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The Challenges of These Hyperpartisan Times: What Next Year May Bring

Wade Henderson
Commentary

2012 is a presidential election year. As we do every four years, we will take stock of the president's record on civil and human rights. At the same time, we in the civil and human rights community will take stock of our many accomplishments over the last three years – and recommit ourselves to pushing forward on those priorities that we still need to drive over the finish line.

It's been a very interesting ride. The first two years of Barack Obama's presidency were incredibly successful, with the passage of many civil and human rights bills, such as the Lilly Ledbetter Fair Pay Act of 2009 and an expansion of the State Children's Health Insurance Program, along with the confirmation of two women to the U.S. Supreme Court (Sonia Sotomayor and Elena Kagan).

And though the satisfaction we felt those first two years has been replaced by frequent frustrations with the cold, hard reality of a Congress that will likely go down in history as one of the most divisive and unproductive in decades, we know that the work that we do to "build an America that's as good as its ideals" is a marathon, not a sprint. Indeed, some years are just harder than others.

There were, of course, some important achievements. In January, we organized Americans for Constitutional Citizenship, a truly amazing coalition of more than 80 national organizations to fight efforts at the state and federal level to undermine the Constitution's guarantee of citizenship for all persons born in the United States. We were so successful at making proposals to eviscerate the 14th Amendment politically radioactive that we didn't actually have to fight any bills in Congress or in state legislatures. This is truly a testament to the benefits of getting out in front of an issue, in a united, creative, focused and tough way.

We also were successful in encouraging Attorney General Eric Holder to lead an effort to have the Fair

Sentencing Act, which reduced the sentencing disparity between crack and powder forms of cocaine and eliminated mandatory minimum sentences for simple possession, applied retroactively. And we succeeded in convincing the U.S. Sentencing Commission to adopt that position as its policy.

But overwhelmingly, 2011 was marked by hyperpartisan gridlock in Congress, which eliminated most opportunities to advance important civil and human rights legislation. It also stymied the routine business of confirming nominees to the judicial and executive branches, even for highly qualified appointees across the ideological spectrum. Indeed, while we were successful in securing the confirmation of exceptional nominees like Edward Chen to the U.S. District Court for the Northern District of California, his confirmation really was the exception that proved the rule for judicial nominations in the 112th Congress.

The challenge for us going forward is to operate effectively in this new hyperpartisan environment without becoming dispirited or accepting it as the "new normal," as so many people have. An election year is an opportunity to educate voters about the issues, the options, the choices they can make, and the candidates who are most likely to deliver the government they desire. We cannot concede the debate on the government's role in advancing civil and human rights to our policy opponents, particularly those who believe that the best government is one so small that you can "drown it in a bathtub."

We know that the work of the civil and human rights movement is always evolving and never quite finished. We must continue the work of explaining why the vision we have for a more equitable, just America is in the best interests of everyone – and how federal legislation and policy can play a role in creating that America.

As important as that kind of education is, it will be for naught if those with the knowledge and the desire to express their will are denied the ability to do so. Therefore, I believe the most important issue we must address in 2012 is voter suppression. Voting is the language of democracy. But as long as we have existed as a nation, there have been efforts to suppress the will of the people by denying some the right to vote. The racial dimension of voter suppression has its roots in slavery, and has long been a stain on our democracy.

Today's efforts to disenfranchising voters in several states are more subtle, more sophisticated, and intended to affect a wider swath of the population than the African-American community. They are no less pernicious than when poll taxes and literacy tests were the order of the day. Voter ID requirements; shortened early voting periods; limits on poll worker assistance; proof of citizenship requirements; restrictions on same day and third-party registration; and felon disenfranchisement are all part of a coordinated campaign of voter suppression.

Our response must be equally coordinated and sophisticated. We must be out in force in our communities next year to prepare every single eligible voter to meet the new state requirements so that they can vote. We must make sure that voter access campaigns, election protection work, and affiliated legal strategies all function in concert to protect the ability of every single American to vote. And we must work to expand the franchise to more Americans by passing legislation such as the Democracy Restoration Act, which would restore the right to vote in federal elections to millions of Americans with felony convictions who have completed their sentences.

Another critical issue for the civil and human rights community is education reform. We have a huge stake in the effort to reform the nation's education system because the current system is failing too many children – low-income and minority students, English language learners, and students with disabilities.

We started 2011 with high hopes that reauthorization of the Elementary and Secondary Education Act (ESEA) might be the one major piece of legislation that Congress would address. And while there was movement, it was not entirely in the direction that we wanted. At the federal level, policymakers put forth legislative proposals and executive actions that represent a disturbing move toward giving states and school district administrators more money and more flexibility while essentially letting them off the hook for educating the very students that they have never done a good job of educating.

As Congress moves forward with ESEA reauthorization, it will be imperative that the civil and human rights community make the case that the improvements we've seen to date have come because of – and not in spite of – federal intervention. Now is not the time to turn the clock back on the federal government's role in ensuring all children have access to high-quality education. We have an opportunity to fulfill the promise of a high-quality public education for every single child in the United States.

And of course, we must deal with the effect our sluggish economic recovery is having on our ability to create jobs. For the last three years, the conversation about economic security in America has centered on esoteric Washington wonkery about our budget deficit and Keynesian economics. All Americans want government to help ensure that we all have access to good paying jobs. That's the message that we have to communicate next year, and every year thereafter.

I could go on because we all know the list is long. We still need comprehensive immigration reform, an overhaul of our racially discriminatory criminal justice system, affordable housing, and so many other essential policies and reforms.

But voting rights, education, and economic security are critical to a functioning democracy. And, not surprisingly, they have always been the three anchors of the civil and human rights movement. Our forebears understood the power of the ballot box, the importance of an educated electorate, and the fact that a good job that pays a living wage is critical to the "pursuit of happiness."

We have an opportunity to make significant progress on these issues – the kind of progress that could be as transformative as the civil and human rights legislation of the 1960s. We need only build the public – and the political – will to do so.

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Efforts to Cut Federal Budget in 2011 Prove To Be No Cup of Tea

Rob Randhava

Spurred on by the electoral victories of conservative tea party-backed candidates in 2010, a new majority in the U.S. House of Representatives engaged in a series of efforts to drastically slash the federal budget. Each attempt triggered intense debates over taxes, spending, and the nature of federal government itself. For advocates concerned with helping unemployed people, preserving important safety nets, and restoring economic growth, 2011 wound up being a very busy year.

Just before 111th Congress adjourned in late 2010, it agreed to extend the federal emergency unemployment insurance program for another year. In an effort to provide a boost to the economy, it also enacted a small one-year cut in payroll taxes. But it was unable to reach an agreement on appropriations levels for the new Fiscal Year, so it provided only a few more months of funding and left the 112th Congress to set spending levels for the rest of the year. When the new House leadership resumed that debate in early 2011, it quickly became clear just how much the mood of Congress had changed.

In February, the House passed an appropriations bill that cut \$1 billion from Head Start, and reduced Pell Grants by 15 percent. The House also loaded the bill with a number of controversial legislative provisions, including a measure to block a Department of Education rule that governed private for-profit colleges, and to prohibit Planned Parenthood, Inc., from receiving any federal funding. The Leadership Conference on Civil and Human Rights and its allies were quick to denounce the measure. Fortunately, the bill also faced strong resistance in the Senate and from President Obama. After several months, and after several standoffs that nearly resulted in a shutdown of the federal government, Congress and Obama reached an agreement in April that cut federal spending by only \$37.6 billion from the previous Fiscal Year and left most education and social welfare spending intact.

House Republicans were disappointed with the final package, and many even opposed it because they felt it did not cut spending enough. But they quickly redoubled their efforts. As the appropriations bill was being finished, the House moved forward with its next effort, a budget resolution, sponsored by Budget Committee Chairman Paul Ryan, R. Wis., which outlined federal spending levels for the next decade.

If the Fiscal Year 2011 appropriations bill was controversial, the Ryan budget was downright explosive. It proposed cutting Medicaid spending by \$1.4 trillion over the next decade, as well as huge cuts to food stamps, education, transportation, and jobs programs. It also extended Bush-era tax cuts that favored the wealthiest Americans, meaning that it was not a serious effort to balance the federal budget. What proved to be most controversial, however, was a proposal to cut Medicare and to eventually replace it with a system of private vouchers.

For many civil and human rights advocates, the Ryan budget was a non-starter. The Leadership Conference denounced the bill as “draconian.” Following an intense public backlash over the Medicare voucher provision, the Senate rejected the Ryan plan in May.

Again, House Republicans were disappointed. But they quickly turned to what they saw as a new source of leverage in their effort. In August, the federal government was expected to reach its debt ceiling, which meant that without additional action by Congress, the government would become unable to borrow additional money to fund its operations and would default on its existing debt. House Republicans signaled that they would not support an increase in this debt ceiling unless the Senate and Obama agreed to massive cuts in existing spending.

If the Ryan budget was explosive, the threatened default was downright reckless. Many economists from both parties were quick to warn that the consequences of a government default would be catastrophic. It would essentially turn the federal government into the world's largest "subprime" borrower, devastating the economy in the process.

For several months, a bipartisan team of senators, working with Vice President Joe Biden, tried to negotiate a compromise. These negotiations, however, did not go far. Taxes proved to be the biggest sticking point. Most congressional Democrats and Obama argued that the only fair and responsible way for Congress to reduce the federal deficit was to increase taxes at the same time that it cut spending. For most House Republicans, however, any increase in taxes – even the elimination of tax loopholes that favored corporations or the wealthy – was simply out of the question. Indeed, in the months before the 2010 elections, many Republicans had signed a pledge to oppose any tax increase, and they saw themselves as locked in by that promise.

Just before the August deadline, congressional negotiators reached an agreement. It raised the debt ceiling in several steps, which would put the issue to rest until early 2013. It also immediately cut discretionary spending by \$917 billion over the next decade. It required the House and Senate to vote on a constitutional balanced budget amendment, but neither chamber was able to muster the two-thirds vote necessary to send it to the states. Finally, the deal established a bipartisan House-Senate "supercommittee" to come up with an additional \$1.2 trillion in savings, but the deal specified that if no agreement was reached, that amount would be cut through an automatic process known as "sequestration."

Not surprisingly, the supercommittee never reached an agreement, so the additional \$1.2 trillion in cuts will be automatic beginning in January 2013. But it may be a better deal than anything that would have emerged from the supercommittee. Half of the cuts will come from defense spending. The other half will come from domestic spending, but Medicaid, Social Security, and veterans benefits will be protected.

With the budget debate largely put to rest until 2013, Obama has shifted the debate away from deficit reduction to the issue of job creation. In September, following a high-profile speech to Congress, he proposed a new bill, dubbed the American Jobs Act. It included a number of measures that would stimulate job growth and investment, and many of its provisions had long enjoyed bipartisan support. The bill got a cool reception on Capitol Hill, however. The House

leadership ignored the proposal, and it was blocked in the Senate by a filibuster. The only part of the bill that passed was aimed at helping unemployed veterans.

As the first session of the 112th Congress drew to an end, there was one last key fight over spending and jobs. The unemployment insurance and payroll tax cut provisions enacted in December 2010 were set to expire and Obama insisted on another year-long extension. The House passed a bill that would have done this, but its version of the bill – which included a provision requiring drug testing as a condition for receiving unemployment benefits -- was so controversial that Obama promptly issued a veto threat. Senate Republicans, fearing a political backlash, agreed to a two-month extension, which passed the Senate overwhelmingly (89-10). The House initially rejected the compromise. But House members found themselves in an untenable position: after campaigning on a "Tea Party" message in 2010, House Republicans would have been responsible for a tax increase, and a politically unpopular one at that. Even many Senate Republicans were openly critical of the House move. After several days of backlash, and even though most members of Congress had already gone home for the holidays, on December 22, the House finally agreed to the two-month extension.

The new House majority will begin its 2012 session having already suffered several major setbacks in its effort to radically downsize the federal government. It will likely agree to again extend the payroll tax cut and unemployment insurance when the current deal expires in February. With the 2012 election approaching, lawmakers may be hesitant to again allow their budget-cutting agenda to take the government to the brink of a shutdown. Given the fierce partisan tensions that continue to run high, however, it is difficult to foresee what Congress will do in 2012 to reduce unemployment, increase revenues, or restore long-term economic growth.

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Getting to “Yes” on ESEA Reauthorization

Dianne Piché

Fixing the nation’s K-12 public education system to prepare all students, regardless of race, ethnicity, disability status, or, most importantly, ZIP code, for higher education or a job that pays a living wage is one of the most critical challenges facing the United States. The 21st century economy is becoming increasingly reliant on a highly skilled and highly educated workforce, so if the next generation is not ready, our future is in serious jeopardy.

Right now, too many students are unprepared for that new world. While the national graduation rate has gone up, only 72 percent of American students graduate from high school on time. The rates for Blacks (57 percent), Latinos (57 percent) and Native Americans (54 percent), although increasing, are much lower. And even those who do graduate are often not prepared for college.

In this new economy, there are fewer jobs that pay a living wage that require only a high school diploma. Increasingly, at least some postsecondary education is a necessity. ACT, a nonprofit testing organization, however, found that three out of four high school graduates are not fully prepared and would likely need to take a remedial course in college.

These dismal outcomes are the result of a system that is failing to reach all children, particularly those in high-poverty communities. Several generations after *Brown v Board of Education*, the Civil Rights Act of 1964, and the Elementary and Secondary Education Act (ESEA) of 1965, children’s chances for educational opportunity and success still depend largely on where they live, their race or national origin, or whether they have a disability.

The prospect of reauthorization of the ESEA, the nation’s primary federal education law last reauthorized in 2002 as No Child Left Behind (NCLB), represented a critical way to help states and school districts begin

to address these challenges and provide high-quality education to every child. Some in Washington, D.C., hoped that there was enough bipartisan support for Congress to pass an ESEA reauthorization in 2011, despite an increasingly hyperpartisan atmosphere resulting from the midterm elections.

In fact, Secretary of Education Arne Duncan said in a January 3 *Washington Post* op-ed that “few areas are more suited for bipartisan action than education reform” and that:

“President Obama in 2009 set a national goal that America will once again lead the world in college completion by 2020. With our economic and national security at risk, this is a goal Republicans, Democrats and all Americans can unite behind. ... In the past two years, I have spoken with hundreds of Republican and Democratic mayors, governors and members of Congress. While we don’t agree on everything, our core goals are shared...”

For its part, the Obama administration made clear that ESEA reauthorization was a major priority for 2011. In his State of the Union speech, Obama made a sweeping case for a national commitment to educating every child and said that “[T]he question is whether all of us – as citizens, and as parents – are willing to do what’s necessary to give every child a chance to succeed.”

Getting to “yes” on reauthorization would prove to be elusive, however, as lawmakers struggled to reach agreement on such critical issues as accountability, the targeting of federal funding, and waivers to current law.

Civil Rights Priorities

For the civil and human rights community, it was imperative that Congress reauthorize ESEA in a way that ensured that the federal government continued to

protect the right of every child in America to have the resources – including great teachers – he or she needs to be ready for college or a job that would pay a living wage. The community also insisted that schools work to create positive learning environments free of bullying, harassment and excessive suspensions and expulsions, all of which lead to excessive absence from school and lower achievement.

On April 5, The Leadership Conference on Civil and Human Rights sent a letter on behalf of its more than 200 member organizations to Sen. Tom Harkin, D. Iowa, and Sen. Michael Enzi, R. Wy., the chair and ranking member, respectively, of the Senate Committee on Health, Education, Labor and Pensions (HELP), outlining its priorities for fixing accountability standards in Title I of the ESEA.

The Leadership Conference called on Congress to enact “strong provisions to preserve accountability, enhance transparency by taking into account the gender of students within each subgroup or ancestry of students in major racial or ethnic groups, and ensure that states and local education agencies take effective action to improve low-performing schools and to close gaps in such areas as achievement, high school graduation, and discipline rates ... and to remove barriers to learning.”

House Proposes Re-Targeting of Funds

The House of Representatives and Senate took very different approaches to reauthorizing ESEA. Rep. John Kline, R. Minn., chair of the House Committee on Education and the Workforce, decided to move a series of smaller bills over the summer and fall that he said were “geared toward streamlining and simplifying the federal role in education.” Among the bills considered in the House were measures to eliminate or consolidate dozens of different federal education programs and to renew the federal charter schools program.

Civil rights organizations were particularly outraged by Kline’s proposal to allow more “flexibility” in how federal education funds are spent, an assault on the federal government’s traditional role of ensuring equity in K-12 education by directing dollars to the schools and students with greatest needs. The bill, H.R. 2445, the State and Local Funding Flexibility Act, would create what amounts to a \$15 billion slush fund for school administrators and state bureaucrats, who would have the ability to divert federal funds earmarked specifically for low-income students (Title I), English learners (Title III), and other disadvantaged students to pay for other things. For instance, school districts would be able to siphon money from Title I schools and purchase new technology for all their schools, rich and poor alike.

Federal dollars are earmarked to specific communities because states and school districts traditionally have done a poor job of spending money equitably so that all students have access to a decent education. As the Education Trust explains, “to now allow school districts to, on a whim, raid these funds for other purposes would be an enormous step backward, not only for these students, but for the nation as a whole.”

On July 12, a group of civil rights organizations including the Southeast Asia Resource Action Center, the National Indian Education Association, the League of United Latin American Citizens and The Leadership Conference sent a letter to Kline and committee ranking member Rep. George Miller, D. Calif., strongly urging them to reject the bill. To date, the House has only voted on and passed H.R. 2218, a bill to expand charter schools, but the committee has reported out all of the ESEA reauthorization bills.

Senate Bill Falls Short

In contrast, leadership of the Senate HELP Committee spent most of the year, behind closed doors, hashing out a deal to introduce and pass a single, bipartisan ESEA reauthorization bill. The bill that was ultimately introduced by Harkin in early October retained some important, core provisions of ESEA, including the framework first adopted by Congress in 1994 requiring states to adopt academic standards and to develop and implement a system of statewide assessments aligned with the standards, along with provisions for public reporting of disaggregated data.

The bill was seriously flawed, however, and repudiated the critical and longstanding role of the federal government in ensuring educational equity. Consequently, the broad civil and human rights community ultimately decided that it could not support the bill as written. In a statement released on the day of the Senate HELP Committee’s markup of the bill, a coalition of 30 civil rights, disability, business and education groups, including the Chamber of Commerce, the ACLU, the NAACP, the Mexican American Legal Defense and Educational Fund, the Education Trust, and The Leadership Conference, said:

“[Under this bill] states would not have to set any measurable achievement and progress targets or even graduation rate goals. They would be required to take action to improve only a small number of low-performing schools. In schools which aren’t among the states’ very worst performing, huge numbers of low-achieving students will slip through the cracks.

Federal funding must be attached to firm, ambitious and unequivocal demands for higher achievement,

high school graduation rates and gap closing. We know that states, school districts, and schools need a more modern and focused law. However, we respectfully believe that the bill goes too far in providing flexibility by marginalizing the focus on the achievement of disadvantaged students.”

The ESEA bill was voted out of the Senate HELP Committee in October and will likely reach the Senate floor sometime in 2012.

Waivers to Current Law

In the years after Congress passed the No Left Behind Act (NCLB) of 2001, few states made significant progress in raising student achievement or closing achievement gaps. While there are several, complicated reasons for this failure – including states’ resistance to leveling the playing field with respect to teacher quality and other school resources – nearly all stakeholders agreed that NCLB was due for an upgrade and rewrite.

In particular, concerns abounded about the law’s 2014 deadline for all schools and districts to show that close to 100 percent of students reach grade-level “proficiency” in reading and math. The Leadership Conference and many individual civil rights organizations, however, did not want the federal government to go too far in the opposite direction by granting flexibility that abdicated its responsibility to ensure states and school districts were educating all children.

So when the Obama administration announced in September that it would be developing a plan to offer waivers from NCLB requirements to give states more flexibility to, as Obama said, “come up with innovative ways to give our children the skills they need to compete for the jobs of the future,” civil rights groups were concerned that the waivers might enable states and school districts to avoid making real improvements that would close achievement gaps, reduce dropouts, and increase equitable distribution of resources among all schools.

The Leadership Conference along with a number of other civil rights groups, including the NAACP, the NAACP Legal Defense and Educational Fund, the Lawyers’ Committee for Civil Rights Under Law, and the National Women’s Law Center, entered into talks with the Obama administration about ways to structure the waiver plan to reduce the “risk of creating confusion and exacerbating inequity among students, schools, and school districts.” The coalition sent a letter to Duncan on September 15 with extensive recommendations to the administration.

Under the plan released by the administration on September 23, states have the opportunity to obtain

waivers of current NCLB requirements and to redesign their statewide accountability and assessment systems provided that they comply with the following requirements advocated by the civil rights community:

- Continue to include all students in all schools;
- Set and use annual performance targets for students of color, students living in poverty, English learners, and students with disabilities;
- Address non-academic factors (such as school climate and student health) in turnaround schools; and
- Take steps to remedy the inequitable distribution of qualified, experienced teachers.

Duncan also agreed to require states to meaningfully engage and solicit input from parents, community-based groups, and civil rights groups in developing their waiver applications to ensure a transparent, inclusive process – an important element of the waiver process that civil and human rights groups pushed hard to include.

The waiver process is expected to go on for the next year or so, as the Department of Education reviews applications submitted by states. The Campaign for High School Equity and other education advocacy organizations are committed to working with advocates in states around the country to ensure that states develop new systems and policies that will serve the best interests of all students.

Conclusion

Fixing the K-12 education system so that every single child has access to the highest quality education that can be provided remains one of the most important issues that the nation faces. But, as so often happens in Washington, the process became complicated and challenging very quickly. Putting the focus of ESEA reauthorization on the impact that it needs to have to improve the education of every child in the United States was a key focus in 2011—and will continue to be a priority of the civil and human rights community if the ESEA reauthorization bill moves in Congress in 2012 and when the Obama administration starts working in earnest on waivers to the current law.

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The Debate over Gainful Employment Rules

Dianne Piché and Scott Simpson

The rapid rise in enrollment at for-profit colleges in recent years set the stage for a new civil rights battle over inequality in higher education. The question for policymakers: Should career education programs be able to participate in federal student financial aid programs if they fail to prepare students for “gainful employment”?

Advocates contend that some for-profit schools have found the ultimate way to guarantee profits: Enroll as many students as possible using the promise of expanded job prospects. Bill the U.S. Department of Education for the highest available amount of federal loans and grants. Then pass the students off to an under-resourced education and job placement program. The formula has helped build a multibillion dollar industry that relies on the Department of Education for up to 90 percent of its profits with no accountability for the quality of education provided to students or their occupational outcomes once they leave school.

The result for students has been devastating. According to U.S. Department of Education data released in September 2011, the rate of federal student loan defaults has increased more sharply at for-profit institutions than at other institutions of higher learning. The default rate at for-profit schools (15 percent) is more than double the rate at public institutions (7.2 percent).

In addition, students taking out loans at for-profit schools were responsible for nearly half of all federal student loan defaults within the first three years of repayment, even though students enrolled at such institutions made up only about 12 percent of college students nationwide. The practices reminded many of the free-wheeling mortgage industry that helped bring down the economy just a few years ago.

“When banks misled African-American, Asian-

American and Latino borrowers into taking on crushing home mortgage debt they could never hope to pay back, we called it what it was: predatory lending.” Wade Henderson, president and CEO of The Leadership Conference on Civil and Human Rights, and Rep. Mike Honda, D. Calif., wrote in a June 13 op-ed in *Roll Call*. “Today, many for-profit colleges have picked up where the subprime lenders left off. They are using the same promise of the American dream as bait to trap vulnerable students – the vast majority of whom are women and minorities – into underperforming schools and saddling them with a lifetime of debt.”

Civil rights groups are concerned because some for-profits have made the lion’s share of their billions in annual profits from low-income, veteran, minority, women, and/or single parent students who fund their educations through the federal financial aid system of loans, grants, and veterans benefits. These communities are the industry’s most coveted markets because the federal aid system guarantees that schools will receive every dollar billed to the government – regardless of whether or not the student pays the loans back or even completes the course of study– resulting in a guaranteed income stream.

As a result, the for-profit college industry has exploded in recent years, with enrollment increasing by 46 percent between 2005 and 2009.

Several trends lead to high default rates at these universities, including:

- The high cost of attendance: Students enrolled at for-profits face an inflated cost per-credit hour – almost double that of public universities. In fact, a Government Accountability Office investigation found multiple instances of recruiters advising enrollees to falsify financial aid forms to maximize

the pay out the school would receive from the government.

- Poor quality of education: Many of these schools invest far less on classroom and teaching expenses than they do on sales and marketing. As a result, these schools have lower-than-average completion rates and many have limited success in placing students in their career fields.
- False promises: Many of these schools market themselves as making students career-ready and employable in a new field with placement. This promise is hollow for students who, if they finish at all, are often left with unaccredited certifications or degrees considered subpar.

When students fail to complete a program or graduates without adequate skills, they're still left on the hook to pay back student loans. When those students eventually default on their loans, taxpayers ultimately pay the bill.

A provision in Higher Education Act (HEA) stipulates that career education programs must prepare students for "gainful employment" to be eligible to receive financial aid dollars. While the "gainful employment" language has been in the law since it was first passed in 1965, it was never enforced by previous administrations or defined in regulation.

As the for-profit sector grew, evidence mounted that the sector was putting more and more students in financial jeopardy while draining federal aid dollars that could have supported more affordable and productive programs. These developments caught the attention of Education Department officials, civil rights groups, student groups, veterans' organizations, consumer advocates, professors, and public and non-profit colleges.

By defining "gainful employment" with an objective measure of work placement or ability to pay back the student loans to the government, the Education Department would have a clear rationale for determining which career education programs were eligible to receive financial aid funding. This metric would be applied to all career education programs – public, non-profit, and for-profit alike. The department went through a lengthy process of public engagement on rulemaking, which included negotiating sessions with various stakeholders and a public comment period generating over 90,000 documents, to determine how to define "gainful employment."

Civil rights groups across the board came out in support of a strong definition that would force schools to actually prepare students for jobs in their chosen field.

The resulting draft rules, first proposed in July 2010, faced furious opposition from the for-profit industry, which spent millions of dollars on lobbying, filed multiple lawsuits, and engaged in an all-out public relations blitz campaign. Additionally, these schools engaged in a sophisticated campaign designed to give the impression that minority-focused organizations opposed the rule – when in fact, civil rights groups almost unanimously supported greater industry accountability.

When the Department of Education released the final gainful employment regulations in June 2011, they were considerably weaker than the initial draft despite student and consumer advocacy organizations' strongly urging them to be strengthened.

Under the department's definition, programs must meet at least one of the following three measures in at least two years out of any four-year period to maintain eligibility to receive federal dollars:

- at least 35 percent of former students are repaying their loans;
- the estimated annual loan payment of a typical graduate does not exceed 30 percent of his or her discretionary income; or
- the estimated annual loan payment of a typical graduate does not exceed 12 percent of his or her total earnings.

The department also postponed the date at which underperforming programs would be cut off until 2015.

The response from the for-profit industry to the regulations was swift. It they declared an all-out war on the modest regulations. The industry lobbied Congress to introduce several pieces of legislation prohibiting the department from enforcing the law. It continued its public relations and lobbying offensive throughout the year to paint for-profits in a positive light. And instead of accepting the watered down rules that had been met with lukewarm response from civil rights groups, the industry continued to litigate and vociferously oppose the department's efforts.

The tangled web of weak regulations, pending litigation, and relentless lobbying currently leaves the gainful employment debate alive, with the for-profit industry showing no signs of retreating from the fight.

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The Civil Rights Division Two Years into My Tenure

Thomas E. Perez
Commentary

In 2009 when I took the reins at the Civil Rights Division, I made a commitment to division staff and to the nation that I would work to restore and transform the division that Attorney General Eric Holder has called a “crown jewel” of the Justice Department.

With the support of President Obama and Attorney General Holder, we have worked to revitalize our ability to enforce our nation’s critical civil rights laws. We have reformed our hiring practices to ensure we hire only the most qualified applicants for the job. We have worked to boost morale among a dedicated and passionate workforce. And we have found great success.

We filed a record number of criminal civil rights cases in Fiscal Year 2009, and then topped that record in Fiscal Year 2010, including charging the largest human trafficking case in Justice Department history. We have ramped up efforts to combat hate crimes, and we are working hard to implement the Matthew Shepard and James Byrd Jr., Hate Crimes Prevention Act. Passed in 2009, the law was years in the making, and allows us to prosecute hate crimes committed because of a person’s sexual orientation, gender identity, gender, or disability. The new law provided us with critical new tools to combat hate-fueled violence, and we have brought several cases under the Act.

In August 2011, we secured the guilty pleas of the first defendants to be charged under the Act. The defendants in this case took advantage of a young man’s mental disability and assaulted him because he is Native American. They took him to their apartment, where they defaced his body with white supremacist and anti-Native American symbols, and used a wire hanger heated on a stove to brand a swastika into his skin. They exploited his disability to try to cover up their actions, and then lied to law enforcement officials investigating

the case. Crimes like this not only hurt victims and their families – they tear apart entire communities.

We have also ramped up efforts to bring justice in cases of police misconduct. In August, in a landmark prosecution by our Criminal Section, five New Orleans Police Department officers were convicted of crimes related to the police-involved shooting on the Danziger Bridge in the aftermath of Hurricane Katrina in which two civilians died and four others were wounded. Five additional officers had previously pled guilty to related charges.

Recognizing systemic problems in the New Orleans Police Department, the division conducted one of the most extensive pattern or practice reviews ever of a law enforcement agency, and is now working with city officials, the police department and the community to develop a comprehensive blueprint for sustainable reform of the police department. Subsequently, the division completed a similarly extensive review of the Puerto Rico Police Department. Our goal in this work is to ensure communities have police departments that reduce crime, ensure respect for the Constitution, and earn the trust of the public they are charged with protecting.

We continue to fight for equal opportunity in education, so that all children can receive the quality education to which they have a right. In 2010, the division reached a settlement with a Louisiana school district to resolve the fact that the district was not offering a single Advanced Placement class at a high school that was 100 percent African American. About 83 percent of the district’s student body is African American, and about 12 percent of its students are White. The district has two high schools – one that is 100 percent African American and one that is about 56 percent African American. And yet the 100 percent African-American school had

only five Gifted and Honors courses, compared to more than 70 AP, Gifted, and Honors courses at the school attended by nearly all of the district's White students. Such differences were determined unconstitutional more than five decades ago in perhaps the most well known Supreme Court ruling in our nation's history, *Brown vs. the Board of Education*, and yet we still struggle to create truly equal educational environments for all students.

Meanwhile, students in school today too often face a different kind of discrimination—in the form of pervasive student-on-student harassment. We have seen recently the dire consequences that unrelenting harassment and bullying can have on students, and the Civil Rights Division is using its authority where it can to combat this pernicious problem.

In July, the division and the Department of Education reached a settlement agreement with the Tehachapi Unified School District in California to resolve an investigation into the harassment of Seth Walsh, a middle school student who committed suicide at the age of 13. The investigation found that Walsh had been the target of severe and pervasive harassment because of his failure to conform to gender stereotypes.

We also continue to see blatant housing discrimination in communities nationwide. In Fiscal Year 2010, the division obtained consent decrees or favorable judgments in 42 fair housing cases, including 26 with pattern or practice claims – the most pattern or practice settlements in 14 years. We reached the largest-ever settlement to resolve claims of rental discrimination in a case alleging discrimination against African Americans and Latinos. We settled a particularly egregious case of housing discrimination that involved a pattern of racial harassment and intimidation of African Americans by the building manager at a Kansas City apartment complex for the elderly and people with disabilities. The complex's manager frequently used racial epithets directed toward African Americans and displayed nooses on the property to intimidate tenants. The case settled for \$2.13 million, resolving claims on behalf of more than 40 current and former tenants.

We filed a lawsuit against the city of Joliet, Illinois, alleging that the city violated the Fair Housing Act by taking action to condemn the Evergreen Terrace apartment complex, which offers affordable housing. The action would displace more than 750 residents of the complex, more than 95 percent of whom are African American. Due to a dearth of affordable housing in and around Joliet, and because the city has failed to produce a meaningful plan to counteract the effect of eliminating 356 units of affordable housing, many of the residents

would be left with nowhere in the city to live if the condemnation action is successful.

We are also addressing new challenges to equal housing and homeownership. Particularly as our nation recovers from the housing and foreclosure crisis, we are working to ensure that all individuals have equal access to credit, a fundamental building block of wealth and the American Dream. The explosion in subprime lending and the subsequent foreclosure crisis has threatened the stability of communities of color at far greater rates than their White counterparts. We created a dedicated fair lending unit to determine where discrimination occurred in the years leading up to the crisis, and to ensure such practices do not occur in the future.

The division reached the largest monetary settlement in a fair lending case in its history. The case involved two subsidiaries of AIG, which we discovered had partnered with brokers that had been charging African-American borrowers higher fees than similarly situated White borrowers on wholesale loans in areas across the country.

In bringing this case, we used disparate impact theory, a critical tool in our law enforcement arsenal—a tool that has been accepted unanimously by the courts and that the career staff was discouraged from using in cases of this nature for many years—but one that we've dusted off and are using again.

More recently, we announced a settlement with a bank in Detroit to resolve a classic case of redlining, where the bank failed to offer credit in the city's African-American neighborhoods. Such practices perpetuate and exacerbate residential segregation, denying entire communities equal opportunities.

We also continue efforts to ensure every individual has equal opportunities in the workplace.

We challenged New York City's use of two written examinations for hiring entry-level firefighters, which we argued had a disparate impact on African-American and Hispanic applicants. At the time the Civil Rights Division filed its lawsuit, barely 7 percent of firefighters in New York were Black or Latino, even though minorities make up nearly 50 percent of the qualified pool of candidates. This was actually a lower percent of African Americans and Hispanics than worked for the New York City Fire Department in 1972.

A federal judge concluded that the fire department's policies had been discriminatory. In fact, the court ruled that the practices constituted discrimination under both disparate impact theory and the intent standard. We continue to work to ensure that the city develops hiring

policies that give all applicants a fair shot.

In 2011, we continue to see a need for enforcement of the landmark Voting Rights Act of 1965. Our Voting Section is in the midst of intensive efforts to review the thousands of redistricting plans that are being submitted for review in the current round of redistricting, all while handling the busiest case docket in the past decade and defending the constitutionality of Section 5 of the Voting Rights Act.

In addition, the division has launched an initiative to ensure compliance with the National Voter Registration Act. We have brought the first two lawsuits in seven years to enforce Section 7 of the law, which requires states to offer voter registration opportunities at agencies offering public assistance and services to persons with disabilities.

Our disability rights practice has been taken to new heights. We have ramped up enforcement of the Supreme Court's landmark decision in *Olmstead*, joining or initiating litigation or issuing findings letters to assure community-based services for persons with disabilities in more than 35 matters in 20 states, including reaching comprehensive settlement agreements with Georgia and Delaware. By comparison, during the previous administration, the division filed a single amicus brief in an *Olmstead* case.

We have also revitalized our enforcement efforts in other areas that languished in the previous administration. We have doubled the rate of amicus briefs filed in federal courts of appeals. We have opened 20 civil investigations under the Freedom of Access to Clinic Entrances (FACE) Act, and filed eight complaints under the Act – compared to just one civil FACE Act case in the eight years of the previous administration.

We have ramped up efforts to protect the rights of service members and their families. We reached the largest-ever settlement under the Servicemembers Civil Relief Act, ensuring Bank of America/Countrywide will pay \$20 million to resolve allegations that they illegally foreclosed upon servicemembers without court orders. In two and a half years, we filed more cases under the Uniformed Services Employment and Reemployment Act than during the previous administration in the entire four years that the division had jurisdiction. And in 2010, we obtained agreements with 14 states or territories to protect voting rights under the Military and Overseas Voter Empowerment Act, the most enforcement actions under a single statute ever taken by the Voting Section leading up to a federal election.

Meanwhile, though a decade has passed since the 9/11

terrorist attacks, the backlash that has followed against Muslim and Arab Americans persists. Hate-fueled violence against Muslims remains intolerably high. In early 2011, a Texas man pleaded guilty to hate crimes charges after he set fire in 2010 to playground equipment at a mosque in Texas. It was the 50th prosecution of post-9/11 backlash crimes against Arab and Muslim Americans.

We have also seen a rise in opposition to mosque construction and expansion around the country. In late 2010, we filed an amicus brief in support of a mosque in Murfreesboro, Tennessee, that had been the target of intense community opposition. The county had approved construction of the mosque, and the case was brought by opponents in the community, arguing that Islam wasn't a religion and therefore not protected by our nation's laws.

These cases remind us that fear, ignorance and misunderstanding can breed widespread discrimination, hate, and intolerance. We are committed to ensuring that our Arab and Muslim American neighbors can feel at home in their communities.

The people among us who have yet to realize the greatest promise of our nation – the promise of equal justice and equal opportunity – are the reason I and my colleagues in the division get out of bed each morning. It is a great honor to work with the dedicated career attorneys and professionals in the division to protect and defend the rights guaranteed by some of our nation's most cherished laws. We take very seriously our responsibility to carry the torch of the great civil rights pioneers who fought for those laws – and we honor their legacy by enforcing those laws aggressively and evenhandedly.

Thomas E. Perez is the assistant attorney general, Civil Rights Division at the Department of Justice.

Voter ID Laws and Blocking Access to the Ballot: New Tools, Old Tricks

Karen Tanenbaum

In 2011, voting rights advocates found themselves fighting a wide range of attempts to create barriers to broad participation to voting—making it more difficult for people of color, people with disabilities, students, low-income workers, and seniors to vote.

Advocates believe that the spate of voter suppression legislation, including shortened early voting periods, limits on poll worker assistance, proof of citizenship requirements, restrictions on same day and third-party registration, and felon disenfranchisement, are all part of a coordinated campaign of voter suppression that is the most significant threat to voting rights in decades.

“Their goal is simple – to suppress the vote of African Americans, Latinos, people with disabilities, low-income people, American Indians, Asian Americans, young people, seniors, and other constituencies that support progressive policies,” said Wade Henderson, president and CEO of The Leadership Conference on Civil and Human Rights. “The poll taxes and literacy tests of an earlier era are today embodied in state laws that require photo IDs to vote and that limit early voting, provisional voting and voter registration.”

New restrictive state voting laws will adversely affect up to five million voters, according to an October 2011 study by the Brennan Center for Justice at New York University School of Law. The study looked at 19 laws and two executive actions that were enacted during the last year in 14 states, all of which make it more difficult for citizens to vote. The rhetoric surrounding the new state laws is both telling and concerning. Nevada Governor Brian Sandoval inaccurately claimed that “the right to vote is a privilege.” New Hampshire House Speaker William O’Brien noted in a speech posted on the internet that young people shouldn’t have the right to cast a ballot because they “vote their feelings” and are “foolish.”

The typical justification for these restrictive laws is that the integrity of elections has to be protected in order for Americans to continue to have faith in our electoral process. But few of the new state laws streamline the process, make it easier for voters, or reduce the likelihood of administrative error.

As an example, voter ID proponents claim that these laws combat voter fraud, but studies have consistently shown that in-person voter impersonation—the only type of fraud an ID would remedy—is virtually nonexistent. The new laws actually create barriers rather than solve an existing problem.

According to the Brennan Center, a full 11 percent of voters in the United States don’t have a current government-issued photo ID, and the figures are disproportionately higher for people of color, people with disabilities, students, low-income workers, and seniors.

For those without ID, the hurdles to obtaining one are substantial. Though the IDs themselves are supposed to be free, a trip to the state motor vehicle office can require an eligible voter to take uncompensated time off from work and to pay for child care and transportation. People may also lack birth certificates and other supporting documents necessary to obtain a government-issued photo ID.

For example, decades ago, many Americans from the rural South used midwives rather than hospitals when giving birth and so formal birth certificates may be nonexistent, incorrect, or misplaced. When those documents do exist, they may also be prohibitively expensive to obtain. A birth certificate can cost up to \$50 and naturalization papers may be up to \$200.

Despite the significant indirect costs to voters, the U.S. Supreme Court upheld states’ ability to pass voter ID

laws in its 2008 decision in *Crawford v. Marion County Election Board*. Justice John Paul Stevens, in his majority opinion, said that the burden to most voters was minimal since “the inconvenience of making a trip to the BMV (Bureau of Motor Vehicles), gathering the required documents... does not qualify as a substantial burden on the right to vote.”

The Court’s decision created the space for other states to pass voter ID and other restrictive laws, and has made it more difficult for voting rights advocates to challenge them.

Nevertheless, advocates have continued to fight back. Groups like the Advancement Project, the Lawyers’ Committee for Civil Rights Under Law, the ACLU, the League of Women Voters, and litigating organizations like NAACP Legal Defense and Educational Fund and the Mexican American Legal Defense and Educational Fund all worked with voting rights advocates in states around the country to keep voter ID bills from being passed in states like Pennsylvania, Missouri, and North Carolina – and, once they did pass in other states, employed a number of tactics to challenge the laws.

In Ohio and Maine, initiatives were placed on the state ballots to repeal new restrictive laws passed by the states’ legislatures. In Maine, voters passed a ballot initiative on November 8 to overturn the state’s new law that eliminated same-day registration. In Ohio, voters approved a referendum on Ohio’s H.B. 194, a law the state legislature passed in June that would severely limit early voting, prohibit poll workers from assisting voters completing forms, and make it more difficult for local boards of elections to promote early voting

Voting rights advocates have also filed a number of lawsuits challenging restrictive voter laws in Florida, Wisconsin, Missouri, Arizona, and other states. In addition, advocates have pushed Congress to investigate these laws, resulting in several congressional hearings throughout the year; and have urged the Department of Justice to use its authority under the Voting Rights Act (VRA) and other voting rights laws to intervene where possible.

A December 13 speech at the Lyndon Baines Johnson Library & Museum in Austin, Texas, Attorney General Eric Holder spoke eloquently of the department’s commitment to ensuring that every single American can cast a vote:

“As concerns about the protection of this right and the integrity of our election systems become an increasingly prominent part of our national dialogue – we must consider some important questions. It

is time to ask: what kind of nation – and what kind of people – do we want to be? Are we willing to allow this era – our era – to be remembered as the age when our nation’s proud tradition of expanding the franchise ended? Are we willing to allow this time – our time – to be recorded in history as the age when the long-held belief that, in this country, every citizen has the chance – and the right – to help shape their government, became a relic of our past, instead of a guidepost for our future?

For me – and for our nation’s Department of Justice – the answers are clear. We need election systems that are free from fraud, discrimination, and partisan influence – and that are more, not less, accessible to the citizens of this country.”

Ten days after the speech, the Justice Department announced that it would block a new South Carolina voter ID law using its authority under Section 5 of the VRA, which requires states and localities with a history of racial discrimination to obtain Justice Department or federal court approval for voting law changes. At the end of 2011, the department was also reviewing voting laws in Texas and Florida.

Voting rights experts expect that some states will introduce (or reintroduce) voter ID and other voter suppression legislation next year.

While maintaining the current focus on battling restrictive voting laws, advocates will continue to push to expand voting rights so more Americans can participate in the democratic process. These initiatives include laws like the Democracy Restoration Act, which would expand access to the ballot box by allowing formerly incarcerated people who have completed their sentences to vote, and legislation to streamline and modernize the registration and election process without restricting access.

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Playing Defense on Immigration Reform

Rob Randhava

While the 111th Congress was marked by dashed hopes for the prospect of major immigration reform, immigrants' rights advocates found themselves switching to a largely defensive posture in the first session of the 112th Congress. A change in party control in the House of Representatives following the 2010 election, along with continued high unemployment in the wake of the 2008 financial crisis, all but guaranteed that the nation's immigration system would remain broken.

Americans for Constitutional Citizenship

The 112th Congress opened with a strong indication of just how much things had changed as a result of the 2010 election. In the first week of January, as the new Congress was being sworn in, immigration restriction advocates in the House, as well as in some state legislatures, announced they were introducing legislation that would rewrite the Citizenship Clause of the 14th Amendment. The various proposals sought to deny citizenship to the children of unauthorized immigrants, who receive it automatically if they are born within the United States.

Proponents argued that changing the 14th Amendment would deter unauthorized immigration. Yet there is scant evidence that immigrants come to the United States for the sole purpose of having children. The few who do are usually economically well-off and frequently return to their home countries only to seek immigration benefits at a later date. Instead, most unauthorized immigrants are drawn by the hope of finding work and obtaining a better life; having children is simply what many people do, regardless of their immigration status.

In response, The Leadership Conference on Civil and Human Rights joined with the NAACP, ACLU, the Asian American Justice Center, the Mexican American Legal Defense and Educational Fund, The Opportunity Agenda, and other groups to announce the formation of Americans for Constitutional Citizenship, a coalition dedicated

to opposing any such measures. In a January 5 press call, Wade Henderson, president and CEO of The Leadership Conference, blasted the proposals:

“For the first time since the end of the Civil War, these legislators want to pass state laws that would create two tiers of citizens – a modern-day caste system – with potentially millions of natural-born Americans being treated as somehow less than entitled to the equal protection of the laws that our nation has struggled so hard to guarantee. The purported purpose of this insidious proposal is to help reform our nation's immigration system. But the real purpose in creating a two-tiered group of citizens is something far darker, far more divisive and we believe, decidedly un-American.”

Civil rights advocates pointed out that measures to alter our citizenship law would contravene the original intent of the 14th Amendment and would have drastic negative policy consequences. They also warned that any such effort at the state level would be blatantly unconstitutional.

By March, the Americans for Constitutional Citizenship coalition had grown to include more than 80 national organizations, as well as many prominent individuals from across the political spectrum. Since its formation, however, the coalition has had little to do, to the relief of its membership. The leadership of both parties in Congress indicated that they would not allow any proposed constitutional amendment to come up for a vote. Moreover, the key sponsor of the amendment in the House, Rep. Steve King, R. Iowa, was blocked from becoming chairman of the House Immigration Subcommittee even though he was the most senior member of the panel. Proposals at the state level have also failed to gain traction, although it is possible that they may be revitalized as a campaign “wedge” issue leading up to the 2012 election.

Efforts to Restrict Immigration in the House

While the effort to undo the 14th Amendment quickly fizzled, the new House majority has continued an array of hostile efforts toward unauthorized immigrants. In addition to holding hearings designed to incorrectly link immigrants to the nation's ongoing economic woes, many members of Congress introduced heavy-handed enforcement measures.

In one such hearing, the House Immigration Subcommittee set out to advance the myth that unauthorized immigrants are to blame for high unemployment in the African-American community. Wade Henderson was invited to testify as the lone witness on behalf of immigration and civil rights advocates. In his testimony, he argued several points. First, Henderson said, economists are in disagreement over whether immigrants cause unemployment among native-born workers, because immigrants also spur economic demand that can offset competition for jobs. Second, he noted that the causes of high African-American unemployment rates are widespread and existed long before our current high levels of unauthorized immigration. Finally, he questioned the motives of many of the advocates who feed myths about immigrants causing African-American unemployment, as many of them do not show much interest in the economic well-being of African Americans in other contexts such as education, health care, or consumer protection.

The most significant legislative effort undertaken to date in the 112th Congress has been a proposal by House Judiciary Committee Chairman Lamar Smith, R. Texas, to require all employers to use the Electronic Employment Verification System, also known as E-Verify. The system aims to ensure that employees are citizens, legal residents, or otherwise eligible to work under U.S. immigration law. But the existing system is rife with errors, and would encourage the use of racial and ethnic profiling, preventing many eligible people from obtaining jobs.

The Leadership Conference and many of its member organizations spoke out against the measure while continuing to urge a more comprehensive overhaul of our immigration system. The bill had only lukewarm support from the more strident advocates of reduced immigration because it had been weakened to placate the concerns of the business lobby. Moreover, the E-Verify bill was brought up in a House that has generally shown tremendous hostility to federal regulations on businesses, and this bill would impose a massive new regulatory regime on those same businesses. As a result, even though the bill was voted out of the House Judiciary Committee, its future prospects appear uncertain.

The House Judiciary Committee also attempted to move legislation that would expand the use of immigration detention, undermining the due process protections established by several U.S. Supreme Court rulings in the past decade. Meanwhile, some more immigrant-friendly bills such as the DREAM Act, which would establish a path to legalization for immigrants brought to the U.S. as children, have been introduced in the Senate. As with E-Verify, however, most immigration bills appear unlikely to move in the 112th Congress, particularly in the continued absence of a bipartisan effort to enact a comprehensive immigration overhaul.

Deportations at an All-Time High

For years, opponents of comprehensive immigration reform have argued that the existing laws against unauthorized immigration must be enforced before Congress can turn its attention to the prospect of legalizing people who are already here, making it easier for employers to hire immigrants legally, or addressing long-needed improvements to family-based visa systems. They have focused much of their criticism on President Obama, who has frequently spoken out in favor of comprehensive reform, accusing him of failing to enforce the laws.

Statistics from the first three years of the Obama presidency have shown these criticisms to be wildly off the mark. For three years in a row, the government under Obama has set new records in the number of unauthorized immigrants who have been deported. In Fiscal Year 2011, the administration's policies resulted in the deportation of nearly 400,000 immigrants. More than half of those deported had felony or misdemeanor convictions. At the same time, the number of arrests at the southern U.S. border have fallen significantly in recent years, including a 25 percent drop in the past year, showing that fewer people are crossing the border unlawfully.

The Obama administration has faced more legitimate criticism by immigration advocates, who have characterized recent policies as being too heavy-handed. Significant numbers of deportees have no criminal record or, under the "Secure Communities" program, have been removed for very minor legal infractions. In November, civil rights advocates were relieved to hear the administration's announcement that it would train immigration enforcement officers to exercise more discretion in non-criminal deportation cases.

Prospects in 2012 and Beyond

As the 112th Congress moves into its second session, there are few signs that the partisanship that marked the first session would improve. Indeed, with a contentious presidential election less than a year away, experience suggests that tensions in Congress will only grow worse.

When combined with persistent high unemployment and economic stagnation, it appears unlikely that we will see any serious attempt by Congress to undertake immigration reform. Instead, most of the focus of civil and human rights advocates will remain on overturning the recent spate of anti-immigrant laws in Alabama, Georgia, and a handful of other states.

The prospects for immigration reform beyond 2012 are harder to predict. On an encouraging note, several contenders for the Republican presidential nomination have argued that their party must take a more “humane” approach to immigration, sounding a note similar to that of former President George W. Bush. It is conceivable that the hardened attitudes of the past several years could eventually soften, particularly if the economy shows more signs of recovery. It would be a mistake, however, to underestimate the complexity of the immigration issue or the political controversy that it generates.

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The Aftermath of Arizona's S.B. 1070

Catherine Han Montoya and Ron Bigler

On December 12, 2011, the U.S. Supreme Court announced it would review a federal appeals court decision striking down key parts of Arizona's anti-immigration law, S.B. 1070. The Obama administration had challenged the Arizona law—and other “copycat” laws in Utah, Alabama, and South Carolina—on the grounds that such laws encroach on the federal government's exclusive authority under the Constitution to regulate immigration policy.

Many advocates hope the Court's decision will stop the wave of anti-immigrant laws crashing over the nation in the wake of S.B. 1070's adoption in April 2010. In the meantime, efforts to enact copycat laws are meeting resistance from new multiethnic coalitions that are forming in states such as South Carolina, Alabama, and Georgia.

Southern Copycat Laws

By the fall of 2010, the legislatures of seven southern states – Alabama, Georgia, Mississippi, Tennessee, Florida, South Carolina, and North Carolina – indicated that Arizona copycat bills would be introduced during the 2011 legislative session.

The results have been mixed. While S.B. 1070 copycat bills were defeated in Florida, Mississippi, Tennessee, and North Carolina, harsh and discriminatory anti-immigrant laws were enacted in Georgia, South Carolina and Alabama:

- In Georgia, H.B. 87 was signed into law by Gov. Nathan Deal on May 13.
- In Alabama, the state legislature passed H.B. 56, which Gov. Robert Bentley signed into law on June 9. H.B. 56 is considered the most repressive anti-immigrant law to date, even surpassing Arizona's S.B. 1070. The new Alabama law makes it a state

crime to be in the state without documentation; requires schools to collect information on the citizenship or immigration status of the students; and requires all businesses in the state to enroll in the federal E-Verify program.

- South Carolina's S.B. 20 was signed into law by Gov. Nikki Haley on June 27. Although less punitive than Alabama's law, S.B. 20 still makes it a crime to be in the state without documentation.

A review of these legislative battles reveals that anti-immigrant extremists have been most successful in states where the Latino population is small but growing. As legislatures in South Carolina, Georgia, Florida, Alabama, and elsewhere started introducing their own S.B.1070-type laws, advocates from across the region began looking into ways to challenge them. But it would soon become apparent that opponents lacked the ability to mobilize in numbers and with force strong enough to defeat the bills.

A case in point is South Carolina, a state with a growing immigrant population and a diverse cross-section of multiethnic communities. While the conservative makeup of the state legislature made defeating S.B. 20 unlikely, advocates saw an opportunity to use the bill as a way to build a broad, multiethnic coalition that would be able to respond to the implementation of S.B. 20 and other attacks on civil and human rights, and that would work to build a new civil and human rights agenda in the state.

Due to the unprecedented level of activity by activists in South Carolina, S.B. 20 was stalled in the regular session of the South Carolina legislature that ended on June 2. It was later passed in a special session and signed by South Carolina's Republican governor, Nikki Haley, on June 27.

What's Next

The South Carolina law, along with others in Georgia and Alabama, is now facing strong legal challenges. Federal judges enjoined the most egregious sections of Georgia's H.B. 87 and South Carolina's S.B. 20. In September, U.S. District Court Judge Sharon Blackburn enjoined some parts of Alabama's H.B. 56 but inexplicably upheld its most repugnant and discriminatory aspects—provisions that had been struck down by nearly every other court that had considered these laws.

While the passage of S.B. 20 in South Carolina had been anticipated, the foundation has now been laid in the state for a broad and diverse coalition to challenge the law's implementation, as well as to provide support for passage of comprehensive immigration reform at the federal level. In many ways, the need to organize new coalitions to combat extremist anti-immigrant laws at the state level has been of born of necessity, and is to a large degree the result of the failure to pass comprehensive immigration reform at the federal level. Whether the Supreme Court will bolster the need for uniform federal immigration laws and rein in the states on their anti-immigrant efforts, or instead stoke the backlash against immigrants in the United States remains to be seen.

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Protecting Consumers: Fighting Efforts to Roll Back Wall Street Reform

John Carey

Passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) in July 2010 was an important step toward reining in abusive and reckless practices that were at the heart of the financial crisis. But passage of the law did not end Wall Street’s efforts to prevent needed change. Financial industry special interests and their friends on Capitol Hill have only redoubled efforts to undermine the law and stop any further progress.

Civil rights groups and consumer advocates believe that after decades of deregulation driven by the interests and power of big Wall Street banks, it is long past time to remake the financial system so that it is fair, accountable and secure, and so that it serves the real economy rather than draining resources from it.

Deceptive and abusive mortgage lending was a fundamental cause of the 2008 financial crisis and the worst recession since the Great Depression. Year in and year out, tricks and traps on credit cards, student loans, overdraft fees, and payday loans, to name just a few, cost working families tens of billions of dollars.

Wall Street spends millions of dollars lobbying Congress and the regulators to fight reform because the status quo is so profitable for them. According to the Center for Responsive Politics, Wall Street interests spent more than \$475 million on lobbying in 2010, and are on pace to match that total in 2011. One major target has been the new Consumer Financial Protection Bureau (CFPB), the sole federal regulator focused on protecting consumers in the financial marketplace. The CFPB was a centerpiece of Dodd-Frank and was fiercely championed by the civil and human rights community and consumer advocates, including Americans for Financial Reform (AFR), a coalition of more than 250 national, state and local organizations working for strong Wall Street reform.

Building the Consumer Bureau

In September 2010, President Obama appointed Elizabeth Warren as assistant to the president and special advisor to the secretary of the Treasury to help build the CFPB. She is credited with conceiving the idea for the agency and has a long track record of fighting for consumer protections and economic security for working families.

Treasury Secretary Timothy Geithner set a “transfer date” of July 21, 2011, on which authority from other bank regulators would transfer to the bureau and it would begin to function as a full-fledged agency. By January, the CFPB was making strides toward putting an agency in place that could dramatically improve the financial services marketplace for tens of millions of families. As part of its progress, the CFPB began building a strong and committed staff, which included former Ohio Attorney General Richard Cordray as director of enforcement and Holly Petraeus to establish the Office of Servicemember Affairs.

Congressional Attacks on the Consumer Bureau

When Congress established the landmark agency, its clear intent was to create a bureau with the independence and authority to stand up for Main Street and take on Wall Street. One key element of this independence is a nonpolitical funding process, with the bureau funded through the Federal Reserve rather than subject to an annual congressional appropriations process that Wall Street and finance industry interests can try to hijack to block regulation they don’t like. But that didn’t stop opponents of the bureau from trying to undermine its funding.

A controversial provision was inserted into a House bill to continue government funding for 2011 that would have effectively slashed the CFPB’s budget in its initial year of operations by 40 percent—from \$143 million

to \$80 million. After strong protests from consumer and civil rights groups, the measure was defeated. Other proposals sought to take away its stable funding altogether and make the bureau vulnerable to political manipulation.

The House Financial Services Committee also passed several bills designed to weaken the CFPB. One proposal would have replaced the CFPB director with a commission, reducing its accountability and effectiveness; another would have made it easier for the other bank regulators – whose failure to protect consumers caused such devastating problems – to block the bureau’s action; yet another would have delayed the transfer of any powers to the CFPB until a director was confirmed by the Senate. As AFR said in a letter to the committee, “These bills would virtually guarantee that the CFPB would be a weak and timid agency without the will or ability to curb the kind of financial abuses that caused the nation’s worst financial crisis since the Great Depression.”

In July, the full House passed H.R. 1315, the Orwellianly named *Consumer Financial Protection Safety and Soundness Improvement Act*, incorporating changes of this kind that would have cut the CFPB off at the knees. The Obama administration threatened to veto the bill and Senate Banking Chairman Tim Johnson, D. S.D., declared the bill would not be heard in the Senate.

Some senators also took aim at the CFPB. Sen. Jerry Moran, R. Kan., proposed a measure to gut the CFPB, and Sen. Jim DeMint, R.S.C., introduced an amendment to repeal the Dodd-Frank Act outright. Neither was successful.

Consumers Get New Cop on the Beat

On July 18, Obama officially nominated CFPB enforcement chief Richard Cordray to head the CFPB. Cordray received enthusiastic support from a wide array of organizations and individuals across the country, ranging from community, faith-based, and labor organizations, to business leaders and law enforcement officials. Advocates noted that Cordray, a former Ohio attorney general, had an excellent and balanced record of service in the public interest that would make him an effective head for the CFPB.

A poll released the same month by AFR demonstrated strong and broad voter support for Wall Street reform. After hearing arguments in support and in opposition, voters across party lines supported the reforms in Dodd-Frank. Seventy-seven percent of those polled—Republican, Democratic, and Independent—favored tough, sensible oversight of the financial services industry, including a strong and independent CFPB.

Filibustering Consumer Protections

In May, 44 GOP senators signed a letter to Obama declaring that they would oppose any nominee to lead the CFPB unless the bureau’s structure was changed and its authority gutted. While the letter said the CFPB otherwise had unprecedented powers, AFR and other CFPB advocates argued that their arguments had more to do with protecting Wall Street than improving the bureau, which is already accountable to Congress, the judiciary, the president, and the American people, and which is structured much like the other banking agencies. In effect, lawmakers who were unable to keep Dodd-Frank from becoming law were signaling their intent to hold confirmation of the critical position of CFPB director hostage unless given the opportunity to rewrite—and weaken—the law.

The consequences of the GOP threat were extremely serious. Without a director in place, the bureau could not effectively do its job, and there were particular constraints on its authority over non-bank institutions and their activities, including payday lenders, private student loans, car loans, or credit reporting agencies, many of which disproportionately affect lower-income families, military servicemembers, and seniors.

In October, the Senate Banking Committee recommended Cordray’s confirmation on a party-line vote that demonstrated the challenges of confirming a director, despite the fact that no one had anything but praise for the nominee’s record and fitness for the job. The vote to bring the nomination to a vote was held in early December. Obama traveled to Kansas to deliver an assertive speech on financial reform and the importance of the CFPB to protecting consumers from abusive financial products. Civil rights organizations and consumer advocates around the country mobilized tens of thousands of people to contact their senators and demand an up-or-down vote on the nomination. A letter to senators organized by AFR and signed by more than 200 organizations stated:

“Failing to confirm a nominee so broadly agreed to be qualified and able for the job needlessly puts consumers, and the economy as a whole, at risk. Leaving the CFPB without a director is unconscionable; it puts consumers who are already suffering through an economic recession caused by a lack of financial regulations in danger of further harm. Leaving the agency without all the tools it needs to not only protect consumers, but to protect companies that compete fairly, leaves both at the mercy of unregulated, predatory firms. And it leaves our whole economy in danger of further problems caused by abusive lending at a particularly vulnerable time. That is the wrong way to go.”

On December 8, 45 GOP senators voted to block Cordray's nomination. While the vote was deeply disappointing, financial reform advocates continued to support Cordray to head the CFPB. The president responded with a recess appointment of Cordray on January 4, 2012, which advocates applauded.

Despite the ongoing efforts to weaken it, the CFPB has not lost sight of its vital mission to protect consumers and ensure transparency and fairness in the consumer financial marketplace. An early effort of the CFPB has been to make mortgage disclosure forms simpler through its mortgage disclosure project, Know Before You Owe. The project's goal is to provide consumers with better information that makes it easier to compare home loan products, while reducing burdens for the financial services industry. The bureau is also working to make credit card agreements and student loan offers clearer and more transparent so that consumers can make informed choices. The CFPB has a statutory mandate to take in and monitor consumer complaints, and it has begun to do so with credit card, mortgage and mortgage servicing complaints. Now that there is a director in place, civil rights and consumer groups look forward to working with the CFPB to take on abusive lending practices in our communities.

Other Attacks on Reform

While the CFPB was a key part of reform, Dodd-Frank also contains a broad array of other initiatives aimed at making the financial system safer and more secure to help prevent a repeat of the disastrous crisis of 2008. These include new oversight for the vast "shadow markets" in unregulated derivatives that helped crash the economy; requirements that the big Wall Street banks hold more private capital to protect against the need for taxpayer bailouts; restrictions on commodity speculation; restrictions on big bank gambling with taxpayer money; and reforms in executive compensation practices.

These other reforms also have come under sustained opposition from Wall Street interests, and AFR and other consumer groups have worked to protect them and to press for their effective implementation.

To take just one example, the role of the Commodity Futures Trading Commission (CFTC) in oversight of financial markets is vital. The CFTC oversees the commodity markets that set the prices for the food we buy for dinner and the gas we buy to get to work. Dodd-Frank requires the CFTC to impose new limits in the commodity markets to prevent excessive speculation and possible manipulation that drive prices up and make them more volatile. Dodd-Frank also assigns the CFTC the responsibility of overseeing vast portions

of the previously unregulated "shadow markets" in derivatives – leading to a seven-fold increase in the size of the markets the agency is responsible for supervising. Yet despite this vast increase in responsibilities, reform opponents have targeted the CFTC for budget cuts as a way of crippling reform.

Growing income inequality makes executive compensation another area of importance. Dodd-Frank prohibits excessive bank bonuses that encourage inappropriate risk-taking by financial institutions and establishes new mechanisms to give shareholders a voice in setting top executive pay. It also requires new disclosures of pay disparities between CEOs and the median paid worker at all companies, not just financial firms. These provisions have come under industry attack with a bill introduced to repeal the new disclosure.

Conclusion

The Dodd-Frank Wall Street Reform and Consumer Protection Act was debated, passed, and signed in to law because the existing system of financial regulation failed. It failed – among other things – to stop clearly fraudulent and obviously unsustainable mortgage lending that devastated our communities and our economy. The fight for consumer protections and other financial reforms will continue into 2012, with new attacks and heated rhetoric. But now the CFPB is fully positioned to advance the work of protecting consumers, and civil rights groups and consumer advocates like Americans for Financial Reform are prepared to continue to fight for reform, and to fend off attacks on the progress made thus far.

John Carey is the communications director of Americans for Financial Reform, a coalition of more than 250 national, state and local consumer, labor, investor, civil rights, community, small business, and senior citizen organizations working for financial reform that will crack down on abusive and irresponsible practices by big Wall Street banks and finance industry bottom feeders, and create a financial system that serves the 'real economy' rather than putting it at risk.

The 2011 Hubert H. Humphrey Civil and Human Rights Award Dinner

The 2011 Hubert H. Humphrey Civil and Human Rights Award Dinner was held on May 12, at the Hilton Washington in Washington, D.C.

The Hubert H. Humphrey Civil and Human Rights Award is presented to those who best exemplify “selfless and devoted service in the cause of equality.” The award was established by The Leadership Conference in 1977 to honor Hubert Humphrey and those who emulate his dedication to and passion for civil rights. This 2011 dinner was particularly special, as it marked the 100th anniversary of Humphrey’s birth.

Three distinguished individuals received the award in 2011: Richard Trumka, president of the AFL-CIO; Joe Solmonese, president of the Human Rights Campaign; and civil rights icon Shirley Sherrod. Victor Sanchez, president of United States Students Association; Karen K. Narasaki, president and executive director of the Asian American Justice Center; and Ben Jealous, president and CEO of the NAACP, introduced the honorees.



From left to right: U.S. Students Association President Victor Sanchez, AT&T Executive Vice President of External and Legislative Affairs James W. Cicconi, Asian American Justice Center President and CEO Karen K. Narasaki, AFL-CIO Executive Vice President Arlene Holt Baker, Leadership Conference President and CEO Wade Henderson, Shirley Sherrod, Human Rights Campaign President Joe Solmonese, Communications Workers of America President Larry Cohen, NVG Co-Founder Maria Echaveste, and Leadership Conference Chief Operating Officer Karen McGill Lawson.



Attendees enjoying The Leadership Conference Education Fund reception before the awards dinner.



Bennett Singer, Walter Naegle, and Adam Waxman enjoying the reception.



Dinner attendees listening to emcee Maria Echaveste.



(1) HRC President Joe Solmonese, a Humphrey Award recipient, and NAACP President Ben Jealous on the dais.

(2) Leadership Conference President Wade Henderson greets dinner attendees.

(3) Humphrey Award recipient Shirley Sherrod and NAACP Washington Bureau Director Hilary Shelton share a laugh on the dais.

(4) AT&T Executive Vice President of External and Legislative Affairs James W. Cicconi, AAJC President and CEO Karen K. Narasaki, USSA President Victor Sanchez, and AFL-CIO Executive Vice President Arlene Holt Baker on the dais.

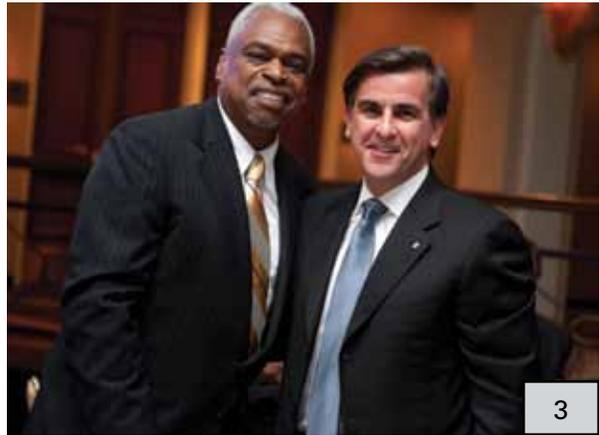
(5) Henderson, Sherrod, and Solmonese on the dais.



Henderson poses for a photo with dinner attendees.



Deb Speed and William Roberts of Verizon.



Henderson and Ed Martinez of UPS.

In Pursuit of Fairness: Recent Reforms in Crack Cocaine Sentencing

Antoine Morris

In 2010, Congress passed the Fair Sentencing Act (FSA), which reduced the sentencing disparity between crack and powder forms of cocaine from 100-to-1 to 18-to-1, and eliminated mandatory minimum sentences for simple possession. The FSA was signed into law by President Obama on August 3. It was the most significant advancement in criminal justice reform in decades. However, questions lingered as to who the new law applied to, when the law applied, and in what manner.

Specifically, questions have been raised about retroactivity (applying the law to offenders currently serving sentences for crack cocaine offenses) and “pipeline” cases (cases involving crack cocaine offenses that were in process at the time of the FSA’s passage). Civil and human rights groups and criminal justice activists argued in 2011 that Congress’ passage of the FSA represented a sharp rebuke to a decades-old overbroad sentencing approach.

Retroactivity

Before the FSA, a person charged with possession of just five grams of crack cocaine – the weight of two sugar packets – received the same five-year mandatory minimum sentence as someone caught with 500 grams – about a pound – of powder cocaine, despite the fact that the two forms are pharmacologically the same. The FSA reduced the disparity from 100-to-1 to 18-to-1 and eliminated the mandatory minimum for simple possession for crack cocaine, but left federal penalties for possession of powder cocaine unchanged.

The FSA also granted the U.S. Sentencing Commission, the agency that establishes sentencing policies for federal judges, emergency authority to revise its guidelines to assist with the implementation of the new law. Sentencing guidelines recommend ranges of punishment that usually exceed the mandatory minimum penalty set by Congress. For example, if a mandatory minimum

sentence for a particular drug offense is five years, a guideline range may be set at 63 months to 78 months. Changes or amendments to the guidelines can be made retroactively as well as prospectively.

At a June 1 hearing, the commission considered three factors as it weighed applying the amended guidelines retroactively:

- The purpose of the amendment;
- The impact of the change on the pool of eligible offenders and on public safety; and
- The administrative burden of applying the amendment retroactively.

According to the commission’s data, about 12,000 people currently serving time for federal crack offenses—86 percent of whom are African American—would receive a shorter sentence if the new guidelines were applied retroactively. The average offender would see about a three-year reduction in his or her sentence.

Former California Republican Assemblyman and victims’ rights advocate Pat Nolan was among the advocates urging the commission to apply the amendment retroactively. “Congress recognized the injustice of this disparity and passed the Fair Sentencing Act,” said Nolan. “If you approve retroactivity, these offenders will not be getting off easily. The average offender benefitting from retroactivity will see their sentence drop from 167 months to 127 months. That is, they will end up serving over ten-and-a-half years. That is not a light sentence in anyone’s book.”

But some at the commission hearing urged a more conservative approach, including U.S. Attorney General Eric Holder, who endorsed a more limited form of retroactivity that excluded people with longer criminal histories and people found guilty of weapons possession.

Critics argued that Holder’s approach could unnecessarily cut the number of prisoners eligible for relief in half. “This is precisely the type of case-specific determination that should be left to the discretion of the sentencing court,” said Jim E. Lavine, president of the National Association of Criminal Defense Lawyers (NACDL), in a prepared statement to the commission.

Like other proponents of retroactivity, NACDL favored the same approach the commission took in 2007 when it readjusted sentencing ranges for crack offenses and then applied those changes retroactively. Federal judges used facts contained in the record and their discretion to determine who among the then-25,000 eligible offenders warranted a reduction in their sentence or did not because they were deemed a public safety risk. That approach is widely considered successful.

Many civil rights groups and leaders, including The Leadership Conference on Civil and Human Rights, had urged Holder to publicly support guideline retroactivity. “Retroactive application of the revised guideline is the necessary next step in addressing the unfair, unjustified and racially discriminatory disparity in the treatment of the powder and crack forms of cocaine. The Department of Justice must demonstrate strong support for retroactive application of the guidelines to ensure that this next step is taken,” the groups said in a letter to Holder.

Some members of Congress vehemently opposed any consideration of retroactivity at all. In a June 16 letter, a group of Republican senators wrote to both Holder and the commission declaring their opposition to any form of retroactivity due to public safety concerns. The senators threatened to withdraw support for any future effort aimed at making sentencing laws more lenient. Sen. Chuck Grassley, R. Iowa, also proposed an amendment to force the commission, if it approved retroactivity, to absorb the administrative costs associated with implementing it in the courts. That letter came on the heels of another strongly worded letter from several House and Senate Republicans to the commission questioning its authority to enact such a change, even though Congress granted the independent agency the power to do so in the Sentencing Reform Act of 1987.

The commissioners rejected those arguments, as well as Holder’s approach, and voted on June 30 to apply the guidelines retroactively on the grounds that it was statutorily obligated to reduce unwarranted disparities in sentencing. “Today’s action by the commission ensures that the longstanding injustice recognized by Congress is remedied,” said Judge B. Saris, the commission chair, in a press statement.

The commission argued that retroactivity was necessary

to relieve overcrowding in the federal Bureau of Prisons, which is currently at 37 percent above capacity, and to save approximately \$270 million over the next decade. With respect to the public safety issue, the commissioners pointed out that eligible prisoners would have to appear before a federal judge before having their sentences shortened. Those who were deemed public safety risks would be denied an earlier release date.

The decision was hailed by civil and human rights groups and criminal justice groups. “Imagine that the Civil Rights Act of 1964 had upheld segregation in existing schools and only mandated integration for new schools being built,” said Jasmine Tyler, deputy director for national affairs at the Drug Policy Alliance. “Without retroactivity, that’s exactly what would happen to the Fair Sentencing Act. The commission should be lauded for their commitment to ensuring racial justice and fairness in the federal system.”

“Pipeline” Cases

Even after the FSA became law, the Justice Department continued to seek sentences based on the old mandatory minimums for conduct that predated the FSA. For months, the Justice Department defended that policy in court, arguing that because the FSA was silent on pending cases, it should apply only to defendants whose crimes occurred on or after August 3, 2010, when the law was enacted.

The policy was roundly criticized by lawmakers, civil rights groups, and trial judges. In November 2010, Sen. Dick Durbin, D. Ill., and Senate Judiciary Chairman Patrick Leahy, D. Vt., sent a letter to Holder arguing that the goal of the FSA was to “restore fairness to federal cocaine sentencing as soon as possible,” and urging the department “to issue guidance to federal prosecutors instructing them to seek sentences consistent with the Fair Sentencing Act’s reduced mandatory minimums.” The letter said that it was incumbent upon the Justice Department “not simply to prosecute defendants to the full extent of the law, but to seek justice” as well.

In January 2011, The Leadership Conference sent a letter to the attorney general urging him to change the department’s charging policy. “The recent passage of the FSA emphatically reaffirms Congress’ intention that crack defendants are entitled to fair treatment,” the letter said. “It makes no sense to apply punishment differentially for defendants whose conduct occurred a few days apart.”

The Leadership Conference letter cited a court decision by U.S. District Judge D. Brock Hornby, a Republican appointee, who had taken issue with the Justice Department’s charging policy. “What possible reason

could there be to want judges to continue to impose new sentences that are not fair over the next five years while the statute of limitations runs?” asked Hornby. “I would find it gravely disquieting to apply hereafter a sentencing penalty that Congress has declared to be unfair.”

On July 15, nearly two weeks after the retroactivity vote, Holder announced in a memorandum that federal prosecutors would no longer charge crack cocaine defendants under the previous and more punitive 100-to-1 law simply because their conduct predated the passage of the FSA.

“The goal of the Fair Sentencing Act was to rectify a discredited policy,” Holder said in the memorandum. “Most importantly, as with all decisions we make as federal prosecutors, I am taking this position because I believe it is required by the law and our mandate to do justice in every case.”

The change in policy will likely help dozens of defendants with cases pending at the time of the FSA’s enactment and others yet to be sentenced. The revised policy, however, does not apply to defendants who were charged and sentenced before the FSA went into effect, even if they have not exhausted their options for appealing their sentences. On November 28, the U.S. Supreme Court decided to hear arguments in two consolidated cocaine sentencing cases, *Dorsey v. United States* and *Hill v. United States*. The Court’s decision will resolve confusion in the lower courts about whether or not the FSA should apply only to defendants whose crimes occurred after the law was enacted.

Next Steps on Cocaine Sentencing

Civil and human rights groups and criminal justice advocates are committed to the complete elimination of unfair, discriminatory cocaine sentencing disparities. The FSA was a tremendous first step toward that goal, so it is critical to the long-term goal of eliminating the disparity that its implementation be undertaken in the fairest manner possible.

Antoine Morris is the former research associate for The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund. He currently attends Fordham University School of Law.

The Supreme Court in the Citizens United Era: Putting Big Business First

Marge Baker
Commentary

Americans generally recognize the importance of having their “day in court” – and with good reason. The courtroom is one of the few venues in our society where differences of wealth and power should take a back seat to the principle that every person should be treated with fundamental fairness.

In *Citizens United v. the Federal Election Commission*, a 5-4 decision handed down in January 2010, the Supreme Court overturned the 2002 Bipartisan Campaign Reform Act’s restrictions prohibiting corporations from using general treasury funds to promote the election or defeat of a federal political candidate by means of independent expenditures. The decision reopened the spigot of money pouring into elections, and with it, the increased risk—and certainly increased perception—of corrupt, quid-pro-quo politics. Simply put, the decision found that, regarding independent campaign expenditures, corporations have the same right as individual Americans.

Many saw this decision as part of a larger picture where individual, flesh-and-blood Americans have fared quite poorly before the Court. In the Court’s most recently completed term, which ended in June 2011, plaintiffs trying to hold large corporations accountable found themselves in situations familiar to many Americans: trying to protect their legal rights to be treated fairly by their cell phone company, trying to be informed of a medication’s known risks, trying to have the safest possible vaccinations for their children, and fighting to have a workplace free of pervasive sex discrimination. In each case, the Supreme Court refused to let people go to court to press their claims. With the courtroom door closed, Americans’ so-called rights make no difference when it really counts.

Progressives have long known of the far right’s efforts to enhance the power of the state to engage in warrantless

searches, dilute church-state separation, and insulate the government from all manner of lawsuits. But *Citizens United* made clear that their agenda is larger than that. As confirmed by the just-concluded 2010-2011 Supreme Court term, the *Citizens United*-era is characterized by decisions that have the effect of preventing ordinary Americans from imposing reasonable restrictions on those who hold immense power, especially large corporations, or from holding them accountable when they do wrong.

In two cases last term, the Supreme Court severely weakened access to class action lawsuits, a critically important tool that is often the only way to hold corporate wrongdoers accountable. Large corporations, with resources dwarfing those available to the average individual, clearly benefit when their victims are unable to pool resources through a class action.

In *AT&T Mobility v. Concepcion*, the Supreme Court made it much easier for powerful corporations to cheat their customers with impunity. AT&T had offered consumers a free phone, but then charged them for the taxes on the undiscounted price of the phone. Few people would notice the relatively small charge, and even fewer would go to the trouble of taking action on their own to get their money back; only class action would make this alleged scheme unprofitable. However, AT&T’s contracts required consumers to agree to resolve disputes through arbitration and without class action. California outlaws contracts where one party holds all the power and is able to dictate terms that empower it to victimize the other. But the Supreme Court ruled, 5-4, that the Federal Arbitration Act required compliance with the otherwise illegal contract, making class action impossible.

The case’s implications go beyond consumer protection, since many large companies require new employees to

agree, as a condition of employment, to resolve conflicts through arbitration, with a ban on class action. With their substantially weaker bargaining position, the potential new employees are in no position to reject the demand. As a result, *AT&T v. Conception's* logic may enable such employers to cut off the most efficient method of antidiscrimination enforcement by simply refusing to hire anyone who does not agree to waive class action remedies for future employment-related disputes.

The Supreme Court more directly limited employment discrimination class action cases in its 5-4 decision in *Wal-Mart v. Dukes*. Suing on behalf of as many as 1.5 million women employees of Wal-Mart stores around the country, the plaintiffs showed a number of common factors that affected them all. These included lower salaries than men, a workplace environment for managers that denigrates women, and a policy of allowing the male managers who were products of that toxic managerial environment to use their discretion in making employment and promotion decisions.

But rather than focus on factors the women have in common that could unite them as a class, the majority focused on the inevitable differences among such a large group of employees and ruled they could never have enough in common to form a class. With giant employers such as Wal-Mart becoming more common, this radical interpretation of class action rules threatens employees around the country. Individual employees or small groups of employees in a particular store or region are unlikely to have the resources (or job security) needed to litigate against their employer, a problem that class action was designed to solve. In addition, even if their lawsuits resolve local or even regional problems, they are unlikely to resolve the nationwide systemic causes of discrimination.

Vulnerable employees are hardly the only ones who need to worry after the Supreme Court's most recent term. Anyone taking prescription drugs or vaccinating their kids also had fewer rights at the end of the term than they did at the beginning. The case of *PLIVA v. Mensing* involved a woman seriously injured by her generic prescription drugs. She sued the manufacturer in state court over its failure to warn of risks the company knew were much greater than had been believed at the time the FDA approved its labeling. However, the Court, in another 5-4 decision, ruled that she had no right to sue because the federal requirement that generic drug labels match brand-name labels made it impossible for the generic drug maker to take action to warn people about its product. The ruling contradicts a recent Court case holding that someone can sue a brand-name drug manufacturer in state court for failure to warn, which means that an injured person's ability to sue now depends on

whether the pharmacy happened to give her brand-name of prescription drugs.

Another case involved six-month-old Hannah Bruesewitz, who developed a serious seizure disorder after getting one of her regular vaccinations. Her parents sued the drug maker, saying it could have avoided damage caused by a scientifically outmoded vaccine by fulfilling its duty under state products liability law to improve its vaccines in light of technological and scientific advancements. The Supreme Court ruled, 6-2, that such state law obligations are pre-empted by a federal law on childhood vaccinations.

While these were far from the only cases of concern last term, they typify the current Supreme Court's tendency during the *Citizens United*-era to twist the law in order to benefit the powerful at the expense of ordinary, but vulnerable, people doing ordinary things: buying cell phones, taking medicine, protecting their kids, and trying to earn enough to pay the bills.

Many people fear how this trend will manifest itself during the 2011-2012 term, which began in October 2011. In fact, the Supreme Court in January 2012 closed the courthouse door to victims of deceptive advertising for credit cards (*CompuCredit v. Greenwood*). Progressives worry that the courtroom door may be closed in similar fashion to the families of railroad employees fatally exposed to asbestos (*Kurns v. Railroad Friction Products*), the families of oil and gas workers killed on the job (*Pacific Operations v. Valladolid*), shareholders seeking to hold corporate insiders accountable (*Credit Suisse Securities v. Simmonds*), and employees wrongfully fired on the basis of disability (*Hosanna-Tabor Church v. EEOC*).

As the Supreme Court said in the landmark 1803 case of *Marbury v. Madison*, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection." The Court added: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

Marge Baker is executive vice president for policy and program at People For the American Way Foundation.

Privacy Rights: A 21st Century Update

Christopher Calabrese and Sandra Fulton

“Top Gun” is in the movie theatres. Martin Luther King, Jr. Day is first celebrated as a national holiday. Fox Broadcasting Company launches a fourth television network. Oprah Winfrey takes her show national. America’s electronic privacy laws are last updated.

What do all of these things have in common? They all happened in 1986.

1986 may or may not seem like a long time ago, but it’s been an eternity when it comes to technology. Technology has had a huge impact on the minority and civil rights communities, whether it is the digital divide, law enforcement surveillance practices that are forms of racial profiling, or the media consolidation that makes diversity in news coverage and editorial viewpoints more difficult.

In 1986 there was no “World Wide Web,” very few people carried a cell phone, almost nothing was stored in the “cloud,” and social networking was still years away. Email was just starting to come into use and large companies were starting to transmit data to other companies to perform internal functions like payroll and data processing. The Electronic Communications Privacy Act of 1986 (ECPA) was Congress’s effort to deal with these new developments. But Congress has not substantially updated the law during the intervening years despite the astounding way in which technology has transformed the world we once knew.

As society’s presence online has increased, ECPA has been stretched to cover many of the new technologies Americans enjoy. Unsurprisingly, that stretch is an uncomfortable fit for the original law and it is now substantially out of date. No one could have predicted how the Internet would evolve and how much we would eventually live our lives online. That evolution now means that more personal information about our lives

is now available to more people—friends and strangers alike—than ever before and there is very little in the law to protect individuals from those who would abuse that access. While such a lack of privacy protection affects all Americans, minority communities – already disproportionately targeted by law enforcement – face particular burdens.

Last year a Freedom of Information Act (FOIA) request from the Electronic Frontier Foundation revealed that the Department of Homeland Security (DHS) monitored social networking sites that cater to specific racial and ethnic demographics. The FOIA documents revealed that during the days leading up to President Obama’s inauguration, DHS had established centers to monitor the online African-American community site BlackPlanet for specific “items of interest,” including users’ political beliefs and key words related to race. The same FOIA also discovered that U.S. Citizenship and Immigration Services had been monitoring social networking sites including MiGente, which caters to the Latino community, to investigate citizenship petitions.

Not only has ECPA not been extended to protect us from government observation as we use social networking sites, but it also fails to protect online records and communications in areas as varied as email, cloud computing, and smart phones.

Problems with Existing Law

ECPA offers little protection for sensitive location information stored by mobile phones and telecommunications providers. Modern cell phones have become, in essence, portable tracking devices. Technologies including GPS and cell tower triangulation allow mobile phone providers to determine a user’s physical location in real time and retain records of this location information indefinitely. The legal standard for access to these records is currently being litigated and Congress

has never weighed in on what the appropriate standard should be.

Communications content online is another area of concern. Information held in the “cloud”— a general term for information held by third parties and accessed through the Internet—doesn’t receive the type of probable cause, warrant protection it would get if left in a desk drawer at home. Instead this information – including pictures on Shutterfly, documents on Google, or wall posts on Facebook— is accessible at a much lower standard. Even email—a technology that existed in 1986—needs better protection. Back then, lawmakers were unsure whether email was more like a letter or more like a phone call. Therefore, different levels of legal protection apply depending on whether it is more or less than 180 days old.

Law enforcement is taking advantage of the outdated privacy protections in ECPA and is increasingly using new technologies in investigations. Google’s semi-annual transparency report tracks government demands for the personal information (like chat records or emails) of its users. According to its most recent report covering July to December 2010, federal government agencies asked Google to disclose the personal information of its users 4,601 times (Google complied with 94 percent of these requests). If Google alone is receiving thousands of demands from the government to provide details of individuals’ online activities, many more must be going out to Verizon, Microsoft, Facebook, and the thousands of other online and telecommunications services that Americans use every day.

Racial Profiling and Weak Electronic Privacy Laws Disproportionately Impact Minority Communities

An outdated ECPA is a particular burden on minority communities. Despite the efforts of civil rights groups, the practice of racial profiling by members of law enforcement at the federal, state, and local levels remains a widespread and pervasive problem affecting African-American, Muslim, Latino, and other communities.

In August 2011, an *Associated Press* report revealed a massive surveillance department established within the New York Police Department (NYPD) after 9/11 to monitor Muslim neighborhoods and infiltrate their community organizations. According to officials involved, undercover officers were sent to investigate all parts of daily life in these communities including bookstores, bars, Internet cafes, and clubs looking for “hot spots” of “radicalization.” As part of a largely secret police program, they spied on and recorded the lives of innocent Americans without any evidence of wrongdoing.

The NYPD has long viewed the Internet as dangerous territory. In a 2009 report it said:

“The Internet plays an important role during the radicalization process.... The Internet becomes a virtual ‘echo chamber’ – acting as a radicalization accelerant while creating the path for the ultimate stage of Jihadization. In the Jihadization phase, people challenge and encourage each other’s move to action. The Internet (sic) is now a tactical resource for obtaining instructions on constructing weapons, gathering information on potential targets, and providing spiritual justification for an attack.”

It’s not known whether NYPD’s efforts to track Muslims involved government surveillance under ECPA because of the secrecy of the program. Assuming ECPA applied, however, there is no question that the outdated nature of ECPA’s protections would have allowed these activities to proceed with little transparency and judicial oversight.

Additionally, recent studies have shown that minority communities use smart phones at a significantly higher rate than the rest of the population. At the same time, the sensitive information stored in these phones has become a hot commodity for law enforcement investigations. In just one year, Sprint Nextel provided law enforcement agencies with the specific whereabouts of its customer more than 8 million times without requiring a warrant or probable cause. The company even set up a website for law enforcement agents so they could access these records from the comfort of their desks. “The tool has just really caught on fire with law enforcement,” said Paul Taylor, Sprint’s manager of electronic surveillance, in 2009. The fact that Sprint needs to employ a person with the title “manager of electronic surveillance” may go a long way toward explaining why ECPA needs updating.

Congressional Efforts to Bring Electronic Privacy Up-to-Date

Calls have already begun for Congress to update ECPA, with a particular focus on the issue of location tracking. The Digital Due Process Coalition—which includes the ACLU, the Electronic Frontier Foundation, and the American Library Association, as well as leading academics and major companies like Google, Microsoft, and Facebook – have called on Congress to increase protection of private online communications and require a warrant based on probable cause for all location tracking. The ACLU believes additional important protections for ECPA should include reporting requirements (disclosing when content and location-based searches are conducted), provisions barring the use of information collected illegally, and heightened protections for sensitive records that reveal information like reading habits or associational information.

Several members of Congress have introduced legislation to address growing concerns over online privacy. In May 2011, Senate Judiciary Committee Chairman Patrick Leahy, D. Vt., took a significant step toward updating ECPA and introduced the Electronic Communications Privacy Act Amendments Act of 2011. Additionally, Sen. Ron Wyden, D. Ore., and Rep. Jason Chaffetz, R. Utah, have introduced the Geolocational Surveillance and Privacy (GPS) Act to establish clear protections for Americans' location information. The bill would require law enforcement to obtain a warrant based on probable cause before accessing any location information. In addition to restricting law enforcement's access to personal information, these bills would also regulate the use of this information by businesses.

Conclusion

The Founding Fathers recognized that participants in a democracy need privacy for their "persons, houses, papers, and effects." That remains as true today as ever. But privacy laws have not kept up as technology has changed the way Americans hold their personal information. Outdated laws allow law enforcement to circumvent the right to privacy, probe personal communications and track an individual's whereabouts without any evidence of wrongdoing. In many circumstances, such a weak statutory scheme has a disproportionate impact on racial minorities and people who may hold unpopular beliefs. Updating privacy laws to require a warrant for access to sensitive personal information will ensure that police are following proper investigative guidelines and help to guard against profiling. It's important to update ECPA in order to maintain the robust privacy protections all Americans expect and deserve.

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Bumpy Ride on the Road to Transportation Equity

Lexer Quamie and Jeff Miller

As with many important issues in 2011, a deeply divided Congress struggled to reach agreement on a long-overdue reauthorization of the federal surface transportation law that has significant implications for the civil rights community.

The law, which establishes federal transportation policy and determines how billions of dollars are spent for roads, bridges, public transit, bicycle paths, and pedestrian walkways, was last authorized in August 2005 as the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). Congress has passed eight temporary extensions of the law since it expired in September 2009, with the current extension extending through March 2012.

The reauthorization raises a number of important civil rights issues for advocates who believe Congress should use the legislation to correct past injustices and open new avenues of opportunities for communities traditionally excluded from the decision-making process and denied the benefits of safe, affordable, and well-designed transportation systems. Throughout the nation, millions of low-income and working-class people, people of color, seniors, and people with disabilities live in communities where quality transportation options are unaffordable, unreliable or nonexistent.

Transportation and Low-Income Populations

Traditionally, critical decisions about transportation policies are made by those with resources and leverage to influence the transportation debate. It's not surprising, then, that transportation decisions and spending do not benefit all populations equitably. As a result, the negative effects of some transportation decisions—dissecting neighborhoods of low-income families and people of color, physically isolating them from needed services and businesses, and disrupting once-stable communities, among other things—are broad and lasting.

Exacerbating the effects of these decisions are the economic downturn and slow recovery, which have wreaked havoc on many of the nation's public transit systems. Since 2010, 79 percent of transit agencies have made or considered service cuts, fare increases, or both.

In Los Angeles County, for instance, massive cuts by the Metropolitan Transit Authority (MTA) have had a profound effect on low-income residents who are dependent on the bus system. MTA's bus ridership is 92 percent people of color with a median income of \$12,000.

One L.A. bus line primarily used by immigrant domestic workers to travel from their low-income neighborhoods to work in upscale neighborhoods in Beverly Hills was targeted for elimination. Alternate routes would make an already long commute even longer. The Los Angeles-based Bus Riders Union complained that the agency treats the bus lines as a "separate and unequal system" and filed a complaint with the Federal Transit Administration's (FTA) Office of Civil Rights highlighting an alleged pattern of discrimination and harm against low-income people and people of color. In its Compliance Review of LA County MTA, published in December 2011, FTA found LA County's MTA deficient in five of 12 civil rights categories. Among other things, FTA found that MTA had ignored evidence that its transit service cuts had a discriminatory impact on riders of color and had failed to analyze the cumulative effect of service changes. FTA required MTA to submit a corrective action plan describing how it will correct its civil rights deficiencies.

Transportation and Jobs

The transportation reauthorization also has the potential to help jumpstart a moribund economic recovery by creating good-paying jobs and making the movement of people and goods more efficient. According to the

Transportation Research Board, more than 14 million jobs – about 11 percent of civilian jobs in the U.S. – are transportation related. The American Public Transportation Association estimates that 36,000 jobs are created or supported for every \$1 billion invested in public transportation and that every \$1 invested in public transportation generates almost \$4 in economic benefits.

For this reason, while still awaiting long-term reauthorization of the transportation bill, civil rights advocates supported passage of S. 1769, The Rebuild American Jobs Act. The bill would provide \$50 billion in much-needed transportation investments and establish a \$10 billion national infrastructure bank to support qualified projects. Senate Republicans blocked the bill from moving forward to an up-or-down vote, however.

Transportation and Public Safety

Current transportation policy has a major impact on health and safety. The advocacy group Transportation for America reported in 2011 that nearly 70,000 U.S. highway bridges—about 12 percent of the total—are classified as “structurally deficient.” In 2007, an eight-lane bridge over the Mississippi River in Minneapolis collapsed during rush hour, killing 13 people and injuring 145.

Many communities also suffer due to transportation planning that favors drivers over pedestrians. According to “Dangerous by Design”, a report by Transportation for America, nearly 70,000 pedestrians were killed between 2000 and 2009, and nearly 700,000 were injured. Children, older adults, low-income individuals, and racial and ethnic minorities suffer from disproportionately high pedestrian fatality rates.

The pedestrian safety issue gained national attention in 2011 after Georgia prosecutors brought charges against the mother of a four-year-old boy killed by a hit-and-run driver in April 2010. Raquel Nelson, her son, A.J. Newman, and his sister were all struck by a car as they were crossing a busy four-lane road that separated their bus stop from their home. Nelson’s neighbors had long complained about the lack of signals and a crosswalk at the bus stop. Nelson, charged with second-degree vehicular homicide and jaywalking, could face a longer sentence than the driver, who received a six-month sentence despite two previous hit-and-run convictions. Nelson’s attorney is seeking to have the charges dismissed.

Roadblocks to Reauthorization

The United States has a long and growing list of transportation needs. Lawmakers, however, have been at loggerheads over the cost and length of the transportation reauthorization, hurdles made more vexing due to

lingering economic woes and strong political pressure to reduce the federal deficit. An agreement to eliminate unpopular congressional earmarks may have also been an impediment to compromise. In past reauthorizations, lawmakers’ ability to use earmarks to give funding priority to projects in their districts provided them with an added incentive to resolve differences and pass the legislation in bipartisan fashion.

Much of the funding for federal transportation projects, including public transit, comes from the Highway Trust Fund, which collects taxes on motor fuels. In recent years, however, the trust fund has failed to keep up with the need, in part because vehicles have become more fuel efficient, forcing Congress to dip into general fund revenues to make up the difference. Even so, Congress has shown little interest in raising the 18.4 cents-per-gallon gas tax, which was last increased in 1993. In fact, it took a last-minute deal when Congress passed the most recent extension of the transportation law in September to keep the gas tax from being eliminated altogether.

The Obama administration’s budget for Fiscal Year 2012 included a proposal to spend about \$556 billion over six years on transportation and infrastructure projects and outlined several policy reforms. The plan was intended to be a blueprint that Congress could use as a basis for its transportation reauthorization bill. While some Democrats working on the surface transportation re-authorization bill praised the president’s budget, the proposal didn’t receive serious consideration given its cost.

Rather, as 2011 drew to a close, House and Senate lawmakers were pursuing different visions of the transportation reauthorization.

The Senate Environment and Public Works Committee focused on a two-year reauthorization bill that would maintain current spending levels adjusted for inflation. The \$109 billion bill, however, is about \$12 billion more than the Highway Trust Fund is projected to take in, requiring Congress to make up the difference through other accounts.

In the House, Rep. John Mica, R. Fla., chairman of the Transportation and Infrastructure Committee, initially proposed a six-year reauthorization that would spend about \$230 billion. That, however, would represent about a 30 percent cut from \$286.5 billion authorized in the last transportation bill. The Republican leadership has since outlined a transportation plan that is consistent with current investments. Democrats have balked at Mica’s intention to link revenue funding to domestic energy production through the sale of new oil and gas lease rights on federal lands, plus a possible new tax

negotiated with the oil and gas industry for new leasing rights.

While Congress debated the reauthorization, the conservative drive in Congress to cut government spending in 2011 has already resulted in cuts to transportation funding. A budget deal struck in April between President Obama and congressional leaders to avoid a threatened government shutdown and fund the government through October 2011 resulted in more than \$2 billion in cuts to transportation projects and programs.

And unless Congress acts in 2012, another deficit reduction deal struck in July 2011 will result in even more cuts to transportation funding that would take effect on January 1, 2013. While the amount of the cuts to transportation has yet to be worked out, Transportation Secretary Ray LaHood believes they could be large and counterproductive. “We now face across-the-board cuts to programs that are critical to rebuilding our crumbling transportation infrastructure and putting Americans back to work,” LaHood said in November.

The most recent extension of the transportation bill gives Congress until the end of March 2012 to pass the reauthorization measure. Leaders in both parties say they are committed to meeting that deadline.

Transportation and Equity

As lawmakers consider a long-term transportation reauthorization, they will continue to hear from a wide-ranging coalition of community development, economic justice, faith-based, health, housing, environmental justice, transportation, and civil rights organizations, including The Leadership Conference on Civil and Human Rights. The Equity Caucus at Transportation for America, launched in the fall of 2009, was organized to advocate for transportation policies that advance economic and social equity in America around several principles and priorities:

- Actively enforcing civil rights protections and reforming metropolitan planning organizations to improve decision making for all communities.
- Creating affordable transportation options for every person.
- Ensuring fair access to quality jobs, workforce development, and contracting opportunities in the transportation industry.
- Promoting healthy, safe and inclusive communities by evaluating health outcomes of transportation projects and ensuring that communities have roads and sidewalks that are safe for everyone.

Transportation policy has always played a central role in the struggle for civil and human rights. Access to affordable and reliable transportation widens opportunity and is essential to addressing poverty, unemployment, and other equal opportunity goals such as access to good schools and health care services. With federal funding battles likely to continue, however, it remains to be seen whether Congress can get out of neutral and move the nation’s transportation policies forward in 2012.

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The Future of Disability Rights and Civil Rights

Mark Perriello
Commentary

Civil rights is a study in the urgency of now. Right *now*, nearly 28 percent of Americans with disabilities live in poverty. Right *now*, 16.1 percent of those people are unemployed and many more underemployed. Somewhere right *now*, a child is being born with a disability, and he or she has the same potential as other children and should have the same human rights.

Every day of my life is measured by how well and how usefully my organization, the American Association of People with Disabilities (AAPD), addresses these issues. But before looking ahead to the future of our civil rights movement, it's important to recall our past, our foundation, and the source of our goals.

America itself is a civil rights movement. Our nation is the oldest, most enduring civil and human rights movement in human history. America was born out of the belief that the existing form of government was not worthy of the governed, who could do better by themselves if given the chance to make the rules. Our founders didn't request this change—they *declared* it necessary. The civil rights movement now known as the United States of America began with an unapologetic declaration of self-determination.

It was not a fully inclusive declaration—they demanded a new government for and by White, male, property owners alone. However, full civil rights for every human being was the logical outgrowth—though in practice, winning these rights continues to be a monumental struggle. Our modern civil rights movement addresses what many among us call the great unfinished business of securing for every person what our founders demanded for the privileged few. It is work that *never* can be finished: each generation must realize its promise for every new human being who joins our civil rights movement, our America.

More than 50 million Americans with disabilities, along with our families and supporters, are continuing to work on the unfinished business of full access to American opportunity: access to education and health care; employment opportunity; economic power; and political participation.

We have a solid track record already, but there is much to be done. Our disability rights movement is grounded in the same principles that resulted in the Declaration of Independence—that people with disabilities would speak for ourselves, and that we would petition our government directly and unapologetically. One memorable example was in 1990, when members of our community hauled themselves up the steps of the U.S. Capitol to demonstrate the tangible, inexcusable barriers that stood in the way of our right to petition our government for redress. That declaration was a crucial moment in passing the Americans with Disabilities Act, a bipartisan law that would change our landscape.

Twenty-one years after the ADA was enacted, the ADA generation is graduating from college. Public buildings erected within this generation's lifetime are accessible. The ADA generation has not been blocked on their way to school by the curbs that AAPD Co-Founder Fred Fay compared to "a Berlin Wall telling me I was not welcome to travel farther than a block." This generation of Americans with disabilities is already demonstrating the value of the ADA and other civil rights laws.

Each summer, AAPD's summer internship program places talented students and recent graduates with disabilities in congressional offices, executive branch agencies, nonprofits, and corporate offices. This year's interns, drawn from all over our country, have impressive academic records that would make them top-tier candidates for any internship. By connecting them with employers and providing support, accommodations,

and mentoring, we affect many people beyond those chosen to participate. We leave an impression on hundreds of professionals who work with them, causing a ripple effect that will open doors for future applicants with disabilities.

This program makes me feel hopeful about the future, but make no mistake: Though these students are a credit to our civil rights progress, they are not the whole picture. All of our interns—who are a racially, ethnically, and geographically diverse group with a wide variety of disabilities—share one common trait: They all received an education. A high-quality education is a prerequisite to the vast majority of good jobs in our 21st century economy. For nondiscrimination laws and corporate diversity practices to be meaningful, we have to produce a pool of qualified applicants, regardless of disability.

Education is the right upon which equal opportunity depends. And yet, students with disabilities still face barriers to receiving the education that is their civil right. Bullying is rampant; more than 50 percent of students with disabilities report being bullied. Many in the education field believe that these incidents are vastly underreported, and put the figure closer to 85 percent. A child who is terrorized at school is not learning up to his or her ability – nor motivated to stay. Ending bullying is a civil rights priority.

At AAPD, we are working to eliminate bullying at its root by promoting greater inclusion, which leads to mutual understanding. This year, we are taking that work a step further and developing educational tools directly targeted at ending bullying. We're also sharing a message with our civil rights allies: Children with disabilities have to be a part of any conversation about the environment in our schools.

Access to education requires thoughtful, robust engagement in policymaking as well. AAPD is proud of our long association with The Leadership Conference on Civil and Human Rights, which occupies a unique position in the education advocacy field. The Leadership Conference brings together a wide spectrum of people who are working on access to education: experts, reformers, educators, traditional civil rights groups. Though this field is often seen as contentious, the fact is that every member of this coalition shares a common goal: to serve America's students. The genius of The Leadership Conference is that it consistently fights to keep that common ground in the forefront, not letting anyone exploit divisions to thwart progress for our nation's children. Education is not a partisan issue; it's not a left- or right-wing issue. It's the logical continuation of the bipartisan effort to enact the ADA, and an important part of our work ahead.

Even those people with disabilities who receive a high-quality education face unacceptable barriers to employment—barriers that directly contribute to the abysmal employment numbers that the Census Bureau released this fall. Programs like Social Security Disability Insurance (SSDI) and Medicaid, which are lifelines to millions of Americans with disabilities, also prevent many of us from realizing our potential. The system shows a bias toward institutionalization over life in the community. There are waiting lists for cost-effective services that enable people to be active, contributing members of society. The system also forces many people to prove that they *cannot* work in order to be eligible for necessary medical and personal care services. I personally know several ambitious, talented college graduates with disabilities who cannot accept offers of employment because if they did so, they would lose the services they need to live and remain mobile. We must fight for a safety net that allows people to move upward in society—not one that keeps them down.

To make an impact on policymaking, our community has to show our power. Voting is the most significant way that Americans of all backgrounds exercise their power and affect change. All voting places and technologies must be fully accessible to people with disabilities. AAPD's voting project, in coalition with state and local organizations and a nationwide grassroots network, is committed to ensuring accessibility. The recent rash of voter identification laws have a disproportionate impact on Americans with disabilities, many of whom lack driver's licenses or require assistance with registration. We stand with the greater civil rights community in our commitment to ensure that every eligible voter is able to cast his or her ballot in 2012.

Improving education, securing employment opportunity, and protecting the right to vote are massive undertakings in themselves, and we have many other things to do. Some might doubt that we could take all of this on in today's economic climate, with confidence in our government quite low and people with disabilities disproportionately affected by these tough times. I disagree.

AAPD already has a strong position in Washington, D.C. policy-making circles. We are heard in Congress, in the executive branch, and among our civil rights allies. The ADA Amendments Act, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, and the 21st Century Communications and Video Accessibility Act are three examples of what we and this coalition can accomplish. AAPD's position in Washington is a testament to the genius of AAPD's past president, Andy Imparato, to whom I owe an enormous debt of gratitude.

As the other great civil rights movements have shown us, our community's true power lies beyond Washington, with real people who are making a difference in their workplaces, PTAs, places of worship, schools, and neighborhoods. Our challenge is to build a platform from which all people with disabilities can exercise our political power *as a community*. AAPD's job is to build a vehicle for people to participate together, and a conduit for swift, decisive, unapologetic demands for justice.

We are building the tools to do this. They include an increased focus on state-level work in concert with our allies on the ground; online resources to learn about and act on the critical issues; networks of people with disabilities and our supporters in colleges and universities; a media presence that puts real human stories front and center in national policy discussions; and finally, our participation in The Leadership Conference, which has played a key role in our past accomplishments and which I see as crucial to what we have yet to do.

Mark Perriello is the president and CEO of the American Association of People with Disabilities, the country's largest cross-disability membership organization.

Racial Profiling 10 Years after 9/11

Lexer Quamie

On December 19, 2010, Rep. Peter King, R. N.Y., chairman of the House Committee on Homeland Security, announced that the committee would hold a series of hearings on the “radicalization of the American Muslim community” when the 112th Congress convened in January 2011. King said that he was holding the hearings because he believed that there is a disconnect between “outstanding Muslims” and those leaders who “acquiesce in terror.”

King’s announcement came as the nation was preparing to mark 10 years since the terrorist attacks of 9/11 and as Congress was once again considering legislation that would ban the use of racial profiling. His announcement prompted strong criticism from many sectors, including the civil and human rights community, which insisted that singling out the Muslim community would only fuel anti-Muslim sentiment. In a February 1 letter to House Speaker John Boehner, R. Ohio, and House Minority Leader Nancy Pelosi, D. Calif., signed by more than 50 national organizations, the advocacy group Muslim Advocates stated:

“Providing a public, government platform for these erroneous and offensive views has consequences. The American public takes cues from government officials. These hearings will almost certainly increase widespread suspicion and mistrust of the American Muslim community and stoke anti-Muslim sentiment. . . . Furthermore, a hearing that demonizes the American Muslim community will not go unnoticed by Muslims around the world and will contribute to perceptions of how the U.S. government treats Muslims. Equal treatment and respect for all faiths are among our nation’s greatest strengths and are essential to a free and just society.”

Many civil and human rights organizations urged King to either cancel the hearings or reframe them to

address the issue of domestic terrorism more broadly and accurately. In a February 4 letter to King, The Leadership Conference on Civil and Human Rights said that the hearing, as initially conceived, would do a “disservice to the seriousness of the topic of ‘domestic terrorism.’” Rather, The Leadership Conference urged, “Any congressional inquiry should be broad in scope to include all forms of domestic terror threats, and it should include violence motivated by all extremist beliefs. We should strive to identify terrorists by their behavior rather than by their religion, race, or ethnicity,”

For his part, King seemed undaunted by the criticism, insisting in a February 8 letter to Rep. Bennie Thompson, D. Miss. — who had asked him to broaden the scope of the hearings — that the “committee will continue to examine the threat of Islamic radicalization, and I will not allow political correctness to obscure a real and dangerous threat to the safety and security of the citizens of the United States.”

King held the first of his hearings as planned on March 10. Those attending agreed that the most moving moment of the hearing was provided by Rep. Keith Ellison, D. Minn., the first Muslim American elected to Congress, who eloquently explained why the hearing was unfair and would do nothing to help keep the United States safe:

“It is true that specific individuals, including some who are Muslims, are violent extremists. However, these are individuals – but not entire communities. Individuals like Anwar Al-Aulaqi, Faisal Shazad, and Nidal Hasan do not represent the Muslim American community. When their violent actions are associated with an entire community, then blame is assigned to a whole group. This is the very heart of stereotyping and scapegoating, which is counter-productive.

This point is at the heart of my testimony today. Ascribing the evil acts of a few individuals to an entire community is wrong; it is ineffective; and it risks making our country less secure.”

King’s subsequent hearings focused on such topics as whether Muslims were being “radicalized” in prisons, and whether terrorists were targeting U.S. military personnel on American soil. For civil and human rights activists, the King hearings represented just the latest high-profile example of how our national consensus about the unjust and ineffective nature of racial and ethnic profiling has eroded in the 10 years since the terrorist attacks of September 11, 2001.

The drive to end racial profiling is aimed primarily at law enforcement activities that are premised on the erroneous assumption that individuals of a particular race, ethnicity, national origin, or religion are more likely to engage in certain types of unlawful conduct than are individuals of another race, ethnicity, national origin, or religion. In the months preceding September 11, a national consensus had developed on the need to end racial profiling. President George W. Bush, in his February 27, 2001, address to a Joint Session of Congress, said that racial profiling is “wrong, and we will end it in America.” He went on to make the point that ending racial profiling “will not hinder the work of our nation’s brave police officers. They protect us every day -- often at great risk. But by stopping the abuses of a few, we will add to the public confidence our police officers earn and deserve.” Attorney General John Ashcroft also publicly condemned profiling, stating that federal and local police agencies must do more to wipe out the practice of targeting minorities for arrest or traffic stops, declaring that there should be “no crime for driving while black or driving while Hispanic.”

On June 6, 2001, Sen. Russell Feingold, D. Wis., and Rep. John Conyers, D. Mich., introduced the bipartisan End Racial Profiling Act of 2001. Its enactment seemed imminent.

But as The Leadership Conference noted in its report entitled, “Restoring a National Consensus: The Need to End Racial Profiling in America:”

“[O]n September 11, 2001, everything changed. The 19 men who hijacked airplanes to carry out the attacks on the World Trade Center and the Pentagon were Arabs from Muslim countries. The federal government immediately focused massive investigative resources and law enforcement attention on Arabs and Muslims—and in some cases on individuals who were perceived to be, but in fact were not, Arabs or Muslims, such as

Sikhs and other South Asians. In the years that followed, the federal government undertook various initiatives in an effort to protect the nation against terrorism. The federal government claimed that these counterterrorism initiatives did not constitute racial profiling, but the actions taken—from the singling out of Arabs and Muslims in the United States for questioning and detention to the selective application of immigration laws to nationals of Arab and Muslim countries—belie this claim.”

The Leadership Conference report, released the week of the first of King’s hearings, documents how the use of racial profiling has expanded in the context of counterterrorism; fighting drug trafficking and other “street-level” crimes; and in efforts to enforce immigration laws. It makes a number of policy recommendations, including enactment of the End Racial Profiling Act. Congress introduced the End Racial Profiling Act of 2011 at the end of the year. While the prospect of its passage in the 112th Congress is slim, it remains a top priority of the civil and human rights community.

Acknowledging the divisions among groups and political fault lines in the public debate, civil and human rights activists observed that the 10th anniversary of the terrorist attacks of 9/11 nonetheless represented a real opportunity for the United States to reflect and rededicate itself to fairness, due process, and ending profiling. In a statement of principles issued to coincide with the anniversary, more than 70 national civil rights, human rights, civil liberties, Muslim, Jewish, and South Asian groups said:

“Effective counterterrorism is important to everyone, but policies that divide communities, inflame fear and violate human rights undermine our nation’s core values and our security. Some counterterrorism measures have resulted in insufficient adherence to constitutional protections and violations of human rights. Moreover, debates on issues such as border security have often fanned public fear and contributed to an atmosphere that fostered distrust, racial profiling and even hate violence. Too often, even well-intentioned public officials have exacerbated fears and misunderstandings. Indeed, some government policies enacted in haste after 9/11 have had discriminatory effects and singled out entire groups as targets of suspicion. This has left some in our communities feeling vulnerable and unsafe in their homes, at their workplaces, at religious gatherings, and in public spaces. This has been the case especially for immigrants, Muslims, Sikhs, South Asians, and Arabs.

Left unaddressed, these conditions threaten to undermine efforts to promote safety and security. We know from experience that America's historic commitment to civil and human rights is not an impediment to public safety but rather offers a more enduring and effective approach by ensuring that all communities are not alienated or scapegoated."

As Wade Henderson, president and CEO of The Leadership Conference has noted, while combating terrorism is important, it must be done so "without casting blame or suspicion or alienating any particular community. This means crafting national policies and partnerships with law enforcement that are based on our common American values such as respect for diversity, fairness and tolerance and fundamental civil and human rights."

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The Fight for Job Creation and the Path to Shared Prosperity

Avril Lighty

Low-income families continued to face a broad array of challenges in 2011, from a decline in quality jobs to persistent high unemployment. Many economists, civil rights organizations, and advocates for low-income families argued that revenue increases and investments to create jobs and spur economic growth now would be far preferable to years of continued sluggish job growth and high unemployment. But protracted congressional debates over the debt ceiling and deficit reduction provided little encouragement for Americans struggling to make ends meet.

While the White House's comprehensive job creation legislation struggled to gain traction in Congress, a late-summer protest in a New York City park called Occupy Wall Street sparked a national grassroots movement that brought renewed attention to income inequality and the problems of people at the bottom "99 percent" of the income scale. In the fall, civil rights and anti-poverty advocates unveiled a comprehensive roadmap designed to cut poverty in half while increasing economic security over the next decade. As the first session of the 112th Congress came to a close, however, major policy fights brewed over an extension of long-term unemployment benefits and a payroll tax cut.

Poverty and Unemployment in the U.S.

More than two years after the recession officially ended in June 2009, unemployment remains high, job growth is stagnant, and millions of Americans are living in poverty.

The number of people living in poverty has risen by nearly nine million since the start of the Great Recession in 2007. The latest census data revealed that in 2010, 46.2 million people were living in poverty, the most since the Census Bureau began tracking poverty 52 years ago. The poverty rate of 15.1 percent is the highest it's been since 1993. More than one in five children

nationally lived in poverty. And the share of Americans in deep poverty – with incomes below half of the poverty line – also reached an all-time high.

One-quarter of all jobs in the U.S. don't pay enough to support a family of four, according to the National Employment Law Project (NELP). Today's federal minimum wage of \$7.25 an hour would need to be at least \$10.34 an hour to have the same purchasing power it had 40 years ago. Yet median incomes declined by 2.3 percent in 2010 and almost three million more Americans fell below the official poverty line – defined as an annual income below \$22,314 for a family of four.

The nation's most vulnerable communities have been hit the hardest. The median wealth of an average White family in 2009 was 20 times greater than that of the average Black family, and 18 times greater than for an average Latino family. That's the largest wealth gap recorded since the government began collecting the data a quarter of a century ago, and twice what it was before the start of the Great Recession.

In 2011, the unemployment rate hovered around 9 percent before falling to 8.6 percent in November, a drop primarily attributed to a reduction in people actively seeking work. While the sluggish economic recovery generated some job growth, almost half of new jobs have been in low-wage industries, while higher-wage industries have accounted for only 14 percent of recent growth, according to NELP.

Anti-poverty advocates argue that the best way to address wealth inequality and child poverty is to create jobs that provide decent wages, benefits, and a pathway out of poverty for heads of households. "We know that poverty diminishes children's success in school, and more recent evidence confirms that it can even dampen their earnings as adults," Erica Williams of the Center

on Budget and Policy Priorities (CBPP) wrote in an analysis of child poverty. “The rising share of children growing up in poverty undermines one of the key ingredients to a strong economy and shared prosperity: our human capital.”

Congressional Efforts Fall Short

Millions more Americans would have fallen into poverty or become uninsured due to the economic decline if not for programs such as unemployment insurance, food stamps, the Earned Income Tax Credit (EITC), and Medicaid. Analysis from the CBPP shows that just seven provisions for low-income families in the 2009 American Recovery and Reinvestment Act kept more than six million Americans out of poverty in 2009.

At the end of 2010, the lame duck 111th Congress extended federal unemployment benefits for one year while approving a two-year extension of Bush tax cuts, which disproportionately benefit the wealthy. Congress also approved a one-year cut the payroll tax paid by all workers that funds Social Security.

In 2011, however, a newly emboldened House Republican majority announced budget plans that took aim at domestic program funding as a way to reduce the federal deficit. Republicans – backed by the conservative tea party movement – resisted numerous proposals to balance program cuts with revenue increases, which they opposed. This led to several proposals seeking draconian cuts to government programs that provide a safety net for struggling middle- and low-income families.

The aggressive focus on cutting government spending forced civil rights groups and advocates for low-income families to defend existing social safety net programs. The Coalition for Human Needs, for instance, rallied national and local advocacy groups, service providers, faith-based organizations and others to join the SAVE (Strengthening American’s Values and Economy) for All coalition, which worked throughout the year to counter attacks on Medicare, Medicaid, Social Security, Head Start and other critical programs.

Those attacks were especially fierce from the political right wing, which argued that helping low-income families not only undermined job growth but was unnecessary. The Heritage Foundation, for instance, released a report relying on old, pre-2007 data, which focused on the types of appliances in low-income households – everyday items such as refrigerators, air conditioners and microwave ovens – as if these were items of luxury.

Low-income advocates fought back. Half in Ten—a joint project of the Coalition on Human Needs, the Center for American Progress, and The Leadership

Conference—noting the rising costs of such real basics as child care and out-of-pocket medical costs, began highlighting the stories of everyday Americans living in poverty and how social programs help them survive. In June, leading up to the 10-year anniversary of the 2001 Bush tax cuts, Half in Ten released an interactive map documenting testimonies of Americans affected by programs under siege in the deficit-reduction debate. The map, entitled “Road to Shared Prosperity,” pairs data on each state’s economic situation with personal stories like those of Rep. Gwen Moore, D. Wis.:

“I was poor ... I was eligible for welfare and I was also able to continue my education and receive Aid to Families with Dependent Children to prepare myself for a work career. So yes I received food stamps, yes I received welfare, but I’ve paid so much more back in taxes to the United States of America than I ever took and have made a contribution to my community.”

In July, Congress and the White House reached a deal that permitted the statutory debt ceiling to be increased in exchange for \$1 trillion in spending cuts over 10 years with no additional revenues. The deal also omitted any additional help for the unemployed or the economy in general.

The deal also stipulated the creation of a bipartisan Joint Select Committee on Deficit Reduction, also known as the “super committee,” which was charged with finding another \$1.2 trillion in deficit reduction. Civil rights groups and advocates for low-income Americans feared that essential safety net and opportunity programs, including food stamps, Supplemental Security Income, education, Head Start, child care, jobs programs, environmental protections, low-income housing, and unemployment compensation – would be sacrificed in the negotiations. But the supercommittee failed to reach agreement, an outcome many advocates cheered. “Simply put, no deal is better for America than a bad deal,” said Nancy Zirkin, executive vice president of The Leadership Conference.

A Path to Prosperity

With the budget debate behind him, in September, President Obama proposed the American Jobs Act, a comprehensive legislative initiative designed to put people back to work and strengthen the economy. The Leadership Conference and its coalition partners strongly supported the bill. After the Act stalled due to congressional obstruction, lawmakers supportive of the president’s agenda sought to move discrete pieces of the package as separate legislation. Only one piece passed Congress, however, and in November, Congress passed and the president signed the VOW to Hire Heroes Act,

which focused specifically on job creation for veterans.

The Brookings Institute estimates that by mid-decade, the aftermath of the Great Recession will drive an additional 10 million people into poverty, six million of them children. The Leadership Conference and other advocates for low-income communities argue that the nation can have a different outcome if it summons the political will to deal forthrightly with the issue. That is a key conclusion of a new Half in Ten report, “Restoring Shared Prosperity: Strategies to Cut Poverty and Expand Economic Growth,” which starts the campaign’s clock on the goal of cutting poverty in half in ten years and establishes metrics to track the nation’s progress in creating good jobs, strengthening families and communities, and ensuring economic security. The report details policy recommendations to ensure pathways out of poverty for millions of Americans, such as creating more decent-wage jobs, investing in nutrition assistance programs, supplying sufficient affordable housing units, expanding child-care assistance, and other foundational supports for American families.

In the near term, prospects for such relief look uncertain. Congress will be starting the 2012 session having nearly shut down the government over a standoff between lawmakers on extensions of the payroll tax cut and emergency unemployment benefits. But as Secretary of Labor Hilda Solis has observed, many Americans have grown weary of congressional gridlock. “Americans are frustrated that one political party is blocking progress on the single most important thing we can do to fight poverty: create more jobs,” said Solis at the October 26 launch event for the Half in Ten report. “At Half in Ten, you’re right that we can’t separate the poverty discussion from the discussion about economic opportunity. Good jobs are the single best solution to poverty.”

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Legislative Updates

Avril Lighty

“Don’t Ask Don’t Tell” Repeal

President Obama signed a law repealing the military’s “Don’t Ask, Don’t Tell” policy (DADT) on December 22, 2010. The policy had prohibited openly gay and lesbian people from serving in the armed forces. The law repealing DADT specified that repeal would not take effect until 60 days after the president, the secretary of defense and the chair of the Joint Chiefs of Staff certified that eliminating the policy would not diminish combat readiness. The certification was made on July 22, 2011, and set the date for the official end of the policy for September 20.

Since the policy was established in 1993, more than 13,000 men and women had been expelled from the military because of their sexual orientation. Civil and human rights organizations had opposed the policy, arguing that DADT turned its back on the principle that people who are willing and able to do a job should be given a fair opportunity to do it. At the same time, according to civil and human rights advocates, DADT also ignored decades of evidence, including the examples of military forces in many other countries, and even many compelling individual cases in the U.S. armed forces, which clearly showed that gays and lesbians could serve openly and honorably in the military.

Judicial Nominations

Federal judicial vacancies remained high due to the Senate’s failure to overcome the obstructionist tactics of the minority party, which continued to threaten filibusters and use anonymous “holds” to delay or prevent confirmation votes. In 2011, the Senate confirmed only 62 of President Obama’s nominees, and left for its end-of-year recess without taking votes on 19 nominees – all but one of whom had no opposition or only token opposition in the Judiciary Committee.

The slow pace of nominations is affecting millions of

people across the country for whom justice delayed is justice denied. As of December 31, 2011, there were 103 current or future vacancies on the federal bench, including 32 deemed to be “judicial emergencies” by the Administrative Office of the U.S. Courts due to excessive caseloads or exceptionally long vacancies. There are still 47 nominees pending in the Senate, although more than half of them (25) have passed through the Judiciary Committee and are waiting for a floor vote.

Three high-profile nominees the civil and human rights coalition supported in 2011 were Edward Chen, Goodwin Liu, and Caitlin Halligan.

On May 10, the Senate voted to confirm Chen’s nomination to the U.S. District Court for the Northern District of California. Chen had served as a U.S. magistrate judge for 10 years. He was first nominated to the court on August 7, 2009, and voted out of the Senate Judiciary Committee two months later. However, due to an unprecedented level of obstruction, Chen’s nomination languished for nearly two years, forcing Obama to renominate him three times.

Liu, an acclaimed scholar, was nominated by Obama for a seat on the U.S. Court of Appeals for the Ninth Circuit on February 24, 2010, and the Senate Judiciary Committee first approved his nomination on May 13, 2010. Liu’s nomination languished for more than a year and was voted out of committee for the third time on April 8, 2011, but a Republican-led filibuster in May denied him a full vote in the Senate. Given the unprecedented level of obstruction to his nomination, Liu withdrew his name from consideration on May 25, 2011. In July 2011, California Governor Jerry Brown nominated Liu to a seat on the California Supreme Court, and three months later, on August 31, 2011, the state Commission on Judicial Appointments voted unanimously to confirm him.

Halligan's nomination to the U.S. Court of Appeals for the D.C. Circuit was blocked by Republicans on December 6, 2011. Halligan had been nominated by Obama in September 2010, and approved by the Senate Judiciary Committee in March 2011 on a 10-8 party-line vote. In addition to the backing of the civil rights coalition, Halligan, a former solicitor general for New York, had received endorsements from former Bush nominee to the D.C. Circuit, Miguel Estrada, the National Conference of Women's Bar Associations, the National District Attorneys Association, the New York Association of Chiefs of Police, and the New York State Sheriffs Association. The obstruction has left the D.C. Circuit, widely regarded as the second most important court in the United States after the U.S. Supreme Court, operating with only 75 percent of its judgeships filled.

Health Care Reform

Minutes after Obama signed the Affordable Care Act into law in March of 2010, the first challenge to the law's constitutionality was filed in federal court. Since then, more than two dozen challenges have been filed, with only one appellate court—the U.S. Court of Appeals for the 11th Circuit—declaring the individual mandate (the requirement to purchase health insurance) unconstitutional, while upholding the remainder of the law. That case, which has been filed by 26 states and a business group, has been accepted for review by the U.S. Supreme Court this term.

The Court said it would hear arguments on four questions:

- Is it constitutional to require Americans to buy health insurance by 2014 or pay a penalty if they don't?
- If the requirement to buy insurance is unconstitutional, is the whole law unconstitutional?
- Can Congress demand that states expand Medicaid by threatening to withhold federal funding?
- Is the requirement to pay a penalty a tax, and therefore not subject to challenge until someone is required to pay it?

The Court will hear five and one-half hours of oral arguments in the spring of 2012 and a decision is expected before the term ends in June 2012.

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