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## The Impact of the Obama Presidency on Civil Rights Enforcement in the United States

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## The Impact of the Obama Presidency on Civil Rights Enforcement in the United States

JOEL WM. FRIEDMAN\*

On Friday, August 4, 1961, police officers in Shreveport, Louisiana, arrested four African American freedom riders after the two men and two women refused to accede to the officers' orders to exit the whites-only waiting room at the Continental Trailways bus terminal.<sup>1</sup> Four thousand miles away, in the delivery room at Kapi'olani Maternity & Gynecological Hospital in Honolulu, Hawaii, Stanley Ann Dunham, a Kansas-born American anthropologist whose family had moved to the island state twenty years earlier, gave birth to the only child that she would have with her first husband, Barack Obama Sr., an ethnic Luo who had come to Hawaii from the Nyanza Province in southwest Kenya to pursue his education at the University of Hawaii.<sup>2</sup> Just over forty-seven years later, on November 4, 2008, their son, Barak Obama II, a mixed-race man who identifies as black, was elected the 44th president of the United States.<sup>3</sup>

The election of the nation's first African American president was hailed as an event of historic importance. Many heralded Obama's victory as signaling the dismantling of "the last racial barrier in American politics."<sup>4</sup> Analogies were quickly and frequently drawn to the historic moment when Jackie Robinson became the first African American player in Major League Baseball.<sup>5</sup> This superficially obvious comparison, however, diminished the causal significance of Obama's election. When Jackie Robinson left the Kansas City Monarchs of the Negro Leagues on October 23, 1945, to sign a contract with the Brooklyn Dodgers, and then made his debut on a major league diamond at Ebbets Field on April 15, 1947,<sup>6</sup> he breached the unofficial, but rigidly enforced exclusionary "color line" in

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\* Jack M. Gordon Professor of Law, Tulane Law School. This Article is based on a presentation offered at the "Labor and Employment Law Under the Obama Administration: A Time for Hope and Change?" conference held at the Indiana University Maurer School of Law on November 12, 2010.

1. *Four Riders Seized: Group Arrested in Shreveport—Madison Sit-In Still On*, N.Y. TIMES, Aug. 5, 1961, at 14.

2. See Camille A. Nelson, *Racial Paradox and Eclipse: Obama as a Balm for What Ails Us*, 86 DENV. U. L. REV. 743, 744 (2009); David L. Ulin, *Portrait Incomplete: At End of Story, We Still Don't Feel Close to Obama's Mother*, CHI. TRIB., May 21, 2011, at C12; *Army Medical Researchers in Kenya Mark World Malaria Day 2010*, U.S. FED. NEWS, Apr. 28, 2010, available at LexisNexis; Laurie Goering, *Violence Threatens Fragile Kenya; Frustration Builds at Corrupt Government*, CHI. TRIB., Nov. 30, 2008, at C12.

3. See Nelson, *supra* note 2.

4. Adam Nagourney, *Obama: Racial Barrier Falls in Decisive Victory*, N.Y. TIMES, Nov. 5, 2008, at A1.

5. See, e.g., Ron Grossman, *Obama in Awkward Spot in Dialogue on Prejudice*, CHI. TRIB., Oct. 5, 2009, at C19; Bill Plaschke, *He Was Saluting the Man, Not Taking on The Man*, L.A. TIMES, Nov. 8, 2008, at D1; George Vecsey, *Coast to Coast: Robinson to Obama: The Timeline Stretches 62 Years*, N.Y. TIMES, Apr. 16, 2009, at B13.

6. Dave Anderson, *A Number to Remember*, N.Y. TIMES, Apr. 16, 2007, at D2; Kevin Sack, *After Decades, A Time to Reap*, N.Y. TIMES, Nov. 5, 2008, at A1.

professional baseball. But this momentous event was the product of a courageous and visionary decision by one man—Branch Ricky, the part-owner, president, and general manager of the Brooklyn Dodgers.<sup>7</sup> Obama's election triumph, on the other hand, was the result of millions of individual determinations to vote for an African American candidate for the nation's highest office.

Beyond the unique historical aspect of Obama's election triumph, the results of the 2008 presidential election were interpreted by many as marking the onset of a new era of American "postracialism."<sup>8</sup> For example, much was made of the fact that in Virginia, home of the Confederacy's capital city, Obama amassed more votes than his Caucasian opponent.<sup>9</sup> Many analysts concluded that the voters' comparative assessments of each candidate's ability to deal with the nation's economic woes, and not his racial classification, were a crucial determinant in their decisions in the voting booth.<sup>10</sup> They pointed to the fact that Obama's 8.5 million vote margin of victory was, in part, the result of his receipt of 40% of the votes cast by white men, a higher share than had been garnered by any of the five previous (white) Democratic presidential nominees.<sup>11</sup>

But the voting statistics also support alternative explanations for Obama's victory. The outgoing president, George W. Bush, was enormously unpopular, and most Americans were demanding a change from the Republican status quo.<sup>12</sup> Additionally, the 2008 election was marked by a more than 20% surge in voting by minority group individuals, resulting in about 5.8 million more minorities voting in that election than in the preceding 2004 presidential election.<sup>13</sup> The nationwide black vote accounted for 13% of all ballots cast in 2008, compared to 11% in 2004.<sup>14</sup> And although candidate Obama received more votes from white voters than the previous Democratic presidential nominee, John Kerry, captured in 2004, the fact remains that a majority—55%—of all white voters cast their ballot for Obama's Republican opponent, John McCain.<sup>15</sup>

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7. Elsa Dixler, *Paperback Row*, N.Y. TIMES, May 23, 2010, at BR24; Robert H. Frank, *When It Really Counts, Qualifications Trump Race*, N.Y. TIMES, Nov. 16, 2008, at BU8; Richard Sandomir, *Main Gate to Citi Field a Tribute to Robinson*, N.Y. TIMES, Apr. 16, 2008, at D5; Editorial, *True to the Dodgers; The Storied Franchise of Rickey and O'Malley Must Be Owned by Someone Other Than McCourt*, L.A. TIMES, July 2, 2011, at A24.

8. See, e.g., Craig Gordon, *Analysis: How Obama Won It; 5 Reasons He'll Be in the White House*, NEWSDAY, Nov. 5, 2008, at W04; John B. Judis, Editorial, *It's a Wrap—The 2008 Campaign; Did Race Really Matter?*, L.A. TIMES, Nov. 9, 2008, at A34; Sack, *supra* note 6, at A1; Peter Wallsten, *Election 2008: The Presidential Vote/News Analysis: Red and Blue, Black and White*, L.A. TIMES, Nov. 5, 2008, at 11.

9. See, e.g., Wallsten, *supra* note 8, at 11.

10. See, e.g., Gordon, *supra* note 8, at W04; Hanes Walton, Jr., Josephine A.V. Allen, Sherman C. Puckett & Donald R. Deskins, Jr., *Barack Obama 2008: The Making of the President*, BLACK COLLEGIAN, Second Semester 2009, at 7.

11. Wallsten, *supra* note 8, at 11.

12. Nagourney, *supra* note 4, at A1.

13. Greg Gordon, *Obama Rode Minority Votes*, CENTRE DAILY TIMES (State College, Pa.), Nov. 19, 2008, at A1.

14. *Id.*

15. Gerald J. Beyer, *Why Race Still Matters: Catholics and the Rise of Barack Obama*, AMERICA, May 18, 2009, at 10, 11.

Moreover, the reality of post-inauguration events suggests that these hopeful prophecies may have been more hope than prophecy.<sup>16</sup> Within months of his assuming the presidency, Obama was subjected to the basest of racial stereotypes and epithets. On September 12, 2009, several participants at a taxpayers' protest march on the National Mall in Washington paraded with placards displaying the president as an African witch doctor.<sup>17</sup> Another sign at that rally depicted a lion with the words: "The zoo has an African [photo of a lion] and the White House has a lyin' African."<sup>18</sup> These events were followed by the decision by Rep. Joe Wilson (a South Carolina congressman who had supported the continued flying of the confederate flag above South Carolina's state capitol and had denounced as a "smear" the true claim of an African American woman that she was the daughter of Strom Thurmond) to shout out "You lie!" during President Obama's speech to a joint session of Congress.<sup>19</sup> Former President Jimmy Carter later commented to a television reporter that "an overwhelming portion of the intensely demonstrated animosity toward President Barack Obama is based on the fact that he is a black man, that he's African American."<sup>20</sup> Subsequently, "an aide to a Republican state senator in Tennessee sen[t] out a mass e-mail of a cartoon showing dignified portraits of the first 43 presidents, and then representing the 44th—President Obama—as a spook, a cartoonish pair of white eyes against a black background."<sup>21</sup> A mayor in California distributed an e-mail depicting the White House lawn as a watermelon patch (he subsequently resigned over the incident).<sup>22</sup> And after a gorilla had escaped from a Columbia, South Carolina zoo, a prominent Republican Party activist from that state who had served as chair of the state elections commission posted on his Facebook page that the gorilla was "just one of Michelle [Obama]'s ancestors" (he subsequently apologized).<sup>23</sup>

At best, then, the record is mixed on the question of whether the election of an African American president of the United States marks, or at least presages, an era of postracialism in American society. What then, if anything, can be predicted or observed about the impact of the election of a mixed-race president on the enforcement of antidiscrimination laws in the United States?

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16. See Bob Herbert, Op-Ed., *The Scourge Persists*, N.Y. TIMES, Sept. 19, 2009, at A19; Toby Harnden, *Embers of Race Debate Threaten to Reignite*, N.Z. HERALD, Sept. 19, 2009, at A28.

17. Richard Wolffe, *Obama Confronts America Over the Racial Divide*, SUNDAY TELEGRAPH (London), Sept. 20, 2009, at 27; Ralph Z. Harrow, *Tea Partyers Moving from Streets into Political Suites*, WASH. TIMES (D.C.), Apr. 21, 2011, A1.

18. Grossman, *supra* note 5, at 19 (alteration in original).

19. Maureen Dowd, Op-Ed., *Boy, Oh, Boy*, N.Y. TIMES, Sept. 13, 2009, at WK17.

20. Jimmy Orr, *Jimmy Carter: Racism Behind Joe Wilson Outburst*, CHRISTIAN SCI. MONITOR: THE VOTE BLOG (Sept. 16, 2009), <http://www.csmonitor.com/USA/Politics/The-Vote/2009/0916/jimmy-carter-racism-behind-joe-wilson-outburst>; Ewen MacAskill, *Animosity Towards Barack Obama Is Due to Racism*, THE GUARDIAN (Sept. 16, 2009, 13:58 BST), <http://www.guardian.co.uk/world/2009/sep/16/jimmy-carter-racism-barack-obama>; Wolffe, *supra* note 17, at 27.

21. Herbert, *supra* note 16, at A19.

22. Grossman, *supra* note 5, at C19.

23. Helen Kennedy, *Gorilla Is "Related" to First Lady*, DAILY NEWS (N.Y.), June 15, 2009, at 8.

Parenthetically, one might ask why we are even posing this question. Should expectations of a president's commitment to enforcing antidiscrimination statutes vary according to that individual's membership in any race or sex category? Should a president who is a member of a minority group be expected to be more attuned to those issues than a majority member official because, inter alia, he embodies them?<sup>24</sup> For example, would we be asking this question if the current chair of the Republican National Committee, Michael Steele, were president? If not, then perhaps the more relevant question is whether a very liberal Democrat would have a different impact on the enforcement of antidiscrimination law than a very conservative Republican. But that, in the end, is not the issue I have been asked to examine and so I shall return to the matter at hand.

In the immediate aftermath of the 2008 presidential election, pundits and other observers gleefully and ruefully predicted that the election would have an immediate, clear, and powerful impact on the future course of civil rights enforcement.<sup>25</sup> If given the time and opportunity, according to the traditional wisdom, President Obama's appointments to the Supreme Court eventually would stall, if not reverse, that court's nearly quarter-century long pattern of restrictively construing the collection of federal antidiscrimination statutes.<sup>26</sup> Similarly, over time, his appointment of federal (trial and appellate court) judges and top officials and decision makers of federal agencies, particularly the Equal Employment Opportunity Commission (EEOC), would result in a more expansive interpretation and enforcement of federal civil rights laws. A mixed-race president, it might have been presumed, also would instruct the Department of Justice to more aggressively intervene in emerging civil rights issues and more actively enforce extant antidiscrimination laws. This would include directing the Office of the Solicitor General to promote a more expansive interpretation of civil rights statutory and

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24. See Nelson, *supra* note 2, at 757–58, 767–68.

25. See, e.g., Charles J. Ogletree, Jr., *From Dred Scott to Barack Obama: The Ebb and Flow of Race Jurisprudence*, 25 HARV. BLACKLETTER L.J. 1, 39 (2009) (predicting that the election of Obama “will continue to energize . . . the nation . . . to press for greater equality”); Kevin Outterson, *The End of Reparations Talk: Reparations in an Obama World*, 57 U. KAN. L. REV. 935, 936 (2009) (“Obama’s agenda holds real promise for addressing inequalities and disparities . . .”).

26. See e.g., *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009) (mixed-motive instructions unavailable in ADEA cases); *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007) (individual salary payment is not a discrete act of discrimination for limitations calculation purposes in Title VII wage discrimination cases); *Smith v. City of Jackson*, 544 U.S. 228 (2005) (employer need only prove existence of a reasonable non-age factor in response to disparate impact claims brought under ADEA); *Penn. State Police v. Suders*, 542 U.S. 129 (2004) (constructive discharge is not a tangible employment practice in Title VII sex harassment cases); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004) (ADEA prohibits only employment decisions that favor younger individuals over older individuals over age forty); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (the effect of a mitigating measure must be considered in determining whether a plaintiff in an ADA case is disabled); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (providing employers with “same decision” affirmative defense to liability); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989) (reducing employer’s evidentiary burden in Title VII disparate impact cases to the burden of production concerning business justification).

constitutional issues through its filing of amicus curiae briefs on behalf of the federal government in the Supreme Court and lower federal courts.

But predicting is a dangerous business that is best left to those professionals who ply their trade in such places as Las Vegas, Reno, and Atlantic City. I prefer to focus on the existing record to see if any pattern has yet emerged. President Obama now has been in office for more than eighteen months. And though his (first?) term is less than half over, enough time has elapsed to permit an initial assessment of the validity of the forecasted effect of his election on the enforcement of federal antidiscrimination laws. So let's examine the record.

#### I. JUDICIAL APPOINTMENTS

The quantitative record on President Obama's judicial appointments is decidedly mixed. While Obama already has matched the number of Supreme Court appointments made by his two immediate predecessors, he has lagged considerably behind them in both nominating and having confirmed appointments to the federal trial and appellate courts.

Within the first twenty months of his administration, Obama had the opportunity to nominate, and has confirmed, two justices of the Supreme Court.<sup>27</sup> Presidents George W. Bush and Clinton, by way of comparison, had only two Supreme Court appointments during the entirety of each of their eight years in office. George W. Bush had to wait until nearly the end of the first year of his second term for his initial Supreme Court nomination (of Chief Justice John Roberts, Jr.; Justice Alito being nominated just over three months later).<sup>28</sup> President Clinton's first opportunity to make such an appointment, on the other hand, came within the third month of his presidency, when Justice Byron White announced his retirement on March 19, 1993 (Clinton subsequently named Ruth Bader Ginsburg to fill that slot).<sup>29</sup> The second and final vacancy during the Clinton administration occurred just over a year later when Justice Harry A. Blackmun announced his retirement on April 6, 1994, and Clinton nominated Stephen G. Breyer on May 13 to fill that seat.<sup>30</sup>

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27. U.S. Second Circuit Judge Sonya Sotomayor's nomination to the Supreme Court was confirmed by the U.S. Senate on August 6, 2009. Charlie Savage, *Senate Confirms Sotomayor for the Supreme Court*, N.Y. TIMES, Aug. 7, 2009, at A1. Solicitor General and former Harvard Law School Dean Elena Kagan's nomination to the Supreme Court was confirmed by the U.S. Senate on August 5, 2010. Carl Hulse, *Senate Confirms Kagan as Justice in Partisan Vote*, N.Y. TIMES, Aug. 6, 2010, at A1.

28. President Bush nominated U.S. D.C. Circuit Judge John G. Roberts to the Supreme Court on July 19, 2005. Todd S. Purdum, *Bush Picks Nominee for Court; Cites His 'Fairness and Civility'*, N.Y. TIMES, July 20, 2005, at A1. U.S. Third Circuit Judge Samuel Alito Jr. was nominated by President Bush on October 31, 2005. Elisabeth Bumiller & Carl Hulse, *Bush Picks U.S. Appeals Judge to Take O'Connor's Court Seat*, N.Y. TIMES, Nov. 1, 2005, at A6.

29. Linda Greenhouse, *Byron R. White, Longtime Justice and a Football Legend, Dies at 84*, N.Y. TIMES, Apr. 16, 2002, at A1; *The Supreme Court; Transcript of President's Announcement and Judge Ginsburg's Remarks*, N.Y. TIMES, June 15, 1993, at A24.

30. Linda Greenhouse, *Justice Blackmun, Author of Abortion Right, Dies*, N.Y. TIMES, Mar. 5, 1999, at A1; Gwen Ifill, *The Supreme Court: President Chooses Breyer, an Appeals*

President Obama dramatically altered the Supreme Court's level of ethnic and gender diversity. His appointment of two females marked the first time in Court history that three of its members were women. And Justice Sotomayor is the first Hispanic among the Court's 111 justices.<sup>31</sup>

Beyond those important milestones, however, and without ignoring or minimizing the cultural changes that may result from the increased presence of women on the Court,<sup>32</sup> it is generally acknowledged that these appointments did not alter the Court's ideological balance or jurisprudential direction. New Associate Justices Sonia Sotomayor and Elena Kagan's replacements of Justices David Souter and John P. Stevens maintained the status quo alignment along the Court's liberal/conservative axis.<sup>33</sup>

While recently confirmed Justice Kagan has yet to sit on a decided case, there were three employment discrimination-related cases decided during the Court's 2009–2010 term in which Justice Sotomayor participated. And her replacement of Justice Souter appears to have made no difference to the result in any of these cases.<sup>34</sup> In the single case directly involving a job discrimination claim, *Lewis v. City of Chicago*,<sup>35</sup> Justice Sotomayor joined a unanimous Court opinion holding that an employment practice that generates a disparate impact constitutes a discrete unlawful employment practice for Title VII charge-filing purposes.<sup>36</sup> And in the two nonemployment cases that nevertheless have direct relevance to discrimination claims, Justice Sotomayor took Justice Souter's traditional place alongside Justices Stevens, Ginsburg, and Breyer in dissenting from a majority opinion in which Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito joined. In *Perdue v. Kenny*,<sup>37</sup> she joined in that part of the opinion in which a unanimous Court held that superior attorney performance and result is presumptively unavailable as the basis for an enhancement of the lodestar fee in a statutory attorney's fee case, and also joined dissenting Justices Stevens, Ginsburg, and Breyer in concluding that the trial court had not abused its discretion in awarding the enhancement in the instant case.<sup>38</sup> She was part of that same quartet of dissenters in *Rent-A-Center, West, Inc. v. Jackson*,<sup>39</sup> in which that same majority ruled that when a party challenges the enforceability of an arbitration agreement that represents the entirety of the agreement between the parties, the threshold issue

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*Judge in Boston, for Blackmun's Seat*, N.Y. TIMES, May 14, 1994, § 1, at 11.

31. Adam Liptak, *Sotomayor Reflects on First Years on Court*, N.Y. TIMES, Feb. 1, 2011, at A17.

32. See Mark Leibovich, *Reshaping Court's Culture, a Woman at a Time*, N.Y. TIMES, May 11, 2010, at A15.

33. See e.g., Robert Barnes, *Roberts Steered High Court on a Bold Course This Term: Assertive Rulings Stole Spotlight from Ideological Divide*, WASH. POST, June 30, 2010, at A3; Naftali Bendavid, *Senate Confirms Kagan for Court*, WALL ST. J., Aug. 6, 2010, at A1; Adam Liptak, *The Roberts Court; The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1.

34. See generally David G. Savage, *So Far, She's a Solid Liberal*, L.A. TIMES, June 9, 2010, at 10.

35. 130 S. Ct. 2191 (2010).

36. *Id.*

37. 130 S. Ct. 1662 (2010).

38. *Id.*

39. 130 S. Ct. 2772, 2781 (2010) (Stevens, J., dissenting).

of unconscionability is to be resolved by the arbitrator when that agreement expressly and unambiguously delegates exclusive authority over that issue to the arbitrator.<sup>40</sup>

When compared with Presidents Bush and Clinton, President Obama has been less aggressive in nominating candidates to vacant federal judicial posts and less successful in having his nominations confirmed by the U.S. Senate.<sup>41</sup> After twenty months in office, President Obama had submitted eighty-five federal trial and circuit court nominees to the Senate (sixty-three district and twenty-two circuit court candidates), of which only 47% (thirty district and ten circuit court) had been confirmed.<sup>42</sup> In contrast, 56% of President Bush's 128 nominees (ninety-six district court and thirty-two circuit court) received Senate confirmation (fifty district and thirteen circuit court) during the initial twenty months of his first term, even though the Democrats controlled the Congress.<sup>43</sup> And Bill Clinton had 74% of his 124 judicial nominees confirmed (eighty-four of his 104 district court nominees and eighteen of twenty appellate court nominees) during the first twenty months of his administration.<sup>44</sup>

As anticipated, however, Obama's nominees have added to the diversity of the federal bench. Among his confirmed nominees are: Dolly Gee, the nation's first Chinese American female judge;<sup>45</sup> Lucy Koh, the country's first Korean American district judge;<sup>46</sup> Jacquelyn Nguyen, the first Vietnamese American federal district judge;<sup>47</sup> Tanya Walton Pratt, the first African American federal judge in Indiana history;<sup>48</sup> and Denny Chin, the only federal appellate court judge of Asian ancestry.<sup>49</sup> Finally, women account for 44% of the district court nominees (twenty-eight of sixty-three) and 32% (seven of twenty-two) of Obama's circuit court nominees.<sup>50</sup>

Accordingly, the evidence of President Obama's performance in his first year and one-half indicates that although he has taken a bit more time offering judicial nominations than his most immediate predecessors, and is having a bit more trouble getting his nominees confirmed (in a Senate controlled by his party), he is making efforts to increase the diversity of the federal bench.

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40. *Id.* at 2777–78 (majority opinion).

41. See Laura Litvan, *Obama Remake of Courts Bogged Down by Republicans*, BLOOMBERG (Aug. 2, 2010, 7:29 AM), <http://www.bloomberg.com/news/2010-08-02/obama-s-remake-of-u-s-courts-bogged-down-by-republican-delays-in-senate.html>.

42. See FED. JUDICIAL CTR., NEWLY APPOINTED FEDERAL JUDGES (2010) (on file with author).

43. *See id.*

44. *See id.*

45. Hector Becerra, *Senate OKs Gee as Judge*, L.A. TIMES, Dec. 26, 2009, at 3.

46. Howard Mintz, *Koh Confirmed to Federal Bench in San Jose—Obama Pick Is Only Korean-American in Federal Circuit*, SAN JOSE MERCURY NEWS, June 8, 2010, at 2B.

47. Seth Stern, *More Balance on the Bench*, CONG. Q. WKLY., May 9, 2011, at 980.

48. Editorial, *Weekly Scorecard*, FORT WAYNE J. GAZETTE, June 19, 2010, at 6A.

49. Stern, *supra* note 47, at 980.

50. *See* FED. JUDICIAL CTR., *supra* note 42.

## II. EEOC APPOINTMENTS

Another way in which a president can directly affect the course of civil rights enforcement is through the exercise of his executive authority to appoint leaders and policy makers of federal agencies. This is particularly true of his appointments to the EEOC, the agency tasked with monitoring, enforcing, and issuing interpretive guidelines with respect to all modern<sup>51</sup> federal antidiscrimination statutes.<sup>52</sup>

The EEOC is composed of five commissioners, all of whom are nominated by the president subject to confirmation by the U.S. Senate.<sup>53</sup> The same is true for the position of general counsel.<sup>54</sup> Three of the commissioner seats (two Democratic and one Republican) and the general counsel position were vacant when President Obama assumed office in January 2009.<sup>55</sup> He submitted the names of three women to fill the vacant commissioner slots in that year.<sup>56</sup> Initially, the president fared even worse with these nominations than he did with his judicial choices, as the Senate failed to vote on any of those nominations before it went into its spring 2010 legislative recess.<sup>57</sup> In response, Obama went forward with recess appointments for all three on March 27, 2010.<sup>58</sup> Finally, on December 22, 2010, the U.S. Senate confirmed the appointment of EEOC Chair Berrien, Commissioners Feldblum and Lipnic, and General Counsel Lopez.<sup>59</sup>

Jacqueline A. Berrien was sworn in as chair of the EEOC on April 7, 2010.<sup>60</sup> The appointment of Ms. Berrien, an African American attorney with an extensive record of public service in civil rights litigation, suggests that President Obama intends for the EEOC to take an active role in civil rights enforcement. She previously served as associate director-general of the NAACP Legal Defense and

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51. The EEOC plays no role in actions brought under the Reconstruction Civil Rights Acts (42 U.S.C. §§ 1981, 1983, 1985 (2006)). It also plays a more limited role under the Equal Pay Act, 29 U.S.C. § 206(d) than it does under Title VII, 42 U.S.C. § 2000e, the ADA, 42 U.S.C. § 12101, the Rehabilitation Act 29 U.S.C. §§ 705(20), 791, 793, 794, and the ADEA, 29 U.S.C. § 621.

52. JOEL WM. FRIEDMAN, *THE LAW OF EMPLOYMENT DISCRIMINATION* 444 (7th ed. 2009) [hereinafter *FRIEDMAN, THE LAW OF EMPLOYMENT DISCRIMINATION*]; JOEL WM. FRIEDMAN, *EMPLOYMENT DISCRIMINATION: EXAMPLES & EXPLANATIONS* 147 (2010).

53. *See The Commission*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/commission.cfm>.

54. *Id.*

55. Press Release, Sen. Tom Harkin, Harkin Welcomes Appointments to Labor Board, Employment Commission (Mar. 27, 2010); Press Release, Equal Emp't Opportunity Comm'n, U.S. Senate Confirms EEOC Chair, Two Commissioners and General Counsel All Four Had Been Serving Under Recess Appointments (Dec. 23, 2010).

56. Press Release, Equal Emp't Opportunity Comm'n, *supra* note 55.

57. *Id.*

58. *Id.*

59. Press Release, U.S. Equal Emp't Opportunity Comm'n, U.S. Senate Confirms EEOC Chair, Two Commissioners and General Counsel (Dec. 23, 2010), <http://www.eeoc.gov/eeoc/newsroom/release/12-23-10.cfm>.

60. *Jacqueline A. Berrien, Chair*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/berrien.cfm>.

Education Fund (LDF) for more than five years where she directed the LDF's national legal advocacy and scholarship programs.<sup>61</sup> Before assuming that position, Ms. Berrien served as a program officer with the Ford Foundation's Peace and Social Justice Program, where she administered grants designed to enhance political participation by underrepresented groups.<sup>62</sup> A Harvard Law School graduate, Ms. Berrien began her career as a practicing civil rights attorney, including seven years as an assistant counsel with the LDF, specializing in voting rights cases.<sup>63</sup>

On the same day that Chair Berrien was sworn in, another civil rights activist, Professor Chai Feldblum also was sworn in as an EEOC commissioner after receiving a recess appointment from President Obama.<sup>64</sup> Professor Feldblum, a member of the Georgetown University Law Center faculty since 1991, is a nationally acknowledged disability law scholar who played a leading role in drafting the Americans with Disabilities Act (ADA) and in helping to pass the ADA Amendments Act of 2008.<sup>65</sup> Most recently, Feldblum has been actively involved in the efforts to enact the Employment Non-Discrimination Act.<sup>66</sup> A Harvard Law School graduate, Feldblum is the first open lesbian to serve as an EEOC commissioner.<sup>67</sup>

The third of President Obama's trio of appointments to the EEOC was Victoria A. Lipnic, a Republican who practiced management-side labor and employment law as counsel to the D.C. office of the Seyfarth Shaw law firm.<sup>68</sup> As U.S. assistant secretary of Labor for Employment Standards during the George W. Bush administration, Lipnic exercised oversight authority over the Wage and Hour Division, the Office of Federal Contract Compliance Programs, the Office of Workers' Compensation Programs, and the Office of Labor Management Standards.<sup>69</sup> During her seven-year tenure, the Wage and Hour Division reissued regulations under the Family and Medical Leave Act, and the Office of Federal Contract Compliance Programs issued its new regulations for evaluating compensation discrimination.<sup>70</sup>

Obama also filled the general counsel vacancy with a recess appointment after the Senate recessed without acting on his nomination of P. David Lopez.<sup>71</sup> Lopez,

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61. *Id.*

62. *Id.*

63. *Id.*

64. *U.S. Senate Confirms EEOC Chair, Two Commissioners and General Counsel*, *supra* note 59.

65. *Chai Feldblum, Commissioner*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/feldblum.cfm>.

66. *Id.*

67. *Id.*

68. *Victoria A. Lipnic, Commissioner*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/lipnic.cfm>; Ilyse Schuman, *Victoria Lipnic Sworn in as EEOC Member*, WASHINGTON DC EMP. LAW UPDATE, (Apr. 21, 2010), <http://www.dcmplemploymentlawupdate.com/2010/04/articles/agency-changes/victoria-lipnic-sworn-in-as-eeoc-member>.

69. *Lipnic*, *supra* note 68.

70. *Lipnic*, *supra* note 68; Schuman, *supra* note 68.

71. *P. David Lopez, General Counsel*, U.S. EQUAL EMP. OPPORTUNITY COMM'N,

the first EEOC general counsel to be appointed from the ranks of field attorneys, is a Harvard Law-educated senior trial attorney in the agency's Phoenix office.<sup>72</sup> During his thirteen years of service with the EEOC, Lopez successfully litigated many disability, retaliation, harassment, and wage discrimination suits.<sup>73</sup>

With less than five months having expired since these individuals were sworn in on April 7, 2010, it is not possible at this time to assess their impact on the direction of the agency. On the other hand, President Obama and his attorney general, Eric H. Holder, Jr., the first African American to hold that post, have announced their intention to revitalize the Justice Department's enforcement of employment discrimination and other civil rights statutes through its Civil Rights Division.<sup>74</sup> In his January 2010 State of the Union address, for example, President Obama declared that "[m]y administration has a Civil Rights Division that is once again prosecuting civil rights violations and employment discrimination."<sup>75</sup>

### III. THE DEPARTMENT OF JUSTICE: CIVIL RIGHTS DIVISION AND OFFICE OF SOLICITOR GENERAL

Created by Congress by the Civil Rights Act of 1957, the first civil rights bill since Reconstruction, the Civil Rights Division of the Department of Justice was and remains tasked with enforcing the nation's antidiscrimination laws and overseeing voting rights cases.<sup>76</sup> To lead the division, President Obama nominated, and the Senate confirmed, Thomas Perez, a former deputy assistant attorney general for civil rights and former director of the Office for Civil Rights at the U.S. Department of Health and Human Services during the Clinton administration who had previously served several years as a career attorney in the Civil Rights Division.

Perez took over a division that President Obama and Attorney General Eric Holder have declared will be revitalized and recommitted to its mission of enforcing antidiscrimination statutes. Nearly 70% of the division's 350 civil rights lawyers left the division between 2003 and 2007,<sup>77</sup> with many of their replacements possessing scant civil rights experience.<sup>78</sup> A report by the Government Accountability Office auditing the activities of the Civil Rights Division from 2001 through 2007 revealed that lawsuits brought by the division challenging alleged acts of racial or sex-based employment discrimination fell from about eleven per

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<http://www.eeoc.gov/eeoc/lopez.cfm>.

72. *Id.*

73. *Id.*

74. Neil A. Lewis, *Panel Backs Justice Dept. Nominee*, N.Y. TIMES, Jan. 29, 2009, at A17; Charlie Savage, *White House to Shift Efforts on Civil Rights*, N.Y. TIMES, Sept. 1, 2009, at A1.

75. Jerry Markon, *Justice Dept. Steps Up Civil Rights Enforcement: Division Reshapes Itself After Employee Exodus During Bush Era*, WASH. POST, June 4, 2010, at A16.

76. See Charlie Savage, *Civil Rights Hiring Shifted in Bush Era; Conservative Leanings Stressed*, BOS. GLOBE, July 23, 2006, at A1.

77. Markon, *supra* note 75, at A16; Savage, *supra* note 76, at A1.

78. Savage, *supra* note 76, at A1.

year under President Bill Clinton to about six per year under President George W. Bush.<sup>79</sup>

In terms of concrete actions, the president's fiscal year 2010 budget request included an increase of about \$22 million for the Civil Rights Division, an 18% increase from its 2009 budget.<sup>80</sup> Much of this increase has been directed toward funding more than 100 new staff positions.<sup>81</sup> In its litigative role, the division filed about ten "friend of the court" briefs in private discrimination-related lawsuits in the first year and one-half since President Obama's inauguration.<sup>82</sup> More particularly, in the area of employment discrimination, Obama's Justice Department filed twenty-nine cases through March 20.<sup>83</sup> By comparison, only one case was filed during that same period of time by the Bush administration.<sup>84</sup> Most notably, perhaps, the Justice Department filed suit in an Arizona federal court on July 6, 2010, to strike down as unconstitutional the recently enacted Arizona state statute known as Senate Bill 1070 that is aimed at deporting illegal immigrants.<sup>85</sup>

Additionally, the Justice Department, through the office of Solicitor General Elena Kagan, appointed by Obama as the nation's first female Solicitor General, filed amicus briefs in four cases relevant to the enforcement of employment discrimination laws;<sup>86</sup> two were heard by the Supreme Court during its 2008–09 term and two were decided during the 2009–2010 term. Although the Office of Solicitor General is often characterized as apolitical, it is located within the Department of Justice. And though the solicitor general traditionally has "enjoyed minimal control from the Attorney General," the holder of that position is chosen by the president (and can be removed at the president's discretion) "not only for her legal expertise but because she shares the President's policy goals and views the [Office of the Solicitor General] as a vehicle for advancing them."<sup>87</sup>

Three of these four cases were brought under federal antidiscrimination statutes; two were under Title VII and one was under the Age Discrimination in Employment Act (ADEA). The fourth, while not an employment case, nevertheless has direct and significant application to employment discrimination suits. In one of

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79. Charlie Savage, *Report Examines Civil Rights Enforcement During Bush Years*, N.Y. TIMES, Dec. 3, 2009, at A26.

80. Markon, *supra* note 75, at A16; Byron York, *Obama's Zealous Civil Rights Enforcer Gets Busy*, WASH. EXAMINER (Aug. 6, 2010, 3:00 AM), <http://washingtonexaminer.com/politics/obama039s-zealous-civil-rights-enforcer-gets-busy>.

81. York, *supra* note 80; Markon, *supra* note 75, at A16.

82. Markon, *supra* note 75, at A16.

83. *Id.*

84. *Id.*

85. See Randal C. Archibold, *Pre-Emption, Not Profiling in Challenge to Arizona*, N.Y. TIMES, July 8, 2010, at A15; Jerry Markon & Michael D. Shear, *Justice Depart. Sues Arizona over Law: Unusual Clash with a State Immigration Measure Called Unconstitutional*, WASH. POST, July 7, 2010, at A1.

86. *Perdue v. Kenny*, 130 S. Ct. 1662 (2010); *Lewis v. City of Chicago*, 130 S. Ct. 2192 (2010); *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009).

87. Karen Swenson, *President Obama's Policy Agenda in the Supreme Court: What We Know So Far from the Office of the Solicitor General's Service as Amicus Curiae*, S. ILL. U. L.J. 359, 359–60 (2010).

the pair of Title VII cases, the government argued in support of a public employer's affirmative action policy. In the other, it urged the Court to adopt a liberal interpretation of the limitations period set forth in Title VII. The government supported the plaintiff's position in the ADEA case. Thus, in these three cases, the government took a "pro" civil rights position. In the non-employment case, however, the government argued against the plaintiff's position in a case challenging the availability of any enhancement of attorney fee awards in cases brought under a federal fee-shifting statute. Let's briefly examine the government's position and its success rate before the Court in this quartet.

*Ricci v. DeStefano*<sup>88</sup> included, inter alia, a claim by several white and Hispanic firefighters that the decision by the City of New Haven to discard the results of examinations after the City had learned that white candidates had outperformed minority candidates constituted intentional racial discrimination in violation of Title VII.<sup>89</sup> The trial court,<sup>90</sup> affirmed by the Second Circuit in a one-paragraph per curiam opinion,<sup>91</sup> had granted summary judgment in favor of the City on the ground that its decision not to use the test results in hiring decisions did not constitute intentional discrimination under Title VII.<sup>92</sup> The United States, as amicus curiae, submitted a brief in support of the City's position that it had justifiably discarded the test results based on its good faith belief that doing so was necessary to avoid the disparate impact liability that would have resulted from appointments made pursuant to those racially disparate test scores.<sup>93</sup> But in another five to four vote, the Court rejected the government's position and held that the decision not to certify test results because of their statistical disparity based on race did constitute intentional discrimination.<sup>94</sup> And though it also held that the City could avoid liability if it could establish that its decision was justified by a valid defense, it rejected the government's suggestion that a good faith belief that such action was necessary to avoid impact liability constituted such a valid defense.<sup>95</sup> Instead, it required the employer to demonstrate a "strong basis in evidence" that the impact-creating test was statutorily deficient and that discarding it was necessary to avoid impact-based liability.<sup>96</sup>

*Gross v. FBL Financial Services, Inc.*,<sup>97</sup> was a case in which the Court ignored the advice of the solicitor general and went far beyond the issue on which it had granted certiorari to rule that mixed-motive analysis was never available in ADEA actions. The trial judge in *Gross* had instructed the jury that if the plaintiff established that age was a motivating factor in the challenged employment decision

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88. 129 S. Ct. 2658 (2009).

89. *Id.* at 2664.

90. *Ricci v. DeStefano*, 554 F. Supp. 2d 142 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 2658 (2009).

91. *Ricci*, 530 F.3d at 87.

92. *Ricci*, 554 F. Supp. 2d at 160.

93. Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 4, *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (Nos. 07-1428 & 08-328).

94. *See Ricci*, 129 S. Ct. at 2663-64.

95. *Id.* at 2673-76.

96. *Id.*

97. 129 S. Ct. 2343 (2009).

by “a preponderance of any category of evidence,” the defendant then bore the burden of persuasion to establish that it would have reached the same result absent consideration of the plaintiff’s age.<sup>98</sup> The court of appeals reversed and remanded for a new trial on the ground that this mixed-motive analysis was only available in ADEA cases when the plaintiff had established *through direct evidence* that age was a motivating factor for the employer’s decision.<sup>99</sup> Certiorari was granted solely to determine whether a mixed-motive instruction in an ADEA action was limited to cases involving direct (as opposed to circumstantial) evidence that an impermissible consideration had played a motivating role in a mixed-motive case.<sup>100</sup> In its amicus brief, the federal government supported the plaintiff’s position that the Eighth Circuit had erred in limiting mixed-motive instructions to cases involving direct evidence.<sup>101</sup> It did not address the larger question of the availability *vel non* of mixed motive analysis in ADEA suits.<sup>102</sup> Nevertheless, despite the facts that the issue was not directly before it, the Court chose to rule on the larger question and, by a five to four vote, held that mixed-motive instructions were unavailable in actions brought under this statute.<sup>103</sup> Justice Stevens, writing for the four dissenters, chided the majority for deciding this issue, noting that the government’s amicus brief had not addressed the issue and that the government, at oral argument, had urged the Court not to reach this issue.<sup>104</sup>

In *Lewis v. City of Chicago*,<sup>105</sup> the Seventh Circuit rejected the plaintiff’s claim that the discriminatory act which triggered the commencement of the EEOC filing period was the date on which employment test results—utilized by the City of Chicago as part of the hiring process for entry-level firefighters—were used to make hiring decisions.<sup>106</sup> Instead, it held that the relevant date was the date that the employment exam was scored and its results discovered.<sup>107</sup> Since the plaintiffs had filed their EEOC charge within 300 days of the date the scores were used to make hiring decisions, but not within 300 days of the time the test was scored and its result discovered by the City, the appellate court had ordered the trial judge to enter judgment in favor of the defense.<sup>108</sup> The United States urged the Supreme Court to reverse the circuit court and to adopt the more expansive interpretation of the statutory limitations period that had been applied by the trial judge in this disparate impact case.<sup>109</sup> The Supreme Court unanimously agreed with the government that

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98. *Id.* at 2348 (emphasis omitted).

99. *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 361–62 (8th Cir. 2008), *rev’d*, 129 S. Ct. 2343 (2009).

100. *Gross*, 129 S. Ct. at 2346.

101. Brief for the United States as Amicus Curiae Supporting Petitioner at 10–12, *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009) (No. 08-441).

102. *Id.* at 11.

103. *See Gross*, 129 S. Ct. at 2346, 2350–51.

104. *Id.* at 2352–53, 2353 n.2 (Stevens, J., dissenting).

105. 130 S. Ct. 2192 (2010).

106. *See id.* at 2196.

107. *See id.*

108. *See id.*

109. Brief for the United States as Amicus Curiae at 6–8, *Lewis v. City of Chicago*, 130 S. Ct. 2192 (2009) (No. 08-974).

the relevant statutory text (42 U.S.C. § 2000e-2(k)(1)(A)) supported a ruling that each *use* of an impact-creating employment practice constituted an independent discriminatory event for determining the relevant charging period.<sup>110</sup> It also agreed with the government that this decision was not inconsistent with Court precedent.<sup>111</sup> As a consequence of the Court's ruling, Title VII plaintiffs have an expanded window within which to challenge employment practices that have an unlawfully disparate impact on the five statutorily protected classifications. Where plaintiffs base their Title VII claim on the adverse consequences of a facially neutral employment requirement, they no longer must file suit within six to ten months of the time that requirement is initially implemented. Rather, they can wait until it is used against them, an option that substantially enhances their opportunity to file a timely charge and, ultimately, a timely suit.

In *Perdue v. Kenny*,<sup>112</sup> the trial judge had granted the prevailing (via settlement) plaintiffs' request for an enhancement of the lodestar fee in a § 1983 class action suit brought against Georgia officials alleged to have violated federal and state constitutional and statutory provisions in their administration of Atlanta's foster care system.<sup>113</sup> The trial judge had based the enhancement on the superior quality of representation coupled with the superior results obtained by plaintiffs' counsel.<sup>114</sup> The Eleventh Circuit panel affirmed the award.<sup>115</sup> The federal government, as a defendant in employment discrimination cases brought by federal employees under fee-shifting statutes such as Title VII, the ADA, and the ADEA, clearly had a direct and substantial institutional interest in the resolution of this question. It chose to file an amicus brief in support of the State of Georgia's position and argued that the Court should never permit enhancements to a lodestar calculation.<sup>116</sup>

The United States urged the Court to rule that the lodestar presumption of reasonableness was conclusive and that any enhancement on grounds of quality of representation and result obtained would constitute double counting since those variables were expressly factored into the calculation of the reasonable hourly rate component of the lodestar fee.<sup>117</sup> The government also maintained that such enhancements were unnecessary to satisfy the aim of the fee-shifting statutes, that is, to enable private parties to attract competent counsel to help vindicate important federally guaranteed rights.<sup>118</sup> Finally, although the government took the position that the question of whether enhancement of the lodestar fee could be permitted on the basis of factors other than quality of representation and result obtained—such as contingency risk and delayed payment of attorney's fees and expenses—was

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110. *Lewis*, 130 S. Ct. at 2198.

111. *Id.* at 2199.

112. 130 S. Ct. 1662 (2010).

113. *Id.* at 1670.

114. *Id.*

115. *Perdue v. Kenny*, 532 F.3d 1209, 1214 (11th Cir. 2008), *rev'd*, 130 S. Ct. 1662 (2010).

116. Brief for the United States as Amicus Curiae Supporting Petitioners, *Perdue v. Kenny*, 130 S. Ct. 1662 (2010) (No. 08-970).

117. *Id.* at 8–10, 25.

118. *Id.* at 8–10.

outside the question contained in the petition for certiorari, it also argued that none of those factors justified an enhancement.<sup>119</sup>

The Supreme Court unanimously agreed with the solicitor general that superior attorney performance or result obtained is not a proper basis for enhancing the lodestar fee.<sup>120</sup> However, the Court rejected the government's absolutist position asserting the blanket unavailability of enhancements.<sup>121</sup> It ruled that the presumption of the reasonableness of the lodestar fee *could* be overcome in "rare" and "exception" cases where the lodestar fee did not adequately take into account a factor that properly could be considered in determining a reasonable fee, such as where the attorney had made an extraordinary outlay of expenses in extremely protracted litigation.<sup>122</sup> Moreover, the Court acknowledged that superior performance-based enhancement could also be possible in a rare or exceptional case, such as where the prevailing attorney tendered specific evidence that the lodestar fee would not have been able to attract competent counsel.<sup>123</sup>

Thus far, then, with the exception of the position taken in *Perdue*, the statements and actions during the first two years of the Obama administration support the president's declared objective of reinvigorating the Justice Department's role in civil rights enforcement, including a revival of high visibility litigative efforts in the employment arena.

The president's executive authority, of course, extends well beyond the power to fill policy-making administrative posts and the actions taken by those appointees. A frequently used part of this portfolio is the unilateral power to issue executive orders, administrative decrees that have the force of law and typically are issued pursuant to expressed or implied legislative delegation.<sup>124</sup> Further, the president's role in the legislative function extends beyond the constitutional authority to sign bills passed by the Congress. Presidents frequently play a leading role in introducing and shaping new federal legislation. So it also is worth examining President Obama's legislative and executive order-issuing track record in assessing his impact on civil rights enforcement in the employment context.

#### IV. LEGISLATIVE INITIATIVES AND EXECUTIVE ORDERS

After twenty months in office, President Obama has amassed a very meager legislative record. But like President Clinton,<sup>125</sup> President Obama's first signed

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119. *Id.* at 9–10, 25.

120. *Kenny*, 130 S. Ct. at 1669.

121. *Id.* at 1674.

122. *Id.*

123. *Id.*

124. JEROME A. BARRON & THOMAS DIENES, *CONSTITUTIONAL LAW IN A NUT SHELL* 164 (7th ed. 2009).

125. The first statute signed by President Clinton was the Family & Medical Leave Act, which, for the first time, provided employees of companies with fifty or more employees with a right to twelve weeks of unpaid leave to provide infant care or provide care for a child, spouse, or parent with a serious health condition. Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified at 29 U.S.C. §§ 2601–2654 (2006)); Robin Finn, *Grateful for More School Aid, but Hold the Champagne*, N.Y. TIMES, Mar. 31, 2006, at B2.

piece of legislation was an antidiscrimination statute. In direct response to the Supreme Court's ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>126</sup> in which the Court, by a five to four vote, ruled that the discrete act in a wage discrimination claim that triggers the limitations period for filing an EEOC charge is the initial pay-setting decision and not individual salary payments, Congress passed, and President Obama signed, the Lilly Ledbetter Fair Pay Act of 2009.<sup>127</sup> This statute amended Title VII, the ADEA, the ADA, and the Rehabilitation Act to provide that an unlawful employment practice occurs each time that compensation is paid pursuant to a discriminatory compensation decision or other practice.<sup>128</sup> At the signing ceremony, President Obama remarked:

[E]qual pay isn't just an economic issue for millions of Americans and their families; it's a question of who we are and whether we're truly living up to our fundamental ideals; whether we'll do our part, as generations before us, to ensure those words put on paper some 200 years ago really mean something, to breathe new life into them with a more enlightened understanding that is appropriate for our time.<sup>129</sup>

The Ledbetter Act is, to date, the only piece of employment discrimination legislation enacted during the Obama administration. But President Obama has been a staunch supporter of the proposed Employment Non-Discrimination Act (ENDA), a statute designed to provide Title VII-like protection against discrimination by civilian, non-religious organizations on the basis of sexual orientation or gender identity (for example, transgender status).<sup>130</sup> Although bills were introduced in both Houses of Congress during the 111th Congress, neither bill came to a full floor vote by the end of the session.<sup>131</sup> So this statute was re-introduced in the 112th Congress on April 6, 2011, by Reps. Barney Frank (D-MA) and Ileana Ros-Lehtinen (D-FL) in the House and on April 13, 2011, by Senator Jeff Merkley (D-OR) and Mark Kirk (R-IL) in the Senate.<sup>132</sup> Finally, on December 22, 2010, President Obama signed a bill repealing the military's seventeen year old "Don't Ask, Don't Tell" policy, which prohibited gays from openly serving in the military.<sup>133</sup>

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126. 550 U.S. 618, 620–21, 637 (2007); FRIEDMAN, *THE LAW OF EMPLOYMENT DISCRIMINATION*, *supra* note 52.

127. Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. & 42 U.S.C.).

128. § 2, 123 Stat. 5, 5 (codified as amended at 42 U.S.C. § 2000(e)-(5)(e)(3)(A); 29 U.S.C. § 626(d)(3) (Supp. III 2010)).

129. Presidential Statement on Signing the Lilly Ledbetter Fair Pay Act of 2009, 2009 DAILY COMP. PRES. DOC. 33 (Jan. 29, 2009).

130. *See e.g.*, David Crary, *Support Is Building for a Ban on Anti-Gay Bias*, STAR-LEDGER (Newark, N.J.), Aug. 28, 2009, at 3.

131. Michelle Garcia, *A Bipartisan Attempt at ENDA*, ADVOCATE (Apr. 15, 2011, 5:38 PM), [http://www.advocate.com/News/Daily\\_News/2011/04/14/A\\_Bipartisan\\_Attempt\\_at\\_ENDA](http://www.advocate.com/News/Daily_News/2011/04/14/A_Bipartisan_Attempt_at_ENDA).

132. *Employment Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN (July 12, 2011) [http://www.hrc.org/laws\\_and\\_elections/enda.asp](http://www.hrc.org/laws_and_elections/enda.asp).

133. Sheryl Gay Stolberg, *Obama Signs Away Signs Away 'Don't Ask, Don't Tell,'* N.Y.

With respect to executive orders, on July 26, 2010, the 20th anniversary of the enactment of the ADA, President Obama signed an executive order designed to increase federal hiring of persons with disabilities. Executive Order 13,548<sup>134</sup> requires the federal government, within sixty days, to develop model recruitment and hiring guidelines and strategies to increase the federal government's employment of people with disabilities, mandates training for human resources personnel and hiring managers on the employment of individuals with disabilities, and requires all federal agencies to develop individual plans for promoting the employment, training, and retention of disabled individuals.<sup>135</sup>

#### CONCLUSION

With President Obama's term nearing its halfway point, what can we say about the impact that the election of this mixed-race president has had on the enforcement of antidiscrimination laws? The limited record is inconclusive. While the president has taken concrete steps to enhance the diversity of the federal bench, including the appointment of two female Justices of the Supreme Court, he has lagged behind his predecessors in the number of federal district and circuit court nominations as well as the number and percentage of those nominees confirmed by the Senate in a comparable time frame, even though the Senate is controlled (though not by a filibuster-proof supermajority) by the president's own party. And though Obama had the opportunity to appoint two Supreme Court justices at a comparatively early point in his administration, and was able to obtain confirmation of both of his nominees, neither of these appointments has changed the Court's ideological balance. All three of his chosen candidates for a seat on the EEOC are women, and the two Democrat appointees certainly can be expected to support a vigorous enforcement of the employment discrimination statutes within their jurisdiction.

The president and his attorney general certainly have consistently proclaimed their intention to reinvigorate the Justice Department as a staunch enforcer of antidiscrimination laws. And there is some evidence that this is happening. The president has increased the budget and staffing of the Civil Rights Division, and the Justice Department has taken an aggressive position on immigration and border issues by choosing to file suit challenging the constitutionality of the Arizona statute aimed at identifying and deporting illegal immigrants. The Justice Department also has taken a more active role in the litigative arena by filing many more employment discrimination suits than had been the case during the George W. Bush administration and by filing amicus briefs in four Supreme Court cases with significant impact in the employment discrimination area. Yet while it argued in support of the more expansive interpretation of these statutes in three cases, the government supported the employer's position in a statutory fee-shifting case, arguing that the Court should decline to permit any enhancement of lodestar fee awards.

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TIMES, Dec. 23, 2010. This statutory repeal, however, does not immediately end the military's policy. It will take effect only after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff jointly certify that the change in law will not harm military readiness. *Id.*

134. Exec. Order No. 13,548, 75 Fed. Reg. 45,039 (July 30, 2010).

135. *Id.*

Finally, with respect to legislative and quasi-legislative results, the record is limited. The president signed the Lilly Ledbetter Act, which made it easier for workers to challenge alleged instances of wage discrimination. He also issued an executive order that will increase the employment of individuals with disabilities by the federal government.

So, with the benefit of nearly two years of data, what, if anything, can be meaningfully and authoritatively said about the impact of the election of this mixed-race president on the enforcement of antidiscrimination laws in the employment context? I think the most one can say is that the president appears to be trying to fulfill the hopes and expectations of those who believed that he would expand the government's role in civil rights enforcement but that his efforts have borne limited success. Time will tell whether he is more successful in the future and how long that future will last.