



# Leadership Conference on Civil Rights

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BY FAX: 202-616-2665

January 29, 2008

The Honorable Michael B. Mukasey  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001

Dear Attorney General Mukasey:

On behalf of Citizens for Responsibility and Ethics in Washington (“CREW”) and the Leadership Conference on Civil Rights (“LCCR”), we write today to urge you to rescind an opinion of the Office of Legal Counsel (“OLC”) issued on December 6, 2004<sup>1</sup> that has had far-reaching consequences which threaten to further undermine the credibility of the United States Commission on Civil Rights (“Civil Rights Commission”) and ensure its continuation as a highly partisan organization, contrary to the intent of Congress. During your recent Senate confirmation hearing, you pledged to review “significant” OLC decisions to ensure that such decisions are “sound, soundly reasoned, [and] soundly based.” Based on our analysis, as well as a recent memorandum issued by the Congressional Research Service (“CRS”), this opinion fails to meet your test.

The Civil Rights Commission was created in 1957 as part of the Civil Rights Act of 1957 (“1957 Act”).<sup>2</sup> As initially constituted by the 1957 Act, the Commission had six members, “not more than three . . . [of which] shall at any one time be of the same political party.”<sup>3</sup> The structure and wording of the 1957 Act were consistent with the aims of President Dwight D. Eisenhower, who first called for the creation of the Civil Rights Commission in his 1956 State of the Union address. In that address, President Eisenhower stated:

It is disturbing that in some localities allegations persist that Negro citizens are being deprived of their right to vote and are likewise being subjected to unwarranted economic pressures. I recommend that the substance of these charges be thoroughly

<sup>1</sup> Political Balance Requirement for the Civil Rights Commission, Op. Off. Legal Counsel (Dec. 6, 2004) (attached as Exhibit 1).

<sup>2</sup> See Pub. L. No. 85-315 § 101, 71 Stat. 634 (1957).

<sup>3</sup> See Pub. L. No. 85-315 § 101(b) (1957).



examined by a Bipartisan Commission created by the Congress . . .

We must strive to have every person judged and measured by what he is, rather than by his color, race or religion.<sup>4</sup>

In 1983, through the Commission on Civil Rights Act of 1983 (“1983 Act”), Congress expanded the Commission to eight members and drastically altered its structure, changing the commissioner selection process from presidential appointment for all commissioners, with advice and consent from the Senate, to a selection process equally allocated between the president and Congress. Under the 1983 Act, the president appoints four members of the commission, while the President *Pro Tempore* of the Senate and the Speaker of the House of Representatives each appoint two Commission members.<sup>5</sup> Congress retained the bipartisan nature of the Commission by providing that “not more than four of the members [of the Commission] shall at any one time be of the same political party.”<sup>6</sup> The structural changes to the Commission were made, in large part, to counter the concern that the prior process had allowed for too much ideological manipulation.<sup>7</sup>

Congressional intent to retain the Commission’s independence and bipartisan membership has been both historically consistent and clear.<sup>8</sup> Nevertheless, despite the consistent statutory requirement that the Civil Rights Commission be bipartisan, the current Commission is not.

On December 6, 2004, the Office of Legal Counsel issued an opinion that construes the statutory requirement that “[n]ot more than 4 of the members [of the Commission] shall at any one time be of the same political party,” as requiring that the president assess the party affiliation of sitting Commission members and potential Commission appointees only at the time any new member is appointed. This interpretation of 42 U.S.C. §1975 allows the president to appoint as many commissioners to the Civil Rights Commission of the same political party as he chooses, as long as a sufficient number of sitting commissioners switch political party affiliations prior to individual presidential appointments, thus undermining the statutory bipartisan requirement.

Contrary to the OLC opinion, the clear legislative history of section 1975(b) calls for Commission membership to be comprised at all times of no more than four members of each political party, with the requisite party affiliation of any commissioner opening determined on the basis of affiliation of sitting commissioners at the time of their appointment to the Commission. This legislative intent should govern here.

At the time the OLC issued its opinion sanctioning political manipulation of the appointment process, that manipulation was already in full swing. As of September 2004, the Commission had four Democrats, two Independents and two Republicans. In October 2004, Commissioner Abigail Thernstrom, originally appointed as a Republican in 2001, switched her personal voter registration to

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<sup>4</sup> President Dwight D. Eisenhower, State of the Union Address (Jan. 5, 1956) (emphasis added).

<sup>5</sup> 42 U.S.C. § 1975(b).

<sup>6</sup> *Id.*; see also Political Balance Requirements at the United States Commission on Civil Rights, Congressional Research Service (Jan. 3, 2008) (“CRS Memorandum”) at pp. 3-7 (in-depth discussion of legislative history to 1983 Act) (attached as Exhibit 2).

<sup>7</sup> Pub. L. No. 98-183 § 2(b)(2), 97 Stat. 1301 (1983).

<sup>8</sup> See e.g., H.R.Rep. No. 104-846, at 29 (1996); H.R. Rep. No. 105-439, at 53 (1998) (emphasis added).



Independent, thus, in the administration's view, creating an "open" Republican slot.<sup>9</sup> That same month, two commissioners, Mary Frances Berry (an Independent since the 1980s) and Cruz Reynoso (Democrat), left the Commission after expired terms. In December 2004, President Bush appointed two Republican commissioners, Gerald Reynolds and Ashley Taylor to the two open slots.<sup>10</sup>

Absent the re-designation of Commissioner Thernstrom's as an Independent, the addition of Mr. Reynolds and Mr. Taylor to the Commission on December 6, 2004 would have clearly violated the statutory requirement that no more than four commissioners be of any one political party. Since the appointments of Mr. Reynolds and Mr. Taylor, one other commissioner, Gail Heriot, has been appointed to the Commission as an Independent to replace outgoing Independent Commissioner, Russell Redenbaugh.<sup>11</sup> Shortly before her appointment in March 2007, Ms. Heriot registered as politically unaffiliated, a change from her previously declared status as a Republican.<sup>12</sup> Recently, Republican Commissioner Jennifer Braceras's term expired and Commissioner Thernstrom re-registered as a Republican. Thus, the Commission's nominal political composition now stands at four Republicans (Mr. Reynolds, Mr. Taylor, Peter Kirsanow, and Ms. Thernstrom), one Independent (Ms. Heriot) and two Democrats (Michael Yaki and Arlan Melendez), with one seat vacant.<sup>13</sup>

Earlier this month, the Congressional Research Service ("CRS") issued a memorandum calling into question the validity of the OLC memorandum approving party-affiliation switches by sitting commissioners, concluding that the practice undermines Congress's intent to maintain political balance on the Commission.<sup>14</sup> We wholeheartedly agree.

Given your promise to ensure that OLC opinions are "soundly based," we urge you to review the CRS memorandum and withdraw the unfounded 2004 OLC opinion. We also request an opportunity to meet with you to discuss this matter further.

In recent years, we have grown increasingly concerned with the politicization of the U.S. Commission on Civil Rights as demonstrated by a shift away from its historic mission of vigorously investigating and reporting on civil rights abuses against minority and disenfranchised communities. We believe this shift is directly related to the erosion of bipartisanship on the Commission. Withdrawing this troubling OLC memo is a necessary first step toward restoring some measure of political balance going forward.

Thank you for your consideration.

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<sup>9</sup> See Charlie Savage, Maneuver Gave Bush a Conservative Rights Panel, *Boston Globe*, Nov. 6, 2007 (attached as Exhibit 3). It appears that within the past month, Commissioner Thernstrom has switched back to her prior affiliation to Republican, see U.S. Commission on Civil Rights, <http://www.usccr.gov> (last visited Jan. 11, 2008).

<sup>10</sup> See Charles Devarics, President Bush Seeks Sweeping Changes on Civil Rights Panel, *Black Issues in Higher Education*, Dec. 30, 2004 (attached as Exhibit 4).

<sup>11</sup> See Savage, *Boston Globe*, Nov. 6, 2007.

<sup>12</sup> *Id.*

<sup>13</sup> See U.S. Commission on Civil Rights, <http://www.usccr.gov>.

<sup>14</sup> See CRS Memorandum at 2.



Sincerely,

Wade Henderson  
President and CEO  
Leadership Conference on Civil Rights

Melanie Sloan  
Executive Director  
Citizens for Responsibility and  
Ethics in Washington

Hilary O. Shelton  
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John Trasvina  
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Jacqueline Johnson  
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National Congress of American Indians

Caroline Fredrickson  
Director, Washington Legislative Office  
ACLU

Encls.

cc: The Honorable Patrick J. Leahy  
The Honorable Arlen Specter  
Senate Committee on the Judiciary

The Honorable John Conyers, Jr.  
The Honorable Lamar S. Smith  
House Committee on the Judiciary