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Welcome Remarks: Overview of Title VII

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Employment Discrimination:

45 Years of Enforcement of Title VII of the Civil Rights Act of 1964

Welcome Remarks:

Overview of Title VII

BEGIN TRANSCRIPT

RICHARD UGELOW: My name is Richard Ugelow. I teach in the clinical program at the [Washington College of Law] ("WCL"). In my prior life, I was an attorney in the Employment Litigation Section ("ELS") of the Civil Rights Division [at the Department of Justice ("DOJ")]. Let me thank you all for coming today to celebrate and review forty-five years of enforcement of Title VII of the 1964 Civil Rights Act by the Department of Justice ("DOJ").[1] A special thank you to the Dean of the Law School, [Claudio] Grossman, who will be here later and to the [Program on Law & Government] who kindly sponsored today's program.

Title VII of the 1964 Civil Rights Act prohibits discrimination in employment on the basis of race, sex, religion, and national origin.[2] As originally enacted by Congress, judicial enforcement authority was the exclusive responsibility of the [DOJ]. Within the [DOJ], that authority was given to the Civil Rights Division and ultimately what became the Employment Section, the Federal Enforcement Section, and now today the [ELS].

Following the 1972 amendments to Title VII, which expanded the scope and coverage of Title VII, enforcement authority was divided between the Equal Employment Opportunity Commission ("EEOC") and the [DOJ].[3] The

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

2. 42 U.S.C. §§ 2000e–2000e-15 (2006).

3. Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e (2006)).

EEOC was given enforcement authority against private sector employers and the [DOJ] responsibility against public sector employers. Today's program is devoted to the [DOJ]'s enforcement of Title VII.

In his recent State of the Union address, President Obama recognized the Civil Rights Division, and, in particular, he recognized the important work [performed by] the [ELS]. That work is indeed important and that's what makes today's program important as well.

The [ELS] litigated seminal employment discrimination cases and has a distinguished record of achievement. Several of those cases will be discussed today by the people who worked on them. The work of the Section, unfortunately, [has become] controversial in recent years—and not just in the last eight years. Politically charged terms such as: "affirmative action," "hiring goals," "hiring quotas," "lowering qualifications for employment," "racial preferences," and the like became public and part of the public discourse. The speakers today will discuss those terms. And if they don't, I hope the audience will ask questions about them.

Let me give you an overview of today's program. The first speaker will be my colleague, Susan Carle, who will provide an overview of Title VII. Professor Carle is also an alumnus of the Appellate Section of the Civil Rights Division. Following Professor Carle, Professor Vicki Schultz of Yale [Law School], and an alumna of the [ELS] will interview Dave Rose. Dave was the first chief of the [ELS] and a mentor and teacher to many of us. Dave will discuss the origins of the [ELS] and the creation of a litigation strategy to the development of Title VII law.

Following Professor Schultz's interview of [Mr. Rose], the first panel consisting of employment litigation attorneys that litigated the early Title VII cases will discuss those cases and their impact of desegregating jobs, industries, and unions in the United States. This panel will also discuss the Supreme Court's decision in *Griggs v. Duke Power Co*., which recognized the disparate impact theory of Title VII liability.[4] As we will see today, disparate impact litigation brought by the [DOJ] was the major vehicle for effecting workforce change.

The second panel will discuss the uniform guidelines on employee selection procedures which were developed following the *Griggs* decision and the cases brought to enforce Title VII against state and local governments, particularly police and fire departments. This panel includes former [ELS attorneys] and non-attorneys who were critical to the enforcement effort.

Finally, the last panel led by WCL Professor Bill Yeomans, also a Civil Rights Division alumnus and . . . my colleague here, will discuss the future of Title VII. This distinguished panel consists of former ELS attorneys including Aaron Schuham, Bob Liven, Professor Mike Selmi of George Washington University [Law School], and current ELS Chief John Gadzichowski. We are honored that Tom Perez, the current Assistant Attorney General for the Civil Rights Division will be our lunch time speaker.

I also want to note the presence of Jim Turner. Jim was the career Deputy Assistant Attorney General for the Civil Rights Division for more than thirty

4. 401 U.S. 424 (1971).

years. He served as the acting Assistant Attorney General for the Civil Rights Division when the position of the Assistant Attorney General was vacant. [I] believe, in that capacity [he] served as the longest Assistant Attorney General in the Civil Rights Division.

Finally, I want to recognize Loretta King, a WCL graduate, who succeeded Jim Turner as the career Deputy Assistant Attorney General for Civil Rights. If she's not here, she will be here later. I would like to mention two other [ELS] alumni, Ray Lohier, a recent alumnus of the Section, last week was recommended by Senator Schumer of New York to be nominated as a Judge on the United States Court of Appeals for the Second Circuit. Ray left ELS for the U.S. Attorney's Office in the Southern District of New York. And I might add that his wife is a clinical law professor at the City University of New York Law School.

The second person is David Lopez. David is awaiting Senate confirmation as General Counsel to the [EEOC]. He would've been here today had he been confirmed. He promised me a future visit to the law school.

I am going to try to be a good moderator, just [and] fair as Dave Rose taught me. One of my goals is to leave time for questions at the end of each segment. Since I know everyone on the panels and I know that they are never at a loss for words, I face a stiff challenge, but I will do my best. So let's begin with the history of Title VII with Professor Carle. Thank you very much.

SUSAN CARLE: Thank you, Richard. Before I start I just wanted to take the opportunity today to say how lucky I feel we are at Washington College of Law that Richard has joined us here. I first met him when I was a brand new lawyer in the Civil Rights Division longer ago than either of us wants to admit. And he was the Deputy Section Chief of the ELS and just a terrific person. He served as an informal mentor to a lot of junior people. Mike Selmi who will be here a little later was another contemporary of mine, and I think he would agree with me that Richard was a really inspiring role model in his fairness, and the care and precision that he put into his work. And so it's just wonderful that we have him here now.

So Richard asked me to discuss the legislative history of Title VII, I think particularly for the [benefit of the] students in the audience. Some of this is not for people who are the old timers here. You would have a lot to teach me so I am really pitching this to students. And he wanted me to keep it brief and he gave me a very long list of questions he thought it was essential that I cover. So I will try to do both things.

Title VII is, of course, part of a very important statute of the Civil Rights Act of 1964, which had a number of titles addressing discrimination in a number of areas including public accommodations, education, federally funded programs, and employment. And as I was putting together my thoughts here I just could not help but [think] about the parallels between 1964 and the situation we face now with healthcare reform, which also, of course, is about a human rights issue and involves issues of race, class, gender, equality, and equity. So at the end of my remarks, I want to just very briefly allude to those parallels.

But first, to take up Richard's list of long questions, his first question was: what led to the enactment of the 1964 Civil Rights Act? And of course, the

Civil Rights Act—from my perspective—was very clearly the product of a social movement. A social movement that was very visible in the 1950's leading to and then responding to the U.S. Supreme Court's decision in *Brown v. Board of Education* and the outburst of direct action including nonviolent civil disobedience that came as a response to the lack of progress after *Brown* in dismantling Jim Crow's segregation in all its forms.[5] [T]hose facts are really imbedded in our national consciousness. But what's not so deeply imbedded in historical memory is the fact that the Civil Rights movement has much, much longer roots, and since I write about that, I always want to focus on that.

Title VII is really the result of activity and activism pushing for civil rights laws that extended all the way back into the nineteenth century. The first statute to prohibit discrimination on the basis of race and religion in private employment was the Ives-Quinn Act of 1945 in New York State.[6] There were also efforts at the federal level in the '40s and '50s to use the President's executive order power to enforce prohibitions on discrimination in businesses receiving federal contracts. And the first of those executive orders was brought about in World War II as a result of the great labor leader A. Philip Randolph's threat to President Roosevelt to call a massive march on Washington to protest discrimination in the defense industry while black soldiers were going off to fight and lose their lives in the war.

In 1957, the Eisenhower administration attempted to pass a very weak, mild civil rights measure—but that attempt was defeated by the opposition of a coalition of southern conservative Democrats along with conservative Republicans. Then, of course, in the 1960 presidential race between Kennedy and Nixon, civil rights became an important campaign issue. Kennedy campaigned very hard for the African American vote by professing a strong commitment to passing civil rights legislation, but once in office, he was criticized for seeming not to be in a particular hurry to prioritize civil rights legislation over the other reform legislation that he was pushing. And historians say that Kennedy was afraid that the coalition of southern Democrats and conservative Republicans would defeat this measure and jeopardize the rest of his legislative agenda. But when the civil rights crisis in Birmingham, Alabama arose in the spring of 1963 where black demonstrators, including many high school students and even some elementary school children, were marching for civil rights in defiance of a city ban and members of the police and fire departments attacked the marchers with dogs and fire hoses knocking people over, tearing off their clothes, and the TV images were broadcast around the country and around the world, Kennedy at that point realized that he really did need to go to Congress and get working on legislative action.

[T]he legislative history of Title VII, which I take here mostly from a book called *The Longest Debate* by Charles and Barbara Whalen—which is a wonderful book; so my account may conflict with others including people in this room who know more than I do about all of this.[7] So the administration first supported a bill that was introduced in the House by the chair of the Judiciary

5. 347 U.S. 483 (1955).

6. N.Y. Exec. Law § 290 (McKinney 2002).

7. CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE (1985).

Committee, Manny Celler, a liberal Jewish Democrat from New York City along with Bill McCulloch, a moderate Republican from a rural district in Ohio with a very small African American population but a strong abolitionist tradition. McCulloch believed in civil rights as a matter of principle. The administration had promised McCulloch and the moderate Republicans to support a very moderate bill. But Manny Celler's strategy on the Judiciary Committee was to load the bill up with as many strengthening amendments as possible so that when the Republicans eventually extracted compromises to the bill on the floor it would still be a strong bill.

So his proposal copied the structure of the Ives-Quinn Act in New York State, and it created the EEOC as an agency like the National Labor Relations Board. It would have a prosecutorial arm and an adjudicatory arm with authority to issue cease and desist orders. So by the time the bill was reported out of committee, McCulloch and the moderate Republicans no longer supported it and Celler had put the Kennedy administration in the embarrassing position of being against the bill the civil rights community supported and trying in the background to broker an agreement that would keep the Republicans on board. But eventually the bill that was reported out and sent to the House Rules Committee was stronger than the initial administration bill. And, in the Rules Committee, it was promptly blocked by the conservative Republican, and former Judge, Howard Ward Smith of Virginia, who was the leader of the Conservative Coalition, an avid segregationist, and a powerhouse in Congress notorious for his ability to block all kinds of progressive legislation, so things did not look good at that point.

Then, in late 1963, the tragedy of President Kennedy's assassination changed the dynamics in Congress, and Lyndon Johnson, [upon] assuming the presidency, used the memory of Kennedy and constructed an image of his legacy as a strong supporter of civil rights and began to call for moving the bill in honor of Kennedy's memory and legacy. And Johnson, of course, had voted against the Civil Rights Bill in 1957 and was a segregationist himself at one point, but he had become convinced of the need for the bill. And being a brilliant legislative strategist, he put his authority behind [it and] push[ed] for it. [T]hrough procedural maneuvering the bill got to the House floor and at this point, Judge Smith, who was still seeking to defeat the bill, decided to offer an amendment including sex as one of the prohibited bases for discrimination. [W]hen he made this amendment he was literally met with laughter and guffaw from the floor as if this was a ridiculous idea. So you often hear people referring to the inclusion of sex in Title VII as a legislative accident.

But [from another perspective] the idea was not so ridiculous. The Equal Pay Act[8] had passed just the year before, and there was also a social movement perspective or story underlying the inclusion of sex in Title VII. It was supported by the five congresswomen in the House; at that time both Republicans and Democrats, strongly supported by the National Women's Party. And ironically enough, Manny Celler opposed the amendment because he was afraid it would lead to the defeat of his legislation.

8. 29 U.S.C. § 206(d)(3) (2006). The Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act.

So there are two ways of looking at this. One is the inside story, the cynical attempt to defeat the bill. And another is a social movement story—which is thinking about how the women's rights movement seized on the opportunity to piggyback on the wave of support for civil rights to add their issue to the civil rights agenda as well. [I]n the end the bill passed the House overwhelmingly by a vote of 280 to 130 in a very strong bipartisan effort. But everyone knew the Senate was going to be a very different story and there, and this will sound familiar, the Democrats did not have a cloture proof supermajority—[at the] time that required sixty-seven votes. It's been changed since then. And in the case of the Civil Rights Act, much more so than even the healthcare issue today, not all Democrats supported the bill.

So the Senate Judiciary Committee had the bill for a long time, was ignoring it, and the Senate Majority Leader Mike Mansfield from Montana assigned the bill handling to the Democratic whip who was Hubert Humphrey, the Senator from Minnesota who had been fighting for strong civil rights legislation since 1948 and had big political ambitions to stake himself out as a liberal Democrat who could get things done, and, of course, became Johnson's vice president in 1965. And Humphrey was opposed by the Democratic opposition led by Senator Richard Russell of Georgia who directed the southern voting block. But Humphrey worked assiduously to get the votes and worked on cultivating the ego of the moderate Republican minority leader Everett Dirksen from Illinois and telling Dirksen that his help on this bill would be the source of his historical legacy.

So together they avoided the bill going to the Judiciary Committee where it would have been sunk. And Dirksen, at the same time, was using his strategic position to negotiate for compromises to the bill. Then, of course, the Senate filibuster began—and this was the longest filibuster in the Senate's history—[and] it lasted two and a half months [w]ith proceedings [that] continued well into the night. Our own alum Senator Robert Byrd of West Virginia was one of the more notorious participants in the filibuster, though I believe he later said he regretted his role in this. He gave fourteen hours of speeches on the Senate floor. [A]t the same time, Dirksen was trying to maneuver behind the scenes to change the bill, but Johnson was resisting him. And the public perception of what was going on in the Senate began to become more and more negative. So that public perception, the pressure from the public on the Senators engaging in the filibuster, and the legislative handling skills by the bill supporters in the Senate eventually led to the votes for closure being there–seventy-one votes–four more than needed, and, of course, this just got the bill up for discussion on the merits in the Senate.

And at this point, two sets of compromises called the Dirksen-Mansfield Compromises in the form of a substitute bill modified some aspects of the bill. And one of the things that the substitute amendments did was to give state and local governments more authority to enforce the bill to placate the Republican's federalism concerns. But the most significant compromise in the bill was to strip enforcement authority from the agency that was created under the statute, the EEOC, taking away its adjudicatory power, its power to issue cease and desist orders so that the EEOC only had authority to investigate and attempt to conciliate complaints, but had no litigation authority in the

courts, so that after the EEOC was done with its efforts the complainants were essentially on their own in terms of trying to seek enforcement of the bill's provisions in court. [T]he only government litigation authority, of course, was granted to the Department of Justice in Section 707 of the Act and that power was limited to cases in which Justice detected a pattern or practice of discrimination.[9] And as I've discussed in my course with my students, that's why you see the early government-litigated cases against private employers as pattern or practice cases.

[S]upporters [of the bill] also got some important things and one of them, I think, was the attorneys' fees provision which allowed private litigants to get their attorney's fees if they prevailed against a defendant in a case. So the passage of Title VII was a huge victory, but there were obviously significant weaknesses in the legislation and the passage was by a very large margin, seventy-three to twenty-seven with forty-six Democrats in favor, twenty-one against, and twenty-seven Republicans in favor of the bill. Richard [has] already talked a little bit about the 1972 amendments. There were efforts to fix some of the weaknesses in the bill that went on for some years unsuccessfully, and then in 1972 Congress was able to fix Title VII. First of all by authorizing the EEOC, as well as individuals, to litigate in federal court and extending coverage of Title VII to the state and local employees and strengthening the coverage of federal employees. And, of course, as Richard has already mentioned, the 1972 Act gave the DOJ the power to sue state and local employers for employment discrimination and it did a few other things as well that I won't go into.

But it occurs to me that when we look back on this [and compare it] to our situation today, we see how long it really took, and how inadequate or imperfect attempts and successes were, and how some of them, at least, were fixed later—which I think are comforting thoughts when we think about our next big super statute initiative of today. But also there [are] really some significant differences and those include the strong bipartisanship that was necessary to enact Title VII and the Civil Rights Act, the coalition building across the aisle, the idea of voting your conscience or voting on principle, and also the huge role of a President with enormous legislative experience and really tough, wily, hardball political skills.

So when we look back at passage of Title VII forty-five years ago from our current perspective and our concern about today's legislative log jams, I think we can even better appreciate the importance, and the enormous accomplishment of the 1964 Civil Rights Act, and also the key need for having a working political system that allows us, as a country, to take . . . and make progress on pressing human rights issues. Thank you.

RICHARD UGELOW: Thank you so much Susan. I wish I could take your course. It's really a pleasure to welcome back Vicki Shultz to the law school. She was here about . . . two years ago, and [she] spoke at a faculty lunch on Friday and it was just wonderful. And she also, the next day, spoke at the fiftieth anniversary of the Civil Rights Division event held at another law school in town. Vicki is the Ford Foundation Professor of Law

9. 42 U.S.C. § 2000e-6 (2006).

at Yale University Law School. Her areas of expertise include employment discrimination, civil procedure, feminism in the law, and gender and work. I'm not going to read her list of publications because we'll be here until tomorrow. Sitting next to her is Dave Rose. I mentioned Dave earlier in my remarks. Dave started in the Department of Justice in what year?

DAVE ROSE: 1956.

RICHARD UGELOW: 1956 in the Civil Division of the Civil Rights Division. From 1969 to 1987 he was Chief of the ELS, and he'll tell you how he got to that position. And at various points he was the Special Assistant to the Attorney General for Civil Rights. Some of the cases that Dave worked on include *Griggs v. Duke Power* which I mentioned and we'll hear about, *Local 189, United Papermakers v. [United States]*,[10] *Contractors Ass'n [of] Eastern Pennsylvania*,[11] which involved the Philadelphia Plan,[12]—which I hope we'll be able to touch upon—*Albemarle Paper v. Moody*,[13] *[EEOC] v. AT&T*,[14] and *Bazemore v. Friday*;[15] and that's only the beginning of the list for Dave. I'm going to turn this over to Vicki because you don't want to hear me talk about Dave when Dave can talk about Dave much better than any of us can. So thank you very much.

VICKI SCHULTZ: Thank you so much, Richard. I can't tell you how honored I feel to be here. It's one of the great honors of my life to be able to interview Dave Rose today—one of my greatest mentors and someone whose belief in me as a young person has really stuck with me and empowered me throughout my life. So with that, let's start with your transition over from the Civil Division. You were recruited to work in the Civil Rights Division in 1967 by John Doar, and hired as the Special Assistant to the Attorney General, then Ramsey Clark, and charged with coordinating the efforts of the federal agencies under Title VI. You did a lot of really important employment cases during that period, and I would just love to hear you talk about one or more of them.

DAVE ROSE: I [was initially recruited] by Bob Bowen who [was] a contemporary of mine but died a number of years ago. [He was] a very

10. 416 F.2d 980 (5th Cir. 1969).

11. Contractors Ass'n of E. Pa. v. Sec'y of Labor, 442 F.2d 159, 163 (3d Cir. 1971).

12. *See* Exec. Order No. 11246, § 202(1), 30 Fed. Reg. 12,319 (1965), *as amended by* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967), 3 C.F.R. 406 (1969), *reprinted as amended in* 42 U.S.C. § 2000e note (2006) ("[Government] contractor[s] will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."); *see also Contractors Ass'n of E. Pa.*, 442 F.2d at 163 (observing that the "Philadelphia Plan" was the Secretary of Labor's implementation of Executive Order No. 11246 & 11375 as to the five-county Philadelphia area).

13. 422 U.S. 405 (1975).

14. 36 F. Supp. 2d 994 (S.D. Ohio 1998).

15. 478 U.S. 385 (1986).

important person in the Civil Rights Division and the person who recommended to John Doar that I be selected for some position. He tried once a couple of years before [1967], maybe in [1966], I'm not sure, the second time there was a position and it was a super grade. I had been a GS-15 at the advanced age of 34 or something like that. I had been in the Appellate Section for several years and argued a number of cases and those cases led to a case involving *mandamus* and that led to the Labor Department coming to Justice and asking us to represent them in contractor cases involving [the Office of Federal Contract Compliance Programs]— the executive order program.

In any event, I got selected. I was told my job description was Title VI, which most of you know does not involve employment matters and expressly disclaims coverage of employment matters although the ultimate interpretation [of the] law sort of contradicts that. But whatever it was, Title VI was not employment. But there were two agendas for the Civil Rights Division. The stated objective was the coordination provision, but John Doar had told me that what he really wanted to do was to bring some employment cases. So I did both, even though that wasn't the job description, and I had a very small group of two lawyers working for me when I was a coordinator—and Dave Martin was [t]here. He is here and was one of the two. In any event, I did a lot of different things, and I did do a number of Title VI [cases] but I also got involved with the *Papermakers* case because that involved the threatened strike by the white union against Crown Zellerbach in Bogalusa, Louisiana. And I had worked defending the decision of the Labor Department which Crown Zellerbach had tried to overturn so I was the logical person to deal with the threatened strike. And the long and short of it was one of the most exciting days I had in my career.

There was a threatened strike. We talked about filing before the first day of business in January because that was when the threatened strike was. I drafted the complaint. I showed it to John Doar. I brought it upstairs, and I forget who signed it, but I brought it upstairs and got Ramsey Clark to sign it, got on the airplane and flew to New Orleans. [W]e had called and told the Judge we were coming, and he said he wanted to see us [and] we notified the Papermakers' lawyer who was also from Washington. We met with him that evening and talked about the case. We had the argument the next day. Judge Heebe was not known for making quick decisions, but he was confronted with it and as he was about to sign the order, the [Temporary Restraining Order] ("TRO"), he said, "I've never enjoined the union before," and I said something like, "Well you've never had a strike that was based on preservation of segregation in violation of Title VII before either" and he said, "I guess that's right." He signed it and we got it entered. Getting the TRO was the whole thing. We had a formal trial, I think, a couple of months later that lasted a day or two. We got a preliminary injunction and ultimately a permanent injunction and that case advocated the disparate impact theory partly because the employer wanted to do the right thing and partly because it was the logical thing to do. And no I didn't invent the disparate impact theory. It was the [*Harvard*] *Law Review* article by Cooper and Sobol, I believe, a year or two before,

that laid it out, and we lawyers heard at least about the law review articles.[16]

VICKI SCHULTZ: [That's] comforting.

DAVE ROSE: And I had figured out what the theory was by the time I got the job. So anyhow, that one worked very well, [and it was] very exciting, . . . because I was doing the Executive Order stuff [and] it was a bridge to Title VII, but it was a case that did both a Title VI-like contract and the purposes of Title VII, but we filed it under Title VII.

VICKI SCHULTZ: Okay, so Mr. Doar wanted you to focus on employment and [then] the Division files six employment suits in 1967, twenty-six more in 1968, and establishes very important precedents like *Local 189 of the United Paper Workers* and *Local 53 v. Vogler*[17] and there are a couple of other really important cases that establish the disparate impact principle. And you say in your *Vanderbilt Law Review* article[18]— which I recommend if you haven't read it—these cases are very important in establishing this principle by the time *Griggs v. Duke Power* goes up to the Supreme Court. So I wanted you to talk a little bit about that and talk about your involvement and the Division's involvement in *Griggs v. Duke Power*.

DAVE ROSE: What I remember about the *Griggs* case was that Dennis Gordon and Frank Petramalo—Frank is here, I don't know if Dennis is here or not—had written a memo to me when the Court of Appeals decision came down, or they visited me and said the government ought to be supporting the petition. And I said, "[w]ell write something" and that was my normal reaction. So they did, and I liked it, and it made sense, and so I talked to Jerry Leonard, and I gave him the memo. Jerry Leonard, the Assistant Attorney General, was, on the whole, a very good boss because he tended to look at your work and try to make a decision on it and do it promptly in contrast to a number of other Assistant Attorney Generals that we've had. So I gave him the paper and I didn't hear anything. I may have asked him about it once or twice, but he didn't tell me anything.

So, it sat there on his desk or some place and nothing happened until April, or something like that, [and] the Supreme Court issued an order requesting participation of the government. And so we had the petition ready, Jerry took it out, looked at it, we talked about it for a few minutes, he signed it, brought it up to the Solicitor General's Office, and we sued.

VICKI SCHULZ: I'm going to switch to affirmative action now. So affirmative action has a long history and it begins with a series of federal

16. George Cooper & Richard B. Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969).

17. Local 53, Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

18. David Rose, *Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121 (1989).

executive orders which leads to President Kennedy's 1961 Executive Order 10,925, the precursor to 11,246, commanding federal contractors to take affirmative action to ensure equal employment opportunities. [19]

So the executive order is given teeth and tested by the Philadelphia Plan. So, I think you were still Special Assistant [to the Attorney General] then. Could you tell us about your involvement?

DAVE ROSE: I'm not sure. No, I think I was the Chief of the Section although if you read the case you can't [tell]; I've re-read it recently and I had a title that was not Section Chief, although I'm sure I was. I became Section Chief in September [1969] when Jerry Leonard and Dave Norman decided that we should have functional sections rather than geographical ones. So I was clearly the Section Chief. I'm not sure how that title got appended to the decision, but I did argue it.

In any event, we had some fans in the Labor Department by then because of the *Papermakers* case, and I believe the Solicitor of Labor invited us to defend them again, and we did. It wasn't a particularly difficult case to win. I believe that Judge Higginbotham in the District Court was the only African American judge and a very smart man. And drawing him was either very great good fortune or somebody was pulling some wires, but I believe it was just luck. In any event we had him. I was delighted to see him. He had us in chambers and he had no problems with the plan and the contractors appealed of course. That was not a difficult piece of litigation but was important because there was a series of other regional affirmative actions plans like the Philadelphia Plan that helped a little bit to desegregate those unions. They remained very strong, and very resistant, and primarily white. And I really have not looked at any demographics for those unions in recent years so I don't really know how much good we did but we tried and got some good law in.

VICKI SCHULTZ: And was the Third Circuit precedent that upheld the Philadelphia Plan important to the Section in later being able to incorporate goals and time tables into the relief?

DAVE ROSE: Yes. It gave me enough intestinal fortitude to use goals and it made it hard for anybody to say no because we'd publicly taken that position. Thank you, that's a very important transition. I had been very, very careful about pushing that envelope too far, and maybe I was overly conservative in that regard.

VICKI SCHULTZ: So in [1969] you become Chief of the Section, which is now reorganized into the functional reorganization. And the next five or six years [after this reorganization] are an extraordinarily productive time in which the Section successfully prosecutes path-breaking pattern or practice cases against several major industries including trucking and the steel industries. Could you tell us a little bit about the trucking lawsuits and how this early industry-wide litigation influenced the climate of enforcement for Title VII?

19. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961).

DAVE ROSE: The first trucking case I had was *Roadway Express*,[20] and I learned there that there were city drivers and over-the-road drivers and, in some parts of the south, the city drivers were black and the over-the-road drivers were white. But in some parts of the south, where the pay was very good, the whites had both jobs. Places like Memphis had a number of black drivers but almost all of them had been hired before '57 or '58; so they were sort of merged into seniority lists. In any event, *Roadway* was a suit we tried to get—and did get—a preliminary injunction in Cleveland. We prevailed in the lawsuit. The numbers were thousands and thousands of white drivers and zero or, almost zero, black over-the-road drivers. One didn't have to be a whiz at math to figure out what was going on. And it was somewhat akin to the voting cases. I mean it was an unspoken rule, but it was almost universally followed by the interstate carriers. So we had one trucking case. We could've had as many trucking cases as we did, and we brought several, and then we decided to [go] amass [the] rest of the major companies in one suit.

Bob Moore, who is not here, was doing the steel industry and had the case against U.S. Steel,[21] and he had, I think, proposed doing it, and that was a much smaller number of employers, a handful of steel makers—the national case—and I think I took his idea, but I'm not positive of that. So those are the only national cases that we had. The law had been changed and we retained authority to bring new suits through '74 under the '72 Act, but we were being put out of the private sector business. And that was disappointing for me; and Vicky and I think that was at least, in part, a mistake. But I do think it would've been a bit much to have [DOJ] do all of the pattern [or] practice cases, but I don't think it was necessarily bad that EEOC could do it, but I think it was a mistake to put us, the Justice Department, out of business in that area.

Clarence Mitchell was the long-time sponsor of the Civil Rights Act and a very great man, but he had worked for the War Labor Relations Board during World War II, I believe, and therefore, his model [was] the NLRB and [a policy of] administrative review. So what we got in Title VII, [as] previously explained, was a dual system—a sort of mixture.

VICKI SCHULTZ: So I'm going to skip over some really important cases against police and fire departments and state agencies because I know that's going to be the subject of a panel later this afternoon. And I would like to skip to, I think, the late '70s. Now, when I joined the Section, which was in 1983, I would hear Section lawyers say that at some point prior to that time, Section lawyers had "rolled like Sherman through the suburbs." So, I was just wondering if you could tell us about how the emphasis on suing suburban government employers such as the Chicago and Detroit suburbs or even the St. Louis or Houston suburban school districts developed, and whether you think the Section's suburban initiative was successful?

20. United States v. Roadway Exp., Inc. 457 F.2d. 854 (6th Cir. 1972).

21. United States v. U.S. Steel Corp., 520 F.2d 1043 (5th Cir. 1975).

DAVE ROSE: Well, let's start with the word Cicero, and not the person, but the town that is adjacent to Chicago and you have the answer.[22] Cicero had a resident requirement and Cicero kept out black residents. So you had to be a resident to be a municipal worker and no black residents allowed means no black employees. Anyhow, I was asked about the *Cicero* case by somebody who brought the housing case, Sandy Ross, and I saw him in the hall one day and he said, "Dave, I got a question for you" and I sa[id], "What?" He said, "What do you think about having a Title VII count against Cicero?" And I said, "I think that's a good idea." Bill Yeomans is here. I think he worked on the *Cicero* case, and he argued once, I remember once to my annoyance, (laughter) not because it was you but because I wasn't given the assignment in the Court of Appeals.

BILL YEOMANS: As I recall, you came along.

DAVE ROSE: I did. (chuckles) I felt much better after you spoke than I did before.

VICKI SCHULTZ: Tell us what those cases were about for people who may not know?

DAVE ROSE: Cicero is the exemplar [because] you've got one side of the street [that] is Cicero and the other side of the street [that] is Chicago. And the side that's Chicago is black and everything, I guess, [that's] to the east is white. So we learned quickly after the *Cicero* case that there were a heck of a lot of other towns that had adopted residency requirements in the '50s or the early '60s and they were all around Chicago. All of Cicero's neighbors had—all of them is a little bit strong, but most of them had—adopted the same rule and the closest thing to Cicero in the Cleveland area is Parma, Ohio, also a city in Sicily.[23] So we went there and we found them springing up all over the place so we had a whole group of cases in Illinois, not as many in Ohio, and one in East Haven—near New Haven, I believe.[24] So, those cases were almost cookie cutters; they didn't involve a lot of intellectual resources but persistence, because the mayors were willing to settle those cases because they did not want to lose the next election.

So when I left the Justice Department, there were a whole bunch of cities that hadn't been sued by [the DOJ] and so the Rose Law Firm and ultimately Rose & Rose brought a bunch of those. And I have one going right now. There's [a case] called *NAACP v. North Hudson Regional Fire & Rescue* which has hired one black fire fighter out of about 300, and that person was hired because we had brought a suit against North Bergen and he was hired as part of the settlement of the suit against North Bergen.[25] And I think the legal [counsel] was the Justice Department.

22. United States v. Town of Cicero, 786 F.2d 331 (1986).
23. NAACP v. City of Parma, 616 F.2d 513 (6th Cir. 1981).
24. NAACP v. Town of East Haven, 998 F. Supp. 176 (D. Conn. 1998).
25. 707 F. Supp. 2d 520 (D.N.J. 2010).

VICKI SCHULTZ: Wow. Okay. There's so much I'd love to ask you but we don't have all day so I'll try to skip ahead here, sadly. [S]o skipping to the early 1980s, Assistant Attorney General Brad Reynolds argues for and seizes on passage of dictum in the *Stotts*[26] case to support the idea that Section 706(g) of Title VII prohibits the award of any race-conscious relief to anyone who's not proven to be an individual victim of discrimination.[27] [T]hen relying on this misreading of *Stotts*, the Section takes the position—or Mr. Reynolds does—that the government's fifty-one consent decrees are contrary to Title VII. So, looking back on it in hindsight, did the Reagan administration represent a turning point in the Division's history, one that set it on a road to a future, which is now our present, in which time honored understandings of civil rights have been undermined in your view?

DAVE ROSE: Well, I think it was an effort in that direction. I don't think it had that result. We remember Chuck Cooper, and Mike Carten, and Brad Reynolds had no notions of that kind when he came in and for the first couple of years w[ere] bringing the same kinds of suits that we always brought. But in the later part of the Reagan years—I call them zealots but that's a little derogatory—but people who had very strong views on that began to become important people in [DOJ], and Cooper was Brad's first assistant and then became an Assistant Attorney General himself. A very smart guy, a very ambitious guy, but his views and mine were not the same.

So the late '80s was when I left and the two or three years before that the job had become very uncomfortable for me. I'd had thirty years of service. I stayed about a year and a half longer to see some of the suburban litigation programs through. That reading of Title [VII] is not correct and was not; I don't think it has become law.

VICKI SCHULTZ: No, it's repudiated by the Supreme Court in the [*Local 28*] case.[28]

DAVE ROSE: Right. Doug Heron [is] here, and I'm very happy to see him. And we talk from time to time, and I believe you're going to be hearing from him in the near future and I've got to talk about the case with Frank Johnson against the State of Alabama. I did that case before the '72 amendments became effective.[29] And we had a unique theory which I think was mine but I'm not sure. Anyhow there was a provision attached to the receipt of federal funds from [the Committee on Health, Education, and Welfare] which required all the government programs to be nondiscriminatory. And, of course, Alabama had not signed that contract, or they may have signed it but they didn't enforce it. So we brought a case based on that theory. The passage of the '72 Act was imminent, so it wasn't a secret to Frank Johnson, but he took our complaint

26. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

27. 42 U.S.C. § 1981a(b)(2) (2006).

28. Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

29. Civil Rights Act of 1964, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000(e)-(e-17)).

and acted on it before the enactment of the '72 Act and that was another sort of exciting day to fly down to Montgomery and file a case. But he was delighted to see a representative of [DOJ] there.

VICKI SCHULTZ: Wonderful. Okay, so I'm going to turn to a few sort of broader questions about the work of the Section now. One thing that I read in Brian Landsberg's excellent book *Enforcing Civil Rights*[30] is that John Doar began training Civil Rights Division lawyers in what he called the immersion method, in which lawyers were expected to know everything there is to know about federal law, all the precedents, all the local customs, and especially all the facts digging very deep as we conducted our own investigations. And it seemed to me that you were training lawyers in this same method when I joined the Section many, many years ago. So I wanted to ask if you self-consciously set out to train lawyers in the Section in that way?

DAVE ROSE: Well, I did because what John Doar was doing and what the Civil Rights Division was doing was really almost unheard of for lawyers. We, John first, but I figured out what the Division did, and I thought it was exactly the right thing to do. So yes, we tried to train because there's no better way to find the facts than to talk to the people who are harmed, many of whom were afraid to act by themselves, and talk to the employer also if you can to get both sides and get the information you need to decide whether you've got a lawsuit. That's very extraordinary. That's a lesson, I believe, that our friends at EEOC had not learned. I'm not saying none of them had learned it, but that, I think, is one of the strengths of the Division and certainly it was one of the strengths of the Employment Section. Richard's getting very uncomfortable.

RICHARD UGELOW: Okay, Vicki has one more question.

VICKI SCHULTZ: All right, since I only have one more it's hard to choose, but as a workplace the Section was, for me, hands down the best place I've ever worked. Things weren't always perfect all the time, but we were reasonably well integrated along race, sex, age lines. We had wonderful leadership in which lawyers got the help they needed but also had some autonomy, and we had an amazing esprit de corps where everyone worked hard but also played hard together. So, I guess, it seems to me that the Section was a model of the kind of equality that we wanted other employers to create. And I think probably everyone here would be interested in knowing how you created such a wonderful, welcoming, and model workplace?

DAVE ROSE: Well, I don't think I created it. I think the people who came to work for us were an exceptional group. We had an embarrassment of riches in terms of able people willing to work hard and doing something important. And probably the easiest time was the first five or ten years; easiest not physically or mentally, but easiest to do. But once the attitude was established,

30. BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE (1997).

I think it is somewhat self-perpetuating because when a new lawyer came in I'd typically send him or her off with an experienced lawyer to work on an investigation, or something of that kind, and to see and experience what we were doing. And so I didn't create it. We were fortunate to have a time when a lot of intelligent people wanted some change made. The change is slow—very, very slow; embarrassing[ly] slow; was and is. There was dramatic change and things are [continuing to change]—I never thought I'd see a black president in my lifetime. I've got to say, not due to us, that the fact that we've had it shows that a lot of progress has been made, but some of the traditions are very, very firmly in place and very hard to detect and overcome. So I don't think the battle's won by any means, but I think that what the Section did was something we all can be very proud of.

END TRANSCRIPT