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Trump has opportunity to restore balance in fair lending cases

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By Paul Hancock

With good cause, anxiety has been expressed regarding the direction of the Department of Justice's civil rights division under the Trump administration.

Unfortunately, the past 16 years have seen the pendulum fly first to lax civil rights enforcement and improper politicization of the division under the Bush administration, and then to overreaching under the Obama administration. Trump administration officials would be wise to seek a balance. To get there, guidance is available from the division's longer-range history — including during years that might not seem obvious, like under the Reagan administration. Balance would benefit both the nation and the future of the division.

The Bush administration is remembered for lax civil rights enforcement, misguided priorities and an undue (perhaps unlawful) politicization of the division. Enforcement narrowed as compared to the Clinton administration. Efforts often focused on protecting the rights of white individuals, which certainly was not the national problem that required the enactment of civil rights laws. Efforts to protect African-Americans slowed noticeably.

Clashes between the division's political appointees and career staff had not been uncommon in the division's history (such as over school desegregation "busing" plans in the Nixon administration), but they became severe under President Bush. The Bush team reacted by driving partisan politics down the division's ranks. This caused an unprecedented investigation and scathing report in 2008 from the DOJ's inspector general, concluding that officials had "used political or ideological affiliations in assessing applicants for career positions" and that similar improper considerations provided the bases for "attorney transfers and attorney case assignments."

The Obama administration prioritized a correction with a vengeance. Officials boasted about filing more lawsuits than the Bush and Clinton administrations combined. Attorneys formerly employed by liberal advocacy groups joined the division. Unfortunately, leaders gave insufficient consideration to Supreme Court guidance and used "statistical shortcuts" long rejected by the division, even during prior Democratic administrations. The result: significant overreach.

The new approach relied heavily, sometimes solely, on statistical differences in racial outcomes to justify lawsuits, claiming no legal obligation to prove statistical differences were caused by discriminatory treatment, and largely ignoring limitations established by the Supreme Court. In lending discrimination actions, for example, the division regularly cited employee "discretion" as unlawful, notwithstanding Supreme Court precedent that discretion "is a very common and presumptively reasonable way of doing business" and "should itself raise no inference of discriminatory conduct." The lawsuits even sought to hold companies liable for actions of independent third parties; without suing car dealers, the division attached

liability to banks that funded auto loans, citing fees that independent dealers charged customers, even though the banks neither set the fees nor knew the race of the car buyers (they are prohibited from asking).

Another example of overreach is the explosive application of "redlining" claims. This morphed far beyond the original invidious practice of drawing a "red line" to exclude minority neighborhoods from a business plan. The Obama team challenged banks simply because they did not distribute loans between minority and nonminority neighborhood in the same proportion as the aggregate of all other lenders. By definition, this means approximately one-half of lenders are always "redlining."

So, how should the Trump administration address this morass? The simplistic answer is to avoid the extreme swings of the last 16 years. Each new administration is entitled to its policies, but it should aggressively enforce all civil rights laws, faithful to the intent of Congress and the interpretations of the Supreme Court. The division cannot be a pawn of the right or left wing.

Obviously, the new administration should avoid the pitfalls of the Bush administration. That starts with a commitment to fair enforcement, as well as placing trust in the nonpolitical career attorneys.

The Obama administration's overreach also warrants reconsideration. Civil rights lawsuits are not notches in a belt: The number of filings is not nearly as important as the quality of the filings. The Obama administration's enforcement policies were often rooted in a demand for equal racial outcomes, balances or quotas. This contradicts the congressional design of civil rights legislation and promotes the consideration of the very factors — e.g., race — that should be absent from decision-making. A requirement that banks distribute loans between minority and non-minority communities in the same proportion is accurately labeled "social engineering" and the message "attain required quotas to avoid a lawsuit" itself violates anti-discrimination law. The Trump administration should encourage proactive fair treatment to make nondiscrimination a reality, and quotas detract from, rather than aid, such efforts.

During the Clinton years, I directed the division's fair-lending enforcement program, and a leading banker provided sage advice to Attorney General Janet Reno with a statement that was something like this: "We applaud your efforts to challenge lending discrimination, but only ask that you make sure you are right before you file, since the reputational damage that you will inflict far outweighs any monetary relief." The Obama administration's approach was closer to "shoot first and consider proof of discrimination later."

Trump officials should revive the division's foundational approach of developing strong factual proof before filing any lawsuit. John Doar, the division's esteemed leader under Presidents Kennedy and Johnson, established this method and it was taught to subsequent generations of division lawyers. Early voting rights and desegregation lawsuits might appear "easy" in a rearview mirror, but the division went to great lengths in examining records and interviewing witnesses to prove that election officials treated black applicants for voter registration less favorably than white applicants. Challenges to school segregation were never viewed as slam dunks. Statistical disparities were not irrelevant, but they were viewed as providing only the start — and not the end — of the proof. The division frequently lost in the lower courts and prevailed on appeal only due to the strength of the record evidence.

Unexpected guidance comes from the division's history during the Reagan years. Then (as now) advocates envisioned enforcement screeching to a halt under President Reagan,

particularly when he selected William Bradford Reynolds to lead the division. Reynolds filled designated political positions with conservative officials, who promoted a backslide in some areas, but he also was willing to consider the views of career staff on enforcement decisions. He welcomed principled debate. Many involved, like myself, would say, “I won some, and I lost some.” I may have disagreed with certain decisions, but I was never blocked from stating my position.

Reynolds established some unexpected collaborations across party lines, such as with the Rev. Jesse Jackson. At Jackson’s request, Reynolds and division personnel (including myself) visited Mississippi Delta counties to hear the concerns of African-Americans on voting issues. In private, between stops at churches, Reynolds and Jackson argued about affirmative action, but the public immersion led Reynolds to reject the racially discriminatory Mississippi redistricting plans.

Reynolds also rejected the discriminatory congressional districting plan that the Georgia Legislature adopted following the 1980 Census. In the bare-knuckle lawsuit, the division aligned with state legislators, from different political parties, to fight for a racially fair plan – including Republican Paul Coverdale, who later became a U.S. senator (and is the namesake of the tax advantaged college saving plan), and Democrat Julian Bond, who later became leader of the National Association for the Advancement of Colored People and president of the Southern Poverty Law Center. The division’s career lawyers prevailed, and the revised plan led to the election of Rep. John Lewis, who remains the area’s congressman to date.

At Reynolds’ direction, the division aggressively litigated, together with the NAACP, a contentious housing discrimination lawsuit against Yonkers, N.Y. The struggle became the subject of Lisa Belkin’s book “Show Me a Hero: A Tale of Murder, Suicide, Race, and Redemption,” which was made into an HBO miniseries. Also during this Republican era, Congress enacted landmark civil rights legislation, including the Fair Housing Amendments Act and the Americans with Disabilities Act. And the first major fair-lending lawsuit was filed. This chapter of the division’s history was not dispute-free, but today we can only remember a time when Democrats and Republicans collaborated on anything.

The best course for the Trump administration calls for fair, objective and nonpartisan enforcement of civil rights laws, guided by Supreme Court decisions. Legal violations should be proved, not presumed, and officials should have no concern with “discretion” by businesses, unless they can prove that discretion is exercised on a discriminatory basis (which is a claim of intentional discrimination). Attorneys should take no shortcuts and develop the facts before filing a lawsuit. Mere differences in racial outcomes — or failures to meet racial quotas — should not suffice. Criticism from both sides may indicate that officials are doing their job properly, and we may experience a more productive civil rights enforcement program than we have seen in many years.

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