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## Barack Obama and the Public Interest Law Movement: A Preliminary Assessment

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### I. INTRODUCTION

In 2008, Stanford Law Professor Deborah Rhode published a pioneering article on the present state of the public interest law movement.<sup>1</sup> Surveying over fifty different organizations and representative staff, the empirically based article addressed such issues as organizational priorities, structures, strategies, funding, and challenges. In recognizing the enormous accomplishments of these organizations, Rhode sought to provide the public with knowledge of how they operate and the issues that they confront.<sup>2</sup> As she indicated, the first studies of the movement<sup>3</sup> were

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<sup>1</sup> Deborah L. Rhode, *Public Interest Law: The Movement At Midlife*, 60 STAN. L. REV. 2027 (2007) [hereinafter *Midlife*]. Recognizing the diversity of the public interest law movement, Rhode included within her survey eight groups deemed “‘conservative’ or ‘freedom based’ organizations.” *Id.* at 2031. We do not include such organizations in our references to the “public interest law movement.” As articulated more fully in text discussion accompanying pages 57–62, we see public interest law as encompassing at least three essential aspects: vindication of rights and values embedded in U.S. constitutional provisions and their enforcing legislation; use of the tools of government to restrain the power and influence of large private concentrations of wealth in the corporate form; and not-for-profit representation of interests and populations that have been historically underrepresented in the legal-political process. We do not see “conservative or freedom based organizations” as fitting this paradigm.

<sup>2</sup> Professor Rhode put it well:

Public interest lawyers have saved lives, protected fundamental rights, established crucial principles, transformed institutions, and ensured essential benefits for those who need them most. The movement has changed not just law but lawyers’ approach to the law. By representing causes as well as clients,

done in the 1970s, and much has changed since that time. Moreover, she described her article as a “critical first step,” and noted the limitation of her focus to the “most prominent” organizations.<sup>4</sup> She explicitly recognized the need for greater public awareness of some of the lesser-known groups, their accomplishments and unmet needs.<sup>5</sup>

Subsequent to the appearance of Professor Rhode’s article, Barack Obama was elected President of the United States. It was the first time that an African American was elected Chief Executive of any western industrialized democracy.<sup>6</sup> In addition to belonging to an ethnic minority that has been a central focus of the public interest law movement in the United States and worldwide, Obama himself has roots in the public

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public interest organizations have made clear the capacity of legal strategies in promoting social change. Law reform has been both an end in itself and a vehicle for raising public awareness, mobilizing political support, and giving communities a voice in the policies that affect them. In virtually every major American social reform movement of the last half century, cause lawyers have played an important role.

*Id.* at 275–76 (internal quotation marks omitted).

<sup>3</sup> Rhode’s use of the term “movement” to describe the development of public interest law is itself groundbreaking. As Edward Rubin has argued: “The prevailing view is that organizations or political parties are not the same as social movements. Rather, social movements are regarded as consisting of more diffuse agglomerations of individuals within civil society who are linked together by ideology, beliefs, or collective identities.” Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 4 (2001). Rhode, however, is correct in her use of the term—it is difficult, if not impossible, to understand the making of social change in modern American history without recognizing the role of organizations, the concept of organization, and the individual as organizer. The classic work is FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 4–5 (1977). See generally *TRANSFORMING THE CITY: COMMUNITY ORGANIZING AND THE CHALLENGE OF POLITICAL CHANGE* (Marion Orr ed., 2007); *GROUNDWORK: LOCAL BLACK FREEDOM MOVEMENTS IN AMERICA* (Jeanne Theoharis & Komozi Woodard eds., 2005).

<sup>4</sup> Midlife, *supra* note 1, at 276. Moreover, her attention was directed solely to the domestic work of these organizations. For a comprehensive discussion of the international implications of the work of the public interest law movement, see Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891 (2008).

<sup>5</sup> *Id.*

<sup>6</sup> Obama has stated that he considers himself African American. When questioned by *The New York Times* in 2004, he responded as follows:

African-Americans are a hybrid people. We’re mingled with African culture and Native American culture and European culture . . . . If I was arrested for armed robbery and my mug shot was on the television screen, people wouldn’t be debating if I was African-American or not. I’d be a black man going to jail. Now if that’s true when bad things are happening, there’s no reason why I shouldn’t be proud of being a black man when good things are happening, too.

Monica Davey, *A Surprise Senate Contender Reaches His Biggest Stage Yet*, N.Y. TIMES, July 26, 2004, <http://query.nytimes.com/gst/fullpage.html?res=9407E2DF153DF935A15754C0A9629C8B63&pagewanted=all>. But see Gloria J. Lidell, Pearson Lidell, Jr., & Donald Shaffer, *Is Obama Black? The Pseudo-Legal Definition of the Black Race: A Proposal for Regulatory Clarification Generated From A Historical Socio-Political Perspective*, 12 SCHOLAR: ST. MARY’S L. REV. ON MINORITY ISSUES 213, 216 (2010) (noting that “[m]any have decried the proclamation of the United States’ forty-fourth President as ‘Black’ or ‘African-American’ and refuse to accept him as such”).

interest law community. He previously served as a community organizer, civil rights lawyer and constitutional law professor, and he has held elective office as a state and federal senator. These accomplishments would make the President a more than welcome addition to the staff of most of the organizations that Professor Rhode surveyed.<sup>7</sup>

In addition to the public interest focus of his resume, as a candidate, Obama made numerous statements during his campaign suggesting a strong identification with many of the goals of the public interest law movement.<sup>8</sup> These include: respect for international law and international obligations;<sup>9</sup> recognition of the need to curb the continuing decimation of the world environment through greater regulation of polluters;<sup>10</sup> dedication to finding ways to improve America's public educational systems;<sup>11</sup> eliminating unlawful employment discrimination;<sup>12</sup> and providing greater protection to consumers heavily burdened by misleading and usurious financial practices.<sup>13</sup>

Barack Obama's activity in the public interest law movement has played a sizeable role in the narrative of his professional life. Throughout

<sup>7</sup> See generally Carla D. Pratt, *Way to Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 FORDHAM L. REV. 1409, 1420–21 (2009) (describing Barack Obama's role as "interpreter for the black community by speaking with them about their government and what they could reasonably expect it to do for them as citizens if they made it accountable to them through voting").

<sup>8</sup> Obama told a convention of the Chicago Developing Communities Project, where he worked for three years as a community organizer before leaving for Harvard Law School, that "[t]he measure of my life would be public service." David Moberg, *Obama's Community Roots*, THE NATION, Apr. 3, 2007, <http://www.thenation.com/article/obamas-community-roots>.

<sup>9</sup> In an executive order entitled "Ensuring Lawful Interrogations," the Administration pledges to "ensure compliance with the treaty obligations of the United States, including the Geneva Conventions." Exec. Order No. 13591, 74 Fed. Reg. 4893 (Jan. 27, 2009).

<sup>10</sup> See *Energy & Environment*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/energy-and-environment/> (last visited Mar. 15, 2011).

<sup>11</sup> For K–12 reform plans, see *Education*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/education> (last visited Mar. 15, 2011).

<sup>12</sup> For a statement on the Americans with Disabilities Act and employment discrimination of the disabled, see *Disabilities*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/disabilities> (last visited Mar. 15, 2011).

<sup>13</sup> See *Wall Street Reform*, THE WHITE HOUSE, <http://www.whitehouse.gov/wallstreetreform> (last visited Mar. 15, 2011). In seeking to understand Obama's political ideology, Richard Epstein wrote:

It is instructive that in the fall of 2008 many people asked whether Obama counted as a socialist—a question that needed (and still needs) a nuanced answer. Obama did not, and does not; believe in the government ownership over the means of production. What he believes in is the extensive regulation by government of the private firms that are responsible for production, which may be achieved by any and all methods that are available to a President and the Congress: taxes, mandates, regulations, subsidies. The hard question is just how far he is prepared to push on these levers of government power.

Richard A. Epstein, *Obama's Constitution: The Passive Virtues Writ Large*, 26 CONST. COMMENT. 183, 183–84 (2010).

his presidential campaign, his supporters and staff successfully portrayed Obama as a legal activist in the tradition of Charles Hamilton Houston, Wiley A. Branton, or Roger Baldwin, rather than as a gifted legislator or an enlightened university professor.<sup>14</sup> Obama himself cited his work as a community organizer and public interest lawyer as providing the impetus for his political career. "In my legal practice," he wrote in his memoir *Dreams From My Father*, "I work mostly with churches and community groups, men and women who quietly build grocery stores and health clinics in the inner city, and housing for the poor."<sup>15</sup> His association with the public interest law movement thus appears to retain both personal and political relevance for Obama.

Many in the public interest law movement saw new opportunities in Obama's election as President of the United States for engaging in forms of collaborative partnership with federal officials and agencies with shared policy agendas. The Department of Justice (hereinafter "DOJ"), with its hundreds of lawyers in Washington and numerous local offices of U.S. Attorneys throughout the nation, present a formidable arsenal of resources to carry out the legal program of the United States government.<sup>16</sup> If means of collaboration were established, this arsenal could be brought to bear on the issues that the public interest law movement has struggled to address.

As Chief Executive Officer of the federal government, President Obama has enforcement powers in areas of government that are at the core of the public interest law movement. His authority to promulgate executive orders, introduce legislation into Congress, and sign or veto Congressional enactments allows the President to shift policy in directions long sought by public interest organizations. However, the first two years of the Obama Administration (hereinafter "Administration" or "Obama Administration") have made it clear that while there have been some advances in public interest collaboration, numerous other plans have failed to materialize.<sup>17</sup> Having lost his Democratic majority in the House of

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<sup>14</sup> See generally David B. Wilkins, *The New Social Engineers in the Age of Obama: Black Corporate Lawyers and the Making of the First Black President*, 53 HOW. L.J. 557, 611–23 (2010).

<sup>15</sup> BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* 438 (Crown Publishers 2004) (1995). Cf. Dan Morain, *Obama's Law Days Effective but Brief*, L.A. TIMES, Apr. 6, 2008, <http://articles.latimes.com/2008/apr/06/nation/na-obamalegal6>.

<sup>16</sup> There are presently ninety-three United States Attorneys for ninety-four federal judicial districts, with one U.S. Attorney representing both the Northern Mariana Islands and Guam. UNITED STATES ATTORNEYS MANUAL § 3-2.100 (2007), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title3/2musa.htm#3-2.100](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title3/2musa.htm#3-2.100) reprinted in GREGORY C. SISK, *LITIGATION WITH THE FEDERAL GOVERNMENT, CASES AND MATERIALS* 1, 21 (2d ed. 2008) ("Because it is the quintessential repeat-player in federal litigation, and because its litigation strategy generally is coordinated . . . across the entire range of government cases, the federal government exerts a powerful influence on the federal courts and the development of legal doctrine.").

<sup>17</sup> For example, candidate Obama promised to close the Guantanamo prison facility within a year of taking office, a plan from which he had to retreat because of uncertainty on where the detainees



Representatives in the midterm elections and seeing his Senate majority shaved by six seats, Obama's hopes of accomplishing his remaining legislative goals appear greatly diminished in 2010 compared to the prospects in 2008.<sup>18</sup> As is clear from the Obama Administration's efforts to expand health care coverage and reform the financial industry,<sup>19</sup> implementing broad progressive policy changes out of the United States

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would be transferred. Charlie Savage & Andrew W. Lehren, *Cables Depict U.S. Haggling to Clear Guantánamo*, N.Y. TIMES, Nov. 29, 2010, [http://www.nytimes.com/2010/11/30/world/americas/30gitmo.html?\\_r=1&pagewanted=print](http://www.nytimes.com/2010/11/30/world/americas/30gitmo.html?_r=1&pagewanted=print). See generally David Cole, *What to Do About Guantánamo?* N.Y. REV. OF BOOKS, Oct. 14, 2010, available at <http://www.nybooks.com/articles/archives/2010/oct/14/what-do-about-guantanamo/?pagination=false&printpage=true>.

Obama also promised to abolish the military commissions that President Bush established for trial of those held at Guantánamo. He now intends to introduce judicial review to the military proceedings. *Id.* at 49. One federal trial has taken place in New York, but future federal trials are unlikely because of Congressional legislation passed in December 2010 barring the use of Department of Defense funds to transfer inmates to the United States for future trials. Benjamin Weiser, *Detainee Acquitted on Most Counts in '98 Bombing*, N.Y. TIMES, Nov. 17, 2010, available at <http://www.nytimes.com/2010/11/18/nyregion/18ghailani.html?pagewanted=print>; Editorial, *The Rule of Law*, N.Y. TIMES, Jan. 7, 2011, <http://www.nytimes.com/2011/01/08/opinion/08sat3.html?pagewanted=print>; Scott Shane & Mark Landler, *Obama Clears Way for Guantánamo Trials*, N.Y. TIMES, March 7, 2011 at A19, available at <http://www.nytimes.com/2011/03/08/world/americas/08guantanamo.html?pagewanted=print>.

Obama has also abandoned his demand that bankruptcy judges be allowed to reschedule mortgage payments on the thousands of properties throughout the United States facing foreclosure. *The Obameter: Allow Bankruptcy Judges to Modify Terms of a Home Mortgage*, POLITIFACT, <http://www.politifact.com/truth-o-meter/promises/promise/313/allow-bankruptcy-judges-to-modify-terms-of-a-home-/> (last visited Mar. 15, 2011). Cf. Paul Krugman & Robin Wells, *The Way Out of the Slump*, N.Y. REV. OF BOOKS, Oct. 14, 2010, at 16, available at <http://www.nybooks.com/articles/archives/2010/oct/14/way-out-slump/?pagination=false&printpage=true>.

*The St. Petersburg Times* established a website that tracks over 500 campaign promises the President made when seeking election. See *Tracking Politicians' Promises*, POLITIFACT, <http://politifact.com/truth-o-meter/promises/> (last visited Mar. 15, 2011).

<sup>18</sup> Jeff Zeleny, *G.O.P. Captures House, but Not Senate*, N.Y. TIMES, Nov. 2, 2010, <http://www.nytimes.com/2010/11/03/us/politics/03elect.html?pagewanted=print>. The rebuff that the Administration suffered in the midterm elections was in part caused by defections from voters who mobilized nationwide to elect Obama, expecting him to bring progressive change to government. Jackie Calmes & Megan Thee-Brenan, *Independents Fueled G.O.P. Gains*, N.Y. TIMES, Nov. 2, 2010, <http://www.nytimes.com/2010/11/03/us/03exit.html?pagewanted=print>; Editorial, *Election 2010*, N.Y. TIMES, Nov. 2, 2010, <http://www.nytimes.com/2010/11/03/opinion/03wed-1.html?pagewanted=print>.

<sup>19</sup> See The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). John Boehner, newly designated Republican Speaker of the House, stated his intention to call a vote to repeal parts of the health care law, and the House of Representatives promptly voted to do so. David M. Herszenhorn & Robert Pear, *House Votes for Repeal of Health Law in Symbolic Act*, N.Y. TIMES, Jan. 19, 2011 <http://www.nytimes.com/2011/01/20/health/policy/20cong.html?pagewanted=print>. The law has been challenged in at least five jurisdictions, and two U.S. district judges have held that parts of the law exceed Congressional power under the Commerce Clause by requiring that citizens purchase health insurance. See *Virginia ex rel. Cuccinelli v. Sebelius*, No. 3:10CV188-HEH, 2010 WL 5059718 (E.D. Va. Dec. 13, 2010); *Florida ex rel. Bondi v. U.S. Dep't of Health and Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011). Spencer Bachus, Republican from Arizona, who now chairs the House Financial Services Committee has called the Dodd-Frank Act a "government takeover of the economy." Andrew Ross Sorkin, ed., *Wall Street Hopes to Gain as Democrats Lose House*, N.Y. TIMES DEALBOOK, Nov. 3, 2010, <http://dealbook.blogs.nytimes.com/2010/11/03/wall-street-gains-as-democrats-lose-house/?dbk&emc=dbk>. See also David M. Herszenhorn, *The Road Ahead Turns Right*, N.Y. TIMES, Nov. 3, 2010, <http://www.nytimes.com/2010/11/04/business/04outlook.html?pagewanted=print>.

Congress is a long and difficult task, often frustrated by the enormous impact of financial contributions and expenditures for Congressional campaigns from individuals, political action groups, and now corporations.<sup>20</sup> Through the use of such contributions, donors can effectively overwhelm the voices of public interest law practitioners and others, distorting the public understanding of fundamental issues.<sup>21</sup>

But there is much that a President can accomplish, notwithstanding significant Congressional resistance. Filings and interventions by the DOJ in high-profile cases being litigated by public interest organizations can make a difference in case outcomes.<sup>22</sup> The DOJ can also use its extensive investigatory resources in situations where public interest organizations have identified specific problems.<sup>23</sup>

Litigation is neither the cheapest, quickest, nor the most effective means to bring about substantive policies.<sup>24</sup> Presidents are aware that the successful implementation of programs also requires bringing people into

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<sup>20</sup> Cf. Michael Tomasky, *The Specter Haunting the Senate*, N.Y. REV. OF BOOKS, Sept. 30, 2010, available at <http://www.nybooks.com/articles/archives/2010/sep/30/specter-haunting-senate/?pagination=false&printpage=true> ("The Senate, except for a few brief moments such as the burst of activity in the 1960s and 1970s, has been where progressive legislation goes to die—not always soundlessly, but almost always.").

<sup>21</sup> This phenomenon has been exacerbated by the Supreme Court decision in *Citizens United v. FEC*, 130 S. Ct. 876 (U.S. Jan. 21, 2010) (determining that government may not, under the First Amendment, suppress political speech on the basis of the speaker's corporate identity). President Obama was highly critical of the ruling, calling it "a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans." Mary Katharine Ham, *Obama Blasts SCOTUS Decision in Citizens United*, THE WEEKLY STANDARD, Jan. 21, 2010, <http://www.weeklystandard.com/blogs/obama-blasts-scotus-decision-citizens-united>. For a critical analysis of the decision, see Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. OF BOOKS, May 13, 2010, available at <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy/?pagination=false&printpage=true>.

<sup>22</sup> In addition to filing civil suits to structure public behavior, the executive branch also has the power to institute criminal proceedings to serve public interest goals. The Obama Administration used this power in September 2010, to indict a Los Angeles company in what the DOJ refers to as the largest human trafficking case ever brought by the Federal Government. The case against Global Horizons Manpower alleges abuse of the H-2A guest worker program to hold 400 Thai workers in conditions of virtual slavery and was brought while legislation that would strengthen immigrant guest workers' rights was stalled in Congress. According to *The New York Times*, the Bush Administration had turned a "blind eye" to the enforcement of wage and hour rules and "in its waning days, it issued new rules that gutted worker pay and labor protections in the program." Editorial, *Forced Labor*, N.Y. TIMES, Sept. 7, 2010, <http://www.nytimes.com/2010/09/08/opinion/08wed2.html?pagewanted=print>.

<sup>23</sup> The ACLU filed a ninety-six page petition with the special litigation section of the DOJ, asking the Department to investigate and monitor the work of the Newark, New Jersey, Police Department. The petition documents excessive force, false arrests and other abuses "by officers against not only civilians but also their fellow officers, and a culture of impunity, with few of the officers ever being punished." Richard Pérez-Peña, *U.S. Intervention Sought for Newark Police Abuses*, N.Y. TIMES, Sept. 8, 2010, <http://www.nytimes.com/2010/09/09/nyregion/09newark.html?pagewanted=print>.

<sup>24</sup> Many of the organization leaders with whom Professor Rhode spoke mentioned how the judicial environment has changed from when they first became involved in public interest lawyering, making it more difficult to obtain their goals through litigation. Midlife, *supra* note 1, at 2034–39.

the government who have strong commitments to shared outcomes. Like its predecessors, the Obama Administration has brought into the executive and judicial branches numerous members of the public interest community.<sup>25</sup> Opening the White House to meetings with like-minded groups and individuals has long been an accepted process for effectuating executive branch policies.<sup>26</sup> Obama's has also been the first presidential administration to successfully utilize the extensive technology available to generate and mobilize voter interest in his campaign and to move forward his programs.<sup>27</sup>

In this Article, we examine the public interest work of the Obama Administration over its first two years and argue the necessity for increased collaboration with public interest organizations and general community organizations for the remainder of the President's term of office. We begin our discussion with a description of social justice proposals articulated by the Obama Administration at its inception, with particular focus on the issues that are of concern for the public interest law movement. We gauge the issues relevant to the public interest community by using Professor Rhode's analysis as a guidepost. Women's rights, economic justice, civil rights, environmental protection, rights for the disabled and the elderly, and immigration have not only been areas at the heart of the public interest law movement,<sup>28</sup> but also appear on the presidential website as issue areas of concern to the Obama Administration.<sup>29</sup> We summarize the agenda President Obama took with him into office regarding these areas and look at some of the accomplishments and failures that characterize the Administration's work

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<sup>25</sup> See discussion *infra* Parts III and IV.

<sup>26</sup> For example, President Bush opened the doors of the White House to corporate executives to help formulate policy and survived a legal challenge seeking to obtain minutes from the meetings. See *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367 (2004). Similarly, Gary Wills has written of a June 30, 2009, dinner he attended with President Obama and eight other historians where they discussed American policy in Afghanistan. Gary Wills, *Obama's Legacy: Afghanistan*, NYR BLOG (July 27, 2010, 10:45 PM), <http://www.nybooks.com/blogs/nyrblog/2010/jul/27/obamas-legacy-afghanistan/>. See also Li Xiaorong, *What I Told Obama About Beijing's Human Rights Problem*, NYR BLOG (Jan. 18, 2011, 10:15 AM), <http://www.nybooks.com/blogs/nyrblog/2011/jan/18/obama-china-human-rights-problem/> (discussing a meeting held by President Obama with activists and scholars regarding human rights in China).

<sup>27</sup> Most of this work has centered around the website Organizing for America that contains news pieces and blogs, and sends e-mail updates to subscribers. See *Organizing for America*, BARACKOBAMA.COM, <http://www.mybarackobama.com/> (last visited Apr. 9, 2011) [hereinafter *Organizing for America*]. Some of this work is discussed in Peter Dreier, *Organizing in the Obama Era: A Progressive Moment or a New Progressive Era?*, 42 J. MARSHALL L. REV. 685, 692–94 (2009). Jane S. Schacter has also suggested speeches and proclamations as “non-policymaking activities” that a President can use to forward social agendas. Jane S. Schacter, *Capacity and Context: LGBT Rights and the Obama Administration's First Year*, 6 STAN. J. C.R. & C.L. 147, 152–53 (2010).

<sup>28</sup> Midlife, *supra* note 1, at 2031.

<sup>29</sup> *Organizing for America*, *supra* note 27.

over its first two years.<sup>30</sup>

To enhance our perspective of the possibilities of such collaboration, we then look at the ways that public interest lawyers and grass-roots movement activists have, over the years, sought to accomplish progressive political goals by forging alliances with federal government officials, up to and including the President of the United States. This historical backdrop seeks to illuminate the ways such alliances have influenced policy outcomes through means that include, but also transcend, litigation. These methods include: strategic meetings with executive branch officials to hammer out common policy agendas and strategies by which they can be attained; actual governmental service by public interest lawyers in executive branch agencies and in the federal judiciary; the creation of joint projects and programs that serve the policies of the President and public interest constituencies; and, of course, litigation, including the initiation of cases regarding areas of mutual interests, strategic interventions in lawsuits that have been filed, and submission of “friend of court” briefs in significant cases. Most of these intensive collaborations took place during the civil rights movement when, in the absence of anything that could be called a public interest law movement, individual citizens took it upon themselves to fight for basic constitutional freedoms, supported by a handful of private lawyers and sporadic backing from the DOJ. The public interest law movement as we know it today has its historic roots in the movements for justice that came to fruition during that tumultuous era.

We then look at the work of the Obama Administration in its first two years in office, noting the personnel chosen by the Administration and the tasks to which they have been assigned, doing so with particular regard for those who have worked in or closely alongside public interest movements or organizations. We also look at the plans and policies put in place by the Administration and consider their consistency with public interests goals, addressing how the public interest community has received them. Finally, we look at the litigation of the Obama Administration, focusing on its

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<sup>30</sup> Our summaries credit the Administration for monies allocated to projects under the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009). Although we do not trace how the monies have actually been spent, it is possible to do so at *Where is the Money Going?*, RECOVERY.GOV: TRACKING THE MONEY, <http://www.recovery.gov/Pages/default.aspx> (last visited Apr. 9, 2011). The Center on Budget and Policy Priorities has concluded that the stimulus spending kept more than 4.5 million people out of poverty in 2009. Arloc Sherman, *Despite Deep Recession and High Unemployment, Government Efforts – Including the Recovery Act – Prevented Poverty From Rising in 2009, New Census Data Show*, CENTER ON BUDGET AND POLICY PRIORITIES, Jan. 5, 2011, available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=3361>; Editorial, *Poverty and Recovery*, N.Y. TIMES, Jan. 18, 2011 at A22, available at [http://www.nytimes.com/2011/01/19/opinion/19wed1.html?\\_r=1&pagewanted=print](http://www.nytimes.com/2011/01/19/opinion/19wed1.html?_r=1&pagewanted=print). Cf. Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 158 (2010) (noting that while the stimulus provides a “powerful occasion” for using federal funds to promote racial equity, “significant aspects of the legislative design of the stimulus threaten to preserve and even deepen racial inequality”).

amicus curiae filings in the Supreme Court of the United States, since that is where the Administration has been most active through the work of the Solicitor General, but also noting pending cases in the lower courts where public interest concerns are paramount.

We conclude that the Administration must do far more to push forward its public interest law agenda, including closer involvement with those groups that have demonstrable interests in common issue areas. The Administration must be more proactive in reaching out to those who have supported it and re-engage them immediately through methods it employed to get elected but which have since drifted into desuetude. We are especially critical of the Administration's work in the federal courts. Our study of the amicus filings in the Supreme Court concludes that the Administration needs to monitor closely the litigation positions being articulated in its name by the Solicitor General's Office to see whether those positions are consistent with the public interest goals for which the Administration otherwise claims to stand. In seven of nine cases that we examined for the October 2008 and 2009 Terms, and seven of seven cases in which Solicitor General Elena Kagan was counsel of record, the Administration submitted briefs opposing vindication of constitutional claims and directly argued against positions asserted by public interest amici participating in the case.

## II. PLANS

### A. *Women*

The Obama Administration came to office focused on four related issues regarding the status of women in society: pay inequity, occupational segregation, reproductive choice, and violence against women.<sup>31</sup> The Administration notes that American women are paid seventy-eight cents for every dollar earned by men and are concentrated in lower paying jobs with a notable under-representation in the sciences, engineering, and technology.<sup>32</sup> The Administration considers the double burden still assumed by working women to be the cause of these disparities, as they are

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<sup>31</sup> To ascertain the administration's policies on these matters, we have relied on *Women*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/women/> (last visited Mar. 17, 2011) [hereinafter *Women*].

<sup>32</sup> *Id.* The Administration website refers to the President's belief in women's "right to receive equal pay for equal work." *Id.* This right was already codified in the Equal Pay Act of 1963, 29 U.S.C. § 201 (1963). The Paycheck Fairness Act (H.R. 12/S.3772), which enhanced remedies against employers engaged in gender discrimination, was passed in the House of Representatives with the President's support, but it died in the Senate. Press Release, Office of the Press Sec'y, The White House, Statement by the President on the Paycheck Fairness Act (Nov. 17, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/11/17/statement-president-paycheck-fairness-act> (last visited Nov. 19, 2010).

forced to “choose between their jobs and meeting the needs of their families.”<sup>33</sup>

Early in his term, President Obama signed two pieces of legislation that reinforced his goal of improving the condition of women in the workforce. The Lilly Ledbetter Fair Pay Act<sup>34</sup> restored certain protections for female and male workers and directly overruled a Supreme Court decision that restricted the time period in which victims of discrimination could challenge and recover for discriminatory compensation decisions.<sup>35</sup> The American Recovery and Reinvestment Act contained a number of provisions expected to assist the status of women.<sup>36</sup> In addition to providing funding to help working parents obtain childcare, this act expanded the Child Tax Credit and changed unemployment insurance rules by creating incentives for states to cover part-time workers and those who have recently entered the workforce.<sup>37</sup>

The Administration website also addresses the reproductive choice of women. The website calls for the preservation of reproductive rights under *Roe v. Wade*,<sup>38</sup> yet notes simultaneously its “respect” for those who do not wish to see those rights preserved, asserting that “we must all come together to help reduce unintended pregnancies and the need for abortion.”<sup>39</sup> In addition to the reproductive rights of women, the website also addresses the issue of violence against girls and women. Referring to

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<sup>33</sup> The Administration promises to pursue more “flexible work policies, such as paid sick leave” for men and women. *Women*, *supra* note 31.

<sup>34</sup> Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

<sup>35</sup> Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

<sup>36</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

<sup>37</sup> In October 2010, the National Economic Council, a policy coordination arm of the White House, issued a report discussing the Administration’s economic impact on the status of women. While praising some of the achievements discussed in the text, the report noted that nearly a half-century after the Equal Pay Act was signed, women still earn seventy-seven cents for every dollar paid to men—a gap that has changed little over the past decade. The report further noted that single mothers and black, Hispanic and older women have been particularly hard hit during the recession. The unemployment rate for women who are single heads of households rose to 13.6 percent—the highest level in twenty-five years—from 6.2 percent before the recession. Sewell Chan, *White House Promotes Economic Efforts for Women*, N.Y. TIMES, Oct. 22, 2010, at A16, available at <http://nytimes.com/2010/10/22/us/politics/22women.html>.

<sup>38</sup> See generally *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>39</sup> *Women*, *supra* note 31. Notwithstanding the evenhandedness of this statement, the Obama Administration rescinded in large part a Bush Administration rule that allowed health care providers in federally funded institutions who opposed abortion, sterilization, and other medical procedures on religious or moral grounds to refuse to provide basic services to the public, such as filling prescriptions for contraceptives. See Robert Pear, *A Bush Rule on Providers of Abortions is Revised*, N.Y. TIMES, Feb. 19, 2011, at A13, available at <http://www.nytimes.com/2011/02/19/health/policy/19health.html>. The Administration also overturned a Bush Administration ban on U.S. funding for international aid groups that provide abortion services. *Obama Ends Ban on U.S. Funds to Aid Abortion*, N.Y. TIMES, available at Feb. 3, 2009, <http://www.nytimes.com/2009/01/23/world/americas/23iht-ban23.19639909.html>.

such violence as a “global epidemic,” the Administration website proclaims the President’s intention to “promote policies that seek to eradicate violence against women.”<sup>40</sup>

### *B. Poverty*

President Obama has pledged to tackle the accelerating poverty rate in the United States,<sup>41</sup> another issue that has drawn enormous attention from the public interest law movement.<sup>42</sup> His agenda called for expanding access to affordable housing, teaching job skills to low-income workers, providing nutritious meals for children at home and at school, and strengthening low-income families.<sup>43</sup>

The American Recovery and Reinvestment Act<sup>44</sup> addressed some of these concerns. The Act authorized \$20 billion in funds for the Supplemental Nutrition Assistance Program, formerly known as food stamps, and \$1.5 billion in Homelessness Prevention Funds to keep people in their homes or to re-house them.<sup>45</sup> The Act provided \$1 billion in increased funding for Community Development Block Grants, \$4 billion in increased public housing Capital funds, \$2 billion in payments to owners of rental assistance properties to keep them affordable, and \$2 billion in Neighborhood Stabilization Funds to purchase and rehabilitate foreclosed homes.<sup>46</sup> In addition, the Act provided an increase of \$25 weekly for those receiving Unemployment Insurance and an additional \$250 to those who receive Social Security and Supplemental Security Income.<sup>47</sup> It provided Child Tax Credits to working families through the Make Work Pay

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<sup>40</sup> *Women*, *supra* note 31.

<sup>41</sup> A recent *New York Times* article reports that 44 million people or “one in seven residents” were living in poverty, including one child out of every five. Erik Eckholm, *Recession Raises Poverty Rate to 15-Year High*, N.Y. TIMES, Sept. 17, 2010, available at <http://www.nytimes.com/2010/09/17/us/17poverty.html>.

<sup>42</sup> The White House website provides some historical background to President Obama’s commitment to poverty issues. It states:

President Obama has been a lifelong advocate for the poor. As a young college graduate, he rejected the high salaries of corporate America and moved to the South Side of Chicago to work as a community organizer. As an organizer, President Obama worked with Chicago residents, churches, and local government to set up job training programs for the unemployed and after-school programs for kids. As President, his life experiences inform his efforts to create a path of opportunity for all hard-working Americans to enter the middle class.

*Poverty*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/poverty/> (last visited Apr. 9, 2011).

<sup>43</sup> *Id.*

<sup>44</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

<sup>45</sup> *Poverty*, *supra* note 42.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

initiative and also provided \$3.95 billion in funding for green job training and summer jobs for young people.<sup>48</sup>

### C. Education

The Obama Administration assumed office with a mandate for education reform that included obliging states to impose higher standards across publicly funded early learning settings, improve the early education workforce, engage parents in their child's early learning and development, and develop new programs to improve opportunities and outcomes.<sup>49</sup> For K-12 education, the Administration proposed investing in programs to help teachers improve student performance and to utilize rewards and incentives to keep talented teachers in the schools where they are most needed. The Administration's website notes President Obama's support for charter schools and his insistence that states eliminate obstacles that stifle the growth of successful charter school projects.<sup>50</sup> The Administration wants to increase access to higher education by restructuring and expanding college financial aid as well as making federal programs simpler and more reliable and efficient for students. The Administration is also developing plans to address college completion rates and to strengthen the higher education pipeline to ensure that more students successfully complete their degrees.<sup>51</sup>

The American Recovery and Reinvestment Act<sup>52</sup> provided funding for areas that constituted part of the Obama Administration's educational agenda. Five billion dollars was directed toward early learning programs including Head Start, Early Head Start, and programs for children with special needs.<sup>53</sup> Seventy-seven billion dollars was allocated to elementary and secondary education reforms, including \$48.6 billion to stabilize state education budgets and encourage states to improve teacher effectiveness and maintain high quality teaching staffs.<sup>54</sup> These funds were also available to low-performing schools through intensive support and virtual

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<sup>48</sup> *Id.*

<sup>49</sup> *Education*, *supra* note 11.

<sup>50</sup> The Charter School Movement and Obama's support of it has been the target of much criticism. See, e.g., Diane Ravitch, *The Myth of Charter Schools*, N.Y. REV. OF BOOKS, Nov. 11, 2010, <http://www.nybooks.com/articles/archives/2010/nov/11/myth-charter-schools/?pagination=false&printpage=true>; Monica Teixeira de Sousa, *A Race to the Bottom? President Obama's Incomplete and Conservative Strategy for Reforming Education in Struggling Schools or the Perils of Ignoring Poverty*, 39 STETSON L. REV. 629, 659–66 (2010); Erica Frankenberg & Genevieve Siegel-Hawley, *Choosing Diversity: School Choice and Racial Integration in the Age of Obama*, 6 STAN. J. C.R. & C.L. 219, 246 (2010).

<sup>51</sup> *Education*, *supra* note 11.

<sup>52</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

<sup>53</sup> *Id.*

<sup>54</sup> *Education*, *supra* note 11.



interventions, and to gather information to improve student learning, teacher performance, and college and career readiness through better use of technology.<sup>55</sup> The Act also provided \$5 billion in competitive funds to spur reforms aimed at closing the achievement gap, and \$30 billion to address college affordability and improve access to higher education. Thirteen billion dollars in Title I funds was slotted to be allocated to K-12 education in disadvantaged school systems.<sup>56</sup>

#### *D. Assisting People With Disabilities*

The Obama Administration's plan for assisting people with disabilities<sup>57</sup> called for greater enforcement of two major pieces of legislation designed to benefit people with disabilities, the Americans with Disabilities Act<sup>58</sup> and the Individuals with Disabilities in Education Act.<sup>59</sup> The Administration insists that the federal government lead by example in hiring people with disabilities, enforcing existing laws, providing technical assistance and information on accommodations for people with disabilities, and removing barriers to employment.<sup>60</sup> The White House views people with disabilities as direct beneficiaries of plans for overall reform of the health care system, another programmatic goal of the Administration.<sup>61</sup>

The American Recovery and Reinvestment Act<sup>62</sup> contained specific provisions to assist people with disabilities, including \$500 million to help the Social Security Administration reduce the backlog in disability applications, \$12.2 billion to fund the Individuals with Disabilities Educational Act, \$87 billion for states to bolster their Medicaid programs during the economic crisis, and \$500 million in funding for vocational rehabilitation services to help with job training, education, and placement.<sup>63</sup> President Obama also signed the Christopher and Dana Reeve Paralysis Act,<sup>64</sup> aimed at improving the lives of disabled Americans living with paralysis, and issued an executive order repealing the Bush era

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Disabilities*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/disabilities> (last visited Apr. 9, 2011).

<sup>58</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, *codified at* 42 U.S.C. § 12101 (1990).

<sup>59</sup> Individuals with Disabilities in Education Act, 20 U.S.C. § 1400(a) (2004).

<sup>60</sup> *Disabilities*, *supra* note 57.

<sup>61</sup> *Id.*

<sup>62</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

<sup>63</sup> *Disabilities*, *supra* note 57.

<sup>64</sup> *Id.*

restrictions on embryonic stem cell research.<sup>65</sup>

### *E. Civil Rights*

Civil rights work has been at the heart of the public interest law movement throughout the movement's history, and President Obama has made great efforts to demonstrate his strong commitment.<sup>66</sup> His plans for enforcing civil rights during his administration include more funding for the Civil Rights Division of the DOJ and the expansion of anti-discrimination laws to include provisions barring discrimination based on sexual orientation or gender identity. Obama has stated his support for full civil unions and federal rights for lesbian, gay, bisexual, and transgender (hereinafter "LGBT") couples as well as opposition to a constitutional ban on same sex marriages.<sup>67</sup> The President opposed the Don't Ask, Don't Tell military policy,<sup>68</sup> and the White House website asserts the right of couples and individuals to adopt regardless of sexual orientation.<sup>69</sup>

The Administration sees criminal justice reform as part of its overall civil rights agenda. Articulated goals include building a fairer and more equitable criminal justice system, strengthening federal hate crime legislation, and preventing federal law enforcement agencies from

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<sup>65</sup> Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (Mar. 9, 2009). The Order states that stem cell research "has the potential to lead to better understanding and treatment of many disabling diseases and conditions." The U.S. Court of Appeals for the D.C. Circuit has reversed a recent U.S. District Court order enjoining this executive order. *Sherley v. Sebelius*, No.10-587, 2011 U.S. App. 2011 WL 1599685 (D.C. Cir. APRIL 29, 2011).

<sup>66</sup> His website, for example, states: "President Obama recognizes that our civil rights laws and principles are at the core of our nation. He has spent much of his career fighting to strengthen civil rights—as a community organizer, civil rights lawyer, Illinois State Senator, U.S. Senator, and now as President." *Civil Rights*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/civil-rights> (last visited Mar. 22, 2011).

<sup>67</sup> On February 23, 2011 the Administration directed the Department of Justice to stop defending the Defense of Marriage Act, 1 U.S.C. § 7, in litigation. Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 23, 2011, [http://www.nytimes.com/2011/02/24/us/24marriage.html?\\_r=1&pagewanted=print](http://www.nytimes.com/2011/02/24/us/24marriage.html?_r=1&pagewanted=print). The Act, which denies federal recognition of same-sex marriages and allows states to deny recognition of same-sex marriages contracted in other states, was deemed by the Administration to violate the Equal Protection component of the Fifth Amendment to the U.S. Constitution. *Id.* However, the letter of Attorney General Holder only addresses Section 3 of the law, concerning federal recognition, and does not indicate a United States position on state recognition. Press Release, Dept. of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011). *Cf.* 28 U.S.C. 1738c.

<sup>68</sup> On Dec. 22, 2010, President Obama signed H.R. 2965, the Don't Ask, Don't Tell Repeal Act of 2010. Sheryl Gay Stolberg, *Obama Signs Away 'Don't Ask, Don't Tell'*, N.Y. TIMES, Dec. 22, 2010, <http://www.nytimes.com/2010/12/23/us/politics/23military.html>. The repealing act, however, states that the policy shall remain in effect until the Department of Defense has prepared the necessary policy regulations and established that the shift will not damage the ability of the military to fight or recruit. John Schwartz, *'Don't Ask Don't Tell' Remains in Effect Months After Passage of Law to End It*, N.Y. TIMES, Feb. 22, 2011, <http://www.nytimes.com/2011/02/23/us/politics/23repeal.html?pagewanted=print>.

<sup>69</sup> *Civil Rights*, *supra* note 66.

engaging in racial profiling.<sup>70</sup> The Administration proposed allowing first-time non-violent drug offenders to serve their sentences in drug rehabilitation programs rather than in prison, asserting that such programs are more effective at changing behavior and improving ex-offender employment and job retention rates.<sup>71</sup> The Administration also seeks to provide mental health and substance abuse counseling so that ex-offenders can successfully rejoin society.<sup>72</sup>

#### *F. Protecting the Environment*

The Obama Administration's programs to protect the environment include: the goals of returning energy savings to families, communities and businesses that are in distress; breaking the national dependence on oil by supporting the next generation of energy efficient trucks and automobiles; and striving to make homes more energy efficient.<sup>73</sup> The Administration's key implementation device has been its proposed use of market-based caps to limit carbon pollution in the manner that sulfur and nitrogen dioxide are regulated.<sup>74</sup>

The Administration has engaged in a number of activities to restore regional habitats in the Gulf Coast, California Bay Delta, the Chesapeake Bay Region, and the Great Lakes and has sought to minimize the adverse environmental consequences of mountaintop coal mining in the six Appalachian states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. In March 2009, President Obama signed the Omnibus Public Land Management Act, which the Administration describes as the most extensive expansion of land and water conservation in more than a generation.<sup>75</sup>

The American Recovery and Reinvestment Act<sup>76</sup> set aside \$11 billion for a new energy grid that would better move energy from the places where it is produced to the places where it is utilized; \$5 billion for low income weatherization projects; \$4.5 billion for green federal buildings; \$6.3 billion for state and local renewable energy and energy efficiency efforts; \$600 million in green job training programs—\$500 million for green workforce training and \$100 million to expand line worker training programs, with an additional \$2 billion in grants to develop the next

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Energy & Environment*, THE WHITE HOUSE, [http://www.whitehouse.gov/issues/energy\\_and\\_environment/](http://www.whitehouse.gov/issues/energy_and_environment/) (last visited Mar. 22, 2011).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

generation of energy efficient batteries. Plans have been introduced to increase fuel economy standards for 2011 vehicles and to implement more efficient energy standards for common household appliances like dishwashers and refrigerators.<sup>77</sup> The President also announced a plan to develop renewable energy projects on the Outer Continental Shelf that will produce electricity from wind, wave, and ocean currents.<sup>78</sup>

### G. Immigration Policy

The President's immigration policy includes plans to curtail illegal immigration from Mexico by promoting economic development in that country and by protecting the United States border and other points of entry. The Administration's website calls for the elimination of incentives to illegal immigration by penalizing employers who hire undocumented workers. In addition, the Obama Administration plans to allow undocumented workers "who are in good standing [to] pay a fine, learn English, and go to the back of the line for the opportunity to become citizens."<sup>79</sup>

### H. Elderly Policy

The Obama Administration is also committed to the elderly. The President's plans include efforts to preserve Social Security and to enable

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<sup>77</sup> *Energy & Environment*, *supra* note 73.

<sup>78</sup> Press Release, U.S. Dept. of the Interior, Interior Initials Leasing Process for Commercial Wind Development on U.S. Outer Continental Shelf off Delaware (Apr. 21, 2010).

<sup>79</sup> *Immigration*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/immigration> (last visited Apr. 6, 2011). Unlike the other equality-seeking constituencies identified on the White House website, the Obama Administration has made no clear commitment to help immigrants in the United States or foreigners contemplating immigration. While the Administration sued to enjoin Arizona from enforcing immigration legislation enacted by its legislature on preemption grounds, and sued a local Arizona sheriff for failing to comply with governmental data requests seeking evidence of national origin discrimination, in *U.S. v. Arizona*, 703 F. Supp. 2d 980 (2010), it has also significantly increased funding for border patrols and is sending agents aboard northern-route Amtrak trains asking selected passengers for identification. Julia Preston, *Obama Signs Border Bill to Increase Surveillance*, N.Y. TIMES, Aug. 13, 2010, <http://www.nytimes.com/2010/08/14/us/politics/14immig.html?pagewanted=print>; Nina Bernstein, *Border Sweeps in North Reach Miles Into U.S.*, N.Y. TIMES, Aug. 30, 2010, <http://www.nytimes.com/2010/08/30/nyregion/30border.html?pagewanted=print>. The Administration has also put in place the "Secure Communities" Program that will mandate anyone arrested and fingerprinted in the United States to also undergo an immigration check. *The New York Times* argued that the Administration "has been using its powers to detain and deport tens of thousands of immigrants who have no criminal records and pose no conceivable danger to their communities." Editorial, *Confusion Over Secure Communities*, N.Y. TIMES, Oct. 5, 2010, <http://www.nytimes.com/2010/10/05/opinion/05tue3.html?pagewanted=print>. While a record number of immigrants convicted of crime have been deported, the Administration has been less likely to deport undocumented students. Julia Preston, *Deportations From U.S. Hit a Record High*, N.Y. TIMES, Oct. 6, 2010, <http://www.nytimes.com/2010/10/07/us/07immig.html?pagewanted=print>; Julia Preston, *Students Spared Amid an Increase in Deportations*, N.Y. TIMES, Aug. 8, 2010, <http://www.nytimes.com/2010/08/09/us/09students.html?pagewanted=print>.

all Americans to participate in some kind of automatic retirement plan at work.<sup>80</sup>

### III. PREDECESSORS

To better understand the possibilities that exist for collaborative work between the Obama Administration and public interest organizations, we examine how public interest lawyers throughout United States history have looked to the executive branch of the federal government for help in attaining their goals. The public interest law movement and its practitioners have not often shared overlapping agendas with presidential administrations, but they have worked together on specific issues. While they have sometimes obtained positive results, their achievements have frequently been accompanied by significant compromise.

#### *A. Early Years – American Civil Liberties Union*

In the 1920s, the American Civil Liberties Union (hereinafter “ACLU”) requested presidential assistance in its campaign seeking redress for individuals imprisoned as conscientious objectors during the First World War.<sup>81</sup> ACLU officials Norman Thomas and Albert De Silver met with President Warren Harding and so convinced him of the justice of their cause that Harding released Eugene Debs and twenty-four other prisoners.<sup>82</sup> Negative reaction by segments of the American public prevented further intervention by Harding, who suggested that the ACLU work harder to mobilize public opinion.<sup>83</sup> Roger Baldwin, ACLU founder and leader, in contrast, felt the civil liberties group should instead work harder to change the President’s mind by “making life a burden” and picketing the White House, Harding’s golf course, and the Attorney General’s office.<sup>84</sup> Although Baldwin’s direct action strategy was not followed, the prisoner release campaign continued intermittently over the next ten years. In 1923, President Coolidge released more prisoners, but many were held until 1933, when Franklin Roosevelt restored the citizenship of the remaining 1500.<sup>85</sup>

The ACLU also worked closely with federal officials in 1929 to mobilize a national campaign against police misconduct. That year, President Herbert Hoover established the Wickersham Commission to

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<sup>80</sup> *Seniors & Social Security*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/seniors-and-social-security> (last visited Apr. 6, 2011).

<sup>81</sup> SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 56 (1990).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

produce one of the earliest studies of the American criminal justice system.<sup>86</sup> Roger Baldwin lobbied the commission to hire scholar Zachariah Chaffee to write the Police Practices section of the report because Chaffee had authored a study critical of police practices in Boston and made this material available to the commission.<sup>87</sup> The ensuing report, "Lawlessness in Law Enforcement," identified numerous police practices such as the infliction of pain to extract confessions, beating of suspects with fists and rubber hoses, and protracted questioning which included keeping suspects standing for hours, depriving them of food or sleep, detaining them illegally, and putting them in "cold storage."<sup>88</sup> Later, in a campaign to implement the report's recommendations, the ACLU drafted a model statute containing ideas that were later embraced by judiciaries across the United States.<sup>89</sup> According to ACLU historian Samuel Walker, "[a]lthough police reform was painfully slow in coming, *Lawlessness in Law Enforcement* was a watershed. It strengthened the hand of reform-minded police chiefs, creating a political constituency for change and advancing the idea that the police should be held accountable to the law through formal procedures."<sup>90</sup>

Although ACLU leader Roger Baldwin was suspicious of the New Deal and Roosevelt because of concerns that a powerful federal government would erode individual rights, the Roosevelt Administration included many officials who were civil libertarians.<sup>91</sup> Baldwin himself lobbied for the appointment of Daniel McCormack as Commissioner of Immigration, who, while in office, drastically reduced the number of aliens deported or excluded because of their political views.<sup>92</sup> Harold Ickes, the Secretary of the Interior, was actually a member of the ACLU.<sup>93</sup> His department was considered a "hotbed[]" of civil liberties activit[ies],<sup>94</sup> and it actively oversaw the implementation of the 1934 Indian Reorganization Act, a major ACLU project.<sup>95</sup>

In the midst of the Japanese Internment Program in 1941, the ACLU maintained its high-level contacts in the federal government, including close relations with Ed Ennis, who was Director of the Enemy Alien

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<sup>86</sup> *Id.* at 87.

<sup>87</sup> WALKER, *supra* note 81, at 87.

<sup>88</sup> *Id.* at 87–88 (internal quotation marks omitted).

<sup>89</sup> Among other guarantees, the statute called for immediate arraignment and right to counsel. *Id.* at 88.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 96.

<sup>92</sup> *Id.* at 96–97.

<sup>93</sup> WALKER, *supra* note 81, at 97.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

Control Unit.<sup>96</sup> Baldwin lobbied Ennis to mitigate the harshness of martial law in Hawaii and to obtain the release from military custody of Hans Zimmerman, thereby mooting Zimmerman's constitutional challenge to the martial law regime.<sup>97</sup>

ACLU leaders met frequently with other administration officials during the war, including Nicolas Biddle, the Attorney General; J. Edgar Hoover, head of the Federal Bureau of Investigation (hereinafter "FBI"); John J. McCloy, Assistant Secretary of War; and Paul V. McNutt, Chairman of War Manpower Commission. Ernest Angell, the Chairperson of the ACLU National Committee on Conscientious Objectors, met directly with President Roosevelt.<sup>98</sup> Baldwin had made clear his view that "in wartime . . . relations with the federal agencies became the primary concern for all of us."<sup>99</sup> As Judy Kutulus points out, "[b]y 1944 Baldwin was so convinced of the necessity of working with the government that he asked 'to be relieved of all administrative work in the office' to devote more time to work 'in the field,' by which he meant the offices of the Roosevelt Administration."<sup>100</sup>

These contacts between the ACLU and high-ranking government officials during the war resulted in some controversies that elicited serious internal criticism of ACLU officials.<sup>101</sup> As General John DeWitt was moving 80,000 Japanese Americans into concentration camps, Roger Baldwin wrote him a congratulatory note for "completing the evacuation 'with a minimum of hardship,' [and] noting the 'comparatively few complaints of injustice and mismanagement.'"<sup>102</sup> And as the *Korematsu* case was in the Supreme Court of the United States, with the federal

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<sup>96</sup> *Id.* at 143.

<sup>97</sup> *Id.* Zimmerman was a German alien living in Hawaii who was arrested for subversive activities shortly after the bombing of Pearl Harbor. Although the writ of habeas corpus had been suspended by military edict, Zimmerman filed a habeas petition in a U.S. District Court in Hawaii, seeking his release on the ground that the civil courts were open and functioning. The district court denied his petition. Ennis was skeptical that the Appeals Court would contain the war powers doctrine to the Hawaiian Islands, complicating the United States litigating positions in the yet to be decided *Korematsu* and *Hirabayashi* cases. PETER IRONS, *JUSTICE AT WAR* 164–65 (1983).

<sup>98</sup> WALKER, *supra* note 81 at 143.

<sup>99</sup> JUDY KUTULUS, *THE AMERICAN CIVIL LIBERTIES UNION & THE MAKING OF MODERN LIBERALISM 1930–1960* 92 (2006).

<sup>100</sup> *Id.* See also ROBERT C. COTTRELL, *ROGER NASH BALDWIN AND THE AMERICAN CIVIL LIBERTIES UNION* 142 (2000) ("Baldwin was elated whenever he believed that he had a pipeline to the inner circles of government . . .").

<sup>101</sup> Northern California ACLU Director Ernest Besig stated that "'Roger used to go the rounds in Washington and meet all these guys and he was more of a government representative than he was an ACLU representative for a while.'" KUTULUS, *supra* note 99, at 103. Florence Isabel, who became a leader of the ACLU, remarked that some in the ACLU were concerned that Baldwin was "informing the FBI about ACLU activities and ACLU people." COTTRELL, *supra* note 100, at 275 (internal quotation marks omitted).

<sup>102</sup> WALKER, *supra* note 81, at 143.

government arguing and subsequently winning the right to place Japanese American citizens in concentration camps, the ACLU's national office ordered the Northern California office to remove its name from any *Korematsu* brief challenging the Government's position.<sup>103</sup>

In one of the most serious examples of compromise, the head of the ACLU's Washington office, Irving Ferman, provided the FBI with internal documents and the names of individuals that he suspected of being communists.<sup>104</sup> He justified these actions on the ground that the national ACLU Board had passed a resolution in 1940 establishing anti-communism as official ACLU policy.<sup>105</sup>

In 1955, the Philadelphia office of the ACLU drafted a pamphlet designed to inform individuals of their rights upon being questioned by the FBI.<sup>106</sup> The pamphlet informed people that they had a right to decline interviews by the FBI, and that if they agreed to be questioned, they were entitled to have an attorney present.<sup>107</sup> It also cautioned them that if they refused to be interviewed, the FBI could record the refusal in its files, leaving employers free to draw negative inferences.<sup>108</sup>

Upon learning of the pamphlet, the national office of the ACLU reportedly went into "apoplexy."<sup>109</sup> National Staff Counsel Herbert Monte Levy conferred with FBI Deputy Director Louis B. Nichols and came back to the ACLU with a positive account of FBI procedures.<sup>110</sup> Levy argued that the pamphlet wrongly "single[d] out" the FBI and should have been applied to all federal agencies.<sup>111</sup> He ultimately assigned the pamphlet to a committee where it met a swift demise.<sup>112</sup> Patrick Murphy Malin, who succeeded Roger Baldwin in 1949, actually visited the FBI to obtain political information about his twenty-three affiliating offices and acknowledged the FBI's right to spy on the ACLU.<sup>113</sup>

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<sup>103</sup> *Toyosaburo Korematsu v. U.S.*, 323 U.S. 214 (1945); WALKER, *supra* note 81, at 146; *see also* KUTULUS, *supra* note 99, at 102, 115–16.

<sup>104</sup> WALKER, *supra* note 81, at 193.

<sup>105</sup> *Id.* Although this was a National Board resolution, it is not clear that it had the support of all the local affiliates. The Civil Liberties Union of Massachusetts, as well as those of Northern and Southern California, mobilized their substantial memberships against it. KUTULUS, *supra* note 99, at 154–55. The ACLU Board repealed the resolution in 1968. ARYEH NEIER, *TAKING LIBERTIES: FOUR DECADES IN THE STRUGGLE FOR RIGHTS* 134 (2003).

<sup>106</sup> WALKER, *supra* note 81, at 193.

<sup>107</sup> *Id.* at 193–94.

<sup>108</sup> *Id.* at 194.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> WALKER, *supra* note 81, at 194.

<sup>113</sup> KUTULUS, *supra* note 99, at 210–11.



*B. National Association for the Advancement of Colored People*

The National Association for the Advancement of Colored People (hereinafter “NAACP”), the oldest civil rights organization in the United States,<sup>114</sup> continually sought assistance from federal officials in its campaign to end racial segregation. Shortly after the Supreme Court of the United States agreed to hear *Shelley v. Kramer* challenging racially restrictive covenants,<sup>115</sup> President Harry Truman made a speech before the NAACP in which he suggested that the federal government was willing to move against state-sanctioned racial discrimination.<sup>116</sup> Seizing the opportunity, Walter White, then head of the NAACP, sent a letter to Attorney General Tom Clark asking the DOJ to file an amicus curiae brief in *Shelley* in support of the plaintiffs. The DOJ agreed and filed a brief on behalf of numerous government agencies arguing that government support of racially restrictive housing was against the national interest. The Secretary of State asserted in the brief that “the United States has been embarrassed in the conduct of foreign relations by acts of discrimination taking place in this country.”<sup>117</sup> Within four years of the *Shelley* decision, the Chicago Commission on Human Relations concluded that 21,000 families of color had been able to purchase homes in areas that were formerly barred to them.<sup>118</sup>

General Counsel Thurgood Marshall asked the DOJ to file an amicus curiae brief supporting the NAACP position in their challenge to the White Primary argued in *Smith v. Allwright*.<sup>119</sup> The department had earlier convinced the Supreme Court in *United States v. Classic* that federal criminal statutes could be utilized to prosecute corrupt state election officials.<sup>120</sup> However, the DOJ refused to file a brief in the case because then Assistant Attorney General Herbert Weschler, who argued the *Classic*

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<sup>114</sup> NAACP, <http://www.naacp.org/pages/naacp-history> (last visited Apr. 11, 2011).

<sup>115</sup> *Shelley v. Kraemer*, 334 U.S. 1, 4 (1948).

<sup>116</sup> Truman stated, “We must make the federal government a friendly, vigilant defender of the rights and equalities of all Americans. And again I mean all Americans.” RICHARD KLUGER, *SIMPLE JUSTICE* 250–51 (1975). According to Kluger, at the time Truman said these words, “[n]o President had ever dared say such a thing.” *Id.* at 251.

<sup>117</sup> KLUGER, *supra* note 116, at 253; PATRICIA SULLIVAN, *LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT* 354–55 (2009).

<sup>118</sup> KLUGER, *supra* note 116, at 253. Kluger reports that after the *Shelley* decision, Truman “called on Congress to make lynching a federal offense, to outlaw the poll tax, to end segregation on all interstate transportation, to set up a permanent FEPC to prevent discriminatory hiring practices, to enforce fair elections, and to create a permanent civil-rights commission.” *Id.* at 255. “Later in 1948, [Truman] went beyond entreaties to the legislative branch and issued executive orders ending all discrimination in federal employment and . . . all segregation in the armed forces. The FHA, too, was told to end its ban on the insurability of racially mixed housing.” *Id.*

<sup>119</sup> KLUGER, *supra* note 116, at 234.

<sup>120</sup> *United States v. Classic*, 313 U.S. 299, 301 (1940); KLUGER, *supra* note 116, at 234.

case, recommended against government participation.<sup>121</sup> As Weschler noted years later, “[w]e were a governmental department . . . and we had to get along with the Senate Judiciary Committee, which was dominated by the Southerners—and this seemed an unnecessary fight.”<sup>122</sup>

The NAACP realized in the 1940s that in order to stop civil rights violations in the South, it would have to work with the FBI.<sup>123</sup> To foster cooperation, Thurgood Marshall met with Attorney General Tom Clark. To Marshall’s surprise, Clark agreed that the federal government needed to do more to end attacks on black people, even going so far as to suggest that he wanted tougher anti-lynching laws.<sup>124</sup> Marshall later met with the FBI Director J. Edgar Hoover and suggested that the NAACP would counter accusations pervading the African American community that the FBI was racist if the FBI would do more to protect black people from racially motivated violence.<sup>125</sup>

Like the ACLU, the NAACP was also seriously committed to maintaining distance from Communists who were organizing around racial justice issues.<sup>126</sup> The NAACP similarly authorized its board “to suspend any branch that fell under Communist or other political domination” and indeed “suspended the San Francisco branch because ‘a known member of the Communist Party had become chairman of the Nominating Committee.’”<sup>127</sup> The most prominent staff member of the NAACP forced out on this basis was W.E.B. DuBois, one of the founders of the organization.<sup>128</sup> Jack Greenberg reports that NAACP “[b]oard meetings regularly dealt with expulsions and suspensions on grounds of Communist party membership.”<sup>129</sup> And in 1956, Thurgood Marshall met with the Assistant Director of the FBI, Lou Nichols, for the purpose of finding out from the bureau which civil rights organizations were “fronts” for Communists because Marshall wanted to use the information to keep them

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<sup>121</sup> KLUGER, *supra* note 116, at 234.

<sup>122</sup> *Id.* (internal quotation marks omitted).

<sup>123</sup> MARY L. DUDZIAK, *EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL’S AFRICAN JOURNEY* 139 (2008).

<sup>124</sup> JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 160 (1998).

<sup>125</sup> *Id.* at 162.

<sup>126</sup> HOWARD BALL, *A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA* 65–67 (1998).

<sup>127</sup> JACK GREENBERG, *CRUSADERS IN THE COURTS* 104 (1994); WILLIAMS, *supra* note 124 at 169.

<sup>128</sup> WILLIAMS, *supra* note 124, at 168. Williams reports that Marshall had “no second thoughts about having helped to push DuBois out.” *Id.* Some of the concern that Marshall had about DuBois may have stemmed from accusations that Marshall and the NAACP had engaged in Communist front activities. See 113 CONG. REC. 15,967 (1967) (statement of Rep. John Rarick); DUDZIAK, *supra* note 123, at 49. In 1963, Martin Luther King expelled Jack O’Dell from the Southern Christian Leadership Conference for the similar reasons. VICTOR S. NAVASKY, *KENNEDY JUSTICE* 143 (1971).

<sup>129</sup> GREENBERG, *supra* note 127, at 104.

out of an upcoming civil rights conference.<sup>130</sup>

Three years later, in 1959, the NAACP suspended Union County North Carolina branch President Robert Williams because Williams had made a public statement that blacks should “meet violence with violence,”<sup>131</sup> in conflict with the NAACP’s stated position of non-violence. When a defense committee formed to defend Williams, Marshall provided the FBI with documents linking the committee to Communists.<sup>132</sup> The racial justice strategy Marshall was seeking to implement required the assistance of the federal government, then consumed by the “Red Scare.”<sup>133</sup>

### C. Eisenhower

Dwight D. Eisenhower was not an advocate for federal enforcement of civil rights and had described *Brown v. Board of Education* as having “set back progress in the South.”<sup>134</sup> When riots broke out at the University of Alabama in 1956, after Autherine Lucy was admitted pursuant to a federal court order, the state refused to act against the rioters, and Eisenhower was unwilling to authorize federal intervention. The university suspended Lucy, stating that it was necessary for her own protection,<sup>135</sup> and when the outraged Lucy publicly criticized her suspension, the university retaliated and expelled her.<sup>136</sup> A federal judge upheld the expulsion, and the incident was later used to rationalize subsequent attempts to forestall school integration.<sup>137</sup> From Washington, Eisenhower described these as purely local problems, not necessitating federal intervention.<sup>138</sup>

Eisenhower also worked to defeat the proposed Title III of the Civil Rights Bill of 1957, which would have given the Attorney General power

<sup>130</sup> WILLIAMS, *supra* note 124, at 255. Although Marshall had insisted on meeting directly with J. Edgar Hoover, Hoover did not attend the meeting but authorized it to transpire. *Id.* at 255–56. According to Williams, Marshall never regretted getting Communists out of the NAACP or using the FBI for that purpose. According to Marshall, “I let Hoover know that I wanted the communists out. He didn’t help us. . . . We did it on our own. . . . We got rid of them [Communists].” *Id.* at 257–58.

<sup>131</sup> Williams made the statement after an all-white North Carolina jury acquitted a white man accused of attempted rape of a black woman who was eight months pregnant. Williams stated: “This demonstration today shows that the Negro in the south cannot expect justice in the courts. He must convict his attackers on the spot. He must meet violence with violence, lynching with lynching.” *Id.* at 280–81.

<sup>132</sup> *Id.* at 280. BALL, *supra* note 126, at 66; DUDZIACK, *supra* note 123, at 195 n.49.

<sup>133</sup> Many works explore this troubling time. See, e.g., TED MORGAN, REDS: MCCARTHYISM IN TWENTIETH-CENTURY AMERICA (2004); GRIFFIN FARIELLO, RED SCARE: MEMORIES OF THE AMERICAN INQUISITION: AN ORAL HISTORY (1995); DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER (1978).

<sup>134</sup> CARL M. BRAUER, JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION 3 (1977).

<sup>135</sup> *Id.* at 2.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 3.

to file a suit in federal court whenever an individual's rights under federal law were violated. Instead, he successfully worked to create a bipartisan Civil Rights Commission and a Civil Rights Division in the DOJ.<sup>139</sup> He thought the new sections would bring into the Republican Party African Americans, who were growing increasingly disenchanted with racist Southern Democrats.<sup>140</sup>

Notwithstanding Eisenhower's great reluctance to use federal power to support civil rights, he sent federal troops into Little Rock, Arkansas to enforce school desegregation orders.<sup>141</sup> It was the first time in the twentieth century that a President used military force to compel equal treatment for blacks, and led, perhaps inadvertently, to a "second Reconstruction."<sup>142</sup> Moreover, the Republican Party platform for the 1960 Republican National Convention endorsed the ruling of *Brown v. Board of Education*<sup>143</sup> and pledged to eradicate racial discrimination, creating what was probably the most liberal civil rights platform in Republican Party history.<sup>144</sup>

#### D. Kennedy

As the presidential campaign of 1960 got under way, John Kennedy was eager to establish his civil rights credentials for the African American community. To accomplish this purpose, he introduced federal anti-bombing legislation that was a top legislative agenda item at the time for the ACLU, NAACP, Americans for Democratic Action, and the Anti-Defamation League, four of the leading public interest activist organizations of the day. The legislation was designed to stop bomb attacks by white supremacists directed at the civil rights movement and

<sup>139</sup> NICK BRYANT, *THE BYSTANDER: JOHN F. KENNEDY AND THE STRUGGLE FOR BLACK EQUALITY* 65, 67–69 (2006); BRAUER, *supra* note 134, at 10. For a uniquely positive assessment of Eisenhower and the civil rights movement, see DAVID A. NICHOLS, *A MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS REVOLUTION* (2007).

<sup>140</sup> BRYANT, *supra* note 139, at 64. The immediate precursor of the Department of Justice was FDR's Civil Liberties Division, created within the Department of Justice in 1940. *Id.* at 20. Harry Truman also called for a permanent commission on civil rights and a civil rights division in the Justice Department. SULLIVAN, *supra* note 117, at 355.

<sup>141</sup> BRYANT, *supra* note 139, at 82.

<sup>142</sup> Eisenhower's Chief of Staff referred to this decision as his "most repugnant" act in eight years of office. *Id.* James M. McPherson saw this act as a new era of civil rights struggle. See James M. McPherson, *The Great Betrayal*, N.Y. REV. OF BOOKS, Nov. 30, 2006, at 47, 49, available at <http://www.nybooks.com/articles/archives/2006/nov/30/the-great-betrayal/?pagination=false&printpage=true> (discussing NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* (2006)).

<sup>143</sup> *Brown v. Board of Ed. of Topeka*, 347 U.S. 483 (1954).

<sup>144</sup> BRAUER, *supra* note 134, at 39. Adam Clayton Powell, Jr. long recognized as a major spokesperson for African Americans, supported Eisenhower's re-election in 1956, and some commentators felt that because of the racism of Southern Democrats, blacks might move back to the Republican Party. *Id.* at 8.

particularly at activists in Montgomery and Birmingham, Alabama.<sup>145</sup> These violent attacks, although initially directed at blacks, extended to their Jewish sympathizers in places such as Nashville, Tennessee; Jacksonville, Florida; and Charlotte and Gastonia, North Carolina.<sup>146</sup> Although the bill never passed, it prompted President Eisenhower to introduce his own anti-bombing legislation that became part of the Civil Rights Act of 1960.<sup>147</sup>

When President Kennedy took office, the DOJ had approximately 950 lawyers, only ten of whom were black.<sup>148</sup> The Civil Rights Division had been understaffed and lacking direction since its creation by the Civil Rights Act of 1957.<sup>149</sup> The new Attorney General, Robert Kennedy, sought to energize the department and appointed Burke Marshall as First Assistant to the Civil Rights Division.<sup>150</sup> Liberal Democrats and civil rights groups had argued for the appointment of Harris L. Wofford Jr., but Kennedy concluded that Wofford was too closely aligned with the civil rights community and might have trouble gaining Senate confirmation.<sup>151</sup>

Wofford was the first white graduate of Howard Law School and an expert in civil rights and foreign affairs, becoming a law professor at Notre Dame Law School and serving as legal counsel to Father Theodore Hesburg, who was a member of the newly formed United States Civil Rights Commission. As Kennedy was preparing to announce his bid for the Presidency, his brother Robert approached Wofford to get him involved with the campaign because of his close relationship to leaders in the civil rights movement.<sup>152</sup>

After Kennedy was elected, Wofford pushed the President to approach the issue of civil rights through the use of presidential powers, encouraging the promulgation of executive orders targeting school segregation and discrimination by federal contractors as well as initiating or intervening in federal lawsuits against discriminatory state action—two forms of executive power that could bypass Congressional legislation.<sup>153</sup> Kennedy disregarded his suggestions, however, and refused to issue executive orders

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<sup>145</sup> BRYANT, *supra* note 139, at 92–93.

<sup>146</sup> *Id.* The Kennedy bill would have made it a federal crime to import or export between states any explosives that were to be used for an unlawful purpose. *Id.*

<sup>147</sup> *Id.* at 101.

<sup>148</sup> BRAUER, *supra* note 134, at 82.

<sup>149</sup> *Id.* at 10–11.

<sup>150</sup> *Id.* at 93.

<sup>151</sup> NAVASKY, *supra* note 128, at 162. *See also* BRAUER, *supra* note 134, at 93. Wofford did serve in the White House as Presidential Assistant for Civil Rights but left in 1962, having become convinced that the “center of civil rights power and decision-making . . . was in the Department of Justice.” NAVASKY, *supra* note 128, at 161.

<sup>152</sup> BRYANT, *supra* note 139, at 108–09. *See also* BRAUER, *supra* note 134, at 93.

<sup>153</sup> BRYANT, *supra* note 139, at 155, 225.

barring discrimination in public housing programs and desegregating the National Guard, although he had campaigned on the issue and had been specifically requested to do so by NAACP head Roy Wilkins.<sup>154</sup>

In light of these differences, the civil rights appointment went to Burke Marshall, at the time a corporate lawyer for the Washington D.C. firm of Covington & Burling, who had spent his entire career in private practice and had no connections to the civil rights movement.<sup>155</sup> Upon taking office in early 1961, Marshall wanted greatly to expand the docket of the agency.<sup>156</sup> In the past, DOJ cases had been argued by local U.S. Attorneys—Marshall, however, allowed lawyers from his Washington staff to go out into the field, conduct investigations, negotiate with local officials and argue their own cases in court.<sup>157</sup>

Kennedy appointed a number of African Americans to significant positions, some of whom were directly involved in the civil rights movement. He appointed ten black judges who served on northern courts, including Thurgood Marshall, who was nominated and took a seat with the U.S. Court of Appeals for the Second Circuit and Wade McCree, Jr., who was named to sit on the U.S. District Court for the Eastern District of Michigan and who later became the second black Solicitor General of the United States after Thurgood Marshall.<sup>158</sup> Other black appointments included: Carl Rowan as Assistant Secretary of State for Public Affairs;

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<sup>154</sup> *Id.* at 227. Ultimately, Kennedy did establish the President's Committee on Equal Employment Opportunity by executive order. *Id.* at 228. *See generally* Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961). As a general matter, Kennedy was extremely reluctant to listen to civil rights activists. Victor Navasky claimed that the Kennedys' vision:

was bounded on the left by the demands of Walter Reuther, Joseph Rauh, the Civil Rights Leadership Conference (NAACP Executive Secretary Roy Wilkins, *et al.*), and the U.S. Civil Rights Commission—in other words by that group whom the Kennedys privately and contemptuously labeled knee-jerk liberals. There was no feeling that men like Bob Moses, the idealistic young civil rights worker who put his life on the line in grass-roots civil rights activities, Howard Zinn, the militant and radical historian, or even organizations like SNCC spoke for the future or even an important point of it. The furthest from the mainstream that the Kennedy imagination ventured was Martin Luther King, whom they couldn't very well ignore and to whom it would have been wise to keep lines open, in any event. Even James Farmer and his militant colleagues . . . were not taken seriously

NAVASKY, *supra* note 128, at 192–93.

<sup>155</sup> BRYANT, *supra* note 139, at 246.

<sup>156</sup> G. CALVIN MACKENZIE & ROBERT WEISBROT, *THE LIBERAL HOUR: WASHINGTON AND THE POLITICS OF CHANGE IN THE 1960'S* 145 (2009). Marshall succeeded in launching 6 voting rights suits in his first ten months, and investigations in sixty-one southern counties. BRYANT, *supra* note 139, at 249. By May of 1963, the Kennedy Administration “had filed thirty-seven voter registration suits under the 1957 and 1960 acts, eleven in Mississippi and the rest in Georgia, Louisiana, Alabama and Tennessee.” NAVASKY, *supra* note 128, at 204.

<sup>157</sup> BRAUER, *supra* note 134, at 117.

<sup>158</sup> NAVASKY, *supra* note 128, at 243.

Clifton Wharton as U.S. Ambassador to Norway; Cecil Poole as U.S. Attorney for Northern California; Samuel Westerfield as Senior Advisor in the Treasury Department's Office of International Finance; George Weaver as Special Assistant to the Secretary of Labor; and Franklin H. Whittaker, who became Director of Public Information at the Commerce Department.<sup>159</sup>

Kennedy's Southern judicial appointments, however, were a matter of grave concern to civil rights activists. In May of 1961, Kennedy signed an Omnibus Judgeship Bill creating thirty federal court vacancies and proceeded to nominate a number of individuals to the federal bench who held white supremacist views, such as William Harold Cox,<sup>160</sup> E. Gordon West,<sup>161</sup> and J. Robert Elliott.<sup>162</sup> Kennedy went so far in his desire to work with Southern Democrats as to ask the American Bar Association to revise its original assessment of a racist judicial candidate so that the nominated judge would be more acceptable during the confirmation process.<sup>163</sup> As Victor Navasky has noted, "[t]he Kennedys named no fewer than 25 percent non-law-of-the-land-followers (five out of twenty appointments) to lifetime judgeships in the Fifth Circuit, the district which encompasses Florida, Texas, Georgia, Alabama, Louisiana, and Mississippi, the heart of the deep South."<sup>164</sup>

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<sup>159</sup> BRYANT, *supra* note 139, at 215.

<sup>160</sup> When Cox was named, Roy Wilkins of the NAACP sent a telegram to the President predicting that for African Americans, Cox would become "another strand in their barbed wire fence, another cross over their weary shoulders and another rock in the road up which their young people must struggle." *Id.* at 286.

<sup>161</sup> As a sitting federal judge, West referred to the *Brown v. Board of Education* decision as "one of the truly regrettable decisions of all time." *Id.* at 287.

<sup>162</sup> In Elliott's career on the federal bench, 90 percent of his civil rights rulings were overturned by the appellate courts, including one where he held that civil rights protest marches infringed the equal protection rights of whites in Albany, Georgia, because law enforcement officers were withdrawn from their community to police the marches. *Id.* at 286–87, 318. The Kennedy Justice Department filed an amicus brief in that case while it was pending in the U.S. Court of Appeals. *Id.* at 324. Elliott's nomination did, however, have the backing of Colonel Austin T. Walden, and the local NAACP. NAVASKY, *supra* note 128, at 257.

<sup>163</sup> BRYANT, *supra* note 139, at 287 (describing the confirmation process of Alabama Judge Clarence Allgood. However, Allgood reportedly had the support of Alabama's local civil rights groups). See also BRAUER, *supra* note 134, at 123.

<sup>164</sup> NAVASKY, *supra* note 128, at 244. Navasky further states,

[w]hen Robert Kennedy retired as Attorney General in September 1964, in the principal Southern states there were no Negro circuit court judges (twelve white ones), no Negro district court judges (sixty-five white ones), no Negro U.S. commissioners (253 white ones), no Negro jury commissioners (109 white ones) and no Negro U.S. marshals (twenty-nine white ones). As a study of the Southern Regional Council concluded, "[a] Negro involved in a federal court action in the South could go from the beginning of the case to the end without seeing any black faces unless they were in the court audience, or he happens to notice the man sweeping the floor."

As a Deputy Attorney General in the Kennedy Administration, Ramsey Clark toured the Southern states and concluded that a case-by-case approach to school desegregation would not work. Arguing for a more aggressive approach from the federal government, Clark wrote:

[t]he national interest must be represented in the school desegregation cases. Private prosecution of school desegregation is ineffective, unfair and capricious. . . . The financial burden of prosecution falls on the wrong people. . . . The institutional rights of school children should not depend on the desire and ability of private interests to protect these rights. . . . There is a great need for coordinated, long range planning for effective integration in depth in all areas where segregation exists whether under color of law, or de facto . . . [i]f something on this order cannot be enacted then we should consider wholesale plans for intervening or the filing of amicus briefs.<sup>165</sup>

The first federal government civil rights suit to desegregate a public school system was filed by the Kennedy DOJ, but involved a case held over from the Eisenhower Administration.<sup>166</sup> The suit against Prince Edward County, Virginia, presented particularly egregious facts. In response to *Brown*, the County decided that it would close its schools rather than integrate its education system.<sup>167</sup> A three-judge federal court found the closures in violation of the Fourteenth Amendment.<sup>168</sup> Rather than comply with the federal court order, Prince Edward County proceeded to dismantle its entire public school system and in its place opened a private academy for white children that was funded by subsidies from the state and county, but was not open to black students.<sup>169</sup> The department's suit sought injunctions barring federal funds to the school district.<sup>170</sup> Notwithstanding the suit's symbolic magnitude, critics complained that the DOJ showed little interest in taking remedial action to assure that the black children received an adequate education while the litigation was proceeding.<sup>171</sup> Other critics, including Thurgood Marshall, noted that most

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*Id.* at 243.

<sup>165</sup> *Id.* at 184 n\*.

<sup>166</sup> BRYANT, *supra* note 139, at 253. The Eisenhower Administration had submitted amicus briefs supporting plaintiffs in desegregation cases in New Orleans and Little Rock. *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*, at 256.



of the school integration that took place under the Kennedy Administration was the result of voluntary efforts and token compliance.<sup>172</sup>

The Kennedy DOJ also filed a series of voting rights cases after the 1962 midterm elections in Louisiana, Alabama, Georgia, and Mississippi, including one in Sunflower County, where only 114 of 13,524 blacks were registered to vote.<sup>173</sup> Eventually, the department recognized that voting rights education work could be utilized as a way to convince the confrontational elements of the civil rights movement to adopt more acceptable means of struggle. With this in mind, the department worked closely with civil rights activists to set up what became known as the Voter Education Project.<sup>174</sup> This initiative was launched at a meeting between Justice Department officials and a number of civil rights organizations.<sup>175</sup> At the meeting, the department articulated its goal of channeling activists away from street level protests to litigation-based reform.<sup>176</sup> Its view was that if blacks registered in sufficient numbers, white politicians would be forced to take more moderate positions on racial issues.<sup>177</sup> The department's unequivocal message was that voter registration drives would

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<sup>172</sup> *Id.* BRYANT, *supra* note 139, at 256. The first case initiated entirely by the Kennedy Department of Justice was filed against Prince Edward County, Virginia, a school district near a military base and thus the recipient of substantial federal funds. *Id.* at 145, 253. Although this case presented the opportunity to seek as a remedy the cessation of federal funding because of segregation, the Administration did not do so. *Id.* See also BRAUER, *supra* note 1384, at 145–47. The Kennedy Administration also filed amicus briefs in key cases, for example, in the case of black Air Force Veteran, George Meredith, seeking admission to the University of Mississippi. BRYANT, *supra* note 139, at 332; NAVASKY, *supra* note 128, at 227; BRAUER, *supra* note 134, at 180–85. However, in the aftermath of the riots at the University that lead to two deaths, fueled in part by Mississippi Governor Barnett, the United States was not able to successfully prosecute anyone, notwithstanding civil contempt charges brought against Governor Barnett himself. BRYANT, *supra* note 139, at 351.

Federal prosecutions were brought against individuals who firebombed a bus carrying freedom riders in Anniston, Alabama, on May 14, 1961, and against Bull Connor and other Montgomery, Alabama, city officials for failing to protect freedom riders traveling through town. BRAUER, *supra* note 134, at 98–99. In addition, U.S. district court Judge Frank Johnson issued an injunction at the behest of the Justice Department to stop Ku Klux Klan and the National States Rights Party from interfering with interstate travel, and another injunction requiring Birmingham and Montgomery police to protect travelers. *Id.* at 101–02; NAVASKY, *supra* note 128, at 20. In Jackson, Mississippi, city officials prosecuted freedom riders. The NAACP Legal Defense Fund sought to enjoin the prosecutions and was assisted by an amicus curiae brief from the Department of Justice. BRYANT, *supra* note 139, at 263–77. The Kennedy Justice Department also brought prosecutions against members of a civil rights group, the Albany Movement. Nine members, afterwards known as the “Albany Nine,” were arrested after picketing a grocery store owned by a white juror who voted to acquit a sheriff charged with shooting at point blank range a black man in his custody. BRYANT, *supra* note 139, at 433–34; NAVASKY, *supra* note 128, at 122–23; CHARLES EUCHNER, NOBODY TURN ME AROUND 43 (2010); MICHAEL R. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH 108–09 (1995).

<sup>173</sup> BRYANT, *supra* note 139, at 364.

<sup>174</sup> *Id.* at 284–85.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 284.

<sup>177</sup> *Id.*

receive greater protection from the federal government than street level protests.<sup>178</sup> The DOJ even went so far as to secure funding for the project from three philanthropic organizations and inquired into obtaining tax-exempt status from the Internal Revenue Service.<sup>179</sup> As the voter registration work proceeded, the DOJ provided various forms of guidance, including targeting populations where voter registration would be most helpful.<sup>180</sup> “During [the] first twenty-one months of [the project’s] operations, [it] claimed to have registered over 327,000 new voters, 287,000 of whom were black”; these new voters had a notable effect on Southern electoral politics, and even where there was great resistance to the project’s work, it triggered waves of voting rights activism.<sup>181</sup>

As civil rights activists were organizing for their biggest demonstration, the August 1963 March on Washington, there was an “unprecedented degree of cooperation” between DOJ officials and demonstration organizers.<sup>182</sup> John Douglas, who was assigned this role by the department, worked to “chang[e] the focus of the demonstration away from a protest against the president into a rally in support of his controversial civil rights bill,”<sup>183</sup> and was largely successful in his efforts.<sup>184</sup> At the same time, the FBI worked to “exploit fears about violence and Communist infiltration of the civil rights movement,” making phone calls to celebrities and suggesting that they should stay away.<sup>185</sup>

Yet another manifestation of the Kennedy government’s orientation to civil rights followed three bombings in Birmingham, Alabama, on the

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<sup>178</sup> *Id.*

<sup>179</sup> BRYANT, *supra* note 139, at 285.

<sup>180</sup> *Id.* According to Navasky,

[T]he Attorney General and his staff had helped convince the civil-rights-oriented Taconic and Field Foundations to subsidize a voter registration drive on condition that civil rights agencies across the board (from the Urban League and NAACP to CORE, SNCC and SCLC) agree to redirect their energies from buses to ballots, from civil disobedience to the Voter Education Project, thereby diverting the energy of civil rights workers from direct confrontation with Southern “law.”

NAVASKY, *supra* note 128, at 20, 21, 207. See also BELKNAP, *supra* note 172, at 106–07 (noting that “[t]he Kennedy Administration was deeply involved in the process which led to VEP’s creation”).

<sup>181</sup> BRAUER, *supra* note 134, at 115–16.

<sup>182</sup> BRYANT, *supra* note 139, at 1–7. See also LUCY G. BARBER, MARCHING ON WASHINGTON 149–61 (2002).

<sup>183</sup> BRYANT, *supra* note 139, at 7. See also NAVASKY, *supra* note 128, at 182–83.

<sup>184</sup> EUCHNER, *supra* note 172, at 43 (“The organizers of the March on Washington agreed that the march would not include a direct challenge to the White House or Congress. There would be no marches along Pennsylvania Avenue. There would be no effort to force an audience with Strom Thurmond or James Eastland or other segregationists. Everyone would be polite.”).

<sup>185</sup> *Id.* at 57. According to Euchner, agents would call and say: “Do you know . . . that many of the march’s leaders are Communists? Do you know that Communists and other leftists could create chaos on the march? Do you know that it’s not too late to pull out of the march? Stay away!” *Id.*

night of May 11, 1962, in the midst of the extraordinary violence that characterized the civil rights campaign in the city. Martin Luther King, Jr., had just been released from jail with the help of the DOJ raising bond money for him, and had visited the Gaston Motel less than an hour before the bombs exploded.<sup>186</sup> To ease tensions, President Kennedy personally called civil rights leaders, asking them not to go to Birmingham.<sup>187</sup>

### *E. Johnson*

Roy Wilkins had been leader of the NAACP for nine years and had been critical of the Civil Rights Act of 1957, describing the law as “soup made from the bones of an emaciated chicken which had died from starvation.”<sup>188</sup> He was especially critical of Lyndon Johnson, who, as Texas’ Senator, had watered down civil rights legislation that had emerged from the House in order to have it passed in the Senate.<sup>189</sup> Yet Wilkins was the first civil rights leader Johnson called to the White House after becoming President.<sup>190</sup> Despite efforts by Johnson’s Press Secretary, George Reedy, to spotlight Roy Wilkins and play down Martin Luther King, Jr., Johnson also met with King in the White House. In these meetings, the two leaders strategized over the passage of civil rights legislation as Johnson continuously pleaded with King to stop confrontational demonstrations.<sup>191</sup>

As a general matter, the major civil rights organizations Southern Christian Leadership Conference (hereinafter “SCLC”), Student Nonviolent Coordinating Committee (hereinafter “SNCC”), and Congress of Racial Equality (hereinafter “CORE”) were not lobbying organizations, and preferred to struggle against injustice in the streets, firmly convinced that this was the best means for achieving civil rights goals.<sup>192</sup> Litigation had taken place under civil rights statutes then in existence, such as the Acts of 1957, 1960, and 1964, but there were large areas where rights already provided by law were not enforced.<sup>193</sup> President Johnson

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<sup>186</sup> BRYANT, *supra* note 139, at 391–92.

<sup>187</sup> *Id.*

<sup>188</sup> NICK KOTZ, JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING JR., AND THE LAWS THAT CHANGED AMERICA 23 (2005).

<sup>189</sup> As journalist Robert Novak and Rowland Evans observed, “[Lyndon] Johnson had voted *no* on the Civil Rights bill 100 percent of the time; *no* on the anti-lynching bill of 1940, *no* on the Democratic leadership amendment in 1940 eliminating segregation in the armed services; *no* on anti-poll tax bills in 1942, 1943, 1945.” BRYANT, *supra* note 139, at 64.

<sup>190</sup> KOTZ, *supra* note 188, at 23.

<sup>191</sup> *Id.* at 43, 66–67.

<sup>192</sup> *Id.* at 3, 14, 59.

<sup>193</sup> Selma, Alabama, for example, had in 1961 over 15,000 voting-age African Americans in its population, but only 156 were registered voters. After three years of litigation, the numbers only showed a slight increase to 335. *Id.* at 255–56.

authorized some key actions, such as his decision in the face of sit-ins at the DOJ to authorize federal participation in King's lawsuit against the Selma, Alabama, police after the infamous Bloody Sunday violence at the Edmund Pettus Bridge.<sup>194</sup> In that case, U.S. District Judge Frank Johnson, after initially restraining the protesters, allowed them to march over the bridge without interference from state officials.<sup>195</sup> King had asked the DOJ to join as a plaintiff; President Johnson initially refused but relented somewhat, allowing for DOJ participation as a "friend of the court."<sup>196</sup>

Earlier litigation had been filed in Selma to enforce provisions of the Voting Rights Act of 1964 in which U.S. Attorney General Nicholas Katzenbach engaged in "secret negotiations" with U.S. District Judge Daniel Thomas that resulted in a wide-ranging federal order commanding local officials to stop using lengthy voting registration tests and otherwise harassing black registrants.<sup>197</sup>

Johnson also nominated members from the civil rights community to various governmental positions, most famously Thurgood Marshall to the United States Supreme Court.<sup>198</sup> He also named Constance Baker Motley as U.S. District Judge in the Southern District of New York, making her the first black woman appointed to the federal bench, as well as A. Leon Higginbotham, who was initially appointed to the U.S. District Court for the Eastern District of Pennsylvania but who finished his career on the United States Court of Appeals for the Third Circuit.<sup>199</sup> Robert Weaver, whom Johnson named as head of the newly established Department of Housing and Urban Development, was the first black member of a presidential cabinet.<sup>200</sup> Johnson also appointed Roger Wilkins to the position of Assistant Attorney General, and named Clifford Alexander as Chairperson of the Equal Employment Opportunity Commission.<sup>201</sup>

One of the characteristics that made Johnson so successful in the Senate was his engaging personality and negotiating skills, which he also utilized with the civil rights community. In 1964, Johnson met with civil rights leaders seeking to gather their support for his programs.<sup>202</sup> At the

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<sup>194</sup> *Id.* at 282, 291-92.

<sup>195</sup> *Id.* at 282, 291-92, 302.

<sup>196</sup> KOTZ, *supra* note 188, at 291.

<sup>197</sup> *Id.* at 266-67.

<sup>198</sup> *Id.* at 356.

<sup>199</sup> *Id.* at 94, 356.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 356-57.

<sup>202</sup> KOTZ, *supra* note 188, at 231. The meeting was attended by A. Phillip Randolph of the Brotherhood of Sleeping Car Porters; Whitney Young of the National Urban League; James Farmer of CORE; Dorothy Height of the National Council of Negro Women; and Jack Greenberg of the NAACP Legal Defense Fund. *Id.*

meeting, Johnson reportedly asked Jack Greenberg of the NAACP Legal Defense Fund: “And what can I do for you?” Greenberg responded that the biggest problem facing civil rights lawyers in the South was segregationist federal judges who had been appointed by President Kennedy.<sup>203</sup> Johnson then promised that he would henceforth “clear all judicial appointments in the South with Greenberg and other civil rights leaders,” which he did from that point on.<sup>204</sup>

#### *F. Carter*

The Administration of President Jimmy Carter presented a watershed moment for one wing of the public interest law movement, as the late 1960s and early 1970s ushered in a new wave of consumer activism generated in large part by Ralph Nader. Nader, a crusading figure who spearheaded the quest for governmental regulation of auto safety,<sup>205</sup> challenged the then-accepted belief that automobile accidents were caused primarily by drivers and overall road conditions, and instead focused on the role of automobile design and engineering.<sup>206</sup> His pioneering book, *Unsafe at Any Speed: The Designed-In Dangers of the American Automobile*, provided a powerful critique of the auto industry and particularly the Chevrolet Corvair because of its susceptibility to low speed flip-overs that Nader attributed to “faulty, even negligent engineering.”<sup>207</sup>

Publication of the book led to Congressional hearings in which Nader served as a star witness and which were followed by enactment of one of the first federal auto safety laws, the National Traffic and Motor Vehicle Safety Act.<sup>208</sup> Although it did not include the criminal penalties making auto executives liable for egregious errors of safety engineering that Nader desired, the Act mandated features that are now taken for granted, such as shoulder straps for front-seat passengers, limits on glare-producing

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 231.

<sup>205</sup> LIZABETH COHEN, A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 354 (2003).

Without Nader consumer abuses would never have gained the public notoriety they did, nor would legislative and regulatory remedies have been adopted so successfully. If anyone can be credited with moral leadership of the consumer movement in the 1960’s and 1970’s, it would be Ralph Nader.

*Id.*

<sup>206</sup> JUSTIN MARTIN, NADER: CRUSADER, SPOILER, ICON 38–39 (2002). Consumers Union, an educational, scientific and lobbying organization, published an article in 1956, “The Safe Car,” in its periodical Consumers Reports, that exposed the dangers of American automobile design. LAWRENCE B. GLICKMAN, BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA 270–71 (2009).

<sup>207</sup> MARTIN, *supra* note 206, at 45–46.

<sup>208</sup> National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966) (repealed 2006).

chrome, shatterproof windshields, energy absorbing steering columns, flashing hazard lights, and dual breaking systems that include backups in case of failure.<sup>209</sup>

One of Nader's chief goals as consumer advocate was the establishment of a Federal Consumer Protection Agency.<sup>210</sup> In furtherance of that goal, he met with Democratic Presidential Candidate Jimmy Carter in Plains, Georgia, in a session that went well enough for Carter to describe himself afterwards as a "consumer activist."<sup>211</sup> After his victorious campaign, President Carter appointed former Nader employees<sup>212</sup> and other consumer activists to various federal governmental posts, including former "Raiders" James Fallows, who served as a Carter speechwriter, and Peter Petkas, who served in the Office of Management and Budget along with Harrison Wellford, former Executive Director of the Center for Responsive Law.<sup>213</sup>

Nader himself never worked for the federal government besides a short stint as a reservist in the U.S. Army, where he served primarily as a cook at

<sup>209</sup> MARTIN, *supra* note 206, at 61.

<sup>210</sup> In July 2010, the Obama Administration signed legislation establishing the Bureau of Consumer Financial Protection and appointed Harvard professor and consumer advocate Elizabeth Warren to oversee its creation. 12 U.S.C.A. § 5491 (West 2010). See also Jackie Calmes & Sewell Chan, *Obama Picks Warren to Set Up Consumer Bureau*, N.Y. TIMES, Sept. 18, 2010, at B5, available at <http://www.nytimes.com/2010/09/18/us/politics/18warren.html> (discussing the appointment of Elizabeth Warren to oversee the Consumer Financial Protection Bureau.).

<sup>211</sup> GLICKMAN, *supra* note 206 at 278–79. Nader also had meetings with Presidents Nixon and Ford, but these meetings were hard-won. MARTIN, *supra* note 206, at 183. In a memorandum to the U.S. Chamber of Commerce former corporate lawyer, American Bar Association President, and United States Supreme Court Justice Lewis F. Powell described Nader as "perhaps the single most effective antagonist of American business." Memorandum from Lewis F. Powell to Eugene Sydnor, Jr. (Aug. 23, 1971), available at [http://www.reclaimdemocracy.org/corporate\\_accountability/powell\\_memo\\_lewis.html](http://www.reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html).

<sup>212</sup> The first group of "Nader's Raiders," as they came to be called, consisted of seven students hired by Nader in the summer of 1968 to investigate the Federal Trade Commission, which then served as a consumer protection agency. MARTIN, *supra* note 206, at 77. The group produced a 185-page report that they distributed to the Washington press corps describing the FTC as a

self-parody of bureaucracy, fat with cronyism, torpid through inbreeding unusual even for Washington, manipulated by the agents of commercial predators, impervious to governmental or citizen monitoring. Alcoholism, spectacular lassitude, and office absenteeism, incompetence by the most modest standards, and lack of commitment to the regulatory mission are rampant.

*Id.* at 80. In response to the report, Richard Nixon asked the American Bar Association to conduct its own investigation, resulting in a report reaching similar conclusions and leading to the stepping down of the agency head, Paul Rand Dixon, and his replacement by Caspar Weinberger. Weinberger instituted litigation against major corporations such as McDonald's and Coca Cola. *Id.* at 81.

<sup>213</sup> Other Nader supporters who went into the government with the Carter Administration included: Mike Pertschuk, who became head of the Federal Trade Commission; Carol Tucker Forman, who became Assistant Secretary of the Department of Agriculture; and Nancy Chasen, who became assistant to Esther Peterson, Carter's Consumer Adviser. Justin Martin commented that the Carter Administration was "crawling" with Naderites. *Id.* at 187.

Ft. Dix, New Jersey.<sup>214</sup> He was fond of saying that he would “work on government rather than in government,”<sup>215</sup> and preferred putting his energy into founding the Center for the Study of Responsive Law, the first of over two dozen not-for-profits that he created as part of a formidable consumer rights movement.<sup>216</sup>

Joan Claybrook was another close associate of Nader chosen by President Carter to serve in the federal government. Prior to her appointment, Claybrook had worked for the Social Security Administration and the former National Highway Transportation Bureau.<sup>217</sup> Because of Claybrook’s work on auto safety, Nader hired her as an attorney in 1970 for the newly formed Public Interest Research Group, where she was soon referred to as Nader’s “right hand woman.”<sup>218</sup> President Carter moved her back to the National Highway Transportation Safety Administration (hereinafter “NHTSA”), but this time as head of the agency.<sup>219</sup> Because the NHTSA was created within the Department of Transportation (hereinafter “DOT”) by Congressional legislation largely influenced by his work, Nader had a special interest in its functioning.<sup>220</sup>

Nader, however, launched a public relations assault on Claybrook when she was head of the agency, which was significant for its insight into how one of America’s iconic public interest attorneys then viewed the relationship between government and the budding public interest law movement. The impetus for the attack was his conviction that the DOT had wrongfully delayed implementation of transportation regulations mandating the installation of passive restraint systems in automobiles.<sup>221</sup> Even though Claybrook’s boss at the DOT had ordered the delay, Nader accused Claybrook of not standing up to him.<sup>222</sup> In a critical statement released to the news media but not to Claybrook herself, Nader attacked his former “right hand woman” not only for missing the seatbelt deadline but also for doing little to address pedestrian deaths, failing to recruit conscientious and experienced staff, and being “more beholden to the auto

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<sup>214</sup> *Id.* at 31.

<sup>215</sup> *Id.* at 152.

<sup>216</sup> *Id.* at 82; COHEN, *supra* note 205, at 355. Nader evidently changed his thinking about this, later running campaigns for President of the United States in 2000, 2004, and 2008.

<sup>217</sup> MARTIN, *supra* note 206, at 122.

<sup>218</sup> *Id.* at 122–23.

<sup>219</sup> *Id.* at 185.

<sup>220</sup> *Id.*

<sup>221</sup> The Carter Administration initially proposed the rules in 1976, and Claybrook assumed her position in 1977. The delay would have required large cars to implement seatbelts by 1982 and smaller cars by 1984. *Id.*

<sup>222</sup> *Id.*

industry than to consumers.”<sup>223</sup> He demanded her resignation, and within nine months, she was gone.<sup>224</sup> Nader justified his tactics in saying, “[t]here are no friends in government, only users and misusers of power.”<sup>225</sup>

Although serving only one term as President, Jimmy Carter bestowed significant honor on the public interest law movement by appointing Ruth Bader Ginsburg, ACLU General Counsel and founder of the Women’s Rights Project, to the U.S. Court of Appeals for the D.C. Circuit, the bench from which President Clinton elevated her to the United States Supreme Court. Carter also appointed Drew S. Days III, first assistant counsel of the Legal Defense Fund, to head the Civil Rights Division of the DOJ. While in that position, Days instituted an innovative, but ultimately unsuccessful, civil lawsuit against the Philadelphia police department,<sup>226</sup> seeking relief for a pattern of police abuse and violations of constitutional rights after the Supreme Court had barred private plaintiffs from litigating a similar claim.<sup>227</sup> President Clinton later selected Days to serve as the second black Solicitor General of the United States.<sup>228</sup>

#### IV. PRACTICES

##### *A. Nominations and Appointments*

Since his own historical job promotion, President Barack Obama has shown himself to be a staunch equal opportunity employer, filling his Administration with individuals from segments of the population that historically have not seen representation in high-level federal positions. According to a July 2010 *Philadelphia Inquirer* report, “nearly half of Obama’s 73 appointments to the federal bench have been women, 25 percent have been African American, 11 percent Asian American, and 10 percent Hispanic. About 30 percent of Obama’s nominees were white males.”<sup>229</sup> By contrast, two out of every three candidates nominated by

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<sup>223</sup> MARTIN, *supra* note 206, at 185–86.

<sup>224</sup> *Id.* at 186.

<sup>225</sup> *Id.*

<sup>226</sup> U. S. v. City of Phila., 644 F.2d 187 (3d Cir. 1980).

<sup>227</sup> Rizzo v. Goode, 423 U.S. 362, 380–81 (1976).

<sup>228</sup> President Clinton was less successful with his choice of Lani Guinier, also from the LDF, to head the Civil Rights Division. In an ugly confirmation battle, Republicans delayed Guinier’s nomination until Clinton withdrew it, without a formal hearing, and proposed Duval Patrick, another former LDF attorney, instead. Guinier went on to become the first African American woman tenured at Harvard Law School. She discussed her nomination debacle in LANI GUINIER, LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE 114–31 (1998).

<sup>229</sup> George Curry, Op-Ed., *Obama, Republicans Square Off Over Courts*, PHILA. INQ., July 11, 2010, available at [http://www.philly.com/inquirer/currents/20100711\\_Obama\\_Republicans\\_square\\_off\\_over\\_courts.html](http://www.philly.com/inquirer/currents/20100711_Obama_Republicans_square_off_over_courts.html). “President Obama has nominated a record number of Asian-Americans to the



President George Bush were white men.<sup>230</sup> For the most part, Obama, like his predecessors, has drawn into his Administration lawyers who established confirmation-proof reputations in Washington-connected private law firms.<sup>231</sup> But, as has been true of previous progressive-reform Presidents, Obama has sought to include those presidents, board members, legal counselors, representatives, activists, and staff attorneys of the public-interest law organizations whose missions correspond with his own, suggesting a willingness to collaborate with the movement.<sup>232</sup>

Many of the Obama appointees to the judiciary started off their careers as public defenders and were selected for positions ranging from U.S. Attorneys to Supreme Court Justices.<sup>233</sup> Judgeships were often filled by lawyers with many years' experience in private practice and consequently fewer years working in public interest not-for-profit organizations. Judicial appointees with notable or ongoing ties to the public interest practice community include the following: Judge Denny Chin, whom President Clinton nominated to serve as U.S. District Judge in the Southern District of New York, was a member of numerous minority mentorship or bar associations including the Asian American Legal Defense and Education Fund when elevated by President Obama to the Second Circuit Court of Appeals.<sup>234</sup> Goodwin Liu, a law professor and associate dean at the University of California Berkeley School of Law, was nominated to the Ninth Circuit Court of Appeals, but Republicans in the 111th Congress blocked the nomination.<sup>235</sup> Liu has served on many not-for-profit boards, including at the National Women's Law Center, a leading women's rights

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federal judiciary.' Pat K. Chew & Luke T. Kelley-Chew, *The Missing Minority Judges*, 14 J. GENDER RACE & JUST. 179 (2010).

<sup>230</sup> Curry, *supra* note 229.

<sup>231</sup> Cf. Wilkins, *supra* note 14, at 625 (noting that although the "blue chip" credentials have played a key role in inoculating Obama's black appointments, they are now being used to argue that these minority appointees are not as progressive as once believed).

<sup>232</sup> Frank Deale & Rita Cant, Table *Public-Interest Not-For-Profit Credentials of Obama Administration Nominees*, Google Docs, tbl. 1, <http://bit.ly/aTN6SV> (last visited April 11, 2011) (hereinafter *Credentials*).

<sup>233</sup> THE WHITE HOUSE, *Nominations & Appointments*, <http://www.whitehouse.gov/briefing-room/nominations-and-appointments> (last visited April 5, 2011).

<sup>234</sup> Press Release, Office of the Press Sec'y, The White House, President Obama Nominates Judge Denny Chin for the U.S. Court of Appeals for the Second Circuit, Judge O. Rogerie Thompson for U.S. Court of Appeals for the First Circuit (Oct. 6, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/President-Obama-Nominates-Judge-Denny-Chin-for-United-States-Court-of-Appeals-for-the-Second-Circuit-Judge-O-Rogerie-Thompson-for-United-States-Court-of-Appeals-for-the-F/](http://www.whitehouse.gov/the_press_office/President-Obama-Nominates-Judge-Denny-Chin-for-United-States-Court-of-Appeals-for-the-Second-Circuit-Judge-O-Rogerie-Thompson-for-United-States-Court-of-Appeals-for-the-F/).

<sup>235</sup> See *Judicial Selection Snapshot*, ALLIANCE FOR JUSTICE, 1, available at <http://www.afj.org/judicial-selection/judicial-selection-snapshot.pdf> (last updated Mar. 11, 2011). Obama re-nominated Liu for the 112<sup>th</sup> Congress on Jan. 6, 2011. *Nominations and Confirmation*, 79 U.S.L.WK. 1884 (2011).

group and one interviewed by Professor Rhode.<sup>236</sup> Supreme Court Justice Sonia Sotomayor, perhaps the most visible of Obama's public interest judicial nominees, served on the board of the Puerto Rican Legal Defense and Education Fund (now called "LatinoJustice PRLDEF") for twelve years, playing a lead role in charting the direction of LatinoJustice's social-policy positions.<sup>237</sup>

Outside the judiciary, President Obama has selected a number of movement activists and lawyers for work in his Administration and executive agencies.<sup>238</sup> Jacqueline Berrien was sworn in as Chair of the Equal Employment Opportunity Commission after working as associate director-counsel to the Legal Defense Fund (hereinafter "LDF"), helping to shape and implement the LDF's national legal advocacy and scholarship programs.<sup>239</sup> Berrien had previously worked as a staff attorney for the LDF, the Lawyers' Committee For Civil Rights Under Law, and the ACLU, three of the national-level civil rights organizations interviewed by Professor Rhode. Berrien is not the only LDF hire: Alaina Beverly and Derek Douglas, serving in the Office of Urban Affairs,<sup>240</sup> and Cassandra Butts, appointed deputy White House counsel and advisor on foreign aid, launched their legal and policy careers at LDF.<sup>241</sup> Finally, Eric Holder, Jr., the first black Attorney General of the United States, spent his first summer at Columbia Law School as an LDF intern.<sup>242</sup>

In May 2009, John Trasviña was confirmed Assistant Secretary for Fair Housing and Equal Opportunity in the Department of Housing and

<sup>236</sup> See Press Release, Marcia D. Greenberger & Nancy Duff Campbell, National Women's Law Center, NWLC Statement in Support of the Nomination of Goodwin H. Liu to the 9th Circuit Court of Appeals (May 13, 2010), available at <http://www.nwlc.org/press-release/nwlc-statement-support-nomination-goodwin-h-liu-ninth-circuit-court-appeals>.

<sup>237</sup> Raymond Hernandez & David W. Chen, *Nominee's Links With Advocates Fuel Her Critics*, N.Y. TIMES, May 28, 2009, available at <http://www.nytimes.com/2009/05/29/us/politics/29puerto.html> ("[Sotomayor] played an active role as the defense fund staked out aggressive stances on issues like police brutality, the death penalty and voting rights.").

<sup>238</sup> *Credentials*, *supra* note 232.

<sup>239</sup> *Jacqueline A. Berrien: Chair*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/berrien.cfm> (last visited Apr. 5, 2011).

<sup>240</sup> *Staff Bios: Derek R.B. Douglas*, OFFICE OF URBAN AFFAIRS, <http://www.whitehouse.gov/administration/eop/oua/staff> (last visited Apr. 16, 2011); *Principals: Alaina Beverly*, THE RABEN GROUP, <http://www.rabengroup.com/our-people/aBeverly> (last visited Apr. 16, 2011).

<sup>241</sup> Press Release, Office of the Press Sec'y, The White House, President Obama Taps Cassandra Butts to Serve as Senior Advisor at the Millennium Challenge Corp. (Nov. 6, 2009), available at <http://www.whitehouse.gov/the-press-office/president-obama-taps-cassandra-butts-serve-senior-advisor-millennium-challenge-corp>.

<sup>242</sup> Attorney General Holder has not spoken at length publicly about his experiences at the LDF, but see *Video Oral History Interview with Eric H. Holder, Jr.* (The History Makers Dec. 17, 2004), available at <http://www.idvl.org/thehistorymakers/iCoreClient.html#&s=6&args=11107>; Eric H. Holder Jr., U.S. Attorney General, 2010 Keynote Address at Columbia Law School Graduation Ceremony (May 14, 2010), available at <http://www.law.columbia.edu/graduation-2010/165448/2010-keynote-address>.

Urban Development.<sup>243</sup> Trasviña, at the time president and general counsel for the Mexican American Legal Defense and Education Fund (hereinafter “MALDEF”), began his public interest career at MALDEF more than twenty years before.<sup>244</sup> Hernán Vera also worked at MALDEF as a staff attorney before his Senate confirmation to the State Justice Institute, a quasi-official agency that administers grants to improve state judiciaries.<sup>245</sup>

Jocelyn Samuels, vice president of the National Women’s Law Center (hereinafter “NWLC”), was selected as senior counselor to the Assistant Attorney General for Civil Rights in the DOJ.<sup>246</sup> At the NWLC, she “oversaw an active litigation docket and engaged in legislative and policy advocacy to promote enforcement of Title VII and Title IX.”<sup>247</sup> Jocelyn Frye was elevated from her position as general counsel for the National Partnership for Women and Families, to become director of policy and projects for the First Lady’s Office.<sup>248</sup>

During her [fifteen]-year tenure at the National Partnership, she testified before Congress and the Equal Employment Opportunity Commission on federal enforcement of employment discrimination laws, analyzed the effectiveness of federal equal employment enforcement efforts, coordinated amicus curiae briefs and work on judicial nominations, and participated in a number of civil rights and women’s coalitions,” according to the White House website.<sup>249</sup>

Frye was also selected as deputy assistant to the President for domestic policy.<sup>250</sup>

Chai Feldblum, nominated and confirmed as an Equal Employment Opportunity Commissioner, previously served briefly as legislative counsel

<sup>243</sup> John Trasviña, *Assistant Secretary*, HUD, <http://www.hud.gov/offices/ftheo/Assistant-Secretary/index.cfm> (last visited Apr. 16, 2011).

<sup>244</sup> *Id.*

<sup>245</sup> Press Release, Office of the Press Sec’y, The White House, President Obama Announces More Key Admin. Posts (Jan. 19, 2010), available at <http://www.whitehouse.gov/the-press-office/president-obama-announces-more-key-administration-posts-11910> (hereinafter *Obama Announces More Posts*); *About Us*, STATE JUSTICE INSTITUTE, <http://www.sji.gov/about.php> (last visited Apr. 8, 2011).

<sup>246</sup> COUNCIL ON WOMEN AND GIRLS, DEP’T OF JUSTICE, <http://www.whitehouse.gov/administration/eop/cwg/council/doj>.

<sup>247</sup> *Id.*

<sup>248</sup> Rachel L. Swarns, *Friendship Born at Harvard Goes on to White House*, N.Y. TIMES, Mar. 9, 2009, available at <http://www.nytimes.com/2009/03/10/us/politics/10frye.html>.

<sup>249</sup> *Office of the First Lady*, Council on Women and Girls, <http://www.whitehouse.gov/administration/eop/cwg/who/flotus> (last visited March 15, 2011, 4:45 pm).

<sup>250</sup> *Id.*

to the ACLU AIDS Project before helping draft the Employee Non-Discrimination Act and Americans with Disabilities Act.<sup>251</sup> Martha Minow, the Dean of Harvard Law School, served on the board of Bazelon Center for Mental Health after clerking with Judges David Bazelon and Thurgood Marshall following her graduation from law school.<sup>252</sup> She was confirmed to the board of the Legal Services Corporation after protracted speculation about a potential Supreme Court nomination.<sup>253</sup>

### B. Women

The status of women has received significant attention from the Administration, which established the White House Council on Women and Girls by executive order,<sup>254</sup> and improved services to victims of domestic and sexual violence by increasing funding for emergency shelters, forensic exams, legal assistance, and advocacy within the criminal justice system.<sup>255</sup> Regarding women's rights, the Administration directs its focus on pay inequity, occupational segregation, reproductive choice, and violence against women.<sup>256</sup> Legal Momentum (formerly NOW Legal Defense Fund) has longstanding interest in these same issues. Its website specifies the organization's concerns with reproductive rights and the many different ways that violence against women is manifested.<sup>257</sup>

The National Partnership for Women and Families is similarly concerned with many of the women's issues identified by the Obama Administration. That organization has been concerned with family and

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<sup>251</sup> Press Release, Office of the Press Sec'y, The White House, President Obama Announces Recess Appointments to Key Admin. Positions: Fifteen Appointees Have Waited an Average of 214 Days for Senate Confirmation (Mar. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions>. See also Dan Pfeiffer, *Obstruction as a Political Strategy*, THE WHITE HOUSE BLOG, <http://www.whitehouse.gov/blog/2010/05/06/obstruction-a-political-strategy> (May 6, 2010, 04:29PM EDT) (listing President Obama nominees who were awaiting a final vote in the Senate, including Chai Feldblum).

<sup>252</sup> *Obama Announces More Posts*, *supra* note 245.

<sup>253</sup> Michael Kranish, *Harvard Law School Dean Martha Minow Considered for Supreme Court Vacancy*, THE BOSTON GLOBE, Apr. 13, 2010, available at [http://www.boston.com/news/politics/politicalintelligence/2010/04/harvard\\_law\\_sch.html](http://www.boston.com/news/politics/politicalintelligence/2010/04/harvard_law_sch.html).

<sup>254</sup> Exec. Order No. 13,506, 74 Fed. Reg. 11,271 (Mar. 11, 2009); Press Release, Office of the Press Sec'y, The White House, President Obama Announces White House Council on Women and Girls (Mar. 11, 2009) available at [http://www.whitehouse.gov/the\\_press\\_office/President-Obama-Announces-White-House-Council-on-Women-and-Girls/](http://www.whitehouse.gov/the_press_office/President-Obama-Announces-White-House-Council-on-Women-and-Girls/).

<sup>255</sup> See Lynn Rosenthal, *The White House's Commitment to Combating Violence Against Women*, THE WHITE HOUSE BLOG, <http://www.whitehouse.gov/blog/issues/Women> (Feb. 2, 2010, 9:00AM EDT) (discussing the FY 2011 budget plans for the Violence Against Women Act).

<sup>256</sup> See *Women*, *supra* note 31 (discussing the Lilly Ledbetter Fair Pay Act, the National Equal Pay Enforcement Task Force, and the Paycheck Fairness Act). See also Rosenthal, *supra* note 255 (discussing the White House's commitment to combating violence against women).

<sup>257</sup> *About Us: Legal Momentum*, LEGAL MOMENTUM, <http://www.legalmomentum.org/about/> (last visited March 30, 2011).

medical leaves, fair pay for women, pregnancy leaves and gender harassment.<sup>258</sup> The Obama Administration has shown its willingness to collaborate with these organizations, inviting both groups to White House announcements and functions, and consulting with them about health care<sup>259</sup> and labor policy.<sup>260</sup>

Groups like Legal Momentum, the National Women's Law Center (hereinafter "NWLC") and the National Partnership for Women and Families praised the Lilly Ledbetter Fair Pay Act,<sup>261</sup> and Obama's female judicial nominations.<sup>262</sup> The NWLC testified before Congress in favor of Elena Kagan's Supreme Court confirmation,<sup>263</sup> and all three nonprofit organizations joined a coalition in support of the President's health reform proposal.<sup>264</sup>

Only rarely have these groups registered concern or disappointment with the Administration's direction on women's issues. Legal Momentum was critical of what it called Obama's "work first" job-seeking requirement for beneficiaries of Temporary Assistance for Needy Families, which they said forced mothers to forgo educational opportunities to continue receiving support.<sup>265</sup> Another substantive criticism came from the ACLU Women's Rights Project, which suggested the Administration's proposed

<sup>258</sup> *About Us*, NAT'L PARTNERSHIP FOR WOMEN & FAMS., <http://www.nationalpartnership.org/site/PageServer?pagename=about> (last visited Mar. 20, 2011).

<sup>259</sup> See, e.g., *Success Stories: Health Information Technology in ARRA*, NAT'L PARTNERSHIP FOR WOMEN & FAMS., [http://www.nationalpartnership.org/site/PageServer?pagename=impact\\_story\\_recovery](http://www.nationalpartnership.org/site/PageServer?pagename=impact_story_recovery) (discussing the Partnership's role in drafting hospital record legislation) (last visited March 30, 2011).

<sup>260</sup> Irasema Garza, President of Legal Momentum, served on President-elect Obama's Education and Labor transition team with the Department of Labor. See Eric M. Appleman, *Obama-Biden Transition Project: Agency Review Working Group*, DEMOCRACY IN ACTION, (Nov. 30, 2008), <http://www.gwu.edu/~action/2008/chmtran08/agencyreview.html>.

<sup>261</sup> See *Legal Momentum's History: 2009*, LEGAL MOMENT, <http://www.legalmomentum.org/about/history.html>.

<sup>262</sup> *Women in the Federal Judiciary: Still a Long Way to Go*, NAT'L WOMEN'S LAW CENTER, 2 (Mar. 8, 2011), [http://www.nwlc.org/pdf/factsheetnumberofwomeninjudiciary.pdf\\_3](http://www.nwlc.org/pdf/factsheetnumberofwomeninjudiciary.pdf_3).

<sup>263</sup> Press Release, Nat'l Women's Law Center, NWLC to Testify in Support of Supreme Court Nominee Elena Kagan (July 1, 2010), available at <http://www.nwlc.org/press-release/nwlc-testify-support-supreme-court-nominee-elena-kagan>. But see Hazel Trice Edney, *Despite Widespread Appeals Obama Fails to Appoint Black Woman to the Supreme Court*, BLACK VOICE NEWS, (May 10, 2010, 6:13), <http://www.blackvoicenews.com/news/news-wire/44391-despite-widespread-appeals-obama-fails-to-appoint-black-woman-to-supreme-court.html> (discussing letter sent to President Obama from twenty-eight African American women criticizing Supreme Court nominee Elena Kagan for her "lack of a clearly identifiable record on the protection of our nation's civil rights laws" and requesting that he consider a black woman instead).

<sup>264</sup> Jesse Lee, *Voices of Reform*, The White House Blog (Mar. 17, 2010, 3:30 PM), <http://www.whitehouse.gov/blog/2010/03/17/voices-reform>.

<sup>265</sup> Statement from Timothy Chase, Senior Staff Att'y, to Subcomm. on Income Sec. and Fam. Support of the House Comm. on Ways and Means (Oct. 8, 2009), available at <http://www.legalmomentum.org/our-work/women-and-poverty/resources--publications/statement-submitted-house-safety-net-response-to-recession.pdf>.

new U.S. Agency for International Development rules requiring an “anti-prostitution pledge” from international HIV/AIDS health service providers would undermine recipients’ alliances in high-risk communities especially among sex workers.<sup>266</sup>

### C. Disability Rights

The White House also pays considerable regard to disability rights. Its website emphasizes workplace discrimination, community and independent-living services, and health care access as executive priorities<sup>267</sup>—areas that the Bazelon Center for Mental Health Law has dedicated substantial resources toward. Disability Rights Advocates, and numerous disability rights groups not identified by Professor Rhode, also share some of these goals.<sup>268</sup>

Three weeks after his inauguration, President Obama created the Office of Special Assistant to the President on Disability Policy.<sup>269</sup> One month later, Obama rescinded the Bush era embryonic cell research bans by executive order<sup>270</sup> and passed the Christopher and Dana Reeve Paralysis Act,<sup>271</sup> which increased National Institutes of Health spending to improve quality of life for Americans with paralysis. On July 26, 2010, the twentieth anniversary of the Americans With Disabilities Act, President Obama issued an executive order designed to increase federal hiring of people with disabilities.<sup>272</sup>

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<sup>266</sup> Letter from the ACLU Acting Director Michael W. MacLeod-Bell et al., to Kathleen Sebelius, Secretary, U.S. Department of Health and Human Services (Dec. 23, 2009), available at [http://www.aclu.org/files/assets/ACLU\\_comments\\_on\\_Proposed\\_Regs-Prostitution\\_Pledge.pdf](http://www.aclu.org/files/assets/ACLU_comments_on_Proposed_Regs-Prostitution_Pledge.pdf).

<sup>267</sup> *Disabilities*, *supra* note 57. The White House website significantly overlooks mental health issues, with the exception of minor discussions of substance addiction and psychiatric support for veterans—notwithstanding the Administration’s political breakthrough in mental health parity insurance rules under the Patient Protection and Affordable Care Act, 42 U.S.C. § 18001.

<sup>268</sup> See *Welcome to Disability Rights Advocates*, DISABILITY RIGHTS ADVOCATES, <http://www.drlegal.org/> (last visited Mar. 17, 2011); *Where We Stand*, JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH LAW, <http://www.bazelon.org/> (last visited March 17, 2011).

<sup>269</sup> Press Release, Office of the Vice President, The White House, Vice President Joe Biden Announces Kareem Dale as Special Assistant to the President for Disability Policy, (Feb. 12, 2009), available at <http://www.whitehouse.gov/the-press-office/vice-president-joe-biden-announces-kareem-dale-special-assistant-president-disabilities>.

<sup>270</sup> Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (Mar. 11, 2009). The Court of Appeals for the D.C. Circuit has reversed a district court decision enjoining the Executive Order. See discussion *supra* note 65.

<sup>271</sup> Christopher and Dana Reeve Paralysis Act, Pub. L. No. 111-11, §1401, 123 Stat. 1452 (2009) (codified as amended at 42 U.S.C. § 280g-9, § 284(o)–(p)). See also Press Release, Office of the Press Sec’y, The White House, Statement of the President (Mar. 30, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Statement-from-the-Presidents-signing-statements-on-HR-146-the-Omnibus-Public-Lands-Management-Act/](http://www.whitehouse.gov/the_press_office/Statement-from-the-Presidents-signing-statements-on-HR-146-the-Omnibus-Public-Lands-Management-Act/) (discussing the passage of The Christopher and Dane Reeve Paralysis Act).

<sup>272</sup> Exec. Order No. 13,548, 75 Fed. Reg. 45039 (2010).

In recognition of these initiatives, Obama has received accolades from the disability rights organizations identified by Professor Rhode. The Bazelon Center for Mental Health Law has issued numerous press releases and action alerts in support of Obama initiatives, such as his “Year of Community Living” proposal, which would deploy federal agencies to help people with disabilities access more integrated, independent-living housing;<sup>273</sup> and his reauthorization of the Children’s Health Insurance Program (hereinafter “CHIP”), expanding coverage to approximately four million children (this in contrast to President Bush, who twice vetoed CHIP).<sup>274</sup>

#### *D. Racial Justice Issues*

An entire “issues” page on the White House website is dedicated to civil rights, and in May 2010, its contents registered themes of LGBT rights, workplace anti-discrimination and progressive criminal justice reform.<sup>275</sup> Yet the “civil rights” section and White House website make no mention of race—a conspicuous omission that has been the subject of unceasing media and legal commentary since Obama’s presidential campaign.<sup>276</sup> Despite its newsworthy irony, however, race is not Obama’s only erasure. “[J]uvenile detention,” “recidivism,” “capital punishment” and “prison reform” are also issues that do not receive serious treatment as Administration agenda items.<sup>277</sup>

Though President Obama has sustained considerable criticism for avoiding race issues, organizations like the LDF, the MALDEF, and LatinoJustice have not pressured him to do so. Under media questioning, NAACP President Benjamin Jealous announced that his concerns are less

<sup>273</sup> Press Release, Judge David L. Bazelon Ctr. For Mental Health Law, The Bazelon Ctr. Welcomes President Obama’s Pledge to People With Mental Disabilities on *Olmstead’s* 10th Anniversary (June 22, 2009), <http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=v32i5nCrmt0%3d&tabid=251>.

<sup>274</sup> Bazelon Ctr. for Mental Health Law, *111th Congress Tackles Critical Economic and Health Initiatives*, 8 MENTAL HEALTH POL’Y REP. (2009), <http://www.bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=HqhoW0t-cIo%3d&tabid=249>.

<sup>275</sup> Civil Rights, *supra* note 66.

<sup>276</sup> See, e.g., Sumi Cho, *Post Racialism*, 94 IOWA L. REV. 1589, 1622 (2009) (“From its inception, his campaign adopted a form of electoral post-racialism that studiously avoided a civil rights agenda”); Angela Onwuachi-Wilig & Osamudia James, *The Declining Significance of Presidential Races?*, 72 LAW & CONTEMP. PROBS. 89, 99 (2009) (“Despite an absence of any indication that Barack Obama would represent only minority constituencies as President, he was forced to express his racial identity in ways that helped white voters overcome the threat to their identity that his political candidacy posed.”); Eduardo Bonilla-Silva & David Dietrich, *The Sweet Enchantment of Color-Blind Racism in Obamerica*, 634 AAPSS ANNALS 190, 200–02 (2011), available at <http://www.ann.sagepub.com/content/634/1/190.full.pdf> (describing “Obama’s color-blind racist ideology”).

<sup>277</sup> These words appeared infrequently on the [whitehouse.gov](http://whitehouse.gov) website during a word search conducted on May 30, 2010.

in what the President says than what he does on the issue of racial disparity. “We are eager to have a conversation. We are just more eager to see progress made on specific policy, changes made in people’s lives,” he told Politico soon after Obama’s inauguration.<sup>278</sup> The LDF, formerly a wing of the NAACP whose legal goals range from criminal and economic justice to voting and education rights, has also shown a reticence to criticize, faulting the Obama Administration only once on its website by mid-2010 for refusing to send a delegation to the United Nations Durban Review Conference against global racism.<sup>279</sup> Similar constraint was found on the websites of most of the civil rights organizations interviewed by Professor Rhode:<sup>280</sup> the Lawyers’ Committee,<sup>281</sup> the Asian American Legal Defense and Education Fund, MALDEF, LatinoJustice,<sup>282</sup> and the ACLU.<sup>283</sup>

The White House has addressed some aspects of criminal justice reform, pledging to reduce racial profiling, eliminate the sentencing disparity between crack and powder cocaine offenses, and institute “drug courts” to keep first-time non-violent offenders out of prison.<sup>284</sup>

<sup>278</sup> Nia-Malika Henderson & Carrie Budoff Brown, *A Year After Race Speech, Silence*, THE POLITICO, Mar. 18, 2009, <http://dyn.politico.com/printstory.cfm?uuid=176FFA39-18FE-70B2-A8713AC7A7712EE0>.

<sup>279</sup> Based on Google.com search engine results for the term “site:http://naacpldf.org/ ‘Obama’” performed May 20-25, 2010; Press Release, PRNewswire.com, NAACP Legal Defense and Educ. Fund and Nat’l Urban League Statement on U.S. Boycott of Durban Review Conference (Apr. 19, 2009), available at <http://exodusnews.com/worldnews/world090.html> (finding fault with the Administration for boycotting the Conference).

<sup>280</sup> Based on Google.com search engine results for the term “Obama” on the identified civil rights groups’ URL’s, performed May 15–25, 2010.

<sup>281</sup> Though far from censorious, the Lawyers’ Committee voted to not take a position on Solicitor General Kagan’s Supreme Court nomination. George E. Curry, Editorial, *Two Lawyers’ Groups Have Reservations About Kagan*, June 30, 2010, <http://www.georgecurry.com/columns/two-lawyers-groups-have-reservations-about-kagan>.

<sup>282</sup> Assessment based on a word search conducted of each site between the days of May 15, 2010 and June 8, 2010.

<sup>283</sup> See, e.g., Rachel Garver, *The Potency of Affirmative Action*, ACLU BLOG OF RIGHTS, <http://www.aclu.org/2009/07/08/the-potency-of-affirmative-action> (Jul. 8, 2009, 4:24 PM); Nicole Kief, *U.N. Independent Expert Recommends Remedies for U.S. Race Relations*, ACLU BLOG OF RIGHTS, (May 11, 2009, 5:32 PM), <http://www.aclu.org/2009/05/11/un-independent-expert-recommends-remedies-for-us-race-relations>. The reluctance to criticize the Obama Administration extends beyond public interest organizations and includes the African American community in general. See, e.g., Keeanga-Yamahtta Taylor, *Race and the Obama Era*, NEW POLITICS, Summer, 2010, at 69, 73, <http://www.newpol.org/node/347> (noting that “Black support for Obama remains at historic highs and above ninety percent”).

<sup>284</sup> See Civil Rights, *supra* note 66. Obama signed the Fair Sentencing Act eliminating the sentencing disparity between crack and powder cocaine in August 2010. Peter Baker, *Obama Signs Law Narrowing Cocaine Sentencing Disparities*, THE CAUCUS: THE POL. & GOV. BLOG OF THE TIMES (Aug. 3, 2010, 12:55 PM), <http://thecaucus.blogs.nytimes.com/2010/08/03/obama-signs-law-narrowing-cocaine-sentencing-disparities/?emc=eta1>. But see Charles Blow, Op-Ed, *Smoke and Horrors*, N.Y. TIMES, Oct. 23, 2010, available at <http://www.nytimes.com/2010/10/23/opinion/23blow.html> (discussing “how the war on drugs in this country has become a war focused on



Doubtlessly laudable goals, these form only a small part of what organizations such as Equal Justice Initiative and the Southern Center for Human Rights advocate. They want the Administration to address issues such as police misconduct, overcrowding, privatization and abuse in federal and state prisons, indigent defense and inadequate counsel, excessive sentencing and wrongful convictions, and severe socioeconomic and racial bias in capital cases.<sup>285</sup> Like their racial justice counterparts, however, criminal justice groups have also refrained from demanding more from the Obama Administration.

A familiar explanation for this reticence is that organizations can achieve stronger working relationships with the Administration by containing their criticism—while a national “conversation about race” led from the White House may be a long-term goal, immediate issues such as the stifling black and Latino unemployment rate require urgent teamwork. Some organizations have achieved certain collaborative goals, albeit with the necessary political concessions. Notably, civil rights leaders were invited to the White House in 2009 to discuss the plight of African Americans in the economic crisis.<sup>286</sup> The guests, including Reverend Al Sharpton and Ben Jealous, urged Obama to help people of color suffering job losses, but agreed to “[back] his approach not to adopt ‘race-based programs.’”<sup>287</sup>

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marijuana, one being waged primarily against minorities and promoted, fueled and financed primarily by Democratic politicians” including President Obama).

<sup>285</sup> EQUAL JUSTICE INITIATIVE, <http://www.eji.org/eji/> (last visited Mar. 23, 2011); SOUTHERN CENTER FOR HUMAN RIGHTS, <http://www.schr.org/> (last visited Mar. 23, 2011); *Key Issues, AMERICAN CIVIL LIBERTIES UNION*, <http://www.aclu.org/key-issues> (last visited Mar. 23, 2011); *Criminal Justice, NAACP LDF*, <http://naacpldf.org/category/criminal-justice> (last visited Mar. 23, 2011).

<sup>286</sup> Michael H. Cottman, *Analysis: Will Black Leaders Prod Obama Action?*, BLACK AMERICA (February 11, 2010, 6:25 AM), [http://www.blackamericaweb.com/?q=articles/news/moving\\_america\\_news/16345](http://www.blackamericaweb.com/?q=articles/news/moving_america_news/16345).

<sup>287</sup> *Obama Hosts Civil Rights Leaders on African American Unemployment*, DEMOCRACY NOW!, Feb. 11, 2010, <http://www.democracynow.org/2010/2/11/headlines>. Three sets of data indicate that the recession had a devastating impact on the African American population. First, black unemployment is moving steadily upward, hitting a 25-year high of 17.2 nationwide and exceeding 20% in five states. V. Dion Haynes, *U.S. Unemployment Rates for Blacks Projected to Hit 25 Year High*, WASH. POST, Jan. 15, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/14/AR2010011404085.html>. Second, according to a report by the Center for Responsible Lending, “[t]he foreclosure crisis has disproportionately affected African American and Latino borrowers, who are 76% and 71% more likely, respectively, to have lost their home to foreclosure than non-Hispanic white borrowers.” DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, FORECLOSURES BY RACE AND ETHNICITY: THE DEMOGRAPHICS OF A CRISIS 8 (2010), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.html>. Third, in the nation’s capital, 43 percent of black children are living in poverty. Carol Morello & Dan Keating, *D.C., Suburbs Show Disturbing Increases in Childhood Poverty*, WASH. POST, Sept. 29, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/28/AR2010092800465.html?sid%3DST2010100204060&sub=AR>. These facts have buttressed criticisms of Obama for his race neutrality and brought about calls for race-based economic programs. See, e.g., Keeanga-Yamahtta Taylor, *supra* note 283 at 69, 72–73.

Education, employment, housing, criminal justice, and effective political participation were key issues identified by LDF President John Payton in a speech on constitutional law at the Winston-Salem State University, North Carolina.<sup>288</sup> Payton suggested that the existence of the Obama Administration means that these issues can be pursued with much more than lawsuits. The opportunity is presented to work with political power to address many of these problems.<sup>289</sup> Refusing to force one issue is a strategy for collaboration on others, and indeed, while the White House website downplays race, the quiet celebration of civil rights leaders and minority group achievement has been recognized by leading civil rights organizations, as has the symbolic yet considerable inclusion of civil rights legal organizations in White House ceremonies, panels, and staffs.<sup>290</sup>

An alternative strategy for collaborating with Obama around a seemingly “no go” issue may be in evidence in criminal justice reform.<sup>291</sup> Though he has made only perfunctory acknowledgement of the problems of the criminal justice system, many reform groups see indications that President Obama is working toward a system overhaul.<sup>292</sup> Of note is his commitment to restoring the Civil Rights Division of the DOJ after its decimation during the Bush Administration.<sup>293</sup> His Attorney General,

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<sup>288</sup> John Payton, President, Director-Counsel, NAACP LDF, *Post-Racial? Not Yet, The J. Alston Atkins Memorial Lecture in Constitutional Law at the Winston-Salem State University* (Oct. 15, 2009), discussed in THE DEFENDERSONLINE, Oct. 17, 2009 available at <http://www.thedefendersonline.com/2009/10/17/post-racial-not-yet/>.

<sup>289</sup> *Id.*

<sup>290</sup> The Obama White House has recognized civil rights and minority achievements on a symbolic level: commemorating the NAACP's 100th Anniversary, Michael Blake, *NAACP: 100 Years, One Historic Night*, WHITE HOUSE BLOG, (July 17, 2009, 6:08 PM), <http://www.whitehouse.gov/blog/2009/07/17/naACP-100-years-one-historic-night>; proclaiming African-American Music Appreciation Month, Proclamation No. 8389, 74 Fed.Reg. 27,067 (June 5, 2009); and issuing Executive Orders to support National Historically Black Colleges, Exec. Order No. 13,532 3, 75 Fed.Reg. 9749 (Mar. 3, 2010); to improve consultation with Native American Tribal authorities Exec. Order No. 13,175, 65 Fed.Reg. 67,249 (Nov. 9, 2000); and to increase Asian American and Pacific Islander participation in federal programs, Press Release, The White House Office of the Press Secretary, Memorandum for the Heads of Executive Departments and Agencies (Nov. 5, 2009), available at <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>; Exec. Order No. 13,515, 74 Fed.Reg. 53,635 (Oct. 14, 2009). For a discussion of the importance of these activities in furthering Presidential agendas see Schacter, *supra* note 27, at 152–53.

<sup>291</sup> The Constitution Project convened twenty-five criminal justice reform groups in 2008 to generate policy recommendations for the next President. The goal of the group that was named “[t]he 2009 Criminal Justice Transition Coalition” was to identify “potential allies” within those departments and agencies that have jurisdiction over particular programs, a strategy that could benefit a legal system reform movement. THE 2009 CRIMINAL JUSTICE TRANSITION COALITION, SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS i (2008).

<sup>292</sup> See e.g., Vanita Gupta, Editorial, *From Incredible to Inevitable: How the Politics of Criminal Justice Reform May Be Shifting*, THE HUFFINGTON POST, Aug. 4, 2010, available at [http://www.huffingtonpost.com/vanita-gupta/from-incredible-to-inevit\\_b\\_670782.html](http://www.huffingtonpost.com/vanita-gupta/from-incredible-to-inevit_b_670782.html).

<sup>293</sup> Charlie Savage, *Justice Department to Recharge Civil Rights Enforcement*, N.Y. TIMES, Sept. 1, 2009, available at <http://www.nytimes.com/2009/09/01/us/politics/01rights.html>; Jerry Markon, *Justice Department's Civil Rights Division Steps Up Enforcement*, WASH. POST, June 4, 2010,

furthermore, has often charged into public interest issues in which the President has refused to stray, including strengthening gun control,<sup>294</sup> ending racial profiling,<sup>295</sup> opposing capital punishment,<sup>296</sup> calling for the end of extraordinary rendition, warrantless surveillance and the use of Guantanamo detention facilities—and, perhaps inadvertently, starting a national conversation about race.<sup>297</sup>

### E. LGBT Rights

As a presidential candidate, Obama spoke of his support for equality for gay, lesbian, bisexual and transgender Americans and those living with HIV/AIDS,<sup>298</sup> and since assuming office, he has made historic strides.<sup>299</sup> As a White House spokesperson exclaimed on Stonewall's fortieth anniversary: "With over 60 out appointees working in this administration already, we are free to be ourselves."<sup>300</sup>

Early in the Obama Administration, Lambda Legal and the National Center for Lesbian Rights, both interviewed by Professor Rhode,<sup>301</sup> heaped

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available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/03/AR2010060304938.html>.

<sup>294</sup> Brent Lang, *Holder Revives Talk of An Assault Weapons Ban*, CBSNEWS.COM, Feb. 26, 2009, [http://www.cbsnews.com/8301-503544\\_162-4831751-503544.html](http://www.cbsnews.com/8301-503544_162-4831751-503544.html).

<sup>295</sup> Press Release, ACLU Racial Justice Project, Attorney General Says Ending Racial Profiling Is Priority For Obama Administration (May 7, 2009), available at <http://www.aclu.org/racial-justice/attorney-general-says-ending-racial-profiling-priority-obama-administration>.

<sup>296</sup> Neil A. Lewis, *Justice Dept. Nominee Faces Questions But No Strong Opposition*, N.Y. TIMES, June 14, 1997, <http://www.nytimes.com/1997/06/14/us/justice-dept-nominee-faces-questions-but-no-strong-opposition.html?ref=neilalewis>.

<sup>297</sup> Jodi Kantor & Charlie Savage, *After 9/11 Trial Plan, Holder Hones Political Ear*, N.Y. TIMES, Feb. 15, 2010, available at [http://www.nytimes.com/2010/02/15/us/politics/15holder.html?ref=eric\\_h\\_holder\\_jr](http://www.nytimes.com/2010/02/15/us/politics/15holder.html?ref=eric_h_holder_jr).

<sup>298</sup> Jeff Johnson, *Obama -- The Pro-'Gay' Candidate*, ONENESSNOW, available at <http://www.onenewsnow.com/Election2008/Default.aspx?id=208420> (last visited Apr. 16, 2011). The evening of November 4, 2008, proved a bittersweet moment for the gay-rights movement. As the California votes were tallied, the LGBT simultaneously community experienced the election of the most openly pro-LGBT President in history and the devastating ballot-box refutation of legalized gay marriage in their state. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 5, 2008, available at <http://www.nytimes.com/2008/11/06/us/politics/06marriage.html>. See also, Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES, Nov. 4, 2008, available at [http://www.nytimes.com/2008/11/05/us/politics/05elect.html?\\_r=1&scp=6&sq=Obama+wins+election&st=nyt](http://www.nytimes.com/2008/11/05/us/politics/05elect.html?_r=1&scp=6&sq=Obama+wins+election&st=nyt).

<sup>299</sup> Press Release, Lesbian, Gay, Bisexual, and Transgender Pride Month, (Jun. 1, 2009), available at <http://www.whitehouse.gov/the-press-office/presidential-proclamation-lgbt-pride-month>. For a comprehensive discussion of the Obama Administration's work advancing LGBT rights, see Schacter, *supra* note 27, at 153–58. For the period preceding his election to President, see TRACY BAIM, OBAMA AND THE GAYS: A POLITICAL MARRIAGE (2010).

<sup>300</sup> Brian Bond, Deputy Director of White House Office of Public Engagement, The Anniversary of Stonewall (June 29, 2009), available at <http://www.whitehouse.gov/blog/2009/06/29/anniversary-stonewall>.

<sup>301</sup> Midlife, *supra* note 1, at 2082.

praise on an unanticipated Presidential Memorandum calling for surrogate designation and hospital visitation rights for LGBT partners,<sup>302</sup> while also insisting that the President's work was not over.<sup>303</sup> Both public interest legal groups applauded Obama's request that the Office of Personnel Management, for the first time headed by an openly gay secretary, extend benefits to same-sex domestic partners of federal employees.<sup>304</sup> New legislation authorizing the DOJ to investigate and prosecute homophobia-motivated assaults as hate crimes<sup>305</sup> and the removal of HIV travel restrictions were attributed to the work of the new President.<sup>306</sup>

Despite these unprecedented gestures, LGBT support for Obama has ebbed and flowed with his fluctuating administrative posture toward the movement's twin campaigns of repealing the Defense of Marriage Act (DOMA) and rescinding the military's Don't Ask, Don't Tell (hereinafter "DADT") employment policy.<sup>307</sup> While Senator Obama scorned DOMA as "abhorrent,"<sup>308</sup> summoning to his presidential campaign a newly empowered "gay vote,"<sup>309</sup> Lambda Legal found itself filing briefs opposite the President's lawyers in *Smelt v. United States*<sup>310</sup> and *Golinski v. United*

<sup>302</sup> Press Release, Kate Kendell, National Center for Lesbian Rights, NCLR Praises President Obama's Order Extending LGBT Hospital Visitation Rights (Apr. 15, 2010), available at [http://www.nclrights.org/site/PageServer?pagename=press\\_2010](http://www.nclrights.org/site/PageServer?pagename=press_2010).

<sup>303</sup> Lisa Keen, *Advocacy Group Tackles Hospital Visitation Regs*, BAY WINDOWS, Aug. 31, 2010, <http://www.baywindows.com/index.php?ch=news&sc=glbt&sc2=news&sc3=&id=109754>.

<sup>304</sup> Scott Wilson, *President Wades Into Gay Issues: Order Gives Some Benefits to Partners of Federal Workers*, WASH. POST, June 18, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/17/AR2009061702578.html>.

<sup>305</sup> Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4706-07, 123 Stat. 2835, 2838-40 (2009) (authorizing an increase in appropriations as necessary to increase the number of personnel to conduct full investigations into crimes where the victim may have been targeted because of actual or perceived race, color, religion, national origin, disability, gender, sexual orientation or gender identity). See Press Release, Nat'l Ctr. for Lesbian Rights, President Obama Signs Hate Crimes Bill (Oct. 28, 2009), available at [http://www.nclrights.org/site/PageServer?pagename=press\\_HateCrimesBill102809](http://www.nclrights.org/site/PageServer?pagename=press_HateCrimesBill102809).

<sup>306</sup> Press Release, Lambda Legal, President Obama to Lift HIV Travel Ban: Lambda Legal Says Good Riddance to Bad Policy (Oct. 30, 2009), available at [http://www.lambdalegal.org/news/pr/ny\\_20091030\\_president-obama-to-lift.html](http://www.lambdalegal.org/news/pr/ny_20091030_president-obama-to-lift.html).

<sup>307</sup> See e.g., Wilson, *supra* note 304.

<sup>308</sup> See John Nichols, *Obama and DOMA: Will the President Do the Right Thing?*, THE NATION (July 9, 2010), <http://www.thenation.com/blog/37234/obama-and-doma-will-president-do-right-thing>.

<sup>309</sup> See, Andrew Jacobs, *For Gay Democrats, a Primary Where Rights Are Not an Issue, This Time*, N.Y. TIMES, Jan. 28, 2008, available at <http://www.nytimes.com/2008/01/28/us/politics/28gay.html> (describing how members of the Human Rights Campaign found it "dramatically refreshing" to be comfortable with democratic candidates on issues of gay rights).

<sup>310</sup> *Smelt v. United States*, 447 F.3d 673 (9th Cir. 2006). See also Press Release, Lambda Legal, LGBT Legal And Advocacy Grps. Decry Obama Admin.'s Def. of DOMA, Jun. 12, 2009, available at [http://www.lambdalegal.org/news/pr/ny\\_20090612\\_lgbt-legal-advocacy-groups-decry-obama-defense-doma.html](http://www.lambdalegal.org/news/pr/ny_20090612_lgbt-legal-advocacy-groups-decry-obama-defense-doma.html) (describing Lambda's disappointment at the way in which the Administration defended the Defense of Marriage Act in *Smelt v. United States*); see also *infra* text accompanying note 317.

*States Office of Personnel Management*<sup>311</sup> just months after his inauguration.

In the final weeks of 2010, simmering aspersions from LGBT leaders were suppressed as Obama signaled a return to his campaign promises to support civil unions and end DADT. Since its compromise adoption by the Clinton Administration in 1993, DADT has empowered the military to discharge more than 13,000 service members because of sexual orientation.<sup>312</sup> Closeted gay and lesbian service members' tested patience was rewarded on December 22, 2010, when the President signed the DADT Repeal Act of 2010.<sup>313</sup> The President's State of the Union Address in January reaffirmed his position that ending DADT was "the right thing to do," but subtly reminded Americans of Congress and the military's ultimate certification responsibilities.<sup>314</sup> Without any firm time commitment by the Department of Defense<sup>315</sup> or solutions to continuing *de facto* DADT discharges,<sup>316</sup> gay and lesbian advocate groups were urgently parsing the repeal act into a new policy for LGBT service members: "don't tell yet."<sup>317</sup>

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<sup>311</sup> *In re Golinski*, 587 F.3d 901 (9th Cir. 2009). See also Press Release, Lambda Legal, *Feds Fail To Appeal Benefits Order* (Dec. 23, 2009), available at [http://www.lambdalegal.org/publications/articles/fa\\_20091223\\_feds-fail-benefits-lesbian-employee-wife.html](http://www.lambdalegal.org/publications/articles/fa_20091223_feds-fail-benefits-lesbian-employee-wife.html) (describing Lambda's outrage at the Administration's defiance of the Ninth Circuit ruling in *Golinski v. Office of Personnel Management*); Shannon Shefron Perez, Comment, *Has President Obama Abandoned His Promises? The Denial of Federal Health Benefits For Same-Sex Spouses of Ninth Circuit Employees*, 32 U. LA VERNE L.REV. 105, 133-34 (2010) (suggesting that the Obama Administration is forcing the issue in court because the outcome will likely be favorable to gay couples and a court decision will carry precedential value, unlike the administrative ruling in *Golinski v. Office of Personnel Management*).

<sup>312</sup> Lawrence J. Korb, *The Costs of Don't Ask Don't Tell*, CTR. FOR AM. PROGRESS, Mar. 26, 2011, [http://www.americanprogress.org/issues/2009/03/dont\\_ask\\_dont\\_tell.html](http://www.americanprogress.org/issues/2009/03/dont_ask_dont_tell.html).

<sup>313</sup> Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f), 124 Stat. 3515, 3516 (Dec. 22, 2010).

<sup>314</sup> See Press Release, White House Office of the Press Sec'y, Remarks by the President in State of the Union Address, Jan. 27, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> ("This year, I will work with Congress and our military to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are. It's the right thing to do.").

<sup>315</sup> Sheryl Gay Stolberg, *supra* note 68 (discussing the remaining steps to be taken before the military can implement the new law repealing Don't Ask, Don't Tell).

<sup>316</sup> See e.g., Craig Whitlock, *Navy Seeks to Discharge Sailor Found Asleep in Bed With Another Male Sailor*, WASH. POST, Mar. 5, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/04/AR2011030403022.html> ("Some gay rights advocates have questioned whether commanders opposed to the new law might try to subvert it by pressing other disciplinary charges against people they suspect of being gay.").

<sup>317</sup> See e.g., Press Release, Anthony Moll, Human Rights Campaign, U.S. Senate Votes for Repeal; On to The President, Dec. 18, 2010, available at <http://www.hrcbackstory.org/2010/12/u-s-senate-votes-for-repeal-on-to-the-president/> (urging the importance of noting that full implementation of the bill had not yet taken place, and that "it is not yet safe for service members to disclose their sexual orientation").

Obama's extraordinary decision not to defend DOMA<sup>318</sup> has put his Administration in the anomalous position of defending the government classification he declared unconstitutional when applied by the Armed Forces. In *Log Cabin Republicans v. United States*, the government appealed a decision granting a universal injunction against DADT's enforcement pending determination of the constitutionality of the DADT Repeal Act, and argued that judicial intervention would "seriously disrupt ongoing and determined efforts by the Administration to devise an orderly change of policy."<sup>319</sup> The legal distinctions between the parallel discriminatory policies, however, do not appear to impress LGBT advocates and activists, who are anxious to see change move past the litigation stage.<sup>320</sup>

#### F. Environmental Justice

The environmental legal movement saw significant integration of many of its policies into governmental regulations in the 1980s and 1990s. Organizations like the Natural Resources Defense Council, Earthjustice, and the Environmental Defense Fund<sup>321</sup> have long worked with Congresses and Presidents to craft legislation and monitor compliance.

Shortly after taking office, the Obama Administration issued three executive orders designed to help curb fuel emissions. The first order directed the Environmental Protection Agency (hereinafter "EPA") to reconsider its refusal to allow California to enact emission standards more stringent than those required by the agency.<sup>322</sup> He also ordered the Department of Transportation to create guidelines to enforce a 2007 law requiring American-made cars to reach average fuel efficiency of thirty-

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<sup>318</sup> See, for example, *Mass. v. U.S. Dept. of Health and Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010), *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010), two recent cases challenging the Defense of Marriage Act, 1 U.S.C. § 7, where the U.S. District Court for the District of Massachusetts concluded that the statutory definition of "marriage," which excludes same-sex unions, violates the Tenth Amendment, the Spending Clause, and the equal protection component of the Fifth Amendment's Due Process Clause.

<sup>319</sup> *Log Cabin Republicans v. United States*, No. 10-56634, 2010 U.S. App. LEXIS 22655 at \*2 (9th Cir. Nov. 1, 2010).

<sup>320</sup> See Chris Geidner, *White House Press Secretary Suggests DADT Court Defense Will Continue*, METROWEEKLY: POLIGOT: A QUEER SPIN ON POLITICS BLOG (Feb. 25, 2011) <http://www.metroweekly.com/poligot/2011/02/white-house-press-secretary-su.html> (noting the confusion and frustration resulting from the Administration's decision to defend DADT).

<sup>321</sup> *Our Priorities*, NATURAL RESOURCES DEFENSE COUNCIL, <http://www.nrdc.org/about/priorities.asp>; *How We Work*, EARTHJUSTICE, [http://www.earthjustice.org/about/how\\_we\\_work](http://www.earthjustice.org/about/how_we_work); *Origin and History*, ENVIRONMENTAL DEFENSE FUND, <http://www.edf.org/page.cfm?tagID=362> (as visited July 2-10, 2010).

<sup>322</sup> Amanda Forester, *The Big Three and Auto Efficiency: How President Obama's Fuel Efficiency Efforts Will Affect the Big Three, The Economy, and the Environment*, 16 U. BAL. J. ENVTL. L. 181, 181-82 (2009).

five miles per gallon by 2020.<sup>323</sup> Additionally, President Obama directed his Administration to create tougher fuel efficiency guidelines for United States auto companies to apply to 2011 model-year cars,<sup>324</sup> a commitment applauded by states for its vast potential impact.<sup>325</sup> The Administration has also allowed gasoline retailers to sell fuel blends that contain as much as 15 percent ethanol for use in late model cars. This move, however, was requested by ethanol producers, and has received a mixed reaction from environmentalists because its production necessarily consumes natural gas and diesel fuel and adversely affects the prices of certain foods.<sup>326</sup>

The EPA held a science symposium in March 2010 to examine why some populations, particularly minority, low-income, and tribal communities, are exposed to greater environmental pollution and negative health impacts than their wealthier, whiter fellow Americans.<sup>327</sup> Lisa Jackson, the administrator of the EPA, called environmental justice a “defining issue” for the agency.<sup>328</sup> The agency is expected to require discussion of environmental justice impacts in the preamble of proposed rules, potentially forcing EPA staff to reach out further to affected communities during the proposal process.<sup>329</sup>

Environmentalists have been angered by the Administration’s embrace of nuclear energy, offshore oil drilling, “clean coal,” Obama’s troubling silence on global warming,<sup>330</sup> and “perplexing policy position on mountaintop removal.”<sup>331</sup> Most recently, environmental activists were “furious” that the Administration had further delayed and watered down

<sup>323</sup> *Id.* at 182.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* (According to Forester, thirteen states in addition to California want to raise fuel-efficiency standards over the next eleven years, impacting forty percent of the American population).

<sup>326</sup> Matthew L. Wald, *A Bit More Ethanol in the Gas Tank*, N.Y. TIMES, Oct. 14, 2010, available at <http://www.nytimes.com/2010/10/14/business/energy-environment/14ethanol.html> (“[I]t contributes to the demand for corn, helping to drive up the cost of that commodity, raising food prices and diverting farmland that could be used for growing crops for human consumption.”).

<sup>327</sup> These disproportionate effects have been extensively documented. See generally e.g., UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE & COMMUNITIES OF COLOR (Robert D. Bullard ed., 1994); THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION (Robert D. Bullard ed., 2005); ENVIRONMENTAL INJUSTICES, POLITICAL STRUGGLES: RACE, CLASS AND THE ENVIRONMENT (David E. Camacho ed., 1998); POWER, JUSTICE AND THE ENVIRONMENT: A CRITICAL APPRAISAL OF THE ENVIRONMENTAL JUSTICE MOVEMENT (David Naguib Pellow & Robert J. Brulle eds., 2005).

<sup>328</sup> Andrew Childers, *EPA Reports Back on Efforts to Address Environmental Justice in Rulemaking*, 79 U.S.L.WK. 1027 (2010), available at [http://news.bna.com/lwln/LWLNWB/split\\_display.adp?fedfid=17414561&vname=lwlnotallissues&wsn=499170500&searchid=14557565&doctypeid=1&type=date&mode=doc&split=0&scm=LWLNWB&pg=0](http://news.bna.com/lwln/LWLNWB/split_display.adp?fedfid=17414561&vname=lwlnotallissues&wsn=499170500&searchid=14557565&doctypeid=1&type=date&mode=doc&split=0&scm=LWLNWB&pg=0).

<sup>329</sup> *Id.*

<sup>330</sup> John M. Broder, *Environmental Advocates are Cooling on Obama*, N.Y. TIMES, Feb. 18, 2010, available at [http://www.nytimes.com/2010/02/18/science/earth/18enviros.html?\\_r=1](http://www.nytimes.com/2010/02/18/science/earth/18enviros.html?_r=1).

<sup>331</sup> Rob Perks, *The Murky Morass That is Mountaintop Removal*, NRDC SWITCHBOARD BLOG (May 29, 2009), [http://switchboard.nrdc.org/blogs/rperks/its\\_gone\\_baby\\_gone\\_for\\_more\\_ap.html](http://switchboard.nrdc.org/blogs/rperks/its_gone_baby_gone_for_more_ap.html).

implementing rules governing smog and toxic emissions from industrial boilers.<sup>332</sup> The new rules were designed to displace standards enforced by the George W. Bush Administration. The smog rule would have lowered the permissible concentration of airborne ozone to sixty to seventy parts per billion compared to the current level of seventy-five parts per billion, and was estimated to save thousands of lives annually, although it would also have cost businesses and cities up to \$90 billion a year.<sup>333</sup> The boiler rule would halve emissions of mercury and other dangerous pollutants that stem from over 200,000 industrial boilers, heaters, and solid waste incinerators across the continental United States.<sup>334</sup> The Administration claims that the new rules promulgated in February 2011 will achieve the same health benefits at half the cost of compliance.<sup>335</sup> The rules will cover approximately 200,000 boilers that produce mercury, organic air toxins and dioxins, but most of these sites are of relatively small size, and they would be required only to provide “tune-ups” using readily available technology.<sup>336</sup> About 14,000 larger facilities would have to meet numerical targets for pollution reduction and would receive government incentives to switch to cleaner burning fuels.<sup>337</sup>

In January 2011, the Administration began to regulate carbon dioxide and green house emissions from stationary sources under the Clean Air Act. The Administration regulated those building new large facilities plants or making major modifications to existing plants.<sup>338</sup> In 2008 and 2009, the nation’s energy sector emitted over five billion metric tons of carbon dioxide, referred to by the Supreme Court as “the most important species [] of a greenhouse gas,” into the atmosphere.<sup>339</sup> The Administration’s rules are only expected to cover approximately 400 plants in the first few years of the regulatory program, but are eventually

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<sup>332</sup> John M. Broder & Sheryl Gay Stolberg, *E.P.A. Delays Tougher Rule on Emissions*, N.Y. TIMES Dec. 9, 2010, available at <http://www.nytimes.com/2010/12/10/science/earth/10epa.html>.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> John Broder, *E.P.A. Scales Back Emission Rules*, N.Y. TIMES (Feb. 23, 2011), available at <http://www.nytimes.com/2011/02/24/science/earth/24emissions.html>.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *EPA Regulation of Greenhouse Gas Emissions*, AMERICAN COALITION FOR CLEAN COAL ELECTRICITY, Apr. 5, 2011, [http://www.americaspowerarmy.org/pdf/GHG\\_REGULATION\\_PAPER.pdf](http://www.americaspowerarmy.org/pdf/GHG_REGULATION_PAPER.pdf). The authority of the EPA to issue such regulations was established in *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497, 532 (2007).

<sup>339</sup> U.S. ENERGY INFORMATION ADMINISTRATION, DOE/EIA-0573, EMISSIONS OF GREENHOUSE GASES REPORT (2009), <http://www.eia.doe.gov/oiaf/1605/ggrpt/carbon.html#emissions>.



expected to impose efficiency and emissions requirements on industries throughout the United States.<sup>340</sup>

### G. Access to Justice

In March 2010, Eric Holder announced the new Access to Justice Program at the DOJ, designed to solicit private attorneys into public interest lawyering and supplement legal services for poor defendants at the federal, state, and tribal levels. “The idea for this office was simple,” Attorney General Holder announced, “[j]ust as you have *pro bono* initiatives at your firms and corporations, I wanted to be sure that in our house, too, there is a permanent effort to provide access to justice and to continuously enhance the fairness and integrity of our legal system.”<sup>341</sup> The program, led in its first nine months by Harvard Law School professor and Obama mentor Laurence Tribe, also seeks to promote cost-effective alternatives to litigation, and install infrastructure to assist the growing number of defendants who represent themselves in court.<sup>342</sup> Like the Lawyers’ Committee for Civil Rights Under Law, an organization called into service by President John Kennedy during the civil rights movement,<sup>343</sup> Access to Justice is designed to tap into the resources and expertise of the private bar, because, according to Holder, “government alone cannot advance the cause of justice.”<sup>344</sup> Consistent with Obama’s privatizing approach to education,<sup>345</sup> his vision of public interest lawyering as demonstrated in Access to Justice does not include not-for-profit groups whose organizational mandates encompass indigent defense.<sup>346</sup>

<sup>340</sup> John M. Broder, *E.P.A. Limit on Gases to Pose Risk to Obama and Congress*, N.Y. TIMES, Dec. 30, 2010, available at <http://www.nytimes.com/2010/12/31/science/earth/31epa.html>.

<sup>341</sup> Eric H. Holder, Jr., Attorney General, Address to the Pro Bono Institute (Mar. 19, 2010), available at <http://www.justice.gov/ag/speeches/2010/ag-speech-100319.html>.

<sup>342</sup> *Tribe Named Senior Counselor for Access to Justice*, HARV. L. SCHOOL NEWS AND EVENTS, (Feb. 26, 2010), [http://www.law.harvard.edu/news/2010/02/26\\_tribe.senior.counselor.html](http://www.law.harvard.edu/news/2010/02/26_tribe.senior.counselor.html) (last visited May 20, 2011). According to the *New York Times*, Professor Tribe was barred from giving interviews to the media on account of his “unabashedly liberal views.” Charlie Savage, *For an Obama Mentor, a Nebulous Legal Niche*, N.Y. TIMES, Apr. 7, 2010, available at <http://www.nytimes.com/2010/04/08/us/politics/08tribe.html>.

<sup>343</sup> In JFK’s time, the public interest law movement was composed to a great extent of private attorneys who lent their expertise to groups like the NAACP and the ACLU. But, as Professor Rhode recounts, extensive professionalization of the public interest movement since its breakout in the 1960s means that part-time *pro bono* lawyering no longer encapsulates the public interest law movement. Midlife, *supra* note 1, at 2028. Now, public interest law financing often dictates the kind of cases that can be pursued and their likely impact. Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 605 (2009).

<sup>344</sup> Eric H. Holder, Jr., *supra* note 341.

<sup>345</sup> See discussion *supra* note 50.

<sup>346</sup> Among those groups whose primary mission involves indigent defense, Professor Rhode interviewed EQUAL JUSTICE INITIATIVE, [www.eji.org/eji/about](http://www.eji.org/eji/about); the SOUTHERN CENTER FOR HUMAN

At the height of the foreclosure crisis in 2009, the Obama Administration awarded Equal Justice Works, a national sponsor of public interest law, \$1.2 million in stimulus funds to place law students at the sides of Americans facing foreclosure, bankruptcy, and homelessness<sup>347</sup> in partnership with national civil service agency AmeriCorps.<sup>348</sup> The Serve America Act will markedly increase AmeriCorps allocations, with potential repercussions for national legal service groups like Equal Justice Works, California's JusticeCorps, which trains university students to provide information to self-representing litigants,<sup>349</sup> and New York's Legal Orientation Program, which provides funding to local nonprofit organizations assisting non-citizens in detention.<sup>350</sup>

## V. LITIGATIONS

A key aspect of the Obama Administration's relationship to the public interest law movement is through litigation engaged in by the United States Government, in particular the Administration's use of the DOJ and the numerous offices of United States Attorneys spread throughout the United States. At the top of the ladder of authority is the Attorney General of the United States, who is the head of the DOJ.<sup>351</sup> Next in line behind the Attorney General is the Deputy Attorney General, followed by the Solicitor General, who represents the federal government before the Supreme Court of the United States.<sup>352</sup>

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RIGHTS, [www.schr.org/about](http://www.schr.org/about); and the LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, [www.lawyerscommittee.org/about](http://www.lawyerscommittee.org/about) (sites visited July 2–10, 2010).

<sup>347</sup> Press Release, PR Web, Equal Justice Works Sends 160 Attorneys into Field to Fight Social Justice Issues (Nov. 17, 2009), available at <http://www.prweb.com/releases/equaljusticeworks/foreclosure/prweb3216844.htm>.

<sup>348</sup> AmeriCorps saw its assets grow substantially with ARRA and will increase its volunteer cadre from 75,000 to 250,000 by 2017. *Service*, THE WHITEHOUSE.GOV, <http://www.whitehouse.gov/issues/service> (last visited Apr. 5, 2011). The Corporation for National and Community Service, which oversees AmeriCorps, was allotted \$1.1 billion in the President's 2010 budget.

<sup>349</sup> *JusticeCorps Background*, CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA (June 20, 2010), <http://www.courtinfo.ca.gov/programs/justicecorps/>.

<sup>350</sup> See Eric H. Holder, Jr., *supra* note 343.

<sup>351</sup> 28 U.S.C. § 503 (2006) ("The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.").

<sup>352</sup> *Department of Justice Agencies*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/agencies/index-org.html> (click "Solicitor General" box on Organizational Chart). Victor Navasky has suggested that although the Solicitor General is "under" the Attorney General,

[H]e is traditionally autonomous. . . . [T]he Attorney General . . . is adviser to the President, and the Solicitor General . . . is adviser to the Supreme Court. [T]he thrust of the Attorney General's attention is on broad policy questions, and the thrust of the Solicitor General's attention is on narrower ones [T]he Attorney General

The Solicitor General or its representative appears before the Supreme Court in cases in which the United States, its agencies, instrumentalities, or personnel is a named party; cases in which the constitutionality of a federal statute has been raised; cases in which the Solicitor General has chosen to participate as amicus curiae by invitation from the Supreme Court; and cases in which the Solicitor has chosen to participate in a case as amicus curiae without invitation from the Supreme Court.<sup>353</sup>

#### A. Methodology

Of these varying contexts, we focus on those cases in which the Solicitor General submits uninvited amicus briefs and is not engaged in its primary defense role of representing the United States or defending legislation passed by Congress. We choose these cases for two reasons. First, we seek to understand the Administration's litigating position in cases where that position has fully crystallized and is being articulated before the nation's highest tribunal. As is clear in the primary defense cases,<sup>354</sup> the Administration's position can be in constant flux from the moment of initial involvement until final appeal. We avoid tracing a

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focuses on short-range political results and the Solicitor General focuses on long-range constitutional-law implications.

NAVASKY, *supra* note 128 at 279–80. See also GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT, TEACHERS MANUAL 41 (2d ed. 2008) (“[T]he Attorney General rarely appears in court [and] . . . is primarily an administrator, not a litigator.”); Drew S. Days, III, *The Solicitor General and the American Legal Ideal*, 49 SMU L. REV. 73, 76 (1995) (“Although the Solicitor General is appointed by the President and works for the Attorney General, it is rare for his decisions to be overruled by either of his superiors.”).

<sup>353</sup> EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 516–17 (9th ed. 2007). The Solicitor General's website is organized accordingly. See also OFFICE OF THE SOLICITOR GENERAL (JULY 21, 2010) <http://www.justice.gov/osg/briefs/2009/2009brieftypes.html>.

<sup>354</sup> The public interest community is closely watching the evolving “war on terror” cases and those arising out of the gay rights revolution. Excluding denials of certiorari, the Supreme Court has decided only one war on terror case since Obama took office. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (upholding federal “material support” statute, 18 U.S.C. § 2389B, which bars the provision of resources to foreign terrorist organizations against First Amendment speech and vagueness challenges). The litigation was twelve years old when decided by the Supreme Court, and thus significantly predates the Obama Administration, yet the Obama-appointed Solicitor General Elena Kagan defended the law. See also *Mohamed v. Jespersen Dataplan, Inc.*, 614 F.3d 1070 (en banc) (9th Cir. 2010) (dismissing under state secrets privilege an action brought by a foreign national under the Alien Tort Statute against a company that allegedly assisted in the CIA's extraordinary rendition program); *Nasser Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (dismissing suit for lack of standing and as presenting a non-justiciable political question suit by a father seeking injunctive relief barring “targeted killing” of his son, a U.S. citizen).

Also closely watched are the Arizona cases raising racial profiling issues. See *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (preliminary injunction issued barring Arizona from enforcing sections of SB1070 regulating immigration on preemption grounds); *United States v. Maricopa Cnty*, No. 2:2010cv01878 (D. Ariz., filed Sept. 2, 2010) (civil action seeking declaratory and injunctive relief ordering Maricopa County to provide documentation and other information as part of an investigation into allegations of national origin discrimination in violation of Title VI of the Civil Rights Act of 1964).

position's evolution, and instead seek to capture it in final form. Second, in primary defense cases, the Solicitor General is obligated by law<sup>355</sup> to represent the interests of the United States and, like many defense attorneys, finds itself defending activities, laws, and decisions that it may not have approved in the first instance.<sup>356</sup> Consequently, to the extent that the Obama Administration is required to defend laws and decisions that predated it, the task of assessing its litigation position against public interest values becomes infinitely more complex,<sup>357</sup> and in a number of areas, it appears that the Administration is struggling with its options.<sup>358</sup>

Although the Administration must make sophisticated judgments in all litigation, the different circumstances in which its participation arises can affect the litigation posture it adopts.<sup>359</sup> In a case where the United States

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<sup>355</sup> 28 U.S.C. §516 (2006) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

<sup>356</sup> Cf. Drew S. Days III, *supra* note 352, at 79–83 (describing the "rare occasions when the Solicitor General will decline to defend the constitutionality of a federal statute.").

<sup>357</sup> Even when operating as primary defense counsel, the role of the United States counsel is not a mechanical one. According to former Legal Defense Fund lawyer Drew Days III, who served as Solicitor General under President Clinton:

In this process the Solicitor General is not a 'hired gun.' Indeed, he has a captive client, who may not seek new counsel if he receives disagreeable legal advice . . . his responsibility is ultimately not to any particular agency or person in the federal government but rather 'the interests of the United States' which may, on occasion, conflict with the short-term programmatic goals of [the] affected governmental entity. . . . In so many ways, the Solicitor General is invited by tradition, as well as statute and regulation, to step out of the role of partisan advocate to assist in the orderly development of the law and to insist that justice be done even where the immediate interests of the federal government may not appear to benefit. For, as it is described on the walls of the Department of Justice, 'The United States wins its point whenever justice is done its citizens in the courts.'

*Id.* at 76–78.

<sup>358</sup> Charlie Savage, *Obama Team is Divided on Anti-Terror Tactics*, N.Y. TIMES, Mar. 28, 2010, <http://www.nytimes.com/2010/03/29/us/politics/29force.html>.

<sup>359</sup> For example, in *Jewel v. Nat'l Sec. Agency*, No. C 07-0693, 2010 WL 235075 (N.D. Cal. Jan. 21, 2010), the Electronic Freedom Foundation brought suit against high-level Bush Administration figures, the National Security Agency, and other governmental actors on behalf of AT&T customers to stop the Bush-era policy of conducting warrantless surveillance of their communications and communication records. In April of 2009, the newly installed Obama Administration entered the case and moved to dismiss it, asserting that litigation over the wiretapping program would require the government to disclose privileged "state secrets," and that they were immune from suit. As the EFF posited on its website, "[t]hese are essentially the same or worse arguments than those made by the Bush Administration when it first set out to dismiss EFF's case against AT&T back in 2006." *Jewel v. NSA*, ELECTRONIC FRONTIER FOUNDATION, <http://www EFF.org/cases/jewel> (last visited Apr. 5, 2011). But see *Korb supra* note 312. On the other hand, in *Massachusetts v. U.S. Dept. of Health and Human Services*, 698 F. Supp. 2d 234 (D. Mass. 2010), and *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010), two recent cases challenging the DOMA, the U.S. District Court for the District of Massachusetts concluded that the statutory definition of "marriage," which excludes same-sex unions, violates the Tenth Amendment, the Spending Clause, and the equal protection component

is not providing primary defense, and has not been invited to participate by the Supreme Court, the United States can simply choose not to participate in the litigation.<sup>360</sup> We have chosen to look at cases during the October 2008 and October 2009 Supreme Court terms where, although the Administration was not required by its primary defense responsibilities to participate,<sup>361</sup> the Administration nonetheless chose involvement.

Before beginning our assessment, we provide our working definition of public interest law. Our understanding and use of that term starts with the United States Constitution, particularly the Bill of Rights and Reconstruction Amendments.<sup>362</sup> By providing affirmative and negative rights to individuals and groups against governments, these provisions afford protections against state structures. Rights to uninhibited and robust speech and other forms of political and cultural expression; to petition the government for redress of real and imaginary grievances; to diverse forms of religious, non-religious, and other forms of spiritual worship, all form a core of authorized activity that is essential to the continued existence of a forward-looking and progressive society.<sup>363</sup>

In addition to these rights, key norms of a tolerant and humane society require provisions protecting the individual from state-sanctioned public as well as private discrimination, especially when such discrimination is based on immutable traits that have historically deprived individuals and groups of meaningful life chances, rights to political participation, and rights to participate meaningfully and experience the benefits and burdens

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of the Fifth Amendment's Due Process Clause. Senior Vice President Tom Clunky of the Family Research Council, which advocates for traditional family values, suggested that the result in the two opinions was directly attributable to the "deliberately weak legal defense of DOMA that was mounted on behalf of the government by the Obama administration, which has called for repeal of the law." *DOMA'S Definition of 'Marriage' Crumbles Under Weight of Constitutional Challenges*, 79 U.S.L.WK. 1077 (2010). Internet policy organizations and gay rights groups have been concerned with Obama Administration policy in each of the respective areas. Charlie Savage, *U.S. Tries to Make It Easier to Wiretap the Internet*, N.Y. TIMES, Sept. 27, 2010, available at <http://www.nytimes.com/2010/09/27/us/27wiretap.html>; Sheryl Gay Stolberg, *Obama Vows Progress On Gay Rights Agenda*, THE CAUCUS, Jun. 22, 2010, <http://thecaucus.blogs.nytimes.com/2010/06/22/obama-vows-progress-on-gay-rights-agenda/?emc=eta1> (last visited Apr. 8, 2011). The Administration has ceased to defend DOMA, deciding in Feb. 2011 that the legislation violates the Fifth Amendment. See *supra* note 318 and accompanying text.

<sup>360</sup> None of the cases we discuss involve an invitation to participate from the Supreme Court.

<sup>361</sup> ABA MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1983) available at <http://www.law.cornell.edu/ethics/aba/mcpr/MCPR.HTM> (last visited Apr. 5, 2011) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations.").

<sup>362</sup> Cf. Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 212, 215, 241-43 (1976) (noting the ACLU's concern with "encroachments on the Bill of Rights" and the NAACP's "multifaceted attack on racial discrimination," utilizing the Fourteenth Amendment).

<sup>363</sup> U.S. CONST., amend. I.

of the economy.<sup>364</sup> Finally, it is imperative for a progressive society to provide protections against arbitrary and unfair treatment in the determination of individuals' civil status, and that concrete and realistic limitations be imposed on the coercive power exercised through criminal processes.<sup>365</sup>

Although we think of constitutional guarantees and protections as individual rights, they have an equally profound meaning as expressions of manifest public values that operate together to create and preserve a foundation for a just and tolerant civil society. They do this by providing enduring benefits for our entire society, notwithstanding the reality that in a market economy few incentives exist to encourage litigation and other forms of direct action to vindicate them. For these reasons, we speak of such values as "public interest values," and of those who use the legal process for purposes of the vindication and advancement<sup>366</sup> of these public interest values as "public interest lawyers."

The work of public interest lawyers goes beyond the assertion of constitutional values, and also entails use of the tools of government to regulate and contain private monopolized corporate power, a second criterion by which we define public interest law and public interest lawyers. Louis D. Brandeis, one of the early great public interest lawyers of United States history, was concerned throughout his career about "the power that huge assets gave to individual companies," a phenomenon he referred to repeatedly as the "curse of bigness."<sup>367</sup> Further, in one of the very first articles to examine the public interest law movement, Robert

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<sup>364</sup> U.S. CONST., art. i, § 2; U.S. CONST. amends. XIII, XIV, XV, XVII, XIX, XXIII.

<sup>365</sup> U.S. CONST. amends. XIV, IV, V, VI, VIII.

<sup>366</sup> By "vindication" and "advancement," we refer to advocacy asserting the legitimacy of the public values claim. Early in its history, the Supreme Court of the United States lacked jurisdiction over state court decisions vindicating constitutional claims. *Cf.* The Judiciary Act of 1789, 1 Stat. 73, §25 (1789), available at [http://www.constitution.org/uslaw/judiciary\\_1789.htm](http://www.constitution.org/uslaw/judiciary_1789.htm) (authorizing Supreme Court review of state judgments only in situations where the state court has invalidated exercises of federal authority or denied federal rights, privileges or exemptions). This was changed by the Judiciary Act of 1914, which for the first time authorized Supreme Court review of state court decisions upholding a claim of federal right. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 432 (6th ed. 2009).

<sup>367</sup> LOUIS D. BRANDEIS, THE CURSE OF BIGNESS (Osmond K. Fraenkel ed., 1934); MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 161 (2009). Summarizing Brandeis's views of the role of the Supreme Court, Philippa Strum wrote:

the Court's duty was to reinforce governmental efforts to return American businesses to the size they would have been had the money trust and the laws its power produced not artificially created giant corporations. The Court had the responsibility not to interfere with experimentation in limiting bigness (antitrust law) and to encourage the growth of nongovernmental forces (unions) that would help curb the power that flowed from bigness.

PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 340 (1984).

Rabin commented on the early work of Ralph Nader, especially his exposure of the way in which the Federal Trade Commission's annual Congressional appropriation was "frittered away on empty public relations gestures and on efforts to assist larger business interests police and harass smaller competitors."<sup>368</sup>

In defining public interest law, Deborah Rhode relied upon its widely held definition as including "non profit tax-exempt organizations that devote a large share of their programs to providing legal representation to otherwise unrepresented interests in court or administrative agency proceedings involving questions of important public policy."<sup>369</sup> This definition provides a third criterion by which we assess public interest law: it emphasizes the work done by public interest lawyers in providing representation of those "otherwise unrepresented." The extent of the population groups deemed to be historically "unrepresented" is reflected in the breadth of those whose causes have been championed by public interest organizations with whom Professor Rhode corresponded, and include African Americans, Asian Americans, Mexican Americans, Puerto Ricans, women, people with disabilities, young people including children, immigrants, poor people, lesbian, gay, bisexual and transgender people, workers, criminal defendants, Native Americans, and students.<sup>370</sup>

What unites these disparate groups of the American population is their subjection at various periods in United States history to large-scale deprivations of civil rights, and other opportunities to participate fully and without discrimination in the institutions of civil society.<sup>371</sup> As Robert Rabin has emphasized, civil rights work has been at the heart of the public interest law movement from its inception, and the two oldest public interest organizations, the ACLU and the NAACP, have always been primarily focused on deprivations of civil rights and liberties.<sup>372</sup> The number of

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<sup>368</sup> Rabin, *supra* note 362, at 225.

<sup>369</sup> Midlife, *supra* note 1, at 2030 n.3 (citing COUNCIL FOR PUBLIC INTEREST LAW IN AMERICA, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA* 81 (1976)) (internal quotation marks omitted).

<sup>370</sup> Midlife, *supra* note 1, app. at 2082–84. Although the Christian Legal Society responded to the Rhode survey, that organization, in our view, does not meet the criteria set out in the text. Although the organization litigates as plaintiffs in First Amendment cases as an advocate of a self-defined right to worship, it does not champion claims of "underrepresented" groups, and its main litigation focus has been exclusionary—preventing non-Christians from attending its campus meetings. *CLS v. Martinez: Some Thoughts on the Recent Supreme Court Decision*, CLSNET.ORG, <http://www.clsnet.org/law-students/cls-v-martinez-some-thoughts-recent-supreme-court-decision> (last visited Apr. 5, 2011).

<sup>371</sup> See generally HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES 1492-PRESENT* (2005).

<sup>372</sup> Rabin, *supra* note 362, at 209–25. Our use of public interest terminology is therefore narrower than the phrase "cause lawyers," coined initially by Austin Sarat and Stuart Scheingold, and used to refer to "lawyering directed at altering some aspect of the status quo, and giving priority to political ideology, public policy, and moral commitment." *Contra* Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *CAUSE*

public interest organizations has expanded over the years to capture the increased historical awareness and the breadth of the work needed to forge an inclusive society.

To clarify our analysis of public interest lawyering, we choose as an illustration the California case *Perry v. Schwarzenegger*, in which two gay couples brought suit against California state and county officials seeking to enjoin enforcement of California's Proposition 8, a ballot initiative approved by California voters that disallowed the issuance of marriage licenses to same-sex couples.<sup>373</sup>

Two prominent members of the private bar who were not employed by public interest organizations brought the suit.<sup>374</sup> In an extraordinary move, the Attorney General of the State of California conceded Proposition 8's unconstitutionality and refused to defend it.<sup>375</sup> The Attorney General of California took this bold approach notwithstanding his capacity as "chief law officer of the State" with the responsibility to "see that the laws of the State are uniformly and adequately enforced."<sup>376</sup> The Governor and county defendants, while not taking a position on the ballot initiative's

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LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 4 (Austin Sarat & Stuart Scheingold eds., 1998). Public interest lawyers, as we define them, may or may not be engaged in "cause lawyering." Arguing for the values identified in the text is not necessarily part of an "ideological" campaign or an attempt to alter the status quo, and can instead be seen as preservative of constitutional values struggled for in U.S. history over many years. In 1998, Sarat and Scheingold excluded right-wing litigation from "cause lawyering," arguing that "at least until very recently moral activism was almost entirely associated with lawyering for progressive causes." *Id.* at 25 n.13. Whether or not they still maintain that belief, the vociferousness with which right-wing lawyers today argue their moral causes matches if not exceeds that of progressive lawyers. We exclude them from public interest lawyering because, as a general matter, we see them as outside the purview of our indicia of public interest values articulated in the text.

<sup>373</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010); Proposition 8 states: "Only marriage between a man and a woman is valid or recognized in California." Marriage Protection Act, 2008 Cal. Legis. Serv. Prop. 8 (Proposition 8) (West 2008).

<sup>374</sup> Attorney Theodore Olson, a former solicitor general of the United States, is in private practice with the Washington, D.C., firm of Gibson, Dunn & Crutcher LLP. Attorney David Boies is in private practice with the New York firm of Boies, Schiller & Flexner LLP. At the time of the initial filing, there was disagreement among gay rights organizations about whether such a federal lawsuit was a good idea, considering the likelihood that the case would go to the U.S. Supreme Court and the small chance of prevailing there. See Michael A. Lindenberg, *A Gay Marriage Lawsuit Dares to Make its Case*, TIME, Jan. 5, 2010, available at <http://www.time.com/time/nation/article/0,8599,1951520-1,00.html>, raising the specter of the dissonance observed in the disability rights movement replicating itself in the gay rights movement. Cf. Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People With Disabilities* 123 HARV. L. REV. 1658, 1670 (2010) (book review) (noting that, of the eighteen ADA cases heard by the Supreme Court, none "was initiated or argued by lawyers who spend a significant part of their professional time on disability rights cases or have a formal connection to a disability rights organization"). See also Nancy Morawetz, *Counterbalancing Distorted Incentives In Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities* 86 N.Y.U. L. REV. 131, 166-67 (2011) ("By bringing suit in *Perry*, the Boies-Olson team preempted discussion of the best timing for broad constitutional litigation.").

<sup>375</sup> *Perry*, 704 F. Supp. 2d at 928-29.

<sup>376</sup> CAL. CONST. art. V, § 13.



constitutionality, also refused to defend it.<sup>377</sup> The proponents of the initiative were allowed to intervene in the action as defendants to argue its legality. Subsequently, the city and county of San Francisco were allowed to intervene as plaintiffs asserting, along with the same-sex couples, that Proposition 8 was unconstitutional.<sup>378</sup>

The plaintiffs argued Proposition 8 deprived them of rights to equal protection and due process of law as provided by the Fourteenth Amendment and sought to enforce these rights pursuant to 42 U.S.C. § 1983, the civil rights statute. Because the plaintiffs were seeking to vindicate and advance public values enshrined in the Constitution, the litigation meets our first criterion of public interest litigation. The lawyers representing the plaintiffs, although not in full time public interest practice, were also seeking vindication of public interest values as we have defined them.

The parties and representatives of the various public officials in the litigation, the Attorney General of California and Governor of California, the county defendants and the city and county of San Francisco also played important public interest roles in the litigation by aligning themselves with values of inclusion, tolerance, and the vindication of rights embodied in the United States Constitution. The lawsuit presents the fundamental question of whether a state can so limit the right to marry, even when acting at the behest of ostensible majoritarian sentiment as expressed in a ballot initiative.<sup>379</sup> The initiative was a facially discriminatory exclusionary mechanism, designed to shut out large segments of the California population from substantial benefits created by the operation of state and federal law.<sup>380</sup> Equally important for our analysis is that the litigation was brought on behalf of an historically unrepresented population that has been at the receiving end of historic violence, prejudice, and discrimination from state officials as well as from organized and unorganized private forces in

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<sup>377</sup> *Perry*, 704 F. Supp. at 928–29.

<sup>378</sup> *Id.*

<sup>379</sup> There is extensive debate on whether “direct democracy” as manifested in ballot initiatives is a legitimate means for determining public policy. A recent discussion posed the issues as follows:

The availability of the initiative process tempts majority factions to impose their will without having to accommodate even intense minorities. Initiative proponents can draft a measure in the strongest possible terms, and if it has the support of a bare majority of the electorate, it becomes law. Conversely, an activist judiciary tempts minority groups to try to establish new rights or settle other hard questions without having to win broad-based support through normal political mobilizations.

KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* 220 (2009).

<sup>380</sup> The district court found that the states and federal government channel benefits, rights and responsibilities through marital status and that marital status affects immigration and citizenship, tax policy, property and inheritance rules and social benefit programs. *Perry*, 704 F. Supp. 2d at 961.

civil society.<sup>381</sup>

On the other side of the case were the proponents of Proposition 8, “Protect Marriage,” the main organizers and sponsors of the petition drive to put the initiative on the ballot.<sup>382</sup> They asserted that the Proposition protected the right to worship<sup>383</sup> although they did not have a client whom they claimed to be representing, outside of their own organization. Since the district court referred to Protect Marriage as “a ‘broad coalition’ of individuals and organizations, including the Church of Jesus Christ of Latter Day Saints, the California Catholic Conference, and a large number of evangelical churches,”<sup>384</sup> we see them and their lawyers as engaging in quintessential “cause lawyering,” as defined by Sarat and Sheingold, since their litigation was explicitly “giv[ing] priority to political ideology, public policy, and moral commitment.”<sup>385</sup> The district court specifically held that one reason why Proposition 8 is unconstitutional is precisely because it “enacts a moral view that there is something ‘wrong’ with same-sex couples.”<sup>386</sup>

The case captures the essence of our understanding of public interest lawyering by illuminating two of the three criteria that we utilize to describe public interest practice. More importantly, for our purposes, it also demonstrates how governmental officials, by declining to utilize their delegated power to work against the vindication and advancement of public interest values, can contribute to the defense of historically unrepresented and vulnerable communities.<sup>387</sup>

### *B. Case Issue Areas*

Our look at the public interest work of the Obama Administration builds upon this profile. Consistent with the criteria previously discussed, we have chosen to focus on two employment cases concerning anti-

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<sup>381</sup> *Id.* at 981–82. See generally HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST (Martin Bauml Duberman et al. eds., 1989).

<sup>382</sup> *Perry*, 704 F. Supp. at 930.

<sup>383</sup> The district court concluded specifically that holding Proposition 8 unconstitutional would not require any religious group to recognize marriage for same-sex couples nor mandate that any religious official be required to solemnize a marriage in contravention of his or her religious beliefs. *Id.* at 976.

<sup>384</sup> *Id.* at 955.

<sup>385</sup> Sarat & Scheingold, *supra* note 372, at 4.

<sup>386</sup> *Perry*, 704 F. Supp. 2d at 1002.

<sup>387</sup> The position taken by the government defendants in *Perry* is identical to that Walter Dellinger has suggested should be taken by the Obama Administration in the cases involving the Don’t Ask, Don’t Tell military policy. Dellinger suggests that the Administration should “tell the appellate court that the executive branch believes the law is unconstitutional.” Walter Dellinger, *How to Really End ‘Don’t Ask, Don’t Tell’*, N.Y. TIMES, Oct. 21, 2010, available at <http://www.nytimes.com/2010/10/21/opinion/21dellinger.html>. The Administration heeded the advice in regard to the Federal Defense of Marriage Act. See *supra* note 67.

discrimination laws, three civil rights cases involving alleged governmental misconduct, and one case involving the rights of immigrants in the criminal justice process. Immigration issues are of great importance to the public interest law community and comprise an area, along with civil rights, where the Obama Administration introduced a specific agenda on its Presidential website.<sup>388</sup> In addition, we look at three other cases affecting the workings of the criminal justice process, focused in particular on rules concerning police interrogations. These cases reveal that early in Obama's term in office, his Acting Solicitor General adopted positions consistent with the public interest organizations participating in the cases; yet, as the Obama Administration continued, his named Solicitor General, Elena Kagan, adopted positions adverse to those of the public interest organizations.

### 1. Employment Discrimination

In *Gross v. FBL Financial Services, Inc.*,<sup>389</sup> Plaintiff Jack Gross was a fifty-four-year-old man who received regular promotions from his employer until his title was changed from Claims Administrator Vice President to Claims Administrator Director. Although this change in job title allowed Gross to retain his job responsibilities, he considered it a demotion because he received fewer points in his company's salary grade system.<sup>390</sup> Later, he was further demoted to the position of Claims Project Coordinator after receiving lower scores on performance evaluations.<sup>391</sup> He filed suit under the Age Discrimination in Employment Act<sup>392</sup> (ADEA) after his duties were transferred to a woman in her early forties whom Gross had previously supervised.<sup>393</sup>

In his suit, Gross alleged that his reassignment to a less desirable

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<sup>388</sup> See *supra* notes 66 and 79. Perhaps the highest profile civil action filed by the Obama Administration in the lower courts has been its challenge to SB1070, the Arizona Immigration Control statute. See *United States v. Arizona*, 703 F. Supp. 2d 980, 986 (D. Ariz., 2010).

<sup>389</sup> *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2346 (2009).

<sup>390</sup> *Id.* at 2347.

<sup>391</sup> In an article published after the Supreme Court ruled against him, plaintiff Gross wrote:

When my employer, Farm Bureau Financial Group (FBL) in Iowa, merged with the Kansas Farm Bureau, the company apparently wanted to purge claims employees who were over age 50. All the Kansas claims employees over 50 with a certain number of years of employment were offered a buyout, which most accepted. In Iowa, virtually every claims supervisor was demoted. Being 54, I was included in that sweep, despite 13 consecutive years of top performance reviews. The company claimed this was not discrimination but simply a reorganization.

Jack Gross, *We Need to Fight Age Bias*, AARP, Sept. 1, 2010, [http://www.aarp.org/work/employee-rights/info-08-2010/we\\_need\\_to\\_fight\\_age\\_bias\\_.html](http://www.aarp.org/work/employee-rights/info-08-2010/we_need_to_fight_age_bias_.html).

<sup>392</sup> 29 U.S.C. § 621 (2006).

<sup>393</sup> *Gross*, 129 S. Ct. at 2346–47.

position amounted to age-based discrimination.<sup>394</sup> At the close of trial, the district court instructed the jury that it should return a verdict for the plaintiff if he had proved that age was a motivating factor in the plaintiff's demotion. "[A]ge was a motivating factor" if it found defendant's stated reasons for its decision were not the real reasons, but were a pretext to hide age discrimination.<sup>395</sup> In a separate instruction to the jury, the court cautioned: "However, your verdict must be for defendant . . . if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age."<sup>396</sup> The jury found in favor of plaintiff and awarded him \$46,945 in lost compensation.<sup>397</sup>

The Eighth Circuit Court of Appeals reversed and remanded for a new trial.<sup>398</sup> In the Appeals Court view, Justice O'Connor's opinion concurring in the judgment in *Price Waterhouse v. Hopkins* required the plaintiff in a Title VII case to "show 'by direct evidence that an illegitimate factor played a substantial role' in a particular employment decision."<sup>399</sup> The Appeals Court further held that if a plaintiff "fails to present 'direct evidence' that an illegitimate criterion played a 'substantial role' in the employment decision," then the burden of persuasion should remain at all times with the plaintiff under the framework for single-motive cases under *McDonnell Douglas Corp. v. Green*.<sup>400</sup>

The Supreme Court went beyond the Court of Appeals, holding in a 5-4 vote that "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."<sup>401</sup>

The amicus brief submitted by the Obama Administration argued that the Court of Appeals should have been reversed because it erred in requiring that a plaintiff present direct evidence of discrimination, basing its argument on the language of the ADEA as well as prior rulings of the Supreme Court.<sup>402</sup> In this case the Obama Administration acted

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<sup>394</sup> *Id.* at 2347.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 2359 (Breyer, J., dissenting).

<sup>397</sup> *Id.* at 2347 (majority opinion).

<sup>398</sup> *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 363 (8th Cir. 2008).

<sup>399</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 275 (1989) (O'Connor, J., concurring).

<sup>400</sup> *Gross*, 526 F.3d at 360 (citing *Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

<sup>401</sup> *Gross*, 129 S. Ct. at 2352.

<sup>402</sup> Brief for the United States Amicus Curiae Supporting Petitioner at 7-9, *Gross v. FBL Fin. Grp., Inc.*, 129 S. Ct. 2343 (2009) (No. 08-441), 2009 WL 253859. The brief was submitted in February 2009, with Edwin S. Kneedler serving as Acting Solicitor General and Counsel of Record.

consistently with the position articulated to the Court by numerous public interest organizations.<sup>403</sup> The ADEA was enacted as one of many statutes passed pursuant to Congressional authority under the Commerce Clause and section 5 of the Fourteenth Amendment to eliminate forms of discrimination that impede the flow of commerce.<sup>404</sup> The act singles out for protection workers over the age of forty to protect them from the very type of discrimination alleged by Gross.<sup>405</sup> In this case, the Obama Administration joined with the public interest community to vindicate a public value with origins in the Fourteenth Amendment.<sup>406</sup>

Another employment discrimination case, *Ricci v. DeStefano*,<sup>407</sup> involved a written and oral promotional exam administered in 2003 by the City of New Haven, Connecticut. Candidates took the examinations in November and December of 2003.<sup>408</sup> Seventy-seven candidates completed the lieutenant examination—forty-three whites, nineteen blacks, and fifteen Hispanics.<sup>409</sup> Of those, thirty-four candidates passed—twenty-five

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<sup>403</sup> See, e.g., Brief of American Ass'n for Justice as Amicus Curiae in Support of Petitioner, *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009) (No. 08-441); Brief of Amici Curiae Lawyers' Comm. for Civil Rights Under Law; Asian Am. Justice Center; Mexican Am. Legal Defense & Educ. Fund, Nat'l. Partnership for Women & Families, & Nat'l. Women's Law Center in Support of Petitioner, *Gross v. FBL Financial Servs., Inc.*, 129 S. Ct. 2343 (2009) (No. 08-441); Motion for Leave to File Amicus Curiae Brief & Brief Amicus Curiae of the Nat'l. Empt. Lawyers Ass'n in Support of Petition for a Writ of Certiorari, *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009) (No. 08-441).

<sup>404</sup> *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 78 (2000).

<sup>405</sup> In passing the legislation, Congress made specific findings:

(1) Many employers adopted specific age limitations in those States that had not prohibited them by their own antidiscrimination laws, although many other employers were able to operate successfully without them. (2) In the aggregate, these age limitations had a marked effect upon the employment of older workers. (3) Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes. (4) Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers. (5) Finally, arbitrary age discrimination was profoundly harmful in at least two ways. First, it deprived the national economy of the productive labor of millions of individuals and imposed on the governmental treasury substantially increased costs in unemployment insurance and federal Social Security benefits. Second, it inflicted on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations.

*EEOC v. Wyoming*, 460 U.S. 226, 231 (1983).

<sup>406</sup> A bill has been introduced in the House of Representatives to overturn the decision in *Gross v. FBL*. See Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (2009).

<sup>407</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

<sup>408</sup> *Id.* at 2666.

<sup>409</sup> *Id.*

whites, six blacks, and three Hispanics.<sup>410</sup> The New Haven City Charter had established a “rule of three,” which required that the relevant hiring authority fill each vacancy by choosing one candidate from the top three scorers on the list.<sup>411</sup> Eight lieutenant positions were vacant at the time of the examination.<sup>412</sup> As the rule of three operated, this meant that the top ten candidates were eligible for an immediate promotion to lieutenant.<sup>413</sup> All ten were white.<sup>414</sup> Subsequent vacancies would have allowed at least three black candidates to be considered for promotion to lieutenant.<sup>415</sup>

After the examinations were administered, the New Haven Civil Service Board held hearings to decide whether to certify the list of individuals eligible for promotion based on the exam results.<sup>416</sup> On March 18, 2004, the Board declined to certify the exam results by a 2-2 vote.<sup>417</sup>

A group of plaintiffs, most of whom were white and one who was Hispanic, filed suit against the Mayor of New Haven, John DeStefano, and other defendants, alleging that they were denied opportunities for promotion on account of their race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment.<sup>418</sup> New Haven answered that it did not certify the results because of its good faith belief that using the examinations would have an unlawful disparate impact on African Americans and Hispanics, in violation of Title VII.<sup>419</sup>

The plaintiffs claimed that New Haven’s decision not to certify was pre-textual because the city lacked evidence that it would not have a defense to disparate-impact liability based on the job-relatedness of the examinations and the absence of other, less discriminatory selection measures.<sup>420</sup> The district court rejected this argument, explaining that “it is not the case that defendants *must* certify a test where they cannot pinpoint its deficiency explaining its disparate impact . . . simply because they have not yet formulated a better selection method.”<sup>421</sup> The district court also dismissed the equal protection claim, holding that the decision not to certify the test results was not a “racial classification,” and that there was

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<sup>410</sup> *Id.*

<sup>411</sup> *Id.* at 2665.

<sup>412</sup> *Id.* at 2666.

<sup>413</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2666 (2009).

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* at 2667–70.

<sup>417</sup> *Id.* at 2669–71.

<sup>418</sup> *Id.* at 2671.

<sup>419</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2671 (2009).

<sup>420</sup> *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 154 (D. Conn. 2006).

<sup>421</sup> *Id.* at 156 (emphasis in original).

no evidence that respondents acted with “an intentionally discriminatory purpose” or “discriminatory animus” toward non-minorities.<sup>422</sup>

The U.S. Court of Appeals for the Second Circuit affirmed in a per curiam opinion, noting its agreement with “the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below,” and further explaining that, “because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected.”<sup>423</sup> The Court of Appeals denied rehearing *en banc*.<sup>424</sup>

In its voluntary amicus submission, the Obama Administration argued that an employer does not violate Title VII’s disparate-treatment prohibition when it decides not to certify the results of a promotional test in order to comply with the statute’s disparate-impact prohibition.<sup>425</sup> Moreover, the brief noted that the plaintiffs’ reading of the statute would needlessly pit Title VII’s basic anti-discrimination provisions against one another and would defeat Congress’s intent to encourage employers to comply voluntarily with Title VII.<sup>426</sup> Nor, the brief claimed, is declining to certify test results the equivalent of “racial balancing” or the imposition of “quotas.”<sup>427</sup>

Thus, the Obama Administration as amicus again closely aligned itself with public interest organizations that have long fought for an end to workplace discrimination under Title VII and its constitutional precursor, the Fourteenth Amendment.<sup>428</sup> However, in a 5-4 decision, the

<sup>422</sup> *Id.* at 161, 162.

<sup>423</sup> *Ricci v. DeStefano*, 530 F.3d 87, 87 (2d Cir. 2008).

<sup>424</sup> *Ricci v. DeStefano*, 540 F.3d 88, 88 (2d Cir. 2008).

<sup>425</sup> Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at \*4, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 507014. The Solicitor’s brief was filed in February 2009. Edwin S. Kneedler was Counsel of Record as Acting Solicitor General.

<sup>426</sup> *Id.* at \*4.

<sup>427</sup> *Id.* (internal quotation marks omitted). Although the Obama Administration brief asserted that the district court had correctly held that intent to comply with Title VII does not constitute intentional racial discrimination, it concluded that the Court of Appeals’ decision to affirm should be vacated to enable both lower courts to consider whether the City’s reasons for discarding the examination results were pretext for discrimination. *Id.* at \*6.

<sup>428</sup> A number of amicus briefs in support of New Haven were filed. See Brief of Industrial-Organizational Psychologists as Amici Curiae in Support of Respondents, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428); Brief of the Int’l Assoc. of Hispanic Firefighters & Bridgeport Hispanic Firefighters Assoc. as Amici Curiae in Support of Respondents, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428); Brief of the Soc’y for Hum. Res. Mgmt. as Amicus Curiae Support of Respondents, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428); Brief Amicus Curiae of the Equal Emp’t Advisory Council in Support of Respondents, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428); Brief of Amici Curiae Lawyers’ Comm. for Civil Rights Under Law; Nat’l Urban League; NAACP & the Equal Justice Soc’y in Support of Respondents, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (No. 07-1428); Brief of Amici Curiae, Int’l Assoc. of Black Prof’l Fire Fighters, Black Chief of Officers Committee, James Clack, et al. in Support of Respondents, *Ricci*

Supreme Court held that the City's action in discarding the tests violated Title VII.<sup>429</sup>

## 2. *Qualified Immunity – § 1983 and Bivens Remedy*

The next three cases we discuss involve claims brought against governmental defendants for alleged violations of rights protected by the United States Constitution. Two of the cases were against state officials under 42 U.S.C. § 1983, a Reconstruction era civil rights provision enacted by Congress to provide a cause of action against defendants who violate the constitutional or statutory rights of plaintiffs while acting under color of state law.<sup>430</sup> The third case was brought against federal government officials, exempt from § 1983, but who are subject to damage liability for such constitutional violations as a result of the cause of action implied in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.<sup>431</sup> In each of the cases, the Office of the Solicitor General filed briefs in the Supreme Court arguing against the claims of the civil rights plaintiffs and supporting an outcome opposed to that sought by public interest amici.

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v. DeStefano, 129 S. Ct. 2658 (2009) (No. 07-1428); Brief of the National Partnership for Women & Families and the Nat'l Women's Law Ctr., et al. as Amici Curiae in Support of Respondents, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (No. 07-1428); Brief for the New York Law Sch. Racial Justice Project as Amicus Curiae in Support of Respondents, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (No. 07-1428); Brief of the ACLU, Mexican Am. Legal Defense & Educ. Fund, & Latino Justice PRLDEF as Amici Curiae in Support of Respondents, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (No. 07-1428); Amicus Brief of the Opportunity Agenda in Support of Respondents, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (No. 07-1428); Brief of Amici Curiae Asian Am. Justice Center, Asian Am. Inst., Asian Law Caucus, et al. in Support of Respondents, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (No. 07-1428); Brief of Int'l Municipal Lawyers Ass'n, Nat'l League of Cities, Nat'l Ass'n of Counties, & Int'l Pub. Mgmt. Ass'n for Human Res. as Amici Curiae in Support of Respondents, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (No. 07-1428).

<sup>429</sup> Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009).

<sup>430</sup> 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2006).

<sup>431</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971) ("[I]t is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.") (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted)).



The first case, *Safford Unified School District #1 v. Redding*,<sup>432</sup> involved a forced search of thirteen-year-old Savana Redding, a female student who was required to expose her breasts and pelvic area to school administrators when they wrongfully accused her of possessing drugs. Redding was searched and interrogated because another student who was discovered carrying a prescription drug (400 mg ibuprofen), and an over-the-counter pain medication (200 mg Naprosyn), told school officials that Redding had provided them.<sup>433</sup> When asked about the pills, Redding denied knowing anything about them and denied carrying or distributing pills at school.<sup>434</sup> Officials asked Redding to agree to a search of her belongings, and she did.<sup>435</sup> After a search of Redding's backpack proved fruitless, she was taken to the nurse's office and told to remove her jacket, socks, and shoes, and then her pants and shirt.<sup>436</sup> She was next instructed to pull her bra and underwear and shake them.<sup>437</sup> Redding later testified that she felt humiliated during the search and that she kept her head down so that the school officials would not see that she was about to cry.<sup>438</sup> The search revealed no pills.<sup>439</sup>

Redding sued school officials under 42 U.S.C. § 1983 alleging a Fourth Amendment violation.<sup>440</sup> The defendants moved for summary judgment, which the district court granted, concluding that the search of respondent was constitutional.<sup>441</sup> A divided Ninth Circuit panel affirmed this decision.<sup>442</sup> Sitting *en banc*, the Ninth Circuit vacated the panel decision and reversed the district court. The six-judge majority concluded that the search violated the Fourth Amendment and that defendant Wilson was not entitled to qualified immunity.<sup>443</sup>

The Obama Administration entered the case voluntarily as amicus<sup>444</sup> and argued that the search violated the Fourth Amendment because "the circumstances the school officials confronted did not furnish reasonable

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<sup>432</sup> *Safford Unified Sch. Dist. No.1 v. Redding*, 129 S. Ct. 2633, 2637 (2009).

<sup>433</sup> *Id.* at 2638.

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> *Id.*

<sup>438</sup> *Safford Unified Sch. Dist. No. 1 v. Redding*, 531 F.3d 1071, 1075 (9th Cir. 2008).

<sup>439</sup> *Safford Unified Sch. Dist. No. 1*, 129 S. Ct. at 2638.

<sup>440</sup> *Redding v. Safford Unified Sch. Dist. No. 1*, 504 F.3d 828, 829 (9th Cir. 2007).

<sup>441</sup> *Safford Unified Sch. Dist. No. 1*, 129 S. Ct. at 2638.

<sup>442</sup> *Redding*, 504 F.3d at 836.

<sup>443</sup> *Redding*, 531 F.3d at 1074 (9th Cir. 2008).

<sup>444</sup> Brief for the United States Amicus Curiae Supporting Reversal, *Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009) (No. 08-479). The Solicitor's brief was filed in March 2009. Edwin S. Kneedler was Counsel of Record as Acting Solicitor General.

suspicion that respondent was hiding . . . pills in her underwear or on her naked body. Absent such particularized suspicion about the location of the pills, the search was excessively intrusive and thus impermissible in scope.”<sup>445</sup> However, the Administration went on to conclude that school officials were entitled to qualified immunity “because the constitutional question in this case has sparked sharp disagreement among the federal judges who have considered it.”<sup>446</sup> This conclusion was contrary to the positions articulated by the numerous public interest amici who participated in the case,<sup>447</sup> and contrary to a growing scholarly recognition that an expansive reading of the qualified immunity doctrine is eviscerating the utility of the § 1983 cause of action.<sup>448</sup> The Supreme Court agreed that the search of Redding’s undergarments violated the Fourth Amendment but concluded that the school officials were entitled to qualified immunity.<sup>449</sup>

The second case, *Pottawattamie County, Iowa et al. v. McGhee*, involved two black men who were wrongfully convicted and sentenced to life imprisonment as teenagers for murdering a white security guard.<sup>450</sup> They each served twenty-five years in prison but were released by state courts after substantial evidence was presented demonstrating that prosecutors and other governmental officials facing election<sup>451</sup> refused to turn over evidence before trial of an alternative suspect as required by *Brady v. Maryland*,<sup>452</sup> and conspired to fabricate testimony that was presented to a jury to obtain the convictions.<sup>453</sup> After their release, the two men brought civil rights actions under § 1983, § 1985(3), and analogous

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<sup>445</sup> *Id.* at \*8 (internal quotation marks omitted).

<sup>446</sup> *Id.* at \*9.

<sup>447</sup> See Brief of Amici Curiae the Nat’l Ass’n of Social Workers & its Arizona Chapter, the Nat’l Education Association, the Nat’l Ass’n of School Psychologists, the Am. Soc’y for Adolescent Psychiatry, & the Am. Prof’l Soc’y on the Abuse of Children in Support of Respondent April Redding, *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009), No. 08-479; Brief of the Urban Justice Center, Asian Am. Legal Defense & Educ. Fund, Advocates for Children of New York, & the Nat’l Youth Rights Ass’n, as Amici Curiae in Support of Respondents, *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009), No. 08-479; Brief of Amici Curiae The Rutherford Inst., Goldwater Inst. & Cato Inst. in Support of Respondent, *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009), No. 08-479; Brief of Juvenile Law Ctr., et al., as Amici Curiae in Support of Respondent, *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009), No. 08-479.

<sup>448</sup> See sources cited *infra* note 581.

<sup>449</sup> *Safford Unified Sch. Dist. No. 1*, 129 S. Ct. 2633, 2644 (2009).

<sup>450</sup> *McGhee v. Pottawattamie Cnty.*, 547 F.3d 922 (8th Cir. 2008).

<sup>451</sup> *Id.* at 926 (noting that Defendant Richter “had been appointed as County Attorney in 1976 and would stand for election, for the first time, in 1978. Richter was campaigning in the face of Schweer’s unsolved murder.”).

<sup>452</sup> See *Brady v. Maryland*, 373 U.S. 83, 86–88 (1963).

<sup>453</sup> *McGhee*, 547 F.3d at 925. The district court noted that the defendants “have fundamentally admitted that they coached and coerced witnesses and fabricated evidence.” *McGhee v. Pottawattamie Cnty.*, 475 F. Supp. 862, 895 (S.D. Iowa, 2007).

state law provisions alleging a racially motivated conspiracy to deprive them of rights under the United States Constitution and state law.<sup>454</sup> The defendant prosecutors moved for summary judgment, claiming entitlement to absolute or qualified immunity for their wrongful acts.<sup>455</sup> The district court rejected these defenses and was affirmed by the U.S. Court of Appeals.<sup>456</sup> The prosecutors petitioned the Supreme Court, and the Obama Administration voluntarily entered the case as amicus.<sup>457</sup> Acknowledging that “[i]f the allegations here are true, petitioners engaged in prosecutorial misconduct of an execrable sort, involving a complete breach of the public trust,” the Administration nonetheless went on to argue that the prosecutors were entitled to absolute immunity and that the lower courts had to be reversed, reasoning that “such conduct [as was engaged in by these defendants] is properly addressed not through civil liability, but through a host of other deterrents and punishments, including judicial oversight of criminal trials, and criminal and professional disciplinary proceedings against prosecutors.”<sup>458</sup> Neither of these proceedings would provide any material redress for the plaintiffs, who spent half of their lives in prison for a crime they did not commit. The case was settled for \$12 million after argument before the Supreme Court.<sup>459</sup>

The third case, *Hui v. Castaneda*,<sup>460</sup> was a *Bivens* action brought on behalf of the estate of Francisco Castaneda, an undocumented immigrant who was detained by Immigration and Customs Enforcement pending removal proceedings against him. In March 2006, while in custody, Castaneda sought a biopsy for genital lesions that were painful and producing a discharge.<sup>461</sup> Because of a family history of cancer, he sought medical determination of whether he had the disease.<sup>462</sup> For almost a year, he was denied the biopsy because the defendants claimed he only had

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<sup>454</sup> *McGhee*, 547 F.3d at 866.

<sup>455</sup> *Id.* at 925.

<sup>456</sup> *Id.*

<sup>457</sup> Brief for the United States, Amicus Curiae Supporting Petitioners, *McGhee v. Pottawattamie Cnty.*, 547 F.3d 922 (8th Cir. 2008) (No. 08-1065), 2009 WL 2159654. The Solicitor’s brief was filed in July 2009, with Elena Kagan as Counsel of Record.

<sup>458</sup> *Id.* at \*\*4–5.

<sup>459</sup> *Immunity Case Deal*, N.Y. TIMES, Jan. 5, 2010, at A12. Amicus briefs were filed by: Brief of Black Cops Against Police Brutality as Amicus Curiae in Support of Respondents, *Pottawattamie County v. McGhee*, 130 S. Ct. 2002 (2009) (No. 08-1065); Brief of Amici Curiae the Nat’l Ass’n of Criminal Defense Lawyers, The Cato Institute, & the ACLU in Support of Respondents, *Pottawattamie County v. McGhee*, 130 S. Ct. 2002 (2009) (No. 08-1065); Brief of Amicus Curiae the Ctr. on the Admin. of Criminal Law in Support of Respondents, *Pottawattamie County v. McGhee*, 130 S. Ct. 2002 (2009) (No. 08-1065).

<sup>460</sup> See generally *Hui v. Castaneda*, 130 S. Ct. 1845 (2010).

<sup>461</sup> *Id.* at 1849.

<sup>462</sup> *Castaneda v. U.S.*, 583 F. Supp. 2d 1279, 1283 (2008).

“genital warts.”<sup>463</sup> He finally saw a doctor in January 2007, who ordered a biopsy that concluded that Castaneda indeed had penile cancer.<sup>464</sup> His penis was amputated, and he began undergoing chemotherapy, but died in February 2008.<sup>465</sup> The defendants’ negligence under the Federal Tort Claims Act (FTCA) was undisputed and was admitted while the case was pending appeal.<sup>466</sup>

Before his death, Castaneda brought a *Bivens* action against PHS, a division of the Department of Health and Human Services, and federal officers alleging that they violated his rights under the Fifth and Eighth Amendments of the Constitution by purposefully denying treatment of his serious medical condition and acting with deliberate indifference to his health needs.<sup>467</sup> The district court’s denial of a defense motion to dismiss was affirmed by the Court of Appeals for the Ninth Circuit on the basis that the FTCA remedy was inferior to the *Bivens* remedy for constitutional violations.<sup>468</sup>

The Solicitor General’s office entered the case as *amicus curiae*,<sup>469</sup> arguing for the grant of certiorari and reversal of the lower courts on the basis that the FTCA provided the only available remedy for Castaneda’s death. The Solicitor General asserted that affirmance of the Court of Appeals decision would “likely have an adverse impact on the government’s ability to recruit, hire, and retain medical personnel for the PHS, and may affect other federal entities that have medical missions covered by similar immunity statutes,”<sup>470</sup> a position contrary to that of Castaneda’s public interest counsel and the numerous *amicus* briefs filed with the Court on his behalf.<sup>471</sup> The Supreme Court agreed with the argument of the Solicitor that PHS officers were immune from *Bivens* suits for constitutional violations.<sup>472</sup>

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<sup>463</sup> *Id.* at 1281.

<sup>464</sup> *Hui*, 130 S. Ct. at 1849.

<sup>465</sup> *Id.*

<sup>466</sup> *Id.* at 1850 n.3.

<sup>467</sup> *Castaneda v. U.S.*, 546 F.3d 682, 686 (9th Cir. 2008) (noting that during Castaneda’s confinement and the period in which he requested medical attention, he was represented by counsel from the American Civil Liberties Union).

<sup>468</sup> *Castaneda*, 546 F. 3d 690–91.

<sup>469</sup> Brief for the United States as Amicus Curiae Supporting Petitioners, *Hui v. Castanada*, 130 S. Ct. 1845 (2010) (No. 08-1529), 2009 WL 4759119. The Solicitor’s brief was filed in July 2009, with Elena Kagan as Counsel of Record.

<sup>470</sup> *Id.* at 8.

<sup>471</sup> Amicus briefs were filed on behalf of Castaneda in the Supreme Court by the American Civil Liberties Union, the National Immigrant Justice Center, National Experts on Health Services for Detained Persons, and House of Representatives Member John Conyers. *Hui*, 130 S. Ct. at 1854, n.11.

<sup>472</sup> *Hui*, 130 S. Ct. at 1841.

### 3. Immigration and Criminal Defense

The plaintiff in *Padilla v. Kentucky*<sup>473</sup> was a Honduran national who had lived in the United States for over forty years as a lawful permanent resident.<sup>474</sup> He was stopped at a Kentucky weigh station for failing to have a weight and distance number on his truck.<sup>475</sup> Padilla consented to a search of his truck, which uncovered approximately one thousand pounds of marijuana.<sup>476</sup> He was arrested and subsequently indicted by a grand jury in Hardin County, Kentucky, on charges of trafficking and possessing marijuana, possessing drug paraphernalia, and operating a truck without a weight and distance tax number.<sup>477</sup> Padilla initially pleaded not guilty, and was released on bond.<sup>478</sup> Because of his arrest, however, the Immigration and Naturalization Service lodged an immigration detainer against him, resulting in the revocation of his bond.<sup>479</sup>

Padilla was provided defense counsel, who conducted discovery and moved to suppress the evidence of the marijuana and an admission by Padilla to the arresting officers that he had been paid to transport the marijuana.<sup>480</sup> The trial court denied the motion, finding that Padilla had validly consented to the search of his truck.<sup>481</sup> Padilla then entered a guilty plea to the three drug-related charges, in exchange for dismissal of the remaining charge and a total sentence of ten years on all charges.<sup>482</sup> The plea agreement provided that Padilla would serve five years of his ten-year sentence, and would be sentenced to probation for the remaining five.<sup>483</sup> Final judgment was entered October 4, 2002,<sup>484</sup> but he was never informed of the harsh immigration repercussions that would attend his pleading.<sup>485</sup>

In August 2004, Padilla filed a *pro se* collateral attack on his conviction in the Hardin County Circuit Court, claiming that in violation of the Sixth Amendment his counsel had provided ineffective assistance by failing to properly investigate and advise him of the potential immigration

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<sup>473</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

<sup>474</sup> *Id.* at 1477. In his majority opinion, Justice Stevens added: "Padilla served this Nation with honor as a member of the U.S. Armed Forces during the Vietnam War." *Id.*

<sup>475</sup> *Id.*

<sup>476</sup> *Id.*

<sup>477</sup> *Id.*

<sup>478</sup> *Id.*

<sup>479</sup> *Padilla*, 130 S. Ct. at 1473.

<sup>480</sup> *Id.*

<sup>481</sup> *Id.*

<sup>482</sup> *Commonwealth v. Padilla*, 253 S.W. 3d 482, 483 (Ky. 2008).

<sup>483</sup> *Id.*

<sup>484</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

<sup>485</sup> *Id.*

consequences of his guilty plea.<sup>486</sup> Padilla alleged that his counsel had inaccurately advised him that he “did not have to worry about [his] immigration status since he had been in the country so long,” and asserted that he would not have pleaded guilty had he been correctly advised about the removal consequences of his plea.<sup>487</sup> The Supreme Court of Kentucky upheld the trial court decision denying Padilla relief.<sup>488</sup>

Amicus briefs from the public interest community argued for reversal of the Kentucky Supreme Court.<sup>489</sup> However, the Obama Administration entered the case voluntarily as an amicus<sup>490</sup> and argued that the Supreme Court of Kentucky judgment should be affirmed, stating that “[c]ounsel . . . does not perform deficiently in failing to advise her client about potential consequences of conviction, including immigration consequences, that are beyond the scope of the criminal case.”<sup>491</sup> The Supreme Court agreed with Padilla and the public interest amici and reversed the Kentucky Supreme Court.<sup>492</sup>

#### 4. *Miranda*

The next three cases we discuss concern the Obama Administration’s position on an essential aspect of the criminal justice process, the rights to remain silent and to have access to counsel when confronted by law enforcement authorities in custodial interrogations as enunciated in *Miranda v. Arizona*.<sup>493</sup> The basis for the Court’s holding in *Miranda* was the privilege against self-incrimination, the constitutional protection from

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<sup>486</sup> *Id.*

<sup>487</sup> *Id.* at 1478.

<sup>488</sup> *Commonwealth v. Padilla*, 253 S.W. 3d 482 (Ky. 2008).

<sup>489</sup> Amicus briefs supporting Padilla included: Legal Ethics, Criminal Procedure, and Criminal Law Professors, the American Bar Association, the National Assoc. of Criminal Defense Lawyers, National Legal Aid & Defender Association, Kentucky Assoc. of Criminal Defense Lawyers, Colorado Criminal Defense Bar, Immigration Impact Unit of the Massachusetts Comm. for Pub. Counsel Services, New Mexico Criminal Defense Lawyers Association, New York State Defenders Association, Oregon Criminal Defense Lawyers Association, Texas Criminal Defense Lawyers Association, Washington Defender Association, Legal Aid Society, Constitutional Accountability Center, Asian American Justice Center, Mexican American Legal Defense and Education Fund, and other immigrants’ rights organizations, criminal and immigration law professors; Capital Area Immigrants’ Rights Coalition, Washington Lawyers’ Committee for Civil Rights and Urban Affairs, and Western Kentucky Refugee Mutual Assistance Society.

<sup>490</sup> Brief for the United States, as Amicus Curiae Supporting Affirmance, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 2509223. The Solicitor’s brief was filed in August 2009, with Elena Kagan as Counsel of Record.

<sup>491</sup> *Id.* at 6. The brief suggested that while there could be circumstances where flawed advice could constitute deficient performance, the “Court should nonetheless affirm the judgment below, on the ground that petitioner cannot establish that he was prejudiced as a result of counsel’s errors.” *Id.* at 7.

<sup>492</sup> *Padilla*, 130 S.Ct at 1478–87.

<sup>493</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

being forced to testify against oneself in a criminal proceeding.<sup>494</sup> As Archibald Cox long ago noted, there had been an extensive history in America of “convictions where confessions had been obtained by torture, beatings, and interrogations to the point of physical or psychological exhaustion, and isolation from lawyers, family, and friends.”<sup>495</sup> The *Miranda* warnings were designed to stop these practices, eliminate some of the “hypocrisy in our criminal justice system,” and promote more “egalitarianism,” since those who confessed during custodial interrogations were “the poor and ignorant, the friendless and frightened, or the young and weak.”<sup>496</sup> The Obama Administration’s position in these cases suggests it has lost sight of these principles.

The first case, *Berghuis v. Thompson*,<sup>497</sup> involved a habeas petition filed by Thompson to obtain release from a sentence of life imprisonment after his conviction of first-degree murder in a mall shooting. Police apprehended Thompson a year after the incident.<sup>498</sup> Before being questioned, he was presented with a form containing his rights under *Miranda*.<sup>499</sup> The examining detective asked Thompson to read one of the warnings out loud in order to ensure that Thompson understood English, and Thompson did so.<sup>500</sup> The detective then read all of the warnings to Thompson and asked him to sign the form to evidence his understanding of his rights; Thompson declined to do so.<sup>501</sup>

Nonetheless, officers began an interrogation.<sup>502</sup> At no point during the interrogation did Thompson say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney.<sup>503</sup> Thompson was largely silent during the interrogation, which lasted about three hours.<sup>504</sup> He did give a few limited verbal responses, however, such as “yeah,” “no,” or “I don’t know.”<sup>505</sup> On occasion he communicated by nodding his head.<sup>506</sup> Thompson also said that he “didn’t want a

<sup>494</sup> U.S. CONST. amend. V.

<sup>495</sup> ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION-MAKING AS AN INSTRUMENT OF REFORM* 84–85 (1968).

<sup>496</sup> *Id.* at 85–86.

<sup>497</sup> *Berghuis v. Thompson*, 130 S. Ct. 2250 (2010).

<sup>498</sup> *Id.*

<sup>499</sup> *Id.* at 2256. *Miranda* held that “[i]f the individual indicates in any manner at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.” *Miranda v. Arizona*, 384 U.S. 436, 473–74 (1966).

<sup>500</sup> *Berghuis*, 130 S. Ct. at 2256.

<sup>501</sup> *Id.*

<sup>502</sup> *Id.*

<sup>503</sup> *Id.*

<sup>504</sup> *Id.*

<sup>505</sup> *Id.*

<sup>506</sup> *Berghuis*, 130 S. Ct. at 2256–57.

peppermint” that was offered to him by the police and that the chair he was “sitting in was hard.”<sup>507</sup> Police eventually asked Thompkins whether he believed in God.<sup>508</sup> Thompkins made eye contact with the detective and said “yes,” as his eyes “well[ed] up with tears.”<sup>509</sup> The detective asked Thompkins whether he prayed to God, and Thompkins said, “yes.”<sup>510</sup> The detective then asked Thompkins, “Do you pray to God to forgive you for shooting that boy down?”<sup>511</sup> Thompkins answered, “Yes,” and looked away.<sup>512</sup> Thompkins refused to write down a written confession, and the interview ended shortly thereafter.<sup>513</sup>

Thompkins was charged with first-degree murder, assault with intent to commit murder, and certain firearms-related offenses.<sup>514</sup> He moved to suppress the statements made during the interrogation, arguing that he had invoked his Fifth Amendment right to remain silent, thus requiring police to end the interrogation at once, that he had not waived his right to remain silent, and that his inculpatory statements were involuntary.<sup>515</sup> The trial court denied the motion, and Thompkins was convicted.<sup>516</sup> The Michigan Court of Appeals rejected Thompkins’s appeal of the *Miranda* ruling, concluding that Thompkins had not invoked his right to remain silent and had waived it. The Michigan Supreme Court denied discretionary

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<sup>507</sup> *Id.*

<sup>508</sup> *Id.*

<sup>509</sup> *Id.*

<sup>510</sup> *Id.*

<sup>511</sup> *Id.*

<sup>512</sup> *Berghuis*, 130 S. Ct. at 2256–57.

<sup>513</sup> *Id.* at 2257–58. The facts as depicted in the text are taken from the majority opinion of Justice Kennedy. Justice Sotomayor, in a dissenting opinion joined by Justices Stevens, Ginsburg, and Breyer accused the majority of “downplay[ing] record evidence that Thompkins remained almost completely silent and unresponsive throughout that session,” *id.* at 2266, and added the following facts:

As to the interrogation itself, [the police interrogator] candidly characterized it as “very, very one-sided” and “nearly a monologue.” Thompkins was “[p]eculiar,” “[s]ullen,” and “[g]enerally quiet.” [The police interrogator] and his partner “did most of the talking,” as Thompkins was “not verbally communicative” and “[l]argely” remained silent. To the extent Thompkins gave any response, his answers consisted of “a word or two.” A “yeah,” or a “no,” or “I don’t know.” . . . And sometimes . . . he simply sat down . . . with [his] head in [his] hands looking down. Sometimes . . . he would look up and make eye contact, [his] only response.” After proceeding in this fashion for approximately 2 hours and 45 minutes, [the police interrogator] asked Thompkins three questions relating to his faith in God. The prosecution relied at trial on Thompkins’ one-word answers of “yes.”

*Id.* at 2267.

<sup>514</sup> *Id.* at 2256–57.

<sup>515</sup> *Id.*

<sup>516</sup> *Id.* at 2257.



review.<sup>517</sup>

Thompkins filed a habeas petition in the United States District Court for the Eastern District of Michigan, which rejected his claims, concluding that he did not invoke his right to remain silent and was not coerced into making statements during the interrogation.<sup>518</sup> It held further that the Michigan Court of Appeals was not unreasonable in determining that he had waived his right to remain silent.<sup>519</sup>

The United States Court of Appeals for the Sixth Circuit reversed, finding that the state court had unreasonably determined the facts because “the evidence demonstrates that Thompkins was silent for two hours and forty-five minutes.”<sup>520</sup> According to the Court of Appeals, Thompkins’s “persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights.”<sup>521</sup>

The Obama Administration entered the case voluntarily as an amicus<sup>522</sup> and argued, contrary to public interest amici,<sup>523</sup> that the court of appeals should be reversed.

The Solicitor General argued that Thompkins,

never stated that he did not want to talk with the police. Nor did he attempt to end the interview. [Thompkins] suggests that he implicitly invoked his right to silence by remaining silent much of the time. But a suspect may silently listen to questions for some period without unambiguously invoking his right to terminate questioning. In any event, even during the time in which he did not answer questions seeking his account of the crime, respondent did occasionally participate in the interview. Under the circumstances, respondent did not invoke his right to silence.<sup>524</sup>

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<sup>517</sup> *Id.*

<sup>518</sup> *Berghuis*, 130 S. Ct. at 2255–56.

<sup>519</sup> *Id.*

<sup>520</sup> *Thompkins v. Berghuis*, 547 F. 3d 572, 586 (6th Cir. 2008).

<sup>521</sup> *Id.* at 588.

<sup>522</sup> Brief for the United States, Amicus Curiae Supporting Petitioner, *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), No. 08-1470, 2009 WL 4927918 [hereinafter *Berghuis Brief*]. The Solicitor General’s brief was filed in December 2009. Elena Kagan was Counsel of Record.

<sup>523</sup> Brief for The American Civil Liberties Union and the National Association of Criminal Defense Lawyers as Amici Curiae Supporting Respondent, *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010) (No. 08-1470), 2010 WL 342030.

<sup>524</sup> *Berghuis Brief*, *supra* note 522, at 8.

The Supreme Court agreed with the Solicitor General, holding that Thompkins's silence during the interrogation did not invoke his right to remain silent.<sup>525</sup> If the accused makes an "ambiguous or equivocal" statement or no statement, the police are not required to end the interrogation, or ask questions to clarify the accused's intent.<sup>526</sup>

The second case, *State of Florida v. Powell*, involved a defendant who was apprehended as part of a robbery investigation.<sup>527</sup> Police saw Powell coming from a bedroom in an apartment that was being rented by his girlfriend, and noticed a handgun inside the bedroom. Powell was arrested and taken to the police station. Before asking Powell any questions, one of the officers read him the applicable portion of the standard Tampa Police Department Consent and Release Form 310 that stated:

You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.<sup>528</sup>

Powell signed the form, acknowledging that the officer had read him his rights, that he "underst[oo]d them," and that he was "willing to talk to" the officers.<sup>529</sup> He then admitted that he owned the firearm found in the apartment, stating that he purchased it and carried it for his protection.<sup>530</sup>

Because of a prior conviction, "Powell was charged in state court with possession of a weapon by a prohibited possessor" in violation of Florida law.<sup>531</sup> He "[c]ontend[ed] that the *Miranda* warnings were deficient because they did not adequately convey his right to the presence of an attorney during questioning, and moved to suppress his inculpatory statements."<sup>532</sup> "The Trial Court denied the motion, concluding that the

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<sup>525</sup> *Berghuis*, 130 S. Ct. at 2260–65.

<sup>526</sup> *Id.*

<sup>527</sup> 130 S. Ct. 1195 (2010).

<sup>528</sup> *Florida v. Powell*, 130 S. Ct. 1195, 1200 (2010).

<sup>529</sup> *Id.* (internal quotation marks omitted).

<sup>530</sup> *Id.*

<sup>531</sup> *Id.*

<sup>532</sup> *Id.*

officers had properly notified Powell of his right to counsel.”<sup>533</sup> A jury convicted Powell of the gun-possession charge.<sup>534</sup>

The Florida Appellate Courts reversed the conviction, concluding that Powell’s confession should have been suppressed because the *Miranda* warnings he received did not “unequivocally inform [him] that he had the right to have an attorney present at all times during his custodial interrogation.”<sup>535</sup>

The Obama Administration entered the case<sup>536</sup> and argued, again contrary to numerous public interest amici,<sup>537</sup> that the warnings Powell received were constitutionally adequate, and that the Florida Supreme Court therefore erred in ordering the suppression of his statements. According to the brief,

[o]n the right to counsel, the warnings stated: ‘[y]ou have the right to talk to a lawyer before answering any of our questions,’ and ‘[y]ou have the right to use any of these rights at any time you want during this interview.’ A suspect who hears those warnings would naturally conclude that he can talk to a lawyer before speaking to the police and that he can turn to his lawyer for help at any time during the interview before answering a question. The suspect would understand, in short, that he has a right to the presence of counsel during questioning.<sup>538</sup>

The Supreme Court, in an opinion by Justice Ginsburg, agreed with this analysis and reversed the Florida Supreme Court.<sup>539</sup>

In the final case, *Maryland v. Shatzer*, defendant Michael Shatzer was already serving a jail sentence after being convicted of an unrelated child sexual abuse offense when his three-year-old son revealed to a social

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<sup>533</sup> *Id.*

<sup>534</sup> *Powell v. State*, 969 So. 2d 1060, 1064 (Fla. App. 2d 2007).

<sup>535</sup> *State v. Powell*, 998 So. 2d 531, 542 (Fla. 2008).

<sup>536</sup> Brief for the United States, as Amicus Curiae Supporting Petitioner, *State of Florida v. Powell*, 130 S. Ct. 1195 (2010) (No. 08-1175), 2009 WL 2903916 [hereinafter *Powell Brief*]. The Solicitor’s brief was filed in September 2009, with Elena Kagan as Counsel of Record.

<sup>537</sup> Brief for the Nat’l Assoc. of Criminal Defense Lawyers and the Nat’l Assoc. of Fed. Defenders as Amici Curiae in Support of Respondents, *State of Florida v. Powell*, 130 S. Ct. 1195 (2010) (No. 08-1175), 2009 WL 3615003; Brief of Professor Richard A. Leo as Amicus Curiae Supporting of Respondent, *State of Florida v. Powell*, 130 S. Ct. 1195 (2010) (No. 08-1175), 2009 WL 3615004; Brief for the Florida Assoc. of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent, *State of Florida v. Powell*, 130 S. Ct. 1195 (2010) (No. 08-1175), 2009 WL 3663946; Brief for the Florida Public Defender Assoc., Inc. as Amicus Curiae Supporting Respondent, *State of Florida v. Powell*, 130 S. Ct. 1195 (2010) (No. 08-1175), 2009 WL 3550276.

<sup>538</sup> *Powell Brief*, *supra* note 536, at 7.

<sup>539</sup> 130 S. Ct. at 1204–05.

worker that Shatzer had forced him to commit fellatio.<sup>540</sup> The social worker reported the information to the police department, which, in August 2003, sent an investigator to the prison to talk to Shatzer.<sup>541</sup> The investigator advised Shatzer of his rights under *Miranda*,<sup>542</sup> and Shatzer stated that he did not want to talk about the allegations without an attorney present.<sup>543</sup> The investigating detective terminated the interview and the investigation was closed.<sup>544</sup>

In February 2006, two-and-a-half years later, the social worker again contacted investigators after Shatzer's son, now eight, made more specific allegations.<sup>545</sup> The case was assigned to a different detective, who knew of the previous investigation, but did not know that Shatzer had requested an attorney during the 2003 interview.<sup>546</sup> In the meantime, Shatzer had remained incarcerated, though he had been transferred to the Roxbury Correctional Institute, where he was confined in the general population.<sup>547</sup>

On March 2, 2006, the detective and social worker met with Shatzer at the Roxbury Correctional Institute.<sup>548</sup> Their interview, which lasted approximately thirty minutes, took place in a maintenance room that contained a desk and three chairs.<sup>549</sup> The detective was not armed and Shatzer was not restrained.<sup>550</sup> Shatzer expressed surprise at the renewed questioning and stated that he thought the investigation involving his son had been closed.<sup>551</sup> He told the detective that he had previously met with another investigator but did not mention that he had requested an attorney during that meeting.<sup>552</sup> The detective advised Shatzer of his *Miranda* rights, and Shatzer signed a form waiving them, including the right to have an attorney present during questioning.<sup>553</sup> Shatzer denied the allegation, but admitted to masturbating in front of his son.<sup>554</sup> He also agreed to take a polygraph examination.<sup>555</sup>

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<sup>540</sup> 130 S. Ct. 1213 (2010).

<sup>541</sup> *Id.* at 1217.

<sup>542</sup> 384 U.S. 436 (1966).

<sup>543</sup> *Shatzer*, 130 S. Ct. at 1217.

<sup>544</sup> *Id.*

<sup>545</sup> *Id.* at 1217–18.

<sup>546</sup> *Shatzer v. State of Md.*, 954 A.2d 1118, 1120–21 n.1 (2008).

<sup>547</sup> *Shatzer v. State of Md.*, 130 S.Ct. 1213, 1218, 1225 (2010).

<sup>548</sup> *Id.*

<sup>549</sup> *Id.*

<sup>550</sup> *Id.*

<sup>551</sup> *Shatzer*, 130 S. Ct. at 1218.

<sup>552</sup> *Id.*

<sup>553</sup> *Id.*

<sup>554</sup> *Id.*

<sup>555</sup> *Id.*

On March 7, 2006, another detective gave Shatzer another set of *Miranda* warnings and then conducted a polygraph examination, which Shatzer failed.<sup>556</sup> Both detectives interviewed Shatzer immediately afterwards in the same room that had been used on March 2.<sup>557</sup> During that interview, Shatzer began to cry and stated: “I didn’t force him. I didn’t force him.”<sup>558</sup> At that point, Shatzer requested an attorney, and the detectives terminated the interview.<sup>559</sup>

The State’s Attorney charged Shatzer with second-degree sexual offense, sexual child abuse, second-degree assault, and contributing to conditions rendering a child in need of assistance.<sup>560</sup> Shatzer moved to suppress his March 2006 statement on the basis of *Edwards v. Arizona*, which created a presumption that once a suspect invokes the *Miranda* right to the presence of counsel, any waiver of that right in response to a subsequent police attempt at custodial interrogation is involuntary.<sup>561</sup> The trial court denied the motion, concluding that the *Edwards* protections did not apply because Shatzer had experienced a break in custody for *Miranda* purposes between the 2003 and 2006 interrogations.<sup>562</sup> Shatzer pleaded not guilty, waived his right to a jury trial, and proceeded to a bench trial based on an agreed statement of facts.<sup>563</sup> In accordance with the agreement, the State described the interview with the victim and Shatzer’s 2006 statements to the detectives.<sup>564</sup> Based on the proffered testimony of the victim and the “admission of the defendant as to the act of masturbation,”<sup>565</sup> the trial court found Shatzer guilty of child sexual abuse of his son.<sup>566</sup>

The Maryland Court of Appeals reversed and remanded, holding that “the passage of time *alone* is insufficient to [end] the protections afforded by *Edwards*,” and that, assuming, *arguendo*, a break-in-custody exception to *Edwards* existed, Shatzer’s release back into the general prison population between interrogations did not constitute a break in custody.<sup>567</sup>

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<sup>556</sup> Shatzer v. State of Md., 130 S.Ct. 1213, 1218 (2010).

<sup>557</sup> *Id.*

<sup>558</sup> *Id.*

<sup>559</sup> *Id.*

<sup>560</sup> *Id.*

<sup>561</sup> *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (“We further hold that an accused having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.”).

<sup>562</sup> Shatzer, 130 S. Ct at 1216.

<sup>563</sup> *Id.* at 1218.

<sup>564</sup> *Id.*

<sup>565</sup> *Id.*

<sup>566</sup> *Id.*

<sup>567</sup> Shatzer v. State of Maryland, 954 A.2d 1118, 1131 (2008).

The Solicitor General submitted an amicus brief<sup>568</sup> arguing for reversal on the basis that a “contrary rule would create significant barriers to effective law enforcement by rendering an entire class of prison inmates those who have validly invoked their Fifth Amendment right to counsel at any point during what may be a lengthy incarceration - effectively unapproachable for the remainder of their sentences.”<sup>569</sup>

The Supreme Court agreed with the Solicitor and established a new rule, concluding that because Shatzer experienced a break in *Miranda* custody lasting more than fourteen days between the first and second attempts at interrogation, *Edwards* did not mandate suppression of his 2006 statements.<sup>570</sup>

### C. Analysis

We are greatly disappointed by the arguments the Obama Administration made to the Supreme Court in all but two of the public interest cases we have chosen to discuss, and this disappointment persists without regard to whether the Administration or the Supreme Court reached the “proper” case outcome. When representing the United States as a party plaintiff or defendant, it is to be expected that the United States will fulfill its ethical obligations in the same manner as an attorney representing a private client.<sup>571</sup> However, we see the role of the United States as amici in a different light.

We view public interest law not as a matter of transferring ideological political campaigns to the courts, but rather as a quest to further this nation’s fundamental values as captured in the constitutional provisions we have cited,<sup>572</sup> and advancing those values to the point where they provide maximum protection for the weakest members of our society. Every Presidential Administration and its appointees at the DOJ should see this as a fundamental governmental responsibility, but we especially take issue with the Obama Administration because it explicitly stated that it would support public interest law ideals.<sup>573</sup>

The Administration advocated positions consistent with this by supporting lower court rulings and public interest advocates in *Gross v.*

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<sup>568</sup> Brief for the United States as Amicus Curiae Supporting Petitioner, *State of Maryland v. Shatzer*, 130 S. Ct. 1213 (2010) (No. 08-680), 2009 WL 1069335. The Solicitor’s brief was filed in April 2009. Elena Kagan was Counsel of Record.

<sup>569</sup> *Id.* at 6. The National Association of Criminal Defense Lawyers filed an amicus brief supporting Shatzer. Brief of Nat’l Assoc. of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent, *State of Maryland v. Shatzer*, 130 S. Ct. 1213 (2010) (No. 08-680), 2009 WL 1611722.

<sup>570</sup> *Shatzer*, 130 S. Ct. at 1227.

<sup>571</sup> MODEL CODE OF PROF’ L RESPONSIBILITY EC 7-1 (1983), *supra* note 361.

<sup>572</sup> See discussion *supra* at notes 362–365.

<sup>573</sup> See discussion *supra* at notes 31–80.

*FBL Financial Group*<sup>574</sup> and *Ricci v. DeStefano*.<sup>575</sup> Both of these cases raised issues relating to efforts to eliminate forms of discrimination in the workplace that victimize workers by excluding them or denying their continuance for circumstances that are beyond their ability to control.<sup>576</sup> In *Safford Unified School District v. Redding*,<sup>577</sup> and *Pottawattamie Iowa et al. v. McGhee*,<sup>578</sup> however, it is exceedingly difficult for the Administration to justify voluntarily entering and arguing for the reversal of lower court decisions to extend the doctrine of qualified immunity to officials responsible for the strip search of a thirteen-year-old on school grounds based solely on the accusation of another child found with drugs on her person,<sup>579</sup> and to protect prosecutors who fabricated evidence to send two black teenagers to prison for twenty years for a crime they did not commit.<sup>580</sup> Public interest lawyers have noted with dismay the growth and extension of the qualified immunity doctrine to narrow the range of circumstances in which § 1983 can provide an effective remedy,<sup>581</sup> and it is disconcerting to see the Obama Administration unnecessarily contributing to these developments.

The qualified immunity rules apply not only to § 1983 actions against state officials alleged to have violated constitutional rights while acting under color of state law, but also to damage remedies under the doctrine of *Bivens*.<sup>582</sup> In *Bivens*, the Supreme Court implied a damage remedy for Fourth Amendment violations committed by federal officers who are not

<sup>574</sup> 129 S. Ct. 2343 (2009). See also discussion *supra* notes 389–405.

<sup>575</sup> 129 S. Ct. 2658 (2009). See also discussion *supra* notes 407–29.

<sup>576</sup> See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (noting how standardized employment tests may “operate as “built-in headwinds” for minority groups”); *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983) (noting that age discrimination is “based in large part on stereotypes unsupported by objective fact, and often defended on grounds different from its actual causes”).

<sup>577</sup> 129 S. Ct. 2633 (2009). See also discussion *supra* notes 432–49.

<sup>578</sup> 547 F.3d 922 (8th Cir. 2008), *cert. denied* 130 S. Ct. 1047 (2009). See also discussion *supra* notes 450–59.

<sup>579</sup> *Safford*, 129 S. Ct. at 2640.

<sup>580</sup> *Pottawattamie Cnty.*, 547 F.3d at 927.

<sup>581</sup> David Rudovsky has been one of the leading critics of the expanding qualified immunity doctrine in the Supreme Court. See, e.g., David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 25–26 (1989) (criticizing § 1983 immunity doctrines and arguing that the balancing of interests necessary to formulate a fair immunity analysis is a task more appropriately assigned to legislatures). See also David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1213–26 (2005); David Rudovsky, *Saucier v. Katz: Qualified Immunity as a Doctrine of Dilution of Constitutional Rights*, in *WE DISSENT: TALKING BACK TO THE REHNQUIST COURT: EIGHT CASES THAT SUBVERTED CIVIL LIBERTIES AND CIVIL RIGHTS* 172 (Michael Avery ed., 2009).

<sup>582</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). See also *Butz v. Economou*, 438 U.S. 478, 504 (1978) (“We deem it untenable to draw a distinction for purposes of immunity law between suits brought under § 1983 and suits brought directly under the Constitution against federal officials.”).

covered by the language of § 1983. As Justice Harlan stated in his concurring opinion, “[f]or people in *Bivens*’ shoes, it is damages or nothing.”<sup>583</sup> The plaintiff in *Hui v. Castaneda*<sup>584</sup> had an alternative remedy under the FTCA, but as Justice Brennan argued in *Carlson v. Green*,<sup>585</sup> the *Bivens* remedy is more effective. Unlike the FTCA, the *Bivens* remedy: (1) serves as a deterrent because it is available against individuals rather than against the United States; (2) allows punitive damages where the FTCA does not; (3) entitles the plaintiff to a jury trial; and (4) is not limited to situations where an alternative cause of action is available under state tort law where the constitutional tort occurred.<sup>586</sup> Members of the conservative phalanx<sup>587</sup> of the Supreme Court have made no secret of their desire to stop further development of the *Bivens* remedy.<sup>588</sup> The Obama Administration should not be supporting these limitations.

*Padilla v. Kentucky*<sup>589</sup> is the one case where former Solicitor General Elena Kagan was unsuccessful in persuading the Supreme Court to abide her argument. The Court, in an opinion by Justice Stevens, rejected the Solicitor’s insistence that there must be “finality of convictions obtained through guilty pleas,”<sup>590</sup> notwithstanding erroneous attorney advice that led to the entry of Jose Padilla’s plea. The Court further noted that adoption of the Solicitor’s recommendation to grant relief only when there was “affirmative misadvice” would lead to “absurd results.”<sup>591</sup> We think it odd that the Solicitor General, as part of an Administration committed to reform of the criminal justice process and immigration reform, would volunteer such arguments considering the compelling facts of the case.

We recognize that criminal cases present issues of compassion not always present on the civil docket, and two of the criminal cases that we have discussed involve serious and grave harms, including charges of

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<sup>583</sup> *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

<sup>584</sup> *Hui v. Castaneda*, 130 S. Ct. 1845 (2010). See also discussion *supra* notes 460–72.

<sup>585</sup> *Carlson v. Green*, 446 U.S. 14 (1980).

<sup>586</sup> *Id.* at 20–23.

<sup>587</sup> The conservative phalanx consists of Justice Antonin Scalia, Justice Clarence Thomas, and recent President G.W. Bush appointees Chief Justice John Roberts and Justice Samuel Alito. Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. OF BOOKS, (2007), available at <http://www.nybooks.com/articles/archives/2007/sep/27/the-supreme-court-phalanx/>.

<sup>588</sup> See, e.g., *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2010) (Scalia, J., concurring) (“*Bivens* is a relic of the heady days in which the Court assumed common law powers to create causes of action—decreeing them to be “implied” by the mere existence of a statutory or constitutional prohibition. . . . I would limit *Bivens* and its two follow-on cases to the precise circumstances that they involved.”).

<sup>589</sup> *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). See discussion *supra* notes 473–92.

<sup>590</sup> *Padilla*, 130 S. Ct. at 1484–85.

<sup>591</sup> *Id.* at 1484.



murder<sup>592</sup> and child molestation.<sup>593</sup> However, experience teaches that we must be most vigilant in scrutinizing the criminal process when the most heinous crimes are charged in order to minimize travesties of justice such as occurred in *McGhee v. Pottawattamie County*.<sup>594</sup> If incapable of filing briefs in support of the *Miranda*-affirming lower court decisions in *Berghuis*, *Shatzer*, and *Powell*,<sup>595</sup> which we believe would have been more consistent with Obama's campaign promises, the Solicitor General nonetheless had two equally satisfactory alternative options. One would have been to adopt, from *Powell* and *Shatzer*, Justice Stevens's often articulated position that the United States Supreme Court should decline to review state court decisions that vindicate assertions of federal rights.<sup>596</sup> The other option could have been employed in all three cases: simple abstention from involvement, since there was no client to be represented and the Supreme Court did not invite the Solicitor's participation.<sup>597</sup> Indeed, the public interest community would have been better served if abstention was exercised in all seven of the cases discussed in which the Solicitor General's Office, under the direction of Elena Kagan, argued against values we have identified as driving public interest practice, as well as the articulated legal positions of the public interest law organizations participating in the respective litigations.<sup>598</sup>

We do not argue the simple proposition that whenever plaintiffs belonging to historically unrepresented groups litigate claims seeking

<sup>592</sup> *Berghuis v. Thompson*, 130 A.S.Ct. 1499 (2010). See discussion *supra* notes 497–526.

<sup>593</sup> *Maryland v. Shatzer*, 130 A.S.Ct. 1213 (2010). See discussion *supra* notes 540–70.

<sup>594</sup> *McGhee v. Pottawattamie Cnty.*, 547 F.3d 922, 933 (8th Cir. 2008) (rejecting defendants' defenses of absolute and qualified immunity in a § 1983 and § 1985(3) civil rights action). The writ of certiorari was granted in this case, *Pottawattamie County, Iowa v. McGhee*, 129 S.Ct. 2002 (2009), but the case was dismissed after oral argument pursuant to S. Ct. Rule 46. 130 S.Ct. 1047 (2010). See discussion *supra* notes 450–58.

<sup>595</sup> *Florida v. Powell*, 130 S.Ct. 1195 (2010).

<sup>596</sup> See *Delaware v. Van Arsdale*, 475 U.S. 673, 697 (1986) (“Thus, although this Court now has the power to review decisions defending federal constitutional rights, the claim of these cases on our docket is secondary to the need to scrutinize judgments disparaging those rights.”) (Stevens, J., dissenting); *Michigan v. Long*, 463 U.S. 1032, 1068 (1983) (“I believe that in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to vindicate federal rights have been fairly heard.”) (Stevens, J., dissenting). Cf. RICHARD FALLON, ET AL., *supra* note 366, at 472 (noting that in cases which reviewed state decisions to uphold claims of federal rights, Justice Stevens often argued “that the Court should not review state-court judgments that upheld claims of federal right.”).

<sup>597</sup> A particularly distressing development for the public interest bar is the decision by Attorney General Holder to seek Congressional legislation that would allow investigators to interrogate terrorism suspects without informing them of their rights under *Miranda*. Charlie Savage, *Holder Backs a Miranda Limit for Terror Suspects*, N.Y. TIMES, May 10, 2010, <http://www.nytimes.com/2010/05/10/us/politics/10holder.html>. President Obama was reported as being “amendable” to Holder’s proposal. Charlie Savage, *Obama Said to Be Open to New Miranda Look*, N.Y. TIMES, May 11, 2010, <http://www.nytimes.com/2010/05/11/us/politics/11miranda.html>.

<sup>598</sup> See *supra* Part V.B.

vindication of constitutional values they are entitled to judgment. Nor do we argue that every claim of denial of a constitutional right brought by a plaintiff who belongs to such a group is one that deserves the support of the public interest community.<sup>599</sup> We believe, along with Justice Jackson, that when a case reaches the Supreme Court of the United States after having been addressed by numerous lower court judges, the “correctness” of the ultimate ruling is a function of the structural demands of the judiciary rather than of the relative strengths of competing jurisprudential truths.<sup>600</sup> Often a case is won because of the resources and skills invested in it.<sup>601</sup> On too many occasions thus far in its term, the Obama Administration has invested the amicus resources of the United States on the wrong side of the case.

## VI. CONCLUSION

The Obama Administration entered the White House riding a wave of enthusiasm generated by the end of two Administrations of George Bush. Yet the midterm elections forced the President to concede that voters had

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<sup>599</sup> In *Rivera v. Illinois*, for example, Defendant Michael Rivera was a Hispanic man accused of two counts of murder including of an African American boy under the mistaken belief that he was a member of a rival gang. 129 S. Ct. 1446, 1450 (2009). At trial, Rivera’s counsel had already utilized three of seven allotted peremptory challenges to eliminate two women, one of whom was African American. *Id.* at 1451. When counsel sought to remove another African American woman who could not be removed for cause, the trial judge disallowed the use of the peremptory challenge, claiming that defense counsel was discriminating against women. *Id.* After the jury returned a guilty verdict, the defendant appealed. The Illinois Supreme Court ultimately held that the trial judge erred in disallowing the peremptory challenge because a prima facie case of discrimination had not been established, but that the error was harmless since “any rational trier of fact would have found [Rivera] guilty of murder on the evidence adduced at trial.” *Id.* at 1452 (internal quotation marks omitted). Rivera petitioned the Supreme Court, claiming that the improper denial of the peremptory challenge and the inclusion of the African American woman on his jury violated the due process clause of the Fourteenth Amendment and required an automatic reversal of his conviction. *Id.* at 1450. His argument was rejected unanimously by the Court as advocated by the Solicitor General in its amicus brief. *Id.* at 1456. Although this case involved a defendant from a historically unrepresented community seeking to vindicate a constitutional right to an impartial jury, his ultimate goal was to prevent an African American from serving on a jury absent any showing that she harbored any bias against him. Because of his racially engendered exclusionary focus, his case does not meet our public interest criteria. The trial judge erred only because there was insufficient evidence to establish a prima facie case of discrimination against African American women jurors, a common deficiency under *Batson v. Kentucky*. William T. Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 97, 143 (1987) (“[W]hat constitutes a prima facie case is not clear, but . . . it seems likely that the use of peremptory challenges . . . to remove one, two, and perhaps even three blacks from the venire will be insulated from scrutiny.”).

<sup>600</sup> See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”); Geoffrey C. Hazard, Jr. & Dana A. Remus, *Advocacy Revalued*, 159 U. Pa. L. Rev. 751, 780 (2011) (defending the “system of adversarial advocacy not as capable of discovering objective truth, but as capable of constructing legitimate and authoritatively accepted truth.”).

<sup>601</sup> Hazard & Remus, *supra* note 600, at 778–79.

given his Administration a “shellacking.”<sup>602</sup> Historians will discern the factors influencing this profound turning of electoral tides, but early commentators have noted that many of the voters who were carried by Obama’s promise for change in 2008 had become disillusioned,<sup>603</sup> including members of the public interest law community. Although successfully nominating two members of the Supreme Court and positioning others with not-for-profit backgrounds in the executive and judicial branches, a number of Obama’s other nominees were either blocked by Republicans<sup>604</sup> or forced from their positions<sup>605</sup>—in one case by the Obama Administration itself in response to a concerted Republican smear campaign.<sup>606</sup> One prominent public interest nominee withdrew from consideration after the Administration failed aggressively to push her nomination.<sup>607</sup> The numbers of bungled appointments is small relative to those that succeeded, but many of them were newsworthy events that

<sup>602</sup> Peter Baker & Carl Hulse, *Deep Rifts Divide Obama and Republicans*, N.Y. TIMES, Nov. 3, 2010, <http://www.nytimes.com/2010/11/04/us/politics/04elect.html> (noting the 2010 midterm elections immediately made an impact as the House Republicans now hold the majority of the House).

<sup>603</sup> See John B. Judis, *A Lost Generation: Obama Deserved to Lose—But the Country Doesn’t Deserve the Consequences*, THE NEW REPUBLIC (Nov. 3, 2010, 3:03 AM), <http://www.tnr.com/article/politics/78890/a-lost-generation> (suggesting that results of the 2010 midterm elections illustrated that the U.S. may have lost its ability to politically adapt to crises); Katrina vanden Heuvel & Robert L. Borosage, *The Post-Midterms Game Plan for Progressives*, THE NATION (Nov. 10, 2010), <http://www.thenation.com/article/156390/post-midterms-game-plan-progressives> (discussing the importance of the “enthusiasm gap” when looking to the turnout base of voters).

<sup>604</sup> See ALLIANCE FOR JUSTICE, THE STATE OF THE JUDICIARY: THE OBAMA ADMINISTRATION: THE FIRST 20 MONTHS at 5 (Sept. 13, 2010), <http://www.afj.org/check-the-facts/nominees/afj-report-state-of-the-judiciary-obama-at-20-months.pdf> (“During the Obama Administration’s first 20 months, Republicans have implemented a strategy to obstruct his judicial nominations, thereby maintaining the Republican dominance of the courts. This is no secret, as Republican Minority Leader Mitch McConnell (R-KY), reflecting on the last 20 months, recently told the New York Times that ‘I am amused with [Democrats’] comments about obstructionism . . . I wish we had been able to obstruct more.’”). See also Editorial, *An Extreme Judicial Blockade*, N.Y. TIMES, Sept. 23, 2010, available at <http://www.nytimes.com/2010/09/23/opinion/23thu2.html?emc=eta1> (noting how the Senate Judiciary Committee had to once again consider nominees for federal district and circuit courts because Senate Republicans refused to allow a vote by the full Senate).

<sup>605</sup> The Administration suffered a setback when Republicans forced Van Jones, a public interest lawyer and environmental activist, out of his job. Jones was hired to work with agencies and departments to advance the Administration’s climate and energy initiatives, with a special focus on improving vulnerable communities. Jones had been described as a “towering figure in the environmental movement.” Scott Wilson & Garance Franke-Ruta, *White House Adviser Van Jones Resigns Amid Controversy Over Past Activism*, WASH. POST, Sept. 6, 2009, available at [http://voices.washingtonpost.com/44/2009/09/06/van\\_jones\\_resigns.html](http://voices.washingtonpost.com/44/2009/09/06/van_jones_resigns.html).

<sup>606</sup> See Editorial, *Faster Than a Speeding Blog*, N.Y. TIMES, July 22, 2010, <http://www.nytimes.com/2010/07/22/opinion/22thu4.html> (discussing the Administration’s discharge of Shirley Sherrod).

<sup>607</sup> Glenn Greenwald, *The Death of Dawn Johnsen’s Nomination*, SALON (Apr. 9, 2010, 6:10 PM), [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/04/09/johnsen](http://www.salon.com/news/opinion/glenn_greenwald/2010/04/09/johnsen) (“[V]irtually everything that Dawn Johnsen said about executive power, secrecy, the rule of law and accountability for past crimes made her an excellent fit for what Candidate Obama said he would do, but an awful fit for what President Obama has done.”).

provided evidence of the growing gap between the Administration's campaign promises and its actual performance in governing.

With reduced sway in Congress, Obama will find his legislative agenda stalled. However, it is here that the public interest law movement and particularly those organizations working in the Administration's designated issue areas can be of most advantage. For example, while the Presidential website supports increased funding for the Civil Rights Division of the DOJ, the provision of additional resources alone will not make the Department the key player that it was in the 1960s, or meet the needs placed upon it today. The Division must formulate a plan that allows it to reach out to communities and encourage them to submit petitions like that submitted by the ACLU regarding the Newark police department.<sup>608</sup> Having stated its intention to expand programs and funding for children with disabilities in public schools, the Administration should acknowledge and support the many community organizations that perform this very work.<sup>609</sup> The Administration is supporting some of these efforts already,<sup>610</sup> but a close analysis of the Obama issue agendas reveal innumerable instances where meaningful collaboration remains unfulfilled. Much of the work in these issue areas has multiplied in the after-glow of the recession. In the face of growing congressional gridlock, the Administration must make greater use of its executive powers<sup>611</sup> and enduring appeal with community organizations and the public interest law movement.

We have not addressed the difficult question of how the Administration should handle litigation where it has direct defense responsibilities for policies it campaigned against, focusing instead on the amicus work of the Solicitor General. Yet we can only reiterate our dismay<sup>612</sup> at how the Administration approached the cases argued during

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<sup>608</sup> Perez-Pena, *supra* note 23.

<sup>609</sup> The Education Law Center in Newark, New Jersey, is directly engaged in this work, as is Volunteer Lawyers for Justice, also a Newark not-for-profit organization that contracts cases out to private law firms, who work on them without charge. See *Mission of Education Law Center*, EDUCATION LAW CENTER, <http://www.edlawcenter.org/ELCPublic/AboutELC/Mission.htm> (last visited Apr. 16, 2011); *Mission Statement*, VOLUNTEER LAWYERS FOR JUSTICE, [http://www.vljinj.org/mission\\_statement.html](http://www.vljinj.org/mission_statement.html) (last Apr. 16, 2011).

<sup>610</sup> See discussion *supra* notes 343–49.

<sup>611</sup> See, e.g., Jeanne Mirer & Marjorie Cohn, *Obama Should Create Jobs by Executive Order*, TRUTHOUT (Nov. 8, 2010), <http://www.truth-out.org/obama-create-jobs-executive-order64901> (suggesting that President Obama issue an Executive Order authorizing the use of repaid Troubled Asset Relief Program Funds to create jobs). See also John D. Podesta, *Forward*, in THE POWER OF THE PRESIDENT: RECOMMENDATIONS TO ADVANCE PROGRESSIVE CHANGE, at iv (Nov. 2010), available at [http://www.americanprogress.org/issues/2010/11/pdf/executive\\_orders.pdf](http://www.americanprogress.org/issues/2010/11/pdf/executive_orders.pdf) (noting that the “U.S. Constitution and laws of our nation grant the president significant authority to make and implement policy [and] can be used to ensure positive progress on many of the key issues facing the country”).

<sup>612</sup> See discussion *supra* pp. 82–83.

the October 2008 and 2009 Supreme Court Terms that were of greatest concern to the public interest community.

If the Solicitor General intends to utilize aggressively the resources of the DOJ to file amicus briefs in cases where there has been no invitation from the Supreme Court, lines of communication must be established with the public interest community.<sup>613</sup> There is no reason for the Administration to approach its amicus work in uninvited cases in the same manner that it represents the United States as a party defendant. As discussed previously, Thurgood Marshall and other civil rights lawyers affirmatively reached out to the DOJ seeking amicus briefs in key cases, a practice that was instrumental in developing American civil rights. On occasion, the President of the United States was directly involved in the decision whether to file a brief.<sup>614</sup> Considering the platform upon which President Obama campaigned to reach office, we believe he owes more oversight and involvement to his public interest constituencies in uninvited amicus work before our nation's highest tribunal.

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<sup>613</sup> Cf. discussion *supra* pp. 31–33 (describing President Johnson's promise to clear Southern judicial appointments with civil rights leaders before making them).

<sup>614</sup> See discussion *supra* notes 193–196.

