the Division's request a list of lawyers who had left the Voting Section over the years who might be contacted to see if they would be interested in returning. Wertz failed to include any perceived "conservatives" on her recruitment list and included only those deemed ideologically liberal. "The list, however, omitted 29 former Section attorneys who had left the Section since January 2001, including 8 attorneys who were widely perceived to be conservatives." IG Report at 195, 218. In recruiting employees, Voting Section Chief Chris Herren:

> sent notifications to at least 11 individuals from "liberal" civil rights organizations, including the American Civil Liberties Union (ACLU), the Mexican American Legal Defense and Education Fund (MALDEF), the National Association for the Advancement of Colored People Legal Defense and Education Fund (NAACP LDF), and the Lawyers' Committee for Civil Rights under Law (LCCR). We found that Herren did not send any e-mail notifications to "conservative" civil rights organizations.

IG Report at 197-198.

Most troubling is the admission in the IG Report that AAG Perez is resistant to amending the hiring policy even after the IG Report concluded: "Evaluating the degree of applicants' civil rights 'commitment' creates the possible appearance that CRT is searching for applicants who share political or ideological views common in the liberal civil rights community. This perception is compounded by the fact that the 'commitment' that passes muster often is demonstrated through work with a small number of influential civil rights organizations." IG Report at 220. Instead of resisting the Inspector General on this point, Division leadership should immediately implement the recommendation.

Race Neutral Enforcement of Voting Laws and Treatment of Chris Coates

As I have already testified, the hostility in the Division toward equal enforcement of the civil rights laws was so open and pervasive that it led to the harassment of Division employees – both black and white – as documented throughout the IG Report. Because these employees were willing to work on cases which protected white victims of discrimination, they were subject to cruel and disgusting harassment by individuals still employed at the Division.

Like other employees in the Division, Voting Section Chief Christopher Coates was subject to harassment and slurs for his willingness to protect all victims of discrimination. One example of many documented in the IG Report was a Division attorney referring to him as a "Klansman" for his willingness to equally enforce the law. IG Report at 123. *Many of those employees who engaged in this conduct about Coates remain employed at the Division, some earning salaries in excess of $140,000 per year.* To my knowledge, the leadership of the Division *has made absolutely no effort to terminate, reassign or discipline any of the attorneys or staff* who engaged in this racialist behavior pertaining to Coates.

Worse, Coates was even was targeted for removal by Division political appointees *specifically because of this willingness to enforce the law equally.* Those involved in an effort to remove Coates because of his willingness to protect all Americans ranged from his immediate supervisors, Steven Rosenbaum and Loretta King up to and including discussions with the Attorney General of the United States.[8]

[8] Steven Rosenbaum remains employed by the Division. His Senior Executive Service status permits him to be reassigned anywhere in the country to any federal agency. Such flexibility gives the administration the opportunity to distance attorneys from future decisions which may manifest his hostility toward enforcing civil rights laws in a race neutral fashion. Rosenbaum, however, was recently given the John Marshall Award by Attorney General Eric Holder. Loretta

The IG Report describes a group of Division political appointees discussing Coates' willingness to enforce civil rights laws with the Attorney General disapprovingly. IG Report at 162-168. Rather than confronting the racialist grievances of these political appointees and instructing them that it would be inappropriate, and potentially illegal, to target Coates for removal because of his willingness to protect Americans of all races from discrimination, the IG Report says Holder charged his subordinates to use their best judgment when it came to removing Coates. IG Report at 167-168. Instead of snuffing out the effort, the Attorney General gave it oxygen.

General Holder should be called to account the next time he is before this Committee why he made no attempt to block Coates from being removed because he was willing to enforce civil rights laws against black defendants as well as white ones.

The IG Report documents many many other examples of an open and pervasive hostility toward race neutral enforcement of the civil rights law by the Division. In an increasingly diverse country, this is a tragedy that merits the attention of Congress. No racial group should be favored for protection by the United States Justice Department. No racial group should be excluded from protection. This is not a hypothetical problem, as news accounts provide repeated examples of instances of federally actionable violence and discrimination where the Division failed even to open even an inquiry.[9] Not surprisingly, the Division has not once made any effort

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King resigned in 2011 just days after her role in some of the matters described in this testimony became public. Her oddly brief resignation letter can be found at http://www.scribd.com/doc/68360691/Loretta-King.

[9] See eg., "State Fair melees produce 11 injuries, 31 arrests," *Milwaukee Journal Sentinel*, August 5, 2011, http://www.jsonline.com/news/milwaukee/126828998.html. ("Then around the closing time of 11 p.m., witnesses told the Journal Sentinel, dozens to hundreds of black youths attacked white people as they left the fair, punching and kicking people and shaking and pounding on their vehicles. . . . Witnesses, though, told the Journal Sentinel that the attacks

to protect Americans of all races since May 15, 2009, the date all defendants save one were dismissed from the New Black Panther lawsuit.

In a few decades, America will look very different. In that increasingly diverse future, America will be a better place if all Americans believe the civil rights laws protect them. If they do not believe the civil rights laws protect them, then they will not support civil rights laws. It is essential for Congress, and those who believe in the rule of law, to establish standards of behavior now. The founding documents of this nation presume that all Americans are treated equally before the law. It's time the Civil Rights Division act accordingly.

Date: April 16, 2013

Respectfully submitted,

J. Christian Adams

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J. Christian Adams is the founder of the Election Law Center Virginia. He served from 2005 to 2010 in the Voting Section at the United States Department of Justice where he brought a wide range of election cases to protect racial minorities in South Carolina, Florida, and Texas. He litigates election law cases throughout the United States. He successfully litigated the landmark case of United States v. Ike Brown in the Southern District of Mississippi, the first case brought under the Voting Rights Act on behalf of a discriminated-against white minority in Noxubee County. He received the Department of Justice award for outstanding service and numerous other Justice Department performance awards. Prior to his time at the Justice Department, he served as General Counsel to the South Carolina Secretary of State. He also serves as legal editor at PJMedia.com, an internet news publication. He has a law degree from the University of South Carolina School of Law. He is a member of the South Carolina and Virginia Bars.

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appeared to be unprovoked and racially motivated. 'You could just tell they were after white people. That was the main thing. If you were white, they were coming after you,' said Jon Stikl of Oak Creek." The Division, as far as I know, declined to even open in inquiry into this racially motivated violence – something it has unquestioned jurisdiction to do.

20

Mr. GOODLATTE. Thank you, Mr. Adams.

We will now proceed under the 5-minute rule with questions, and I will begin by recognizing myself for 5 minutes.

First, I would like to ask unanimous consent to put into the record a joint report of the House Committee on Oversight and Government Reform, the House Judiciary Committee, and the Sen-

ate Judiciary Committee minority. The report is titled, "DoJ's *Quid Pro Quo* with St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law."

Without objection, it will be made a part of the record.

[The information referred to follows:]

House Committee on Oversight and Government Reform
Darrell Issa (CA-49), Chairman
Patrick McHenry (NC-10)

Senate Committee on the Judiciary
Charles E. Grassley (IA), Ranking Member

House Committee on the Judiciary
Bob Goodlatte (VA-6), Chairman

DOJ'S *QUID PRO QUO* WITH ST. PAUL:
HOW ASSISTANT ATTORNEY GENERAL THOMAS PEREZ MANIPULATED JUSTICE AND IGNORED THE RULE OF LAW

Joint Staff Report
United States Congress
113th Congress
April 15, 2013

Table of Contents

Executive Summary

In early February 2012, Assistant Attorney General Thomas E. Perez made a secret deal behind closed doors with St. Paul, Minnesota, Mayor Christopher Coleman and St. Paul's outside counsel, David Lillehaug. Perez agreed to commit the Department of Justice to declining intervention in a False Claims Act *qui tam* complaint filed by whistleblower Fredrick Newell against the City of St. Paul, as well as a second *qui tam* complaint pending against the City, in exchange for the City's commitment to withdraw its appeal in *Magner v. Gallagher* from the Supreme Court, an appeal involving the validity of disparate impact claims under the Fair Housing Act. Perez sought, facilitated, and consummated this deal because he feared that the Court would find disparate impact unsupported by the text of the Fair Housing Act. Calling disparate impact theory the "lynchpin" of civil rights enforcement, Perez simply could not allow the Court to rule. Perez sought leverage to stop the City from pressing its appeal. His search led him to David Lillehaug and then to Newell's lawsuit against the City.

Fredrick Newell, a minister and small-business owner in St. Paul, had spent almost a decade working to improve economic opportunities for low-income residents in his community. In 2009, Newell filed a whistleblower lawsuit alleging that the City of St. Paul had received tens of millions of dollars of community development funds, including stimulus funding, by improperly certifying its compliance with federal law. By November 2011, Newell had spent over two years discussing his case with career attorneys in the Department of Housing and Urban Development, the U.S. Attorney's Office in Minnesota, and the Civil Fraud Section within the Justice Department's Civil Division. These three entities, which had each invested a substantial amount of time and resources into Newell's case, regarded this as a strong case potentially worth as much as $200 million for taxpayers and recommended that the federal government join the suit. These career attorneys even went so far as to prepare a formal memorandum recommending intervention, calling St. Paul's actions a "particularly egregious example of false certifications."

All this work was for naught. In late November 2011, Lillehaug made Perez aware of Newell's pending case against the City and the possibility that the Justice Department may intervene. A trade was proposed: non-intervention in Newell's case for the withdrawal of *Magner*. Perez contacted HUD General Counsel Helen Kanovsky and asked her to reconsider HUD's support for intervention in Newell's case. Perez also spoke to then-Civil Division Assistant Attorney General Tony West and B. Todd Jones, the U.S. Attorney for the District of Minnesota, alerting them to his new interest in Newell's case. The withdrawal of HUD's support for Newell's case led to an erosion of support in the Civil Division, a process that was actively managed by Perez.

In January 2012, Perez began leading negotiations with Lillehaug, offering him a "roadmap" to a global settlement. Once negotiations appeared to break down, Perez boarded a plane and flew to Minnesota to meet face-to-face with Mayor Coleman. At that early February meeting, Perez pleaded for the fate of disparate impact and reiterated the Justice Department's willingness to strike a deal. His lobbying paid off when Lillehaug accepted the deal on Mayor

Coleman's behalf. The next week, the Civil Division declined to intervene in Newell's case and the City withdrew its *Magner* appeal. The *quid pro quo* had been accomplished.

Still, Perez and several of his colleagues at the Justice Department are unwilling to acknowledge that the *quid pro quo* occurred despite clear and convincing evidence to the contrary. The Administration maintains that although career attorneys in the Department of Justice recommended intervention in Newell's case – and, in fact, characterized the False Claims Act infractions reported by Newell as "particularly egregious" – the case was nonetheless quite weak and never should have been a serious candidate for intervention. The Administration maintains that the United States gave up nothing to secure the withdrawal of *Magner*. Left unexplained by the Administration is why the City of St. Paul would ever agree to withdraw a Supreme Court appeal it believed it would win if the City knew the Department would not intervene in Newell's case. Dozens of documents referring to the "deal," "settlement," and "exchange" between the City of St. Paul and DOJ show that the Administration's narrative is not believable.

There is much more to the story of how Assistant Attorney General Perez manipulated the rule of law and pushed the limits of justice to make this deal happen. In his fervor to protect disparate impact, Perez attempted to cover up the true reasons behind the Justice Department's decision to decline Fredrick Newell's case by asking career attorneys to obfuscate the presence of *Magner* as a factor in the declination decision and by refraining from a written agreement. In his zeal to get the City to agree, Perez offered to provide HUD's assistance to the City in moving to dismiss Newell's whistleblower complaint. The facts surrounding this *quid pro quo* show that Perez may have exceeded the scope of the ethics and professional responsibility opinions he received from the Department and thereby violated his duties of loyalty and confidentiality to the United States. Perez also misled senior Justice Department officials about the *quid pro quo* when he misinformed then-Associate Attorney General Thomas Perrelli about the reasons for *Magner*'s withdrawal.

The *quid pro quo* between the Department of Justice and the City of St. Paul, Minnesota, is largely the result of the machinations of one man: Assistant Attorney General Thomas Perez. Yet the consequences of his actions will negatively affect not only Fredrick Newell and the low-income residents of St. Paul who he championed. The effects of this *quid pro quo* will be felt by future whistleblowers who act courageously, and often at great personal risk, to fight fraud and identify waste on behalf of federal taxpayers. The effects of withdrawing *Magner* will be felt by the minority tenants in St. Paul who, due to the case's challenge to the City's housing code, continue to live with rampant rodent infestations and inadequate plumbing. The effects of sacrificing Newell's case will cost American taxpayers the opportunity to recover up to $200 million and allow St. Paul's misdeeds to go unpunished. Far more troubling, however, is the fundamental damage that this *quid pro quo* has done to the rule of law in the United States and to the reputation of the Department of Justice as a fair and impartial arbiter of justice.

Findings

- The Department of Justice entered into a *quid pro quo* arrangement with the City of St. Paul, Minnesota, in which the Department agreed to decline intervention in *United States ex rel. Newell v. City of St. Paul* and *United States ex rel. Ellis v. City of St. Paul et al.* in exchange for the City withdrawing *Magner v. Gallagher* from the Supreme Court.
- The *quid pro quo* was a direct result of Assistant Attorney General Perez's successful efforts to pressure the Department of Housing and Urban Development, the U.S. Attorney's Office in Minnesota, and the Civil Division within the Department of Justice to reconsider their support for *Newell* in the context of the proposal to withdraw *Magner*.
- The initial development of the *quid pro quo* by senior political appointees, and the subsequent 180 degree change of position, confused and frustrated the career Department of Justice attorneys responsible for enforcing the False Claims Act, who described the situation as "weirdness," "ridiculous," and a case of "cover your head ping pong."
- The reasons given by the Department of Housing and Urban Development for recommending declination in *Newell* are unsupported by documentary evidence and instead appear to be pretextual post-hoc rationalizations for a purely political decision.
- The "consensus" of the federal government to switch its recommendation and decline intervention in *Newell* was the direct result of Assistant Attorney General Perez manipulating the process and advising and overseeing the communications between the City of St. Paul, the Department of Housing and Urban Development, and the Civil Division within the Department of Justice.
- Assistant Attorney General Perez was personally and directly involved in negotiating the mechanics of the *quid pro quo* with David Lillehaug and he personally agreed to the *quid pro quo* on behalf of the United States during a closed-door meeting with the Mayor in St. Paul.
- Despite the Department of Justice's contention that the intervention recommendation in *Newell* was a "close call" and "marginal," contemporaneous documents show the Department believed that *Newell* alleged a "particularly egregious example of false certifications" and therefore the United States sacrificed strong allegations of false claims worth as much as $200 million to the Treasury.
- Assistant Attorney General Perez offered to arrange for the Department of Housing and Urban Development to provide material to the City of St. Paul to assist the City in its motion to dismiss the *Newell* whistleblower complaint. This offer was inappropriate and potentially violated Perez's duty of loyalty to his client, the United States.
- Assistant Attorney General Perez attempted to cover up the *quid pro quo* when he personally instructed career attorneys to omit a discussion of *Magner* in the declination memos that outlined the reasons for the Department's decision to decline intervention in *Newell* and *Ellis*, and focus instead only "on the merits."

- Assistant Attorney General Perez attempted to cover up the *quid pro quo* when he insisted that the final deal with the City settling two cases worth potentially millions of dollars to the Treasury not be reduced to writing, instead insisting that your "word was your bond."

- Assistant Attorney General Perez likely violated both the spirit and letter of the Federal Records Act and the regulations promulgated thereunder when he communicated with the City's lawyers about the *quid pro quo* on his personal email account.

- Assistant Attorney General Perez made multiple statements to the Committees that contradicted testimony from other witnesses and documentary evidence. Perez's inconsistent testimony on a range of subjects calls into question the reliability of his testimony and raises questions about his truthfulness during his transcribed interview.

- The ethics and professional responsibility opinions obtained by Assistant Attorney General Thomas Perez and his staff were narrowly focused on his personal and financial interests in a deal and his authority to speak on behalf of the Civil Division, and thus do not address the *quid pro quo* itself or Perez's particular actions in effectuating the *quid pro quo*.

- The Department of Justice violated the spirit and intent of the False Claims Act by privately acknowledging the *quid pro quo* was a settlement while not affording Fredrick Newell the opportunity to be heard, as the statute requires, on the fairness and adequacy of this settlement.

- The *quid pro quo* exposed serious management failures within the Department of Justice, with senior leadership – including Attorney General Holder and then-Associate Attorney General Perrelli – unaware that Assistant Attorney General Perez had entered into an agreement with the City of St. Paul.

- The Department of Justice, the Department of Housing and Urban Development, and the City of St. Paul failed to fully cooperate with the Committees' investigation, refusing for months to speak on the record about the *quid pro quo* and obstructing the Committees' inquiry.

- In declining to intervene in Fredrick Newell's whistleblower complaint as part of the *quid pro quo* with the City of St. Paul, the Department of Justice gave up the opportunity to recover as much as $200 million.

Table of Names

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Sara Grewing
City Attorney

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John Lundquist
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Thomas Fraser
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"[T]he role of a lawyer at the Department of Justice, whether you are in the Civil Division or the Civil Rights Division, is to do justice, is to do what is in the best interests of the United States."

—Thomas Perez, Assistant Attorney General for the Civil Rights Division[1]

"The matters at hand are not just – the ethics of [the Department of Justice] leveraging the False Claims Act lawsuit to secure the disparate impact regulations, or the treatment of myself as a whistleblower, or the influence of the Supreme Court docket. . . . The way that HUD and Justice have used me to further their own agenda is appalling – and that's putting it mildly."

—Fredrick Newell, small-business owner and minister, St. Paul, Minnesota[2]

Introduction

When Assistant Attorney General Thomas Perez traveled to St. Paul, Minnesota, in early February 2012 to meet with St. Paul Mayor Christopher Coleman and other City officials in the Mayor's City Hall offices, he had one goal in mind. He wanted the City to withdraw a potential landmark case scheduled for argument before the United States Supreme Court only days later. The agreement struck between Assistant Attorney General Perez and Mayor Coleman at that closed-door meeting resulted not only in the withdrawal of the appeal, but also the fatal weakening of a whistleblower lawsuit potentially worth $200 million to the federal treasury. The story of this *quid pro quo* is a story of leverage and political opportunism. The effects of the *quid pro quo* are even more unfortunate. The *quid pro quo* not only reflects poorly on the senior leadership of the Department of Justice, but it will have real and lasting consequences for public policy and federal taxpayers.

In the early 2000s, the City of St. Paul began aggressively enforcing the health and safety provisions of its housing code, targeting rental properties. With increased inspections and stricter certifications, the City cited various infractions ranging from broken handrails and torn screens to a toilet in a kitchen and rats in a bathtub.[3] The owners of these properties sued the City, arguing that the aggressive code enforcement adversely impacted their mostly minority tenants. The lawsuit worked its way through the federal court system for years, eventually arriving at the Supreme Court. In November 2011, the Supreme Court agreed to hear the case, known as *Magner v. Gallagher*, to decide whether the Fair Housing Act allows for claims of disparate impact.

Meanwhile, Fredrick Newell, a small-business owner and minister in St. Paul, had been working for years to improve low-income jobs programs in his community. After pursuing

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[1] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 208 (Mar. 22, 2013).
[2] Transcribed Interview of Fredrick Newell in Wash., D.C. at 16 (Mar. 28, 2013).
[3] *See* Fredrick Melo, *St. Paul Landlords Discuss their Fight over City Rental Housing Inspection Practices*, Pioneer Press, Oct. 15, 2012; Kevin Diaz, *St. Paul Yanks Housing Fight from High Court*, Star Tribune (Feb. 10, 2012).

various administrative avenues through the Department of Housing and Urban Development, Newell filed a federal whistleblower lawsuit against the City of St. Paul in May 2009. His suit, known as a *qui tam* action and brought under the False Claims Act,[4] was encouraged by HUD employees and supported by career officials in the Justice Department. If successful, Newell's lawsuit could have returned over $200 million of taxpayer funds to the federal Treasury. Although career officials viewed Mr. Newell's lawsuit as a "particularly egregious example" of false claims, Mr. Newell, as it turned out, would never receive a fair shot.

Documents and testimony given to the Committees show that after the Supreme Court agreed to hear *Magner* in November 2011, Assistant Attorney General Perez sought to find a way to prevent the Court from hearing the case and eviscerating disparate impact theory, which Perez had used to secure multimillion dollar settlements. His outreach put him in contact with a Minnesota lawyer named David Lillehaug, a former U.S. Attorney and outside counsel to the City of St. Paul. In discussions between Perez and Lillehaug, a proposal was raised to link the *Magner* and *Newell* cases, in which the City would withdraw *Magner* if the Department did not join Newell's suit. With *Newell* as leverage, Perez went to work to get *Magner* withdrawn. He asked HUD's General Counsel to reconsider HUD's support for *Newell* and raised the prospect of a deal with senior DOJ officials. Slowly, support for intervening in *Newell* eroded among the political DOJ leadership while career DOJ attorneys wondered among themselves what caused the sudden change of course.

Perez facilitated the slow bureaucratic march toward a *quid pro quo* with the City. In early January 2012, as progress on an agreement stalled, Perez began personally leading negotiations with Lillehaug. Once negotiations broke down in late January, and with *Magner* oral arguments looming, Perez made one last attempt to strike a deal. He flew to St. Paul on Friday, February 3, 2012, to lobby the Mayor directly. His persuasion proved successful; the City accepted the deal on the spot. Six days later, DOJ formally declined to join Newell's case. The following day, Friday, February 10, 2012, the City upheld its end of the bargain by withdrawing its *Magner* appeal. Perez's coup was complete.

This joint staff report is the product of a year-long investigation conducted by the House Committee on Oversight and Government Reform, the House Committee on the Judiciary, and the Senate Committee on the Judiciary. The Committees reviewed over 1,500 pages of documents produced by the Department of Justice, the Department of Housing and Urban Development, and the City of St. Paul.[5] The Committees conducted transcribed interviews with Assistant Attorney General Thomas Perez, Acting Associate Attorney General Tony West, former Associate Attorney General Thomas Perrelli, United States Attorney B. Todd Jones, HUD General Counsel Helen Kanovsky, HUD Deputy Assistant Secretary Sara Pratt, and Fredrick Newell. The Committees also interviewed David Lillehaug and St. Paul City Attorney Sara Grewing; Joyce Branda, a Deputy Assistant Attorney General in DOJ's Civil Division; Mark Kappelhoff, former Criminal Section Chief in DOJ's Civil Rights Division; Kevin Simpson, HUD's Principal Deputy General Counsel; and Bryan Green, HUD's Principal Deputy

[4] Under the False Claims Act, an individual may bring a *qui tam* action on behalf of the United States. 31 U.S.C. § 3730.

[5] The City of Saint Paul, however, continues to withhold twenty documents and one audio recording from the Committees.

Assistant Secretary for Fair Housing. Despite repeated requests, DOJ refused to allow the Committees to speak to the Assistant United States Attorney who handled the *Newell* case and HUD refused to allow the Committees to speak to Associate General Counsel Dane Narode and Regional Director Maurice McGough.

How the *Quid Pro Quo* Developed

The Fair Housing Act and Disparate Impact

The Fair Housing Act, found in Title VIII of the Civil Rights Act of 1968, prohibits discrimination in the sale or rental of housing units.[6] As passed by Congress, the Act made it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[7] The Act charged the Secretary of Housing and Urban Development with administering the provisions of the law.[8]

Unlike other federal laws concerning employment discrimination and age discrimination, the plain text of the Fair Housing Act only includes language prohibiting disparate *treatment* – not disparate effects. By contrast, in the employment context, Title VII of the Civil Rights Act of 1964 prohibits an employer from "fail[ing] or refus[ing] to hire or . . . discharg[ing] any individual" on the basis of a protected status, as well as prohibiting action that would "otherwise adversely affect [a person's] status as an employee."[9] Although the Fair Housing Act has language prohibiting the disparate *treatment* of individuals in the housing context, it does not include any similar language prohibiting the disparate *effects* of housing practices.[10] Because the plain language of the Fair Housing Act lacks this disparate effects language, it is clear that Congress never intended the disparate *impact* standard to be cognizable under the Fair Housing Act.

Nonetheless, despite the clear statutory language, some courts and policymakers have read the disparate impact standard into the Fair Housing Act. The roots of disparate impact under the Fair Housing Act can be traced back to Title VII of the Civil Rights Act of 1964, which prohibited employment discrimination based on race, color, religion, sex, or national origin.[11] In a case called *Griggs v. Duke Power Co.*, the Supreme Court interpreted the broad statutory text of Title VII to prohibit "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[12] Congress subsequently codified this disparate impact standard in the context of employment discrimination, creating a separate prohibition in Title VII

[6] 42 U.S.C. § 3604.
[7] *Id.* § 3604(a).
[8] *Id.* § 3608.
[9] 42 U.S.C. § 2000e-2(a).
[10] 42 U.S.C. § 3604.
[11] Pub. L. 88-352 tit. VII, 78 Stat. 241, 253 (1964).
[12] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

for "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[13]

As the courts gained familiarity with the disparate impact standard for employment discrimination, they simultaneously began to interpret the text of the Fair Housing Act "to draw an inference of actual intent to discriminate from evidence of disproportionate impact."[14] Federal agencies likewise began interpreting the Fair Housing Act beyond the strictures of its plain language. In November 2011, HUD issued a proposed rule codifying the disparate impact standard for discrimination claims arising under the Fair Housing Act.[15] The rule proposed to prohibit discriminatory effects under the Fair Housing Act, "where a facially neutral housing practice actually or predictably results in a discriminatory effect on a group of persons."[16] HUD finalized the rule in February 2013.[17] The new Consumer Financial Protection Bureau has also adopted the disparate impact standard for enforcing lending discrimination.[18]

This broad and controversial interpretation of the Fair Housing Act has been roundly criticized. The American Bankers Association, the Consumer Bankers Association, the Financial Services Roundtable, and the Housing Policy Council argue that the Act does not permit disparate impact claims because the law's plain text prohibits only intentional discrimination.[19] Likewise, attorneys from Ballard Spahr note that the Supreme Court's precedents "with regard to disparate impact claims make it clear that such claims cannot be brought under the Fair Housing Act . . . ."[20] Attorneys with BuckleySandler LLP criticize the analogous treatment between Fair Housing Act claims and Title VII claims – due to the express differences in the statutory language – and concluded that disparate impact "claims were neither provided for in the [Fair Housing Act] nor anticipated by the lawmakers who enacted the Act."[21]

The Supreme Court has never directly considered whether the Fair Housing Act supports the disparate impact standard. Although the Court has heard two cases involving disparate impact claims under the Fair Housing Act, both cases were decided on other grounds and the issue was never settled by the Court.[22] By the fall of 2011, as a case involving this precise issue was making its way through the federal court system, the Court was poised to resolve the dispute.

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[13] 42 U.S.C. § 2000e-2(k)(1)(A)(i).
[14] Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 Emory L.J. 409, 426 (1998).
[15] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (Nov. 16, 2011).
[16] *Id.* at 70,924.
[17] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013).
[18] Consumer Financial Prot. Bureau, CFPB Bulletin 2012-04 (Apr. 18, 2012).
[19] *See* Brief of Amici Curiae American Bankers Association, Consumer Bankers Association, Financial Services Roundtable, and Housing Policy Council Suggesting Reversal, Magner et al. v. Gallagher et al., No. 10-1032 (filed Dec. 29, 2011).
[20] Ballard Spahr LLP, *Dismissal of Fair Housing Case Perpetuates Uncertainty on Disparate Impact Claims*, Feb. 15, 2012.
[21] Kirk D. Jensen & Jeffrey P. Naimon, *The Fair Housing Act, Disparate Impact Claims, and* Magner v. Gallagher*: An Opportunity to Return to the Primacy of the Statutory Text*, 129 Bank. L.J. 99 (Feb. 2012).
[22] *See* City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found., 538 U.S. 188, 199-200 (2003); Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P., 488 U.S. 15, 18 (1988).

Magner v. Gallagher

On November 7, 2011, the United States Supreme Court granted a petition for a writ of certiorari filed by the City of St. Paul, Minnesota, in the case *Magner v. Gallagher*. In agreeing to hear the case, the Court decided to answer a fairly straightforward question: "Are disparate impact claims cognizable under the Fair Housing Act?"[23]

Magner arose from the City's enhanced enforcement of its housing codes from 2002 to 2005, particularly with respect to rental properties. The City directed inspectors to enforce the "code to the max," conducting unannounced sweeps for code violations and asking residents to report so-called "problem properties."[24] These enhanced enforcement measures documented violations in many properties occupied by low-income residents, including violations for rodent infestations, inoperable smoke detectors, inadequate sanitation, and inadequate heat.[25] The owners of these low-income properties, which housed a disproportionate percentage of African Americans, faced increased maintenance costs, higher fees, and condemnations as a result.[26]

In 2004 and 2005, several of the affected property owners sued the City in federal district court, alleging that the City's aggressive enforcement of the housing code violated the Fair Housing Act.[27] The City asked the court to throw out the cases before trial, arguing in part that its code enforcement did not have a disparate impact on minorities and therefore did not violate the Act.[28] The court agreed and granted summary judgment in the City's favor in 2008.[29] Appealing to the Eighth Circuit Court of Appeals, the property owners renewed their argument that the City violated the Fair Housing Act "because [its] aggressive enforcement of the housing code had a disparate impact on racial minorities."[30] The Eighth Circuit agreed. In its 2010 opinion reversing the lower court, the Eighth Circuit stated:

> Viewed in the light most favorable to [the property owners], the evidence shows that the City's Housing Code enforcement temporarily, if not permanently, burdened [the property owners'] rental businesses, which indirectly burdened their tenants. Given the existing shortfall of affordable housing in the City, it is reasonable to infer that the overall amount of affordable housing decreased as a result. And taking into account the demographic evidence in the record, it is reasonable to infer racial minorities, particularly African-Americans, were disproportionately affected by these events.[31]

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[23] Petition for Writ of Certiorari, Magner v. Gallagher, No. 10-1032 (U.S. filed Feb. 14, 2011).
[24] Gallagher v. Magner, 619 F.3d 823, 829 (8th Cir. 2010).
[25] *Id.* at 830.
[26] *Id.*
[27] Steinhauser et al. v. City of St. Paul et al., 595 F. Supp. 2d 987 (D. Minn. 2008).
[28] *Id.*
[29] *Id.*
[30] Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010).
[31] *Id.* at 835

With an adverse decision at the appellate level, the City faced a decision whether to litigate the disparate impact claim before the district court or to appeal the decision to the United States Supreme Court. On February 14, 2011, the City filed a petition for a writ of certiorari, asking the Court to take the case.[32] On November 7, 2011, the Court granted the petition to finally settle whether the Fair Housing Act supports claims of disparate impact.

United States ex rel. Newell v. City of Saint Paul

Fredrick Newell's history with Section 3 of the Housing and Urban Development Act dates back to 1997.[33] Section 3 requires recipients of HUD financial assistance to provide job training, employment, and contracting opportunities "to the greatest extent feasible" to low- and very-low-income residents, as distinct from minority residents.[34] In 2000, Newell began to pursue Section 3 opportunities in St. Paul, but quickly found that although the City had programs for minority business and women business enterprises, the City did not have a program to comply with Section 3 in particular. Newell even offered to start a Section 3 program in St. Paul, but the City refused.[35]

After a lawsuit Newell filed was dismissed because Section 3 does not allow for a private right of action, Newell initiated an administrative complaint with HUD.[36] This administrative complaint led to a formal finding by HUD that St. Paul was not in compliance with Section 3,[37] and eventually to a Voluntary Compliance Agreement that required St. Paul to improve its future compliance with Section 3.[38] The Voluntary Compliance Agreement, however, did not release the City from any liability under the False Claims Act.[39] According to Newell's attorney, the Justice Department reviewed the language of the Voluntary Compliance Agreement to ensure it did not disturb any False Claims Act liability.[40]

In May 2009, Fredrick Newell filed a whistleblower complaint under the *qui tam* provisions of the False Claims Act, alleging that the City of St. Paul had falsely certified that it was in compliance with Section 3 of the HUD Act from 2003 to 2009.[41] In particular, Newell alleged that the City had falsely certified on applications for HUD funds that it had complied with Section 3's requirements when in fact the City knew it had not complied.[42] He alleged that based on these knowingly false certifications, the City had improperly received more than $62

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[32] Petition for Writ of Certiorari, Magner v. Gallagher, No. 10-1032 (U.S. filed Feb. 14, 2011).
[33] Transcribed Interview of Fredrick Newell in Wash., D.C. at 9-10 (Mar. 28, 2013).
[34] 12 U.S.C. § 1701u.
[35] Transcribed Interview of Fredrick Newell in Wash., D.C. at 27-28 (Mar. 28, 2013).
[36] Transcribed Interview of Fredrick Newell in Wash., D.C. at 9-10 (Mar. 28, 2013).
[37] *See* Letter from Barbara Knox, Dep't of Housing and Urban Development, to Chris Coleman, City of St. Paul (Aug. 25, 2009).
[38] Voluntary Compliance Agreement; Section 3 of the Housing and Community Development Act between U.S. Dep't of Housing and Urban Development and the City of Saint Paul, MN (Feb. 2010).
[39] *Id.*
[40] Transcribed Interview of Fredrick Newell in Wash., D.C. at 33 (Mar. 28, 2013).
[41] Complaint, United States *ex rel.* Newell v. City of Saint Paul, No. 0:09-cv-1177 (D. Minn. May 19, 2009).
[42] *Id.*

million in federal HUD funds.[43] As a whistleblower, Newell brought the case – *United States ex rel. Newell v. City of St. Paul* – on behalf of the United States.

Like all other alleged violations of the False Claims Act, Newell's complaint was evaluated by career attorneys in the Civil Fraud Section within DOJ's Civil Division as well as career Assistant United States Attorneys in Minnesota. These attorneys spent over two years conducting an exhaustive investigation of Newell's allegations. As a part of this investigation, the attorneys interviewed Newell and his attorney several times, gathered information from HUD, and spoke with the City about its actions. At the conclusion of this investigation, both the Civil Fraud Section and the U.S. Attorneys' Office in Minnesota strongly supported the case.

That these career DOJ officials enthusiastically supported Newell's lawsuit was obvious to Newell and to HUD. His initial relator[44] interview with federal officials in the summer of 2009 included an unusually large number of HUD and DOJ attendees.[45] During his transcribed interview, Newell told the Committees that "[t]here was a real interest . . . and the DOJ felt it was a good case."[46] His attorney stated: "I believe around . . . September-October of 2011, my information was that Justice was working on finalizing its intervention decision. And I don't mean what the decision was. I mean finalizing intervention, because they were going to intervene in the case."[47]

This understanding was confirmed by HUD General Counsel Helen Kanovsky, who told the Committees that career attorneys in DOJ's Civil Fraud Section and U.S. Attorney's Office in Minnesota felt so strongly about intervening in Newell's case that they requested a special meeting with her to convince her to lend HUD's support.[48]

On October 4, 2011, a line attorney in the Civil Fraud Section wrote to HUD General Counsel Dane Narode about the *Newell* case: "Our office is recommending intervention. Does HUD concur?"[49] Three days later, Narode replied, "HUD concurs with DOJ's recommendation."[50] The AUSA in Minnesota handling *Newell* forwarded HUD's concurrence to his supervisor with the comment, "[l]ooks like everyone is on board."[51] On October 26, 2011, the AUSA transmitted a memorandum to the two Civil Fraud Section line attorneys with the official recommendation from the U.S. Attorney's Office.[52] The memorandum recommended intervention. It stated:

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[43] Amended Complaint, United States *ex rel.* Newell v. City of Saint Paul, No. 0:09-cv-1177 (D. Minn. Mar. 12, 2012). The Civil Fraud Section of the Justice Department valued the fraud at $86 million. *See infra* note 336.
[44] A "relator" is the private party who initiates a *qui tam* lawsuit under the False Claims Act on behalf of the United States.
[45] Transcribed Interview of Fredrick Newell in Wash., D.C. at 192-93 (Mar. 28, 2013).
[46] *Id.* at 48.
[47] *Id.* at 55.
[48] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 25-30 (Apr. 5, 2013).
[49] Email from Line Attorney 1 to HUD Line Employee (Oct. 4, 2011, 5:05 p.m.). [DOJ 67]
[50] Email from HUD Line Employee to Line Attorney 1 (Oct. 7, 2011, 11:27 a.m.). [DOJ 68]
[51] Email from Line Attorney 3 to Greg Brooker (Oct. 7, 2011, 11:28 a.m.). [DOJ 69]
[52] Email from Line Attorney 3 to Line Attorney 2 & Line Attorney 1 (Oct. 26, 2011, 3:39 p.m.). [DOJ 71]

> The City was repeatedly put on notice of its obligations to comply with Section 3. At best, its failure to take any steps towards compliance, while continually telling federal courts, HUD and others that it was in compliance with Section 3, represents a reckless disregard for the truth. Its certifications of Section 3 compliance to obtain HUD funds during the relevant time period were knowingly false.[53]

The memo also referenced the HUD administrative proceeding initiated by Fredrick Newell, noting that in the proceeding "HUD determined that the City was out of compliance with Section 3. **It did not appear to be a particularly close call.** The City initially contested that finding, but dropped its challenge in order to retain its eligibility to compete for and secure discretionary HUD funding."[54]

The Civil Fraud Section also prepared an official memorandum recommending intervention in Newell's case. This memo, dated November 22, 2011, found that "[t]he City was required to comply with the statute. Our investigation confirms that the City failed to do so."[55] The memorandum stated:

> To qualify for HUD grant funds, the City was required to certify each year that it was in compliance with Section 3. The City then made claims for payment, drawing down its federal grant funds. Distribution of funds by HUD to the City was based on the City's certifications. Each time the City asked HUD for money, it impliedly certified its compliance with Section 3. At best, the City's failure to take any steps towards compliance while continually telling federal courts, HUD and others that it was in compliance with Section 3 represents a reckless disregard for the truth. **We believe its certifications of Section 3 compliance to obtain HUD funds were actually more than reckless and that the City had actual knowledge that they were false.**[56]

Thus, as of November 22, 2011, HUD, the Civil Fraud Section, and the U.S. Attorney's Office in Minnesota all strongly supported intervention in Fredrick Newell's case, believing it was worthy of federal assistance. There was no documentation that it was a marginal case or a close call.

Executing the Quid Pro Quo

Shortly after the Supreme Court granted certiorari in *Magner* on November 7, 2011, Assistant Attorney General Perez became aware of the appeal.[57] On November 17, he emailed

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[53] U.S. Attorney, District of Minnesota, Intervention Memo: *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Oct. 25, 2011). [DOJ 72-79]

[54] *Id.* (emphasis added).

[55] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]

[56] *Id.* at 5 (emphasis added).

[57] Assistant Attorney General Perez testified that he did not become aware of the *Magner* case until after the Court agreed to hear the appeal; however, HUD Deputy Assistant Secretary Sara Pratt told the Committees that she and Perez likely had discussions about the case before the Court granted certiorari.

Thomas Fraser, a partner at the Minneapolis law firm Fredrickson & Bryon, P.A. and an old colleague. Fraser put Perez in touch with his law partner David Lillehaug, who was defending the City of St. Paul in the *Newell* False Claims Act litigation.

On the morning of November 23, 2011, Perez had a telephone conversation with Lillehaug and Fraser. During this conversation, Perez explained the importance of disparate impact theory, calling it the "lynchpin" of civil rights enforcement,[58] and his concerns about the *Magner* appeal. Their accounts of the conversation differed as to when and who first raised the prospect that the City would withdraw *Magner* if the Department declined to intervene in *Newell*. Lillehaug told the Committees that he told Perez that he should know that the City was potentially adverse to the United States in a separate False Claims Act case.[59] Lillehaug further told the Committees that at a subsequent meeting, approximately one week later on November 29, Perez told Lillehaug that he had looked into *Newell* and he had a "potential solution."[60] According to Perez, however, during the initial telephone call on November 23, Lillehaug actually linked the two cases and in fact suggested that if the United States would decline to intervene in *Newell*, the City would withdraw the *Magner* case.[61] Both parties agreed that Perez indicated he would look into the *Newell* case, and they would meet approximately one week later on November 29.

Following his conversation with Lillehaug and Fraser, Perez immediately reached out to HUD Deputy Assistant Secretary Sara Pratt, HUD General Counsel Helen Kanovsky, and then-Assistant Attorney General Tony West. During a telephone conversation with Kanovsky, Perez told her that he had discussions with the City about *Magner* and asked her to reconsider HUD's support for the *Newell* case.[62] On November 29, 2011 – only seven weeks after he signaled HUD's support for intervention and less than one week after Perez's initial telephone call with Lillehaug – HUD Associate General Counsel Dane Narode informed career Civil Fraud Section attorneys that HUD had reconsidered its position in *Newell*.[63] On December 1, Narode memorialized the change in an email to the line attorney.[64]

On December 13, 2011, several City officials – including Mayor Coleman and City Attorney Sara Grewing, as well as Lillehaug – traveled to Washington, D.C., for meetings with HUD and DOJ's Civil Division. In the morning, the City officials met with Sara Pratt, discussing ideas for expanding the City's Section 3 compliance programs. In the afternoon, the City met with officials from the Civil Fraud Section to discuss *Newell* and *Ellis* – which was a second False Claims Act *qui tam* case filed against the City – as well as *Magner*.

At the conclusion of the December 13, 2011, meeting, the Civil Division asked HUD to better explain the reasons for its changed recommendation. Eventually, late on December 20,

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[58] Interview with David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[59] *Id.*
[60] *Id.*
[61] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 47-48 (Mar. 22, 2013).
[62] Transcribed Interview with Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 40-41 (Apr. 5, 2013).
[63] Email from Dane Narode to Line Attorney 1 (Nov. 29, 2011, 8:06 p.m.). [HUD 130]
[64] Email from HUD Line Employee to Line Attorney 1 (Dec. 1, 2011, 10:08 a.m.). [DOJ 161/156]

HUD sent its formal explanation to the Civil Fraud Section.[65] The memorandum referenced HUD's voluntary compliance agreement with the City, describing it as "a comprehensive document that broadly addresses St. Paul's Section 3 compliance, including the compliance problems at issue in the False Claims Act case."[66] This explanation did not satisfy the career attorneys in the Civil Fraud Section.

Throughout this period, Perez continued conversations with Lillehaug and the City. In mid-December, Perez had a telephone conversation with B. Todd Jones, the U.S. Attorney for the District of Minnesota, and began to speak regularly with Assistant U.S. Attorney Greg Brooker in Jones's office. In early January 2012, Perez had a meeting with Tony West and Deputy Assistant Attorney General Michael Hertz. According to the DOJ officials with whom the Committees spoke, the Civil Division reached a "consensus" around this same period that the Division would decline intervention in *Newell*.

In early January, Perez personally led the negotiations with Lillehaug about DOJ declining intervention in *Newell* in exchange for the City withdrawing *Magner*. According to Lillehaug, Perez presented a proposal on January 9, 2012, which Lillehaug described as a "roadmap" designed to get the City "to yes."[67] In this proposal, DOJ would decline to intervene in *Ellis*, the City would then withdraw *Magner*, and DOJ would subsequently decline to intervene in *Newell*. In mid-January, Lillehaug made a "counterproposal"[68] in which instead of merely declining to intervene in the *qui tam* cases, DOJ would intervene and settle *Newell* and *Ellis* in exchange for the City withdrawing *Magner*.

By late January, it appeared as if no deal would be reached between the federal government and the City of St. Paul. With the oral argument date in *Magner* quickly approaching, Perez flew to St. Paul to personally meet the Mayor and try once more for an agreement. At a meeting in City Hall on February 3, 2012, Perez lobbied the Mayor on the importance of disparate impact and told him DOJ could not go so far as intervening and settling the cases out from under the relator, but was still willing to decline *Newell* in exchange for the City withdrawing *Magner*. The City officials caucused privately for a short time and eventually returned to accept the deal. The next week, DOJ formally declined to intervene in *Newell* and the City formally withdrew its appeal in *Magner*. After DOJ declined to intervene, Newell's case was fatally weakened, as the declination allowed the City to move for dismissal on grounds that would have been unavailable if the Department had intervened in the case.

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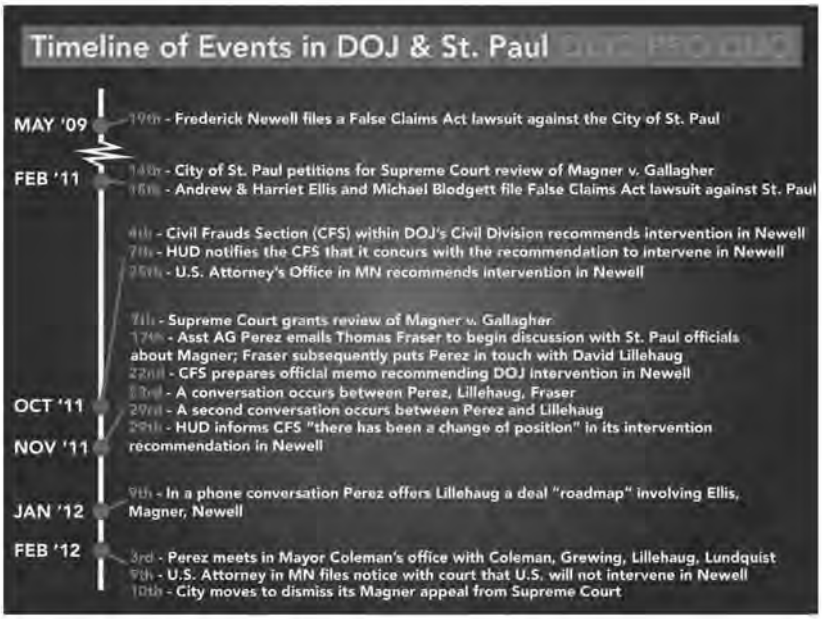
[65] *See* Email from HUD Line Employee to Joyce Branda (Dec. 20, 2011, 6:21 p.m.). [DOJ 408/369]

[66] Memorandum for Joyce R. Branda (Dec. 20, 2011). [DOJ 409-10/370-71]

[67] Assistant Attorney General Perez and Acting Associate Attorney General West testified that DOJ never made an offer to Lillehaug. Other testimony and documentary evidence, however, supports Lillehaug's characterization.

[68] In his transcribed interview, West initially characterized this offer as a "counterproposal" from the City, stating: "[T]here was this counterproposal from the City, which we rejected, of intervention and dismissal." Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 90 (Mar. 18, 2013).



The *Quid Pro Quo* Explained

The story of the *quid pro quo* – how one man manipulated the levers of government to prevent the Supreme Court from hearing an important appeal – is itself incredible. The Administration's version of events is even more unbelievable. The post hoc explanations defy common sense and are contradicted by both the tenor and substance of numerous internal documents produced to the Committees.

The Administration maintains that although career attorneys in the Department of Justice recommended intervention in *Newell* – and, in fact, characterized the infractions as "particularly egregious" – the case was nonetheless quite weak and never should have been a serious candidate for intervention. Accepting this as true, Perez's intervention was merely fortuitous to ensuring that the career attorneys with expertise on the False Claims Act had one more shot to reevaluate the case. Because the decision was made to decline *Newell* and – as Tony West told the Committee – that decision was communicated to the City, the Administration maintains that the United States gave up nothing to secure the withdrawal of *Magner*. But the Administration offers no explanation as to why the City would ever agree to withdraw a Supreme Court appeal it believed it would win, if *already* it knew the Department intended to decline intervention in *Newell*. Dozens of documents refer to the "deal," "settlement," and "exchange" between the City and DOJ. These documents cast doubt on the Administration's narrative, as well.

After almost fourteen months of investigating, the Committees found that the Department of Justice agreed to a *quid pro quo* with the City of St. Paul, Minnesota, in which the Department agreed to decline intervention in *Newell* and *Ellis* in exchange for the City withdrawing its appeal in *Magner*. This *quid pro quo* was facilitated, overseen, and consummated by Assistant Attorney General Thomas Perez, who made it known to the City that his "top priority" was to have *Magner* withdrawn from the Supreme Court. To get the deal done, Perez exceeded the scope and authority of his office, manipulated the protocols designed to preserve the integrity of intervention decisions, worked behind the scenes – and at times behind the backs of his colleagues at the Department with whom decision-making authority rested – and took it upon himself to strike an agreement with the City. These are the findings of the Committees' investigation:

The Agreement Was a Quid Pro Quo Exchange

The Department of Justice and the Department of Housing and Urban Development have repeatedly insisted that the agreement with the City was not a "*quid pro quo*." In transcribed interviews, Assistant Attorney General Perez, Acting Associate Attorney General West, and U.S. Attorney Jones all contested the characterization that the agreement was a *quid pro quo* or an exchange between the parties.[69] In particular, Perez told the Committees: "I would disagree with the term '*quid pro quo*,' because when I think of a *quid pro quo*, I think of, like in a sports context, you trade person A for person B and it's a – it's a binary exchange."[70] In fact, that is precisely what transpired.

Although these officials disputed the existence of an exchange, they did not dispute the fact that discussions with the City concerned a proposal that the City withdraw *Magner* if the Department declined *Newell*. Perez testified: "[St. Paul's outside counsel David] Lillehaug raised the prospect that the city would withdraw its petition in the *Magner* case if the Department would decline to intervene in *Newell*."[71] Perez subsequently testified: "What I recall Mr. Lillehaug indicating in this initial telephone call was that if the Department would decline to intervene in the *Newell* matter, that the city would then withdraw the petition" in *Magner*.[72] This testimony shows the exchange between the City and the Department was conditional.

Contemporaneous documents confirm that an exchange took place. An email from a Civil Fraud Section line attorney to then-Civil Fraud Director Joyce Branda expressly characterized the agreement as an "exchange" while explaining the state of negotiations. The attorney wrote: "We are working toward declining both matters [*Newell* and *Ellis*]. It appears that AAG for Civil Rights (Tom Perez) is working with the city on a deal to withdraw its petition before the Supreme Court in the *Gallagher* case **in exchange** for the government's declination in both cases."[73]

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[69] *See* Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 170-71 (Mar. 22, 2013); Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 117 (Mar. 18, 2013); Transcribed Interview of Byron Todd Jones, U.S. Dep't of Justice, in Wash., D.C. at 140-41 (Mar. 8, 2013).
[70] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 170 (Mar. 22, 2013).
[71] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 10 (Mar. 22, 2013).
[72] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 47-48 (Mar. 22, 2013).
[73] Email from Line Attorney 1 to Joyce Branda (Jan. 9, 2012, 1:53 p.m.) (emphasis added). [DOJ 686/641]

In addition, a draft version of the *Newell* declination memo prepared by career attorneys in the Civil Fraud Section in early 2012 clearly stated that the Department entered into an exchange with the City:

> The City tells us that Mr. Perez reached out to them and asked them to withdrawal [*sic*] the *Gallagher* petition. The City responded that they would be willing to do so, only if the United States declined to intervene in this case, and in *U.S. ex rel. Ellis v. the City of St. Paul et al.* The Civil Rights Division believes that the [Fair Housing Act] policy interests at issue here are significant enough to justify such a deal."[74]

The final version signed by Tony West, Assistant Attorney General for the Civil Division, obfuscated the true nature of the exchange. The memo signed by West stated: "The City has indicated that it will dismiss the *Gallagher* petition, and declination here will facilitate the City's doing so."[75]

Former Associate Attorney General Thomas Perrelli told the Committees that he understood from speaking with Perez that the proposal included an exchange. Perrelli testified:

> [Perez] indicated to me that this case [*Magner*] was before the Supreme Court. He indicated the desire for the United States to not file a brief in the case, and expressed the view that this was not a good vehicle to decide the issue of disparate impact, and indicated that the city had proposed to him the possibility of dismissing – and I don't remember whether it was one or more *qui tam* cases – **in exchange** for them not pursuing their appeal to the Supreme Court.[76]

In addition, a chart of significant matters within the Civil Division prepared for the Deputy Attorney General James Cole in March 2012 characterized the agreement with the City as follows: "Government declined to intervene in Newell, and has agreed to decline to intervene in Ellis, **in exchange** for defendant[']s withdrawal of cert. petition in Gallagher case (a civil rights action)."[77]

Based on Perez's admission that negotiations centered on the City of St. Paul's withdrawal of *Magner* if the Department declined intervention in *Newell* and DOJ's own characterization of an exchange, it is apparent that the agreement reached between Perez and the City involved the exchange of *Newell* and *Ellis* for *Magner*. In this exchange, the City gave up its rights to litigate *Magner* before the Supreme Court – an appeal it publicly stated it believed it

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[74] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Jan. 10, 2012) (draft declination memorandum). [DOJ 1089-99/979-89]

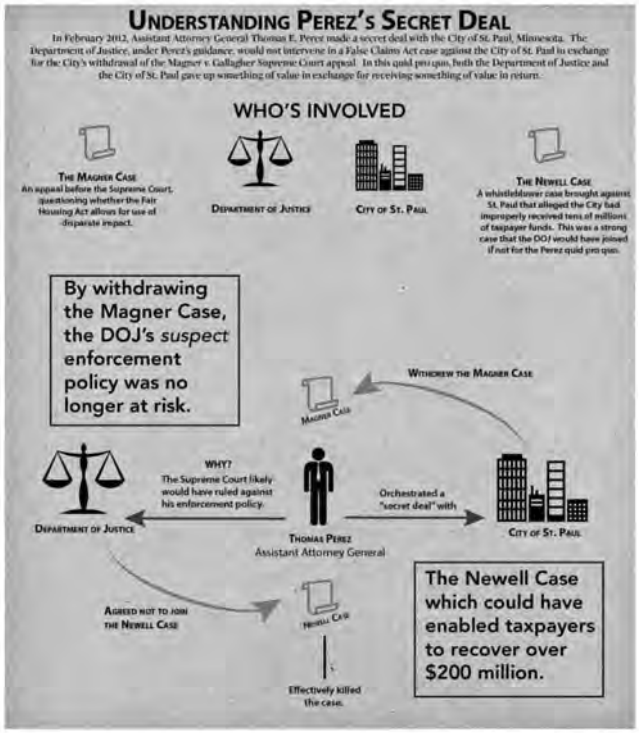
[75] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Feb. 9, 2012). [DOJ 1318-29/1162-73]

[76] Transcribed Interview of Thomas John Perrelli in Wash., D.C. at 16 (Nov. 19, 2012) (emphasis added).

[77] Significant Affirmative Civil and Criminal Matters (Mar. 8, 2012) (emphasis added). [DOJ 1410-12/1248-50]

would win[78] – and DOJ gave up its right to intervene and prosecute the alleged fraud against HUD in *Newell* – a case that career attorneys strongly supported. In return, the City received certainty that DOJ would not litigate *Newell* and DOJ received assurance that the Supreme Court would not consider *Magner*. Therefore, under the common usage of the term, the agreement between DOJ and the City clearly amounted to a *quid pro quo* exchange.

Finding: The Department of Justice entered into a *quid pro quo* arrangement with the City of St. Paul, Minnesota, in which the Department agreed to decline intervention in *United States ex rel. Newell v. City of St. Paul* and *United States ex rel. Ellis v. City of St. Paul et al.* in exchange for the City withdrawing *Magner v. Gallagher* from the Supreme Court.



[78] Press Release, City of Saint Paul Seeks to Dismiss United States Supreme Court Case Magner v. Gallagher (Feb. 10, 2012)

Assistant Attorney General Perez Facilitated the Initial Stages of the Quid Pro Quo

In the early stages of developing the *quid pro quo*, Assistant Attorney General Perez told the City's outside counsel, David Lillehaug, that withdrawing *Magner* was his "top priority."[79] But arriving at that point was no certainty. Already, three separate entities within the federal government had recommended intervention in *Newell*. For a deal to be made and for *Magner* to be withdrawn, Perez would have to aggressively court key officials in DOJ and HUD.

On November 13, 2011, Perez had an email exchange with HUD Deputy Assistant Secretary Sara Pratt about efforts by housing advocates to facilitate a settlement to prevent the Court from hearing the appeal.[80] After the Court granted certiorari in *Magner*, Perez contacted Minnesota lawyer Thomas Fraser to start a "conversation" with the Mayor and City Attorney about his "concerns about *Magner* and to see whether the City might reconsider its position."[81] When Fraser connected Perez with Lillehaug and Perez became aware of the *Newell* case pending against the City,[82] Perez had found his leverage.[83]

Perez and Lillehaug spoke on the telephone on the afternoon of November 23, 2011.[84] Perez and Lillehaug gave differing accounts of this initial conversation. Perez testified that Lillehaug linked the *Magner* case with the *Newell* case, and offered that the City would withdraw the *Magner* appeal if DOJ declined to intervene in *Newell*.[85] Lillehaug, however, told the Committees that he merely mentioned the *Newell* case because the City may be adverse to the United States, and Perez promised that he would look into the case.[86] Lillehaug told the Committees that it was Perez who first raised the possibility of a joint resolution of *Magner* and *Newell* in a November 29 meeting with Lillehaug and St. Paul City Attorney Sara Grewing.[87] Again, Perez's version of events strains credulity. It is difficult to believe that Lillehaug, during this initial telephone call, would immediately be in a position to make an offer of this nature on behalf of the City without discussing it first with his client.

Immediately after speaking with Lillehaug at 2:00 p.m., Perez went to work, somewhat frenetically. At 2:29 p.m. that day, Perez emailed HUD Deputy Assistant Secretary Pratt, asking to speak with her as soon as possible.[88] At 2:30 p.m., Perez emailed HUD General Counsel Helen Kanovsky, asking to speak about a "rather urgent matter."[89] At 2:33 p.m., Perez emailed Tony West, head of DOJ's Civil Division and thus ultimately responsible for False Claims Act cases like *Newell*. Perez wrote: "I was wondering if I could talk to you today if possible about a

[79] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[80] Email from Sara K. Pratt to Thomas E. Perez (Nov. 13, 2011, 2:59 p.m.). [DOJ 93]
[81] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 9 (Mar. 22, 2013).
[82] Email from Thomas Fraser to Thomas E. Perez (Nov. 22, 2011, 7:07 p.m.). [DOJ 95-96]
[83] Given that Perez called Fraser, who had no involvement with the *Magner* appeal, instead of directly contacting the St. Paul City Attorney's Office, it is likely that Perez contacted Fraser in search of leverage to use to get the *Magner* case withdrawn – and not to start a "conversation" with the City.
[84] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012); Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 127-28 (Mar. 22, 2013).
[85] Transcribed Interview of Thomas E. Perez, U.S. Dep't of Justice, in Wash., D.C. at 10 (Mar. 22, 2013).
[86] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[87] *Id.*
[88] Email from Thomas E. Perez to Sara K. Pratt (Nov. 23, 2011, 2:29 p.m.). [DOJ 103]
[89] Email from Thomas E. Perez to Helen Kanovsky (Nov. 23, 2011, 2:30 p.m.). [DOJ 165-66]

separate matter of some urgency."[90] All three officials – Pratt, Kanovsky, and West – would be vital for making the withdrawal of *Magner* a reality.

The next week, on November 28, Perez had a meeting with several of his senior advisers in the Civil Rights Division. During this meeting, Perez and his advisers discussed a search for leverage in *Magner* and the fact that St. Paul Mayor Coleman's political mentor is former Vice President Walter Mondale, a champion of the Fair Housing Act.[91] Civil Rights Division Appellate Section Chief Greg Friel's notes from the meeting reflect a discussion of the *Newell qui tam* case. Friel's notes stated that "HUD is will[ing] to leverage [the] case to help resolve [the] other case," presumably referring to *Magner*.[92] The last lines of the notes state the Civil Rights Division's "ideal resolution" would be the dismissal of *Magner* and the other case "goes away."[93]

Perez testified that he did not recall ever asking HUD to reconsider its initial intervention recommendation in *Newell*.[94] However, HUD General Counsel Helen Kanovsky's testimony to the Committees directly contradicted Perez's testimony. Kanovsky testified that after HUD recommended intervention in *Newell*, Perez called her to ask her to reconsider. Kanovsky stated:

> Q Did [Perez] ask you to go back to your original position, to reconsider?
>
> A He did. He did.
>
> Q He did? What did he say?
>
> A He said, well, if you don't feel strongly about it, how would you feel about withdrawing your approval and indicating that you didn't endorse the position? And I said, I would do that.[95]

HUD Principal Deputy General Counsel Kevin Simpson verified this account in an earlier non-transcribed briefing with the Committees.[96] Once HUD flipped, support for *Newell* eroded within the U.S. Attorney's Office and the Civil Division. In transcribed interviews, both Acting Associate Attorney General Tony West and U.S. Attorney B. Todd Jones cited HUD's change of heart as a strong factor in their decision to ultimately decline intervention in *Newell*.[97]

Although it is in dispute as to who first raised the idea of exchanging *Newell* for *Magner*, it is clear that the proposal got off the ground within the bureaucracies of HUD and DOJ as a

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[90] Email from Thomas E. Perez to Tony West (Nov. 23, 2011, 2:33 p.m.). [DOJ 104]
[91] Handwritten notes of conversation between Thomas Perez, Jocelyn Samuels, Vicki Schultz, and Eric Halperin (Nov. 28, 2011). [DOJ 111-13/106-08]
[92] *Id.*
[93] *Id.*
[94] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 131 (Mar. 22, 2013).
[95] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 40-41 (Apr. 5, 2013).
[96] Briefing with Kevin Simpson and Bryan Greene in Wash., D.C. (Jan. 10, 2013).
[97] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 100 (Mar. 18, 2013); Transcribed Interview of Byron Todd Jones, U.S. Dep't of Justice, in Wash., D.C. at 39 (Mar. 8, 2013).

result of the machinations of Assistant Attorney General Perez. It was Perez who became aware of the existence of the *Newell* complaint against the City and it was Perez who asked Helen Kanovsky to reconsider HUD's initial recommendation for intervention.[98] Perez also initiated conversations with Tony West about the Civil Division's interests in *Newell*. It was Perez who spoke to HUD's General Counsel Helen Kanovsky about calling Tony West – without telling West that he was doing so.[99] The eventual agreement between the City and DOJ in February 2012 was only possible due to the early politicking done by Perez in late November 2011.

Finding: The *quid pro quo* was as a direct result of Assistant Attorney General Perez's successful efforts to pressure the Department of Housing and Urban Development, the U.S. Attorney's Office in Minnesota, and the Civil Division within the Department of Justice to reconsider their support for *Newell* in the context of the proposal to withdraw *Magner*.

The Initial Stages of the Quid Pro Quo Confused and Frustrated Career Attorneys

As Assistant Attorney General Perez facilitated the early stages of the *quid pro quo*, the high-level communications he initiated about the rather routine intervention decision in *Newell* led to confusion and frustration among career Civil Fraud Section attorneys. HUD's unexpected and unexplained change in its intervention recommendation in late November and the ripple effects it caused in the Civil Fraud Section and U.S. Attorney's Office in Minnesota created an atmosphere of uncertainty and disorder. From late November 2011 to early January 2012, the career attorneys in the Justice Department – including those with expertise and responsibility for enforcing the False Claims Act – were working at cross-purposes with some of the Department's senior political appointees.

In late November 2011, HUD Associate General Counsel Dane Narode informed the Civil Fraud Section that HUD had changed its recommendation. Career officials in DOJ's Civil Fraud Section and the U.S. Attorney's Office expressed surprise about the sudden shift within HUD. One attorney called it "weirdness,"[100] and Greg Brooker, the civil division chief in the U.S. Attorney's Office in Minnesota, wrote "HUD is so messed up."[101] A Civil Fraud line attorney reported to then-Civil Fraud Section Director Joyce Branda that Narode cryptically told her "if DOJ wants further information about what is driving HUD's decision, someone high level within DOJ might need to call [HUD General Counsel] Helen Kanovsky."[102] She also told Branda that Greg Friel, the Appellate Section chief in the Civil Rights Division, had "never heard of the *Newell* case, so he cannot imagine how the *Gallagher* case can be affecting the *Newell* case."[103] Branda passed this uncertainty along to Deputy Assistant Attorney General

[98] Here, again, Perez's testimony contradicts other testimony received by the Committees. Perez testified that he did not recall asking HUD to reconsider its intervention decision; however, Helen Kanovsky told the Committees that HUD only changed its position after being asked to do so by Perez.

[99] *See* Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 149-50, 188-89 (Mar. 18, 2013).

[100] Email from Line Attorney 3 to Greg Brooker (Dec. 2, 2011, 12:02 p.m.). [DOJ 172/164]

[101] Email from Greg Brooker to Line Attorney 3 (Nov. 30, 2011, 10:48 a.m.). [DOJ 120/115]

[102] Email from Line Attorney 1 to Joyce Branda (Dec. 2, 2011, 11:59 a.m.). [DOJ 169/161]

[103] *Id.*

Michael Hertz in an email, where she stated: "I am not sure [h]ow [G]allagher impacts [N]ewell."[104]

HUD's change of heart, however, was no surprise to Assistant Attorney General Perez. On November 30, then-Assistant Attorney General Tony West emailed Perez about *Newell*. He stated: "HUD formally recommended intervention. Let's discuss."[105] Perez responded only minutes later. He wrote: "I am confident that position has changed. You will be hearing from Helen [Kanovsky] today."[106]

What Perez did not tell West was that he was simultaneously communicating with Kanovsky – a fact that West did not know at the time.[107] Later on November 30, after West and Kanovsky spoke, Perez emailed Kanovsky and asked: "How did things do with Tony?"[108] Kanovsky responded the next day. She wrote: "I hope ok. He was aware of our communication to his staff earlier and asked for it in writing. We sent [Line Attorney 1] the requested email this morning."[109]

As the month of December wore on, confusion mounted. At the conclusion of the December 13 meeting with City officials, DOJ's Hertz asked HUD's Dane Narode to provide a fuller explanation of HUD's changed recommendation in *Newell*.[110] When HUD had not offered an explanation by December 20, Civil Fraud reiterated Hertz's request.[111] A Civil Fraud line attorney explained the situation to then-Civil Fraud Section Director Branda in an e-mail: He stated:

> [T]he USAO is inquiring about the status of our position. It is not withdrawing its recommendation to intervene, HUD does not seem inclined to give us its position in writing short of the email it sent . . . . Mike Hertz told Dane at the conclusion of the meeting on December 13 that [HUD's given basis] was not a reason to decline a *qui tam* and asked Dane to follow-up with a formal position. In the meantime, Mike Hertz sent the authority memo back to our office. We are in a difficult position because we have an intervention deadline of January 13 and the USAO does not know what, if anything, it is being asked to do at this point.[112]

Branda told the Committees that when Hertz returned the initial intervention memo, she took that to mean that he had decided against intervention.[113] However, an email between two line attorneys in December 2011 indicates that Hertz returned the memo to allow the attorneys to

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[104] Email from Joyce Branda to Michael Hertz (Dec. 5, 2011, 7:05 a.m.). [DOJ 186/175]
[105] Email from Tony West to Thomas E. Perez (Nov. 30, 2011, 3:07 p.m.). [DOJ 124/119]
[106] Email from Thomas E. Perez to Tony West (Nov. 30, 2011, 3:14 p.m.). [DOJ 124/119]
[107] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 149-50, 188-89 (Mar. 18, 2013).
[108] Email from Thomas E. Perez to Helen R. Kanovsky (Nov. 30, 2011, 7:20 p.m.). [DOJ 165]
[109] Email from Helen R. Kanovsky to Thomas E. Perez (Dec. 1, 2011, 10:50 a.m.). [DOJ 165]
[110] *See* Email from Line Attorney 1 to HUD Line Employee (Dec. 20, 2011, 4:38 p.m.). [DOJ 387/349]
[111] *Id.*
[112] Email from Line Attorney 1 to Joyce Branda (Dec. 20, 2011, 4:44 p.m.). [DOJ 388/350]
[113] Briefing with Joyce Branda in Wash., D.C. (Dec. 5, 2012).

incorporate HUD's "new analysis and explanation for its changed position."[114] A contemporaneous email from Branda supports this understanding. Branda wrote: "I guess the other issue we need to flesh out better (hopefully with HUD) is the extent to which they had a reasonable belief that their compliance with other requirements for minorities and women satisfied Section 3, which I think troubled Mike . . . . The memo may need to address that more fully . . . ."[115]

As the career attorneys at DOJ attempted to get further information on HUD's position, their frustration mounted. One career attorney wrote: "This is ridiculous. I have no control over any of this. Why are higher level people making phone calls?"[116] Another career attorney wrote: "It feels a little like 'cover your head' ping pong. Do we need to suggest that the big people sit in a room and then tell us what to do? I kinda think Perez, West, Helen, and someone from the Solicitor's office need to make a decision."[117]

Kanovsky told the Committees that she was aware of this frustration among the career attorneys in the Civil Fraud Section. Kanovsky testified that the career attorneys were "upset that there was another part of the Justice Department that wanted to go a different direction, which was going to get in the way of them doing what they want to do."[118]

On December 23, 2011, a line attorney in the Civil Fraud Section wrote to another line attorney about HUD's change of heart and the silence from the U.S. Attorney's Office about its position. She wrote: "It seems as though everyone is waiting for someone else to blink."[119] The same day, the line attorney emailed Joyce Branda. The email stated:

> I thought our marching orders were to draft a declination memo and to concur with the USAO-Minn. USAO-Minn. called me today (Greg Brooker, [Line Attorney 3], [Line Attorney 4]). Tony West, Todd Jones, and Tom Perez have apparently had conversations about this. Everything I have is third hand. Tom Perez called Greg Brooker directly yesterday. We discussed this plan today and the USA blessed the idea of [Line Attorney 2] and [Line Attorney 3] reaching out to defendant. The clear implication is that this is what should happen, but certainly I have not heard this directly from Tony West or Perez.[120]

In another email to Branda minutes later, the same line attorney elaborated on her frustration with the process. The email stated:

> By the way, when the district called me this morning to discuss the case, I did not tell them I knew that their USA was planning to decline (as we

[114] Email from Line Attorney 1 to Line Attorney 2 (Dec. 17, 2011, 3:10 p.m.). [DOJ 381/346]
[115] Email from Joyce Branda to Line Attorney 1 (Dec. 20, 4:54 p.m.). [DOJ 390/352]
[116] Email from Line Attorney 1 to Line Attorney 2 (Dec. 20, 5:00 p.m.). [DOJ 397/359]
[117] Email from Line Attorney 2 to Line Attorney 1 (Dec. 20, 2011, 5:02 p.m.). [DOJ 400/362]
[118] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 137 (Apr. 5, 2013).
[119] Email from Line Attorney 1 to Line Attorney 2 (Dec. 23, 2011, 9:35 a.m.). [DOJ 541/501]
[120] Email from Line Attorney 1 to Joyce Branda & Line Attorney 2 (Dec. 23, 2011, 3:47 p.m.). [DOJ 552/512]

> discussed I would not tell them). **It was a difficult conversation to be honest, me playing dumb and them clearly feeling me out to see [if] I had been told about the conversation with their USA.** Eventually they got around to telling me, but clearly they were hoping not to be the first office to say "we will decline." I did tell them that I felt confident that we would concur with their declination and that our offices would not be split on this question (of course I know that was our position). **This really seems extremely off and inefficient.** Why are hire-ups [*sic*] having numerous one on one conversations instead of us all having a conference call with Tony West, Perez, and the USA so we can get perfectly clear on what we are to do.[121]

Documents produced to the Committees show that this confusion continued throughout December 2011. In an early January 2012 meeting between Assistant Attorney General Perez, then-Assistant Attorney General West, and Deputy Assistant Attorney General Michael Hertz, West and Hertz agreed to allow Perez to lead negotiations with the City about *Magner* and the two False Claims Act matters.[122] At this point, the career trial attorneys in the Civil Fraud Section became merely a rubberstamp for Perez's eventual agreement.

Finding: The initial development of the *quid pro quo* by senior political appointees, and the subsequent 180 degree change of position, confused and frustrated the career Department of Justice attorneys responsible for enforcing the False Claims Act, who described the situation as "weirdness," "ridiculous," and a case of "cover your head ping pong."

***HUD's Purported Reasons for Its Changed Recommendation in* Newell *Are Unpersuasive and a Pretext for HUD's Desired Withdrawal of* Magner**

The Department of Housing and Urban Development initially notified the Civil Fraud Section that it had changed its *Newell* recommendation in late November 2011. HUD did not fully explain its reasons until mid-December 2011 – and only then after DOJ attorneys asked HUD to do so. A careful examination of HUD's purported reasons for its changed recommendation reveals that those reasons are unsupported by the evidence and suggests a pretext for a politically motivated decision to prevent the Supreme Court from hearing *Magner*.

On November 29, 2011 – only seven weeks after he signaled HUD's support for intervention and only six days after Perez's first discussion with Lillehaug – HUD Associate General Counsel Dane Narode informed career Civil Fraud Section attorneys that HUD had reconsidered its intervention recommendation in *Newell*.[123] On December 1, Narode memorialized the change in an email. He stated:

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[121] Email from Line Attorney 1 to Joyce Branda & Line Attorney 2 (Dec. 23, 2011, 4:11 p.m.) (emphases added). [DOJ 559/519]

[122] *See* Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 79-84 (Mar. 18, 2013).

[123] Email from Dane Narode to Line Attorney 1 (Nov. 29, 2011, 8:06 p.m.). [HUD 130]

> This is to confirm our telephone conversation of Tuesday night in which I informed you that HUD has reconsidered its support for intervention by the government in the St. Paul *qui tam* matter. HUD has determined that intervention is not necessary because St. Paul's programmatic non-compliance has been corrected through a Voluntary Compliance Agreement with HUD.[124]

After DOJ asked for further explanation, a HUD attorney sent HUD's formal explanation in a memorandum to the Civil Fraud Section on December 20.[125] The memorandum referenced HUD's Voluntary Compliance Agreement with the City, describing it as "a comprehensive document that broadly addresses St. Paul's Section 3 compliance, including the compliance problems at issue in the False Claims Act case."[126] The memo stated:

> Given the City's success in ensuring that its low- and very low-income residents are receiving economic opportunities generated by federal housing and community development funding, as required by Section 3, and the financial and other investments that the City has made and is continuing to make from its own resources to accomplish this, HUD considers it imprudent to expend the limited resources of the federal government on this matter.[127]

This explanation initially did not satisfy the career attorneys in the Civil Fraud Section. One line attorney, in an email to her colleague, wrote: "Well that was a fast change of heart."[128] Joyce Branda, the then-Director of the Civil Fraud Section, was even more direct: "It doesn't address the question I have. Do they agree their belief was reasonable about section 3 compliance? Nothing about the merits."[129] When Deputy Assistant Attorney General Hertz forwarded the memo to then-Assistant Attorney General Tony West, he stated that the memo "[s]till principally focuses on the prospective relief."[130]

Unconvinced by HUD's explanation, the Civil Fraud Section asked Narode to address whether HUD believed that St. Paul had complied with Section 3 through its women- and minority-owned business enterprises (WBEs and MBEs).[131] This request sparked a mild panic within HUD. Melissa Silverman, a HUD Assistant General Counsel, wrote to Dane Narode about the City's Vendor Outreach Program (VOP) for WBEs and MBEs, explaining that there were significant problems with the City's VOP and "just because St. Paul had a VOP doesn't mean it met the goals of the VOP or Section 3."[132] Silverman also emailed HUD Deputy Assistant Secretary Sara Pratt to inform her about press reports and an independent audit that

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[124] Email from HUD Line Employee to Line Attorney 1 (Dec. 1, 2011, 10:08 a.m.). [DOJ 161/156]
[125] *See* Email from HUD Line Employee to Joyce Branda (Dec. 20, 2011, 6:21 p.m.). [DOJ 408/369]
[126] Memorandum for Joyce R. Branda (Dec. 20, 2011). [DOJ 409-10/370-71]
[127] *Id.*
[128] Line Attorney 1 to Joyce Branda (Dec. 21, 2011, 7:13 a.m.). [DOJ 418/379]
[129] Email from Joyce Branda to Line Attorney 1 & Line Attorney 2 (Dec. 21, 2011, 7:51 a.m.). [DOJ 420/381]
[130] Email from Michael Hertz to Tony West (Dec. 21, 2011, 10:57 a.m.). [DOJ 440/401]
[131] Email from Melissa Silverman to Michelle Aronowitz (Dec. 22, 2011, 3:58 p.m.). [HUD 232]
[132] Email from Melissa Silverman to Dane Narode (Dec. 22, 2011, 12:01 p.m.). [HUD 222]

found problems with the City's WBE and MBE enforcement.[133] Pratt responded: "Yes, I'm treading carefully here."[134]

As HUD struggled to respond to the Civil Fraud Section, Sara Pratt reached out directly to the City to seek its assistance. On the same day that the Civil Fraud Section made its request, Pratt spoke with St. Paul's outside counsel, John Lundquist, a law partner of David Lillehaug.[135] Lundquist responded by sending three separate emails to Pratt with information about the City's programs.[136] These emails included information about the City's VOP and the independent audit, as well as a position paper that the City prepared for the Civil Division.[137] When Pratt forwarded this information to Silverman, Silverman noted her concerns about the information in an email to Narode. She stated:

> Sara's attachment is the City's 'position paper' setting forth reasons why the City thinks the Govt should decline to intervene. Among other things, the City references the Hall audit's review of its VOP, but says nothing other than: 'overall, the results were largely positive.' **This is just not true**. The Hall audit reports the small percentages of contracting dollars directed toward MBEs and WBEs . . . and describes a lack of responsibility, enforcement, etc.[138]

With this information calling into doubt the City's WBE and MBE programs, HUD had difficulty crafting an adequate response. Pratt and other attorneys traded draft language before HUD Deputy General Counsel Michelle Aronowitz suggested, "if we respond at all, why wouldn't we just reiterate that HUD does not want to proceed with the false claims for the reasons stated in our letter, the city is in compliance with HUD's section 3 VCA, and it is possible that compliance with MBE, etc, requirements could result in compliance with Section 3."[139]

This is the path HUD took. On December 22, Melissa Silverman wrote to the Civil Fraud Section line attorney. She stated:

> HUD's Office of Fair Housing and Equal Opportunity has determined that the City of St. Paul is not only in compliance with the VCA, but is also in compliance with its Section 3 obligations at this time. As described in our December 20, 2001 [*sic*] memo, HUD does not wish to proceed with the False Claims Act case. It is possible that notification to MBEs, WBEs, and SBEs could result in compliance with Section 3 requirements, in

[133] Email from Melissa Silverman to Sara K. Pratt (Dec. 22, 2011, 2:16 p.m.). [HUD 225]
[134] Email from Sara K. Pratt to Melissa Silverman (Dec. 22, 2011, 2:24 p.m.). [HUD 225]
[135] *See* Email from John Lundquist to Sara K. Pratt (Dec. 22, 2011, 1:45 p.m.). [SPA 144]
[136] Email from John Lundquist to Sara K. Pratt (Dec. 22, 2011, 2:37 p.m.); [SPA 145] Email from John Lundquist to Sara K. Pratt (Dec. 22, 2011, 3:16 p.m.); [SPA 146] Email from John Lundquist to Sara K. Pratt (Dec. 23, 2011, 2:05 p.m.). [SPA 150-51]
[137] *Id.*
[138] Email from Melissa Silverman to Dane Narode (Dec. 22, 2011, 2:57 p.m.) (emphasis added). [HU D231]
[139] Email from Michelle Aronowitz to Melissa Silverman, Sara Pratt, & Dane Narode (Dec. 22, 2011, 4:57 p.m.). [HUD 240-41]

> which case the existence or non-existence of Section 3 notification procedures would essentially be the basis for technical assistance, not a finding of a violation.[140]

HUD's rationale was so unconvincing that the Civil Fraud Section line attorney had to confirm with Narode that Silverman's email was in response to the Civil Fraud Section's question about St. Paul's compliance with Section 3 via its WBE and MBE programs.[141]

HUD's rationale supporting its declination recommendation is flawed in at least two respects. First, HUD's Voluntary Compliance Agreement (VCA) with the City was never intended to remedy the City's past violations of Section 3. At the time the VCA was consummated, HUD Regional Director Maurice McGough publicly stated: "The purpose of the VCA isn't to address past noncompliance, but to be a blueprint to ensure future compliance."[142]

Further, the plain language of the agreement acknowledges its non-application to the False Claims Act. The agreement states: "[t]his Voluntary Compliance Agreement does not release the City from any claims, damages, penalties, issues, assessments, disputes, or demands arising under the False Claims Act . . . ."[143] By its own terms, therefore, the VCA cannot address the City's "Section 3 compliance, including the compliance problems at issue in the False Claims Act case" as asserted by HUD.[144]

The preservation of False Claims Act liability in the language of the VCA matches what HUD told whistleblower Fredrick Newell at the time. Newell testified to the Committees that "when we met with [HUD Regional Director] Maury McGough in the first interview regarding the [administrative] complaint process, Maury had stated that the process would allow me to be part of the negotiation and that our companies would be made whole."[145] Instead, when HUD settled the administrative complaint without remedying Newell, McGough told him that he would be made whole through the False Claims Act process.[146] Fredrick Newell's attorney stated: "[T]oward the end of 2009, after Fredrick's input was solicited and then it became clear that he wasn't going to be at the table, then they said, 'Don't worry, we'll take care of you later.' . . . I was told, 'do not worry, Fredrick will be taken care of through the False Claims Act.'"[147]

Second, HUD never asserted whether it believed that St. Paul had actually complied with Section 3 through its WBE and MBE programs. The most HUD ever asserted was that "it is **possible**" that the City's WBE and MBE initiatives in its Vendor Outreach Program satisfied the strictures of Section 3.[148] Privately, however, HUD officials acknowledged that the City's WBE

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[140] Email from Melissa Silverman to Line Attorney 1 (Dec. 22, 2011, 6:01 p.m.). [DOJ 541/501]
[141] Email from Line Attorney 1 to Dane Narode (Dec. 23, 2011, 9:43 a.m.). [DOJ 542/502]
[142] Anna Pratt, *Faith Leaders Want St. Paul to Pay for Its Sins*, Minnesota Spokesman-Recorder, Feb. 17, 2010.
[143] Voluntary Compliance Agreement; Section 3 of the Housing and Community Development Act between U.S. Dep't of Housing and Urban Development and the City of Saint Paul, MN (Feb. 2010).
[144] Memorandum for Joyce R. Branda (Dec. 20, 2011). [DOJ 409-10/370-71]
[145] Transcribed Interview of Fredrick Newell in Wash., D.C. at 38 (Mar. 28, 2013).
[146] *Id.* at 39-41
[147] *Id.* at 43-44
[148] Email from Melissa Silverman to Line Attorney 1 (Dec. 22, 2011, 6:01 p.m.) (emphasis added). [DOJ 541/501]

and MBE initiatives were deficient. Newell explained the City's Vendor Outreach Program to the Committees during his transcribed interview. Newell testified:

> St. Paul created had [*sic*] a program called – that resulted in its final naming of the Vendor Outreach Program. That was solely and particularly set up to address minorities and minority contractors. That program is what St. Paul would often throw up when I would say to them that they're not doing Section 3. They would say, We're complying based on our Vendor Outreach Program. The truth of the matter is they wasn't even complying with the Vendor Outreach Program. But I explained to them that they could not meet the Section 3 goals based on the Vendor Outreach Program because the Vendor Outreach was a race based program, and Section 3 was an income based program.[149]

Tellingly, Sara Pratt – a senior HUD official in the Office of Fair Housing and Equal Opportunity, with responsibility for enforcing Section 3 – could not tell the Committee whether the City of St. Paul's WBE and MBE programs satisfied the requirements of Section 3.[150]

Seen in this context, HUD's changed recommendation appears motivated more by ideology than by merits. Early in the process, Assistant Attorney General Perez told his staff that "HUD is willing to leverage the case."[151] Perez testified that HUD recognized the "importance" of the disparate impact doctrine and that HUD's Pratt and Kanovsky "rather clearly expressed their belief" that it would be in the interests of HUD to use *Newell* to withdraw *Magner*.[152] In addition, shortly after the Court agreed to hear the *Magner* appeal, HUD promulgated a proposed regulation codifying the Department's use of disparate impact.[153] HUD did not want *Magner* decided before it could finalize its regulation, as its General Counsel Kanovsky admitted to the Committees. She stated: "[T]o have the Supreme Court grant cert on a legal theory which had been developed by the courts but hadn't yet been part of the regulations of the United States under the Administrative Procedure Act was very problematic to us. We . . . were in the process of meeting our responsibilities to promulgate the rule, and the timing of this was of grave concern."[154]

After carefully examining HUD's reasons for recommending declination in *Newell*, it is apparent that neither basis – the Voluntary Compliance Agreement or the Vendor Outreach Program for women business enterprises and minority business enterprises – justifies the declination. There is simply no documentation to refute the assertion that the only changed circumstance from October 7, 2011 – when HUD recommended intervention – to November 29,

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[149] Transcribed Interview of Fredrick Newell in Wash., D.C. at 24-25 (Mar. 28, 2013).
[150] Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 58-59 (Apr. 3, 2013).
[151] Handwritten notes of conversation between Thomas Perez, Jocelyn Samuels, Vicki Schultz, and Eric Halperin (Nov. 28, 2011). [DOJ 111-13/106-08]
[152] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 130-31 (Mar. 22, 2013).
[153] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (Nov. 16, 2011).
[154] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 35 (Apr. 5, 2013).

2011 – when HUD changed its recommendation – was the Supreme Court's decision to hear the *Magner* appeal and the subsequent association between *Magner* and *Newell*.

Finding: The reasons given by the Department of Housing and Urban Development for recommending declination in *Newell* are unsupported by documentary evidence and instead appear to be pretextual post-hoc rationalizations for a purely political decision.

The "Consensus" that Emerged for Declining Intervention in Newell Directly Resulted from Assistant Attorney General Perez's Stewardship of the Quid Pro Quo

Acting Associate Attorney General West testified that the recommendation of the Civil Division for intervention in *Newell* shifted in January 2011 after a "consensus" began to emerge for declination. As West stated, "by early, mid-January, there was a consensus that had coalesced in the Civil Division that we were going to decline the *Newell* case."[155] Assistant Attorney General Perez similarly testified that a "consensus began to emerge . . . shortly before Christmas that it was in the interest of the United States" to decline intervention in *Newell*."[156] This consensus, however, only resulted from the careful stewardship of Perez in shaping the deal.

After laying the groundwork for the *quid pro quo*, Assistant Attorney General Perez remained closely involved in overseeing the development and execution of the deal. Perez openly advised senior officials at HUD how to communicate with the Civil Division career attorneys and what steps had to be taken to change the Civil Division's impression of *Newell*. He also counseled St. Paul's outside counsel, David Lillehaug, how to approach Civil Division officials about the cases. Throughout the entire process, documents and testimony suggest that Perez remained keenly aware of all the moving parts and what steps needed to occur to arrive at a consensus for declining *Newell*.

As discussions on a possible agreement progressed in early December 2011, Perez began to counsel senior HUD officials about how to effectively shift the opinion of the Civil Division. On December 8, Perez advised HUD Deputy Assistant Secretary Sara Pratt about which Civil Fraud personnel were handling the *Newell* case and who to approach. In an email to Pratt, Perez stated:

> The trial atty assigned to the matter is [Line Attorney 2]. He reports to [Line Attorney 1], who can be reached at 202-[redacted]. [Line Attorney 1] in turn reports to Joyce Branda, I am told, who can be reached at 202-[redacted]. My instinct would be to start with [Line Attorney 1], and see how it goes. I do not know any of these folks. Thx again for agreeing to conduct an independent review of this matter.[157]

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[155] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 82-83 (Mar. 18, 2013).
[156] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 87-88 (Mar. 22, 2013).
[157] Email from Thomas E. Perez to Sara K. Pratt (Dec. 8, 2011, 9:27 a.m.). [DOJ 272-74]

Perez offered this information while acknowledging that he was not acquainted with these career attorneys and while he was aware that HUD had already been talking to the Civil Fraud Section. When asked by the Committees, Pratt testified that she did not recall receiving this email.[158]

The same day, Perez alerted HUD General Counsel Kanovsky about "a step that needs to occur in your office that has not occurred and has therefore prevented progress from occurring."[159] Perez testified that he was referring to "the communication to the Civil Division by HUD that they believe that the *Newell* matter is not a candidate for intervention."[160] Perez also told the Committees that at the time, although he was aware that HUD's recommendation had changed, he was unsure if HUD had already conveyed its new recommendation to the Civil Division.[161] His email to Kanovsky, therefore, seems to have been calculated to ensure that the Civil Division knew of HUD's new recommendation so that the *quid pro quo* could continue to progress. When interviewed by the Committees, Kanovsky could not recall this email.[162]

Perez likewise facilitated discussions between the City and HUD. In early December 2011, he asked HUD's Sara Pratt to meet the City's lawyer, David Lillehaug, in advance of a December 13 meeting between the Civil Division and City officials in Washington, D.C.[163] Lillehaug, along with St. Paul City Attorney Sara Grewing, subsequently spoke with Pratt on the morning of December 9, discussing ideas for how the City's Section 3 compliance program could be enhanced.[164] Pratt and Lillehaug agreed to meet on December 13 before the City's meeting with the Civil Division.[165] Lillehaug called Perez afterward and told him that the conversation with Pratt had been "helpful."[166] Pratt similarly reported to Perez that she had a "very excellent call" with Lillehaug and Grewing.[167] The effect of these discussions between the City and HUD was not lost on DOJ officials, as evidenced by notes of one phone call. Notes from the call stated: "HUD is now abandoning ship – may be lobbied by St. Paul."[168]

In advance of the City's meetings on December 13, Perez took an active role in moving the different offices. Perez also appears to have been coaching the City on how to approach its discussions with the Department of Justice. Perez advised Lillehaug "that he should be prepared to make a presentation to the Civil Division about why they think the case, the *Newell* case,

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[158] Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 74 (Apr. 3, 2013).
[159] Email from Thomas E. Perez to Helen R. Kanovsky (Dec. 8, 2011, 9:03 p.m.) [DOJ 275-76]
[160] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 139-40 (Mar. 22, 2013).
[161] *Id.* at 140
[162] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 54-55 (Apr. 5, 2013).
[163] Interview of David Lillehaug (Oct. 16, 2012); Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 65 (Apr. 3, 2013); Email from Thomas E. Perez to Sara K. Pratt (Dec. 8, 2011, 10:42 p.m.). [DOJ 279]
[164] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012). Pratt testified that this call was between her and Lillehaug. Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 65 (Apr. 3, 2013).
[165] *See* Email from Sara K. Pratt to David Lillehaug (Dec. 9, 2011, 10:47 a.m.) ("Thank you for a helpful discussion this morning. I look forward to meeting you on Tuesday at 9:00 am."). [SPA 158]
[166] *Id.*
[167] Email from Sara K. Pratt to Thomas E. Perez (Dec. 9, 2011, 1:04 p.m.). [DOJ 283]
[168] Handwritten notes of conversation between Joyce Branda, Line Attorney 2, and Greg Brooker (Dec. 28, 2011). [DOJ 618/576]

should be declined."[169] Perez also asked Pratt to include him in her meeting with the City. In an email to Pratt, he wrote: "Maybe after you meet with them, you can patch me in telephonically and we can talk to them. We need to talk them off the ledge."[170]

After the meetings, Lillehaug emailed Pratt thanking her for the "productive" meeting with the City.[171] Lillehaug told Pratt "[u]nfortunately, our meeting in the afternoon did not go as well. The possibility of an expanded VCA did not seem to be given much weight by the representatives of the DOJ's Civil Division, who described their job as 'bringing in money to the U.S. Treasury.'"[172] Pratt later emailed Perez: "We should talk; the Tuesday afternoon meeting did NOT go well at all."[173] Perez responded: "I am well aware of that. We will figure it out."[174]

Perez continued to closely oversee the progress of the *quid pro quo* as December progressed. On December 19, Lillehaug and Perez spoke on the telephone. Lillehaug expressed dismay to Perez about the meeting with the Civil Division.[175] Perez told Lillehaug that his "top priority" was to ensure that *Magner* was withdrawn.[176] Perez told Lillehaug that HUD was working the matter "as we speak."[177] Meanwhile, Perez kept the pressure on HUD to ensure that it was satisfying the requests and answering the questions of the Civil Division. In particular, he kept tabs on the progress of a detailed declination memo that Deputy Assistant Attorney General Michael Hertz had requested from HUD after the December 13th meeting. Perez wrote to HUD Deputy Assistant Secretary Pratt on December 20 to ask if the memo had been sent.[178] Pratt responded: "Am trying to find out. I sent to [HUD Line Employee] but didn't hear back from him. [General Counsel] Helen [Kanovsky] has them both and she could send them too . . . but I can't."[179]

In the early weeks of discussions on the *quid pro quo*, there was no guarantee that an agreement would be reached. By the time Perez became aware of *Newell*, three separate entities in the federal government – HUD, the U.S. Attorney's Office in Minnesota, and the Civil Fraud Section – had each recommended that the government intervene in the case. The recommendations of each of these three entities would have to be changed to reach a deal with the City. In early-to-mid-December, Perez painstakingly advised HUD and the City and oversaw their communications with the Civil Division to ensure that these recommendations were changed. Only then did a "consensus" emerge for declining intervention in *Newell*.

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[169] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 196 (Mar. 22, 2013).
[170] Email from Thomas E. Perez to Sara K. Pratt (Dec. 12, 2011, 2:03 p.m.). [DOJ 312-13]
[171] Email from David Lillehaug to Sara K. Pratt (Dec. 14, 2011, 12:46 p.m.). [DOJ 371/336]
[172] *Id.*
[173] Email from Sara K. Pratt to Thomas E. Perez (Dec. 16, 2011, 6:13 a.m.). [DOJ 369]
[174] Email from Thomas E. Perez to Sara K. Pratt (Dec. 16, 2011, 8:04 a.m.). [DOJ 369]
[175] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[176] *Id.*
[177] *Id.*
[178] Email from Thomas E. Perez to Sara K. Pratt (Dec. 20, 2011, 4:56 p.m.). [DOJ 403]
[179] Email from Sara K. Pratt to Thomas E. Perez (Dec. 20, 2011, 5:34 p.m.). [DOJ 403]

Finding: The "consensus" of the federal government to switch its recommendation and decline intervention in *Newell* was the direct result of Assistant Attorney General Perez manipulating the process and advising and overseeing the communications between the City of St. Paul, the Department of Housing and Urban Development, and the Civil Division within the Department of Justice.

As Discussions Stalled, Assistant Attorney General Perez Took the Lead and Personally Brokered the Agreement

From the day that Assistant Attorney General Thomas Perez became aware that the Supreme Court granted certiorari in *Magner*, time was working against him. The Court was poised to hear oral arguments in the appeal on February 29, 2012, and the deadline for the Department of Justice to file its amicus brief was December 29, 2011. By early January 2012, with only weeks remaining until oral arguments, Perez personally assumed the lead and negotiated directly with the City's outside counsel, David Lillehaug. When discussions broke down in late January 2012, Perez traveled to St. Paul to seal the deal in person with St. Paul Mayor Coleman.

Once Perez had secured a consensus in support of declining *Newell* in exchange for the City's withdrawal of *Magner*, he began to directly negotiate with Lillehaug on the mechanics of the eventual agreement. Acting Associate Attorney General West testified that the decision to allow Perez to begin leading discussions with the City resulted from a meeting between West, Perez, and Deputy Assistant Attorney General Michael Hertz on January 9, 2012.[180] However, documents show that Perez may have taken it upon himself to lead negotiations even before that meeting. An email from a line attorney in Civil Fraud to then-Civil Fraud Section Director Joyce Branda on January 6 states: "[Line Attorney 2] and I just spoke with USAO-Minn. [Assistant U.S. Attorney] Greg Brooker received a call yesterday from Tom Perez. It sounds like Tom Perez agreed to take the lead on the negotiations with the City of St. Paul, in terms of negotiating a withdraw [*sic*] by the City of the cert petition."[181] Notes of this line attorney's call with Assistant U.S. Attorney Brooker show Perez asked Brooker "where are we on these cases" and "who has lead negotiating," and that Perez said that "he needs to start doing this."[182]

According to Lillehaug, he and Perez had a telephone conversation on January 9 – the same day Perez received the approval of then-Assistant Attorney General West to negotiate on behalf of the Civil Division – in which Perez offered a precise "roadmap" to use in executing the *quid pro quo*.[183] Lillehaug told the Committees that Perez proposed that the Department would first decline to intervene in *Ellis*, then the City would withdraw *Magner*, and finally the Department would decline to intervene in *Newell*.[184] Lillehaug further told the Committees that Perez promised "HUD would be helpful" with the *Newell* case in the event Newell continued his suit after the Department declined intervention.[185] This account is confirmed by a voicemail left

[180] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 79-82 (Mar. 18, 2013).
[181] Email from Line Attorney 1 to Joyce Branda (Jan. 6, 2012, 11:52 a.m.). [DOJ 656/611]
[182] Handwritten Notes (Jan. 6, 2012). [DOJ 647-54/602-09]
[183] Interview of David Lillehaug in Wash., D.C. (Oct. 18, 2012).
[184] *Id.*
[185] *Id.*

for Assistant U.S. Attorney Brooker by Perez on January 12, in which Perez stated: "We should have an answer on whether **our proposal** is a go tomorrow or Monday and just wanted to let you know that."[186] During his transcribed interview, the Committees asked Perez about his use of the phrase "our proposal" on the voicemail during his transcribed interview. Perez testified:

> Q The voicemail says, "And we should have an answer on whether our proposal is a go." What are you referring to when you say "our proposal"?
>
> A Again, up until about the middle of January, the proposal of the United States – the proposal of Mr. Lillehaug was the proposal that was under consideration.
>
> Q Okay.
>
> A And so the Civil Division had completed its review, as I have described, and had determined that it, the *Newell* case, was a weak candidate for intervention. And that is what we are referring to.
>
> Q Okay. I ask because you described it a number of times today as Mr. Lillehaug's proposal, the one he offered the first time you guys spoke on the phone. This is the first time that it's been described, to my knowledge, as "our proposal." And I am wondering if this was a proposal by you on behalf of the Department to Mr. Lillehaug? Or are you describing there the proposal that Lillehaug made to you?
>
> A Well, again, I don't know what you're looking at in reference. But what I meant to communicate in that period of time in January was that the United States was prepared to accept Mr. Lillehaug's proposal.

On January 13, the Civil Fraud Section became aware that Lillehaug had presented a counteroffer to the U.S. Attorney's Office. A DOJ line attorney described the phone conversation in an email to a colleague. He stated:

> Lillehaug says they have been thinking about it, and the City feels pretty strongly that it can win the Gallagher case in the Supreme Court, and will win back at the trial court when it is remanded. The City is concerned that getting us to decline does not really get them what they want – they would still have to deal with the case. The City wants us to consider an arrangement where we agree to a settlement where it will extend the VCA for another year, value that as an alternative remedy, and it would add a small amount of cash for relator's attorney fees, and a small relator's share. They say this has to be a very modest amount of money. In exchange we would have to intervene and move to dismiss.[187]

[186] Voicemail from Thomas Perez to Greg Brooker (Jan. 12, 2012, 5:58 p.m.) (emphasis added). [DOJ 719/670]
[187] Email from Line Attorney 2 to Line Attorney 1 (Jan. 13, 2012, 4:00 p.m.). [DOJ 721/671]

Then-Civil Fraud Section Director Branda's reaction to the development was "quite negative." In an email the same day, she stated: "This is so not what was discussed with [T]om [P]erez as what the plan was – basically we were to decline [E]llis first and use that as the good faith government gesture to get them to dismiss the petition."[188]

By January 18, the prospects for an agreement were beginning to look bleak. In updating Branda on the state of negotiations, a Civil Fraud line attorney explained that the deal was falling apart. He stated:

> [The Assistant U.S. Attorney] says he understood that West, Perez, and Hertz had had a meeting and that the resulting go forward was the plan to decline Ellis, resolve Gallagher, and then decline Newell. . . . [T]he City called and said they are no longer willing to accept the decline [of the] two *qui tams* and dismiss Gallagher deal. That they will not withdrawal [*sic*] Gallagher on that basis, that they are only willing to do the new deal they propose . . . . If we are unwilling to accept this deal, they said they will not dismiss Gallagher.[189]

In the ensuing week, DOJ deliberated about how to respond to the counterproposal from Lillehaug. By late January, the Department had decided to reject the City's counterproposal. On or around January 30, the Assistant U.S. Attorney in Minnesota conveyed to Lillehaug that the Department had declined the counterproposal.[190] The attorney's "conclusion [was] that we are no longer on a settlement track, and we should move forward with our decision making process."[191]

The next day, January 31, Perez emailed Lillehaug, proposing a meeting with the Mayor and City Attorney in St. Paul for February 3.[192] Perez was joined at this meeting by Eric Halperin, a special counsel in the Civil Rights Division. No officials from the Civil Division or the U.S. Attorney's Office were present. At the meeting, Perez initiated a "healthy, robust exchange" about disparate impact and the *Magner* appeal.[193] Perez raised the initial proposal to decline intervention in *Newell* and *Ellis* in exchange for the withdrawal of *Magner* and said the Department could agree to that exchange.[194] The City officials then left the room to caucus privately, and Lillehaug returned to accept the proposal on behalf of the Mayor.[195]

Finding: Assistant Attorney General Perez was personally and directly involved in negotiating the mechanics of the *quid pro quo* with David Lillehaug and he personally agreed to the *quid pro quo* on behalf of the United States during a closed-door meeting with the Mayor in St. Paul.

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[188] Email from Joyce Branda to Line Attorney 1 and Line Attorney 2 (Jan. 13, 2012, 5:35 p.m.). [DOJ 735/685]
[189] Email from Line Attorney 2 to Joyce Branda (Jan. 18, 2012, 4:06 p.m.). [DOJ 754/702]
[190] Email from Line Attorney 2 to Line Attorney 1 & Joyce Branda (Jan. 30, 2012, 5:18 p.m.). [DOJ 993/918]
[191] *Id.*
[192] Email from Thomas E. Perez to David Lillehaug (Jan. 31, 2012, 12:09 p.m.). [DOJ 59]
[193] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 48-56 (Mar. 22, 2013).
[194] *Id.*
[195] *Id.*

The Department of Justice Sacrificed a Strong Case Alleging a "Particularly Egregious Example" of Fraud to Execute the Quid Pro Quo with the City of St. Paul

In several settings, officials from the Department of Justice have told the Committees that the decision whether to intervene in *Newell* was a close decision and therefore the United States never gave up anything of substance in exchange for the City withdrawing *Magner*. Assistant Attorney General Perez testified: "[M]y understanding is that the original recommendation was to proceed with intervention, but it was a marginal case."[196] Acting Associate Attorney General West told the Committees "I can tell you that this case was a close call. It was a close call throughout."[197] U.S. Attorney Jones likewise testified: "[T]hey were both marginal cases. We could have gone either way on *Newell*."[198] In addition, now-Deputy Assistant Attorney General Joyce Branda briefed the Committees that after the December 13 meeting with the City, Deputy Assistant Attorney General Michael Hertz whispered to her, "this case sucks," which she interpreted to mean that it was unlikely the Department would intervene.[199] Branda also told the Committees that she personally felt the case was a "close call."[200]

However, testimony and contemporaneous documents indicate that the career Civil Fraud Section and U.S. Attorney's Office in Minnesota officials thought the *Newell* suit was indeed a strong case for intervention. HUD General Counsel Kanovsky told the Committees that these officials had a strong desire to intervene in the case and that they personally met with her in fall 2011 to lobby her to lend HUD's support for the intervention decision.[201] Attorneys from the U.S. Attorney's Office in Minnesota even flew to Washington, D.C. at taxpayer expense specifically for the meeting.[202] At this meeting, Kanovsky did not recall any career attorney mentioning that the case was a "close call" or "marginal."[203]

On October 4, 2011, a line attorney in the Civil Fraud Section wrote to HUD's Associate General Counsel Dane Narode about the *Newell* case: "Our office is recommending intervention. Does HUD concur?"[204] Three days later, Narode replied: "HUD concurs with DOJ's recommendation."[205] The AUSA handling *Newell* in Minnesota forwarded HUD's concurrence to his supervisor with a comment. He wrote: "Looks like everyone is on board."[206]

The memo prepared by the U.S. Attorney's Office in Minnesota recommending intervention used strong language to explain its support for intervention, explaining that the City

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[196] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 185-86 (Mar. 22, 2013).
[197] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 53 (Mar. 18, 2013).
[198] Transcribed Interview of Byron Todd Jones, U.S. Dep't of Justice, in Wash., D.C. at 80 (Mar. 8, 2013).
[199] Briefing with Joyce Branda in Wash., D.C. (Dec. 5, 2012).
[200] *Id.*
[201] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 25-30 (Apr. 5, 2013).
[202] *Id.*
[203] *Id.* at 109-11.
[204] Email from Line Attorney 1 to HUD Line Employee (Oct. 4, 2011, 5:05 p.m.). [DOJ 67]
[205] Email from HUD Line Employee to Line Attorney 1 (Oct. 7, 2011, 11:27 a.m.). [DOJ 68]
[206] Email from Line Attorney 3 to Greg Brooker (Oct. 7, 2011, 11:28 a.m.). [DOJ 69]

made "knowingly false" statements and had a "reckless disregard for the truth."[207] This memo also emphasized that administrative proceedings performed by HUD found the City's noncompliance with Section 3 "not . . . to be a particularly close call."[208] Similarly, the initial intervention memo prepared by career attorneys in the Civil Fraud Section described St. Paul's conduct as a "particularly egregious example of false certifications." The memo stated:

> To qualify for HUD grant funds, the City was required to certify each year that it was in compliance with Section 3. . . . Each time the City asked HUD for money, it impliedly certified its compliance with Section 3. At best, the City's failure to take any steps towards compliance while continually telling federal courts, HUD and others that it was in compliance with Section 3 represents a reckless disregard for the truth. We believe its certifications of Section 3 compliance to obtain HUD funds were actually more than reckless and that the City had actual knowledge that they were false.[209]

Neither the U.S. Attorney's Office memo nor the memo prepared by the Civil Fraud Section described the recommendation to intervene as a "close call" or "marginal."[210]

Other documents show that as late as mid-December 2011, career officials in DOJ still supported intervention in *Newell*. On December 20, 2011, then-Civil Fraud Section Director Branda wrote to Deputy Assistant Attorney General Hertz: "The USAO wants to intervene notwithstanding HUD. I feel we have a case but I also think HUD needs to address the question St. Paul is so fixated on, i.e. was their belief they satisfied Section 3 by doing enough with minorities and women reasonable?"[211] On December 21, a line attorney in the Civil Fraud Section wrote to Branda about HUD's memo to decline intervention. The line attorney stated: "Are we supposed to incorporate this into our memo and send up our joint recommendation with the [U.S. Attorney's Office] that we intervene?"[212]

Fredrick Newell and his attorney testified that no individual from DOJ or HUD ever told them that his case was a "close call" or "marginal" or otherwise indicated it was weak.[213] In fact, Newell told the Committees that "[t]here was a real interest . . . and the DOJ felt it was a good case."[214] Newell's attorney stated:

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[207] U.S. Attorney, District of Minnesota, Intervention Memo: *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Oct. 25, 2011). [DOJ 72-79]
[208] *Id.*
[209] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]
[210] U.S. Attorney, District of Minnesota, Intervention Memo: *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Oct. 25, 2011); [DOJ 72-79] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]
[211] Email from Joyce Branda to Michael Hertz (Dec. 20, 2011, 5:05 p.m.). [DOJ 404/365]
[212] Email from Line Attorney 1 to Joyce Branda (Dec. 21, 2011, 7:36 a.m.). [DOJ 419/380]
[213] Transcribed Interview of Fredrick Newell in Wash., D.C. at 55-56 (Mar. 28, 2013).
[214] *Id.* at 48.

> And to build on that, there were a number of indications that Justice was going to intervene in the case, up to and including them saying, we're going to intervene in the case. But it started with the relator interview. And I would say that just the attendance at the interview and the amount of travel expense you're looking at, at the interview, knowing that Justice had already spoken to HUD about the substance of the action and then having that many people from Washington at the meeting [in Minnesota], sent a clear signal to me that this was a case of priority.[215]

Newell's attorney also told the Committees that when the City initially met with DOJ and HUD in 2011, the attorneys from DOJ and HUD were unconvinced by the City's defenses.[216] According to Newell, even then-HUD Deputy Secretary Ron Sims acknowledged the strength of the case, telling Newell in 2009 that the False Claims Act would be the new model for Section 3 enforcement and directing Newell to "keep up the good work."[217]

That the U.S. Attorney's Office in Minnesota and DOJ's Civil Fraud Section perceived Newell's case to be strong is also corroborated by HUD General Counsel Helen Kanovsky's testimony to the Committees. Kanovsky testified that because she believed HUD's programmatic goals regarding future compliance had been met by the VCA, she was not inclined to recommend intervening in *Newell* when it was first presented to her in the summer or early fall of 2011.[218] However, the U.S. Attorney's Office in Minnesota and DOJ's Civil Fraud Division requested a meeting with her in order to persuade her to support intervention. Kanovsky testified:

> Then attorneys from the U.S. Attorney's Office in Minnesota and from Civil Frauds asked if they could meet with me to dissuade me of that and to get the Department to accede to their request to intervene, so there was that meeting. Assistant U.S. Attorneys flew in from Minnesota, people from Civil Frauds came over. They did a presentation on the matter and why they thought this was important from Justice's equities to intervene. And after that presentation, and because this seemed like a matter that was so important to both Main Justice and the U.S. Attorney's Office, we then acceded to their request that we agree to the intervention.[219]

When questioned more closely about her basis for understanding Civil Fraud Division's position, Kanovsky testified:

> A Came from the fact that they and the U.S. Attorney's Office in Minnesota asked for a meeting, came to HUD, spent an amount of time briefing me and trying to convince me that it was in HUD's best interests to agree to

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[215] *Id.* at 53-54.
[216] *Id.* at 122-26.
[217] *Id.* at 133-36.
[218] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 25, 30 (Apr. 5, 2013).
[219] *Id.* at 25.

> intervention. So . . . I concluded that the fact that they had come over to make that argument to convince me to go the direction that I had already indicated was not my inclination certainly strongly suggested to me that was where they wanted to go.[220]

This meeting undermines the Justice Department's post hoc claim made during the Committees' investigation that the Civil Frauds Division and the U.S. Attorney's Office in Minnesota saw the case as weak from the beginning.

Finding: Despite the Department of Justice's contention that the intervention recommendation in *Newell* was a "close call" and "marginal," contemporaneous documents show the Department believed that *Newell* alleged a "particularly egregious example of false certifications" and therefore the United States sacrificed strong allegations of false claims worth potentially $200 million to the Treasury.

Assistant Attorney General Perez Offered to Provide the City of St. Paul with Assistance in Dismissing Newell's Complaint

St. Paul's outside counsel, David Lillehaug, told the Committees that during a discussion with Assistant Attorney General Thomas Perez on January 9, 2012, Perez told Lillehaug that "HUD would be helpful" if the *Newell* case proceeded after DOJ declined intervention.[221] Lillehaug further told the Committees that on February 4 – the day after Perez reached the agreement with the City – Perez told Lillehaug that HUD Deputy Assistant Secretary Sara Pratt had begun assembling information from local HUD officials to assist the City in a motion to dismiss the *Newell* complaint on original source grounds.[222] This assistance disappeared, Lillehaug stated, after Civil Division attorneys told Perez that DOJ should not assist a False Claims Act defendant in dismissing a whistleblower suit.[223]

In his transcribed interview with the Committees, Perez testified that he did not recall ever suggesting to Lillehaug that HUD would provide material in support of the City's motion to dismiss the *Newell* complaint on original source grounds.[224] However, contemporaneous emails support Lillehaug's version of events and suggest that Lillehaug in fact believed this additional "support" was included as part of the agreement. On February 7, Lillehaug had a conversation with the Assistant U.S. Attorney handling *Newell* in Minnesota.[225] Later that same day, a line attorney in the Civil Fraud Section emailed then-Civil Fraud Section Director Joyce Branda, explaining that Lillehaug had told the Assistant U.S. Attorney that he believed the deal included an agreement that "HUD will provide material to the City in support of their motion to dismiss on original source grounds."[226] The Civil Fraud Section attorneys disagreed strongly with this promise, and they conveyed their concern to then-Assistant Attorney General Tony West.[227]

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[220] *Id.* at 91-92.
[221] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[222] *Id.*
[223] *Id.*
[224] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 60-61 (Mar. 22, 20113)
[225] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[226] Email from Line Attorney 2 to Joyce Branda (Feb. 7, 2012, 7:17 p.m.). [DOJ 1141/1020]
[227] Email from Joyce Branda to Tony West & Brian Martinez (Feb. 8, 2012, 9:35 a.m.). [DOJ 1141/1020]

West asked his chief of staff, Brian Martinez, to schedule a call with Perez for the morning of February 8.[228]

West told the Committees that providing material to the City outside of the normal discovery processes would have been "inappropriate" and "there was not a question in my mind that we were not going to allow discovery to occur outside the normal *Touhy* channels."[229] West did not recall speaking to Perez about the email from Lillehaug.[230] When asked how the matter was resolved, he replied "[m]y recollection is this somehow got resolved" and "[w]hen I say I don't recall, I don't even know if I know how it was resolved. I just know that that wasn't going to happen, and it didn't happen."[231]

HUD's Sara Pratt testified that she was unaware of any offer for HUD to provide information to the City in support of its motion to dismiss; however, she did state that "to the extent that existing documents or knowledge available at HUD would have supported the City's motion, . . . that doesn't concern me."[232] Although Pratt did not recall any offer for HUD to assist the City in dismissing the *Newell* complaint, on February 8 – the same day West attempted to speak with Perez about the offer – Perez emailed Pratt asking for her to call him.[233] Lillehaug likewise told the Committees that Perez told him on February 8 that HUD would not be providing assistance to the City.[234]

Although Perez testified that he did not recall ever offering HUD's assistance to the City, contemporaneous documents and Lillehaug's statements to the Committees strongly suggest that such an offer was made. This offer was inappropriate, as acknowledged by Acting Associate Attorney General Tony West. However, on a broader level, this offer of assistance potentially violated Perez's duty of loyalty to his client, the United States, in that Newell's lawsuit was brought on behalf of the United States and any assistance by Perez or HUD with the City's dismissal of the case would have harmed the interests of the United States. Because the original source defense would have been unavailable if the United States had intervened in Newell's case,[235] Perez's offer to the City went beyond simply declining intervention to affirmatively aiding the City in its defense of the case.

Finding: Assistant Attorney General Perez offered to arrange for the Department of Housing and Urban Development to provide material to the City of St. Paul to assist the City in its motion to dismiss the *Newell* whistleblower complaint. This offer was inappropriate and potentially violated Perez's duty of loyalty to his client, the United States.

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[228] Email from Tony West to Joyce Branda & Brian Martinez (Feb. 8, 2012, 9:48 a.m.). [DOJ 1141/1020]
[229] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 165-67 (Mar. 18, 2013).
[230] *Id.*
[231] *Id.*
[232] Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 82-83 (Apr. 3, 2013).
[233] *See* Email from Thomas E. Perez to Sara K. Pratt (Feb. 8, 2012, 12:35 p.m.). [DOJ 1177/1056]
[234] Interview with David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[235] *See* 31 U.S.C. § 3730(e)(4).

***Assistant Attorney General Perez Attempted to Cover Up the Presence of* Magner *as a Factor in the Intervention Decision on* Newell**

On the morning of January 10, 2012, Assistant Attorney General Perez left a voicemail for Greg Brooker, the Civil Division Section Chief in the U.S. Attorney's Office in Minnesota. In that voicemail, Perez said:

> Hey, Greg. This is Tom Perez calling you at – excuse me, calling you at 9 o'clock on Tuesday. I got your message. The main thing I wanted to ask you, I spoke to some folks in the Civil Division yesterday and **wanted to make sure that the declination memo that you sent to the Civil Division – and I am sure it probably already does this – but it doesn't make any mention of the *Magner* case**. It is just a memo on the merits of the two cases that are under review in the *qui tam* context. So that was the main thing I wanted to talk to you about. I think, to use your words, we are just about ready to rock and roll. I did talk to David Lillehaug last night. So if you can give me a call, I just want to confirm that you got this message and that you were able to get your stuff over to the Civil Division. 202 [redacted] is my number. I hope you are feeling better. Take care.[236]

A career line attorney's notes from a subsequent phone conversation between Brooker and attorneys in the Civil Fraud Section and the U.S. Attorney's Office confirm Perez's request. The notes describe a Tuesday morning "message from Perez" in which he told Brooker "when you are working on memos – make sure you don't talk about Sup. Ct. case."[237] Brooker told those on the call that Perez's request was a "concern" and a "red flag," and that he left a voicemail for Perez indicating that *Magner* would be an explicit factor in any declination memo.[238]

During his transcribed interview, the Committees asked Perez about this voicemail. Perez maintained that the voicemail was merely an "inartful" attempt to encourage Brooker to expedite the preparation of a concurrence memo by the U.S. Attorney's Office. Perez testified:

> So I was – I was confused – "confused" is the wrong term – I was impatient on the 9th of January when I learned that the U.S. Attorney's Office still hadn't sent in their concurrence, because I had a clear impression from my conversation with Todd Jones that they would do that. So I called up and I was trying to put it together in my head, what would be the source of the delay, and the one and only thing I could really think of at the time was that perhaps they hadn't – they didn't write in or they hadn't prepared the language on the *Magner* issue, and so I admittedly inartfully told them, I left a voicemail and what I meant in that voicemail to say was time is moving. . . . And so what I really meant to

[236] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 120-21 (Mar. 22, 2013) (emphasis added).
[237] Handwritten Notes of Line Attorney 2 (Jan. 11, 2012). [DOJ 713/666]
[238] *Id.*

> communicate in that voice message, and I should have – and what I meant to communicate was it is time to bring this to closure, and if the only issue that is standing in the way is how you talk about *Magner*, then don't talk about it.[239]

When pressed, however, Perez stated that he never asked Brooker about the reason for the delay and that he only assumed through "the process of elimination" that the presence of *Magner* as a factor in the decision was delaying the preparation of the memo.[240] He also testified that he believed the memos had not been transmitted to the Civil Division at the time he left the voicemail.[241]

When presented with a transcription of the voicemail and asked why he used the past tense verb "sent" if he believed the memos had not be transmitted to the Civil Division, Perez stated that he disagreed with the transcription of the voicemail.[242] After the Committees played an audio recording of the voicemail for Perez, he suggested that he was unable to ascertain what he had said. He stated: "Having listened to that, I don't think that – I would have to listen to it a number of additional times."[243] However, later in the voicemail Perez again used the past tense, saying he wanted to confirm with Brooker "that you **were** able to get your stuff over to the Civil Division."[244] Perez did acknowledge that his voicemail for Brooker did not mention anything about a delay.[245]

The words that Perez spoke in his voicemail speak for themselves. Perez said: "I . . . wanted to make sure that the declination memo that you sent to the Civil Division . . . doesn't make any mention of the *Magner* case. It is just a memo on the merits of the two cases that are under review in the *qui tam* context. So that was the main thing I wanted to talk to you about." No other witness interviewed by the Committees has indicated that there was any delay in the preparation of a concurrence memo from the U.S. Attorney's Office. Indeed, the U.S. Attorney's Office did not even prepare a concurrence memo for the *Newell* case – instead, it communicated its concurrence in an email from Greg Brooker to then-Civil Fraud Section Director Joyce Branda on February 8, 2012.[246]

Moreover, in a contemporaneous email to Brooker – sent less than an hour after the voicemail – Perez wrote to him: "I left you a detailed voicemail. Call me if you can after you have a chance to review [the] voice mail."[247] This email does not mention any concern about a delay in transmitting concurrence memos. Instead, the email suggests that Perez intended to leave instructions for Brooker, which matches the tone and content of the voicemail to omit a

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[239] Transcribed Interview of Thomas E. Perez, U.S. Dep't of Justice, in Wash., D.C. at 111-12 (Mar. 22, 2013).
[240] *Id.* at 113-17.
[241] *Id.* at 117.
[242] *Id.* at 119.
[243] *Id.* at 121.
[244] *Id.* at 121 (emphasis added).
[245] *Id.* at 124.
[246] Email from Greg Brooker to Joyce Branda (Feb. 8, 2012, 4:01 p.m.). [DOJ 1198/1077]
[247] Email from Thomas E. Perez to Greg Brooker (Jan. 10, 2012, 9:52 a.m.). [DOJ 707-08]

discussion of *Magner* from the declination memos. Later the same day, at 1:45 p.m., Perez again emailed Brooker, asking "[w]ere you able to listen to my message?"[248]

Finally, additional contemporaneous documents support a common sense interpretation of Perez' intent. For instance, Perez testified that after he left the January 10 voicemail, Brooker called him back the next day and said he [Brooker] would not accede to his request. And, according to Perez, he told Brooker that in that case he should "follow the normal process."[249] Yet, one month later on February 6, 2012, following Perez' meeting in St. Paul where he finalized the agreement, Line Attorney 1 wrote to Branda updating her on the apparent agreement. The email included eight "additional facts" regarding the deal.[250] Points five and six were:

> 5. Perez wants declination approval by Wednesday, but there is no apparent basis for that deadline.
> 6. USA-MN considers it non-negotiable that its office will include a discussion of the Supreme Court case and the policy issues in its declination memo.[251]

If Perez's version of events were accurate, and the issue was resolved on January 11, 2012, when Brooker returned Perez's phone call, then it is difficult to understand why the U.S. Attorney's office would still feel the need to emphatically state its position that a discussion of *Magner* must be included in the final declination memo approximately one month later on February 6, 2012.

The only reasonable interpretation of the words spoken by Assistant Attorney General Perez in his January 10 voicemail is that he desired the *Newell* and *Ellis* memos to omit a discussion of *Magner*. Acting Associate Attorney General West told the Committees that it would have been "inappropriate" to omit a discussion of *Magner* in the *Newell* and *Ellis* memos.[252] U.S. Attorney B. Todd Jones also told the Committees that it would have been inappropriate to omit a discussion of *Magner*.[253] Thus, even other senior DOJ political appointees felt that Perez was going too far in his cover-up attempt. In addition, the fact that the *quid pro quo* was not reduced to writing allowed Perez to cover up the true factors behind DOJ's intervention decision. When asked by career Civil Fraud attorneys about whether the deal was in writing, Perez responded: "No, just oral discussions; word was your bond."[254] Thus, with nothing in writing, only the fortitude of Assistant U.S. Attorney Greg Brooker in resisting the voicemail request prevented Perez from inappropriately masking the factors in the Department's decision to decline intervention in *Newell* and *Ellis*.

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[248] Email from Thomas E. Perez to Greg Brooker (Jan. 10, 2012, 1:45 p.m.). [DOJ 717-18]
[249] Transcribed Interview of Thomas E. Perez, U.S. Dep't of Justice, in Wash., D.C. at 220 (March 22, 2013).
[250] Email from Line Attorney 1 to Joyce Branda (Feb. 6, 2012, 2:58 p.m.). [DOJ 1027-28/948]
[251] *Id.*
[252] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 133 (Mar. 18, 2013) ("For me, yes, it would have been inappropriate, which is why I included it along with all of the other things I thought were relevant.").
[253] Transcribed Interview of Byron Todd Jones, U.S. Dep't of Justice, in Wash., D.C. at 177-78 (Mar. 8, 2013).
[254] Handwritten notes (Feb. 7, 2012). [DOJ 1059-60/975-76]

Finding: Assistant Attorney General Perez attempted to cover up the *quid pro quo* when he personally instructed career attorneys to omit a discussion of *Magner* in the declination memos that outlined the reasons for the Department's decision to decline intervention in *Newell* and *Ellis*, and focus instead only "on the merits."

Finding: Assistant Attorney General Perez attempted to cover up the *quid pro quo* when he insisted that the final deal with the City settling two cases worth potentially millions of dollars to the Treasury not be reduced to writing, instead insisting that your "word was your bond."

Assistant Attorney General Perez Made Statements to the Committees that Were Largely Contradicted by Other Testimony and Documentary Evidence

Several times during his transcribed interview with the Committees, Assistant Attorney General Thomas Perez gave testimony that was contradicted by other testimony and documentary evidence obtained by the Committees. These contradictions in Perez's testimony call into question the veracity of his statements and his credibility in general. During his interview, Perez stated that he understood that he was required to answer the questions posed truthfully and stated he had no reason to provide untruthful answers.[255]

Section 1001 of title 18 of the United States makes it a crime to "knowingly and willfully . . . make[] any materially false, fictitious, or fraudulent statement or representation" to a congressional proceeding.[256] Any individual who knowingly and willfully makes false statements could be subject to five years of imprisonment.[257] This section applies to "any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with the applicable rules of the House or Senate."[258]

First, Perez testified repeatedly – both in response to questions and during his prepared testimony delivered at the beginning of the interview – that it was St. Paul's outside counsel, David Lillehaug, during a November 23, 2011, phone conversation, who first proposed the idea of a joint resolution of *Magner* and *Newell* in which the City would withdraw the *Magner* appeal if DOJ declined to intervene in *Newell*.[259] Lillehaug, however, told the Committees that it was in fact Perez who first raised the possibility of a joint resolution of *Magner* and *Newell* in a November 29 meeting with Lillehaug and City Attorney Grewing.[260] Lillehaug also stated that it was Perez who first proposed the precise "roadmap" in early January 2012 that guided how the Department would decline the False Claims Act cases and the City would withdraw *Magner*.[261] This statement is verified by a voicemail from Perez to Assistant U.S. Attorney Greg Brooker on

[255] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 6-7 (Mar. 22, 2013).
[256] 18 U.S.C. § 1001(a).
[257] *Id.*
[258] *Id.* at § 1001(c)(2).
[259] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 10, 43-44 (Mar. 22, 2013).
[260] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[261] *Id.*

January 12, 2012, in which he stated "we should have an answer on whether **our proposal** is a go tomorrow or Monday and just wanted to let you know that."[262]

Second, Perez testified that he did not recall ever asking HUD General Counsel Helen Kanovsky to reconsider HUD's recommendation for intervention in *Newell*.[263] Perez testified:

> Q So just to be clear, you never affirmatively asked [HUD Deputy Assistant Secretary] Pratt or Ms. Kanovsky to reconsider HUD's position in Newell, is that correct?
>
> A Again, my recollection of my conversations with Helen Kanovsky and Sara Pratt was that they concluded, their sense of the Newell case was that it was a weak case and that disparate impact enforcement was a very important priority of HUD, and that they had spent a lot of time preparing a regulation. They were very concerned, as I was, that the Supreme Court had granted cert without the benefit of the Reagan HUD's interpretation. And so for both of them it was based on my conversations with them, they were both very – they rather clearly expressed their belief that it would be in the interests of the Department of Housing and Urban Development to determine whether they could – whether the proposal of Mr. Lillehaug could go forward.
>
> Q I just want to be clear. You never asked them to reconsider that, is that right?
>
> A Again, I don't recall asking them. I don't recall that I needed to ask them because they both understood and indicated their sense that it was a marginal or weak case to begin with, and the importance of disparate impact.[264]

Helen Kanovsky, however, testified that Perez did in fact ask her to reconsider HUD's recommendation. She stated: "He said, well, if you don't feel strongly about it, how would you feel about withdrawing your approval and indicating that you didn't endorse the position? And I said, I would do that."[265] Kanovsky acknowledged that Perez' request was the only new factor in HUD's decision-making process between the time it initially recommended intervention in *Newell* and the time it recommended to not intervene.[266]

Third, Perez's testimony that his voicemail request that Assistant U.S. Attorney Greg Brooker omit a discussion of *Magner* as a factor in the *Newell* declination memo was merely an "inartful" attempt to expedite the memo contradicts the plain language of his request and defies a

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[262] Voicemail from Thomas Perez to Greg Brooker (Jan. 12, 2012, 5:58 p.m.) (emphasis added). [DOJ 719/670]
[263] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 131 (Mar. 22, 2013).
[264] *Id.*
[265] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 41 (Apr. 5, 2013).
[266] *Id.* at 48.

commonsensical interpretation. When presented with a transcription and an audio recording of the voicemail, Perez testified that he could not be certain what he had said in the voicemail. Contemporaneous documents show, however, that Brooker, the recipient of the voicemail, understood the voicemail to be a "message from Perez" that "when you are working on memos – make sure you don't talk about Sup. Ct. case."[267]

Fourth, Perez testified before the Committees that he had no recollection of offering to provide HUD assistance to the City in support of the City's motion to dismiss the *Newell* complaint.[268] However, contrary to Perez's testimony, the City's outside counsel, David Lillehaug, told the Committees that Perez told him as early as January 9, 2012, that "HUD would be helpful" if the *Newell* case proceeded after DOJ declined intervention.[269] Lillehaug also explained to the Committees that Perez told him on February 4, 2012, that HUD had begun assembling information to assist the City in a motion to dismiss the *Newell* complaint on original source grounds.[270] Evidence produced to the Committees – including a DOJ email from early February 2012 noting Lillehaug's recitation of the agreement included an understanding that "HUD will provide material to the City in support of their motion to dismiss on original source grounds"[271] – support Lillehaug's account.

Fifth, Perez told the Committee that he only became aware of the *Magner* appeal once the Supreme Court granted certiorari;[272] however, HUD Deputy Assistant Secretary Sara Pratt testified that she and Perez likely had discussions about the *Magner* case well before the Court granted certiorari.[273] Pratt testified:

> Q Do you recall speaking to Mr. Perez during that time period?
>
> A The time frame?
>
> Q Between February 2011 and November 2011?
>
> A I'm sure we did have a conversation.
>
> Q About the *Magner* case?
>
> A Yes. Yes. Nothing surprising, nothing shocking about that.
>
> Q Okay.
>
> A Along with many, many other people.[274]

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[267] Handwritten Notes of Line Attorney 2 (Jan. 11, 2012). [DOJ 713/666]
[268] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 60-61 (Mar. 22, 2013).
[269] Interview of David Lillehaug in Wash., D.C. (Oct. 16, 2012).
[270] *Id.*
[271] Email from Line Attorney 2 to Joyce Branda (Feb. 7, 2012, 7:17 p.m.). [DOJ 1141/1020]
[272] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 39-40 (Mar. 22, 2013).
[273] Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 33 (Apr. 3, 2013).
[274] *Id.*

Sixth, during his transcribed interview, Perez was asked whether he had used a personal email to communicate about matters relating to the *quid pro quo* with the City of St. Paul.[275] Perez answered: "I don't recall whether I did or didn't" and later clarified, "I don't have any recollection of having communicated via personal email on – on this matter."[276] However, a document produced to the Committees by the City of St. Paul indicates that Perez emailed David Lillehaug from his personal email account on December 10, 2011, to attempt to arrange a meeting with the City the following week.[277] This revelation that Perez used his personal email address to communicate with Lillehaug about the *quid pro quo* raises the troubling likelihood that his actions violated the spirit and the letter of the Federal Records Act.

Seventh, Perez testified that he understood *Newell* to be a "marginal case" and a "weak" case,[278] however, the initial memoranda prepared in fall 2011 by the Civil Fraud Section and the U.S. Attorney's Office never described the recommendation to intervene as a "close call" or "marginal."[279] In addition, whistleblower Fredrick Newell and his attorney testified that no individual from DOJ or HUD ever told them that the case was a "close call" or "marginal" or otherwise indicated it was weak.[280]

The contradictions and discrepancies in Perez's statements in his transcribed interview cast considerable doubt on his truthfulness and candor to the Committees. His testimony departed significantly from that of the City outside counsel, David Lillehaug, on several key elements about the development and execution of the *quid pro quo*. Because documentary evidence exists to support Lillehaug's testimony, the Committees can only conclude that Perez was less than candid during his transcribed interview.

Finding: Assistant Attorney General Perez made multiple statements to the Committees that contradicted testimony from other witnesses and documentary evidence. Perez's inconsistent testimony on a range of subjects calls into question the reliability of his testimony and raises questions about his truthfulness during his transcribed interview.

Finding: Assistant Attorney General Perez likely violated both the spirit and letter of the Federal Records Act and the regulations promulgated thereunder when he communicated with the City's lawyers about the *quid pro quo* on his personal email account.

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[275] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 161 (Mar. 22, 2013).
[276] *Id.*
[277] Email from Thomas Perez to David Lillehaug (Dec. 10, 2011). [SPA 159]
[278] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 185-86, 257 (Mar. 22, 2013).
[279] U.S. Attorney, District of Minnesota, Intervention Memo: *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Oct. 25, 2011). [DOJ 72-79] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]
[280] Transcribed Interview of Fredrick Newell in Wash., D.C. at 55-56 (Mar. 28, 2013).

The Ethics and Professional Responsibility Opinions Obtained by Assistant Attorney General Perez Were Not Sufficient to Cover His Actions

In late November 2011, Assistant Attorney General Thomas Perez obtained an ethics opinion from the designated ethics official within the Civil Rights Division and his staff obtained separate professional responsibility guidance from another official.[281] Perez told the Committees that he orally recited the situation to the ethics officer.[282] And when asked, he testified that he "believe[d]" he explained that the United States was not a party to the *Magner* appeal.[283] The ethics official – who was also a trial attorney reporting to Perez in the normal course of his duties – found no ethical prohibition. The attorney wrote:

> You asked me whether there was an ethics concern with your involvement in settling a Fair Lending Act challenge in St. Paul that would include an agreement by the government not to intervene in a False Claims Act claim involving St. Paul. You indicated that you have no personal or financial interest in either matter. Having reviewed the standards of ethical conduct and related sources, there is no ethics rule implicated by the situation and therefore no prohibition against your proposed course of action. Please let me know if you have any questions.[284]

By its terms, the ethics opinion that Perez received advised him that there were no personal or financial conflicts prohibiting his involvement in the *quid pro quo*. It did not address the propriety of the agreement itself or any conflicts broader than Perez's personal or financial interests. As a general matter, ethics officers within the Justice Department answer questions of government ethics, such as conflicts of interest. These officials do not handle questions of professional ethics at issue here, such as duties to clients and global resolution of unrelated cases. The Justice Department's ethics website specifically states: "Questions concerning professional responsibility issues such as the McDade amendment and contacts with represented parties should be directed to the Department's Professional Responsibility Advisory Office."[285] Thus, the ethics opinion Perez received did not address the propriety of the agreement itself or any conflicts broader than Perez's personal or financial interests.

Moreover, two additional points cast doubt on the adequacy of the opinion. First, based on Perez's testimony that he "believe[d]" he informed the ethics advisor the United States was not party in *Magner*, it is not clear Perez equipped him with a full set of facts. Understanding that the United States was not a party to *Magner* – and in fact that it had no direct stake in the outcome – was of course a significant fact. Second, it is curious that Perez did not seek the ethics opinion until well after he had set in motion the entire chain events. More specifically, Perez spoke with Lillehaug for the first time on November 23, 2011. Nine minutes after that telephone call, Perez emailed HUD Deputy Assistant Secretary Pratt, asking to speak with her as

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[281] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 191, 202-03 (Mar. 22, 2013).
[282] *Id.* at 194-95.
[283] *Id.*
[284] Email from Civil Rights Division Ethics Officer to Thomas E. Perez (Nov. 28, 2011, 3:53 p.m.). [DOJ 114/109]
[285] U.S. Dep't of Justice, Departmental Ethics Office, http://www.justice.gov/jmd/ethics/.

soon as possible.[286] One minute later, at 2:30 p.m., Perez emailed HUD General Counsel Helen Kanovsky, asking to speak about a "rather urgent matter."[287] At 2:33 p.m., Perez emailed Tony West, head of DOJ's Civil Division and thus ultimately responsible for False Claims Act cases like *Newell*. Perez wrote: "I was wondering if I could talk to you today if possible about a separate matter of some urgency."[288] All of these actions set in motion the quid pro quo. Yet, he did not receive his "ethics opinion" until five days later on November 28.

Assistant Attorney General Perez received no written professional responsibility opinion about his involvement in the *quid pro quo*. Perez told the Committees that he inquired orally, through an intermediary, and "the answer that we received on the professional responsibility front was that because the United States is a unitary actor, that we could indeed proceed so long as the other component did not object and . . . would continue to be the decisionmaking body on those matters that fall within their jurisdiction."[289] This guidance, as described to the Committees by Perez, focused narrowly on his authority to speak on behalf of the Civil Division when negotiating with the City of St. Paul. It did not affirmatively authorize Perez to enter into the *quid pro quo*.

Because both the ethics opinion and the professional responsibility opinion were limited to Assistant Attorney General Perez's theoretical involvement in negotiating the *quid pro quo* – and do not affirmatively approve the agreement or his particular actions in reaching the agreement – the opinions do not suffice to cover the entirety of his actions in the *quid pro quo*. Neither the ethics opinion nor the professional responsibility opinion sanctioned Perez's actions in offering the City assistance in dismissing the whistleblower complaint against his client, the United States. Nor would the ethics opinion have absolved him of responsibility for his attempt to cover up the fact that *Magner* was underlying reason for the *Newell* declination decision.

Finding: The ethics and professional responsibility opinions obtained by Assistant Attorney General Thomas Perez and his staff were narrowly focused on his personal and financial interests in a deal and his authority to speak on behalf of the Civil Division, and thus do not address the *quid pro quo* itself or Perez's particular actions in effectuating the *quid pro quo*.

The Department of Justice Likely Violated the Spirit and Intent of the False Claims Act by Internally Calling the Quid Pro Quo a "Settlement"

The False Claims Act exists to help the United States recover taxpayer dollars misspent or misallocated on the basis of fraud committed against the government. Since it was amended in 1986, the False Claims Act has helped recover over $40 billion of taxpayer dollars that would otherwise be lost to fraud and abuse of federal programs.[290] The Act includes a whistleblower provision allowing private citizens to bring an action on behalf of the United States.[291] This

[286] Email from Thomas E. Perez to Sara K. Pratt (Nov. 23, 2011, 2:29 p.m.). [DOJ 103]
[287] Email from Thomas E. Perez to Helen Kanovsky (Nov. 23, 2011, 2:30 p.m.). [DOJ 165-66]
[288] Email from Thomas E. Perez to Tony West (Nov. 23, 2011, 2:33 p.m.). [DOJ 104]
[289] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 201-02 (Mar. 22, 2013).
[290] *The False Claims Act*, TAF http://www.taf.org/fraud-cases/false-claims-act (last visited April 12, 2013).
[291] *See* 31 U.S.C. § 3730.

provision is powerful, and according to the Department's own press release, since 1986, 8,500 *qui tam* whistleblower suits have been filed since 1986 totaling $24.2 billion in recoveries.[292] Where the government intervenes in the private action and settles the complaint, or where the government pursues an alternate remedy, the whistleblower is afforded the opportunity to contest the fairness and adequacy of the settlement or alternate remedy.[293]

As a result, the False Claims Act, and the *qui tam* whistleblower provisions have become an important part of the Civil Division's enforcement efforts and a key component of Senate confirmation hearings for senior officials at the Department. In fact, Attorney General Holder, Deputy Attorney General Cole, then-Associate Attorney General Perrelli, and Assistant Attorney General West were all asked specific questions about the False Claims Act and all answered that they supported the law and would work with whistleblowers to ensure that their cases were afforded due consideration and assistance from the Department.[294]

Unfortunately, despite these successes, and contrary to the assertions about support for the False Claims Act, the *qui tam* whistleblower provisions, and whistleblowers, Fredrick Newell, was treated differently and given no opportunity to contest the fairness and adequacy of the settlement or alternate remedy– despite DOJ privately labeling the resolution a "settlement."

Several contemporaneous documents suggest that DOJ viewed the *quid pro quo* with St. Paul as a settlement. In fact, in the initial ethics opinion that Perez received, the Division ethics officer evaluated Perez's "involvement in **settling** a Fair Lending Act challenge in St. Paul that would include an agreement by the government not to intervene in a False Claims Act claim involving St. Paul."[295] Handwritten notes of a subsequent meeting between then-Civil Frauds Section Director Joyce Branda, Deputy Assistant Attorney General Michael Hertz, and a Civil Fraud line attorney likewise reflect that "Civil Rights wants a settlement; St. Paul brought up another case," in reference to the *Newell qui tam*.[296] Even then-Assistant Attorney General Tony West's own handwritten notes of a Civil Division senior staff meeting in early January 2012 call the *quid pro quo* a settlement. West's notes state: "City: we've learned that as settlement City means they'll just withdraw the petition."[297] Other notes from January 2012 similarly state:

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[292] Press Release, Office of Public Affairs, U.S. Department of Justice, Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), *available at* http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html.

[293] *Id.* § 3730(c).

[294] *See generally*, *Nomination of Eric H. Holder, Jr., Nominee to be Attorney General of the United States*, 111th Cong. 276–277 (2009) (Responses to Written Questions of Senator Chuck Grassley); *Nomination of James Micheal Cole, Nominee to be Deputy Attorney General, U.S. Department of Justice*, 111th Cong. 148–150 (2010) (Responses to Written Questions of Senator Chuck Grassley); *Confirmation Hearings on the Nominations of Thomas Perrelli Nominee to be Associate Attorney General of the United States and Elena Kagen Nominee to be Solicitor General of the United States*, 111th Cong. 129 (2009) (Responses to Written Questions of Senator Chuck Grassley to Thomas Perrelli, to be Associate Attorney General for the U.S. Department of Justice); and *Confirmation Hearings on Federal Appointments*, 111th Cong. 784–785 (2009) (Responses to Written Questions by Senator Chuck Grassley).

[295] Email from Civil Rights Division Ethics Officer to Thomas E. Perez (Nov. 28, 2011, 3:53 p.m.) (emphasis added). [DOJ 114/109]

[296] Handwritten Notes of Line Attorney 2 (Dec. 7, 2012). [DOJ 230/217]

[297] Handwritten Notes of Tony West (Jan. 3, 2012). [DOJ 627/585]

"Newell – mtg w/ Joyce; decline the second case first; do not say there is a *quid pro quo* settlement; settlement is not contingent on declination."[298]

When Perez testified before the Committees, he stated that his discussions with the City's outside counsel, David Lillehaug, about the *quid pro quo* were "settlement negotiations." Perez testified:

> Q Mr. Perez, I just have a couple of follow up questions for you just to clarify some of the discussion you had with my colleague in the previous round. In the time period that we have been discussing, November 2011 to February 2012, is it fair to say that you were the primary representative of the Department in the settlement negotiations with the *Magner* and *Newell* cases with the city?
>
> A Here is how I look at it. I had initial conversations with Mr. Lillehaug, after I had spoken to Mr. Fraser and then Mr. Fraser put me in touch with Mr. Lillehaug. We had those conversations and then took the appropriate measures that I discussed this morning. During a substantial part of this period, Mr. Lillehaug, as I understand it, was also in contact with the U.S. Attorney's Office in Minnesota, so those conversations were occurring. And he obviously met directly with the Civil Division in connection with the discussion of the *qui tams* when the mayor came in, and I was not part of that. So there were a number of different conversations that were ongoing. I was involved in some of them, the U.S. Attorney's Office was involved in others, and the Civil Division was involved in yet others.
>
> * * *
>
> Q Were there settlement negotiations going on with the city in January and February of 2012?
>
> A We had – there were discussions underway in January and February of 2012 relating to Mr. Lillehaug's proposal.
>
> Q So the answer to my question is yes then?
>
> A Well, again, there were a number of different – Mr. Lillehaug was talking to the U.S. Attorney's Office, I was discussing – I was having discussions with him. So the reason I wanted to be complete in your other question was about whether it was just me, and I wanted to make sure that the record was complete in connection with the various people with whom Mr. Lillehaug I think was communicating.[299]

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[298] Handwritten Notes (Jan. 2012). [DOJ 653/608]

[299] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 105-07(Mar. 22, 2013).

Only after the Department's counsel interjected did Perez begin to contest the characterization of the discussions as "settlement negotiations."[300]

Although the Department of Justice decided to decline intervention in Newell's case in exchange for the City's withdrawal of the *Magner* Supreme Court appeal, Newell was never afforded the opportunity to contest the fairness or adequacy of this resolution. Simultaneously, however, internal Department documents reflect that high-level officials with the Department saw the *quid pro quo* as the outgrowth of settlement discussions with the City. As such, Newell should have been involved in these discussions and allowed the opportunity to opine on the resolution in a fairness hearing. Because he was not, the Department of Justice likely violated the spirit and intent of the False Claims Act.

Finding: The Department of Justice violated the spirit and intent of the False Claims Act by privately acknowledging the *quid pro quo* was a settlement while not affording Fredrick Newell the opportunity to be heard, as the statute requires, on the fairness and adequacy of this settlement.

The Quid Pro Quo Exposed Management Failures Within the Department of Justice

The process by which the Department of Justice arrived at this *quid pro quo* with the City of St. Paul is not at all a template for Departmental management. The Committees' investigation has exposed how Assistant Attorney General Thomas Perez was able to manipulate the bureaucratic mazes of DOJ and HUD to ensure that *Magner* was withdrawn from the Supreme Court. The management failures, however, run far deeper. According to information given to the Committees, senior leadership in the Department – up to and including Attorney General Holder – was unaware of the extent to which Perez had gone to realize his goal.

In November 2011, after the Supreme Court granted the City's appeal in *Magner*, Assistant Attorney General Perez initiated a process that ultimately resulted in an agreement with the City to withdraw the appeal. In this process, Perez asked HUD to reconsider its support for *Newell*, causing HUD to change its recommendation and subsequently eroding support for the case in DOJ's Civil Division. Once a consensus had been reached to decline *Newell*, Perez personally began leading negotiations with the City on the *quid pro quo*. His efforts paid off in February 2012, as the City agreed to withdraw *Magner* in exchange for the Department's declination in *Newell* and *Ellis*.

Senior leadership within the Department of Justice, however, was unaware of the full extent of Perez's actions. Former Associate Attorney General Thomas Perrelli, Perez's supervisor at the time of the *quid pro quo*, told the Committees that he was not aware that the Department of Justice entered into an agreement with the City until he was interviewed by Department officials in preparation for dealing with congressional scrutiny of this matter.[301] While Perrelli stated he was aware of Perez's discussions with the City, he was under the impression that an agreement had never been reached.[302] Perrelli testified that when he became

[300] *Id.* at 109-10.
[301] Transcribed Interview of Thomas John Perrelli in Wash., D.C. at 19 (Nov. 19, 2012).
[302] *Id.* at 94.

aware that *Magner* had been withdrawn from the Supreme Court, Perez told him that it was the "civil rights community" that had encouraged the City to withdraw the case. Perrelli testified:

> A I do remember a conversation with Tom Perez – and I can't remember whether it was a conversation or voicemail, what it was – where he – where I expressed surprise that the case had been dismissed. And he indicated that the civil rights community had encouraged the city to dismiss.
>
> Q So that's all he told you, civil rights community had encouraged the city to dismiss?
>
> A That's what he told me.
>
> Q He didn't tell you anything about the arrangement, *Newell*, the two *qui tam* cases?
>
> A That was the substance of the conversation.
>
> * * *
>
> Q And you were surprised because you had thought that this would be so difficult to get done?
>
> A I was surprised because I wasn't aware that the case was going to be dismissed. Obviously, I knew, you know, as Tom had indicated, that was something he was interested in. But I hadn't talked to him about it in a long time and was unaware that that would happen.
>
> Q And at that time, did it occur to you that an agreement may have been reached been [*sic*] the department and the city?
>
> A I was not aware that one was reached at that time and
>
> Q Did the thought cross your mind?
>
> A It didn't, frankly, or at least I don't remember it crossing my mind.[303]

Perrelli also testified that after a congressional inquiry from House Judiciary Committee Chairman Lamar Smith, Perrelli briefed Attorney General Holder on the *quid pro quo* and he "indicated to him that there had been these discussions in the Department that the City had put on the table this idea of the *qui tam* cases, but that that hadn't happened."[304] Instead, Perrelli passed on to Attorney General Holder the incomplete information from Perez that

[303] *Id.* at 96-97.
[304] *Id.* at 104.

encouragement from the civil rights community led to the City's withdrawal of the appeal.[305] Perrelli acknowledged that due to Perez's omission, he "didn't give [Attorney General Holder] a complete set of facts" about the *quid pro quo*.[306]

Finding: The *quid pro quo* exposed serious management failures within the Department of Justice, with senior leadership – including Attorney General Holder and then-Associate Attorney General Perrelli – unaware that Assistant Attorney General Perez had entered into an agreement with the City of St. Paul.

The Department of Justice, the Department of Housing and Urban Development, and the City of St. Paul Obstructed the Committees' Investigation

The House Committee on Oversight and Government Reform and the House Committee on the Judiciary first began investigating the circumstances surrounding the withdrawal of *Magner* in February 2012. The Department of Justice did not acknowledge the existence of the *quid pro quo* until a non-transcribed staff briefing in August 2012. The City of St. Paul, likewise, did not acknowledge the existence of the *quid pro quo* to the Committees until October 2012. This obstruction by DOJ and the City – as well as similar obstruction by HUD – has unnecessarily delayed the Committees' investigation.

For six months, DOJ refused to allow the Committees to speak on the record about the *quid pro quo* with Department officials. The Department reluctantly allowed the Committees to speak to Assistant Attorney General Perez, U.S. Attorney Jones, and Acting Associate Attorney General West in March 2013 only after the Committee on Oversight and Government Reform began to prepare deposition subpoenas. DOJ also refused to allow the Committees to transcribe an interview in December 2012 with Deputy Assistant Attorney General Joyce Branda. During the transcribed interviews, DOJ also attempted to frustrate the Committee's fact-finding effort. A Department attorney directed Perez not to answer questions posed to him about whether he has communicated with any officials at HUD or the parties to *Township of Mt. Holly v. Mt. Holly Gardens Citizens in Action*, a pending Supreme Court appeal with precisely the same legal question as *Magner*.[307]

Similarly, HUD refused for over four months to allow the Committees to speak on the record about the *quid pro quo* with HUD officials. HUD eventually agreed to allow the Committees to speak with General Counsel Helen Kanovsky and Deputy Assistant Secretary Sara Pratt; however, the Department continues to refuse the Committees' requests to speak with Associate General Counsel Dane Narode and Regional Director Maurice McGough. Even during the interviews of Kanovsky and Pratt, HUD objected to the presence of Senator Grassley's staff and their right to ask questions of the witnesses. HUD attorneys also directed Kanovsky and Pratt to not answer questions about the *Mt. Holly* Supreme Court appeal.[308]

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[305] *Id.* at 152.
[306] *Id.* at 154.
[307] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 141-43 (Mar. 22, 2013).
[308] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 80-82 (Apr. 5, 2013); Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 85-90 (Apr. 3, 2013).

The City of St. Paul's cooperation with the investigation has been no better. After the Oversight Committee first wrote to Mayor Coleman in February 2012, City Attorney Grewing telephoned Committee staff and indicated that the City would fully respond to the inquiry. When the City eventually sent its response, it declined to answer any questions about the withdrawal of *Magner*. It was not until May 2012 that the City substantially complied with the investigation. Even today, however, the City continues to withhold twenty documents and one audio recording from the Committees. The City also denied the Committees the opportunity to review these documents *in camera*.

A key difficulty throughout this investigation has been DOJ's insistence that former Deputy Assistant Attorney General Michael Hertz motivated the Department's ultimate decision to decline intervention in *Newell*. Both Acting Associate Attorney General West and Assistant Attorney General Perez testified that Hertz expressed concern about the *Newell* case and suggested that Hertz's negative opinion about the case carried considerable weight.[309] Branda also told the Committees that Hertz expressed to her privately that the *Newell* case "sucks," which she understood to mean that it was unlikely the Department would intervene.[310] The Department positioned Hertz as the central figure in its narrative, which Perez alluded to in his testimony. Perez testified:

> Well, as I said before, in the end, the United States made a decision in this matter, and the decisions in the *qui tam* matters were made at the highest levels of the Civil Division, Mike Hertz and – who is, again, the Department's preeminent expert on *qui tam* matters, personally participated in the meeting and weighed all of the factors, including the weakness of the evidence, in his judgment, resource issues, and policy considerations, and the Magner matter, and they made the decision that it was in the interests of justice to agree to the proposal that – the original proposal that Mr. Lillehaug had put forth.

Sadly, Michael Hertz passed away in May 2012, so the Committees have been unable to ask him about DOJ's assertions about his statements and opinions. Documents produced by the Department, however, call into question the Department's narrative about Hertz's opinions. In particular, an email from Principal Deputy Attorney General Elizabeth Taylor to then-Associate Attorney General Thomas Perrelli in January 2012 suggests that Hertz had some concern about declining *Newell* as a part of the *quid pro quo*. Taylor stated: "Mike Hertz brought up the St. Paul 'disparate impact' case in which the SG just filed an amicus in the Supreme Court. He's concerned about the recommendation that we decline to intervene in two *qui tam* cases against St. Paul."[311]

In addition, notes from a meeting in early January 2012 reflect that Hertz expressed the opinion that the *quid pro quo* "looks like buying off St. Paul" and "should be whether there are

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[309] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 54-56, 77-78 (Mar. 18, 2013); Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 89-90 (Mar. 22, 2013).

[310] Briefing with Joyce Branda in Wash., D.C. (Dec. 5, 2012).

[311] Email from Elizabeth Taylor to Thomas Perrelli (Jan. 5, 2012, 34:43 p.m.). [DOJ 631/588]

legit reasons to decline as to past practice."[312] It remains unclear how Hertz truly viewed the merits of the *Newell* case or the propriety of the *quid pro quo* in general.

Finding: The Department of Justice, the Department of Housing and Urban Development, and the City of St. Paul failed to fully cooperate with the Committees' investigation, refusing for months to speak on the record about the *quid pro quo* and obstructing the Committees' inquiry.

Consequences of the *Quid Pro Quo*

The *quid pro quo* exchange between the Department of Justice and City of St. Paul, Minnesota, is no mere abstraction and not simply a theoretical proposition. This *quid pro quo* has direct and discernible real-world effects. The manner in which the Department of Justice – and in particular Assistant Attorney General Thomas Perez – sought to encourage a private litigant to forego its Supreme Court appeal and the leverage used to achieve that goal have lasting consequences for whistleblowers, taxpayers, and the rule of law.

The Sacrifice of Fredrick Newell

Fredrick Newell has spent over a decade of his life working to improve jobs and contracting programs for low-income residents in St. Paul. A part-owner of three small construction companies, Newell became exposed to the value of Section 3 programs in creating economic opportunities for low-income individuals. St. Paul's noncompliance with Section 3 limited the available contracting opportunities and prevented him from hiring and training new workers.[313] As a minister as well, Newell was acutely aware of the broader effect of Section 3 noncompliance on the community. To help solve this problem, Newell founded a nonprofit organization "to be a watchdog group that would be able to ensure that Section 3 was taking place" in his community.[314]

Since 2005, Newell has fought in the courts and through HUD to improve Section 3 programs in the City of St. Paul. As a result of his advocacy, HUD found six separate areas of noncompliance with Section 3 in St. Paul and further found that the City had "no working knowledge of Section 3 and was generally unaware of the City's programmatic obligations thereto."[315] Newell's advocacy resulted in a Voluntary Compliance Agreement between HUD and the City to ensure improved compliance with Section 3 in the future. Newell pressed for the agreement to include some restitution for the community's opportunities lost by the City's noncompliance. HUD finalized the agreement without Newell's suggestions, however, and HUD officials told Newell that his goals would be met through the False Claims Act.

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[312] Handwritten Notes (Jan. 4, 2012). [DOJ 639/587]

[313] Newell testified that "St Paul is a union town, and . . . one of the problems we ran across is most of [the trained workers] couldn't get into the union because they couldn't get someone to hire them." Transcribed Interview of Fredrick Newell in Wash., D.C. at 169 (Mar. 28, 2013).

[314] Transcribed Interview of Fredrick Newell, U.S. Dep't of Justice, in Wash., D.C. at 20 (Mar. 28, 2013).

[315] *Id.* at 11.

In pursuing his False Claims Act cases, Newell indicated that he intended to put the recovered money back into the community. "From the beginning," Newell testified, "when I first started this – and, like I said, as I trace it back to 2000 – it's all been with the efforts of trying to build the Section 3 community."[316] He stated:

> [T]he bottom line is those opportunities belong to those communities. And what's been happening is you've got companies coming out of the suburbs come in, do the [construction] work, hire nobody from the city, and go and take the funds back to the suburbs. And so we wanted this program to work that these communities could be rebuilt.[317]

Every indication Newell received from HUD and DOJ about his False Claims Act lawsuit was positive – that is, until the day that the Department declined to intervene in his case. With DOJ declining to intervene, Newell's complaint stood little chance of success.

The Justice Department – including all three DOJ officials interviewed by the Committees – has maintained that its non-intervention did not affect Newell's case because Newell was still able to pursue the claim on his own.[318] However, the Department's decision had a direct practical effect on Newell's case by allowing the City to move for dismissal of the case on grounds that would have otherwise been unavailable if the Department had intervened. Newell's attorney testified:

> The jurisdictional defense raised in the district court by the City of St. Paul is not available against the United States. Ultimately, at the trial court level, St. Paul prevailed on the theory that the court lacked subject matter jurisdiction over the claims because the relator was not an original source, and the court also relied on prior public disclosures . . . . The point being: a defendant can't raise those defenses on an intervening case because the United States – there's always the subject matter of jurisdiction when the United States intervenes and is the plaintiff before the court.[319]

The Department of Justice's *quid pro quo* sacrificed Fredrick Newell to ensure that an abstract legal doctrine would remain unchallenged. It cut loose a real-world whistleblower and an advocate for low-income residents to protect a legally questionable tactic. When asked whether he believed justice was done in this case, Newell answered "no" and explained: "The problems that existed, they still exist. Our aims weren't just to walk in and blow a whistle on someone or collect money; it was for the greater good of our community. And I have yet to see that happen."[320] Yet, despite the double crossing by the Justice Department, Newell remains optimistic that greater good may still be achieved. He testified: "And like I said earlier, when I

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[316] *Id.* at 81.
[317] *Id.* at 83.
[318] *See* Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 110 (Mar. 22, 2013); Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 98-99 (Mar. 18, 2013); Transcribed Interview of Byron Todd Jones, U.S. Dep't of Justice, in Wash., D.C. at 54 (Mar. 8, 2013).
[319] Transcribed Interview of Fredrick Newell in Wash., D.C. at 101-02 (Mar. 28, 2013).
[320] *Id.* at 134.

said Section 3 is that important, to me, and I'm going to speak from the minister's perspective, God just moved us into a bigger ballpark."[321]

The Chilling Effect on Whistleblowers

Above and beyond Fredrick Newell, the *quid pro quo* will likely have a severe chilling effect on whistleblowers in general. The Civil Fraud Section within DOJ's Civil Division is entirely dedicated to litigating and recovering financial frauds perpetrated against the federal government.[322] Acting Associate Attorney General Tony West – who had previously led the Civil Division – told the Committees that the Division takes fraud "very seriously" and that he made "fighting fraud one of [the Division's] top priorities."[323] In particular, he praised the whistleblower *qui tam* provision of the False Claims Act, calling them "a very important tool" that "really allow us to be aggressive in rooting out . . . fraud against the government."[324]

The current *qui tam* provisions of the False Claims Act were authored by Senator Grassley in 1986 and have been a valuable incentive for private citizens to expose waste and wrongdoing. Since 1986, whistleblowers have used the *qui tam* provisions to return over $35 billion of taxpayer dollars to the federal treasury.[325] Without the assistance of private citizens in uncovering waste, fraud, and abuse, the Justice Department's enforcement of the False Claims Act would not be as robust.

The *quid pro quo* between Assistant Attorney General Perez and the City of St. Paul threatens the vitality of the False Claims Act's *qui tam* provisions. In this deal, the Department gave up the opportunity to litigate a multimillion dollar fraud against the government in *Newell* in order to protect the disparate impact legal theory in *Magner*. In doing so, political appointees overruled trial-level career attorneys who initially stated that the allegations in *Newell* amounted to a "particularly egregious example of false certifications." These career attorneys were never given the opportunity to prove Newell's allegations and hold the City of St. Paul accountable for its transgressions.

More alarmingly, the Department abandoned the whistleblower, Fredrick Newell, after telling him for years that it supported his case. The manner in which the Department treated Newell presents a disconcerting precedent for whistleblower relations. Newell stated:

> As noted by Congress, the protection of the whistle blower is key to encouraging individuals to report fraud and abuse. The way that HUD and Justice have used me to further their own agenda is appalling – and that's putting it mildly. This type of treatment presents a persuasive argument

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[321] *Id.* at 86.
[322] *See* U.S. Dep't of Justice, Commercial Litigation Branch, Fraud Section, http://www.justice.gov/civil/commercial/fraud/c-fraud.html.
[323] Transcribed Interview of Derek Anthony West, U.S. Dep't of Justice, in Wash., D.C. at 18 (Mar. 22, 2013).
[324] *Id.* at 19.
[325] Press Release, Senator Charles Grassley, Grassley Law Recovers Another $3.3 Billion of Taxpayer Money Otherwise Lost to Fraud (Dec. 4, 2012).

> for anyone who is looking for a reason to not get involved in reporting fraud claim or even discrimination.[326]

Rather than protecting and empowering the whistleblower, the Department used him and his case as a bargaining chip to resolve unrelated matters. This type of treatment and horse trading will likely discourage other potential whistleblowers from staking their time, money, and reputations on the line to fight fraud. This conduct should not be practice of the Department and it should not have been the treatment of Fredrick Newell.

The Missed Opportunities for Low-Income Residents of St. Paul

The saddest irony of this *quid pro quo* is that the Department of Justice and the Department of Housing and Urban Development, by maneuvering to protect a legally questionable legal doctrine, directly harmed the real-life low-income residents of St. Paul who they were supposed to protect. By declining intervention in *Newell*, the Department of Justice has contributed to a continuation of Section 3 problems in St. Paul.

Congress passed Section 3 of the Housing and Urban Development Act of 1968 "to ensure that the employment and other economic opportunities generated by Federal financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed toward low- and very low-income persons."[327] Section 3 requires recipients of HUD financial assistance to provide job training, employment, and contracting opportunities to these low- and very-low-income residents.[328] However, HUD by its own admission has failed to vigorously enforce Section 3. Even Sara Pratt told the Committees that HUD does "not do a lot of enforcement work under Section 3, much, much less than we do in all our other civil rights matters."[329]

In the wake of the settlement in *United States ex rel. Anti-Discrimination Center v. Westchester County*,[330] a landmark 2009 case in which DOJ and HUD used the False Claims Act to enforce fair housing laws, the Administration signaled a new reinvigorated approach to fair housing enforcement. At the time, then-HUD Deputy Secretary Ron Sims proclaimed: "Until now, we tended to lay dormant. This is historic, because we are going to hold people's feet to the fire."[331] Deputy Secretary Sims even told Newell in 2009 that "the False Claims Act lawsuit was the new model for ensuring compliance" with federal housing laws.[332]

With the Administration's actions in the *quid pro quo*, HUD has all but given up on using the False Claims Act as a tool to promote fair housing and economic opportunity. Fredrick Newell testified:

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[326] Transcribed Interview of Fredrick Newell in Wash., D.C. at 16 (Mar. 28, 2013).
[327] 12 U.S.C. § 1701u(b).
[328] 12 U.S.C. § 1701u.
[329] Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 22 (Apr. 3, 2013).
[330] United States ex rel. Anti-Discrimination Center v. Westchester County, No. 06-Civ.-2860 (S.D.N.Y. 2009).
[331] Peter Applebome, *Integration Faces a New Test in the Suburbs*, N.Y. Times, Aug. 22, 2009.
[332] Transcribed Interview of Fredrick Newell in Wash., D.C. at 134-35 (Mar. 28, 2013); *see also id.* at 170-71.

> The Section 3 regulations and the Section 3 community have languished under a period of noncompliance and lack of enforcement of the Section 3 statute and regulations for over 45 years. The Section 3 program received its impetus from incidents such as the Watts riot of 1968 and the Rodney King riots of 1992. The Section 3 community has long sought a catalyst to revive this program, the Section 3 program. The Section 3 False Claims Act lawsuit was heralded even by HUD itself to be such a catalyst [of] Section 3 compliance – a nonviolent catalyst. A valuable tool was taken away with the *quid pro quo*.[333]

Newell still sees problems with Section 3 compliance in St. Paul, explaining that: "there's a whole list and host of problems that are there. Some of it is not knowing how the program works. Some of it is just simply no interest, from my belief, no interest in really complying."[334]

If given a fair opportunity with the assistance of the federal government, he could have made a difference. Newell told the Committees that he intended to use his lawsuit as a vehicle to improve economic opportunities in the St. Paul community by putting any False Claims Act recovery back into the community.[335] Now, unfortunately, the *quid pro quo* is just a missed opportunity for the federal government to provide real assistance to the low- and very-low-income residents of St. Paul.

Taxpayers Paid for the Quid Pro Quo

The *quid pro quo* was not cheap for federal taxpayers. The Department of Housing and Urban Development, the U.S. Attorney's Office in Minnesota, and the Civil Fraud Section within the Justice Department each spent over two years investigating and preparing the *Newell* case. By November 2011, all three entities were uniformly recommending that the government join the case. According to the memorandum prepared at the time by the Civil Fraud Section, Newell had exposed a fraud totaling over $86 million.[336] Because the False Claims Act allows for recovery up to three times the amount of the fraud, the United States was poised to potentially recover over $200 million.[337]

The deal reached by Assistant Attorney General Thomas Perez prevented the United States from ever having a chance to recover that money – and odds were high that the case would be successful. The memorandum prepared by the Civil Fraud Section in November 2011 called St. Paul's actions "a particularly egregious example of false certifications" and found that the City knowingly made these false certifications.[338] Newell told the Committees his impression

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[333] Transcribed Interview of Fredrick Newell in Wash., D.C. at 17-18 (Mar. 28, 2013).
[334] *Id.* at 22.
[335] *Id.* at 78-79.
[336] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]
[337] In his amended complaint, Newell valued the fraud at $62 million, meaning the government could have recovered over $180 million. *See* First Amended Complaint, United States *ex rel.* Newell v. City of St. Paul, Minnesota, No. 09-SC-1177 (D. Minn. filed Mar. 12, 2012).
[338] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]

that it was a strong case matched the language used by the November 2011 memorandum.[339] Newell's attorney called the case a "dead-bang winner,"[340] and indicated to the Committees that federal officials expressed their support for the case to him.[341]

Some of the dollars improperly received by the City appear to be HUD funds financed by the Obama Administration's stimulus in 2009. According to the Civil Fraud Section memorandum, the City initially contested HUD's administrative finding that it was out of compliance with Section 3, "but dropped its challenge in order to renew its eligibility to compete for and secure discretionary stimulus HUD funding."[342] Newell and his attorney confirmed this understanding, telling the Committees that the City disputed HUD's findings and HUD put a deadline on the City to resolve the dispute or risk losing stimulus funding.[343]

The amount of the fraud alleged in *Newell* did not appear to be a concern for HUD. In a briefing with Committee staff, HUD Principal Deputy General Counsel Kevin Simpson stated: "The monies don't supplement HUD's coffers, so [the money] wasn't much of a factor."[344] He elaborated that "HUD did have an institutional interest [in recovering the funds], but it was outweighed by other factors."[345] In the same briefing, Elliot Mincberg, HUD's General Deputy Assistant Secretary for Congressional and Intergovernmental Relations, added that $200 million "wasn't all that much money anyway."[346] HUD Deputy Assistant Secretary Sara Pratt testified that the amount of the alleged fraud was not a factor in her decision whether to recommend intervention in the case.[347] While this funding may not be "much of a factor" for federal bureaucrats, it is no insignificant amount to American taxpayers.

Finding: In declining to intervene in Fredrick Newell's whistleblower complaint as part of the *quid pro quo* with the City of St. Paul, the Department of Justice gave up the opportunity to recover as much as $200 million.

Disparate Impact Theory Remains on Legally Unsound Ground

Assistant Attorney General Perez's machinations to stop the Supreme Court from hearing *Magner* prevented the Court from finally adjudicating whether the plain language of the Fair Housing Act supports a claim of disparate impact. Although courts and federal agencies have asserted that it does, considerable doubts remain about the legality of disparate impact claims. Perez's *quid pro quo* prevented the Court from finally bringing clarity and guidance to this important area of federal law.

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[339] Transcribed Interview of Fredrick Newell in Wash., D.C. at 58-61 (Mar. 28, 2013).
[340] Jim Efstathiou Jr., *Whistle-Blower Blames Lost Millions on Perez's Settlement*, Bloomberg, Mar. 22, 2013.
[341] Transcribed Interview of Fredrick Newell in Wash., D.C. at 53-55 (Mar. 28, 2013).
[342] U.S. Dep't of Justice, Civil Division, Memorandum for Tony West, Assistant Attorney General, Civil Division, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Nov. 22, 2011). [DOJ 80-91]
[343] Transcribed Interview of Fredrick Newell in Wash., D.C. at 41-46 (Mar. 28, 2013).
[344] Briefing with Kevin Simpson and Bryan Greene in Wash., D.C. (Jan. 10, 2013).
[345] *Id.*
[346] *Id.*
[347] Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 123 (Apr. 3, 2013).

Perez testified to the Committees that he encouraged the City to withdraw its *Magner* appeal – and later agreed to exchange *Newell* and *Ellis* for *Magner* – because he believed that "*Magner* was an undesirable factual context in which to consider disparate impact."[348] He also stated that he was concerned that HUD had not yet finalized a rule codifying its use of disparate and believed the Court would benefit from HUD's final regulation.[349] Perez testified:

> [T]he particular facts of *Magner* I thought did not present a good vehicle for addressing the viability of disparate impact. If the court is going to take on the question of the viability of disparate impact it was my hope that they would do so in connection with a typical set of facts. This was not a typical set of facts. And it was further in my view that if the court was going to take a case of this nature that they should have the benefit of HUD's thinking, and the reg was very much in the works and I don't believe the court was aware of that. And so those two factors were sources of concern for me.[350]

HUD General Counsel Helen Kanovsky also testified to the Committees that she feared an "adverse decision" from the Supreme Court that could upset HUD's rulemaking.[351]

The *quid pro quo* did little to bring certainty or clarity to disparate impact claims arising under the Fair Housing Act. In June 2012, the Township of Mount Holly, New Jersey, filed a petition for certiorari asking the Supreme Court to hear its appeal on precisely the same legal issue as *Magner*: whether claims of disparate impact are cognizable under the Fair Housing Act.[352] The Court has yet to decide whether to take the appeal, but has asked the Solicitor General for his thoughts on whether to hear the case. Within this context, there are concerns in some quarters that discussions are underway to prevent the Court from hearing this case as well.[353] When the Committees inquired about the *Mt. Holly* case during the transcribed interviews, Assistant Attorney General Perez, HUD General Counsel Kanovsky, and HUD Deputy Assistant Secretary Pratt were all ordered not to answer by Administration lawyers.[354]

The Rule of Law

Most fundamentally, the actions of the Department of Justice in facilitating and executing the *quid pro quo* with the City of St. Paul represent a tremendous disregard for the rule of law. The Department of Justice was created "[t]o enforce the law and defend the interests of the

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[348] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 9 (Mar. 22, 2013).
[349] *Id.* at 43.
[350] *Id.* at 42.
[351] Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 36 (Apr. 5, 2013).
[352] Petition for a Writ of Certiorari, Township of Mount Holly et al. v. Mt. Holly Gardens Citizens in Action, Inc., No. 11-1507 (U.S. filed June 11, 2012).
[353] *See* Alan S. Kaplinsky, *Will Mt. Holly Take A Dive Just Like St. Paul*, CFPB Monitor (Jan. 10, 2013).
[354] Transcribed Interview of Thomas Edward Perez, U.S. Dep't of Justice, in Wash., D.C. at 141-43 (Mar. 22, 2013); Transcribed Interview of Helen Kanovsky, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 80-82 (Apr. 5, 2013); Transcribed Interview of Sara Pratt, U.S. Dep't of Housing & Urban Development, in Wash., D.C. at 85-90 (Apr. 3, 2013).

United States according to the law; . . . to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans."[355] In this *quid pro quo* with the City of St. Paul, the Department of Justice failed in each of those respects.

Rather than allowing the Supreme Court to freely and impartially adjudicate an appeal that the Court had affirmatively chosen to hear, the Department – led by Assistant Attorney General Thomas Perez – openly worked to get the appeal off of the Court's docket. Rather than allowing the normal intervention decision-making process to occur within the Civil Division, Assistant Attorney General Perez usurped the process to ensure his preferred course of action occurred. The Department's action in departing from the rule of law to exert arbitrary authority to jointly resolve two wholly unrelated matters, including one in which the United States is not even a party, is extremely concerning.

Conclusion

The *quid pro quo* resulted in the Department of Justice declining to intervene in two whistleblower False Claims Act lawsuits, *Newell* and *Ellis*, in exchange for the City of St. Paul's withdrawal of *Magner v. Gallagher* from the Supreme Court. The process that culminated in this *quid pro quo* was facilitated and executed by Assistant Attorney General for the Civil Rights Division Thomas E. Perez.

In November 2011, after the Court agreed to hear the *Magner* appeal, Perez's search for leverage against the City led him to discover the existence of *Newell* and the City's desire to jointly resolve both cases. This discovery began a series of events in which Perez asked the Department of Housing and Urban Development to reconsider its initial support for *Newell* and the subsequent erosion of support in DOJ's Civil Division and the U.S. Attorney's Office in Minnesota. Eventually, by January 2012, Perez's machinations had created a "consensus" within DOJ to decline *Newell* and *Ellis* as part of the deal with the City. Perez then began personally leading negotiations with the City, offering a roadmap in early January for how to jointly resolve the cases and asking career attorneys to cover up a linkage between the cases. By late January, as negotiations broke down, Perez flew to St. Paul to personally meet with Mayor Coleman and strike a deal. The agreement he reached with the Mayor led to the Department declining intervention in *Newell* and *Ellis* in exchange for the City withdrawing *Magner*.

This *quid pro quo* has lasting consequences for the Department of Justice, the City of St. Paul, and American taxpayers. In sacrificing Fredrick Newell to protect an inchoate theory, the Department weakened its own False Claims Act standards and created a large disincentive for citizens to expose fraud. The City of St. Paul, likewise, missed a tremendous opportunity to improve the economic opportunities available to the low- and very-low-income residents that Newell championed. American taxpayers lost a good chance to recover as much as $200 million of fraudulently spent funds. Above all, however, the *quid pro quo* demonstrated that the Department of Justice, led by Assistant Attorney General Thomas Perez, placed ideology over objectivity and politics over the rule of law.

[355] U.S. Dep't of Justice, About DOJ, http://www.justice.gov/about/about.html.

Mr. GOODLATTE. And I would like to ask my first question to Mr. von Spakovsky and Mr. Adams, and I would like to ask you this: in your experience as attorneys at the Justice Department, whether you or do you know of anyone else who ever participated in or ever became aware of a quid pro quo like the one that occurred between Tom Perez and the City of St. Paul? That is, a deal in which the United States agreed to settle two cases in which the United States

could have made a significant recovery to the United States Treasury in one in exchange for a litigant dismissing a case in which the United States was not even a party?

Mr. von Spakovsky?

Mr. VON SPAKOVSKY. Mr. Chairman, I am not aware of anything like that happening. When I was at the Civil Rights Division, I knew people in the Civil Division, which was involved in this particular deal. And we would have considered it improper and unethical to have requested the Civil Division to give up a qui tam action under the False Claims Act where the American taxpayer was possibly going to recover $200 million, especially in this case, which, as I understand it, both HUD, the Civil Division, and the U.S. Attorney's Office in Minnesota thought it was most egregious examples of false certifications they had ever seen. To ask them to dismiss a case like that in exchange for asking St. Paul to dismiss a case in which we were not even a party because they were afraid the Supreme Court would toss out a discredited legal theory.

I mean, I think that is unethical, and I think, quite frankly, it violates professional codes of conduct. For example, Rule 1.3 of the D.C. Code, which says that you are not supposed to intentionally fail to seek lawful objectives of a client or prejudice or damage a client. And that is, in fact, what happened this case, prejudicing and damaging the False Claims Act that the American taxpayer had.

Mr. GOODLATTE. Mr. Adams?

Mr. ADAMS. Mr. Chairman, that would have been radioactive for us to leverage one division's enforcement authority to a civil rights matter.

But the report from the House Oversight Committee had something even more disturbing, and that is that the Assistant Attorney General was doing this by using his personal Verizon email account. When he was asked by Oversight Committee investigators whether or not he was using his personal email to do the St. Paul, he said he did not recall until he was confronted with a document showing that he did, and then he recalled.

Mr. GOODLATTE. Mr. Adams, in a 2012 decision by the D.C. District Court, the court states, "The documents reveal that political appointees within the Department were conferring about the state and resolution of the New Black Panther Party case in the days preceding the Department's dismissal of claims in that case," which would appear to contradict Assistant Attorney General Perez's testimony that political leadership was not involved in the decision.

Did Mr. Perez mislead the Civil Rights Commission and the Congress?

Mr. ADAMS. Well, there are two points involving Mr. Perez's testimony, and the first one the IG report deals with. The second does not deal with in the IG report.

The first one. He was asked whether or not anybody besides career lawyers were involved in the decision to dismiss the New Black Panthers, and he testified no. The IG report says he was not forthcoming. He should have inquired into greater detail. It did not accuse him of committing perjury.

The second point, though, is more important, and the IG report is silent. He was asked whether or not he knew about the open and

pervasive hostility toward race neutral enforcement, which frankly is worse than political appointees being involved in the dismissal. He testified that there were no people of that ilk in that Division. Of course, that is false. He knew there were people of that ilk because we told him the day before there were. Secondly, the IG report details dozens of instances of people of that ilk, including him——

Mr. GOODLATTE. Mr. Adams, I am going to interrupt you because I have got one more question to ask you, and then you can answer that, and then we will move on to the Ranking Member.

In your written testimony, you cited a December 2009 statement that Mr. Perez made before the American Constitution Society where he stated, "Those who have been entrusted with the keys to the Division treated it like a buffet line at the cafeteria, cherry picking which laws to enforce." In your opinion, does Mr. Perez's record as Assistant Attorney General reflect an improvement of this image of the Civil Rights Division?

Mr. ADAMS. It is worse. I would put our record up against anybody in the Division. We brought cases under Section 2 to protect minority voting rights, Section 203, foreign language protections. We protected people under both Section 7 and Section 8 of Motor Voter. We enforced all the laws. We did not treat it as a buffet line.

It has been precisely the opposite. No Section 7. No Section 2. Barely any Section 203 cases. They are focused on different priorities instead of all priorities.

Mr. GOODLATTE. Thank you very much. My time has expired.

The gentleman from Michigan, Mr. Conyers, is recognized for 5 minutes.

Mr. CONYERS. Thank you. Mr. Chairman, I ask unanimous consent to enter in the Democratic staff findings on the results of the investigation of the St. Paul decision, and also 10 errors and mischaracterizations and omissions in the other report.

Mr. GOODLATTE. Without objection, they will be made a part of the record.

[The information referred to follows:]

Washington, DC 20515

April 14, 2013

To: Democratic Members of the Committees on Oversight and Government Reform and Judiciary

Fr: Democratic Staff

Re: Results of Investigation of Justice Department Role in St. Paul's Decision to Withdraw Appeal to Supreme Court in *Magner v. Gallagher*

This memo sets forth the preliminary results of an investigation conducted by the House Committee on Oversight and Government Reform and the House Committee on the Judiciary into the role of the Department of Justice in urging the City of St. Paul, Minnesota, to withdraw its appeal to the U.S. Supreme Court in *Magner v. Gallagher*. As part of this extensive investigation, Committee staff reviewed more than 3,500 pages of documents and conducted six transcribed interviews with officials from the Department of Justice (DOJ) and the Department of Housing and Urban Development (HUD).

This investigation was initiated when former Judiciary Committee Chairman Lamar Smith, Oversight Committee Chairman Darrell Issa, Representative Patrick McHenry, and Senator Charles Grassley accused Tom Perez, the Assistant Attorney General for the Civil Rights Division, of brokering a "dubious bargain" and a "quid pro quo arrangement" with St. Paul "in which the Department agreed, over the objections of career attorneys, not to join an unrelated fraud lawsuit against the City in exchange for the City's dropping its *Magner* appeal."

This memo sets forth several key findings based on the documents produced to the Committees and the transcribed interviews conducted by Committee staff to date:

- First, rather than identifying any unethical or improper actions by the Department, the overwhelming evidence obtained during this investigation indicates that Mr. Perez and other Department officials acted professionally to advance the interests of civil rights and effectively combat the scourge of discrimination in housing.

- Second, the evidence demonstrates that the Department's decisions not to intervene in unrelated False Claims Act cases were based on the recommendations of senior career officials who are regarded as the nation's preeminent experts in their field.

Instead of identifying inappropriate conduct by Mr. Perez, it appears that the accusations against him are part of a broader political campaign to undermine the legal safeguards against discrimination that Mr. Perez was protecting.

The remainder of this memo provides additional background and details regarding these findings.

TABLE OF CONTENTS

BACKGROUND

The Fair Housing Act was passed in 1968 as Title VIII of the Civil Rights Act to prohibit discrimination by landlords and other housing providers based on race, religion, sex, national origin, familial status, or disability.[1] The Act has long been interpreted to ban practices that have an unjustified "discriminatory effect" or "disparate impact," regardless of whether there is evidence of specific intent to discriminate, and eleven federal courts of appeals have upheld this disparate impact standard.[2]

On November 16, 2011, HUD issued a Notice of Proposed Rulemaking to codify uniform standards for "discriminatory effect" claims under the Act, and that rule was finalized in February 2013.[3] Republican Members of Congress opposed codifying this standard and offered an amendment by Rep. Scott Garrett (R-NJ), in the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act for the 2013 Fiscal Year, to prohibit HUD from using funds to finalize or enforce the disparate impact rule. Although this prohibition passed the House, it was not taken up by the Senate.[4]

Before HUD finalized its rule, landlords of low-income housing units filed a lawsuit, *Magner v. Gallagher*, alleging that St. Paul was enforcing its housing safety codes too aggressively in addressing "rodent infestation, missing dead bolt locks, inoperable smoke detectors, poor sanitation, and inadequate heat."[5] The landlords made the novel argument that St. Paul was violating the Fair Housing Act because its enforcement efforts had a racially disparate impact on their tenants. St. Paul challenged the application of the disparate impact standard in this context, arguing that the Act should not be used to permit landlords to avoid bringing low-income housing units into compliance with uniform safety codes.[6] On November

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[1] Department of Justice, *The Fair Housing Act* (accessed Apr. 13, 2013) (online at www.justice.gov/crt/about/hce/housing_coverage.php).

[2] Department of Housing and Urban Development, *Implementation of the Fair Housing Act's Discriminatory Effects Standard,* 78 Fed. Reg. 11460 11482 (Feb. 15, 2013) (final rule) (online at www.gpo.gov/fdsys/pkg/FR-2013-02-15/pdf/2013-03375.pdf).

[3] *Id.*

[4] H.AMDT.1363, 112th Cong. (2012); U.S. House of Representatives, Debate on Amendment Numbered A048, to H.R. 5972 (Jun. 27, 2012); U.S. House of Representatives, Roll Call Vote on Agreeing to .R. 5972 (Jun. 29, 2012); Legislative Research Service, *Bill Summary & Status: H.R. 5972 (112th).*

[5] City of St. Paul, Minnesota, *City of Saint Paul Seeks to Dismiss United States Supreme Court Case Magner vs. Gallagher* (Feb. 10, 2012) (online at www.stpaul.gov/index.aspx?NID=4874&ART=9308&ADMIN=1).

[6] Petitioners' Reply Brief on Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit (June 28, 2011) *Magner v. Gallagher* (No. 10-1032) (online at http://sblog.s3.amazonaws.com/wp-content/uploads/2011/07/Petitioners-Reply-10-1032-Magner.pdf).

7, 2011, the Supreme Court granted St. Paul's petition to hear the case.[7] The first question presented in the case was whether disparate impact claims are cognizable under the Fair Housing Act, thus placing at risk this key civil rights enforcement tool.

On December 29, 2011, the United States filed an *amicus* brief in *Magner* urging the Supreme Court to uphold the disparate impact standard based on the text and history of the Fair Housing Act, as well as consistent interpretations of the Act by appellate courts that allowed the use of disparate impact claims to enforce non-discrimination and equal opportunity requirements.[8]

As this memo explains in more detail below, in November 2011, the Department proposed that St. Paul withdraw the *Magner* case to avoid an adverse ruling by the Supreme Court that could have invalidated the disparate impact standard and impaired its ability to combat discrimination in housing. In response, St. Paul proposed that the Department refrain from intervening in two unrelated False Claims Act cases in which St. Paul was a defendant.

Under the False Claims Act, private citizens referred to as "relators" may file lawsuits alleging fraud against the government and may recover a percentage of awards if fraud is proven. These are also known as "qui tam" cases. The Department of Justice may intervene in False Claims Act cases on the side of relators to become the primary litigant. If the Department declines to intervene, relators may continue to litigate and, if successful, recover damages for themselves and the government.[9]

One of the False Claims Act cases at issue was *U.S. ex. Rel. Newell v. City of St. Paul*, in which the relator argued that St. Paul falsely certified that it was in compliance with Section 3 of the Housing and Urban Development Act of 1968.[10] Under Section 3, HUD requires Public Housing Authorities to use their best efforts to give low-income individuals training and employment opportunities and to award contracts to businesses that provide economic opportunities for low-income individuals.[11]

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[7] Docket, *Magner v. Gallagher* (No. 10-1032) (online at www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1032.htm).

[8] Brief for The United States as Amicus Curiae in Support of Neither Party (Dec. 2011) *Magner v. Gallagher* U.S. (No. 10-1032) (online at http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/10-1032-SG-amicus-brief.pdf).

[9] Department of Justice, *The False Claims Act: A Primer* (undated) (online at www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf).

[10] First Amended Complaint (Mar. 12, 2012), *U.S. ex. Rel. Newell v. City of St. Paul,* D. Minn. (0:09-cv-01177).

[11] Department of Housing and Urban Development, *Programs Administered by FHEO* (Sept. 25, 2007) (online at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/progdesc/title8).

The other False Claims Act case at issue was *U.S. ex rel. Ellis v. City of St. Paul*, in which the relators argued that Minneapolis, St. Paul, and the Metropolitan Council for the Twin Cities Metro Region falsely certified that they were complying with the Fair Housing Act's requirement to affirmatively further fair housing.[12]

On February 9, 2012, the Department officially declined to intervene in the *Newell* case, while the relator continued to pursue his case and is now appealing a District Court decision dismissing the case.[13] On February 10, 2012, St. Paul withdrew the *Magner* case from consideration by the Supreme Court.[14] On June 18, 2012, the Department declined to intervene in the *Ellis* case, and the relators continued to pursue their case.[15]

METHODOLOGY

Pursuant to multiple requests from the Committees, the Department of Justice produced more than 1,400 pages of documents, HUD produced more than 2,200 pages of documents, and St. Paul produced approximately 150 pages of documents.

Committee staff conducted extensive transcribed interviews with six government officials: Thomas Perez, Assistant Attorney General for the Civil Rights Division; Derek Anthony West, Acting Associate Attorney General and former Assistant Attorney General for the Civil Division; B. Todd Jones, former U.S. Attorney for the District of Minnesota; Thomas Perrelli, former Associate Attorney General; Helen Kanovsky, HUD General Counsel; and Sara Pratt, HUD Deputy Assistant Secretary for Enforcement and Programs.

Committee staff also received briefings from Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch at DOJ and former Director of the Fraud Section at DOJ; Bryan Greene, Principal Deputy in the Office of Fair Housing and Equal Opportunity at HUD; and Kevin Simpson, Principal Deputy in the Office of General Counsel at HUD. Committee staff also spoke with attorneys representing St. Paul and interviewed Fredrick Newell, the relator who filed a False Claims Act lawsuit against St. Paul.

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[12] Order (Dec. 12, 2012) *U.S. ex rel. Ellis v. City of St. Paul,* D. Minn. (No. 11-CV-0416).

[13] The Government's Notice of Election to Decline Intervention (Feb. 9, 2012), *Newell v. City of Saint Paul, Minnesota,* D. Minn. (No. 0:09-cv-01177-DWF-TNL); Notice of Appeal to the United States Court of Appeals for the Eight Circuit (Dec. 4, 2012), *U.S. ex. Rel. Newell v. City of St. Paul,* D. Minn. (0:09-cv-01177).

[14] City of Saint Paul, Minnesota, *City of Saint Paul Seeks to Dismiss United States Supreme Court Case Magner vs. Gallagher* (Feb. 10, 2012) (online at www.stpaul.gov/index.aspx?NID=4874&ART=9308&ADMIN=1)

[15] United States' Notice of Election to Decline Intervention (Jun. 18, 2012) *U.S. ex rel. Ellis v. City of St. Paul,* D. Minn. (No. 11-CV-0416).

FINDINGS

I. NO EVIDENCE OF UNETHICAL OR IMPROPER ACTIONS

Rather than identifying any unethical or improper actions by the Department, the overwhelming evidence obtained during this investigation indicates that Mr. Perez and other Department officials acted professionally to advance the interests of civil rights and effectively combat the scourge of discrimination in housing.

A. Efforts by Perez to Urge St. Paul to Withdraw *Magner* Served the National Interest in Combating Discrimination in Housing

The evidence obtained by the Committee indicates that, by encouraging St. Paul to withdraw the *Magner* case, Mr. Perez was properly performing his role as head of the Civil Rights Division, effectively representing the position of the United States government, and advancing the national interest in combating discrimination in housing.

Multiple witnesses interviewed by the Committee expressed concern that the highly unusual fact pattern of *Magner* involving landlords who were invoking the disparate impact standard to avoid complying with building safety codes rather than tenants utilizing it to ensure equal housing opportunities, did not provide a strong factual context to highlight the importance of the disparate impact theory. Specifically, witnesses expressed concern that the Court could invalidate the disparate impact standard, which has been used for decades to enforce the Fair Housing Act's prohibition against housing discrimination. As the Department stated in a letter to Congress on February 12, 2013:

> [T]he Department believes that carrying out the Fair Housing Act's (FHA) purpose of remedying discrimination, including through disparate-impact enforcement, is an important law enforcement and policy objective.[16]

During his transcribed interview with Committee staff, Mr. Perez explained these vital interests:

> [W]e are a guardian of what Attorney General Holder called the crown jewels, which are the civil rights laws that were passed. The Fair Housing Act was passed a few short days after Dr. King's assassination in 1968. And the United States has very strong equities, and so does HUD, in ensuring the effective and full enforcement of the Fair Housing Act. ... [T]hese civil rights matters are very important, I think, to our national interest.[17]

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[16] Letter from Judith C. Appelbaum, Principal Deputy Assistant Attorney General, Department of Justice, to Senator Patrick J. Leahy, Rep. Bob Goodlatte and Rep. Darrell E. Issa (Feb. 12, 2013).

[17] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 2013).

Mr. Perez explained that urging St. Paul to withdraw *Magner* would avoid a negative Supreme Court decision that could have impaired the ability to enforce laws to combat housing discrimination. He stated:

> I was concerned because I thought that *Magner* was an undesirable factual context in which to consider disparate impact. And because bad facts make bad law, this could have resulted in a decision that undermined our ability and the City of St. Paul's ability to protect victims of housing and lending discrimination.[18]

Mr. Perez also highlighted the importance of the disparate impact standard in obtaining relief for hundreds of thousands of victims in previous Fair Housing Act cases:

> [W]e had just settled a case involving Countrywide Financial, which was the largest residential fair lending settlement in the history of the Fair Housing Act, assisting hundreds of thousands of victims of funding discrimination, including hundreds who reside in the Twin Cities area. And so I was making the point that disparate impact theory in the vast majority of cases assists the Department in these efforts.[19]

Similarly, Assistant Attorney General Tony West, who led the Department's Civil Division, explained during his transcribed interview that a negative Supreme Court ruling would have impaired the ability of law enforcement officials to effectively enforce civil rights protections against housing discrimination. He stated:

> [T]here was a risk of bad law if the Supreme Court had considered this question, that it could undermine the disparate impact work in a very significant way. And, therefore, impair effective civil rights enforcement. And so it was a very important interest of the United States to try to minimize that possibility.[20]

In addition, Associate Attorney General Tom Perrelli stated during his transcribed interview that it was common Department practice to encourage parties not to pursue Supreme Court cases with poor fact patterns that could adversely impact national interests:

> I think the idea of incentivizing parties not to pursue a Supreme Court matter because it's a poor vehicle is not an unusual thing. You know, parties, you know, work to settle cases or resolve cases all the time.[21]

These interests were also extremely important to HUD, which had serious concerns about the Supreme Court issuing a ruling in the *Magner* case before HUD issued its final disparate

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[18] *Id.*

[19] *Id.*

[20] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[21] House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

impact rule. Helen Kanovsky, HUD's General Counsel, explained during her transcribed interview:

> With respect to *Magner*, we had very, very strong equities in not wanting that case to be heard by the Supreme Court at the time and in the posture that it was at because it was directly undermining our rulemaking, and we had huge equities in our discriminatory effects rulemaking process.[22]

There was no dispute among the witnesses interviewed by the Committees that it was appropriate for Mr. Perez, as head of the Department's Civil Rights Division, to handle the *Magner* matter and contact St. Paul to urge the City to withdraw the case. During the course of this investigation, no witness interviewed by the Committees identified any improper or unethical action by Mr. Perez.

B. Perez Received Approval from Ethics Official, Professional Responsibility Official, and Head of Civil Division

When St. Paul proposed linking its withdrawal of the *Magner* case to its request for the Department not to intervene in two unrelated False Claims Act cases, Mr. Perez sought and received approval from a DOJ ethics official, a DOJ professional responsibility official, and the head of the Civil Division before proceeding. These officials agreed that because the United States is a "unitary actor" seeking the best overall results for the nation, it was proper for Mr. Perez to negotiate both the *Magner* case and the False Claims Act cases on behalf of the United States.

During his transcribed interview, Mr. Perez explained that he first contacted David Lillehaug, an attorney representing St. Paul, to urge the City to withdraw the *Magner* case in November 2011. During this conversation, Mr. Lillehaug responded to Mr. Perez's request by proposing that the Department refrain from intervening in the *Newell* case, which had been filed against St. Paul.[23] Mr. Perez described this conversation during his transcribed interview:

> I outlined my concerns about the *Magner* case and my feeling that the mayor, given his longstanding commitment to expanding opportunity for underserved communities, benefits from disparate impact. And he then raised the prospect of linking the two cases, at which point I told him I can't speak for the Civil Division on this qui tam matters, and that's not my area of expertise, and it's not my area of responsibility, and so I'd have to get back to you on whether this proposal that you've presented is something that we can discuss further.[24]

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[22] House Committee on Oversight and Government Reform, Interview of Helen Renee Kanovsky (Apr. 5, 2013).

[23] At the time, St. Paul did not know about the *Ellis* case, which was in a more preliminary stage. In later discussions, the proposal was that the Department decline to intervene in both the *Newell* and *Ellis* cases.

[24] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 2013).

Since the *Newell* case was being brought under the False Claims Act, it fell under the authority of the Department's Civil Division headed by Mr. West instead of the Civil Rights Division headed by Mr. Perez. During his transcribed interview, Mr. Perez explained that he consulted with the Civil Rights Division's Ethics Official and separately with the Division's Professional Responsibility Official. In response to his inquiries, he was informed that his discussions with St. Paul about the *Magner* case and the False Claims Act cases were appropriate. Mr. Perez explained:

> To address this concern my staff and I sought ethical and professional responsibility advice. I was informed that there would be no concern so long as I had permission from the Civil Division to engage in these conversations. I was also informed that because the United States is a unitary actor and entitled to act in its overall best interest, there was no prohibition on linking matters as Mr. Lillehaug had suggested.[25]

Documents obtained by the Committees confirm Mr. Perez's account. Specifically, on November 28, 2011, the Civil Rights Division's Ethics Officer sent an email to Mr. Perez stating:

> You asked me whether there was an ethics concern with your involvement in settling a Fair Lending Act challenge in St. Paul that would include an agreement by the government not to intervene in a False Claims Act claim involving St. Paul. You indicated that you have no personal or financial interest in either matter. Having reviewed the standards of ethical conduct and related sources, there is no ethics rule implicated by this situation and therefore no prohibition against your proposed course of action.[26]

Mr. Perez also reported that a Department professional responsibility official also approved his actions. He stated:

> [T]he answer that we received on the professional responsibility front was that because the United States is a unitary actor, that we could indeed proceed so long as the other component did not object and as long as and with the understanding that they would continue to be the decisionmaking body on those matters that fall within their jurisdiction.[27]

In addition to obtaining approval from the ethics and professional responsibility officers to engage in these discussions, Mr. Perez also obtained the approval of Mr. West, who led the Civil Division. Mr. Perez stated:

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[25] *Id.*

[26] Email from ["Civil Rights Division Ethics Officer"] to Thomas E. Perez (Nov. 28, 2012) (HJC/HOGR STP 114).

[27] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

> He [Mr. West] indicated that he had no objection with proceeding, understanding, of course, that the Civil Division was going to conduct the review of the *Newell* and later the *Ellis* matters, and they were going to make that decision and pursuant to their practice they would make that decision looking at a host of factors, including the strength of the case, the resource issues and potentially the *Magner* case.[28]

Mr. West confirmed this account during his transcribed interview:

> I felt comfortable with him [Mr. Perez] speaking for the department when he was talking to the City of St. Paul because I knew that ultimately, any intervention decision rested with the Civil Division.[29]

Mr. West also explained that he and Mr. Perez met in January 2011 and agreed that Mr. Perez would discuss the *Magner* and *Newell* cases with St. Paul with the understanding that the Civil Division "had a process that we had to complete in the Civil Division, and that that decision rested with us as to whether there would be an intervention or a declination."[30]

II. DECISION NOT TO INTERVENE IN FALSE CLAIMS ACT CASES BASED ON RECOMMENDATIONS OF CAREER EXPERTS

The evidence obtained by the Committees during this investigation demonstrates that the Department's decisions not to intervene in the two unrelated False Claims Act cases were based on the recommendations of senior career officials regarded as the nation's preeminent experts in their field.

A. Decision Not to Intervene in *Newell* Based on Recommendation of Preeminent Career Experts with Decades of Experience

The decision not to intervene in the *Newell* case was made by Tony West, Assistant Attorney General for the Civil Division, based on the recommendation of then Deputy Assistant Attorney General Michael Hertz. Mr. Hertz, who passed away in May 2012, had been a career employee of the Department for more than 30 years and was widely regarded as the Department's preeminent career expert on False Claims Act cases.[31]

During his transcribed interview, Mr. West elaborated on Mr. Hertz's qualifications and experience:

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[28] *Id.*

[29] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[30] *Id.*

[31] *Long Time Civil Division Leader Dies of Cancer,* Main Justice (May 7, 2012) (online at www.mainjustice.com/2012/05/07/longtime-civil-division-leader-dies-of-cancer/).

> Mike Hertz was the undisputed expert on qui tam and False Claims Act in the Department of Justice. And that was his reputation. It was his reputation amongst my predecessors in the Civil Division, and certainly I knew that to be true based on my work with him.[32]

According to several witnesses interviewed by Committee staff, Mr. Hertz had concerns about the *Newell* case from the outset, despite the fact that some junior attorneys initially supported intervention. Joyce Branda, who served under Mr. Hertz as Director of the Fraud Section, informed Committee staff that when she submitted a draft memo to Mr. Hertz initially supporting intervention in November 2011, Mr. Hertz returned the memo, which she understood from their 28-years of working together to mean that he disagreed with intervening.[33] Ms. Branda explained that, even as she submitted this draft recommendation, she viewed the decision regarding whether to intervene as "a close call from day one" and communicated that understanding to Mr. Hertz.[34]

Mr. West, the head of the Civil Division, also confirmed during his transcribed interview that Mr. Hertz had concerns with intervening even before learning of the potential link to the *Magner* case. He explained:

> I went to ask Mike Hertz about the *Newell* case. What is this *Newell* case? Mike reminded me in that conversation that he had previously brought the *Newell* case to my attention saying, remember this is that close-call case that I told you I had some doubts about and, you know, some concerns about. He said, I haven't sent you anything on it because I, you know, want the career attorneys to do more work on it.[35]

Mr. Hertz's opposition to intervening in the *Newell* case intensified after a meeting he and Ms. Branda had with the Mayor of St. Paul and other City officials on December 13, 2011. Ms. Branda informed Committee staff that the Mayor was "articulate and persuasive" during the meeting.[36] She also explained that, after the meeting concluded, Mr. Hertz pulled her aside and told her "this case sucks."[37]

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[32] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[33] Briefing by Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch, Department of Justice, to the House Committees on Oversight and Government Reform and the Judiciary, Majority and Minority Staffs (Dec. 5, 2012).

[34] *Id.*

[35] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[36] Briefing by Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch, Department of Justice, to the House Committees on Oversight and Government Reform and the Judiciary, Majority and Minority Staffs (Dec. 5, 2012).

[37] *Id.*

Ms. Branda explained to Committee staff that the December meeting was also a "turning point" for her and that after the meeting, she agreed with Mr. Hertz that the Department should not intervene in the case based on the litigation concerns.[38] Ms. Branda told Committee staff that she never felt any pressure to change her decision.[39]

This account was also confirmed by Mr. West, who stated during his transcribed interview:

> Mike Hertz, who I have described previously as the undisputed expert in the Department on qui tam and False Claims Act, he, the more he learned about the case, and the deeper he got into the case, the more doubtful he became about its worthiness as an intervention candidate, and came away from the impression that it was weak and that we should not litigate this case. That was very significant because when Mike spoke, you know, his opinion carried an enormous amount of weight within the Department, and within the Civil Frauds Section, appropriately so.[40]

During his transcribed interview, former Associate Attorney General Tom Perrelli also confirmed that Mr. Hertz had serious concerns about the merits of intervening in *Newell* and *Ellis*. He explained:

> Mike did give me his impression of the first case, in my parlance. He very clearly said I think we're going to decline. In the second case, he said I think we're going to decline, but it's going to take more time.[41]

On February 9, 2012, Mr. West, the head of the Civil Division, signed an official "declination memo" formalizing the Department's decision not to intervene in the *Newell* case. Since Mr. Hertz had become ill by that time, Ms. Branda submitted the memo in his stead.[42] The declination memo explained the Department's investigation of the *Newell* case and described in detail the factual, legal, and policy reasoning on which the declination decision was based.[43]

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[38] *Id.*

[39] *Id.*

[40] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[41] House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

[42] Memorandum from Tony West, Assistant Attorney General, Civil Division, Department of Justice, for File, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Feb. 9, 2012) (HJC/HOGR 1307-17/ A1151-61). Ms. Branda, who has more than 30 years of experience working as a career attorney on False Claims Act cases for the Department, has now replaced Mr. Hertz as the Deputy Assistant Attorney General for the Commercial Litigation Branch.

[43] *See, e.g.*, Memorandum from Tony West, Assistant Attorney General, Civil Division, Department of Justice, for File, *U.S. ex rel. Newell v. City of St. Paul, Minnesota* (Feb. 9, 2012) (HJC/HOGR 1307-17 /A1151-61).

Based on the evidence obtained by the Committees, the recommendation to decline intervention was the only recommendation sent to Mr. West, and it was made by senior career officials who concluded that declining to intervene served the best interests of the United States. Although some attorneys within the Department and the U.S. Attorney's Office had advocated in favor of intervention, the ultimate decision reached by Mr. Hertz and Ms. Branda, who were experts in the False Claims Act, was that the Department should not intervene. As Mr. West explained in his transcribed interview:

> The way the process would work is after, you know, the line attorneys, working with Joyce Branda and Mike Hertz, come to a view as to whether or not we ought to intervene, a memo would be prepared, and it would be forwarded to me. And usually there is a cover sheet that indicates whether or not I approve or disapprove of the recommendation decision that is contained in the memo.[44]

According to Mr. West, "by early, mid-January, there was a consensus that had coalesced in the Civil Division that we were going to decline the *Newell* case."[45] He added:

> I wanted to make sure that we employed our normal, regular process in assessing whether or not intervention was appropriate in this case, and that's what we did.[46]

B. *Ellis* Case Was Never Serious Candidate for Intervention

Career officials at the Justice Department, the U.S. Attorney's Office in Minnesota, and HUD agreed that the *Ellis* case was not a serious candidate for intervention. Mr. West, the head of the Civil Division, stated during his transcribed interview:

> [T]he only conversations I had about the merits of the *Ellis* case tended to be conversations that talked about how weak the case was. And so I don't recall anyone calling the *Ellis* case a close call, for instance. I recall only Mike, and to the extent I was aware of the *Ellis* case, people talking about it as if it were a very weak case, a weak candidate for intervention.[47]

Mr. West also stated:

> My consistent recollection of the conversations I had with *Ellis* -- about *Ellis* with members of the Civil Division were all along the lines that *Ellis* was not an appropriate candidate for intervention.[48]

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[44] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

Todd Jones, the U.S. Attorney for the District of Minnesota, confirmed this account during his transcribed interview:

> We weren't going to go with *Ellis*. And I don't -- my recollection is that we weren't -- we weren't considering *Ellis* and an intervention in *Ellis* at any point, as I recall. That was going to be a declination. [49]

C. Department Openly and Properly Considered Impact of *Magner* on Decision Not to Intervene in *Newell*

The evidence obtained by the Committees indicates that the Department openly and properly considered the Department's request to St. Paul to withdraw the *Magner* case as one of many factors it evaluated when deciding not to intervene in the *Newell* case.

The memo officially declining to intervene in the *Newell* case, which was submitted by Ms. Branda and signed by Mr. West on February 9, 2012, set forth "a number of factual and legal arguments that support a decision not to intervene," including St. Paul's withdrawal of the *Magner* case. It stated:

> [T]he City is dismissing a Supreme Court appeal in the *Gallagher v. Magner* case, a result the Civil Rights Division is anxious to achieve. Declination here would facilitate that result which, we are advised, is in the interests of the United States.[50]

In addition, in a section entitled "Other Considerations," the memo explained:

> The Supreme Court has not decided whether the FHA [Fair Housing Act] allows for recovery based on a disparate-impact theory. We understand that the Civil Rights Division is concerned that there is a risk of bad law if the Court rules on the question of whether the City's health and safety efforts her justify a departure from the mandates of the FHA. The City has indicated that it will dismiss the Gallagher petition, and declination here will facilitate the City's doing so. Under the circumstances, we believe this is another factor weighing in favor of declination.[51]

During his transcribed interview with Committee staff, Mr. West explained that the False Claims Act provides the Department with broad discretion to consider multiple factors when deciding whether to intervene:

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[49] House Committee on Oversight and Government Reform, Interview of Byron Todd Jones (Mar. 8, 2013).

[50] Memorandum from Joyce R. Branda, Director, Commercial Litigation Branch, Department of Justice, *Request for Authority to Intervene Re: U.S. ex rel. Newell V. City of St. Paul, Minnesota* Case No. 09-SC-001177 (D. Minn.) (Feb. 9, 2012) (HJC/HOGR 1310-17/ A1154-61).

[51] *Id.*

> Not only are we given broad discretion under the False Claims Act to consider a wide variety of factors in making our intervention decision; it's appropriate because we have a responsibility to act in the best interests of the United States as a whole. And this -- it was appropriate to note that a declination decision here for all of the reasons that we previously stated in our memo, another factor that weighs in favor of declination is that it advances an interest of the United States, an important civil rights equity.[52]

Mr. West explained that his understanding was based on advice from Mr. Hertz, the career expert on False Claims Act cases:

> Mike Hertz had advised me, not just in this context, but just generally about the wide discretion we have under the False Claims Act to reach intervention decisions. And so, you know, it was always the presumption that this was an appropriate consideration under that discretion.[53]

Similarly, Ms. Branda, then the Director of the Fraud Division, confirmed that it was appropriate to consider the *Magner* case and the civil rights equities when weighing the equities of intervening in the *Newell* case.[54]

Associate Attorney General Tom Perrelli also agreed during his transcribed interview that it was appropriate to consider the *Magner* case as one factor in this context:

> I think it is appropriate to consider policy interests, so I don't think there's anything inappropriate about considering any policy interest of the United States.[55]

He also stated that it was not unusual to resolve multiple unrelated issues jointly:

> [T]here are all manner of situations where the United States -- or where parties or the United States will resolve things on multiple fronts at the same time, you know, recognizing that some claims maybe connected, some claims may be unconnected. So I don't think that's atypical.[56]

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[52] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[53] *Id.*

[54] Briefing by Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch, Department of Justice, to the House Committees on Oversight and Government Reform and the Judiciary, Majority and Minority Staffs (Dec. 5, 2012).

[55] House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

[56] *Id.*

Several documents obtained by the Committees include handwritten notes by third parties indicating that, during internal meetings with staff charged with drafting the declination memo, Mr. Hertz supported transparency regarding consideration of the *Magner* case in order to fully explain the Department's decision and avoid any misconceptions about the optics of linking the cases. For example, one note from a regular meeting with the Associate Attorney General's office on January 4, 2012, stated: "Mike – Odd, looks like buying off St. Paul, should be whether there are legit reasons to decline as to past practice." Subsequent notes indicate that all parties, including Mr. Hertz and in particular the U.S. Attorney's Office, agreed on the need for "a very comprehensive memo that discusses the Supreme Ct. case."[57]

Associate Attorney General Tom Perrelli stated during his transcribed interview that he understood that Mr. Hertz's evaluation of the False Claims Act case was "on the merits."[58] He stated:

> I am confident that what he was articulating to me was his view about the case and whether --notwithstanding any other factors related to *Magner*, whether the United States was going to intervene.[59]

According to Mr. West, the head of the Civil Rights Division, by mid-January 2011, there was a broad consensus that the Department should decline intervening in the *Newell* case:

> [B]y early, mid-January, there was a consensus that had coalesced in the Civil Division that we were going to decline the *Newell* case. ... My understanding is that certainly that was Mike Hertz' view, it was Joyce Branda's view, and that represented the view of the branch, U.S. Attorney's Office. Also, I think around that time period would be included in that consensus, it was my view too. It was the view of the client agency, HUD. And this was a view that we had all arrived to having taken into consideration the numerous factors, including the *Magner* case, as really as reflected in our memo. I think the memo -- the declination memo that I signed really does encapsulate what our view was, what that consensus was in the early to mid-January time frame.[60]

D. HUD Recommended Against Intervention in *Newell*

During her transcribed interview, Helen Kanovsky, HUD General Counsel, stated that it was not in HUD's interest to intervene in the *Newell* case because HUD had already entered into a Voluntary Compliance Agreement (VCA) with St. Paul, and the City was complying with that agreement. She stated:

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[57] Handwritten Notes of ["Line Attorney"], Department of Justice (undated) (HJC/HOGR STP 000651).

[58] House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

[59] *Id.*

[60] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

> [T]hey, "they" meaning Civil Frauds and the U.S. Attorney's Office, understood that I had reservations about proceeding, in large part because HUD had no equities in this issue any longer. All of our programmatic goals had already been met. We had a VCA. We were monitoring compliance with the VCA. There was compliance with the VCA. So in terms of the interest that the Department had with respect to ensuring compliance with Section 3, those goals had been met.[61]

Sara Pratt, HUD's career Deputy Assistant Secretary for Enforcement and Programs, confirmed this account in her transcribed interview:

> I had confirmed with my staff that their view was that the City of St. Paul was not only in compliance with the voluntary compliance agreement and had been since it had been entered into, but they were also very much operating in good faith to try to address issues beyond the ones in the voluntary compliance agreement.[62]

As a result, Ms. Pratt also concluded that there would be no programmatic benefit for HUD if the Department intervened in the *Newell* case:

> HUD's programmatic concerns had been fully resolved with the VCA and other activities by the City of St. Paul and that our engagement in further False Claims Act activities would be a drain on our resources financially and staff-wise.[63]

Ms. Kanovsky also expressed concerns about the difficulties in proving the case at issue, stating:

> Because Section 3 cases are very hard to prove, because the standard is best efforts, and since you can't look at the end result, you have to look at the effort. That becomes very difficult and very resource intensive.[64]

Ms. Kanovsky also stated that she did not think that the government would recover funds as a result of the government's intervention in the case:

> Q: But does HUD have an interest in recovering funds that were allegedly improperly allocated based on a false certification to HUD?

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[61] House Committee on Oversight and Government Reform, Interview of Helen Renee Kanovsky (Apr. 5, 2013).

[62] House Committee on Oversight and Government Reform, Interview of Sara Pratt (Apr. 3, 2013).

[63] *Id.*

[64] House Committee on Oversight and Government Reform, Interview of Helen Renee Kanovsky (Apr. 5, 2013).

A: As a hypothetical matter, sure. Did we actually think that there was the capability to do that in this case? No.[65]

Although Ms. Kanovsky initially opposed intervening in the case, she stated that she was approached by attorneys from the Civil Fraud Division and the U.S. Attorney's Office in September or October 2011 requesting that she change her position. Ms. Kanovsky stated that she reluctantly agreed to this request not based on the merits, but because they wanted HUD's support to make their case. She ultimately returned to her original position opposing intervention, however, after being informed that they these attorneys did not represent the Department's consensus position. She stated:

> [W]hen it turned out that we weren't really accommodating Justice, we were just accommodating certain lawyers in Civil Frauds, we sent the memo that said on the merits of the Section 3 claim, which is the basis for the False Claims Act claim, we do not think that the government should go forward.[66]

Ms. Kanovsky stated that she explained her changes in position during a conversation with Mr. Perez:

> I told him that it had been my original inclination that this was not a strong case, and that HUD's equities had already been met, and that we were not inclined to recommend that the United States intervene, but that this had been -- it appeared to me something that Civil Frauds and the U.S. Attorney in Minnesota felt very strongly about and were committed to proceeding with, and therefore we had acceded to their request.[67]

She explained further:

> I said, well, if Justice is not of one mind here, then I certainly have no problem going back to my original position, which is this was not an appropriate case for the United States to intervene in.[68]

Mr. Perez confirmed Ms. Kanovsky's account during his transcribed interview with Committee staff:

> [M]y principal recollection of my conversations with Helen Kanovsky was that she said that in her judgment the *Newell* case was a weak case and that given the pendency of the regulation and the importance of disparate impact for HUD and for United States

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[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

> generally that in her judgment it would be in the interest of justice to see if we could pursue through Mr. Lillehaug's proposal.[69]

Several documents obtained during the investigation include email exchanges among junior line attorneys expressing frustration with Ms. Kanovskey's decision to return to her original position opposing intervention. For example, in one email exchange, a line attorney in the U.S. Attorney's Office reacted to learning of HUD's decision to return to its original position by writing the he would "work to figure out what['s] going on with this."[70] In another email, that same attorney referred to HUD's returning to its original position as "weirdness."[71]

Ms. Kanovsky explained that although she could understand their frustration, she believed HUD's substantive position was justified. She stated:

> They thought that they had the go-ahead to proceed. They asked for the go-ahead to proceed, and we had said we weren't inclined. They had come over and thought they had convinced me to do it, they had gotten a go-ahead and now we were reversing the decision and saying, no, we want to go back to our original position and, no, we do not think this is an appropriate manner in which to intervene.[72]

She explained further:

> If the decision had been totally mine in October, and there weren't any dealings with the Department of Justice that I needed to worry about in terms of a relationship with the Department of Justice, we never -- we never would have recommended an intervening, and if it were my decision whether to intervene or not, I never would have intervened.[73]

During his transcribed interview, Mr. West, the head of the Civil Division, explained the importance of HUD's position on this matter:

> [T]here were a whole variety of factors that went into our decision to decline the *Newell* case. *Magner* was one of them. It was one of many. And as far as I was concerned, it wasn't even the most important one. The most important one was the decision of the

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[69] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

[70] E-mail from ["Line Attorney 3"] to Assistant U.S. Attorney Gregory G. Brooker, Office of the U.S. Attorney for the District of Minnesota, Department of Justice (Nov. 30, 2011) (HJC/HOGR STP 000119).

[71] E-mail from ["Line Attorney 3"] to Assistant U.S. Attorney Gregory G. Brooker, Office of the U.S. Attorney for the District of Minnesota, Department of Justice (Dec. 2, 2011) (HJC/HOGR STP 000172).

[72] House Committee on Oversight and Government Reform, Interview of Helen Renee Kanovsky (Apr. 5, 2013).

[73] *Id.*

client agency not to stand behind this case in the litigation risk analysis that we engaged in.[74]

E. U.S. Attorney Recommended Against Intervention in *Newell*

The evidence obtained by the Committees indicates that Todd Jones, the U.S. Attorney in Minnesota, recommended against intervening in the *Newell* case after being informed that intervention would not serve HUD's interests.

During his transcribed interview with Committee staff, Mr. Jones stated that he concurred with all of the recommendations in the final declination memo that was signed by Mr. West on February 9, 2012. As he explained, he agreed with "all of the rationale, including the *Magner v. Gallagher* factor that was in the Civil – the Civil Fraud Division memo."[75]

Mr. Jones explained that he recommended against intervention because it would have been difficult to prove the case without HUD's concurrence:

> Well, first and foremost was the fact that our client agency, HUD, was not in concurrence about proceeding with the intervention decision anymore. That was first and foremost, because we can't do it without their help.[76]

Mr. Jones also explained that he was not concerned with HUD returning to its original position opposing intervention:

> [I]t didn't cause me any concern, because I've been doing this a long time, and the dynamics and factors that go into litigation decisionmaking, litigation risk, ranging from witnesses' changing positions to the state of the law changing, to staffing or individual – there is all kinds of dynamics. So, no, the fact that at a certain point in time, here is what our decision is and, later on down the road, that decision is changed because there are factors that have changed that add or enhance to the litigation risk, it is not unusual in my experience, and it is not something I am uncomfortable dealing with.[77]

Greg Brooker, the career Chief of the Civil Division within the U.S. Attorney's Office, also concurred with the ultimate decision not to intervene, according to Mr. Jones.[78] This account was confirmed by Mr. Perez, who stated during his transcribed interview:

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[74] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[75] House Committee on Oversight and Government Reform, Interview of Byron Todd Jones (Mar. 8, 2013).

[76] *Id.*

[77] *Id.*

[78] *Id.*

> I had discussions with Greg Brooker, who was our point of contact in the U.S. Attorney's Office in Minnesota. … And it was my impression from conversations I had with him that he concurred with the conclusions of Mike Hertz and the other senior people in the Civil Division who had determined that this was a weak candidate for intervention.[79]

On January 10, 2012, Mr. Perez returned a telephone call from Mr. Brooker about the status of the declination memo, which had not yet been completed, and left the following voicemail message:

> Hey, Greg. This is Tom Perez calling you at -- excuse me, calling you at 9 o'clock on Tuesday. I got your message.
>
> The main thing I wanted to ask you, I spoke to some folks in the Civil Division yesterday and wanted to make sure that the declination memo that you sent to the Civil Division -- and I am sure it probably already does this -- but it doesn't make any mention of the *Magner* case. It is just a memo on the merits of the two cases that are under review in the qui tam context.
>
> So that was the main thing I wanted to talk to you about. I think, to use your words, we are just about ready to rock and roll. I did talk to David Lillehaug last night. So if you can give me a call, I just want to confirm that you got this message and that you were able to get your stuff over to the Civil Division.[80]

When asked about this voicemail, Mr. Perez explained that he was concerned that delay in completing the memo could cause St. Paul to raise additional demands. He stated:

> I was impatient in part because on the 9th of January, I had had another conversation with Mr. Lillehaug [the attorney representing St. Paul] that I outlined earlier and I was growing increasingly concerned that he was running out of patience and might in fact raise additional terms and conditions which turned out to be accurate.[81]

Mr. Perez also stated:

> I was trying to put it together in my head, what would be the source of the delay, and the one and only thing I could really think of at the time was that perhaps they hadn't -- they didn't write in or they hadn't prepared the language on the *Magner* issue, and so I admittedly inartfully told them, I left a voicemail and what I meant in that voicemail to say was time is moving. … [I]f the only issue that is standing in the way is how you talk about *Magner*, then don't talk about it.[82]

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[79] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

[80] *Id.*

[81] *Id.*

[82] *Id.*

According to Mr. Perez, Mr. Brooker returned his call the next day and informed him that the protocols governing declination memos required a discussion of the *Magner* case as one factor that was considered:

> Mr. Brooker promptly corrected me and indicated that the *Magner* issue would be part of the discussion. I said fine, follow the standard protocols. But my aim and my goal in that message and in the ensuing conversations was to get him to communicate that, so that we could bring the matter to closure.[83]

A document obtained by the Committees includes handwritten notes from a line attorney in the U.S. Attorney's Office confirming this account. The notes indicate that Mr. Brooker received the voicemail from Mr. Perez, describing it as a "Concern for Greg" and a "Red flag."[84] The notes then confirm that Mr. Brooker resolved this question within one day: "Greg left message saying the Sup. Ct. info. will be in the memo."[85]

Mr. Perez stated that although he did not see the final declination memo, he understood that it "did have a discussion of the *Magner* case as a factor."[86]

During his transcribed interview, Mr. Jones, the U.S. Attorney, confirmed that the declination memo did include an appropriate discussion of the *Magner* case.[87] He stated that no attorneys in his office reported feeling pressure to concur in its recommendation, and he characterized the recommendation as "based on the litigation risk and the facts in front of us."[88] He stated:

> [W]hat's reflected in that memo [the *Newell* declination memo] is what's important to us. And that's all the relevant factors articulated in a memo for Tony West's consideration as to whether or not the United States should intervene in the *Newell* case. And that included the *Magner* decision.[89]

F. Justice Decided Not to Intervene Even if St. Paul Pursued *Magner*

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[83] *Id.*

[84] Handwritten Notes of ["Line Attorney"], Office of the U.S. Attorney for the District of Minnesota, Department of Justice (Jan.11, 2012) (HJC/HOGR STP 000713 / Formerly HJC/HOGR A 000666).

[85] *Id.*

[86] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

[87] House Committee on Oversight and Government Reform, Interview of Byron Todd Jones (Mar. 8, 2013).

[88] *Id.*

[89] *Id.*

The evidence obtained by the Committee demonstrates that the Department decided not to intervene in the *Newell* case even if St. Paul planned to go forward with the *Magner* case in the Supreme Court.

During his transcribed interview with Committee staff, Mr. West, the head of the Civil Division, explained that consensus had been reached in January 2012 that the Department would not intervene in the *Newell* case. He explained that at that time, however, St. Paul made a new demand for the Department to intervene in order to settle the *Newell* case, which would mean the relator could not pursue his own case against St. Paul. According to Mr. West, that course of action "was a non-starter" for the Department.[90]

Because the Department refused to agree to this new demand, Mr. West stated that he believed St. Paul would not withdraw the *Magner* case. He stated:

> Our decision in the Civil Division is that we were not going to go forward and litigate the *Newell* case. That meant we were either going to decline it, and if the city was willing to withdraw its *Magner* petition because we declined it, that is great. But it looked like, at one point, that the City was no longer willing to do that. We still weren't going to litigate the case.[91]

During his interview with Committee staff, Mr. Perez confirmed this account:

> Mr. Lillehaug changed the terms of the proposal. He wanted the United States to intervene and settle the case from underneath the relator. And we communicated clearly, based upon the judgment and direction from the Civil Division, that that was unacceptable and that the United States could not agree to those terms.[92]

Ms. Branda, then head of the Civil Fraud Section, also confirmed that the Civil Division decided not to litigate the *Newell* case, regardless of the impact on the *Magner* case.[93] Ms. Branda stated that the decision by her and her office not to intervene was made "on the merits" based primarily on St. Paul's arguments at the December 13, 2012 meeting.[94] Ms. Branda

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[90] House Committee on Oversight and Government Reform, Interview of Derek Anthony West (Mar. 18, 2013).

[91] *Id.*

[92] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

[93] Briefing by Joyce Branda, Deputy Assistant Attorney General for the Commercial Litigation Branch, Department of Justice, to the House Committees on Oversight and Government Reform and the Judiciary, Majority and Minority Staffs (Dec. 5, 2012).

[94] *Id.*

rejected the argument that she would have recommended intervention "but for" the *Magner* factor.[95]

Once the Civil Division decided not to intervene in the *Newell* case, Mr. Perez accepted and communicated that decision to St. Paul, understanding that the impact of that decision was that St. Paul would go forward with the *Magner* case. During his transcribed interview, he stated: "for a period of time in January it appeared that there would be no agreement."[96] He also stated:

> I remember saying to someone, shortly after this, words to the effect of, well, we gave it our best efforts and we will move on and get ready for oral argument.[97]

In a final attempt to convince St. Paul to withdraw the *Magner* case, Mr. Perez met with the Mayor on February 3, 2012. Mr. Perez described this meeting during his transcribed interview:

> I was aware, however, that civil rights organizations were continuing their efforts and that Vice President Mondale was his mentor and was apparently reaching out to the mayor. And I know when I met with the mayor on February 3rd, he indicated that he had had at least one, and I believe more conversations with the Vice President, who was really one of his idols.[98]

At the February 3 meeting, St. Paul confirmed that it would, in fact, withdraw the *Magner* case, and Mr. Perez reiterated the Department's decision not to intervene in either the *Newell* or *Ellis* cases.[99] Mr. Perez explained:

> During that meeting the city reconsidered its position and we reached an agreement that had as its central terms the original proposal made by Mr. Lillehaug. The Civil Division, having completed its review process, thereafter authorized declination in the False Claims Act cases and the city dismissed its *Magner* appeal.[100]

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[95] *Id.*

[96] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

[97] *Id.*

[98] *Id.*

[99] *Id.* Although some documents produced to the Committees include inquiries by Department attorneys about whether in these discussions Mr. Perez promised to provide HUD documents to support St. Paul's litigation, Mr. Perez said in his transcribed interview that he did not make that offer, and other witnesses confirmed that no documents were ultimately provided. House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

[100] House Committee on Oversight and Government Reform, Interview of Thomas Edward Perez (Mar. 22, 3013).

St. Paul formally withdrew the *Magner* case on February 10, 2012, and issued the following public statement:

> The City of Saint Paul, national civil rights organizations, and legal scholars believe that, if Saint Paul prevails in the U.S. Supreme Court, such a result could completely eliminate "disparate impact" civil rights enforcement, including under the Fair Housing Act and the Equal Credit Opportunity Act. This would undercut important and necessary civil rights cases throughout the nation. The risk of such an unfortunate outcome is the primary reason the city has asked the Supreme Court to dismiss the petition.[101]

During his transcribed interview with Committee staff, Tom Perrelli, the former Associate Attorney General, stated:

> [I]f you weren't going to intervene in either of the cases, okay, based on the -- based on the merits of those cases, then -- I know you guys talk about quid pro quo. You know, there is no quid because you weren't going to intervene anyways, or maybe no quo.[102]

CONCLUSION

Far from supporting allegations that Assistant Attorney General Tom Perez brokered an unethical or improper *quid pro quo* arrangement with the City of St. Paul, the overwhelming evidence obtained during this investigation indicates that Mr. Perez and other Department officials acted professionally to advance the interests of civil rights and effectively combat the scourge of housing discrimination.

Rather than identifying any inappropriate conduct by Mr. Perez or other Department officials, it appears that the accusations against Mr. Perez are part of a broader political campaign to undermine the legal safeguards against discrimination that Mr. Perez was protecting.

For example, in their letter to the Department on September 24, 2012, former Chairman Smith, Chairman Issa, Representative McHenry, and Senator Grassley attacked the disparate impact standard as a "questionable legal theory" despite the fact that it has been used by law enforcement for decades to combat discrimination, and despite the fact that it has been upheld by eleven federal courts of appeals.[103] They wrote:

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[101] City of St. Paul, Minnesota, *City of Saint Paul Seeks to Dismiss United States Supreme Court Case Magner vs. Gallagher* (Feb. 10, 2012) (online at www.stpaul.gov/index.aspx?NID=4874&ART=9308&ADMIN=1).

[102] House Committee on Oversight and Government Reform, Interview of Thomas John Perrelli (Nov. 19, 2012).

[103] Letter from Reps. Lamar Smith, Rep. Darrell Issa, Rep. Patrick McHenry, and Senator Charles E. Grassley to Hon. Attorney General Eric H. Holder, Jr. (Sept. 24, 2012).

> One of the features of this quid pro quo, distinguishing it from a standard settlement or plea deal, was that it obstructed rather than furthered the ends of justice. It was possible only because Perez knew the disparate impact theory he was using to bring fair lending cases was poised to be overturned by the Supreme Court. So he bargained away a valid case of fraud against American taxpayers in order to shield a questionable legal theory from Supreme Court scrutiny in order to keep on using it.[104]

In other words, their letter contends that eliminating the disparate impact standard and diminishing the ability of law enforcement officials to combat discrimination would further "the ends of justice."

These arguments echo those of several conservative organizations that submitted an amicus brief in the *Magner* case in 2011 urging the Court to strike down the disparate impact standard. Filed by the Pacific Legal Foundation, the Center for Equal Opportunity, the Conservative Enterprise Institute, and the CATO Institute, the brief argues that the disparate impact doctrine "encourages racial quotas," would "require imprudent mortgage eligibility determinations to avoid racial disproportionalities," and could place "pressure on banks and mortgage companies to grant loans to applicants with poor credit."[105]

Despite efforts by some to use ethics complaints against Mr. Perez as a proxy for their opposition to legal standards for combating housing discrimination, the Committees have identified no evidence during this investigation that calls into question Mr. Perez's integrity, professionalism, or effectiveness as Assistant Attorney General for the Civil Rights Division in the Department of Justice.

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[104] *Id.*

[105] Brief Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, Competitive Enterprise Institute and CATO Institute in Support of Petitioners *Magner v. Gallagher*, U.S. (No. 10-1032) (online at http://sblog.s3.amazonaws.com/wp-content/uploads/2012/01/10-1032-PLF-amicus.pdf).

TOP TEN ERRORS, MISCHARACTERIZATIONS, AND OMISSIONS IN PARTISAN REPUBLICAN STAFF REPORT ON TOM PEREZ

On April 14, 2013, House Oversight Committee Chairman Darrell Issa, House Judiciary Committee Chairman Bob Goodlatte, Representative Patrick McHenry, and Senate Judiciary Committee Ranking Member Charles Grassley issued a partisan staff report alleging that Assistant Attorney General Tom Perez, the head of the Civil Rights Division at the Department of Justice, "manipulated justice and ignored the rule of law." The report was riddled with numerous factual errors, broad mischaracterizations, and stark omissions, however, and the ten most egregious examples are set forth below.

1. Erroneous Claim That Perez's Actions Were "Inappropriate"

The Republican report argues that Mr. Perez's actions were "inappropriate and potentially violated Perez's duty of loyalty to his client, the United States." To the contrary, the evidence demonstrates that Mr. Perez sought and received approval from a DOJ ethics official, a DOJ professional responsibility official, and the head of the Civil Division before proceeding. As one ethics official concluded in writing, "there is no ethics rule implicated by this situation and therefore no prohibition against your proposed course of action." Far from supporting allegations that Mr. Perez brokered an unethical arrangement with St. Paul, the overwhelming evidence obtained during the investigation indicates that he was properly performing his role as head of the Civil Rights Division, effectively representing the position of the United States government, and advancing the national interest in combating discrimination.

2. Erroneous Claim that Perez was Defending a Weak Legal Theory

The Republican report disparages the "disparate impact" legal standard for combating discrimination based on race, religion, sex, national origin, familial status, and disability under the Fair Housing Act as "inchoate." Similarly, Republican Members sent a letter to the Justice Department on September 24, 2012, attacking this legal standard as "questionable" and condemning Mr. Perez for defending it as counter to the "ends of justice." To the contrary, the "disparate impact" standard has been used by the Justice Department for decades to combat discrimination, has been upheld by 11 federal courts of appeal, and has resulted in the award of millions of dollars to injured victims.

3. Erroneous Claim That the Department Violated the "Rule of Law"

The Republican report claims that the Department violated "the rule of law to exert arbitrary authority to jointly resolve two wholly unrelated matters, including one in which the United States is not even a party." To the contrary, Assistant Attorney General Tom Perrelli explained: "[T]here are all manner of situations where the United States—or where parties or the United States will resolve things on multiple fronts at the same time, you know, recognizing that some claims maybe connected, some claims may be unconnected. So I don't think that's atypical." DOJ ethics officials and Tony West, the head of the Civil Division, agreed that because the United States is a "unitary actor" seeking the best overall results for the nation, it was proper for Mr. Perez to negotiate both the *Magner* case and False Claims Act cases.

4. Erroneous Claim that the Political Appointees "Overruled" Career Attorneys

The Republican report claims that "political appointees overruled trial-level career attorneys." To the contrary, the decision not to intervene in the *Newell* case was made by Tony West, head of the Civil Division, based on the recommendation of then Deputy Assistant Attorney General Michael Hertz and then head of the Fraud Division, Joyce Branda. Mr. Hertz, who passed away in 2012, had been a career employee for more than 30 years and was widely regarded as the Department's preeminent career expert on False Claims Act cases. Mr. Hertz's opposition to intervening solidified after a meeting with the Mayor of St. Paul and other City officials on December 13, 2011, after which he pulled Ms. Branda aside and told her "this case sucks."

5. Erroneous Claim that Perez Sought to "Pressure" HUD and DOJ

The Republican report argues that the agreement was reached as "a direct result of Assistant Attorney General Perez's successful efforts to pressure the Department of Housing and Urban Development, the U.S. Attorney's Office in Minnesota, and the Civil Division within the Department of Justice." To the contrary, all three offices agreed with the recommendation to decline intervention, and none stated that they were pressured. Helen Kanovsky, HUD General Counsel, stated that "we sent the memo that said on the merits of the Section 3 claim, which is the basis for the False Claims Act claim, we do not think that the government should go forward." Similarly, the U.S. Attorney stated that he concurred with all of the recommendations in the declination memo and agreed with "all of the rationale, including the *Magner v. Gallagher* factor." Finally, Mr. West, the head of the Civil Division, stated: "[T]here was a consensus that had coalesced in the Civil Division that we were going to decline the *Newell* case. … My understanding is that certainly that was Mike Hertz' view, it was Joyce Branda's view, and that represented the view of the branch, U.S. Attorney's Office. Also, I think around that time period would be included in that consensus, it was my view too. It was the view of the client agency, HUD. And this was a view that we had all arrived to having taken into consideration the numerous factors, including the *Magner* case, as really as reflected in our memo."

6. Erroneous Claim That Perez Exceeded the "Authority of His Office"

The Republican report claims that "Perez exceeded the scope and authority of his office, manipulated the protocols designed to preserve the integrity of intervention decisions, worked behind the scenes—and at times behind the backs of his colleagues at the Department with whom decision-making authority rested—and took it upon himself to strike an agreement with the City." To the contrary, Tony West, who led the Civil Division and had authority to decide whether to intervene in the False Claims Act cases, said: "I wanted to make sure that we employed our normal, regular process in assessing whether or not intervention was appropriate in this case, and that's what we did." Mr. West also explicitly approved of Mr. Perez negotiating with St. Paul. There was no dispute among any witnesses interviewed by the Committees that it was appropriate for Mr. Perez, as head of the Department's Civil Rights Division, to handle the *Magner* matter and contact St. Paul to urge the City to withdraw the case.

7. Erroneous Claim That Agreement "Exposed Serious Management Failures"

The Republican report claims that the agreement with St. Paul "exposed serious management failures within the Department of Justice, with senior leadership—including Attorney General Holder and then-Associate Attorney General Perrelli—unaware that Assistant Attorney General Perez had entered into an agreement with the City of St. Paul." The Republican report ignores the fact that Tony West, then head of the Civil Division, was responsible for the intervention decision, which did not require approval from the Associate Attorney General or Attorney General. Career experts in the False Claims Act, including Ms. Branda, who was then the career Director of the Fraud Division, concluded that it was appropriate to consider *Magner* and the civil rights equities in this intervention decision.

8. Erroneous Claim That Perez Attempted to "Cover Up" the Agreement

The Republican report claims that Mr. Perez "attempted to cover up the presence of *Magner* as a factor in the intervention decision" by leaving a voicemail for an attorney in the U.S. Attorney's Office saying that he "wanted to make sure that the declination memo … doesn't make any mention of the *Magner* case." The Republican report disregards Mr. Perez's explanation, which is that he was becoming "impatient" because of the delay and was concerned that St. Paul would raise additional demands. He explained: "[I]f the only issue that is standing in the way is how you talk about *Magner*, then don't talk about it." The Republican report also disregards the fact that the attorney in the U.S. Attorney's office returned his call within one day to fully resolve the matter, and that *Magner* was explicitly included in the declination memo.

9. Erroneous Claim that HUD's Reason for Opposing Intervention Was a "Pretext"

The Republican report claims that HUD's reason for returning to its original position opposing intervention is "unsupported by the evidence and suggests a pretext for a politically motivated decision to prevent the Supreme Court from hearing *Magner*." To the contrary, Helen Kanovsky, HUD General Counsel, explained that HUD would not benefit from intervention because it had already entered into a Voluntary Compliance Agreement (VCA) with St. Paul: "HUD had no equities in this issue any longer. All of our programmatic goals had already been met." Sara Pratt, HUD's career Deputy Assistant Secretary for Enforcement and Programs, confirmed this account, stating: "HUD's programmatic concerns had been fully resolved with the VCA and other activities by the City of St. Paul." No evidence obtained by the Committees provides any basis to question the truthfulness of Ms. Kanovsky or Ms. Pratt.

10. Erroneous Claim that Department Made a "Secret Deal"

The Republican report claims that Mr. Perez made a "secret" deal. To the contrary, the memo officially declining to intervene in the *Newell* case was signed by then Assistant Attorney General for the Civil Division Tony West on February 9, 2012, based on the advice of career officials with decades of experience. The memo set forth "a number of factual and legal arguments that support a decision not to intervene," including St. Paul's withdrawal of the *Magner* case. It stated: "[T]he City is dismissing a Supreme Court appeal in the *Gallagher v. Magner* case, a result the Civil Rights Division is anxious to achieve. Declination here would facilitate that result which, we are advised, is in the interests of the United States."

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Mr. GOODLATTE. And the gentleman is recognized.

Mr. CONYERS. Thank you. Could I begin by asking Professor Bagenstos to just review, since we are all under 5 minutes, just a couple of the problems that we have had with the accuracy of the allegations. It sometimes seems like we are talking about two completely different sets of events and work in the Civil Rights Division.

Mr. BAGENSTOS. I think that is right, you know. So when I read the Inspector General's report with great interest, as I think everybody at this table did, what I saw in the report is, number one, the

report goes through allegations of politicized hiring in this Administration and finds there was no politicized hiring in this Administration.

The report rehashes once again what had already been investigated by the Office of Professional Responsibility with respect to the New Black Panther case, and finds, as the Office of Professional Responsibility did, there was nothing illegal, unethical, or improper that happened in that case.

The report finds a number of incidents of harassment of employees, which are unacceptable, and I want to say that. But I will note that the incidents of harassment of employees that the report finds are centered in the period between 2003 and 2007, and there are no incidents of harassment found by the report that I could find that post-dated 2009. Of course, Tom Perez became Assistant Attorney General in October of 2009.

Mr. CONYERS. Right.

Mr. BAGENSTOS. Obviously there is work still to be done, but that is consistent with him making substantial progress.

Mr. CONYERS. Now, in your view, did Mr. Perez not reverse some of the unlawful practices and negative trends that had been established before he became the head of this part of the Civil Rights Division?

Mr. BAGENSTOS. Absolutely. And so the two examples are, one, the career driven, nonpartisan, merit-based hiring process, which, as I said in my prepared and spoken testimony, the Inspector General found was successful in hiring people with a high degree of skills. Also restoring the role of career attorneys in the Section 5 pre-clearance process is exceptionally important, and that was something that was a very big priority of Tom Perez's.

Mr. CONYERS. Yes. And after the departure of the Bush administration, did you find that Mr. Perez took the appropriate steps to address the Inspector General's 2008 findings after becoming what has now been characterized, a division in crisis?

Mr. BAGENSTOS. I think he did, absolutely. Absolutely. I think, you know, it was Tom Perez's major priority from day one to restore the traditions of the Civil Rights Division, which is a nonpartisan tradition of enforcement of civil rights. As I said when I started my career as a career attorney, the people who I looked up to, the people who are my bosses, my first boss had actually had been hired during the Reagan administration. You know, Tom Perez came to work as an intern in the Reagan administration. He wanted to restore that, and I think the evidence suggests that he did restore the nonpartisan, and merit-based, and career driven aspects of our practice.

Mr. CONYERS. Well, I am the only Member of this Committee that voted to pass the 1965 Voting Rights Act. That is because I was the only one here. It was not they were not in support of it. But I was grateful when Jim Sensenbrenner on this Committee joined with us and others when we reenacted and went further in 2006. And we now have Section 5, pre-clearance. Why is that so crucial to halting discriminatory practices in voting?

Mr. BAGENSTOS. It is so crucial. I think, you know, the best example of that actually is given by the preclearance decisions of the Federal District Court this year, this past year, in response to the

objections or litigation by the Justice Department. When the District Court in D.C., Republican and Democratic judges, Democratic appointed judges, denied pre-clearance to various voting chances because they said there is still substantial discrimination going on, and these laws are still necessary.

Judge Bates, a George W. Bush appointee to the District Court, who wrote the opinion upholding the Voting Rights Act extension, also said in the South Carolina case, look, this is an example of why we need Section 5 of the Voting Rights Act.

Mr. CONYERS. Exactly. Thank you very much. Very much.

Mr. GOODLATTE. I thank the Ranking Member.

And the Chair now recognizes the gentleman from Iowa, Mr. King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I thank the witnesses, and I happened to have a couple of flashbacks from testimony before this Committee by Mr. Perez. And I picked out some of the language along the line of our witnesses. I turn first to Mr. von Spakovsky and ask you, as you testified, as you reviewed this, as you read the record, I would like to take this to the perjury discussion.

If I remember right, Mr. Perez was sitting in exactly that same chair when he told me that the maximum penalty under the law had been applied to the perpetrators at the Philadelphia New Black Panthers case. Do you have knowledge of that testimony, and do you believe that his testimony, that that was the maximum penalty applied under the law, was a dishonest statement before this Committee?

Mr. VON SPAKOVSKY. Well, I have never seen a case in my career at the Justice Department where the Department decided when the defendant defaulted and did not answer the claim, therefore, admitting all of the allegations, would suddenly decide to dismiss the case.

And the one injunction that they did get was considerably weakened. It was for a short period of time. And all too early at times, one of the defendants who had engaged in this despicable behavior was a poll watcher again in Philadelphia.

Mr. KING. And when Mr. Perez testified that they had applied the maximum penalty under the law, and I asked him specifically, do you believe that today that the maximum penalty was obtained, and his answer was, that was the maximum penalty. We know today that it was, in fact, a minimum penalty rather than a maximum penalty. Would you agree with that?

Mr. VON SPAKOVSKY. I would agree with that, yes.

Mr. KING. Thank you. And I would turn to Mr. Adams with a similar question. You have been involved in the middle of this and you have watched this unfold. I recall also testimony, a question that was asked by Mr. Gohmert. Five times he asked Mr. Perez, did you review the videotape of the New Black Panther intimidation that took place in Philadelphia, and after the fifth question, he finally and reluctantly answered, yes. If you were evaluating this for potential prosecution of someone who was not forthcoming, would that be something that would bring your antenna up to listen very carefully to the balance of his answers? And what is your

viewpoint on whether perjury was committed before this Committee?

Mr. ADAMS. Well, Mr. King, I do not have the benefit of Mr. Perez's transcript. But I will say this, that there are criminal penalties associated with violations of Section 11 of the Voting Rights Act, which, as far as I know, could still be imposed against those New Black Panthers. They could still be indicted today.

There are nationwide injunctions available, and as you know, the injunction was restricted to the city of Philadelphia, and it was limited in time as opposed to being permanent.

Mr. KING. And so the testimony by Mr. Perez, it is a clear matter of the record that they had applied the maximum penalty allowable under the law. Could you devise how that could be an honest statement before this Committee?

Mr. ADAMS. Well, I would prefer to see the Black Panthers indicted. Obviously that has not happened.

Mr. KING. And I will make this point back again, that in a Justice Department that would objectively be not choosing from the cafeteria form of what to prosecute, what kind of justice under the law could happen when you have an Administration, an Attorney General, and an Assistant Attorney General that all seem to agree that the civil rights cases under the law should be brought selectively with a preference for people of, let me say, certain ethnicity or race.

How would justice ever prevail in an Administration that was locked in from the White House, to the Attorney General, to the Assistant Attorney General, and have people come before this Committee and provide dishonest statements to the Justice Department? Is there anybody out there that can prosecute perjury if it takes place before this Committee, or how would that take place?

Mr. ADAMS. Well, I would probably direct that question to your staff. But generally speaking, it is important to have equal enforcement of the law. It is a bedrock principle of America that——

Mr. KING. Mr. Adams, I know you have contemplated this, so could you give me a little bit more, maybe a hypothetical response on how that might happen at a different time——

Mr. ADAMS. Sure. I mean, the U.S. Attorney would look at a transcript, the U.S. Attorney for the District of Columbia——

Mr. KING. Pardon me, I am sorry?

Mr. ADAMS [continuing]. Would look at a transcript, look at the law, and make a decision. But to get the U.S. Attorney from the District of Columbia to do so may be a task.

Mr. KING. That is my point. And I would turn back to Mr. von Spakovsky. How would justice prevail under the configuration that I have described hypothetically?

Mr. VON SPAKOVSKY. Well, there are not often voting cases pursued by the Department where they have video evidence. And I was at the Civil Rights Commission when the poll watchers and others who were actually there came in and testified, and it was extremely strong testimony. I think it would be fairly easy to win a criminal prosecution for voter intimidation.

Mr. KING. Easy to win, and perhaps difficult to confirm someone who would perpetrate such a thing.

I thank all the witnesses, and I yield back the balance of my time.

Mr. GOWDY [presiding]. I thank the gentleman from Iowa.

The Chair would now recognize the gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you. Mr. von Spakovsky, do you have any firsthand personal knowledge of the *Magner v. Gallagher* case, a matter about which you testified, yes or no?

Mr. VON SPAKOVSKY. No.

Mr. NADLER. Thank you very much. I would point out that people have investigated this and have talked to the individuals involved. Namely, the minority staff have concluded there was no inappropriate conduct.

Since we have wasted our time with more misinformation about the New Black Panther Party case, let me just comment that that case was investigated in the recent OIG report as well as in a prior Office of Professional Responsibility report. The allegations of voter intimidation were taken seriously in that case, as they should be. Without any evidence that any voter felt intimidated, and having determined that many of the charges lacked sufficient evidentiary support, experienced career DoJ lawyers decided to dismiss some of the defendants in that case. These decisions came before Assistant Attorney General Perez assumed leadership of the Civil Rights Division.

We have now spent 6 years and hundreds of thousands of taxpayer dollars investigating baseless allegations that these decisions were racially or politically motivated. Those allegations have now been investigated and debunked twice before we hear crap again today with both the Inspector General and the——

Mr. ISSA. Would the gentleman yield?

Mr. NADLER. No, I will not.

Mr. ISSA. I did not catch the word.

Mr. NADLER. What word?

Mr. ISSA. We hear something. Again, I could not understand what it is.

Mr. NADLER. I think I said "nonsense."

Mr. ISSA. Okay, "nonsense." That is what I thought, thank you.

Mr. NADLER. Baseless nonsense, ill-motivated baseless nonsense. Those allegations have now been investigated and debunked twice with both the Inspector General and the Office of Professional Responsibility, finding that these decisions were based on the facts in the law and nothing else.

There should be no bite at this apple. Any continued claims of wrongdoing in efforts to taint this Administration or Assistant Attorney General Perez with this case should be flatly rejected as the ill-motivated nonsense that they are.

Professor Bagenstos, it has been alleged that little changed in the Civil Division from the leadership of the Bush administration where key leaders broke the law by engaging in politicized hiring personnel practices. Do you agree?

Mr. BAGENSTOS. I disagree. Very much has changed. I mean, there has been a very substantial change in both the policies adopted for purposes of hiring, which have restored nonpartisan, merit-based, and career-driven hiring, and there has been a change, I

think, in the culture of the Division. I think it is restored, you know to——

Mr. NADLER. And these changes to restore de-politicized hiring have been made under the leadership of Assistant Attorney General Perez?

Mr. BAGENSTOS. Under the leadership of Assistant Attorney General Perez. He issued the policy, absolutely.

Mr. NADLER. Thank you. You know, many inflammatory claims have been made about the findings of the recent Office of Inspector General report. Would you help us clear up the record on this, please? Specifically, was there any finding in the report of selective enforcement of the law by this Administration?

Mr. BAGENSTOS. No, there was not.

Mr. NADLER. Was there any finding in the report that this Administration's hiring or personnel practices improperly considered the political or ideological views of applicants?

Mr. BAGENSTOS. No. In fact, the IG found to the contrary.

Mr. NADLER. Was there any findings in this report, in the OIG report, that this Administration's handling of FOCA requests—I am sorry, Freedom of Information Act requests favored liberal groups or interests?

Mr. BAGENSTOS. No. The IG found that when they were asked to respond to requests or requests for pending Section 5 submissions, regardless of who sent them, they got filled quickly, and other requests did not get filled quickly.

Mr. NADLER. And it is true that we know from the Office of Professional Responsibility report, and from this OIG report, and the prior OIG report, is it not, that all these things were going on during the period of 2003 to 2007 during the prior Administration when Mr. von Spakovsky and Mr. Adams were in the Department?

Mr. BAGENSTOS. Well, certainly as to the politicized hiring and the politicized culture within the Division, absolutely.

Mr. NADLER. Thank you. I would simply comment then that the credibility of Mr. von Spakovsky and Mr. Adams, anything they testify here lacks any credibility.

Now, Mr. von Spakovsky, the Inspector General finds the disclosure of confidential or deliberative information for publication by a third party has "contributed to partisan rancor within the Voting Section." That is on page 135. The two recent examples given by the IG involved internal information related to the two of you—that is, to Mr. von Spakovsky and Mr. Adams—and then posted by you on the Internet in 2011 and 2012. That is, footnotes 117 and 118 on page 136 of the report.

Do you agree that the employees leaking internal information to you should be investigated, Mr. von Spakovsky?

Mr. VON SPAKOVSKY. When they are providing evidence of wrongdoing and they can get no responses from people above them, in fact, they will be harassed and bullied and intimidated for calling attention to things that are being done wrong——

Mr. NADLER. So it is your——

Mr. VON SPAKOVSKY [continuing]. No, I do not think so. I think they should be recognized as whistleblowers who are trying to right wrongs.

Mr. NADLER. So people who leak internal information to motivate—I will not say motivated—outside individuals should not be disciplined, but they should praised.

Mr. VON SPAKOVSKY. No, that is not what I said, Mr. Nadler. What I said was that given the current attitudes there and the fact that conservative employees there are marginalized, harassed, intimidated, when they see wrongdoing, they have no alternative because they know that their supervisors and other individuals above them will do nothing about it. And, in fact, if they become whistleblowers, they will be retaliated against.

And individuals who are trying to draw attention to things that are unlawful and unethical I do not think should be——

Mr. NADLER. So people who see things that they believe are unethical or unlawful, instead of reporting them to law enforcement authorities should report them to you.

Mr. GOWDY. The gentleman's time has expired.

Mr. GOHMERT. Mr. Chairman, I have a point of personal privilege. While Mr. Nadler is still here, he referenced more than once ill motivation, and it was not clear to me whether he was imputing ill motivation finally to Mr. Perez or if he was imputing ill motivation to Members of Congress in violation of the rules of the House.

Mr. NADLER. Neither. I was imputing ill motivation to Mr. von Spakovsky and to Mr. Adams.

Mr. GOHMERT. Well——

Mr. GOWDY. The gentleman's time has expired.

The Chair would now recognize the gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman, and I might note for the record that without whistleblowers, including the update the President recently signed, my Committee next door could not operate. We depend on whistleblowers, and, in fact, Fast and Furious, Benghazi, the IRS scandal, and right down next door, the manipulation that went on and what was disclosed when the Park Service complained they would not have enough money for toilet paper. All of that was exposed and more by whistleblowers. So I want to commend whistleblowers. I would prefer they come to Congress. I would prefer they trust my Committee. But notwithstanding that, if it is the New York Times they feel they have to go to, then I will read the New York Times.

With that, I would like to read an older quote for a moment to begin my questioning. Congressman Davy Crockett famously in 1835, when speaking and coining the phrase, "log rolling," "My people don't like me to log roll in their business. To vote away their preemption rights to fellows in other States that never kindle the fire in their own land." He was talking about Congress doing quid pro quo, to use a different term.

Mr. von Spakovsky, in the case of Mr. Perez and his going to St. Paul and trading away $200 million of taxpayer potential money, and in return for dismissing effectively or killing a Supreme Court case, one that might have been decided in a way he did not like, was he not, in fact, log rolling through his administrative power?

Mr. VON SPAKOVSKY. I think he was, and I think it was another example of, frankly, something that Mr. Adams and I saw a lot, and that is the inability of individuals going to work in the Civil

Rights Division, particularly individuals from liberal advocacy organizations, being able to make the transition to being a government lawyer and understanding that their clients were now the American public and the American taxpayer.

Instead, many of them go to work for the Civil Rights Division and continue to push and advocate the same kind of policies and legal positions that they did at those organizations, and they do not make the transition. I think it is an example of that.

Mr. ISSA. Now, the same court, the exact same court, that decided Obamacare would have decided this civil rights question on behalf of people who felt that poor people in a city who felt that they should have better solutions than the status quo of calculation. Do you trust that Supreme Court?

Mr. VON SPAKOVSKY. Well, I do, and it is very clear that this whole deal was done because Mr. Perez believed that the Supreme Court, and a lot of commentators agreed, was going to toss out these legal theories that were being used. And it is important to remember the whole issue here was over a city falsely certifying that it was going to use millions of dollars to help low income individuals, and they falsely certified to doing that.

Mr. ISSA. So I think one of the more important questions that I need to get answered is, if you, in fact, bribe a city into dropping a case in return for dropping another case, or log rolling, to use Davy Crockett, because quid pro quo sounds way too highfalutin, and I think the gentleman from Tennessee would be more appropriate to quote. If, in fact, that were to continue, would we not basically have any number of things? I will give you a new courthouse in your district. I will bring stimulus funds. Would there not be almost limitless things the executive branch could do in return for having the Court not see cases they did not want, and see cases they wanted?

Mr. VON SPAKOVSKY. Yeah, I think that would be the start of a long trend of doing that.

Mr. ISSA. And is not the fact that that case is now basically dead, does that not mean that we have an inconsistency? We have one part of the country, one circuit, that has one rule and others that may have another? In other words, the lack of a clear decision could be years before we have one law of the land?

Mr. VON SPAKOVSKY. That is true. And one of the worst things that all lawyers will tell you is to have inconsistent views and opinions from different courts in the country.

Mr. ISSA. Now, from the IG report, and Mr. Nadler mentioned the OIG and the other case. But I just want you to help me with something that was said in the OIG report, and I will quote it. This is as to Thomas Perez. "Nevertheless, we found that Perez's testimony did not reflect the entire story regarding the involvement of political appointees in MBPP decision making." And then they again say, "We believe that Perez should have sought more details from King and Rosenbaum about the nature and extent of participation of political appointees," et cetera.

Now, you are more technical than I am. Would you say that that is not a lie, but it is not the whole truth?

Mr. VON SPAKOVSKY. What I would say about that is my job as counsel to the Assistant Attorney General previously was to help

prepare my boss, people like Mr. Perez, for testimony before hearings like this and before the Commission. We would have briefed him on every aspect of that case and gotten all of the information necessary to answer every question, particularly a question like that, which Perez told the IG he anticipated the question.

Mr. ISSA. So what you are saying is he did not tell the whole truth, and that was part of what he was sworn to do.

Mr. VON SPAKOVSKY. I believe that is correct.

Mr. ISSA. Thank you, Mr. Chairman. I yield back.

Mr. GOWDY. I thank the gentleman from California.

The Chair would now recognize the gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Let me thank the Chair very much, and I want to thank Mr. Conyers for refreshing our memory on one of the most hope springs eternal moments of this Congress and this Committee, which was the reauthorization in 2006-2007 led by Mr. Sensenbrenner and many of our colleagues here. And I want to thank them for the reauthorization of Section 5 of the Voting Rights Act and thank you for your historical perspective as well. And I know that the witnesses here would agree with me that the legislation lives and provides vitality to democracy.

I would only offer a caveat and suggest that the hearing should be renamed to "We Lost the Presidency, and Mr. Tom Perez is at fault," because I see no reason for this hearing. I respect my colleagues. But let me just put on the record that the Office of Professional Responsibility as it relates to the New Black Panther Party did confirm that no mishandling occurred, no professional misconduct, no exercise of poor judgment. And Mr. Tom Perez was not even at the Department of Justice, to my knowledge.

I note that in the earlier comments, some individuals were quoted as indicating that someone was booing at a Member of Congress, and as well that someone mentioned something about a noose. I would ask, as my good friend who is not here, that that individual go immediately and become a whistleblower. To my knowledge, it was Facebook, and I would hope because of the whistleblower protection, let me very clear to all of those who worked hard to cover under the whistleblower protection, that would have been the appropriate vehicle in which to be able to deal with.

But let me show what Tom Perez did to uphold democracy, because this is a map of shame that shows the variety of voter suppression laws across America. If we had not had a diligent Justice Department led by Tom Perez, then people who wanted to vote, no matter where they came from, would not have had the opportunity to vote.

The Voting Rights Act protects all people. Texas, which passed the strictest voter ID law in 2011 fortunately was turned back because of the Department of Justice, and people were able to vote. If you are not familiar with Texas, you will note Romney won the State of Texas. States like Florida that had enormous voter suppression that occurred, the Justice Department intervened. Ohio that had voter suppression, fortunately they turned it back.

Voter suppression is not democratic, and I am not understanding why we are here trying to malign a gentleman who worked vigor-

ously to enhance the opportunity for all Americans to vote. So let me proceed with some questioning for Mr. von Spakovsky.

Mr. von Spakovsky, do you know perjury is? Can you explain that to me?

Mr. VON SPAKOVSKY. Well, any lawyer will tell you perjury is lying under oath.

Ms. JACKSON LEE. So let me recount for you, and I am not going to challenge your interpretation. But in your July 2008 testimony before the House Judiciary Committee, July 2009 testimony before the U.S. Civil Rights Commission, March 2010 testimony before the House Judiciary Committee, and your September 2011 before the Senate Judiciary Committee, you praised the work of the Department during your tenure and consistently cite the positive cases, actions, and the environment fostered at the Department during that time.

At the time of your testimony in the aforementioned Committee and commissions, did you believe your perception and depiction of the Department's culture and work to be true at that time?

Mr. VON SPAKOVSKY. I am sorry. I did not quite understand your question.

Ms. JACKSON LEE. In all of your testimonies that I gave—'09, '08, 2010, and 2011, do you believe your perception and depiction of the Department's culture and work to be true at that time, what you said?

Mr. VON SPAKOVSKY. I would stand behind any testimony——

Ms. JACKSON LEE. You are saying yes. Were you aware of any illegal hiring practices at the Department at that time? Yes or no?

Mr. VON SPAKOVSKY. I was not aware.

Ms. JACKSON LEE. Yes or no, sir.

Mr. VON SPAKOVSKY. There was absolutely no prosecution or——

Ms. JACKSON LEE. There was confusion——

Mr. VON SPAKOVSKY. There was no prosecution of any case by the United States Attorney's Office. They did not believe that any law had been violated.

Ms. JACKSON LEE. Were you aware of any harassment or misconduct within the Division at that time?

Mr. VON SPAKOVSKY. I am sorry, what?

Ms. JACKSON LEE. Were you aware of any harassment or misconduct within the Division at that time against career attorneys?

Mr. VON SPAKOVSKY. There has been harassment from the first day I went to work there, including of me.

Ms. JACKSON LEE. Yes. And the OIG recently found otherwise and characterized division at the time that you were in that were in crisis during the time that you were there. I think it is somewhat questionable to come before this panel when charges have been made during your tenure, and when Mr. Perez has been proven innocent of the charges you all make. And if it had not been for his vigorous prosecution of the Voting Rights Act, the legal Voting Rights Act of 1965, Section 5, that none of us would have had a fair and honest election in 2012. Do you admit to that, Mr. von Spakovsky?

Mr. VON SPAKOVSKY. I completely disagree. I disagree with that.

Ms. JACKSON LEE. Do you admit to that, sir?

Mr. VON SPAKOVSKY. I disagree with your assessment of that and the way Mr. Perez has conducted himself. Perhaps you could explain——

Ms. JACKSON LEE. And there may be those who disagree with how you handled yourself.

Mr. VON SPAKOVSKY. Perhaps you can explain, Ms. Lee, why it is that—I recall getting criticism from Members of this Committee during the Bush administration that we supposedly had not filed enough Section 2 lawsuits. If you look on page 44 of this, you will find that there were 18 lawsuits filed under Section 2 during the Bush administration. If you look on the same IG report, you will find that this Administration has one case, one case that the investigation was started during the Bush administration, and that Section 2 was filed by Mr. Adams. There has not been a single Section 2 lawsuit——

Ms. JACKSON LEE. It may be that the——

Mr. GOWDY. The gentlelady's time has expired.

Ms. JACKSON LEE. It may be that the time was used up by voter oppression. And I thank the Chairman for his time.

Mr. GOWDY. The gentlelady's time has expired.

Ms. JACKSON LEE. I yield back.

Mr. GOWDY. The Chair will now recognize himself. I want to see if I can settle some facts. I had hoped to settle the facts with the witnesses, no offense intended to any of the four of you. But you were not the witnesses I wanted to settle these facts with. I wanted to ask the Department of Justice, but they are not here, so this is going to be a challenge, but I will see if I can work my way through it.

South Carolina passed a voter ID law in 2011, May of 2011. And in 2011, one-third of South Carolina's congressional delegation was African-American. I may be mistaken. I suspect that South Carolina's percentage of African-American Members of Congress may have been the highest in the country in 2011. And as we now know, one of two African-American United States senators is from South Carolina in the person of my friend, Tim Scott.

In addition, South Carolina's governor is of Indian descent. Further to the same, South Carolina's voter ID law was similar, if not less, restrictive than those Department of Justice had pre-cleared in New Hampshire, Virginia, and Georgia. And moreover, South Carolina's plan was similar, if not less, restrictive to plans approved outside of Department of Justice preclearance in States like Tennessee, Kansas, Indian, which incidentally was affirmed by the United States Supreme Court, Idaho, South Dakota, and Michigan.

And just to be clear, South Carolina's voter ID law allowed for the casting of provisional ballots where the voter did not have one of the forms of accepted identification. Now, that is withstanding the fact that South Carolina's new voter ID law made it easier to obtain one of those forms of identification, allowed for the casting of provisional ballots.

So, Professor, in your testimony, you had mentioned the significance of having career prosecutors to make these decisions. Did I understand your testimony correctly?

Mr. BAGENSTOS. Yes, absolutely.

Mr. GOWDY. Would you be interested to know whether or not the leadership of the Department of Justice ignored the opinion of these career prosecutors whose opinion you value so highly?

Mr. BAGENSTOS. What I would want to know——

Mr. GOWDY. I want to know whether or not you—I want you to answer my question before you answer the one you want to answer, okay? Answer my question, and it is this: would you be interested in knowing whether or not leadership in the Department of Justice ignored the advice of career Department of Justice attorneys?

Mr. BAGENSTOS. Of course, but ignoring and disagreeing are not the same thing. I do not know what happened in that case.

Mr. GOWDY. Exactly, and we do not either. You know why? Because they will not tell us. They have ignored Senator Graham's letter. So I am asking you, will you join Senator Graham and me in asking the Department of Justice whether or not they ignored advice from career attorneys to pre-clear South Carolina's plan? Will you join us?

Mr. BAGENSTOS. No. I think the deliberative process within the Department is incredibly important. You cannot get candid——

Mr. GOWDY. Is that a yes? Will you join us today?

Mr. BAGENSTOS. No, congressman. You cannot get candid views from career staff if they know——

Mr. GOWDY. Are you interested in whether or not those candid views were ignored?

Mr. BAGENSTOS. You know, as a citizen I would be interested whether they were ignored. But ignore and——

Mr. GOWDY. As a citizen? How about as a law professor?

Mr. BAGENSTOS. Yeah.

Mr. GOWDY. Would you be interested in whether or not sound legal advice was ignored for political expediency? Would you be interested in that?

Mr. BAGENSTOS. Sure, but I think the proof in the pudding in this case is precisely in the opinion of the District Court, which I referred to——

Mr. GOWDY. Oh, I have read the opinion. And by the way, who won?

Mr. BAGENSTOS. And by the way it was a——

Mr. GOWDY. Who won?

Mr. BAGENSTOS [continuing]. Decision, by the way.

Mr. GOWDY. South Carolina won.

Mr. BAGENSTOS. By the way——

Mr. GOWDY. And here is the difference. I am going to reclaim my time. Here is the difference. There was a 1.6 percent difference in African-Americans who had accepted photo IDs and White South Carolinians, 1.6 percent difference. Twenty years ago when I was working on voting rights cases, that was considered the minimus. Now it costs South Carolina $3.5 million to defend that 1.6 percent difference.

But it also means this: that my fellow South Carolinians who are African-American are 1.6 percent less likely, less able, to enter a Federal courthouse because an ID is required there also. And they are 1.6 percent less likely to be able to board an aircraft because it also requires a photo ID. They are 1.6 percent less likely to enter the front door of this building because it also requires a voter ID.

So my time is up. I would simply say this to the men and women who have dedicated their careers at the Department of Justice to the apolitical, nonpartisan enforcement of the law, I am sorry that we are having to have this hearing. And I am also sorry to the State of South Carolina that it had to spend $3.5 million to have a district court, ultimately a three-judge panel, ultimately agree with us. And I am sorry for the Department of Justice that they put politics ahead of the law.

And with that, I would recognize the gentlelady from California, Ms. Chu.

Ms. CHU. I am one who feels very strongly about the Voting Rights Act, in particular, the aspects that protect language minority groups. And so, Mr. Bagenstos, we still continue to have examples of those who experience problems. For example, in 2010, we learned that poll sites in Queens, New York did not have translators for Korean and Chinese voters, even though languages are indeed covered by the Voting Rights Act, Section 203. And some sites were prohibiting limited English proficient voters from getting the assistance of a person of their choice in the voting booth as would be required by Section 208.

As you know, the Voting Rights Act was specifically designed to protect citizens who are members of language minority groups from being excluded from the voting process and to ensure that they can receive the language assistance that they need to cast an effective vote.

So let me ask: during and after your tenure, what progress and specific actions has the Civil Rights Division taken to enforce Section 203 and 208 of the Voting Rights Act, and to protect the voting rights of language minority groups more broadly?

Mr. BAGENSTOS. Well, obviously the Division has brought a whole series of cases in the last 4 years to enforce Sections 203 and 208 and the language minority provisions generally of the statute. It is a very important area.

You know, after the 2010 census, there was a new set of jurisdictions that were certified for coverage under Section 203 of the statute because that is now the statute works. It is based on census data. And actually, as detailed in the OIG report, it is clear that Tom Perez and the Department of Justice Civil Rights Division responded immediately to first try outreach with jurisdictions that were newly covered because litigation is not the first response. Better to try to get voluntary compliance with the law. But we also saw a substantial effort to enforce these laws, both with respect to language minority voters, with respect to Asian languages, but also the first new case on behalf of Native Americans since 1998. So a very substantial push in this area.

Now, I will say, I do want to be here and say nothing that happened in any previous Administration was positive by any means. I think the language minority provisions of the statute were enforced in the previous Administration, and this Administration has continued to enforce them. But I think there has been a substantial uptick in voting rights enforcement generally.

Ms. CHU. Thank you. Let me ask, Mr. Bagenstos, about the Inspector General's report. From 2003 to 2007, the Office of the IG concluded that the polarization and suspicion in the Voting Section

became particular acute as political appointees illegally recruited new attorneys into the Voting Section and other parts of the Division based on their conservative affiliations. Appointees regularly considered political and ideological affiliations in their personnel actions.

What was the impact on the Department's expertise and capabilities and on the remaining career attorneys' morale when you came on in 2009?

Mr. BAGENSTOS. It was dreadful. It was absolutely dreadful. I mean, I have often described my first 6 months on the job as Deputy Assistant Attorney General at the time as basically conducting grief counseling. I mean, it was a place where the career staff was completely demoralized. There had been very substantial turnover. Many of the people who had left, not surprisingly, are people who were outstanding attorneys, who had very good options, so they were the people who we would rely on to lead very significant litigations if we were to try to ramp up enforcement efforts. We had to figure out how to kind of rebuild what was there. It was a place that was in complete disarray and complete demoralization.

Ms. CHU. And so, then Assistant AG Perez came in. And what was his attitude toward these improper hiring practices? How did he reform the hiring practices of that section and the Civil Rights Division as a whole? And in your personal view, what is the impact on the Division of these new policies? And what did the IG's Office conclude in their recent investigation?

Mr. BAGENSTOS. So if you look at the IG report, it does detail what Tom Perez did pretty much right away as soon as he got in. I mean, he got in in October and had to look at various proposals to do this. But by the end of 2009, he instituted a process where career attorneys were in the driver's seat for hiring. All experienced attorney hiring would be done through hiring committee staff of career attorneys.

The section chief, also a career employee, would make a recommendation to the Assistant Attorney General for hiring. If the Assistant Attorney General was to disagree with that recommendation, the Assistant Attorney General would have to do that in writing to promote transparency and to promote this culture of accountability. And the IG found that the nine attorneys hired in the Voting Section under that policy were outstanding in their qualifications and in their voting rights experience.

Ms. CHU. Thank you. I yield back.

Mr. GOWDY. I thank the gentlelady.

The Chair would recognize the gentleman from Arizona, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Mr. von Spakovsky, in your written statement, you described the Division's legal arguments in the 2012 Hosanna-Tabor Supreme Court case as representing a "war on religious freedom, completely at odds with the Division's prior history of protecting religious freedom." You also state that Mr. Perez signed a brief to the United States Supreme Court that claimed "such an extreme position, that all nine justices of the Supreme Court disagreed." I mean, nine justices, nine to zero. I am not sure in today's environment of judicial

activism that we could get nine justices to all agree that two and two still equal four, so it is a pretty profound decision.

Can you put some context on this and tell us why this Division, whose purpose it is to protect religious freedom, seemed in this case committed to turning it on its end and wiping away not only hundreds of years of history, but vaporizing the First Amendment in the process?

Mr. VON SPAKOVSKY. Well, what was amazing about that case was that they basically tried to tell the Supreme Court that there should be no ministerial exemption. In other words, churches should not have the ability to impose their religious beliefs when they are hiring ministers, and lay ministers, and things like that.

And that position was so at odds with the First Amendment. They were basically saying that churches should not have any more associational rights than a private club. And the Supreme Court said, you know, nine justices. And, in fact, Elena Kagan, the former Solicitor General for this Administration, joined with Justice Alito in a concurring opinion because the Court just could not believe, and it is very clear from the language, they could not believe that the Justice Department was pushing this kind of a view.

Mr. FRANKS. Well, I mean, I do sometimes think we get so impractical in these areas, under that reasoning of that brief, it would occur to me that as a Baptist, I could hold myself electable to papacy because I felt better qualified somehow than the pope. And I just find it hysterical. I mean, next we will have, you know, some bill here that suggests that Russian citizens should be able to vote in American elections. So, I mean, I do not know where this thing goes.

Mr. Mihet, in your written testimony, you provided an email dated November 5th of 2009. And incidentally, your story, sir, compels all of us greatly. But this was a Civil Rights Division attorney that wrote the email to an employee of the Presidential Women's Center, which, in part, states, "On Saturday, we had planned to observe the protestors. Usually we just hang outside the clinic and observe as well as chat with the escorts. We had planned to leave on Saturday afternoon."

Now, can you elaborate again, put some context in this situation? Elaborate on the Civil Rights Division's presence in West Palm Beach. And do you think that the proponents of abortion who claimed that you got lucky in this case with the judge who is himself an ideologue, of course, and that the outcome would have been different in any other court? Can you put that in context and help us understand that?

Mr. MIHET. Yes. The written documentation we obtained in discovery revealed a very sinister plan that began way before the lawsuit was actually filed against Susan in which the Department of Justice planned an elaborate trap against Susan and others of her pro-life friends. The email showed that they were on a first name basis with the clinic staff, Mona and Julie, and they were making all these plans. And multiple DoJ lawyers were flying from Washington, D.C. to Florida. Now, perhaps the weather differential in February might account for some of that eagerness to travel to Florida on taxpayer dollars. But that fact was easily lost upon

Susan, who all of a sudden is being prosecuted by the most powerful government on earth.

As to your second question, if you read Judge Ryskamp's opinion, which has been provided in the written submission, it is well reasoned and supported by the law. He exercised remarkable restraint in the face of what he clearly understood to be frivolous and outrageous conduct. Any other judge faithful to the Constitution would have reached the same result. How do we know that? The DoJ could have appealed that decision if they disagreed with it. In fact, Professor Bagenstos was an attorney at the DoJ at that time, perhaps the only attorney who managed not to have his name on the pleadings in this particular case. But he was in charge of the Appellate Division. If they thought the judge was off base, they could have appealed the decision. They chose not to. They quietly paid the significant attorney fee sanctions out of the public treasury, and then moved on to their next target.

Mr. FRANKS. Thank you, folks. And thank you, Mr. Chairman.

Mr. GOWDY. I thank the gentleman from Arizona.

Mr. CONYERS. Mr. Chairman?

Mr. GOWDY. Before we go to my friend, the gentleman from Louisiana, I wanted to recognize the gentleman from Michigan.

Mr. CONYERS. Thank you, sir. I would like to ask unanimous consent to enter into the record the letter from Wade Henderson, who heads the Leadership Conference on Civil and Human Rights, as well as the letter from Joe Rich, the chief of the Voting Section from 1999 to 2005, a letter sent to the Honorable Dianne Feinstein and the Honorable Bob Bennett.

Mr. GOWDY. Without objection, it will be made part of the record.

[The information referred to follows:]

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The Leadership Conference

April 15, 2013

Civil Rights Community Support for the Work of Thomas Perez as Assistant Attorney General of the Civil Rights Division

Dear Chairman Goodlatte and Ranking Member Conyers:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States, we write to express our strong support for the leadership of Thomas Perez as Assistant Attorney General for the Civil Rights Division of the Department of Justice. We are deeply troubled by the hearing scheduled for tomorrow in the Committee on the Judiciary, which seems to be aimed at doing little more than undermining civil rights enforcement and, perhaps more directly, trying to tarnish a profoundly talented and honest individual while the Senate is actively considering his nomination to become the next Secretary of Labor.

As the Assistant Attorney General for the Civil Rights Division, Mr. Perez has restored the Division to its original purpose: to uphold civil and constitutional rights for all Americans, particularly the most vulnerable in our society. Mr. Perez has stepped up enforcement of human trafficking laws, and has worked to ensure that veterans can keep their civilian jobs while serving in the military. He has also been a tireless champion of voting rights, disability rights, equal educational equity, and has prosecuted some of the most heinous hate crimes in recent memory. During Mr. Perez's tenure, the Civil Rights Division also settled the three largest fair-lending cases in the history of the Fair Housing Act; as a result, it recovered more money for victims of housing discrimination in 2012 than in the previous 23 years combined. Mr. Perez has helped build consensus with stakeholders to uphold the civil and constitutional rights of all Americans.

Mr. Perez has restored integrity to the Civil Rights Division and its Voting Section. Under his leadership, the Civil Rights Division has put an end to politicized hiring practices and enforcement decisions and increased its commitment to upholding the civil rights of all Americans. In fact, the Voting Section has never been more productive than under Mr. Perez. It handled more new cases in 2012 than in any other year, including critical cases defending the constitutionality of Section 5 of the Voting Rights Act.

Those who oppose the work of the Civil Rights Division have grasped at every possible straw to discredit Perez's work, but their efforts have been fruitless. The recent report of the Office of the Inspector General (OIG), *Review of the Operations*

The Leadership Conference

of the Voting Section of the Civil Rights Division, serves as a clear vindication of the work of the Division under Mr. Perez. In stark contrast to the allegations that the Voting Section made decisions based on improper partisan or racial considerations, the OIG report found no evidence of improper decision-making in the Voting Section's enforcement of laws protecting the right to vote.

Assistant Attorney General Thomas Perez has served as an outstanding leader of the Civil Rights Division and has ably taken on the important responsibility of enforcing our nation's civil rights laws. For further information, please contact Nancy Zirkin at (202) 466-3311 or email zirkin@civilrights.org or Lisa Bornstein Senior Counsel at (202) 263-2856 or bornstein@civilrights.org.

Sincerely,

Wade Henderson
President & CEO

Nancy Zirkin
Executive Vice President

cc: House Judiciary Committee members

June 11, 2007

The Honorable Diane Feinstein
The Honorable Bob Bennett
Senate Committee on Rules and Administration
SR-305 Russell Senate Office Building
Washington, DC 20510

Dear Chairperson Feinstein and Ranking Member Bennett:

As former career professionals in the Voting Section of the Department of Justice's Civil Rights Division, we urge you to reject the nomination of Hans A.von Spakovsky to the Federal Election Commission (FEC). Prior to his current role as a recess appointee to the FEC, Mr. von Spakovsky oversaw the Voting Section as Voting Counsel to the Assistant Attorney General of the Civil Rights Division from early in 2003 until December, 2005. While he was at the Civil Rights Division, Mr. von Spakovsky played a major role in the implementation of practices which injected partisan political factors into decision-making on enforcement matters and into the hiring process, and included repeated efforts to intimidate career staff. Moreover, he was the point person for undermining the Civil Rights Division's mandate to protect voting rights. Foremost amongst his actions was his central decision-making role on a matter where he clearly should have recused himself. We urge you to use this confirmation process as an opportunity to thoroughly examine Mr. von Spakovsky's tenure at the Department of Justice and how his commitment to party over country will affect his decision making at the FEC.

Each of us came to the Voting Section to participate in the crucial role the Department of Justice plays in protecting all Americans without fear or favor. We saw this as an honor. Our commitment to public service was grounded in the belief that every American should have an equal opportunity to participate in our political process. We sought to work for the Civil Rights Division because of our patriotism, because of the honor of service and because of our commitment to the historic and heroic work of our predecessors in the Division. We are deeply disturbed that the tradition of fair and vigorous enforcement of this nation's civil rights laws and the reputation for expertise and professionalism at the Division and the Department has been tarnished by partisanship. Over the past five years, the priorities of the Voting Section have shifted from its historic mission to enforce the nation's civil rights laws without regard to politics, to pursuing an agenda which placed the highest priority on the partisan political goals of the political appointees who supervised the Section. We write to urge you not to reward one of the architects of that unprecedented and destructive change with another critical position enforcing our country's election laws.

During his three years in the front office of the Civil Rights Division, Mr. von Spakovsky assumed primary responsibility for the day to day operation of the Voting Section. His superiors gave him the authority to usurp many of the responsibilities of the career section chief and institute unprecedented policies that have led to a decimation of the Section and its historic and intellectual resources.

Personnel management decisions in place at the Justice Department were abandoned during Mr. von Spakovsky's tenure. Rules designed to shield the civil service from the political winds of changing administrations were cast aside in favor of a policy designed to permit partisanship to be inserted into career hiring decisions. In the past, career managers took primary responsibility for the hiring decisions of the civil service. During Mr. von Spakovsky's tenure that changed. Career managers were shut out of the process and criteria for hiring career staff shifted from rewarding legal capacity, experience and especially commitment to civil rights enforcement, to prioritizing a candidate's demonstrated fidelity to the partisan interests of the front office. Mr. von Spakovsky vigorously carried out this policy in hiring interviews he conducted.

Mr. von Spakovsky also corrupted the established personnel practices that led to a productive working environment within the Section. He demanded that the Chief of the Section alter performance evaluations for career professionals because of disagreements with the legal or factual conclusions of career attorneys and differences with the recommendations they made, not the skill and professionalism with which these attorneys did their jobs. Such changes in performance evaluations by political appointees had never occurred in the past. There is good reason for giving deference to the section chief's judgment in performance given that political appointees lack the day to day work experience that a section chief possesses in his work with all members of the section. Not surprisingly, actions such as these undermined Section morale.

The matter which best demonstrates Mr. von Spakovsky's inappropriate behavior was his supervision of the review of a Georgia voter ID law in the summer of 2005. It demonstrates the unprecedented intrusion of partisan political factors into decision-making, the cavalier treatment of established Section 5 precedent of the Voting Section, and the unwarranted and vindictive retaliation against Voting Section personnel who disagreed with him on this matter.

Prior to his coming to the Civil Rights Division in 2001, Mr. von Spakovsky had vigorously advocated the need to combat the specter of voter fraud through restrictive voter identification laws. In testimony before legislative bodies and in his writings, Mr. von Spakovsky premised his conclusions upon the notion – not well-supported at the time and now discredited – that there was a widespread problem with ineligible voters streaming into the polling place to influence election outcomes. In this same period, starting in 1994, the Voting Section had on several occasions reviewed other voter ID laws pursuant to its responsibility under § 5 of the Voting Rights Act, to determine if they had a negative impact on the ability of minority voters to participate in elections. Precedent from these prior reviews was clear: changes requiring voters to provide government-issued photo identification without permitting voters to attest to their identity

if they did not have the required ID have a greater negative impact on minority voters than white voters because minority voters are less likely to have the government issued photo identification required by these laws.

Despite his firm position on voter ID laws and his partisan ties to his home state of Georgia, Mr. von Spakovsky refused to recuse himself from considering a Georgia law that would be the most restrictive voter identification law in the country. To the contrary, he was assigned the task of managing the process by the front office. Most disturbing was that just before the Department began consideration of the Georgia law, Mr. von Spakovsky published an article in a Texas law journal advocating for restrictive identification laws. Possibly understanding the impropriety of a government official taking a firm stand on an issue where he was likely to play a key role in the administrative decision concerning that issue, as the Department does under §5, Mr. von Spakovsky published the article under a pseudonym, calling himself "Publius." Such a situation -- where the position he espoused in an article that had just been published is directly related to the review of the Georgia voter ID law -- requires recusal from Section 5 review of this law, either by Mr. von Spakovsky or by his superiors. No such action was taken.

After careful review of the Georgia voter ID law, career staff responsible for the review came to a near unanimous decision, consistent with the precedent established by the Department in previous reviews; that the Georgia provision would negatively affect minority voting strength. Four of the five career professionals on the review team agreed. The one who did not had almost no experience in enforcing §5 and had been hired only weeks before the review began through the political hiring process described above. The recommendation to object to the law, detailed in a memo exceeding 50 pages was submitted on August 25, 2005. The next day, Georgia submitted corrected data on the number of individuals who had state-issued photo identification. The career review team was prevented by Mr. von Spakovsky from analyzing this data and incorporating the corrected data into their analysis. Instead, there was an unnecessary rush to judgment and the law was summarily precleared on August 26, the same day the corrected data had been submitted. Subsequent analysis of this data by a Georgia political scientist revealed that hundreds of thousands voters did not have the required voter ID, a disproportionate number of whom were poor, elderly and, most importantly for the Voting Rights Act review, minorities. In short, this data provided further evidentiary support for the objection recommended by professional staff. Subsequently, a federal court in Georgia found that this law violated the poll tax provision of the Constitution.

The personnel fallout after this review is at least as disturbing as the decision-making process. The Deputy Chief for the Section 5 unit who led the review, a 28 year Civil Rights Division attorney with nearly 20 years in the Voting Section, was involuntarily transferred to another job without explanation. The three other professionals who recommended an objection left the Voting Section after enduring criticism and retaliation, while the new attorney who was the only one not to recommend an objection received a cash award. The Section 5 unit suffered serious morale problems and it has lost at least four analysts with more than 25 years of experience, all of whom are African-

Americans. In addition, more than half of the Section's attorneys have left the Section since 2005.

Of equal concern, is an action taken against one of the career professionals on the Georgia review team, a career professional who had participated in the recommendation to object to the Georgia voter ID law. After the decision to preclear in August, 2005, this career employee filed a complaint with the Office of Professional Responsibility (OPR) directed at the inappropriate actions taken during this review, a complaint that remains pending, more than 18 months since it was filed. About three months later, Mr. von Spakovsky, along with Deputy Assistant Attorney General Bradley Schlozman, filed an OPR complaint against this employee. The complaint was based solely on emails that they had obtained from this person's records without his authorization. Such an intrusion of privacy is unprecedented in our experience and caused an increased level of distrust in the Voting Section. OPR recognized the frivolous nature of this complaint and dismissed it within three months.

Other decisions reflect similar inappropriate behavior. A unanimous recommendation to object to the unprecedented mid-decade redistricting plan that Texas submitted in 2003 by career staff was rejected by a team of political appointees that included Mr. von Spakovsky. Subsequently, the plan was found by the Supreme Court to violate the voting rights of Latino voters. Mr. von Spakovsky also rushed through a preclearance of the harsh and discriminatory Arizona voter ID and proof of citizenship law over the recommendation by career staff to seek more information to determine its impact on minority voters.

Mr. von Spakovsky's involvement concerning enforcement of the Help America Vote Act ("HAVA") raises several other concerns. He violated decades-long traditions and policies of the Voting Section against issuing advisory opinions by sending a series of letters to state officials which had the effect of forcing states to implement HAVA in an exceedingly restrictive way. For example, in one letter, he advocated for a policy keeping eligible citizens off the voter rolls for typos and other mistakes by election officials. When Washington State followed this advice, the rule was struck down by a federal court. He also usurped the role explicitly set forth in Section 214(a)(13) of HAVA that the Voting Section chief serve on the EAC Advisory Board, and exclusively handled, with no consultation of the section chief, all communications for the Division with the EAC. According to e-mails that have been made public, Mr. von Spakovsky tried to pressure the Chairman of the EAC, Paul deGregorio, to rescind a letter stating that Arizona had to accept federal voter registration forms that did not include documentary proof of citizenship. The emails further indicate that he proposed to the Chairman "trading" the EAC's rescinding the letter mentioned above for the Department's rescinding a letter the Civil Rights Division had earlier issued which improperly stated that Arizona voters had to provide identification before they could cast a provisional ballot. Mr. von Spakovsky's attempt to bargain over the interpretation of federal law was specifically criticized by Mr. DeGregorio.

Mr. von Spakovsky adopted the same restrictive approach during the 2004 election cycle when he once again broke with established Department policy by getting involved with contentious and partisan litigation on the eve of an election. Mr. von Spakovsky drafted legal briefs in lawsuits between the Republican and Democratic parties in three battleground states, Ohio, Michigan and Florida, just before the election, all in favor of the Republican party's position and included a position that the Civil Rights Division had never taken before with regards to statutes it enforces, i.e. that there was no private right of action to enforce HAVA. These briefs ran counter to the well-established practice of the Civil Rights Division not to inject itself into litigation or election monitoring on the eve of an election where it could be viewed as expressing a political preference or could have an impact on a political dispute. Moreover, in another case between the Republican and Democratic parties which concerned an Ohio law that permitted political parties to challenge voters, he drafted a letter that was sent to the court which supported the Republican Party position even though the law did not implicate any statute that the Department enforces.

He also changed the enforcement direction of the Department regarding the National Voter Registration Act. In 2005, Mr. von Spakovsky introduced a new initiative to target states to demand that they purge their voter lists under Section 8 of the Act. This was done despite a lack of evidence that registration deadwood leads to invalid votes and instead of enforcing important federal requirements that states make voter registration more accessible to all its citizens. Moreover, the cases filed seeking large-scale purges were in states with a tight partisan split – like Missouri and New Jersey -- rather than states like Texas and Utah where the rolls were equally or more inflated. A federal court in Missouri recently threw out the Department of Justice's complaint because the Department insisted on suing on only the (Democratic) Secretary of State, instead of those counties with actual deadwood problems, also noting that there was no evidence of voter fraud or evidence that any voter was denied the right to vote.

Finally, Mr. von Spakovsky never appeared to understand that his role as a Department of Justice attorney was to represent the "United States of America." Instead, on several occasions he took actions indicating a stubborn view that the Department represented the Bush Administration, the Republican Party or the Assistant Attorney General. For example in the *Georgia v. Ashcroft* litigation, Mr. von Spakovsky took a leading role in the case on remand. In that case, he proposed that the United States sign a joint co-counsel agreement with the defendant-intervenors – who were represented by top lawyers for the Georgia Republican Party -- which would have been an unprecedented and inappropriate political action. At a court hearing in the case he insisted on sitting at counsel with the Voting Section's attorneys but refused to file a notice of appearance for the United States, bizarrely claiming that he represented the Assistant Attorney General. Such a gross misunderstanding of the proper role of a Department of Justice attorney typifies his shortcomings

We have served the Department through Democratic and Republican administrations, consistently seeking to protect minority voters regardless of the impact of these actions on the political parties. While the priorities of the front offices in these administrations

change based on the results of the elections, never before has professionalism given way to partisanship. We may have disagreed with our front office colleagues, but those disagreements were given a forum and, between professionals, we found resolution. Mr. von Spakovsky and others in this front office violated the sacred rule that partisanship should be checked at the door of the Justice Department so the business of protecting the American people through federal law enforcement can be honored without prejudice. We urge you to explore Mr. von Spakovsky's role in this unfortunate endeavor and refuse to reward him for this dubious stewardship.

Sincerely,

Joseph D. Rich
Chief, Voting Section, 1999-2005
Civil Rights Division Attorney, 1968-2005

Robert A. Kengle
Deputy Chief, Voting Section, 1999-2005
Voting Section Attorney, 1984-2005

Jon Greenbaum
Senior Trial Attorney, Voting Section, 1997-2003

David J. Becker
Senior Trial Attorney, Voting Section, 1998-2005

Bruce Adelson
Senior Trial Attorney, Voting Section, 2000-2005

Toby Moore
Political Geographer, Voting Section, 2000-2006

June 18, 2007

The Honorable Dianne Feinstein
The Honorable Bob Bennett
Senate Committee on Rules and Administration
SR-305 Russell Senate Office Building
Washington, DC 20510

Dear Chairperson Feinstein and Ranking Member Bennett:

We are writing as a follow up to our letter of June 11 in opposition to Mr. Hans von Spakovsky's nomination to the Federal Election Commission (FEC). We have reviewed his testimony to the Committee on June 13 and write to address some concerns we have over these statements.

Specifically, the following areas of testimony conflict with our recollection of events at the Voting Section in the Department of Justice's Civil Rights Division:

1. Mr. von Spakovsky attempted to paint a picture of his role in the Civil Rights Division's front office as one of a simple "middle manager," merely providing legal advice and recommendations to his superiors and then delivering the decisions made by his superiors to Voting Section staff.

   This characterization differs significantly from our experience with Mr. von Spakovsky. From the time he assumed the role of Counsel to the Assistant Attorney General in early 2003 until he left in December 2005, Mr. von Spakovsky spent virtually all of his time on voting matters and assumed the role of de facto Voting Section chief replacing the career Section Chief in most of his statutory responsibilities and traditional duties managing the Section. Mr. von Spakovsky assumed a position on the EAC Advisory Board that was reserved explicitly by Section 214(a)(13) of the Help America Vote Act (HAVA) for "the chief of the voting section . . . or the chief's designee" even though the Section chief had never designated Mr. von Spakovsky for this position; assigned staff to cases; took over lead review in a major case; rewrote performance evaluations of career staff; and set Section priorities. During our combined tenure at the Voting Section, we have never seen a political appointee exercise this level of control over the day to day operations of the Voting Section. Indeed, testimony previously given by Bradley Scholzman, Mr. von Spakovsky's supervisor, to the Senate Judiciary Committee reinforces

the degree to which front office oversight of the Section was delegated to Mr. von Spakovsky.

Moreover, as discussed in our June 11 letter, he consistently used this position to promote partisan political interests through narrow interpretations of HAVA, refocusing the Department's National Voter Registration Act (NVRA) enforcement activities, refusing to allow investigations under the Voting Rights Act based on discrimination in African-American and Native American communities, and redirecting limited resources to a partisan search for unsubstantiated allegations of voter fraud.

2. Mr. von Spakovsky conceded that he wrote an April 15, 2005 letter to Arizona, which opined that the state did not need to provide provisional ballots to voters who did not present identification when voting. This was a reversal of the Division's previous interpretation, and in direct conflict with the letter and spirit of HAVA. In fact, five months later Mr. von Spakovsky admitted drafting another letter reversing this position after a disagreement with the Election Assistance Commission that led one of the EAC's commissioners to protest that Mr. von Spakovsky was unnecessarily pressuring him to change his position on the issue.

In addition, contrary to his testimony, Mr. von Spakovsky did not seek information or input from career staff when he wrote the April 15, 2005 letter. After the April 15 letter was received by Arizona, an Arizona government official contacted Voting Section career staff seeking more information about the Department's new position on provisional balloting. Neither the attorney who fielded the call nor the Section chief had ever seen nor heard of the letter. The Section chief sent an email to other staff attorneys about the letter and none had seen nor heard of it. The Section chief called then-Assistant Attorney General Alex Acosta for an explanation of why and under what process the policy of the Section on provisional ballots had changed. Mr. Acosta indicated to the Section chief that he had never seen this letter.

According to the letter's signature, the policy was approved by former Principal Deputy Assistant Attorney General Sheldon Bradshaw. Curiously, however, Mr. Bradshaw left the Division approximately five days before the letter was sent.

3. Mr. von Spakovsky testified that he received approval from appropriate Department officials before he published *Securing the Integrity of American Elections: The Need for Change, 9 Tex. Rev. Law & Pol. 277*. The article, which advocated on behalf of restrictive

voter identification provisions, was published at about the same time that Mr. von Spakovsky began his active role in the Section's consideration of a similarly restrictive measure in Georgia.

Despite Mr. von Spakovsky's implication that publication of the article was pursuant to Department of Justice policy, our experience over decades and multiple administrations was decidedly different. Traditional practice when officials at the Department write scholarly articles is for those articles to be signed by the author and to include a disclaimer that the views in the article do not necessarily reflect the views of the Department.

It is clear from his explicit views in the article that his mind was made up about identification provisions and how they relate to voting, yet neither he nor his superiors (whom he testified were aware of the publication of the article), took steps to recuse him from consideration of the proposed Georgia law. Moreover, the views expressed in the article were consistent with his unwillingness to consider evidence that weighed against preclearance in the Georgia submission.

The role of the Department in reviewing voting laws submitted to the Attorney General under Section 5 of the Voting Rights Act is the same as the District Court of the District of Columbia when a jurisdiction decides to file a Section 5 declaratory judgment action. See 42 U.S.C. § 1973c. Indeed, a decision to preclear cannot be reviewed by a court. Participating in the preclearance process while serving as a vigorous advocate for provisions like this across the country created an insurmountable conflict of interest.

4. We are also concerned with Mr. von Spakovsky's characterization of the shifting enforcement priority established under the voter purge program he directed in 2005 During our tenure, Mr. von Spakovsky rejected requests from several voting rights advocacy groups to enforce that part of the National Voter Registration Act (NVRA) which requires social service agencies to provide voter registration opportunities, despite the fact that there is substantial evidence that registration at social service agencies has plummeted during this administration. This type of activity expands the right to vote, especially for minorities and the disabled, and yet Mr. von Spakovsky placed no resources into this area and no cases were filed. Instead, Mr. von Spakovsky shifted the Voting Section's NVRA enforcement priorities to enforcement of the voter purge provisions of the law. This was problematic as the pressure on states to purge their voter rolls came at the same time as state election officials were implementing new, often unprecedented statewide voter registration databases. Moreover, in at least two instances (Washington and

Missouri), the positions he pushed encouraging voter purges were rejected by federal district courts.

5. Mr. von Spakovsky testified he had very little memory of the 2004 incident involving a directive of the Minnesota Secretary of State regarding voter identification for Native American voters who do not live on reservations. It is likely that the directive would have disenfranchised thousands of Native American voters had a federal court not found it discriminatory.

Mr. von Spakovsky testified that he failed to recollect this particular matter because it was one of a deluge of requests that flooded the Voting Section in the run up to the election. This matter, however, received unique treatment from Mr. von Spakovsky and his colleagues in the front office. On no other occasion was the Section Chief told that a matter was especially "sensitive" nor that each step of an investigation had to be approved by Mr. von Spakovsky or by Mr. Schlozman.

Furthermore, Mr. von Spakovsky testified that he thought it made sense to restrict the Section's contact on the matter to the Secretary of State rather than the Hennepin or Ramsey County Boards of Elections who registered the complaint with the U.S. Attorney's office. According to his testimony, Mr. von Spakovsky restricted the contact out of an interest in expediency, because the Secretary of State issued the directive. However, at the time, Mr. von Spakovsky communicated to the Section chief that it would be better to call the Secretary of State to avoid a leak. It is important to note that interviewing Hennepin and/or Ramsey county election officials was necessary to find what they had actually been told by the Secretary of State.

6. Mr. von Spakovsky defended his enforcement record by alluding to two Section 2 cases that had been approved internally but were never filed in court because of a subsequent change in circumstances. It is inconsistent that Mr. von Spakovsky discussed internal decision-making when testifying about these cases while at the same time asserting that nebulous claims of privilege prevented him from answering the Committee's questions concerning his recommendations in the Georgia and Texas matters. More importantly, he did not mention the several matters in which Voting Section staff recommended lawsuits be brought on behalf of African-American and other minority voters (each with a strong evidentiary record requiring action) that the front office either refused to approve, or on which they unnecessarily delayed action for as long as a year and a half. Nor did he mention an important policy change

concerning approval of Section 2 investigations. Until Mr. von Spakovsky came to the front office, the Section chief had authority to approve such investigations, but at about the same time as his arrival in the front office in 2003, the policy was changed, requiring Mr. von Spakovsky's approval for all such investigations. This led to far fewer investigations and occasions when requests to merely begin an investigation into a matter were rejected.

Finally, we want to respond to a suggestion made during the hearing that the signatories of the June 11 letter had their own partisan interests in mind in writing to the Committee and advocating for the defeat of Mr. von Spakovsky's nomination. As we have mentioned before, we served proudly through Republican administrations and Democratic administrations. We welcome discussion about ideas and relish intelligent debate about principles, but as civil servants we committed ourselves to enforcing federal civil rights laws without fear or favor. We were required to be apolitical while protecting a political process. We relished that challenge. Our decisions sometimes disappointed Democrats and sometimes disappointed Republicans, but always honored our belief that it is the *voters* who are protected by the statutes the Section enforces, not the political parties. We oppose Mr. von Spakovsky's nomination because he made it impossible for us to carry out that essential mission in our service at the Voting Section.

We appreciate the Committee's commitment to uncovering the role that Mr. von Spakovsky played in the changing priorities and policies within the Voting Section and in the politicization of the Civil Rights Division. We are committed to preserving the legacy, potential and commitment of the career civil servants who have dedicated their lives to protecting our nation's Civil Rights. Unfortunately, the changes that Mr. von Spakovsky oversaw at the Department threaten that tradition. We look forward to your continued investigation into his role in initiating that change.

Sincerely,

Joseph D. Rich
Chief, Voting Section, 1999-2005
Civil Rights Division Attorney, 1968-2005

Robert A. Kengle
Deputy Chief, Voting Section, 1999-2005
Voting Section Attorney, 1984-2005

Stephen B. Pershing
Senior Trial Attorney, Voting Section 1996-2005

Jon Greenbaum
Senior Trial Attorney, Voting Section, 1997-2003

David J. Becker
Senior Trial Attorney, Voting Section, 1998-2005

Bruce Adelson
Senior Trial Attorney, Voting Section, 2000-2005

Toby Moore
Political Geographer, Voting Section, 2000-2006

Mr. CONYERS. Thank you.

Mr. GOWDY. I think the gentlelady from Texas had a quick document submission as well?

Ms. JACKSON LEE. Thank you, Mr. Chairman. I ask unanimous consent to put the submission of the testimony of the Lawyers Committee for Civil Rights Under Law, submitted to this Committee on April 16, 2013. I ask unanimous consent.

And I ask unanimous consent to put in from the Lawyers Committee on Civil Rights the Map of Shame on voter suppression legislation by State.

Mr. GOWDY. Well, is it entitled the "Map of Shame," because I see my State highlighted on it. If that is the title of it, then that is fine. But if that is your editorializing what the document means, then we will just put the document in.

Ms. JACKSON LEE. Sir, I would never editorialize on a document, and it is not from me. It is from the Lawyers Committee on Civil Rights. I ask unanimous consent to put it in the record.

Mr. GOWDY. Without objection.

[The information referred to follows:]

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TESTIMONY OF
THE LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUBMITTED TO:
THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

"Mismanagement at the Civil Rights Division of the Department of Justice"

On

April 16, 2013

INTRODUCTION

Mr. Chairman, and members of the Committee, the Lawyers' Committee for Civil Rights Under Law appreciates the opportunity to submit this testimony, which addresses issues regarding the Civil Rights Division's management of the Voting Section, primarily during the Obama Administration's tenure. As detailed below, the Civil Rights Division's management of the Voting Section during the Obama Administration has been competent and free from inappropriate ideological and politicized decision-making. Indeed, the current administration has done much to repair the damage created by the previous administration.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee) has a unique perspective on these issues because the Lawyers' Committee's management includes three former career attorneys in the Voting Section, two of whom were managers. Joseph Rich, who is the Director of the Lawyers' Committee's Fair Housing and Fair Lending Project, served in the Civil Rights Division from 1968 to 2005, including as a Deputy Chief from 1973 to 1999 and Chief of the Voting Section from 1999 to 2005. Robert Kengle, who is co-Director of the Lawyers' Committee's Voting Rights Project, was an attorney in the Voting Section from 1984 to 2005, including as a Deputy Chief from 2000 to 2005. Jon Greenbaum, who is Chief Counsel at the Lawyers' Committee, was a Senior Trial Attorney in the Voting Section from 1997 to 2003. These current Lawyers' Committee, and former Civil Rights Division attorneys, served under both Democratic and Republican Administrations and are well-qualified to assess whether political appointees are properly overseeing the section.

BACKGROUND

In order to assess the oversight of the Voting Section during the Obama Administration, it is necessary to understand the situation the Obama Administration

inherited from the Bush Administration. Under the Bush Administration, particularly when Bradley Scholzman and Hans von Spakovsky oversaw the Voting Section between 2003 and 2005, improper political considerations and personal vendettas frequently drove management decisions.

As described in the March 2013 report by the Office of Inspector General which examined the management and performance of the Voting Section from 2001 to 2011, *"A Review of the Operations of the Voting Section of the Civil Rights Division* ("2013 OIG Report"), "polarization and suspicion became particularly acute during the period from 2003 to 2007, including when Bradley Schlozman supervised the Voting Section in his capacity as Principal [Deputy Assistant Attorney General] and Acting [Assistant Attorney General]." As a result the Voting Section suffered a significant "brain drain" as experienced voting rights attorneys left the Section in droves. Staff morale was low and enforcement suffered.

It has been well documented that, among other things, the previously nonpartisan hiring process for career attorneys became partisan under Mr. Scholzman; voting rights laws under the Department's jurisdictions were selectively enforced;[1] and division management directed section management to change the personnel reviews of nonmanagerial career employees. For example, the Department of Justice's Office of Inspector General reached the following conclusion regarding the misconduct of Mr. Scholzman and other Division management in its 2008 report entitled "*An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division*" ("2008 OIG report"):

> The evidence in our investigation showed that Schlozman, first as a Deputy Assistant Attorney General and subsequently as Principal Deputy Assistant Attorney General and Acting Assistant Attorney General, considered political and ideological affiliations in hiring career attorneys and in other personnel actions affecting career attorneys in the Civil Rights Division. In doing so, he violated federal law – the *Civil Service Reform Act* – and Department policy that prohibit discrimination in federal employment based on political and ideological affiliations, and committed misconduct.
> The evidence also showed that Division managers failed to exercise sufficient oversight to ensure that Schlozman did not engage in inappropriate hiring and personnel practices. Moreover, Schlozman

[1] The voting rights enforcement record for the first several years of the Bush Administration is detailed in Taylor, Piche, Rosario, and Rich, *The Erosion of Rights: Declining Civil Rights Enforcement Under the Bush Administration* (2007) at 32-49 ("Erosion"). The 2013 OIG Report stated that it did not conduct a systematic evaluation of Voting Section enforcement during the Bush Administration, and we differ with the Report to the extent that it did not find evidence of a pattern of improper enforcement among the examples from that period that it did discuss.

> made false statements about whether he considered political and ideological affiliations when he gave sworn testimony to the Senate Judiciary Committee and in his written responses to supplemental questions from the Committee. (2008 OIG Report at 64.)

Other information in that report reflect the vicious anti-career attorney bias of Mr. Schlozman. For example, the 2008 OIG Report at pp. 20-21, (fn. 13 reports), a July 15, 2003 email that Schlozman wrote before he had even assumed his supervision of the Voting Section, as follows:

> 'I too get to work with mold spores, but here in Civil Rights, we call them Voting Section attorneys.' As part of the same e-mail exchange, on July 16, 2003, Schlozman wrote, 'My tentative plans are to gerrymander all of those crazy libs right out of the section.'

Further, the following quote at p. 44 of the 2008 Schlozman reflects how this bias resulted in the extreme politicization of the Voting Section under his and his counselor, Hans von Spakovsky, supervision:

> 'The evidence also indicated that Schlozman considered the politics of attorneys in the Division's Voting Section. In an e-mail dated November 28, 2003, to front office Counsel von Spakovsky and Principal DAAG Bradshaw, Schlozman wrote about a particular Voting Section attorney, 'If I recall correctly [Voting Section attorney] is a crazy lib hans am I right?' and 'a detail would be a great way to get him out of the way.'

The result of this and other inappropriate conduct by division managers was disastrous to the Voting Section.

The Obama Administration has done much to stabilize and restore the Voting Section. The Administration bolstered the number of attorney slots in the Section while leaving the primary responsibilities of screening and interviewing career attorney applicants with the Division's career attorneys. Several experienced voting rights lawyers have joined the Section and this has proved valuable as, among other things, the Section has effectively defended the constitutionality of Section 5 of the Voting Rights Act in *Shelby County v. Holder* and ably represented the United States in several Section 5 declaratory judgment actions.

The 2013 OIG Report examined the management and performance of the Voting Section in a number of respects. In some cases, the 2013 OIG Report specifically investigated allegations of inappropriate conduct made by conservative critics like Hans von Spakovsky and J. Christian Adams. The 2013 OIG Report largely validates the management and performance of the Voting Section during the Obama Administration.

HIRING POLICY

With respect to career attorney hiring, the 2013 OIG Report makes clear that political considerations have not played a role in career attorney hiring in the Voting Section during the Obama Administration. The Report states that, in 2009, Assistant Attorney General Tom Perez issued a policy stating that primary decision-making responsibility for hiring career attorneys was returned to career staff. (2013 OIG Report at 192.) That same policy stated that hiring must be merit-based and that political affiliation should play no role in the hiring process. *Id.* The 2013 OIG Report found that when the Voting Section hired nine career attorneys in the first three years of the Obama Administration political affiliations did not play any consideration: "Our review of thousands of internal CRT documents, including e-mails, hand-written notes, and interviews of CRT staff who participated in the selection of the Voting Section's experienced attorneys did not reveal that CRT staff allowed political or ideological bias to influence their hiring decisions." *Id.* at 214.

SUBSTANTIVE DECISION-MAKING

The OIG investigated numerous allegations that the Obama Administration and the Voting Section since January 20, 2009 had enforced the law in a discriminatory manner. After a review of the facts, the OIG found that all those allegations were unfounded: "[T]here was no policy prohibiting enforcement of [voting rights] statutes to protect White victims, and that the decisions that Division or Section leadership made in controversial cases did not substantiate claims of political or racial bias. (2013 OIG Report at 114.) The OIG investigated these allegations in a number of different enforcement contexts.

New Black Panther Party Case

The 2013 OIG Report contained a detailed review of the Voting Section's litigation against members of the New Black Panther Party. This case arose from the November 2008 general election, and was filed shortly before the Bush Administration left office. Division leadership under the Obama Administration had directed that three of the original defendants who had defaulted be dismissed from the case, and that an injunction against the fourth defendant be significantly narrowed. The 2013 OIG Report found that improper racial or political considerations did not motivate any of the decisions made by Obama Administration officials. (2013 OIG Report at 66-71.) In addition, the Report concluded that political appointees outside of the Justice Department were not involved in any decision-making regarding the New Black Panther Party case. *Id.* at 72. This was consistent with previous findings of the Department of Justice's Office of Professional Responsibility ("OPR"):

> OPR conducted an investigation of the New Black Panther Party case and issued a report dated March 17, 2011, which found that the attorneys did not commit professional misconduct or exercise poor judgment, but rather acted appropriately in the exercise of their supervisory duties; and that the decision to dismiss three of the four defendants and to seek more narrowly-tailored injunctive relief against the fourth was based on a good faith assessment of the law and facts of the case and had a reasonable basis.

Id. at 45, n.31.

Enforcement of Sections 2 and 11(b) of the Voting Rights Act

The OIG also "received allegations that Division leadership between 2009 and 2012 was hostile to 'race neutral' enforcement of the voting rights laws," particularly regarding Sections 2 and 11(b) of the Voting Rights Act. (2013 OIG Report at 75.) The OIG found "insufficient evidence to conclude that Division leadership had such a policy, or that laws were enforced in a discriminatory manner to achieve that result." *Id.*

Enforcement of the National Voter Registration Act

The OIG found that the Obama Administration had "placed a higher priority on the enforcement of NVRA's ballot-access provisions, particularly Section 7, than the enforcement of the statute's list-maintenance provision," 2013 OIG Report at 107, but that the Administration was enforcing the NVRA in a nondiscriminatory manner:

> Although we found that current Division leadership has a clear priority structure for NVRA enforcement, we found insufficient evidence to conclude that they enforced the NVRA in a discriminatory manner. We found no direct evidence, such as e-mails, indicating or implying a racial or partisan motive for such prioritization. Moreover, the states in which the Section took enforcement actions during this time period (Georgia, Rhode Island, and Louisiana) are of varied geographies and political histories. It was within the discretion of senior management to prioritize enforcement efforts, particularly based on what appeared to be genuinely held perceptions about the need to redress previous enforcement imbalances. *Id.*

RESPONSES TO REQUESTS FOR PUBLIC RECORDS

The OIG investigated allegations made in a blog post by J. Christian Adams that the Civil Rights Division, and the Voting Section in particular, "provided

preferential treatment when responding to records requests from civil rights groups or individuals alleged to support 'liberal' issues in comparison to requests from Republicans or individuals or organizations alleged to support 'conservative' issues." (2013 OIG Report at 223.) The OIG found that these allegations were totally unfounded: "[W]e found no evidence supporting the allegation that differences in response times were the result of partisan or ideological favoritism." *Id.* at 249.

CONCLUSION

The Obama Administration inherited a Voting Section that had become polarized and demoralized as a result of inappropriate decision-making and policies implemented by political appointees during the Bush Administration. As detailed in the 2013 OIG Report, the current administration has made decisions free from improper political and racial considerations. Accordingly, much of the damage to the Voting Section has been remedied and the Voting Section has become a functional unit again.


MAP OF SHAME: VOTE SUPPRESSION LEGISLATION BY STATE
WA
OR
CA
ID
NV
MT
V
WY
UT
AZ
CO
NM
ND
SD
NE
KS
OK
TX
MN
V
IA
MO
V
AR
LA
IL
MS
MI
IN
OH
X
KY
TN
AL
GA
FL
X
WV
VA
NC
V
SC
PA
NY
ME
VT
V
NH
MA
CT
RI
NJ
MD
DE
DC
AK
HI
Require Photo Voter ID Only
Photo Voter ID Requested
Photo Voter ID Legislation Proposed
No Existing Photo Voter ID Law, No Current Legislation
States with Proof of Citizenship Laws
X States with Repressive Election Legislation
V Governor Vetoed Photo Voter ID Law
*Law takes effect in 2012 and beyond
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Mr. GOWDY. I will now recognize the gentleman from Louisiana, Mr. Richmond.

Mr. GOHMERT. Mr. Chairman, if the Civil Rights Division is editorializing by denoting that a State, which has clearly been found not to be discriminatory by the courts, is part of a Map of Shame, then I would submit—first I thought I would object, but then I would submit that is evidence of outright bigotry by this Justice Department. So I will not object.

Mr. GOWDY. I thank the gentleman from Texas.

And I will now recognize the gentleman from Louisiana and thank him for his patience.

Mr. RICHMOND. Thank you, Mr. Chairman. [Laughter.]

Mr. GOWDY. We are going to restart the clock for the gentleman from Louisiana so he does not lose any time.

Mr. RICHMOND. Thank you, Mr. Chairman. And to the Ranking Member, who commented last week, and I think we both commented on the titles of the hearings in this Committee. I was excited when I saw the mild title of this one and thought we were actually having a hearing, and then I had a chance to read the report, which is the "Department of Justice's Quid Pro Quo with St. Paul: How Assistant Attorney General Thomas Perez Manipulated Justice and Ignored the Rule of Law," which is right in line with other outrageous titles of hearings.

It begs the question to me whether we are in search, whether we are trying to solve problems, or is this a race to be obstructionist in chief. And as I think about what we are trying to accomplish and if we are trying to accomplish anything, I can only think back to the last hearings. We had the REINS Act, which is Regulations From the Executive In Need of Review, where Congress wanted to approve every rule that the President wanted to promulgate.

So last week, we wanted to be president. This week we want to be the U.S. Senate and actually have a hearing on Mr. Perez, who is not here, but we have heard his name a million times in this Committee. My understanding is this is a Committee in the House, and we do not have the right to examine Senate presidential appointees. But nevertheless, we are crossing not that jurisdictional lines, but, again, we want to be more than what we are.

So let me just go ahead and ask a few questions, and I will start with the professor. Let me ask you, are you aware that the 2009 GAO study conducted by the Civil Rights Division under the Bush administration, to be specific, are you aware, for instance, that it indicated that they decreased the number of Section 5 investigations, even though the number of submissions from States did not decrease?

Mr. BAGENSTOS. I certainly generally read that report before I took my job, you know, a few years ago.

Mr. RICHMOND. Did you remember or can you recall the part of the report that found that in various cases, career staff attorneys would recommend going forward with an investigation. However, political appointees would choose that these matters, would close those matters without any explanation?

Mr. BAGENSTOS. Yes, and that was a substantial problem. I mean, that was the lack of transparency and respect for the career staff precisely there.

Mr. RICHMOND. Did you also know that they would stop communications with the States in those case, which ended the paper trail on their deliberation and further explanation of why they made their decision?

Mr. BAGENSTOS. You are getting beyond my knowledge on that. But if the GAO said it, I trust that the GAO said it.

Mr. RICHMOND. How far of a departure from the standard procedure do you think that eliminating the paper trail creates?

Mr. BAGENSTOS. So, I mean, when we are talking about negotiations, I just want to understand what context we are talking about. We are talking about the Section 5 submission made to the Justice Department. And, you know, usually what happens in the context of a Section 5 submission made to the Justice Department, is the jurisdiction is required to submit all the information necessary to consider whether the voting change is discriminatory in purpose or effect.

That information is supposed to go to the Justice Department both for its consideration and, as something we learned from the IG's report most recently, and so it can be released to interested parties, who have an interest in commenting on the submission. And so, if the information is not provided in a way that it can be released to interested parties in that context, then you have a serious problem with the Section 5 procedure, if that is what you are talking about.

Mr. RICHMOND. Mr. Mihet, you spoke about the case you all were involved in, and you said that it was government actors, they lost evidence, they did not have the license plate. The police officer was the only witness. As a defense attorney, I want you to know that that is not that far from the norm of many cases that I seek. Is this the only case that you all have ever initiated that there was only a police witness and not much further evidence?

Mr. MIHET. This was the only case where the one eyewitness put forth by the plaintiff, the DoJ in this case, came back and actually refuted the very claim that the DoJ was making. Here they said that Susan "stopped and stood in front of a vehicle." This one and only eyewitness comes and testifies that, no, she immediately moved out of its way.

Mr. RICHMOND. In all of your practice of law, is this the first time that you have seen that happen?

Mr. MIHET. In all of my practice of law, I have never seen the kind of politically motivated conduct that I have seen in this case from any plaintiff, let alone a government.

Mr. RICHMOND. We were just talking about a witness contradicting the report of themselves.

Mr. MIHET. Well, what is interesting here is that both the police officer and the DoJ admitted on the record——

Mr. RICHMOND. Is it the first time you have seen a witness contradict the prosecution in all of your practice of law? It is very simple.

Mr. MIHET. It is my first time that I have seen it to this extent. No one disputed that this police officer and the DoJ had conferred before the lawsuit was filed. We have the documents going back and forth between them. There was no reason for them to misunderstand each other what I submit to you happened.

Mr. RICHMOND. I will take you at your word. In your vast experience, this is the first time you have seen a witness contradict the prosecution.

I yield back.

Mr. MIHET. To this extent.

Mr. GOWDY. I thank the gentleman from Louisiana.

The Chair would now recognize the gentleman from Texas, Judge Poe.

Mr. POE. Thank you, Mr. Chairman. A lot has been said about Tom Perez and his reign in the Justice Department and what he has done or not done. It is my understanding he was invited to be here to talk about what he has done or not done, and he willfully chose not to be here. Is that correct, Mr. Chairman? Mr. Perez was invited, and he is not here?

Mr. GOWDY. Judge Poe, my information is that he was invited. In the interest of full disclose to the court so I do not get myself in trouble, I think that there was some effort to arrange a date, but he is pretty occupied with the confirmation. And not only was he invited, I think the DoJ was given an opportunity to send another witness, and they did not avail themselves of that opportunity either.

Mr. POE. Thank you. When a person goes to vote, if someone is cheating and should not be voting, it disenfranchises the lawful voter. That is the way I see our system. Cheats hurt the right and the power of the vote of one person, one vote because it is diminished to some extent. Some States have passed voter ID laws. The Supreme Court has ruled on Indiana's voter ID law.

I will ask the professor, do you agree with the Supreme Court's decision in the Indiana case where they uphold their voter ID laws? It is either a yes or it is a no.

Mr. BAGENSTOS. Well, it is a complicated——

Mr. POE. It is a either a, yes, you agree or it is a no, and I do not want to hear your answer that wants to explain it because I am not asking you to explain the answer. Either you agree with the Supreme Court or you disagree. Which is it? Pick a horse and ride it.

Mr. BAGENSTOS. I do not have a problem with them upholding the voter ID law against the claim that was asserted against them there. I do think there are certain statements in——

Mr. POE. So you agree with the Supreme Court decision in that Indiana case under the circumstances.

Mr. BAGENSTOS. I agree with the bottom line. There are parts of the opinion——

Mr. POE. Thank you, Professor. It is not that complicated. It is not a trick question.

Mr. BAGENSTOS. Well, I am a professor. It is always complicated.

Mr. POE. I want to call you that because they claim you are the professor, and I do not have a problem with that. So anyway, it is either yes or no. Pick a horse and ride it. It is probably a yes in your circumstances.

Texas has a similar voter ID law that the Justice Department, after the Supreme Court decision, chose to make sure that law was not implemented for last year's election. Now, I personally think

voter ID laws are probably a good idea. We will see what the Supreme Court does in this case.

I want to ask the other members as well. Do you believe the Department of Justice in its litigation, and its philosophy, and its procedure applies our voter rights laws equally across the board to all citizens. Once again, it is either a yes or it is a no. I will start with Mr. Adams and go down the row.

Mr. ADAMS. No.

Mr. POE. Professor?

Mr. BAGENSTOS. Yes.

Mr. MIHET. No.

Mr. POE. It is a no. Mr. von Spakovsky?

Mr. VON SPAKOVSKY. No.

Mr. POE. All right. Do you believe that if the three of you who think it is now not applied equally, do you think that is a violation of the Equal Protection clause of the 14th Amendment, yes or no?

Mr. ADAMS. No.

Mr. BAGENSTOS. I thought you were skipping me.

Mr. POE. Yes. We are just getting the yesses. Yes, that answered yes.

Mr. MIHET. Yes.

Mr. VON SPAKOVSKY. I am frankly not sure on that one.

Mr. POE. All right. I will take that as an answer. Let me ask you this. Do you you believe that the Justice Department's Civil Rights Division has a bias against voter integrity groups that are of a conservative persuasion? In other words, if you are a conservative group and you are trying to promote integrity, hypothetically, you are looked at with intimidation as opposed to some other group? I mean, is that a fair statement or not? Mr. Adams, you may answer that question and explain it if you want to.

Mr. ADAMS. We know the answer is yes based on the depositions that the Justice Department conducted in the State of Texas regarding the voter ID case where attorneys for the Department made inquiry of, for example, Patricia Harless, your State sponsor of the voter ID law there, about which conservative groups she was talking, whether or not she met with True the Vote, in full disclosure, one of my clients. And so there was an inquiry in discovery as to the extent of conservative groups' involvement in the passage of the voter ID law. That is a fact.

Mr. POE. Mr. von Spakovsky, you may answer that, too, if you want.

Mr. VON SPAKOVSKY. Well, I agree with Mr. Adams.

Mr. POE. All right. I see that my time has expired. I will yield back to the Chair.

Mr. GOWDY. I thank the gentleman from Texas. Thank you, Judge Poe.

The Chair would now recognize the gentleman from Florida, Mr. Garcia.

Mr. GARCIA. Thank you, Mr. Chairman.

I find myself at a great disadvantage with the other Members here today since I have known Tom Perez for many years, and I find him to be an excellent representative of a public servant, and someone who is committed to doing justice. Clearly, his tenure at the Department of Justice is something we should all be proud of.

But nonetheless, this morning when I woke up, I realized that I had been promoted to the rank of United States senator since we are engaging in a confirmation process. And thereby, since the judge engaged in questioning the panel, let us question the panel.

According to the Constitution, does the House of Representatives have a role to play in the confirmation of a nominee? We will start from left to right, and you can answer.

Mr. VON SPAKOVSKY. I certainly think in its oversight role——

Mr. GARCIA. I would like a yes or a no answer like the judge has provided. According to the Constitution of the United States, does the House of Representatives have the same confirmation responsibilities as the United States Senate?

Mr. VON SPAKOVSKY. No.

Mr. MIHET. Not the same, but a——

Mr. GARCIA. I would like a yes or no answer just as was given to the judge.

Mr. MIHET. Not the same, but a different function, yes.

Mr. GARCIA. Thank you. I will take as a no since the judge is allowed to interpret the question.

Mr. MIHET. That is not what I testified.

Mr. BAGENSTOS. The advice and consent power is to the Senate.

Mr. GARCIA. Thank you.

Mr. ADAMS. No.

Mr. GARCIA. Great. Thank you, gentleman. That is all I have.

Thank you, Mr. Chairman.

Mr. GOWDY. Thank the gentleman from Florida.

The Chair would now recognize the gentleman from Texas, Judge Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman, and thank you to the witnesses for being here.

There has been discussion already obviously about Mr. Perez's prior testimony on different issues. And obviously the U.S. Commission on Civil Rights decided that Assistant Attorney General Thomas Perez testified that political appointees in the Department were not involved in the New Black Panther case. And they found, and I am quoting from the CCR, "We found that Perez's testimony did not reflect the entire story regarding the involvement of political appointees. In particular, Perez's characterizations omitted that Assistant Attorney General Pirelli and Deputy Associate Attorney General Hirsch were involved in consultations about the decision as shown in testimony and contemporaneous emails." But basically they were giving him a pass because he at the time he testified did not know.

Then in 2011, he testified before our Committee, and my friend, Mr. King, asked him specifically, but the decision to drop the case against other individuals you testified was made not by political, but by career employees. And I think the names were Mr. King and Mr. Rosenbaum. Does that still remain the case, or would you wish to clarify? He said that decision was made Mr. King and Steve Rosenbaum, two people who are career attorneys in the Division with combined experience of 60 years. Anyway, he said, but the question was, it was not overruled by or influenced unduly by political appointees, and he answered no.

Mr. Adams, from your own personal experience, after the CCR investigation had determined that he did not apparently know the truth at the time he misstated the truth, but by June of 2011, from your own personal experience, do you know if he lied when he said political appointees did not unduly influence that decision?

Mr. ADAMS. Well, he certainly did not tell the truth when he said he had never heard about this toxic culture against race neutral enforcement. I can personally testify about that second point.

As to your specific question, by that time you would have thought he would have inquired about the Attorney General's involvement, which is detailed in the IG report, as well as Tom Pirelli, the Associate Attorney General, specifically denying them the opportunity to dismiss the entire case. So political appointees did overrule Rosenbaum and King, and they knew it. But Perez testified to the contrary.

Mr. GOHMERT. So is it a true statement by Mr. Perez, now up for consent before the Senate, when he said that the decision not to pursue the New Black Panther case was not overruled by or influenced unduly by political appointees?

Mr. ADAMS. Completely inaccurate.

Mr. GOHMERT. All right, thank you. Now, there is a new thing that has arisen in conduct of people who appear to be violating State law and possibly Federal law with regard to something people in the media have called flash mobs. Mr. Adams, are you familiar with the consideration by the Federal Government to pursue such flash mobs and the civil rights that might be involved and being violated?

Mr. ADAMS. Yes.

Mr. GOHMERT. Would you tell us about that?

Mr. ADAMS. What this refers to is racially motivated mob violence in places like Chicago, also at the Wisconsin State fair a number of years ago. The issue is whether or not it violates 18.U.S. 242 and 18 U.S.C. 245, which is to deprive somebody of their civil rights.

The Justice Department has long had a public streets view of exercising civil rights. If you are going about your business, you are exercising your civil rights. These groups have been attacking people with racial motivation in very violent fashion, and this Justice Department has done absolutely nothing about it.

They have brought cases against White wrongdoers or Hispanic wrongdoers in places like New York, and they should because we have the right to walk the streets without being attacked. But those parents who went to the Wisconsin State fair or those parents who were attacked on their front lawn in Ohio by racially motivated mobs have had no justice from this Justice Department.

Mr. GOHMERT. Okay.

Mr. ADAMS. It is time that that stopped.

Mr. GOHMERT. Thank you. Well, very quickly, let me ask about Section 5 of the Voting Rights Act. It seemed to me I tried to persuade my friend, Mr. Conyers and Mr. Sensenbrenner that to continue to cram down Section 5 requirements on States where there was less racial disparity than in the States where senators and congressmen were voting to force this down the throats of States who had brought themselves into compliance with the law was a

violation of Equal Protection, and the continued forcing of this law and these requirements, the punitive requirements, down the throats of States where the racial disparity had been cured while States that were cramming down those throats punitively now, after 40 years, were having great racial disparity that they are refusing to address, was a violation of Equal Protection.

And since there is nobody here to object, I would just ask if each of you would address in your opinion whether you believe Section 5, as it is today, violates the Constitution's right of Equal Protection to those States that were in the minority, and upon whom that was crammed down.

Mr. GOWDY. I have given everybody one extra minute that has gone over, and Judge Gohmert just hit the 1 minute. If you can answer with one sentence, then we will allow that to happen.

Mr. ADAMS. Section 4's triggers are probably outdated, and I suspect the Supreme Court will find that shortly.

Mr. BAGENSTOS. I do not agree it is unconstitutional.

Mr. MIHET. I would just defer to Mr. Adams on this.

Mr. VON SPAKOVSKY. The extraordinary circumstances which justified Section 5 in 1965 have long disappeared. It is no longer constitutional.

Mr. GOHMERT. Thank you very much.

Mr. GOWDY. Thank the gentleman from Texas.

On behalf of Chairman Goodlatte and all the Members of the Judiciary Committee, I want to thank all of our witnesses for your patience and your comity toward one another with a "T" and with the full Committee.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

With that, thank you again on behalf of all of us. And this hearing is adjourned.

[Whereupon, at 12:16 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Response of Prof. Samuel R. Bagenstos to
Questions for the Record from Mr. Gowdy

1. **Mr. Bagenstos, in your written testimony you indicate the important role career attorneys have in the preclearance process under Section 5 of the Voting Rights Act. In your oral testimony at the hearing on April 16, 2013, you answered in the affirmative to questions by Representative Trey Gowdy about whether you would be interested in knowing, both as a citizen and law professor, whether political appointees ignored the advice of career attorneys regarding the preclearance of South Carolina's voter ID law under Section 5 of the Voting Rights Act. South Carolina spent $3.5 million defending its 2011 voter ID law despite the fact that the evidence and law was contrary to the Department of Justice's denial of preclearance.**

   a. **Will you join with Representative Gowdy and Senator Lindsay [*sic*] Graham in asking leadership in the Department of Justice whether or not they rejected the advice of career DOJ attorneys regarding South Carolina's 2011 voter ID law? If not, why not?**

   The validity of South Carolina's 2011 voter ID statute under Section 5 was extensively litigated before a three-judge federal district court. That court, in a published opinion, refused to preclear the voter ID statute for the 2012 election. See *South Carolina v. United States*, 898 F. Supp.2d 30. 48-51 (D.D.C. 2012) (three-judge court). The three-judge court went on to hold, based on the interpretation of the voter ID statute proffered by state officials during the litigation, that the statute was entitled to preclearance for future elections so long as state officials in fact implement it in accordance with that interpretation. See *id.* at 51-52.

   Judge John D. Bates, a George W. Bush appointee to the court, wrote a concurring opinion that emphasized what he called the "obvious" point that "Act R54 [the voter ID law] as now pre-cleared is not the R54 enacted in May 2011." *Id.* at 53 (Bates, J., concurring). Judge Bates explained that it was "understandable that the Attorney General of the United States * * * would raise serious concerns about South Carolina's voter photo ID law as it then stood." *Id.* And he noted that state officials' "interpretations of * * * key provisions of Act R54, particularly the reasonable impediment provision," had "evolv[ed]" in direct response to the Section 5 preclearance regime. *Id.* at 54. Indeed, the unanimous opinion of the three-judge court explained that "[a]s this litigation unfolded, the responsible South Carolina officials determined, often in real time, how they would apply the broadly worded reasonable impediment provision." *Id.* at 35 (opinion of the court). It was that "evolutionary process"—triggered by the Department of Justice's denial of preclearance—that Judge Bates credited with "produc[ing] a law that accomplishes South Carolina's important objectives while protecting every individual's right to vote

and a law that addresses the significant concerns raised about Act R54's potential impact on a group that all agree is disproportionately African–American." *Id.* at 53 (Bates, J., concurring).

Particularly given the extensive discussion in the district court's opinion, which vindicates the Department of Justice's decision to deny preclearance to the South Carolina voter ID statute as it was originally enacted, I do not believe that it would be appropriate to demand to know what advice the career staff of the Civil Rights Division gave the Division's leadership regarding this matter. It is essential that the Civil Rights Division's senior leadership can count on receiving the candid advice of the career staff. Based on my experience as first a career attorney and later a political appointee in the Division, I know that revealing to Congress or the public the confidential, deliberative legal advice that career staff have provided to Division leadership in particular matters can impose a significant chilling effect on the willingness of career attorneys to provide candid advice in the future.

b. Would you have an interest in knowing whether political considerations drove the Department of Justice's decision to deny preclearance in the South Carolina case?

The district court litigation provided both South Carolina and the Department of Justice an opportunity to address whether the decision to deny preclearance accorded with the facts and law. As the discussion in both the unanimous opinion of the three-judge court and Judge Bates's concurrence indicates, the Department's decision to deny preclearance to the voter ID statute as originally enacted had support in the law and the facts as they stood at the time. It was only the state's subsequent interpretations of the statute—interpretations that, the court said, evolved in "real time" "[a]s th[e] litigation unfolded"—that led the court to grant preclearance for post-2012 elections. I see no reason to believe that political considerations, rather than a good-faith determination of what the law required, drove the initial denial of preclearance.

c. As a general matter, should politics affect decision-making at the Department of Justice?

Decisions at the Department of Justice should be based on the facts and the law. They should not be based on whose political interests will be served.

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