

The Civil Rights Division: The Crown Jewel of the Justice Department

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ABSTRACT. The Civil Rights Division of the United States Department of Justice (DOJ) always has been a conundrum—frequently lauded by DOJ leadership even as the importance of its work is sometimes discounted or even ignored. While currently much attention is being paid to the importance of reversing the harms of the Trump Administration, it is important to look beyond simply restoring the enforcement energy and ethos of the previous Administration. Rather, we should acknowledge that institutional dynamics that transcend administration can undermine the work of the Division, as underscored by the experience of now-Judge Thelton Henderson when he worked as one of the first Black attorneys at the Division during the civil-rights era of the 1960s. These dynamics include the Division’s tendency to undertake civil-rights work in a manner that is highly traditional, often emphasizes symbolism, almost pathologically moderate, and influenced by political considerations. If we understand and learn to better leverage these dynamics, we can both make the work of the Division more effective in coming years, and better promote social progress more broadly.

INTRODUCTION

*The Civil Rights Division is the “crown jewel” of the Justice Department.*¹

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1. *E.g., Nomination of Eric H. Holder, Jr., Nominee to Be Attorney General of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Sen. Charles E. Schumer), <https://www.govinfo.gov/content/pkg/CHRG-111shrg56197/html/CHRG-111shrg56197.htm> [<https://perma.cc/722E-FAL5>]; Eric Holder, Att’y Gen., Address at the Hispanic National Bar Association Annual Conference (Sept. 3, 2009), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-hispanic-national-bar-association-annual-conference> [<https://perma.cc/F3B2-F5WN>]; Sally Q. Yates, Deputy Att’y Gen., Remarks at the Civil Rights Division Awards Ceremony (Dec. 7, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-civil-rights-division-awards> [<https://perma.cc/DP4L-5K72>].

(The Civil Rights Division is not mentioned once in the Department’s timeline of its 150-year history.)²

*The Civil Rights Division is the stalwart protector of the fundamental rights guaranteed by the Constitution.*³

(The Civil Rights Division does less work during Republican administrations – and especially so during the Trump Administration.)⁴

*In 1963, a Civil Rights Division attorney lent his rental car to an associate of Dr. Martin Luther King, Jr. so that he and King would not have to make a late-night drive across Alabama in a car with a bad tire.*⁵

(The Civil Rights Division attorney resigned and the Division apologized to the State of Alabama.)⁶

*The Civil Rights Division is tasked with overseeing law enforcement agencies.*⁷

2. See *150 Years of the Department of Justice*, U.S. DEP’T JUST. (Oct. 15, 2020), <https://www.justice.gov/history/timeline/150-years-department-justice#event-1212096> [<https://perma.cc/DQ3H-HF7N>].

3. See generally Civil Rights Div., *Civil Rights Division*, U.S. DEP’T JUST., <https://www.justice.gov/crt> [<https://perma.cc/PQJ4-E6DD>] (describing the Civil Rights Division’s history, mission, and work).

4. See U.S. COMM’N ON CIVIL RIGHTS, *ARE RIGHTS A REALITY? EVALUATING FEDERAL CIVIL RIGHTS* 3, 50-51, 67-159, 498-99 (2019), <https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf> [<https://perma.cc/G2FT-NWYY>]; see also Rob Arthur, *Exclusive: Trump’s Justice Department Is Investigating 60% Fewer Civil Rights Cases than Obama’s*, VICE NEWS (Mar. 6, 2019, 12:11 PM ET), https://www.vice.com/en_us/article/bjq37m/exclusive-trumps-justice-department-is-investigating-60-fewer-civil-rights-cases-than-obamas [<https://perma.cc/N2ZQ-6CTG>] (“The DOJ’s Civil Rights Division . . . has started 60 percent fewer cases against potential violations during the first two years of the Trump administration than during the Obama years and 50 percent fewer than under George W. Bush.”).

5. See RICHARD B. KUHN, JUDGE THELTON HENDERSON: BREAKING NEW GROUND 58 (2017).

6. See *Dr. King Used Agency Car, Justice Dept. Now Admits*, EVENING STAR (D.C.), Nov. 7, 1963, at A-2; *Justice Dept. Not to Prosecute Attorney After ‘Embarrassment,’* BALT. AFRO-AM., Nov. 16, 1963, at 3; *King Got Free Transportation, Wallace Screams*, CHI. DAILY DEFENDER, Oct. 21, 1963, at A6; *infra* pp. 392-393 (describing this account in more detail).

7. See Civil Rights Div., *Special Litigation Section*, U.S. DEP’T JUST., <https://www.justice.gov/crt/special-litigation-section> [<https://perma.cc/BK2V-8QDC>].

(The Civil Rights Division sits within the nation’s most prominent law enforcement agency.)⁸

*The Civil Rights Division leads the charge for equality for women and LGBT persons.*⁹

(The Civil Rights Division has never had a woman confirmed to lead it.)¹⁰

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The Civil Rights Division is a conundrum. It has been a conundrum throughout its history, no matter who has been at the helm or in the White House. There is no question that the energy and ethos of the Civil Rights Division turns, to some extent, upon the priorities and proclivities of the political party in charge. This has perhaps never been truer than over the past four years. But as anyone who has worked in the Division knows first-hand, the drivers of the Division’s work are more complex. Even in “good” times, the Civil Rights Division’s work is limited by its institutional trappings. Those same institutional dynamics, however, are the source of the Civil Rights Division’s unique influence – an influence we need now as much as ever. Thus, advocates for an effective Civil Rights Division should do more than await a new administration to reinvigorate civil-rights enforcement at the federal level. We also should consider how the Civil Rights Division’s institutional characteristics, which are longstanding and transcend administration, can be better leveraged to more fully realize the Division’s potential to drive positive social change in our country.

8. The Department of Justice (DOJ) includes the United States Marshals Service, the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and the Federal Bureau of Prisons. DOJ was the largest law enforcement agency until the creation of the United States Department of Homeland Security in 2002. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 251922, FEDERAL LAW ENFORCEMENT OFFICERS, 2016 – STATISTICAL TABLES 1 (2019), <https://www.bjs.gov/content/pub/pdf/fleo16st.pdf> [<https://perma.cc/ES53-9WFL>].

9. See generally LGBTI Working Group, Civil Rights Div., *Protecting the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Individuals*, U.S. DEP’T JUST. (Oct. 2016), <https://www.justice.gov/crt/page/file/910161/download> [<https://perma.cc/2PA2-X2X3>] (describing recent DOJ enforcement actions and guidance with regard to the protection of women and LGBT individuals).

10. Beth Reinhard, *Contender to Run Civil Rights Post Can’t Be Pigeonholed*, WALL ST. J. (Mar. 9, 2017, 11:36 PM ET), <https://www.wsj.com/articles/indian-american-contender-to-run-justice-departments-civil-rights-division-cant-be-pigeonholed-1489100195> [<https://perma.cc/S5TL-8N38>].

Part I of this Essay first describes how the Civil Rights Division during the Trump Administration has faced unprecedented challenges, including open hostility from Trump’s appointed Attorney Generals. Part II follows with an overview of the Division’s history, with a closer look at the experience of one of the first Black attorneys to work in the Division, Thelton Henderson. This overview and illustrative – if unusually dramatic – example provides a glimpse at the institutional dynamics Division attorneys and staff face when attempting to live within institutional constraints while meaningfully responding to individuals’ significant, sometimes immediate, need for civil-rights protection. Part III argues that notwithstanding the shortcomings indicated by both the Division’s recent history and institutional characteristics, and the opening of other avenues of civil-rights protection, the Division remains not only relevant but essential in the struggle for equality and fair treatment. This Essay concludes by discussing feasible steps that can be taken to change, perhaps dramatically, the Division’s approach to and ethos regarding civil-rights enforcement.¹¹

I. THE CIVIL RIGHTS DIVISION UNDER TRUMP

There is no doubt that the Trump Administration’s support for white supremacy, alongside a particular hostility to civil rights more generally, has taken its toll on the work of the Division and the people in it. As a result, people and communities across the country have suffered.

The Department of Justice’s (DOJ) abdication of its responsibility to protect civil rights over the past four years has perhaps been most prominently evidenced by its near-complete cessation of new enforcement work on police-department misconduct.¹² Soon after being confirmed as Attorney General, Jeff

11. In a 1997 book chronicling the Civil Rights Division, Brian K. Landsberg, argued that “vigorous enforcement” of civil-rights laws led to “unparalleled gains” for African Americans but noted also that these gains had “failed to reach a large minority of the African-American population and has not eliminated the two-caste system as reflected in gaps in economic and educational status and in the growth of substandard, racially impacted housing.” He then posed a query that is still salient: “One must wonder whether the division has a renewed role to play in confronting these conditions or whether its role should remain more narrowly confined.” BRIAN K. LANDSBERG, *ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE* 5 (1997). Over twenty years later, a de facto two-caste system remains for Black and Latine people in the United States and, this Essay argues, the answer to Landsberg’s query is clear: the Division must take a more expansive and aggressive approach to promoting and protecting civil rights than it has historically – under both Republican and Democratic administrations.

12. The Special Litigation Section of the Civil Rights Division has been given the authority to enforce the “law enforcement misconduct” statute. This statute makes engaging in a “pattern or practice of conduct by law enforcement officers” that “deprives persons of rights, privileges,

Sessions made good on his thinly veiled confirmation-hearing threat to stop using consent decrees to remedy systemic police misconduct.¹³ The Department took the unprecedented step of trying, albeit unsuccessfully, to back out of the consent decree the Civil Rights Division had negotiated with the Baltimore Police Department to remedy the patterns of misconduct it found in an investigation.¹⁴ In another unprecedented move, DOJ refused to follow through on an agreement-in-principle the Division had reached with the City of Chicago to negotiate a consent decree to end unconstitutional policing practices revealed by a previous Division investigation.¹⁵ Notwithstanding the states' rights rhetoric

or immunities secured or protected by the Constitution or the laws of the United States," unlawful, and provides that whenever the Attorney General has reasonable cause to believe the statute has been violated, the Attorney General may bring civil suit to "eliminate the pattern or practice." 34 U.S.C. § 12601 (2018) (formerly codified at 42 U.S.C. § 14141 (2012)).

13. Broadly speaking, consent decrees are a set of remedial measures negotiated between the Department of Justice and the entity found to have violated civil rights. Consent decrees are court orders and are generally accompanied by ongoing court oversight. They often require the appointment of an independent monitor to ensure they are fully implemented. Consent decrees are used to address systemic violations of civil rights in a variety of contexts, from policing, to prisons, housing, education, employment, voting, and disability rights. In the years leading up to the Trump Administration, the Division has used consent decrees most prominently in its investigations of law-enforcement agencies. See Ed Chung, *The Trump Administration Is Putting DOJ Policing Reform Efforts at Risk*, CTR. AM. PROGRESS (Apr. 13, 2017, 9:00 AM), <https://www.americanprogress.org/issues/criminal-justice/news/2017/04/13/430461/trump-administration-putting-doj-policing-reform-efforts-risk> [https://perma.cc/7GMR-5CCY]; John Fritze, *Jeff Sessions Voices Concern About Use of Consent Decrees for Police*, BALT. SUN (Jan. 10, 2017, 6:40 PM), <https://www.baltimoresun.com/politics/bal-jeff-sessions-voices-concern-about-use-of-consent-decrees-for-police-20170110-story.html> [https://perma.cc/SM9F-9PQE]; Ian Millhiser, *Trump's Justice Department Has a Powerful Tool to Fight Police Abuse. It Refuses to Use It*, VOX (June 30, 2020, 5:00 AM EDT), <https://www.vox.com/2020/6/30/21281041/trump-justice-department-consent-decrees-jeff-sessions-police-violence-abuse> [https://perma.cc/W6X7-ZR42].
14. Camila Domonoske, *Federal Judge Approves Consent Decree to Overhaul Baltimore Police*, NAT'L PUB. RADIO (Apr. 7, 2017, 5:38 PM ET), <https://www.npr.org/sections/thetwo-way/2017/04/07/523055618/federal-judge-approves-consent-decree-to-overhaul-baltimore-police> [https://perma.cc/KZ97-DSPX]; Peter Hermann & Justin Jouvenal, *Justice Dept. Expresses Skepticism in Court over Baltimore Police Consent Decree*, WASH. POST (Apr. 6, 2017), https://www.washingtonpost.com/local/public-safety/justice-department-expresses-skepticism-in-court-over-baltimore-police-consent-decree/2017/04/06/64d2a756-1a40-11e7-9887-1a5314b56a08_story.html [https://perma.cc/KG44-LDET].
15. Bill Ruthhart, *Justice Department: No Agreement with Chicago on Police Reform*, CHI. TRIB. (June 7, 2017, 9:28 PM), <https://www.chicagotribune.com/politics/ct-department-of-justice-chicago-police-reform-20170607-story.html> [https://perma.cc/P8MA-JMJ7].

Sessions espoused as the basis for his views, the Division took the time to affirmatively oppose a negotiated agreement between the State of Illinois and the City of Chicago to reform the Chicago Police Department.¹⁶

Jeff Sessions's hostility to the Civil Rights Division's police-reform work, and consent decrees in particular, continued through his last day as Attorney General. One of Sessions's last acts as head of the Justice Department was to issue a memorandum making clear to Division attorneys that seeking a consent decree to remedy systemic police misconduct would be futile.¹⁷ Sessions did this notwithstanding the fact that consent decrees are arguably the most powerful enforcement tool the Civil Rights Division has to protect the rights of marginalized communities from systemic police misconduct.¹⁸

Meanwhile, the Civil Rights Division has brought only one new investigation of a police department during the past four years. When we contrast this with the Obama Administration's record of twenty-three such investigations

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16. Katie Benner, *Sessions, in Last-Minute Act, Sharply Limits Use of Consent Decrees to Curb Police Abuses*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/us/politics/sessions-limits-consent-decrees.html> [https://perma.cc/329R-AVEU]; Lynn Sweet, Jon Seidel & Frank Main, *Trump's Justice Department to Oppose Pending Chicago Police Consent Decree*, CHI. SUN-TIMES (Oct. 10, 2018, 6:46 AM CDT), <https://chicago.suntimes.com/2018/10/10/18390126/trump-s-justice-department-to-oppose-pending-chicago-police-consent-decree> [https://perma.cc/A8P3-EN47]; Debra Cassens Weiss, *Justice Department Will Oppose Consent Decree to Reform Chicago Police Department*, A.B.A. J. (Oct. 10, 2018, 12:25 PM CDT), https://www.abajournal.com/news/article/justice_department_will_oppose_consent_decree_to_reform_chicago_police_depa [https://perma.cc/JM8Q-Y5YH].
17. Memorandum from Jefferson B. Sessions III, Att'y Gen., U.S. Dep't of Justice, to Heads of Civil Litigating Components and United States Attorneys (Nov. 7, 2018), <https://www.justice.gov/opa/press-release/file/1109681/download> [https://perma.cc/4B4D-YTRA] (setting guidelines that severely curtailed the permissible use of consent decrees); see also Sari Horwitz, *In One of His Final Actions as Attorney General, Sessions Moves to Restrict Police Reform Agreements*, WASH. POST (Nov. 9, 2018, 4:04 PM EST), https://www.washingtonpost.com/world/national-security/in-one-of-his-final-actions-as-attorney-general-sessions-moves-to-restrict-police-reform-agreements/2018/11/09/76a64e5c-c437-11e8-8f5f-a55347f48762_story.html [https://perma.cc/ZP4Y-HMAM] (stating that DOJ attorneys now must meet additional requirements "beyond establishing that a police department repeatedly violated the Constitution" to gain approval for a consent decree); Christy E. Lopez, *Here's Why Jeff Sessions' Parting Shot Is Worse than You Thought*, MARSHALL PROJECT (Nov. 19, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/11/19/here-s-why-jeff-sessions-parting-shot-is-worse-than-you-thought> [https://perma.cc/N8ZJ-43ER] (stating that Sessions's memorandum admonishes again consent decrees being used to achieve a "general policy goal," making it easy for officials to line-item veto the most critical portions of consent decrees).
18. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 4, at 88-96, 108-09; see also Benner, *supra* note 16; Ian MacDougall, *Why Jeff Sessions' Final Act Could Have More Impact than Expected*, PROPUBLICA (Nov. 12, 2018, 11:58 AM EST), <https://www.propublica.org/article/why-jeff-sessions-final-act-could-have-more-impact-than-expected> [https://perma.cc/TY79-4NPK].

brought over eight years, and the Bush Administration's record of twenty-two investigations over eight years,¹⁹ the extent to which DOJ's failure to enforce the police-misconduct statutes reflects more than a usual shift in party-to-party enforcement priorities comes into stark relief. Further, in the one police investigation the Civil Rights Division completed under the Trump Administration, it found that the Springfield, Massachusetts police department had a pattern of using excessive force against its residents but has taken no steps to end this systemic misconduct.²⁰ In contrast to past practice and statutory directive, the Division has not sought to negotiate any enforceable plan to eliminate Springfield's unconstitutional practices, not even the relatively anodyne "memorandum of agreement" approach it took in Ville Platte, Louisiana in response to unconstitutional conduct revealed by an investigation it inherited from the previous Administration.²¹

Most recently, in contrast to the rest of the country and the world, the Department has been largely unmoved by the death of George Floyd, at least in terms of what Mr. Floyd's death tells us about the need to address structural racism and systemic misconduct in policing. The Department has resisted pleas—including pleas from Minnesota's Republican state senators—to investigate allegations that George Floyd's death reflects a pattern of systemic constitutional violations within the Minneapolis Police Department.²²

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19. Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *FORDHAM L. REV.* 3189, 3232 (2014); *Police Reform and Accountability Accomplishments*, U.S. DEP'T JUST., <https://www.justice.gov/opa/file/883386/download> [<https://perma.cc/7LVU-H34G>]. Most of the Obama-era investigations ended with consent decrees or memoranda of understanding, while most of the Bush-era decrees ended without an agreement.
 20. Jeremy C. Fox, *DOJ Report Says Springfield Narcotics Officers Have a Pattern of Using Excessive Force*, *BOS. GLOBE* (July 8, 2020, 9:47 PM EST), <https://www.bostonglobe.com/2020/07/08/metro/doj-report-says-springfield-narcotics-officers-have-pattern-using-excessive-force> [<https://perma.cc/63F8-BM33>]; Press Release, Dep't of Justice, Justice Department Announces Findings of Investigation into Narcotics Bureau of Springfield, Massachusetts Police Department (July 8, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-narcotics-bureau-springfield> [<https://perma.cc/B9VB-33SV>]. While the Justice Department did issue recommendations, they are not binding. See Daniel Medwed, *US DOJ Investigates Allegations of Police Brutality in Springfield Narcotics Unit* (July 28, 2020), <https://www.wgbh.org/news/local-news/2020/07/28/us-doj-investigates-allegations-of-police-brutality-in-springfield-narcotics-unit> [<https://perma.cc/5SBY-4J99>].
 21. Ian MacDougall, *How the Trump Administration Went Easy on Small-Town Police Abuses*, *PROPUBLICA* (Aug. 27, 2018, 5:00AM EST), <https://www.propublica.org/article/ville-platte-louisiana-police-consent-decree-trump-justice-department> [<https://perma.cc/VCW7-KWE9>].
 22. Sadie Gurman & Chad Day, *Justice Department Considering Probe of Minneapolis Police Department*, *WALL ST. J.* (June 24, 2020, 8:19 AM EST), <https://www.wsj.com/articles/justice-department-considering-probe-of-minneapolis-police-department-11593001145> [<https://perma.cc/VCW7-KWE9>].

The Civil Rights Division's failure to protect civil rights has been painfully evident on other fronts as well. During the Trump Administration, the Civil Rights Division has not filed any new voting-rights cases.²³ Further, after years of litigating against deliberately discriminatory voting laws in Texas, Division attorneys in 2017 were ordered to reverse course and give up the fight for a fair vote.²⁴ In a similar reversal that upends civil-rights protections, Division leadership has used the Division's enforcement powers *against* university efforts (based on Supreme Court guidance) to increase racial and ethnic diversity. Using the Civil Rights Division to do this anti-civil-rights work reflects either profound misapprehension of civil rights and racial equity, a high degree of cynicism, or

perma.cc/A6TA-5Y3S]; Tim Pugmire, *GOP State Lawmakers Want AG Barr to Look at Minneapolis Police Department*, MPR NEWS (June 24, 2020, 1:16 AM CST), <https://www.mprnews.org/story/2020/06/23/gop-state-lawmakers-want-barr-to-look-at-mpls-pd> [<https://perma.cc/HRV5-PLL4>]; *Transcript: Attorney General William Barr on "Face the Nation,"* CBS NEWS (June 7, 2020), <https://www.cbsnews.com/news/bill-barr-george-floyd-protests-blm-face-the-nation-transcript> [<https://perma.cc/A752-P6KR>] (quoting Barr as stating, "I don't think necessarily starting a—a pattern-or-practice investigation at this stage is warranted"); see also Chiraag Bains & Dana Mulhauser, *The Trump Administration Abandoned a Proven Way to Reduce Police Violence*, WASH. POST (June 9, 2020, 6:00 AM EDT), <https://www.washingtonpost.com/outlook/2020/06/09/trump-pattern-or-practice> [<https://perma.cc/CA9A-4LNJ>] (asserting that there is "no replacement for a federal government with deep experience in police reform" and noting how Minnesota's Department of Human Rights launched an investigation into whether the Minneapolis Police Department has engaged in systemic discrimination because the federal government is "missing in action"). The Civil Rights Division did open a criminal investigation of the individual officers involved with Floyd's death. Press Release, Dep't of Justice, Attorney General William P. Barr's Statement on the Death of Mr. George Floyd (May 29, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-death-mr-george-floyd> [<https://perma.cc/UV9A-DJQB>]. Under Republican administrations in particular, the Division is generally more open to criminal prosecutions of individuals than efforts to remedy the root causes of unlawful conduct.

23. Sam Levine, "An Embarrassment": *Trump's Justice Department Goes Quiet on Voting Rights*, GUARDIAN (June 23 2020, 10:00 PM EST), <https://www.theguardian.com/us-news/2020/jun/23/us-justice-department-voting-rights-2020-election> [<https://perma.cc/WQA3-R4UN>]; Ian Millhiser, *DOJ's Civil Rights Division Has Not Filed a Single Voting Rights Act Case Since Trump Took Office*, THINKPROGRESS (Nov. 5, 2018, 12:12 PM), <https://archive.thinkprogress.org/civil-rights-division-has-not-filed-a-single-voting-rights-act-case-under-trump-792914a2689a> [<https://perma.cc/5TW6-DF48>].
24. See Jessica Huseman & Annie Waldman, *Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government*, PROPUBLICA (June 15, 2017, 8:00 AM EST), <https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government> [<https://perma.cc/2JBj-AEJQ>]. A federal judge rejected the Division's about-face, finding that Texas's voter-identification law was discriminatory, as the Division had argued for years—until it did not. Ultimately, a divided Fifth Circuit upheld a revised version of the voter-identification law. See *Texas NAACP v. Steen* (*Consolidated with Veasey v. Abbott*), BRENNAN CTR. FOR JUST. (Sept. 21, 2018), <https://www.brennancenter.org/our-work/court-cases/texas-naACP-v-steen-consolidated-veasey-v-abbott> [<https://perma.cc/PU8G-ZVBC>].

both.²⁵ There have been countless less high-profile decisions to change positions, water down views, or simply do nothing to protect civil rights related to housing, education, disability rights, and incarceration.²⁶

This abdication of responsibility to protect civil rights is deliberate. The Trump Administration's first Assistant Attorney General for Civil Rights, John Gore, had no experience protecting civil rights. He had instead fought against the Division's efforts to end racial gerrymandering, and even represented North Carolina in its opposition to the Division's high-profile efforts to protect the rights of transgender individuals.²⁷ The Administration's budget requests for the Division have made clear that it has little interest in protecting civil rights, whether that means ensuring constitutional policing and advancing criminal-justice reform; protecting the rights of persons with disabilities; or protecting LGBTQ individuals from discrimination, harassment, and violence.²⁸ The Justice Department's unprecedented week of training on religious freedom for all Department lawyers could, in some administrations, fairly be read as a legitimate, if unusual, expression of support for a reasonable shift in agency civil-rights enforcement priorities.²⁹ In the context, however, of a Department that

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25. Letter from Eric S. Dreiband, Assistant Att'y Gen., U.S. Dep't of Justice Civil Rights Div., to Peter S. Spivack, Hogan Lovells US LLP, regarding Notice of Violation of Title VI of the Civil Rights Act of 1964 (Aug. 13, 2020), <https://www.justice.gov/opa/press-release/file/1304591/download> [<https://perma.cc/LP8L-YALC>]; Press Release, Dep't of Justice, Justice Department Files Amicus Brief Explaining that Harvard's Race-Based Admissions Process Violates Federal Civil-Rights Law (Feb. 25, 2020), <https://www.justice.gov/opa/pr/justice-department-files-amicus-brief-explaining-harvard-s-race-based-admissions-process> [<https://perma.cc/AE5K-BRRP>]; Press Release, Dep't of Justice, Justice Department Sues Yale University for Illegal Discrimination Practices in Undergraduate Admissions (Oct. 8, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-yale-university-illegal-discrimination-practices-undergraduate> [<https://perma.cc/8Q3S-RNS3>].
26. See, e.g., Arthur, *supra* note 4; Kristen Clarke, Opinion, *What Trump Has Done to the Justice Department's Civil Rights Division Is a Disgrace*, CNN (Sept. 11, 2020, 3:23 PM ET), <https://www.cnn.com/2020/09/11/opinions/trump-barr-undercutting-doj-civil-rights-division-clarke/index.html> [<https://perma.cc/58Y7-7YQ4>]; Huseman & Waldman, *supra* note 24; Sherrilyn Ifill, *President Trump's First Year Was an Affront to Civil Rights*, TIME (Jan. 17, 2018, 3:42 PM EST), <https://time.com/5106648/donald-trump-civil-rights-race> [<https://perma.cc/VCX8-CL2J>].
27. See Jeremy Stahl, *One of Trump's Picks to Enforce Civil Rights Is a Civil Rights Disaster*, SLATE (Jan. 27, 2017) <https://slate.com/news-and-politics/2017/01/one-of-trumps-picks-to-enforce-civil-rights-is-a-civil-rights-disaster.html> [<https://perma.cc/6T23-SAZL>].
28. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 4, at 82-85.
29. See Katie Benner, *Justice Dept. Religious Freedom Training Spurs Concern Among Lawyers*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/13/us/politics/justice-department-religious-freedom.html> [<https://perma.cc/SYF8-K3E2>].

argued in favor of the Administration’s “Muslim travel ban,”³⁰ and shut down its own implicit bias training³¹ in the face of strong evidence showing such biases influence how we make decisions—including related to religion,³² it is more fairly seen as an attempt to explain and excuse the Department’s use of civil-rights laws to weaken antidiscrimination protection for LGBTQ persons, support Attorney General William Barr’s personal antisecularism, and inappropriately use civil-rights enforcement to rally Trump’s evangelical base.³³

As if to underscore the depth of the current Administration’s hostility to genuine civil-rights enforcement, the Department’s timeline of its 150-year history does not make a single mention of the Civil Rights Division: not the fact that it was established in 1957, nor any of the work that it has done in the fifty-plus years since then.³⁴

Notwithstanding the unprecedented institutional hostility to the work of the Division over the past four years, good civil-rights work continues, albeit mostly under the radar. All of us who care about civil rights owe a debt of gratitude to those who have kept up the work of the Division throughout the considerable challenges of the last four years. Attorneys and other dedicated civil-rights staff bring new cases where they can and continue to commit long hours to the always-challenging work of implementing existing consent decrees and other

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30. See Jess Bravin, *Justice Department Asks Supreme Court to Fully Reinstate Travel Ban*, WALL ST. J. (Nov. 21, 2017, 12:01 AM ET), <https://www.wsj.com/articles/justice-department-asks-supreme-court-to-fully-reinstate-travel-ban-1511239748> [<https://perma.cc/S4DR-BT5W>]; Dahlia Lithwick, *Bad Faith? What’s That?*, SLATE (May 15, 2017, 5:54 PM), <https://slate.com/news-and-politics/2017/05/doj-attempts-to-wish-away-trumps-muslim-ban-statements-are-not-working.html> [<https://perma.cc/M8MQ-Y3QR>].
 31. Andrew Keshner, *Trump’s Crackdown on ‘Critical Race Theory’ Training Leads to Cancellation of Justice Department ‘Unconscious Bias’ Program*, MARKETWATCH (Sept. 19, 2020, 3:11 AM EST), <https://www.marketwatch.com/story/trumps-crack-down-on-critical-race-theory-training-leads-to-cancellation-of-justice-department-unconscious-bias-program-2020-09-17> [<https://perma.cc/VCG6-CKVN>].
 32. See *Research Reveals Pervasive Implicit Hierarchies for Race, Religion, and Age*, ASS’N FOR PSYCHOL. SCI. (July 31, 2014), <https://www.psychologicalscience.org/news/releases/research-reveals-pervasive-implicit-hierarchies-for-race-religion-and-age.html> [<https://perma.cc/5JA5-GBG9>].
 33. Matt Ford, *Bill Barr’s Invisible Crusade*, NEW REPUBLIC (June 8, 2020), <https://newrepublic.com/article/158024/bill-barr-christian-crusade-executive-branch-power> [<https://perma.cc/6DG5-KYJM>]; David Rohde, *William Barr, Trump’s Sword and Shield*, NEW YORKER (Jan. 20, 2020), <https://www.newyorker.com/magazine/2020/01/20/william-barr-trumps-sword-and-shield> [<https://perma.cc/5AVF-YLSE>].
 34. See *150 Years of the Department of Justice*, *supra* note 2. To the extent that the timeline mentions civil-rights milestones at all, it does so in reference to federal law-enforcement involvement. Thus, for example, we learn that the U.S. Marshalls helped integrate the University of Mississippi, and that the U.S. Marshalls and ATF hired their first female agents in 1949 and 1972, respectively.

agreements to remedy civil-rights violations. Overall, however, the volume of the Division's work is down considerably. While volume is only one metric of the Department's civil-rights efforts, it is telling that there are far fewer civil-rights actions being brought in comparison to not only the Obama DOJ, but also the Bush DOJ.³⁵ In many sections, career staff dedicated to civil-rights enforcement have fled in droves, leaving a relatively few hardy individuals trying to push forward.³⁶

There is thus no question that the new administration will be more appreciative of the importance of civil-rights enforcement and, accordingly, there will be a resumption of Civil Rights Division activity and the Department will return to taking positions that *actually* support civil rights.

The undeniable import of a change of administration, especially this Administration, should not, however, mask the historical shortcomings and limitations of the Civil Rights Division that have prevented it from more fully advancing civil-rights protection in this country, even under favorable administrations. We should avoid the tendency to assume that a favorable administration will solve the challenges the Division faces and instead recognize that even with executive leadership that supports civil rights we must make changes to the Department's approach and ethos regarding civil-rights enforcement. It is only by looking beyond simply securing supportive leadership that the Civil Rights Division will achieve its full potential in helping to dismantle structural racism and other institutional inequities, allowing far more individuals to benefit from the civil-rights protections that, for too many, currently exist only on paper.

II. DIVISION DYNAMICS THAT TRANSCEND ADMINISTRATIONS

An overview of the history of the Civil Rights Division is useful to understanding its characteristics and limitations. The precursor to the Civil Rights Division was the Civil Liberties Unit, established within DOJ's Criminal Division

35. See *supra* note 19 and accompanying text.

36. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 4, at 78; see also Ryan J. Reilly, *5 Years After Ferguson, The Justice Department Has All But Ended Federal Police Reform*, HUFFINGTON POST (Aug. 9, 2019, 9:03 AM EST), https://www.huffpost.com/entry/ferguson-justice-department-police-reform-trump-pattern-or-practice_n_5d4b18b3e4b0066eb70bad87 [<https://perma.cc/KTK6-XJUH>] (“[R]oughly a third of the thinly staffed group that investigates police practices at the Civil Rights Division’s Special Litigation Section have departed since Trump’s election.”).

in 1939.³⁷ The purpose of the Civil Liberties Unit was to study the Constitution and federal statutes relating to “civil rights with reference to present conditions” and make relevant recommendations, as well as to “direct, supervise and conduct prosecutions of violations of the provisions of the Constitution or Acts of Congress guaranteeing civil rights to individuals.”³⁸ The Assistant Attorney General of the Criminal Division, O. John Rogge, reported to Congress in 1939 that the Unit was established to

handle all problems and supervise all prosecutions involving interference with the ballot, peonage, the strike-breaking Statute, shanghaiing men for service at sea, conspiracies to violate the National Labor Relations Act, the intimidation of persons for having informed the Department or the Government of matters pertinent to their function[,] and other infringement of civil rights.³⁹

There is a lot one could unpack in that sentence, but the main takeaway may be that, from the outset, DOJ’s civil-rights work was ensconced in traditional criminal mechanisms designed to put wrongdoers in jail. The outsized emphasis on this aspect of the Division’s work largely continues to this day. It is important to also understand that the Unit was established in part in response to a reluctance by existing components of the Department of Justice to enforce sections 242 and 243 of Title 18 of the U.S. Code – the criminal “color of law” provisions that still are the Division’s mainstay for criminally prosecuting police brutality and other abuse by governmental officials.⁴⁰ The Unit was also viewed as a compromise with the National Association for the Advancement of Colored People and others who were urging the passage of a federal antilynching law.⁴¹ Thus, from the outset, dedicated civil-rights enforcement within DOJ was used both to alleviate the need for other Divisions to attend to civil-rights concerns, and to placate mainstream civil-rights organizations when their primary demands were rejected.

The Civil Liberties Unit was replaced by the Civil Rights Division in the middle of the last century. The Truman Committee had first proposed the Division

37. See ATT’Y GENERAL, ORDER NO. 3204 (Feb. 3, 1939); LANDSBERG, *supra* note 11, at 9; J. Clay Smith, Jr., History of the Civil Rights Section, Criminal Division, Department of Justice (unpublished manuscript) (on file with author). I am grateful to Civil Rights Division alumnus Lisa Wilson Edwards for providing me with Dr. Smith’s manuscript.

38. LANDSBERG, *supra* note 11, at 9.

39. Smith, *supra* note 37 (manuscript at 2).

40. *Id.* at 8-15.

41. *Id.* at 10.

in 1947, finding that the establishment of a Civil Rights Division would give federal civil-rights enforcement the “prestige, power, and efficiency” that it lacked when relegated to a Unit within the Criminal Division.⁴² Truman’s committee also recommended that the Division be given civil, as well as criminal, enforcement authority.⁴³ The Division was signed into law by (Republican) President Dwight Eisenhower as part of the Civil Rights Act of 1957.⁴⁴ This dramatic elevation of the import of civil rights in federal enforcement is broadly understood to be in part a response both to the horrors of the Holocaust and to a Cold War reality where Communists routinely criticized the United States’ hypocrisy in how Black Americans were treated.⁴⁵ The symbolic import of the Division was thus evident at its inception.

The symbolism of the Division has remained important. Yet, while progressive administrations have consistently touted the Civil Rights Division’s work, the DOJ infrastructure and broader institutional ethos sometimes makes it unduly difficult for Civil Rights Division attorneys to actually do that work. One set of examples illustrating this point is from the experiences of attorneys working in the early days of the Division to protect voting rights. These examples resonate both because of their import at the time and the surprisingly familiar feel they will have to those who have just recently worked in the Division.

In the early 1960s, the work of the Civil Rights Division was devoted almost entirely to protecting the ability of Black people in the South to register to vote. Of the thirty-plus lawyers in the Division however, only one was Black: Maceo Hubbard. Hubbard was not directly involved in the Southern voter-registration litigation. In 1962, the Division hired Thelton Henderson – who would later become a judge in the Northern District of California – as he was graduating from what was then Boalt Hall, the University of California, Berkeley’s law school.⁴⁶ The Division sent Henderson to the South to gather information that would form the basis of voter-registration litigation. Because segregation required that he stay at Black-only hotels and eat at Black-only restaurants, he had significant interaction with civil-rights activists, including Martin Luther King, Jr. From

42. *Long Road to Justice: The Civil Rights Division at 50*, Leadership Conference on Civil Rights Education Fund at 3 (Sept. 2007). I am grateful to Civil Rights Division alumnus Richard Jerome for alerting me to this report.

43. Landsberg, *supra* note 11, at 9.

44. The Division essentially was created by the appointment of an additional Assistant Attorney General, which provided direct access to the Attorney General. *See* Civil Rights Act of 1957, Pub. L. No. 85-315, § 111, 71 Stat. 634, 637 (1957); ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 205-08 (1947).

45. *See, e.g.*, LANDSBERG, *supra* note 11; David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L.J. 741, 780-86 (1981).

46. KUHNS, *supra* note 5, at 46.

this vantage point, Henderson had first-hand experience, and ultimately became a victim of, what his biographer later called the “somewhat schizophrenic official response to the burgeoning civil rights movement.”⁴⁷ This fractured response stemmed from the conflict between the seemingly genuine commitment to civil rights on the part of President Kennedy and his brother, Attorney General Robert Kennedy, and the reliance of the Democratic party on Southern, white, staunchly segregationist Democrats.

In one instance, the Division sent Henderson and his colleague Richard Wasserstrom to monitor voter-registration efforts in Selma, Alabama. Henderson and Wasserstrom sought permission from the head of the Civil Rights Division, Burke Marshall, to escort Student Nonviolent Coordinating Committee (SNCC) workers to bring water and sandwiches to long lines of Black people waiting to register to vote – local poll workers and law enforcement prohibited Black registrants from leaving the day-long line for any reason, even as they let white registrants go through a separate door, with no line, to register. Marshall denied Wasserstrom and Henderson’s request. When SNCC workers tried to deliver the sandwiches and water, they were clubbed by Sheriff Jim Clark’s posse and later charged and convicted of criminal provocation. Wasserstrom and Henderson had thought to ask Federal Bureau of Investigation (FBI) agents to come out of their nearby offices and photograph the delivery of food and water. But they realized this effort was futile when they saw the FBI cameras pan to the upper stories of nearby buildings as the Sheriff’s posse began beating the students.⁴⁸ Judge Henderson told me recently that Wasserstrom quit the Department as a result of that experience.⁴⁹ For his part, Henderson narrated to his biographer:

I found myself too often in the role of a notetaker . . . I became a collector of civil rights atrocities . . . I was working with [FBI agents], and I can remember pointing . . . things out and asking them to photograph it and document it. They were cooperative in the sense that they never said no. But the FBI that you and I hear about was never there, in terms of digging in and really getting it and doing a workman-like job. They would take a picture, but I think our banks would be nonexistent if they pursued bank robbers like they pursued civil rights cases. I presume that

47. *Id.* at 47.

48. *Id.* at 48.

49. Judge Henderson reports that, despite these challenges, he, Wasserstrom, and others worked up complaints regarding Selma but the Division refused to move forward with them, prompting Wasserstrom’s resignation. Telephone Interview with Thelton Henderson, Senior Judge, N.D. Cal. (July 31, 2020).

they had no interest in it. I would again just presume that their directions come from above.⁵⁰

On another occasion, after a long telephone call to headquarters made from a phone booth in the “Klan Country” town of Forest, Mississippi, Henderson had to flee, in a car driven by Civil Rights Division intern Jim Thomas, past an attempted blockade by white people.⁵¹ On still another occasion, Henderson withstood a beating by the police chief of a small Mississippi town rather than reveal his DOJ affiliation to avoid the preferential treatment he knew that affiliation conferred. He reconsidered this decision when evening fell and it became clear that he was about to be locked in a cell with no way to communicate with the outside world. Henderson decided to “make [his] point in some other jail” and pulled out his DOJ identification, prompting the jail’s sheriff to say “Mr. Henderson, with credentials like that we’ll treat you like any self-respecting white man,” and immediately release him.⁵² On yet another occasion, when author James Baldwin was in Selma to support registration efforts and began receiving death threats, Henderson drove him and his brother David to Birmingham so that the Baldwin brothers would not have to flee in David’s conspicuous red Ford.⁵³

With this lived experience, there must have been little doubt in Henderson’s mind about how to respond to a request—only a week after the “flight to Birmingham” with James Baldwin—to lend his government-rented car to Martin Luther King, Jr., as King’s car had a bad tire and King needed to traverse a Klan-heavy part of Alabama to get to Selma. Henderson knew as well as King and his colleagues did that law enforcement would follow any car with King in it, and harass and endanger any local person seen giving aid to King. In contrast, Henderson’s DOJ credentials conferred upon him a unique ability to intervene safely. Perhaps most importantly, Henderson knew that King was right to fear for his life should his car break down on the road to Selma. Could there be any question of the ethically appropriate decision? Henderson declined to drive King and his colleague to Selma, but did agree to lend them his car. State police followed the car, saw the driver was Black, checked the car’s license number, and learned it had been rented by the Justice Department. Governor George Wallace knew that Henderson was Black and, likely assuming the driver was Henderson, reported the next morning that a DOJ attorney named Thelton Henderson had driven King to Selma. DOJ asked Henderson about this and Henderson truthfully

50. KUHNS, *supra* note 5, at 48 (alteration in original).

51. *Id.* at 55-56. Thomas was a Yale Law School student at the time and later went on to become an Associate Dean at the school. *Id.* at 55 n.2.

52. *Id.* at 53-54.

53. *Id.* at 57.

stated he had not driven King, but did not say that he had lent the car to King's colleague. The Justice Department then issued a statement denying any involvement in King's trip to Selma.⁵⁴

Eventually, the full story came out when Henderson acknowledged that he had lent his car to King and his colleague.⁵⁵ As Henderson's biographer puts it, "[a]t that point[] strong political forces came into play."⁵⁶ The South was an important constituency for President Kennedy, and it was critical that the Justice Department "avoid the appearance of taking sides in the civil rights struggle."⁵⁷ Henderson submitted his resignation, and the Justice Department accepted it, notwithstanding that Henderson was considered one of the Division's most effective attorneys in the South.⁵⁸ Marshall also publicly apologized to the state of Alabama for the episode.⁵⁹ Judge Henderson still believes he did the right thing by lending his car to Dr. King, even as he acknowledges that he was wrong by not being completely candid about his decision from the first inquiry.⁶⁰

Henderson's experience in the Civil Rights Division demonstrates that effective protection of civil rights sometimes calls for immediate action that officials in Washington D.C. may not recognize or countenance. It demonstrates further that challenges to effective enforcement persist even in favorable administrations, due to ambivalence to federal civil-rights enforcement and DOJ's underlying institutional dynamics. Judge Henderson's experiences from sixty years ago are echoed in Division enforcement efforts today. DOJ attorneys are not allowed to join in with local activists and advocates as they work on the ground — no matter how aligned that work is with DOJ's civil-rights enforcement efforts, or how impossible it may be to later remedy the harms that might have been prevented if DOJ officials had intervened in real time. While the reasons for this

54. *Id.* at 58; see also *King Got Free Transportation, Wallace Screams*, *supra* note 6.

55. James E. Clayton, *Flipflop on Rented Car for Dr. King Makes Justice Department Blush*, WASH. POST (Nov. 7, 1963).

56. KUHNS, *supra* note 5, at 58.

57. *Id.*

58. Clayton, *supra* note 55; *Justice Dept. Not to Prosecute Attorney After 'Embarrassment,' supra* note 6. Two Alabama counties convened grand juries to look into the conduct, heeding Governor Wallace's admonition that it was "vitally necessary that the people know exactly to what extent the Justice Department civil rights attorneys have consorted with, aided and abetted the flood of beatniks, sex perverts, narcotics addicts and common criminals who have invaded Alabama as so-called civil rights workers." See *Grand Jury Raps U.S. Car for King*, EVENING STAR (D.C.), Nov. 9, 1963, at B-11; *U.S. Blamed by Wallace for 'Undesirables,'* L.A. TIMES (Nov. 19, 1963); *U.S. Is Balked in Attempt to Block Alabama Inquiry*, EVENING STAR (D.C.), Nov. 12, 1963, at A-8.

59. *Dr. King Used Agency Car, Justice Dept. Now Admits*, *supra* note 6.

60. KUHNS, *supra* note 5, at 59.

separation are readily apparent and (in my view) ultimately sensible, as Henderson's experience illustrates in the extreme, they can create some difficult situations for Division attorneys and staff on the ground who develop working relationships with local civil-rights advocates. These attorneys recognize that their DOJ credentials might provide them with a unique ability to further the work being done – if only they were allowed to take advantage of them. As I have written elsewhere, I and other DOJ officials felt this conflict acutely in Ferguson, where protestors called us out for not intervening in real time in response to law enforcement interfering with protestors' First Amendment right to peacefully protest.⁶¹ As others have noted, this conflict is likely greater in administrations that are more supportive of civil rights, as these administrations are more likely to attract lawyers and other staff from the ranks of "cause" or "movement" lawyering.⁶² But this conflict is important to address not because of how it makes Division attorneys feel, but because the current approach too often fails to prevent civil-rights violations and undermines the credibility and efficacy of the Division's civil-rights work.

Further, as Henderson's comment regarding the FBI captures, despite DOJ's law-enforcement ethos (the FBI is part of DOJ), DOJ's incentive structure does not always seem to recognize that civil-rights statutes are laws to be enforced. There have been some tremendously dedicated and talented FBI agents who have supported the work of the Civil Rights Division, especially the work of the criminal section (again, because criminal work is incentivized more than civil work). But, regardless of administration or the stated values of DOJ's law-enforcement leaders, there is a tension between the work of the Civil Rights Division and the work of DOJ's law-enforcement components (not only the FBI, but also the Drug Enforcement Agency and Bureau of Alcohol, Tobacco, Firearms and Explosives, among others), that too often results in the "components with guns" advocating for positions and making statements that needlessly undermine the work of the Civil Rights Division.⁶³ Perhaps unsurprisingly, DOJ leadership has a tendency to side with DOJ's law enforcement "components with

61. See Christy E. Lopez, *Responding to the (Dual) Policing Crisis in Ferguson*, in *CRISIS LAWYERING: EFFECTIVE LEGAL ADVOCACY IN EMERGENCY SITUATIONS* (Ray Brescia & Eric Stern eds., NYU Press) (forthcoming 2021).

62. See, e.g., David Luban, *The Moral Complexity of Cause Lawyers Within the State*, 81 *FORDHAM L. REV.* 705, 711-12 (2012) (describing the conflicts experienced by cause lawyers who are in some ways constrained by their position as government actors); Douglas NeJaime, *Cause Lawyers Inside the State*, 81 *FORDHAM L. REV.* 649, 663-64 (2012) (noting the historical tendency of liberal and progressive cause lawyers to join the state when the state shares their priorities and political orientation).

63. See, for example, then-FBI Director James B. Comey's "chill wind" speech in which, shortly after the Civil Rights Division's release of the Ferguson Report, he blamed the debunked "Ferguson effect" for causing a spike in violent crime because officers were fearful of doing their

guns” rather than its law-enforcement components without guns. This is true to some extent regardless of administration, albeit clearly worse in administrations like Trump’s where “law and order” is posited as at odds with civil-rights protection, rather than fundamentally intertwined. I recently noted with chagrin that, just a few years after I wrote a letter on behalf of the Civil Rights Division demanding that Ferguson police officers wear nameplates during protests,⁶⁴ federal law enforcement did not clearly identify themselves as such during the protests in Washington, D.C. following George Floyd’s death.⁶⁵ Yet, I cannot say with certainty that they would have done so had a pro-civil-rights Democrat been in the White House.

Undergirding all of this are political concerns that influence the work of the Division. The level of political interference with the Division’s work during the current Administration is unprecedented and permeates even those aspects of the work traditionally less susceptible to the concerns of the party in power—such as the initiation of federal investigations.⁶⁶ But with every change of administration there is a new slew of “political” that come in, comprising not just

jobs lest they be held accountable for not policing constitutionally. Fiona Ortiz, ‘Chill Wind’ in Policing Fueling National Murder Spike: FBI Head, REUTERS (Oct. 23, 2015, 6:30 PM), <https://www.reuters.com/article/us-usa-police/chill-wind-in-policing-fueling-national-murder-spike-fbi-head-idUSKCN0SH2M420151023> [https://perma.cc/M77P-UCKE]; see also Amanda Woog, *FBI Director James Comey Has a Long History of Ignoring the Truth*, WASH. POST (Nov. 4, 2016, 10:33 AM), <https://www.washingtonpost.com/posteverything/wp/2016/11/04/fbi-director-james-comey-has-a-long-history-of-ignoring-the-truth> [https://perma.cc/XXX7-MN3R] (discussing Comey’s comments about the “Ferguson effect”).

64. Letter from Christy E. Lopez, Deputy Chief., Special Litigation Div., U.S. Dep’t of Justice Civil Rights Div., to Thomas Jackson, Police Chief, City of Ferguson, regarding Ferguson Police Department Investigation: Bracelets (Sept. 26, 2014), <https://s3.amazonaws.com/s3.documentcloud.org/documents/1306217/letter-to-ferguson-police-regarding-bracelets.pdf> [https://perma.cc/3X49-AUE7].
65. Federal officials in the Trump Administration appear to have taken refusal to identify themselves to a new level in Portland, Oregon, reportedly terrifying protestors by dragging them into unmarked vehicles without identifying themselves as law enforcement. See Rachel Brown & Coleman Saunders, *Can Law Enforcement Officers Refuse to Identify Themselves?*, LAWFARE (June 12, 2020, 12:46 PM), <https://www.lawfareblog.com/can-law-enforcement-officers-refuse-identify-themselves> [https://perma.cc/TGN3-NF56]; Philip Bump, *A Dangerous New Factor in an Uneasy Moment: Unidentified Law Enforcement Officers*, WASH. POST (June 4, 2020, 1:50 PM), <https://www.washingtonpost.com/politics/2020/06/03/dangerous-new-factor-an-uneasy-moment-unidentified-law-enforcement-officers> [https://perma.cc/TXW2-2CTD]; Alex Ward, *The Unmarked Federal Agents Arresting People in Portland, Explained*, VOX (July 20, 2020 6:30 PM), <https://www.vox.com/2020/7/20/21328387/portland-protests-unmarked-arrest-trump-wold> [https://perma.cc/J64G-8XUC].
66. For just one example of apparently inappropriate political influence on Civil Rights Division investigations, see Ryan J. Reilly, *Trump DOJ Targets Democratic Governors for COVID-19 Outbreaks in Veterans Homes*, HUFFINGTON POST (Aug. 28, 2020, 5:48 PM), <https://www.huffpost>

the heads of Divisions and Department leadership, but a small army of lower-level positions—generally at the same managerial level or above as any career DOJ employee. These individuals, regardless of administration, can have a decisive impact on the direction, priorities, and ethos of the Department and its Divisions. To be sure, in my experience these political appointees, for the most part, recognize both the potential for, and impropriety of, allowing political concerns to influence much of the Division’s work, including enforcement decisions. This is in stark contrast to current DOJ leadership, which has in many respects put the Department at the service of the President. But no one can seriously argue that politics play no role in what the Division does—regardless of administration. Democrats may no longer cater to segregationist “Dixiecrats,” as they did in Henderson’s time, but they care quite a lot, for example, about what voters in Pennsylvania, Michigan, and Ohio think. Whatever the appropriate level of political influence, it is important to note that this impact plays differently in the Civil Rights Division than in other Divisions, because the Civil Rights Division’s mandate largely involves protecting the rights of people who have been politically marginalized. It thus may be that, even in an administration favorable to civil-rights enforcement, the Division’s inherently political nature will cause it to inevitably gravitate towards the middle ground (at best), when effective rights enforcement requires a more robust response.

III. THE CONTINUING RELEVANCE OF THE CIVIL RIGHTS DIVISION

The Division’s constraints persist even as other avenues for social change—especially racial equality—appear to be opening up. While the Civil Rights Division has been mostly somnolent during the past several years, the rest of the country has experienced an unprecedented awakening to the reality that prejudice on the basis of race, ethnicity, gender, sex, and disability is not only alive and well, but systemic. This has never been clearer than in the response to the police killing of George Floyd in May 2020, which resulted in the most widespread protests in American history.⁶⁷ In the wake of these protests, a majority of Americans now say that “major changes” are needed to make policing better.⁶⁸

.com/entry/coronavirus-doj-democratic-governors-cuomo-whitmer_n_5f46c038c5b6cf66b2b22b75 [https://perma.cc/BMT7-38DV].

67. Lara Putnam, Erica Chenoweth & Jeremy Pressman, *The Floyd Protests Are the Broadest in U.S. History—and Are Spreading to White, Small-Town America*, WASH. POST (June 6, 2020, 2:10 AM), <https://www.washingtonpost.com/politics/2020/06/06/floyd-protests-are-broadest-us-history-are-spreading-white-small-town-america> [https://perma.cc/8NS5-AA8P].

68. Steve Crabtree, *Most Americans Say Policing Needs ‘Major Changes,’* GALLUP (July 22, 2020), <https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx> [https://perma.cc/P44A-9AF9].

This sentiment may fuel the same changes through democratic processes that the Civil Rights Division was created to advance through the enforcement of federal civil-rights laws. Advocates across the country are finding new traction as they push for changes to policing that go much further than merely seeking enforcement of current law.⁶⁹ The United States Conference of Mayors has developed a proposal for broad police reform and racial justice;⁷⁰ state and local legislatures across the country are considering reform agendas;⁷¹ and “progressive” prosecutors are being elected at an accelerating pace.⁷² Most states have downsized their prison populations in recent years, as has the federal government.⁷³ In a shift that was unimaginable to most just a few months ago, Mississippi removed Confederate symbolism from its flag and has committed to designing a new flag that does not glorify a war fought to protect slavery.⁷⁴ Those who lament the “anti-democratic” nature of court-ordered consent decrees to protect rights, along with those advocates and academics who believe that courts

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69. *E.g.*, Justice Reform Res., *How We’re Fighting for Police Reform and Systemic Change in America*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (June 12, 2020), <https://civilrights.org/blog/how-were-fighting-for-police-reform-and-systemic-change-in-america> [https://perma.cc/L773-3JZK]; Kenny Lo, *Assessing the State of Police Reform*, CTR. FOR AM. PROGRESS (July 16, 2020), <https://www.americanprogress.org/issues/criminal-justice/news/2020/07/16/487721/assessing-state-police-reform> [https://perma.cc/F99R-AXTW]; *The Time Has Come to Defund the Police*, MOVEMENT FOR BLACK LIVES (2020), <https://m4bl.org/defund-the-police> [https://perma.cc/77FX-ZPHC]; #8CantWait, CAMPAIGN ZERO, <https://8cantwait.org> [https://perma.cc/Y9FF-834T].
70. *Report on Police Reform and Racial Justice*, U.S. CONF. MAYORS (Aug. 2020), https://www.usmayors.org/wp-content/uploads/2020/08/20.55.USCM_.Police-Reform.Report.MEC_.pdf [https://perma.cc/DE9Z-PH3D].
71. See Weihua Li & Humera Lodhi, *Which States Are Taking on Police Reform After George Floyd?*, MARSHALL PROJECT (June 18, 2020, 3:00 PM), <https://www.themarshallproject.org/2020/06/18/which-states-are-taking-on-police-reform-after-george-floyd> [https://perma.cc/54LH-4CWX].
72. See Daniel Nichanian, *Eleven Prosecutors Form a Progressive Alliance in Virginia*, APPEAL (July 28, 2020), <https://theappeal.org/politicalreport/virginia-prosecutors-form-progressive-alliance> [https://perma.cc/ZB26-YGPH]; *Progressive Prosecutors*, MARSHALL PROJECT (Oct. 1, 2020, 2:08 PM), <https://www.themarshallproject.org/records/8469-progressive-prosecutors> [https://perma.cc/QCF9-LN3K].
73. See Nazgol Ghandnoosh, *U.S. Prison Population Trends: Massive Buildup and Modest Decline*, SENT’G PROJECT (Sept. 2019), <https://www.sentencingproject.org/wp-content/uploads/2019/09/U.S.-Prison-Population-Trends.pdf> [https://perma.cc/CG3Q-SBQ6].
74. Giacomo Bologna, *New Mississippi State Flag: Commission Has Made Its Final Selection, Now It’s Up to Voters*, CLARION LEDGER (Sept. 2, 2020, 11:25 AM), <https://www.clarionledger.com/story/news/politics/2020/09/02/new-mississippi-state-flag-commission-final-design/3455475001> [https://perma.cc/Q7VB-HS36]; Rick Rojas, *Mississippi Governor Signs Law to Remove Flag with Confederate Emblem*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/06/30/us/mississippi-flag.html> [https://perma.cc/VQT7-3UBN].

do not do a very good job of protecting rights, can find common cause to welcome this apparent opening to advocate successfully for fair treatment through democratic governance.⁷⁵

It may be tempting to decide that with this public shift, and given the Civil Rights Division's recent history and institutional limitations, the game is no longer worth the candle. But this is not the lesson we should draw. Rather, the events we have experienced and watched unfold over the past several years make clear how important the Civil Rights Division is and how we must take steps to make it work better, independently of the party in power.

Perhaps most fundamentally, the Trump Administration's attacks on basic tenets of democracy themselves underscore the import of the Civil Rights Division. This Administration has caused many to recognize that our nation's hold on democracy is more tenuous than many would have believed just a few years ago.⁷⁶ We see more than ever before that we need institutions—government institutions—charged with protecting the framework that supports the tenets of democracy: the ability to cast your vote; to be free from state violence meted out on the basis of race or other characteristics; to fight against de facto second-class citizenry in housing, education, and jobs; and to be given a fair chance regardless of disability. It matters that we, the people, have a government that created and sustained a Civil Rights Division, however imperfect. It matters that lawyers in this country who work to vindicate fundamental civil and human rights can get a good government salary, and do not get disappeared as they do in countries that perhaps are not as different from ours as we have always presumed. We should not give up on the ideal of government protection of fundamental rights. We should not allow this Administration to erase this value as it has literally written out the Civil Rights Division from the history of the Department of Justice. There is not even a semblance of justice without a Civil Rights Division.

Nor does the current public focus and relative support for equal treatment diminish the need for a Civil Rights Division. It is true progress that the majority of the populace, in many places, has woken up to the fact that entrenched racism and other forms of discrimination have been causing harm to people who are Black, Latine, living with disabilities, members of minority religions, and other

75. See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1827 (2015) (arguing that in a democracy, all police practices should be legislatively authorized, subject to public rulemaking, or adopted and evaluated through some alternative process that permits democratic input).

76. See, e.g., Editorial Bd., Opinion, *A Second Trump Term Might Injure the Democratic Experiment Beyond Recovery*, WASH. POST (Aug. 21, 2020), <https://www.washingtonpost.com/opinions/2020/08/21/second-trump-term-might-injure-democratic-experiment-beyond-recovery/> [<https://perma.cc/GPV3-9PBU>].

groups traditionally protected by civil-rights statutes.⁷⁷ It is inspiring that this makes achievements through the majoritarian-driven legislative branches at the state, local and federal level possible. It is important to recognize, however, that this awakening is due in part to the work undertaken and enabled by the Civil Rights Division. The Ferguson Report, for example, played a large role in spearheading efforts across the nation to reduce the harm meted out by abusive fines and fees, and has spilled over into bail-reform efforts and a continuing wave of electing progressive prosecutors. The Division's illuminating work on policing more generally in places beyond Ferguson, like Baltimore, New Orleans and Chicago, helped lay the groundwork for the mass awakening after George Floyd was killed.

Further, it is clear that this mass awakening extends to only a fraction of the areas protected by federal civil-rights statutes, is geographically quite limited, and in all likelihood will fade at least somewhat over time. For many people, especially persons who are incarcerated or formerly incarcerated, and in most parts of this country, the founding purpose of the Civil Rights Division – to ensure that the rights of people who are politically marginalized are protected nonetheless – remains as salient today as it was in 1957.⁷⁸ We can expect that to be the case for the foreseeable future.

77. See Anna North, *White Americans Are Finally Talking About Racism. Will It Translate Into Action?*, VOX (June 11, 2020, 2:00 PM EDT), <https://www.vox.com/2020/6/11/21286642/george-floyd-protests-white-people-police-racism> [https://perma.cc/KD63-ZRKQ]; David Smith, *Nine out of 10 Americans Say Racism and Police Brutality Are Problems, Poll Finds*, GUARDIAN (July 8, 2020, 6:00 EDT), <https://www.theguardian.com/us-news/2020/jul/08/americans-racism-police-brutality-problems-poll> [https://perma.cc/M3HL-5TP9].

78. The Special Litigation Section of the Civil Rights Division enforces the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. §§ 1997-1997j (2018), which gives the Department of Justice the authority to investigate and remedy patterns of unconstitutional conditions for confined individuals, including those in prisons and jails. While civil-rights efforts related to prisons and jails have shifted (appropriately, in my view) to efforts to decarcerate and reduce the devastating effects of mass incarceration, the exponential increase in incarceration from the 1980s through the first decade of this century has resulted in millions of people behind bars, often in horrifying conditions that violate the Constitution and fundamental tenets of human dignity. See, e.g., Kristine Phillips & Melissa Brown, “Chaos, Confusion and Corruption”: *Violence Persists in Alabama’s Prisons Despite Federal Investigation*, USA TODAY (Mar. 9, 2020, 11:30 AM EDT), <https://www.usatoday.com/in-depth/news/politics/2020/03/08/alabama-prisons-remain-deadly-year-after-dojs-civil-rights-report/4644789002> [https://perma.cc/754L-TBGD]; Press Release, Dep’t of Justice, *Justice Department Alleges Conditions in Alabama Men’s Prisons Violate the Constitution* (Apr. 3, 2019), <https://www.justice.gov/opa/pr/justice-department-alleges-conditions-alabama-mens-prisons-violate-constitution> [https://perma.cc/R4WF-GMAU]; *Criminal Justice Facts: Our Criminal Justice System Today Is a Bicycle Stuck in One Gear*, SENT’G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts> [https://perma.cc/C48X-RFRM]. Further, the ability of private plaintiffs, including incarcerated persons, to seek relief on their own behalf has been drastically reduced over the last twenty-five years, primarily as a result of the Prison

We need the Division to return to doing the work of enforcing civil-rights laws. There is a life-or-death difference between a world in which civil-rights laws get enforced and one in which they do not. One only has to look at how Trump has so quickly denigrated our institutions by being allowed to be above the law⁷⁹ – or look at the outrage being expressed in the streets in cities across the country⁸⁰ – to see the impact of a lack of accountability for rights violations. Enforcement of civil-rights laws prevents harm, protects people, and makes our stated value of equal protection real. Advocates,⁸¹ educators,⁸² journalists,⁸³ legislators,⁸⁴ and judges,⁸⁵ are right to demand that the Civil Rights Division do its law-enforcement job.

Litigation Reform Act (PLRA), 42 U.S.C. § 1997e (2018). See *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUM. RTS. WATCH (June 15, 2019), <https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states> [<https://perma.cc/MAQ7-9AVQ>]. Even as we seek structural change to prevent people from becoming future victims of mass incarceration, we must use CRIPA to mitigate the harm perpetrated against those our country has already victimized.

79. See *supra* Part I.

80. See *supra* pp. 396-397.

81. E.g., Letter from The Leadership Conference on Civil and Human Rights, to William P. Barr, Att’y Gen., Dep’t of Justice & Eric Dreiband, Assistant Att’y for the Civil Rights Div., Dep’t of Justice (May 14, 2020), <https://civilrights.org/resource/doj-must-open-a-full-and-thorough-civil-rights-investigation-into-the-horrific-killing-of-ahmaud-arbery> [<https://perma.cc/EK9V-HMFH>].

82. E.g., Sari Horwitz, *More than 1,100 Law School Professors Nationwide Oppose Sessions’s Nomination as Attorney General*, WASH. POST (Jan. 3, 2017), https://www.washingtonpost.com/world/national-security/more-than-1100-law-school-professors-nationwide-oppose-sessionss-nomination-as-attorney-general/2017/01/03/dbf55750-d1cc-11e6-a783-cd3fa95of2fd_story.html [<https://perma.cc/RKY3-8VY3>].

83. E.g., Rob Arthur, *Trump’s Justice Department Isn’t Enforcing Civil Rights: A Vice News Analysis of Cases and Investigations Shows Enforcement Is at Its Lowest in Decades*, VICE NEWS (Feb. 23, 2018, 12:45 PM), https://www.vice.com/en_us/article/wj44y4/trumps-justice-department-isnt-enforcing-civil-rights [<https://perma.cc/NU5A-C5HL>]; Radley Balko, *Opinion, Consent Decrees Have a Mixed Record of Success, But Sessions’s Plan to End Them Is Still Worrisome*, WASH. POST (Apr. 4, 2017, 6:43 PM EDT), <https://www.washingtonpost.com/news/the-watch/wp/2017/04/04/consent-decrees-have-a-mixed-record-of-success-but-sessionss-plan-to-end-them-is-still-worrisome> [<https://perma.cc/XHL9-ZX2D>].

84. E.g., Kevin Featherly, *Republican Senators Want DOJ Police Inquiry*, MINN. LAW. (June 30, 2020), <https://minnlawyer.com/2020/06/30/republican-senators-want-doj-police-inquiry> [<https://perma.cc/48KC-YD5S>]; Press Release, House Committee on the Judiciary, House Judiciary Committee Democrats Demand DOJ Open Investigations in Response to Recent Murders of Ahmaud Arbery, Breonna Taylor, & George Floyd; Pledge Additional Oversight and Legislation (May 28, 2020), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2972> [<https://perma.cc/CCR5-J6ZS>].

85. E.g., Hermann & Jouvenal, *supra* note 14; *LAPD Consent Decree Renewed*, L.A. DAILY NEWS (Aug. 29, 2017, 3:06 AM), <https://www.dailynews.com/2006/05/16/lapd-consent-decree-renewed> [<https://perma.cc/ZDM3-YL53>].

IV. MAKING THE CIVIL RIGHTS DIVISION BETTER

The Civil Rights Division thus remains relevant and necessary; it may in fact be more relevant and necessary than ever. But this does not mean all will be well once we get people who actually believe in civil rights back in power. Further, we must seek to do more than simply undo the harms of the Trump Administration on the Division, although this, as many recognize, is an essential part of the work to be done.⁸⁶ The Division's shortcomings, evident in Henderson's era, have persisted over time and are part of the reason that the Civil Rights Division has not had as broad an impact as it could have, or done more to dismantle our country's de facto caste system. These shortcomings, to some extent, are a feature of our democracy and will continue to persist, albeit manifest differently over time. But they can be mitigated and, to some extent overcome, if we are willing to think differently about the Civil Rights Division and put in place different structures and practices accordingly.

Perhaps counter-intuitively, thinking differently about the Civil Rights Division requires that we first accept the Division for what it is: a law-enforcement agency. The Division is charged with enforcing the law. It cannot make new laws or circumvent the current ones. This can be deeply unsatisfying as a Division attorney when it is clear that the current law is not enough to achieve equity or prevent harm. It can be infuriating to advocates to see that an institution as seemingly powerful as the Department of Justice is unable to sufficiently protect people. It can be devastating to communities suffering generations of harm when the Department of Justice cannot do anything to address what is clearly wrong and unjust because the law has fallen short.

When we recognize that the Division is a law-enforcement agency constrained to enforcing the law as it exists, we can more clearly see that the Division was not meant to be, is not, and likely never will be, the sole or even primary driver of the dramatic social change necessary to become the country we need to be. As should be obvious – but must nevertheless be stated because of assertions from some on the right⁸⁷ – the Civil Rights Division is not and never has been a radical agency. The Division is nothing if not pathologically moderate.

Accepting this fundamental institutional trait of the Division allows civil-rights advocates to see that we should not, even in a favorable administration,

86. See, e.g., *Restoring Integrity and Independence at the U.S. Justice Department*, CTR. FOR AM. PROGRESS (Aug. 13, 2020, 9:01 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/08/13/489387/restoring-integrity-independence-u-s-justice-department> [<https://perma.cc/87S5-9AVF>].

87. See, e.g., John Fund, *The DOJ's Radical Civil Rights Division*, NAT'L REV. (Nov. 18, 2013, 9:00 AM), <https://www.nationalreview.com/2013/11/dojs-radical-civil-rights-division-john-fund> [<https://perma.cc/U882-P43P>].

put all our social-change eggs into the DOJ basket. We should instead build up a panoply of social-change drivers at all levels of government that rely on a variety of approaches: legal, educational, legislative, and direct-action efforts. For its part, DOJ, mindful of its own limitations, should be careful to not dismiss or work at cross-purposes with on-the-ground efforts that are fueled by the same values, and working towards the same ends, as the Division. The Civil Rights Division will be better if DOJ recognizes and respects that it will take advocates from all walks, employing a broad range of tools, to realize the objectives the Division has long articulated: a country “where talent trumps color and opportunity knocks on all doors[;] [w]here you cannot predict the quality of a local school system by the race or ethnicity of the school’s population[;] [w]here access is a right, not a privilege[;] [w]here difference is both tolerated and valued.”⁸⁸ And where surviving a police encounter does not depend on your race.

The Division’s law-enforcement nature does not mean it must delegate the work of transformation entirely to others. Indeed, the Division’s law-enforcement efforts can serve to drive deeper social change in interesting and important ways.

The past few years, for example, have underscored the importance, and surprising elusiveness, of a shared set of facts. Precisely because the Civil Rights Division strives to stay separate and neutral, its work, including the findings reports documenting the results of investigations, has a unique potential to create a shared understanding of reality upon which to build coalitions to change laws and social structures. The work of the Division traditionally has not only been more likely to be broadly disseminated than the work of many private or local entities, it has also been more broadly recognized as objective. The Division’s position gives its articulation of facts a certain heft, and it may be more persuasive to groups and individuals less inclined to accept the seriousness of civil-rights violations when articulated by advocacy groups.

Thelton Henderson was right to feel frustrated by the sense that he was being reduced to a “notetaker of atrocities”⁸⁹: bearing witness should never be the end game of the Division’s work. But this should not detract from the intrinsic and irreplaceable value of the Division’s ability to serve as a reliable, objective purveyor of facts that can affirm for a broader audience the legitimacy of longstanding grievances and the need for change. This was the case with the Ferguson Report, which has been called “one of the defining cultural artifacts of our time,”⁹⁰ and is broadly viewed as a driver of nationwide efforts to reform

88. *Long Road to Justice: The Civil Rights Division at 50*, *supra* note 42, at 40.

89. See KUHN, *supra* note 5, at 48.

90. Paul Butler, *Equal Protection and White Supremacy*, 112 NW. U. L. REV. 1457, 1463 (2018).

finest and fees in the United States.⁹¹ As I have written elsewhere, being thoughtful and intentional when selecting and framing findings can increase the impact of the Division's work and support the efforts of others working towards the same civil rights objectives.⁹²

Just as Thelton Henderson felt pulled in two directions – between his Division enforcement agenda and a desire to address the immediate needs of civil-rights activists – Civil Rights Division officials in recent times have felt conflicted between whether to focus on the civil-rights investigation that brings them into a community, or the immediate need for assistance that greets them when they arrive. This dilemma could be mitigated if DOJ made better use of a component that historically has been underused egregiously, despite its potential to significantly advance civil rights and save lives: DOJ's Community Relations Service (CRS). As noted above, from the time of Thelton Henderson to my time over fifty years later in Ferguson, the inability of the Civil Rights Division to quell conflict in real time has resulted in harm and undermined the legitimacy of the Division's work. As it turns out, Congress recognized in 1964 a need for a federal agency to do this work. DOJ's Community Relations Service is, according to its website, meant to be the Department of Justice's "[p]eacemaker" for "community conflicts [and] . . . alleged hate crimes arising from differences of race, color, national origin, gender, gender identity, sexual orientation, religion, and disability."⁹³ CRS fulfills its "peacemaker" role by

work[ing] with all parties, including State and local units of government, private and public organizations, civil rights groups, and local community leaders, to uncover the underlying interests of all of those involved in the conflict and facilitates the development of viable, mutual understandings and solutions to the community's challenges. In addition, CRS assists communities in developing local mechanisms and community capacity to prevent tension and violent hate crimes from occurring in the future. All CRS services are provided free of charge to the communities and are confidential. CRS works in all 50 states and the U.S. territories, and in communities large and small, rural, urban and suburban.⁹⁴

91. *Investigation of the Ferguson Police Department*, FINES & FEES JUST. CTR (Mar. 1, 2015), <https://finesandfeesjusticecenter.org/articles/investigation-ferguson-police-department> [<https://perma.cc/699Y-AM9L>].

92. See Lopez, *supra* note 61.

93. Cmty. Relations Serv., *About CRS*, U.S. DEP'T JUST., <https://www.justice.gov/crs/about> [<https://perma.cc/B9L6-DGZ3>]. Tellingly, the current Community Relations Service website no longer has this information or that noted *infra*.

94. *Id.*

Since its creation in 1964, CRS has “worked to rectify civil rights disputes and respond to conflicts that poison communities and prohibit society from reaching its full potential.”⁹⁵ CRS was created out of a recognition that litigation and other law enforcement tools are not enough to advance and sustain civil-rights protections in this country. CRS respects the fact that communities that have experienced generations of civil-rights violations have unique wisdom and insights that should be heeded so that accountability measures and remedies are sustainable and effective.⁹⁶

CRS thus has the potential, and the mandate, to play a role that, as the past summer demonstrated once again, is still desperately needed. CRS, rather than militarized federal law enforcement, is the agency the federal government *should* be sending into communities wracked by conflict stemming from civil-rights abuses. These conflagrations are happening across the country, and have happened intermittently over the past few decades. Yet CRS largely has been invisible – not withstanding its mandate to “assist[] communities in developing local mechanisms and community capacity to prevent tension and violent hate crimes.”⁹⁷ CRS was deployed to respond to protests in Sanford, Florida, after Trayvon Martin was killed; to Maricopa County, Arizona, where Sheriff Joe Arpaio’s police department harassed Latine residents for years; and to Ferguson, Missouri, in the summer of 2014 after Michael Brown was killed.⁹⁸ However, it was not resourced adequately to do necessary community building and to respond as robustly as possible when broad-scale protests arise. Further, CRS should be resourced and deployed to build up relationships and systems *before* communities erupt in conflict. At a time when activists and law-enforcement leaders⁹⁹ alike are recognizing that we look to law enforcement for services for

95. *Id.*

96. *See id.*

97. *Id.*

98. *See, e.g.,* Audra D.S. Burch, *Federal Mediator Thomas Battles Serves as Peacemaker in Sanford*, MIAMI HERALD (July 8, 2013, 6:23 PM), <https://www.miamiherald.com/news/state/florida/trayvon-martin/article1953005.html> [<https://perma.cc/S2DK-93B7>] (Sanford protests); Paul Giblin, *Mesa Sweep Heats Up Arpaio-Gascón Feud*, E. VALLEY TRIB. (Oct. 7, 2011), https://www.eastvalleytribune.com/news/ mesa-sweep-heats-up-arpaio-gasc-n-feud/article_f6e4604b-3e62-52d5-bf96-e48e88ca12c9.html [<https://perma.cc/MUS6-KCXL>] (Maricopa County protests); David Hunn, *The Justice Department’s Soft Side: How One Federal Agency Hopes to Change Ferguson*, ST. LOUIS POST-DISPATCH (Oct. 12, 2014), https://www.stltoday.com/news/local/govt-and-politics/the-justice-departments-soft-side-how-one-federal-agency-hopes-to-change-ferguson/article_591a2e64-7dd1-5008-b300-0ab9ad8b9168.html [<https://perma.cc/4V39-BBWW>] (Ferguson protests).

99. *See, e.g., Police Use of Force and Community Relations: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Steven R. Casstevens, President, Int’l Ass’n of Chiefs

which we should be looking to social-services professionals, we should recognize that CRS can play a unique and critical role in ensuring that community members are at the table identifying local priorities and creating budgets that reimagine a real and inclusive vision of public safety.

Unfortunately, the Trump Administration has gone in the opposite direction. Indeed, through the President's budget, the Trump Administration has repeatedly attempted to effectively end CRS.¹⁰⁰ But even in favorable administrations, CRS has been under-resourced and overlooked. This is no doubt due in part to the law and litigation emphasis that has undergirded DOJ's civil-rights work from the outset. We should not only reverse the Trump Administration trend of dismantling CRS; we should build up and energize CRS so that it can, at last, fulfill the role we need it to for our country.

Ancillary to its law-enforcement function, the Division has responsibilities that could have greater impact if they were not so frequently overlooked or minimized. As one might expect, the order implementing the Civil Rights Act charged the Division with enforcing all federal statutes affecting civil rights. Less well known is that this order also charges the Division with "conferring with individuals and groups who call upon the Department in connection with civil rights matters, advising such individuals and groups thereon, and initiating appropriate action."¹⁰¹ This charge directs the Division to undertake the sort of collaborative civil-rights efforts that hostile administrations generally discourage or outright prohibit. In this respect, the next administration should build on and expand the efforts of the Civil Rights Division from 2008-2016 to facilitate the exchange of ideas on thorny civil-rights issues and develop, in collaboration with all stakeholders, civil-rights guidance to help public and private entities navigate the thicket and better protect the civil rights of their constituents. Examples of this include the Division's guidance on the protection of individuals with limited

of Police), <https://www.judiciary.senate.gov/imo/media/doc/Casstevens%20Testimony.pdf> [<https://perma.cc/G698-YY82>].

100. Civil Rights Div., *General Legal Activities*, U.S. DEP'T JUST., <https://www.justice.gov/jmd/page/file/1142376/download> [<https://perma.cc/ZZN4-BZGL>] ("[The Civil Rights Division's] FY 2020 budget request includes absorbing the functions of the Community Relations Service (CRS) with 15 positions, including 2 attorneys."); see also U.S. COMM'N ON CIVIL RIGHTS, *supra* note 4, at 84; A.C. Thompson & Robert Faturechi, *How a Key Federal Civil Rights Agency Was Sidelined as Historic Protests Erupted*, PROPUBLICA (July 9, 2020, 11:15 AM EDT), <https://www.propublica.org/article/how-a-key-federal-civil-rights-agency-was-sidelined-as-historic-protests-erupted> [<https://perma.cc/TQ93-7CY5>] ("President Donald Trump, in his budget proposals, has repeatedly recommended eliminating the agency.").

101. ATT'Y GEN, ORDER NO. 155-57, ESTABLISHMENT OF THE CIVIL RIGHTS DIVISION IN THE DEPARTMENT OF JUSTICE (Dec. 9, 1957), <https://www.justice.gov/crt/page/file/918916/download> [<https://perma.cc/HL4R-JSKZ>].

English proficiency under Title VI of the Civil Rights Act of 1964,¹⁰² and on local enforcement of fines and fees.¹⁰³ Attorney General Jeff Sessions rescinded guidance on these topics, among many others, during the time he led DOJ.¹⁰⁴ The next administration should reconstruct this work as appropriate and thoughtfully develop an agenda for covering the civil-rights topics we as a nation most need to address.

As importantly, other lesser-known mandates within this Order give the Division the responsibility of informing and influencing DOJ positions on civil-rights matters. The Order requires that the Division “[c]oordinate[e] within the Department of Justice on all matters affecting civil rights,” and “[r]esearch . . . civil rights matters and . . . mak[e] recommendations to the Attorney General as to proposed policies and legislation therefor.”¹⁰⁵ While the Division’s Federal Compliance and Policy Sections, as well as its “front office,” do some of this work, the Division has often been ignored, and sometimes deliberately circumvented, when questions that raise civil-rights concerns (or that should raise civil-rights concerns) arise in other Divisions or components, including DOJ’s “components with guns.” With haphazard exceptions,¹⁰⁶ the Division is routinely ignored in the development or execution of programs or decisions with significant civil-rights implications. Notwithstanding the origin story recounted above, the Division should not be confined or relegated to placating mainstream civil-rights organizations. For one thing, those organizations, and the constituencies they represent, have evolved so that they (rightfully) expect more from their government. More fundamentally, it is important for the Division to inform the Department’s larger law-enforcement conversations – not

102. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, COMMONLY ASKED QUESTIONS AND ANSWERS REGARDING THE PROTECTION OF LIMITED ENGLISH PROFICIENT (LEP) INDIVIDUALS UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 AND TITLE VI REGULATIONS (Apr. 2011), <https://www.justice.gov/file/1252441/download> [<https://perma.cc/6WDV-TDZ8>].

103. Letter from Vanita Gupta, Principal Deputy Assistant Att’y Gen., DOJ Civil Rights Div. & Lisa Foster, Dir., DOJ Office for Access to Justice (March 14, 2016), <https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf> [<https://perma.cc/XVW2-QLA6>].

104. *Attorney General Jeff Sessions Rescinds 24 Guidance Documents*, U.S. DEP’T JUST. (July 3, 2018), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents> [<https://perma.cc/CUR3-3HF6>]; Press Release, U.S. Dep’t of Justice, Attorney General Jeff Sessions Rescinds 25 Guidance Documents (Dec. 21, 2017), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents> [<https://perma.cc/F4A8-ZBKU>].

105. ATT’Y GEN., ORDER NO. 155-57, *supra* note 101.

106. One such example is the Division’s involvement in the DOJ working group that revised criteria for providing surplus military equipment to local law-enforcement agencies through the “1033” program. 10 U.S.C. § 2576 (2018).

to take over the work, but to ensure that a civil-rights ethos is central to the Department's work, as it should be to any properly functioning government entity. Relatedly, the Division should serve a coordinating function for the civil-rights units of all federal government entities, as set out in a recent report from the Center for American Progress.¹⁰⁷

As the last few years have underscored, the Civil Rights Division's vulnerability to politics makes it a less reliable and at times mercurial protector of rights. In the coming years the Division must work to ensure that its enforcement work is apolitical—regardless of administration. This does not conflict with demanding that the Division's enforcement work be as robust and impactful as possible. Civil-rights enforcement is not an item on the Democratic party platform—it is a statutorily mandated responsibility of the federal government. Division and Department officials, whether career or political, and at whatever level, should recognize the potential for political concerns to influence enforcement decisions, and should understand that this influence is not benign or inconsequential just because one genuinely cares about civil rights. Allowing political drivers to take hold undermines the legitimacy, integrity, and efficacy of the Division, both in the immediate and long term. This, of course, means not allowing political affiliation to play any role in selecting the target of a Division enforcement action. But it requires more than abiding by this obvious ethical consideration. It requires also that Civil Rights Division officials focus on the more fundamental importance of their work to the well-functioning of our democracy, and that even political appointees be circumspect in letting administration policies and priorities influence direction and decision making in the Division. Former leaders and chroniclers of the Division have condoned striving to comport Division work to the proclivities of the administration in the White House.¹⁰⁸ In my view, however, over the past several administrations, overindulgence of administration priorities has become normalized in the Division. While these priorities have import and should be considered, Division leaders will need in the future to redouble efforts to ensure the work is not overly influenced by politics.

Finally, one particularly powerful way to ensure that the Division's potential is more fully realized would be to confirm a person with a strong civil-rights

107. Criminal Justice Team, *Restoring Integrity and Independence at the U.S. Justice Department*, CTR. FOR AM. PROGRESS (Aug. 13, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/08/13/489387/restoring-integrity-independence-u-s-justice-department> [<https://perma.cc/9B3D-Z3GV>] (recommending that DOJ take a “whole-of-government approach to civil rights”).

108. LANDSBERG, *supra* note 11, at 157 n.10 (urging political appointees to ensure that civil-service lawyers enforce the law in a manner consistent with administration policies and quoting Burke Marshall advocating for the Division following administration policy direction).

background to a senior-level position in the Department, such as Attorney General, Deputy Attorney General, or Associate Attorney General. This would send the message that protecting and promoting civil rights is the responsibility of every component of the Department of Justice, and make it more likely that DOJ's Civil Rights Division has a meaningful voice in that effort. It likely would serve to incentivize efforts to support civil-rights work and aim, among DOJ's law-enforcement components and elsewhere. Regardless of whether a person with civil-rights enforcement experience is appointed to a high-level position in the Department, DOJ and civil rights advocates can and should look at concrete ways to incentivize support for civil-rights work among DOJ's investigative components outside the Civil Rights Division.

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Yes, the Civil Rights Division is a conundrum, but no more so than the rest of our country. Unless we are ready to give up on the latter, we should not give up on the former. We have learned a lot over the years about the role the Civil Rights Division can play in bending the arc of the universe towards justice.¹⁰⁹ We have learned something about where the Division can be most effective — and where to leave the work to others. We have learned to lead, not be dragged along. We have learned how to support, rather than undermine or ignore, civil-rights allies. Now is the time to build on these lessons and put them to work like never before. Justice depends on it.

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¹⁰⁹. Martin Luther King Jr. often paraphrased a quote from nineteenth-century theologian Theodore Parker: “The arc of the moral universe is long, but it bends toward justice.” *All Things Considered: Theodore Parker and the ‘Moral Universe,’* NAT’L PUB. RADIO (Sept. 2, 2010, 3:00 PM ET), <https://www.npr.org/templates/story/story.php?storyId=129609461> [<https://perma.cc/VA2C-4YZM>]. Former Attorney General Eric Holder has noted more than once that the arc bends toward justice, but it only bends toward justice because people pull it towards justice; it does not happen on its own. See *Eric Holder Discusses Advancing Equity and Civil Rights in the Trump Era at San Francisco Policy Event*, RABEN GROUP (Oct. 20, 2017), <https://rabengroup.com/2017/10/eric-holder-discusses-advancing-equity-civil-rights-trump-era-san-francisco-policy-event> [<https://perma.cc/3KGQ-E589>]; *The Stakes: A Conversation with Eric Holder, Jr.*, WNYC STUDIOS (Apr. 30, 2019), <https://www.wnycstudios.org/podcasts/the-stakes/episodes/the-stakes-pulling-arc-justice-eric-holder> [<https://perma.cc/AZP2-PSHM>].

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