Progress Toward Change Civil Rights Priorities for the Obama Administration

By Barbara R. Arnwine

This year marks the 45th anniversary of the historic Voting Rights Act of 1965. The legislation's significance in the long-standing struggle and sacrifice by civil and voting rights activists was amplified by the election of Barack Obama as the 44th president of the United States. And while great strides have been made in achieving "a more perfect union"—a phrase in the Preamble to the U.S. Constitution and the title of a speech by Obama in March 2008—key civil rights issues remain.

This article provides an overview by the Lawyers' Committee for Civil Rights Under Law in Washington, D.C. (hereinafter referred to as the Committee), of initiatives the administration and 111th Congress already have taken and, in the view of the Committee, should expand on toward ensuring equality, justice, and access

for all Americans. The article also offers the Committee's input for shaping the administration's civil rights agenda.

DOJ's Civil Rights Division Restored

President Barack Obama has taken initial steps in restoring the Civil Rights Division of the Department of Justice (DOJ), the federal government's primary prosecutor of civil rights cases. The well-publicized politicization of both personnel actions and substantive decision making of the DOJ's Civil Rights Division under the Bush administration has compromised the department's credibility with both the public and the courts.

U.S. Attorney General Eric H. Holder Ir., the first African American

has identified fair and vigorous civil rights enforcement as a top priority. The report of the Office of the Inspector General and the Office of Professional Responsibility concerning the Civil Rights Division's hiring and internal operations was released last summer, and steps have been taken by the DOI to address problems revealed in that report. The primary problem cited was the improper consideration of political affiliation in decisions regarding the hiring of attorneys and immigration judges. Holder has pub-

licly stated his commitment to fighting

racial discrimination and has engaged

in meaningful dialogue with the civil

rights community.

appointed,

Voting Rights

Voter registration remains the single greatest barrier to enfranchisement; according to the Census Bureau, approximately 25 percent of the country's eligible voters are not registered. Traditionally disenfranchised groups remain targets of deceptive practices and intimidation as they attempt to vote. Although many deceptive practices have been documented, the DOJ has testified before Congress that these deceptive practices are not actionable under federal law. The president has addressed these practices, such as in 2007 when he, along with Sen. Charles Schumer (D-NY), introduced S. 453, the Deceptive Practices and Voter Intimidation Prevention Act. The legislation was approved by the Senate Judiciary Committee but was not considered by the full Senate before the end of the 110th Congress. The House passed companion bill H.R. 1253 in 2007 and has introduced similar legislation in 2009, H.R. 97.

To promote the fundamental right to vote, the Committee has urged Congress to pass voter registration modernization and antideceptive practice legislation. In the Committee's view, voter registration modernization legislation should include

- an affirmative duty of state governments to register all eligible citizens,
- permanent registration within states, and
- Election Day registration.

Educational Opportunity and Parental Empowerment

Guidance is needed from the Department of Education in a number of areas involving educational opportunity, and the Committee has urged the administration to take the lead. For example, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the U.S. Supreme Court affirmed the promotion of educational diversity by permitting post-secondary schools to consider race as one factor among several in a careful and

individual assessment of each applicant. The Department of Education has not yet issued much needed guidance to post-secondary institutions on implementing diversity measures in compliance with this act. Similarly, in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), the Court limited, but did not eliminate, voluntary desegregation programs at the K–12 level.

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The Committee believes that it is also critical to promote the importance of parental involvement in curtailing the huge dropout rate for Latino and African American youth and in narrowing the achievement gap. The Committee has thus established a Parental Empowerment Program, designed to promote parental responsibility and quality education by focusing on the president's theme that "programs alone can't replace parents."

Employment

In January, civil rights advocates lauded Obama's first legislative matter as president—passage of the Lilly Ledbetter Fair Pay Act (Pub. L. No. 111-2), which protects the right of employees to challenge discriminatory pay. Several bills currently before the Congress would build upon this success by strengthening the remedies available to those who face discrimination in the workplace.

The Paycheck Fairness Act (S. 182), introduced in January, would provide a much-needed update of the Equal Pay Act of 1963 (Pub. L. No. 88-38) and enhance the penalties for pay discrimination, clarify the affirmative defenses to claims of pay discrimination, and prohibit employers from retaliating against workers who inquire about employers' wage practices.

The Arbitration Fairness Act of 2009 (H.R. 1020) would protect the right of employees to have their claims of employment discrimination heard in court. The Act also would prohibit employers from subjecting workers to mandatory, predispute arbitration clauses that are often hidden in the boilerplate of employment applications. Employees must have the right to make an informed and free choice to challenge discrimination either in court or in an arbitral forum.

Advocates are anxiously awaiting the introduction of the Civil Rights Act of 2009, an omnibus bill that would provide a number of critical fixes. In part, this legislation would strengthen the remedies available to victims of discrimination and their ability to recover litigation costs and fees.

Housing and Community Development

Several key events have occurred regarding the Obama administration's fair housing and fair lending agenda.

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968 (Pub. L. No. 90-284)) requires all federal agencies administering and funding federal housing programs to take actions that affirmatively further fair housing. Pursuant to that Act, the Department of Housing and Urban Development (HUD) recently rejected a certification by Westchester County, New York, that its consolidated fair housing plan would affirmatively further fair housing. Westchester County and local communities that are subgrantees of the funds were faced with losing an estimated \$15 million to \$20 million in federal housing assistance as a result of HUD's rejection of this certification. HUD's decision to withhold funds followed a February 24, 2009, decision in United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County (No. 06 Civ. 2860, 2009 WL 455269 (S.D.N.Y., Feb. 24, 2009)) holding that Westchester had previously falsely certified to HUD that it would affirmatively further fair housing. Since this decision, Westchester has amended its plan to bring it into compliance, and HUD has approved it. This was the first such enforcement action by HUD in memory and is consistent with recommendations made in December 2008 by the National Commission on Fair Housing and Equal Opportunity, which was cosponsored by the Committee and other national civil and housing rights groups.

Another favorable development was the April 6, 2009, announcement of the formation of a multi-agency task force that includes the DOJ, HUD, Department of the Treasury, Federal Trade Commission, and state attorneys general. The task force will target mortgage loan modification fraud and foreclosure rescue scams that threaten to hurt U.S. homeowners and prevent them from obtaining help during the current economic downturn. As part of this announcement, Attorney General Holder discussed the DOJ's focus on investigating and prosecuting lenders that discriminate against borrowers based on race, national origin, or other prohibited factors.

The Obama administration and Congress, however, failed to pass legislation to amend bankruptcy laws enabling struggling homeowners to have their mortgage loans modified by bankruptcy courts. This was a high priority of the administration before and after it took office and one of the Committee's major recommendations. Although it is significant that President Obama signed the Helping Families Save Their Homes Act (Pub. L. No. 111–22) and the Fraud Enforcement and Recovery Act (Pub.

L. No. 111-21) into law on May 20, the foreclosure crisis continues at alarming levels. According to RealtyTrac, Inc., foreclosures were up 32 percent nationally in April compared to the same month in 2008. More than 3.1 million foreclosure filings were reported on U.S. properties in 2008. African American and Latino borrowers have been more likely to receive subprime loans than white borrowers, regardless of creditworthiness. Minority borrowers with prime credit ratings were frequently steered into subprime loans.

The Committee
has identified
actions for Congress
and the president
that are central to
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For these reasons, enforcement of Section 3 of the Housing and Urban Development Act of 1968 (Pub. L. No. 90-448), as amended, is critical. That Act was passed to ensure that economic opportunities for employment and contracting generated by certain HUD-assisted activity be directed to low-income persons and disadvantaged business concerns. This law places an affirmative responsibility on government and private recipients of federal financial housing and community development assistance to implement a plan of action to train, hire, and contract with residents and businesses in lower-income communities targeted for redevelopment. It is estimated that \$21 billion in federal funds appropriated through the recent stimulus bill and the fiscal year (FY) 2010 budget process carries an affirmative Section 3 compliance obligation.

The law requires that, to the greatest extent feasible, at least 30 percent of new employment and contracting opportunities generated by this federal housing and community development assistance be targeted to low-income recipients of federal housing subsidies residing in the project to be redeveloped or to low- and very-low-income residents in the affected neighborhood. 24 C.F.R. § 135.5. The Committee estimates that 60,000 to 100,000 new jobs should be available through Section 3 during FY 2010.

Reports from the Government Accountability Office (GAO) have noted that HUD does not have the resources to run an effective compliance program. One effective solution would be for Congress to amend this law to give the intended beneficiaries the right to seek judicial redress from localities and contractors that fail to comply.

Environmental Justice— Alexander v. Sandoval

Under the Supreme Court's 2001 decision in Alexander v. Sandoval (532 U.S. 275 (2001)), individuals can no longer challenge federally funded programs that have a discriminatory impact on a legally protected class. Individuals must meet the heavy burden of proving discriminatory intent in the use of federal funds. For example, if a city locates all its landfills, refineries, and chemical plants in a minority neighborhood—despite the discriminatory impact of these actions—local residents have no right to pursue their claim in court unless they can provide evidence the city intended to discriminate. Amending Title VI of the Civil Rights Act of 1964 (Pub. L. No. 82-352) will prevent tax dollars from being used in ways that discriminate against individuals and communities because of race, color, national origin, sex, age, or disability.

The Sandoval decision undermines the intent and goals of U.S. antidiscrimination laws and runs contrary to established legal precedent. Supreme Court Justice John Paul Stevens made clear in his dissent that no U.S. circuit court of appeals had ever denied that a private right of action exists to enforce agency regulations promulgated under Title VI.

Given the broad reach of Title VI, it is unreasonable for governmental agencies to be the sole entities enforcing their own regulations or challenging violations. The government does not have the resources to litigate every instance where enforcement is necessary. Since their inception, federal agencies charged with implementing Title VI have been either unable or unwilling to enforce that law, leaving the benefits and protections envisioned in Title VI largely unrealized.

The Sandoval Court failed to look at the intent of Congress to establish a private right of action at the time it passed the Civil Rights Act of 1964 and in subsequent amendments to the Act. Amending Title VI is necessary for Congress to clarify its intent.

The Committee has been working with the Leadership Conference on Civil Rights to support amending Title VI to provide a private cause of action for disparate impact cases. The Committee's Environmental Justice Project is documenting the impact of *Sandoval* on communities across the country.

Health Care

The Committee commends the January 29, 2009, U.S. Senate approval of the Children's Health Insurance Program Reauthorization Act of 2009 (Pub. L. No. 111-3). This legislation is expected to continue coverage for 6 million to 7 million children and increase that coverage to 4 million more, which is particularly important among minority communities.

A recent Department of Health and Human Services report addresses other concerns, such as reduced access to care experienced by racial and ethnic minorities and low-income communities in the United States. See Health Disparities: A Case for Closing the Gap, available at www.health reform.gov/reports/healthdisparities/index.html.

The Unfinished Business of the Gulf Coast

The lack of federal leadership and assistance to poor and African American citizens in the immediate aftermath of Hurricane Katrina left the country's reputation in the world in tatters and an entire region of the nation in shambles. Years later, Americans of all races in the Gulf Coast continue to suffer from a negligible response by the federal government.

The Committee has urged the new administration to support legislation such as the Gulf Coast Civic Works Act (H.R. 2269), which would create 100,000 jobs for Gulf Coast residents and evacuees to rebuild their communities, and the Gulf Coast Hurricane Housing Recovery Act (first introduced in 2007), which would provide comprehensive housing relief for areas of the Gulf Coast affected by recent hurricanes. President Obama's leadership is critical to promote a federally directed expansion of volunteer efforts, including a Civil Conservation Corps, to assist in rebuilding in the Gulf Coast.

Hate Crimes

The Committee applauds the critical passage of the Local Law Enforcement Hate Crimes Prevention Act of 2009 (H.R. 1913). The U.S. House of Representatives has made strides to expand existing federal hate-crimes law—which protects people based on race, color, religion, and national origin—to also protect people based on their actual or perceived gender, sexual orientation, gender identity, or disability.

Building "a More Perfect Union"

The Committee has identified a series of actions that Congress and the president can take that are central to President Obama's vision of a united and equal society—one that recognizes needs in other critical areas.

First among these are criminal justice initiatives, specifically those that mitigate the statutory disparity

between sentencing for crack and powder cocaine offenders, which has a long-standing disproportionate impact on minority citizens. President Obama has announced the administration's intention to improve ex-offender employment and job retention strategies, substance abuse treatment, and mental health counseling to aid them in successfully rejoining society.

Second, beyond the urgent need to repair civil rights enforcement of the DOJ, it is also crucial that all federal agencies tasked with civil rights enforcement duties be reviewed and restructured as necessary to ensure their ability to carry out these obligations. Special attention should be given to the Department of Agriculture's historic record of discrimination against minority farmers.

Third, increased funding for the Legal Services Corporation is needed to fill an enormous gap to educate and protect underserved American populations.

Finally, the United States must comply fully with the international human rights treaties to which it is a signatory, including the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights. It can begin by addressing shortcomings identified in the United Nations bodies' most recent reviews of the status of U.S. compliance.

The Lawyers' Committee and other civil rights groups will continue to encourage President Obama and the Congress to honor the aspirations and sacrifices of the country's forebears by making these priorities the heart and soul of this administration's quest to achieve "a more perfect union."

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