

TESTIMONY OF  
ROGER CLEGG,  
PRESIDENT AND GENERAL COUNSEL,  
CENTER FOR EQUAL OPPORTUNITY  
ON  
OVERSIGHT OF THE DEPARTMENT OF JUSTICE'S  
CIVIL RIGHTS DIVISION  
BEFORE THE  
SENATE JUDICIARY COMMITTEE

June 21, 2007

Dirksen Senate Office Building, Room 226

Thank you very much, Mr. Chairman, for the opportunity to testify today. My name is Roger Clegg, and I am president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Falls Church, Virginia. Our chairman is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation.

I should also note that I was a deputy in the U.S. Department of Justice's Civil Rights Division for four years, from 1987 to 1991. My career at the Justice Department began, however, five years before that, when I was first hired to a nonpolitical slot there, in a different office. Then I held several positions as a political appointee, but I went back to nonpolitical status when I was Assistant to the Solicitor General. I finished my service at the Department as a political appointee, including my four years as a Deputy Assistant Attorney General in the Civil Rights Division.

### *Overview*

Mr. Chairman, as you know, I have to submit my testimony—reasonably enough—in advance of when the head of the Civil Rights Division, Mr. Wan Kim, will be questioned by the Committee, but I am going to assume—based on similar hearings before the Senate Judiciary Committee last November 16, a House Judiciary Committee subcommittee hearing earlier this year, news accounts, and my own experience in Washington, including my time at the Civil Rights Division—that the Division's record will be criticized in three basic ways. These are the same criticisms that are always made during oversight hearings of the Division.

First, some members of the Committee will say that the Division is not bringing enough of the kinds of cases they would like. Second, and conversely, some members will argue that the Division is bringing too many of the kinds of cases that they do not like. And, third, some members will say that the hiring process and other ways in which political appointees deal with career lawyers has become wrongly politicized. The fact that the criticisms are not new does not make them false, of course, but recognizing this helps to keep things in perspective.

Since Congress appropriates money for the Division and wants it to enforce the laws it has passed, it makes sense for the members to keep an eye on what sort of job the Division is doing—so long, of course, as the oversight process does not become so onerous that it actually prevents the Division from doing its job. If the members don't agree with the way the Division is interpreting the law, or don't like the enforcement priorities it has set, they can certainly argue with the Division leadership about these matters. But ultimately the call is, of course, the Executive Branch's.

And the questioning at hearings like these should be civil, as befits conversations between two coequal branches of government. There will inevitably be differences of opinion about how to interpret laws and what the Division's priorities ought to be. There is nothing sinister about this. I have to say, Mr. Chairman, that when I read the transcript

of last fall's oversight hearings before the Senate Judiciary Committee, I discerned a distinct lack of civility in some Senators' questioning of Mr. Kim. I hope that this doesn't repeat itself at this week's hearings.

### *Legitimate Changes in Legal Interpretations and Enforcement Priorities*

There will be legitimate differences of opinion—among members of the Committee, between members and the administration, and between political and career lawyers in the Division—about how to interpret the civil rights laws. Judges don't interpret the laws the same way; neither do government lawyers. And, of course, outside groups like mine will sometimes be critical of the Division. I have criticized the Division during the Clinton administration, and I have criticized it during the Bush administration. Many of you think the Division has been too conservative; well, I think it has not been conservative enough.

I am including with my statement today a paper that I delivered at a political science conference last year at the University of Virginia, comparing the enforcement policies of the employment antidiscrimination laws at the Civil Rights Division during the Clinton and Bush administrations, respectively. I noted there, in particular, differences I saw with respect to disparate impact lawsuits and challenges to what I call "affirmative discrimination"—a.k.a. reverse discrimination. The Clinton administration was more aggressive--so aggressive, for example, that it was fined over \$1.7 million for overreaching in one matter--in bringing disparate impact cases (which is too bad, since the theory on which such cases depend is misguided, and they often result in more rather than less discrimination), and with only one possible exception never challenged affirmative discrimination (which is also too bad, since the civil rights laws ought to be interpreted to protect all of us from discrimination on the basis of race, ethnicity, or sex). But the Bush administration has, nonetheless, brought and continued to litigate some disparate impact lawsuits, and it has not been terribly aggressive in challenging affirmative discrimination, so it has not been perfect either, at least by my lights.

There will also be differences of opinion—again, among members of the Committee, between members and the administration, and between political and career lawyers in the Division—about how to set law-enforcement priorities. The lack of enthusiasm that the Clinton administration had for challenging affirmative discrimination had to do, I suspect, not only with a difference of opinion in how it read the law, but also with a belief--misguided in my opinion--that fighting such discrimination was just not as important as other items on its agenda. The Bush administration's greater care in bringing disparate impact cases may reflect, again, not just a difference in how it reads the statutes, but also in a belief that, say, human trafficking is a more pressing problem than, say, a fire department's alleged overemphasis on one kind or another of physical conditioning.

In addition, even without differences in law-enforcement philosophy, the Division's priorities will change over time. Congress will pass new laws. Lawbreaking will become more common in some areas, and less common in others.

For instance, the Bush administration has spent much time enforcing the Help America Vote Act, which was just passed in 2002. New statutes often require a great deal of enforcement attention, to educate those affected to its requirements. The administration has spent more time, proportionately, enforcing the foreign-language ballot provisions of the Voting Rights Act than the Division did several decades ago. This probably reflects the fact that we have many more jurisdictions and voters affected by those provisions now than we did back then, because of increases in immigration. I say this, by the way, even though in my opinion those provisions of the Voting Rights Act are misguided as a policy matter and unconstitutional as a matter of law. The Division is also spending a lot of time enforcing laws that prohibit discrimination against servicemen and servicewomen; this is also unsurprising, since there will probably be more such cases in a time of war than in a time of peace.

An article in *The New York Times* last week (June 14) discussed the greater emphasis being given religious discrimination cases in this administration. [link: [http://www.nytimes.com/2007/06/14/washington/14discrim.html?\\_r=1&hp&oref=slogin](http://www.nytimes.com/2007/06/14/washington/14discrim.html?_r=1&hp&oref=slogin)] But that article concedes that the cases being brought are meritorious. “The department has prevailed in many, if not most of the cases in which it has become involved,” has “successfully argued ... [against] improperly suppressed religious expression,” and “has, in effect, duplicated in the religious arena its past success in cases involving race and national origin.” And here again, it should be noted that one of the statutes the Division is enforcing in this area--the Religious Land Use and Institutionalized Person Act (passed in the summer of 2000 by unanimous consent and signed by President Clinton that September)--was new when the administration took office, which means it is unsurprising that the Division has given its enforcement special priority. Likewise, the article noted the increase in human trafficking cases--which it called “a favored issue of the religious right”--but the Trafficking Victims Protection Act, which makes it easier to prosecute criminal misconduct involving human trafficking and which the Clinton administration had pushed for--is another recently enacted statute, passed just before the November 2000 presidential election.

Some people have criticized the Division for concentrating proportionately fewer resources than in years past on bringing cases that allege discrimination against African Americans. But accepting *arguendo* that there has been such a decline, one must bear in mind, first, that the Division now has many more laws to enforce, and, second, that discrimination against African Americans is less pervasive now than it was in 1964. To give just one example, we would hardly expect a southern city to discriminate to the same degree in its municipal hiring today--when African Americans have much more political power and may even constitute a majority of its city council and other municipal offices, including mayor--as when the government there was lily white and black people were disenfranchised. I’m not saying that antiblack discrimination has vanished; it hasn’t, and there will always be bigots, of all colors, in a free society. But anyone who thinks that antiblack discrimination is the same problem in 2007 that it was in 1964 is delusional.

I hasten to add, Mr. Chairman, that of course none of this means that the Division is free to interpret the law in bad faith, or to set enforcement priorities, for partisan political purposes. But charges that the Division is doing so are serious indeed, and should not be made lightly. For Congress to do so, without strong evidence, is itself irresponsible, in addition to being demagogic. The examples that I've seen cited to date--invariably involving two cases under the Voting Rights Act--are unpersuasive; your hearings last fall, I think, showed as much, but let me briefly cover this ground again.

The first is a case where the Justice Department decided that a Georgia photo ID statute did not violate the anti-racial discrimination protections of Section 5 of the Voting Rights Act. Now, it is frequently asserted or reported, as proof of the untenability of the Division's decision, that--as a recently *Washington Post* article said--"The Georgia photo ID statute was struck down by a court." But the court struck it down, not under Section 5 and for its racial impact, but under other laws and not because of its racial impact—in other words, on issues not before the Division. And the case is still being litigated.

The second case involves redistricting in Texas. Here again, the Justice Department's action was based on Section 5, a different statute than the one the Supreme Court ruled on, which is Section 2 of the Voting Rights Act. The rationale for the court's ruling under Section 2 involves a criterion that is not considered under Section 5; in all events, the Court's ruling was close (5-4), and most of the challenged plan was upheld. On the Section 5 issue, the position that the Division took was exactly right, as I explained in a *National Review Online* article last year [link: [http://www.nationalreview.com/comment/blum\\_clegg\\_thernstrom200601240829.asp](http://www.nationalreview.com/comment/blum_clegg_thernstrom200601240829.asp)].

### ***Relationship between Political Appointees and Career Staff***

This brings us to, and overlaps with, the relationship between political appointees and career lawyers (since in the Georgia and Texas cases the political appointees went against the recommendations of some--though not all--of the career lawyers). Here, too, I think it ought to be easy to agree on some basic boundaries.

On the one hand, no career lawyer should be penalized for partisan political reasons. What's more, most of the time political appointees should be eager to draw upon the institutional memory and expertise of the career staff. I know that I usually was when I was a deputy in the Division.

On the other hand, our government is a democratic republic, and the Executive Branch is accountable to the American people. Elections have consequences. That means that the President and his appointees have the responsibility and the right to run the Executive Branch—to set its priorities, to make the call on how to interpret the law (consistent with decisions by the Judicial Branch, of course), and even to decide which lawyers will best serve the Division's interests by most intelligently, enthusiastically, and resourcefully litigating its cases.

The picture that is frequently painted, moreover, of political hacks (ignorant of the law and interested only in winning political elections) overruling disinterested, white-lab-coat-wearing career lawyers is, to put it mildly, misleading. Political appointees, in my experience, are frequently at least as knowledgeable about the law as the career people whom they supervise (and, again, I have been on either side of the table); conversely, the career lawyers are frequently at least as partisan and ideological in their orientation. When there is friction between the two, I would not jump to the conclusion that it is the fault of the political appointees, or that they are showing an unprofessional lack of respect to the career lawyers, rather than vice versa.

Nor is it surprising--and it certainly doesn't prove illegal partisan hiring--when more conservatives are hired in a Republican administration and more liberals are hired in a Democratic administration. For starters, one would expect more conservatives to *apply* to Bush than to Clinton, and more liberals to apply to Clinton than to Bush. And while partisan bias is a no-no, looking for philosophical and policy compatibility is not. In the desegregation era, would Bobby Kennedy have wanted to retrain Jim Crow-loving applicants, or would he have given an edge to individuals passionately committed to destroying a separate-and-unequal status quo? Likewise, there's no reason why this administration should prefer not to hire lawyers whose briefs will have to be rewritten and who really aren't interested in working on, for instance, religious freedom cases.

With regard to hiring policy, by the way, I should note that the *New York Times* article I mentioned earlier said that "from 2003 through 2006, there was a notable increase of hirings from religious-affiliated institutions like Regent University and Ave Maria University." But the table that is included with the article shows that this "notable increase" was from zero per year at these schools to, occasionally, 1 per year (and, in only one instance, 2 hires); meanwhile, hires from Harvard were in double digits throughout most of the Bush administration--the only school that could claim that, and an actual increase from the Clinton administration.

### ***Conclusion***

Finally, Mr. Chairman, I must observe that, in my opinion, a big part of what's going on here is that disgruntled liberal lawyers are trying to influence policy by making miserable the lives of their conservative bosses or former bosses. It is no coincidence that some of those liberal lawyers leading the charge against the political appointees now have recently left the Division to work for liberal Democrats in Congress and organizations like the People for the American Way. Their targets are not political hacks; the average political appointee is, in my experience, a better lawyer than the average career staffer. In all events, the liberals are not white-lab-coat professionals (the Clinton administration's Civil Rights Division had to pay over \$4.1 million in penalties for sloppy lawyering--see attached letter from the Justice Department to Representative Sensenbrenner).

Thank you again, Mr. Chairman, for the opportunity to testify today. I would be happy to try to answer any questions the Committee may have for me.

## **EMPLOYMENT ANTIDISCRIMINATION POLICIES IN THE CLINTON AND BUSH ADMINISTRATIONS**

by Roger Clegg [paper presented at the University of Virginia “Policy History Conference” in June 2006]

### ***Introduction and Scope***

There are two federal agencies that enforce federal employment discrimination law through lawsuits. (In addition, the Department of Labor, pursuant to Executive Order 11,246, requires private companies contracting above a certain dollar amount with the federal government to refrain from discrimination and to have “affirmative action” programs.) The Justice Department’s civil rights division brings lawsuits against public employers (state, county, and municipal governments and the like, including fire and police departments, for example); the Equal Employment Opportunity Commission brings lawsuits against private employers (so long as they have at least 15 employees).

This paper will focus on the civil rights division, since it is unclear whether there actually is a Bush administration EEOC. The EEOC considers itself a “quasi-independent agency,” and, indeed, while the president does designate the chairman, he appoints commissioners only when their staggered five-year terms expire. The commissioners do not serve, then, at the pleasure of the president, and indeed by law no more than three of the five can be of the same political party. Accordingly, there need not be an immediate shift in the Commission’s ideological orientation upon a change in administration. Furthermore, the Bush administration has been quite lackadaisical about filling Commission slots (and the slot for the Commission’s general counsel). For all these reasons, the EEOC does not appear to be a promising place to look for making administration-to-administration comparisons.

With regard to the civil rights division, its employment antidiscrimination duties involve principally Title VII of the 1964 Civil Rights Act, 42 U.S.C. sec. 2000e et seq. (supplemented by the Equal Protection Clause of the Fourteenth Amendment, since generally the division's targets are public employers), and Title I of the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. (It should be noted that the employment section is one of the division's nine sections; the others enforce civil rights laws in various other areas, such a voting, education, housing, and so forth.) I am going to focus in this paper on Title VII, and I have good reasons for doing so, but it would be possible, I think, to do an interesting paper on differences between the Clinton and Bush administrations with respect to ADA employment discrimination cases. I think there have been differences; candidly, however, it would have doubled the length of this paper to have considered the ADA, too, and I felt I had to pick one or the other and--again, candidly--I personally have been more interested in Title VII cases (particularly the ones involving race and ethnicity), and I think the differences between the two administrations have been more clear-cut with respect to Title VII than with respect to the ADA.

Title VII forbids discrimination on the basis of "race, color, religion, sex, or national origin." Cases in employment about "color" per se are rare. Religion cases are more common, but, interestingly, I do not think there are dramatic differences in the two administrations in this area, since both have been fairly hospitable to ensuring that employers (a) refrain from outright disparate treatment on the basis of religion, and (b) provide the "reasonable accommodation" that Title VII also requires employers to make for religious practice.

Most of the division’s Title VII work, in any event, is about race, sex, and ethnicity. (The Supreme Court ruled early on that “national origin” means, essentially, ethnicity. *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973).)

One can classify the division’s Title VII work further. There are “disparate treatment” cases and “disparate impact” cases, and there are “reverse discrimination” cases (i.e., those alleging discrimination against whites, or against males, or both) and “traditional” cases (alleging discrimination against minorities or women). Disparate treatment cases allege that the alleged victim was treated differently and worse because of his race, ethnicity, or sex. Disparate impact cases, on the other hand, attack an employment criterion of some sort (say, to give the classic instance, a high-school diploma) as having an unjustified and disproportionate result with respect to a protected category (say, African Americans)—and do not allege that the criterion is itself by its terms discriminatory, or was chosen in order to discriminate, or has not been applied evenhandedly to all groups.

Disparate treatment cases on behalf of women and minority groups carry no ideological baggage; there is no difference in the zeal with which they are pursued from administration to administration, nor should we expect there to be. To be sure, the remedies sought may vary (e.g., the use of quotas), and conservative administrations will be somewhat less willing to pursue exotic evidentiary theories. But no one has a problem with fighting actual discrimination against women and minorities, and any administration is only too happy to pursue such lawsuits.

This is not true, however, with respect to cases that allege discrimination against whites or males, and there is evidence—and one would suspect *a priori*—that this is also

not true with respect to disparate impact cases. The disparate impact approach inevitably pushes employers to abandon perfectly legitimate selection criteria and to ensure against liability by “getting their numbers right”--i.e., employing surreptitious quotas. See Roger Clegg, *Disparate Impact in the Private Sector: A Theory Going Haywire* (2001) (National Legal Center for the Public Interest monograph); Roger Clegg, “The Bad Law of ‘Disparate Impact,’” *Public Interest* (Winter 2000). (This is so, by the way, not only in employment, but in other areas, such as housing.) Conservatives dislike these two consequences more than liberals do. Thus, as we shall see, the Clinton administration did not like to bring reverse discrimination cases, which the Bush administration was sometimes willing to bring; and the Clinton administration appeared to be more willing to bring disparate impact cases than the Bush administration has been.

A word on methodology. The author has kept careful tabs on the filings of the civil rights division from May 1997 until the present; he worked in the first Bush administration, and was actually in the civil rights division there until July 1991 (and he continued to work on some civil rights matters even after that); from January 1993 until May 1997, he followed the civil rights activities of the Clinton administration, although not as closely as before and after this period. Nonetheless, the paper will proceed in the most part anecdotally--or, if you will, qualitatively rather than quantitatively for its assessment--since numbers of filings alone would not be very illuminating (after all, times change, case law develops, not all cases are equal, and sometimes good results are achieved without a lawsuit).

### *Affirmative Discrimination Cases*

I am going to label cases that challenge discrimination against nonminorities and men as “affirmative discrimination cases.” They are frequently referred to as “reverse discrimination” cases, but I prefer the phrase coined by Nathan Glazer, because it is both more accurate and more stinging.

The Clinton administration’s discomfort with such cases became apparent early on, in *Taxman v. Piscataway Township Board of Education*. The prior Bush administration had joined in a white female schoolteacher’s lawsuit against her school board’s decision to lay her off, rather than a black teacher, because of a desire to ensure greater faculty “diversity.” The Clinton administration did not simply drop out of the case; it switched sides. For a discussion of the Piscataway case, see Terry Eastland, *Ending Affirmative Action: The Case for Colorblind Justice* 109-115 (1996).

The Piscataway flip-flop was dramatic and high-profile; usually the nudge toward quotas is much less overt. For instance, as I testified at division oversight hearings in 1998 (Testimony of Roger Clegg, Feb. 25, 1998 (emphasis in original), available at <http://judiciary.house.gov/legacy/222323.htm>):

probably few people noted that the Division signed a consent decree on April 14, 1997, which was filed in court on June 19, 1997, in its lawsuit against the Arkansas Department of Corrections (ADC) for sex discrimination in employment. Fewer still know about paragraph 5 of the consent decree, which requires the ADC to "seek in good faith to achieve the employment of women in correctional officer positions at correctional institutions housing male offenders *in numbers approximating their application for, and ability to qualify for, such positions. Absent explanation, the parties expect the ADC to hire women for entry-level [positions] ... at a rate that approximates the female applicant flow for such positions. ...It is also expected that the ADC will promote women ... at least in proportion to their representation in the class of qualified employees applying for promotion.*" Paragraph 6 then provides: "Failure to obtain a particular female applicant flow or hiring or promotion rate is not by itself a violation of this Decree, *but may prompt an inquiry by the United States.*" I suspect that no one

has any doubt that these provisions are telling the ADC to meet its quota, or else. Assuming that it makes sense to have female prison guards in male prisons, there is still no justification for quota hiring. Incidentally, this case was pointed to by the administration's witness at your last oversight hearing as "[o]ne of the Division's most significant recent achievements ...." Of course, the administration did not mention the quotas.

The civil rights division took a similar position in its brief to the U.S. Court of Appeals for the Fourth Circuit in *United States v. State of North Carolina* (filed July 14, 1998) (asking for an order that the state department of corrections "seek to hire and promote women roughly in proportion to their representation in the pool of applicants qualified for hire or promotion").

There are other examples. The Clinton administration supported an unsuccessful challenge to the constitutionality of Proposition 209, a California ballot-initiative that banned state preferences in employment and other areas based on race, ethnicity, or sex (see Bill Lann Lee's February 25, 1998 testimony before the House Judiciary Subcommittee on the Constitution).

In at least one instance, the Clinton administration refused to act on an affirmative discrimination case--involving the Howard County, Maryland, police department, which was accused of "applying a different, higher cut-off score to evaluations of white male applicants than it was to female and minority applicants"--that had been referred to it by the EEOC. In its referral, the Commission was quite clear that something was amiss: It found that Howard County "admits to having treated minority and female candidates more favorably than white male candidates," and that, based on "the evidence obtained," "there is reasonable cause to believe" that Howard County "has engaged in a pattern and practice of discrimination" against the complainant and "white males as a class." Howard County, the EEOC concluded, "has violated Title VII of the Civil Rights Act of 1964 by

giving impermissible consideration to applicants' race and sex in making police officer selection decisions." But the division deliberated for 10 months and then told the complainant, without giving any explanation why, that "we will not file suit." See Roger Clegg, "Leeway on Bias Cases," *Washington Times*, Nov. 28, 1999, page B3.

On August 12, 1998, the division filed a brief in the U.S. Court of Appeals for the Second Circuit in *Hayden v. County of Nassau*, arguing that it was not a violation of Title VII to redesign a test deliberately so that fewer whites and more blacks will pass it. For a collection of division affirmative discrimination--and disparate impact--cases, filed just in 1998, see Roger Clegg & Clint Bolick, *Defying the Rule of Law: A Report on the Tenure of Bill Lann Lee*, "Acting" Assistant Attorney General for Civil Rights (February 1999). Things did not improve in 1999. See Roger Clegg, "Lee's Record at Justice," *Washington Times*, August 24, 1999 (the division, in the first half of 1999, "[e]ntered a settlement agreement in *United States v. New York City Board of Education* that included this provision: 'If the aforementioned test preparation sessions are oversubscribed, preferences will be given to black, Hispanic, Asian and women applicants'"; the division also "[e]ntered an agreement requiring race-conscious recruiting, hiring, and retention policies in *Lee vs. Elmore County Board of Education*").

The Bush administration, on the other hand, has been willing to defend the Title VII rights of men and nonminorities. Just within the last year, in widely publicized cases, it has successfully challenged graduate fellowships at Southern Illinois University under Title VII, on the grounds that they excluded men and certain non-underrepresented (overrepresented?) ethnic groups (like whites and Asians); and Langston University's

policy of paying black professors more than nonblack professors (a white female professor was the complainant).

It has also moved to amend or dismiss old consent decrees that contained affirmatively discriminatory quotas. For instance, according to an April 9, 2002 article in the *Los Angeles Times* (“Firefighter Hiring Quotas Ended,” by David Rosenzweig): “The Justice Department’s civil rights division and the Los Angeles city attorney’s office, parties to the 1974 agreement [that “require[ed] that half of all Los Angeles firefighters be hired from the ranks of blacks, Latinos and Asians to alleviate racial disparities”], filed briefs in March asking the judge to scrap the racial hiring quotas.” The division made a similar filing last year with respect to the Indianapolis police and fire departments. Editorial, *Indianapolis Star*, October 13, 2005.

Other anti-affirmative discrimination actions by the civil rights division in the Bush administration include a July 26, 2005 challenge to fire department dual lists filed against the City of Pontiac, Michigan; a July 29, 2003 consent decree against Greenwood Community School Corp. in Indiana; and an October 1, 2001 consent decree against the City of Bastrop, Louisiana.

Additional evidence that there was a clear difference in enforcement philosophy in this area between the two administrations can be drawn from the nonemployment context--most dramatically, the University of Michigan cases involving affirmative discrimination in student admissions. The Clinton administration filed an amicus brief in the lower courts defending the university’s discrimination; before the Supreme Court, the Bush administration took the position that the discrimination was illegal. (The Supreme

Court, of course, split the baby in two, upholding the law school's discrimination but striking down the undergraduate admissions policy.)

The Clinton administration also had defended the University of Washington law school's affirmative admissions discrimination in *Smith v. University of Washington Law School*, Nos. 99-35209 et seq. (filed in the U.S. Court of Appeals for the Ninth Circuit on Sept. 16, 1999), and supported race-based student assignments at the K-12 level (e.g., in amicus briefs filed on July 21, 1998 with the U.S. Court of Appeals for the Fourth Circuit in *Tuttle v. Arlington County School Board*; in 1999 in another Fourth Circuit case, this one in Maryland, *Eisenberg v. Montgomery County Public Schools*; and in the Second Circuit on April 22, 1999 (No. 99-7186) in *Brewer v. West Irondequoit Central School District*).

The Bush administration, on the other hand, has been willing to challenge antiwhite harassment under the Voting Rights Act (*United States v. Brown*, No. 4:05 CV 33 TSL-AGN (S.D. Miss. 2-17-05)).

As the careful reader may glean from the foregoing lists, it is not so much that the Bush administration has filed a large number of anti-affirmative action cases (in any context), but that at least it has been willing to file *some*, and has been unwilling to defend affirmative discrimination. I am aware of only one instance in which the Clinton administration filed a brief opposing affirmative discrimination; in the summer of 1998, it did so in Maryland federal district court, in *United States v. New Baltimore City*, on behalf of a white applicant for middle-school assistant principal; even here, however, it might have been motivated more out of a desire for racial homogeneity in the school system than simple nondiscrimination. (As noted above, however, my really close

monitoring of the division's filings in the Clinton administration did not begin until 1997, so it is possible that it defended a white or male or two before then.) And, of course, it was quite aggressive in defending such affirmative discrimination.

### ***Disparate Impact Cases***

As noted, we would expect there to be more enthusiasm in a liberal administration than in a conservative administration for disparate impact cases. And that is apparently the case.

The House Judiciary Committee's Subcommittee on the Constitution devoted a substantial part of two oversight hearings to testimony that the Clinton administration was bringing abusive disparate-impact employment cases. In May 1997, it heard testimony "about the Division's abuse of disparate impact theory in its challenges to the use of written exams by police and fire departments," focusing in particular on its lawsuit against the Torrance, California, police and fire departments. On February 25, 1998, there was similar testimony about the division's lawsuit against Garland, Texas.

Testimony of Roger Clegg, Feb. 25, 1998, available at

<http://judiciary.house.gov/legacy/222323.htm>.

Other examples of Clinton administration disparate-impact challenges include *United States v. New York City Board of Education* (E.D.N.Y. settlement agreement dated Feb. 11, 1999) (disparate-impact challenge to school-custodian test); *United States v. City of Belleville*, No. 93-CV-0799-PER (S.D. Ill. 1998) (disparate-impact challenge to written and physical tests for firefighters and police); *Pietras v. Board of Fire Commissioners of the Farmingville Fire Dist.*, No. 98-7334 (amicus brief filed in the U.S. Court of Appeals for the Second Circuit on Jan. 20, 1999) (challenging disparate-impact

on women of firefighter physical-fitness requirements). On the aggressive stance of the Clinton administration with respect to the disparate-impact approach generally (in employment and nonemployment contexts), see my *Public Interest* and NLCPI pieces, *supra*; and Roger Clegg, “Distorting ‘Equal Opportunity,’” *Regulation*, Summer 2001, pp. 44-45.

The division was also criticized when it “sued the Philadelphia area’s regional transit police for discriminating against female applicants by requiring them to be able to run 1.5 miles in less than 12 minutes.” Testimony of Roger Clegg, Feb. 25, 1998, available at <http://judiciary.house.gov/legacy/222323.htm>. In this litigation, the division took the position that this requirement was “unrelated to job performance” and that there should be different standards for men and women. *Id.*

The division dropped out of this lawsuit during the first year of the Bush administration. The decision to do so, which was announced just after September 11, 2001, was made easier by the events of that day, which made it unappealing to argue that some minimum level of physical conditioning is desirable for police officers. A division spokesman said, “We feel it is critical to public safety that police and firefighters be able to run, climb up and down stairs to rescue people quickly under the most trying of circumstances.” Quoted in Roger Clegg, “Tripped Up,” *Legal Times*, February 18, 2002, page 36.

There have been, accordingly, fewer disparate-impact employment cases filed under the Bush administration (and, in the nonemployment context--in housing, for instance--it has also been less willing to push the outside of the disparate-impact envelope). This does not mean, however, that the Bush administration never brings

disparate-impact challenges, even to police and firefighter requirements. It recently won a case against Erie, Pennsylvania, in which it had claimed that the city's physical fitness test for police officers--in particular, the push-up and sit-up components to it--had an illegal disparate impact on women. Department of Justice press release, dated December 14, 2005, available at [http://www.usdoj.gov/opa/pr/2005/December/05\\_crt\\_667.html](http://www.usdoj.gov/opa/pr/2005/December/05_crt_667.html).

### ***Conclusion***

I have noted in the past that there are four basic differences on principles and law that separate relatively liberal administrations (like Clinton's) and relatively conservative ones (like Bush's) when it comes to civil rights enforcement. Roger Clegg, "Do the Right Thing," *Legal Times*, February 19, 2001. I've discussed two of them here:

Conservatives are more willing to challenge affirmative discrimination, but less enamored of disparate-impact lawsuits. The other two differences involve federalism and the free market: Conservatives are more sensitive to federal-versus-state divisions of power and competence, and more skeptical about the government second-guessing economic decisions made by the private sector.

I should conclude by saying that it is not necessarily a bad thing that enforcement policies should differ from administration to administration. The executive branch should not urge interpretations of the law that it does not itself believe are a fair reading of the underlying statutory or constitutional texts, and in particular it should not be influenced by simply small-p political considerations. But there are legitimate differences in how to interpret statutes among enforcement officials, just as there are among judges.

Moreover, even if two officials interpret a statute the same way, they might not be equally zealous in enforcing it. Law enforcement agencies have finite resources, and they must set priorities. Those priorities may change over time; antiblack discrimination might be a greater problem in 1964 than 2006, and anti-Muslim discrimination may be a bigger problem in 2006 than in 1964, for instance. Moreover, officials may just believe that certain kinds of discrimination threaten society more than others; one administration might be more upset about sex discrimination in the workplace, another by race discrimination in housing.

Elections have consequences, as they should. Roger Clegg, "Marching Orders," *Legal Times*, April 29, 2002.

*Roger Clegg is president and general counsel of the Center for Equal Opportunity in Sterling, Virginia. From 1982 to 1993, he served in the U.S. Department of Justice, including four years (from May 1987 through July 1991) as a deputy in the civil rights division. He is a graduate of Rice University and Yale Law School.*

### **Bibliography/Selected Works Cited**

Terry Eastland, *Ending Affirmative Action: The Case for Colorblind Justice* 109-115 (1996).

David Rosenzweig, "Firefighter Hiring Quotas Ended," *Los Angeles Times*, April 9, 2002.

Editorial, *Indianapolis Star*, October 13, 2005.

Roger Clegg & Clint Bolick, *Defying the Rule of Law: A Report on the Tenure of Bill Lann Lee, "Acting" Assistant Attorney General for Civil Rights* (February 1999).

Testimony of Roger Clegg, Feb. 25, 1998 (emphasis in original), available at <http://judiciary.house.gov/legacy/222323.htm>.

Roger Clegg, *Disparate Impact in the Private Sector: A Theory Going Haywire* (2001) (National Legal Center for the Public Interest monograph) (drawing from Roger Clegg, "The Bad Law of 'Disparate Impact,'" *Public Interest* (Winter 2000)).

Roger Clegg, "Distorting 'Equal Opportunity,'" *Regulation*, Summer 2001, pp. 44-45.

Roger Clegg, "Do the Right Thing," *Legal Times*, February 19, 2001.

Roger Clegg, "Tripped Up," *Legal Times*, February 18, 2002.

Roger Clegg, "Marching Orders," *Legal Times*, April 29, 2002.

Roger Clegg, "Lee's Record at Justice," *Washington Times*, August 24, 1999.

Roger Clegg, "Leeway on Bias Cases," *Washington Times*, November 28, 1999.