Race Neutral Enforcement of the Law?

The U.S. Department of Justice and the New Black Panther Party Litigation

An Interim Report

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
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U.S. Commission on Civil Rights
624 Ninth Street, NW
Washington, DC 20425
(202) 376-8128
(202) 376-8116 TTY
www.usccr.gov

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Letter of Transmittal
The President
The President of the Senate
The Speaker of the House

Sirs:

The United States Commission on Civil Rights transmits this report, *Race Neutral Enforcement of the Law? DOJ and the New Black Panther Party Litigation: An Interim Report*, pursuant to Public Law 103-419. The purpose of the report is to examine the U.S. Department of Justice's ("DOJ" or "the Department") legal and policy rationales for dismissing a civil voter intimidation lawsuit against three of four defendants and reducing the relief requested against the fourth, despite the case being in default. Based upon the incomplete, incorrect and changing explanations offered by the Department for its actions, the Commission decided to examine whether the U.S. Department of Justice enforced voting rights in a race-neutral manner when it reversed course in the New Black Panther Party case.

The case stemmed from an incident that occurred in Philadelphia during the 2008 presidential election in which two New Black Panther Party members stood in the entrance to a polling place in full paramilitary garb and shouted racial slurs. One of the two brandished a nightstick. In December 2008, a civil case for alleged Voting Rights Act violations for intimidating or attempting to intimidate voters, poll workers and observers was initiated against the NBPP, its chairman, and the two men at the polling place. Despite the entry of a default in DOJ's favor against each of the defendants, in May 2009 the Department abruptly reversed course and dismissed charges against all but one of the defendants and reduced the original sanctions it requested against the remaining defendant, who was only enjoined from carrying a weapon at a polling place in Philadelphia until 2012.

Pursuant to its investigation, the Commission has held four public hearings, taken several depositions and attempted several others. It has attempted to work cooperatively with DOJ, but has been met with substantial resistance and only contrived cooperation for public affairs purposes. For example, though DOJ has provided thousands of documents unrelated to its decision to drastically reduce the nature and scope of the relief it sought in the NBPP case, it has repeatedly rebuffed Commission requests for key documents. While it provided witness testimony from a high-level official not at the Department during the relevant time period in question, it has directed those of its employees under subpoena with relevant, direct knowledge not to provide testimony to the Commission. It has also attempted to impose unreasonable conditions on the Commission before it will allow the deposition testimony of other Department employees and has raised questionable and sweeping privilege claims.

Two senior career attorneys who worked on the NBPP case defied DOJ's directive not to comply with the Commission's subpoenas at great personal risk to themselves. One testified after resigning his position at DOJ. The other, the former head of the Voting Section who was transferred to South Carolina, is still currently employed with DOJ. Both accused the Department of failing to enforce the voting rights laws in a race-neutral manner, an allegation denied by the current head of the Civil Rights Division who testified, but who was not at DOJ during the critical period in question.

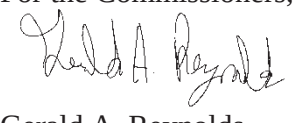
Because the Department withheld relevant documents and relevant officials' and supervisors' witness testimony, the Commission was limited in its ability to complete a final report. As a result, the Commission issues this interim report, which was approved on November 19, 2010. Part A of the report, consisting of Chapters 1 through 5 and the appendix, was approved by a vote of 5-2. Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow and Taylor voted in the majority. Commissioners Yaki and Melendez voted against the report. Vice Chair Thernstrom was absent and declined an opportunity to cast her vote for the body of the report and findings and recommendation at a subsequent meeting.

The Commission, by a separate 5-2 vote breaking down along the same lines, found that although its statute authorizes the Commission to subpoena witnesses and written material and requires federal agencies to cooperate fully with its investigations, its authority to seek legal recourse when the Attorney General refuses to enforce Commission subpoenas, as has occurred repeatedly during this investigation, is unclear. By a vote of 5-1-1, the Commission further found that the Department has an inherent conflict of interest when it would prefer not to cooperate fully with the Commission's investigations of DOJ's actions. In the New Black Panther Party investigation that is the subject of this report, the Department refused to comply with certain Commission requests for information concerning DOJ's enforcement actions, and it instructed its employees not to comply with the Commission's subpoenas for testimony. (Commissioner Yaki voted against; Commissioner Melendez abstained; Vice Chair Thernstrom was absent for the vote; the remaining Commissioners approved the finding).

The Commission recommended, therefore, that Congress consider amendments to the Commission's statute to address investigations in which the Attorney General and/or the Department have a conflict of interest in complying fully with the Commission's requests for information. Options might include the enactment of a statutory procedure to require the Attorney General to respond in writing to a Commission request for the appointment of a special counsel to represent it in court; a statutory provision clarifying that the Commission may hire its own counsel and proceed independently in federal court; or a conscious decision by Congress not to alter the current authority that allows the Attorney General and the Department of Justice to act against the Commission's interest without explanation (5-2; Commissioners Yaki and Melendez voted against; Vice Chair Thernstrom was absent for the vote; the remaining Commissioners approved the recommendation).

The report includes separate concurring statements submitted by Commissioners Gaziano, Heriot and Kirsanow. Commissioners Gaziano and Kirsanow joined each other's statements and Commissioner Heriot's statement. Commissioners Melendez and Yaki filed a joint dissenting statement. Vice Chair Thernstrom also submitted a dissenting statement. Finally, the report includes a joint-rebuttal statement submitted by Commissioners Kirsanow, Heriot and Gaziano.

For the Commissioners,



Gerald A. Reynolds
Chairman

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Chronology of Significant Events in United States of America v.New Black Panther Party for Self Defense et al.

- November 4, 2008

  Two members of the New Black Panther Party for Self Defense (NBPP), Jerry Jackson and Minister King Samir Shabazz, appear in front of a polling station in Philadelphia, Pennsylvania, sporting paramilitary-style gear. Mr. Shabazz carries a night stick and stands with Jackson close to the polling place entrance doors. Witnesses report that Mr. Shabazz shouts racial epithets and threatening statements.

- January 7, 2009

  The U.S. Department of Justice (DOJ) files a lawsuit for voter intimidation under § 11(b) of the Voting Rights Act against: (1) Minister King Samir Shabazz; (2) Jerry Jackson; (3) NBPP President Malik Zulu Shabazz; and (4) the New Black Panther Party for Self Defense.

- April 17, 2009

  A default is entered. DOJ is given until May 1, 2009 to file a motion for default judgment.

- April 28, 2009

  DOJ provides the NBPP defendants notice of its intent to file for default judgment.

- April 29, 2009

  Acting Deputy Assistant Attorney General Steve Rosenbaum tells trial team for the first time of his doubts about the case.

- April 30, 2009

  Rosenbaum exchanges eight e-mails with Deputy Associate Attorney General Sam Hirsch about the case. Hirsch communicates with Associate Attorney General Thomas Perrelli.

- May 1, 2009

  DOJ files a motion to extend the filing deadline for a default judgment until May 15, 2009.

- May 6, 2009

  The trial team, made up of DOJ career attorneys Christopher Coates (the Chief of the Voting Section), Robert Popper (the Deputy Chief), and trial attorneys J. Christian Adams and Spencer Fisher, submits a Remedial Memorandum to Acting Assistant Attorney General Loretta King detailing legal arguments in support of the lawsuit.

- May 7, 2009

  Rosenbaum forwards background material to Appellate Section for review of merits of the lawsuit.

- May 13, 2009

  Appellate Section Chief Diana Flynn sends her comments, along with those of fellow Appellate Section attorney Marie McElderry, to Steven Rosenbaum, copying Coates. Flynn recommends proceeding to judgment against all four defendants.

- May 15, 2009

  DOJ voluntarily dismisses three of the original four defendants. The injunctive relief against the remaining defendant is substantially reduced.

- November 18, 2009

  The U.S. Commission on Civil Rights issues subpoenas to members of the trial team, Christopher Coates and J. Christian Adams, to testify. The Department instructs Coates and Adams not to comply with the subpoena.

- May 13, 2010

  Assistant Attorney General for Civil Rights Thomas Perez has meeting with trial team members Christopher Coates, Robert Popper, and J. Christian Adams. Perez is told that the trial team believes the lawsuit was justified as to all defendants. Coates tells Perez of hostility within the Civil Rights Section to race-neutral enforcement of voting laws.

- May 14, 2010

  Thomas Perez testifies before the Commission.

- May 14, 2010

  J. Christian Adams submits resignation to the Department following Perez's testimony.

- July 6, 2010

  J. Christian Adams testifies before the Commission, claiming that Thomas Perez testified inaccurately.

- September 24, 2010

  Coates testifies before the Commission, claiming that he believes Perez's statements to the Commission do not "accurately reflect what occurred in the Panther case and do not reflect the hostile atmosphere that has existed within the Division [Civil Rights Division] for a long time against race-neutral enforcement of the Voting Rights Act."[1]

[1] Sept. 24, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 9 (Testimony of Christopher Coates), *available at* http://www.usccr.gov/NBPH/09-24-2010_NBPPhearing.pdf [hereinafter "Coates Testimony"].

INTRODUCTION

For over a year, the U.S. Commission on Civil Rights (the Commission) has been trying to determine why the U.S. Justice Department took the unusual action of dismissing voter intimidation claims against defendants who did not contest their own liability, as well as significantly scaling back the injunctive relief sought against the remaining defendant. Almost from the beginning of its inquiry, the Commission has been interested in determining what could explain this abrupt change in the trajectory of the lawsuit and what the implications might be for other law enforcement actions. The troubling testimony of misconduct provided by Justice Department whistleblowers thus far deserves careful attention; it may even explain why the Department refuses to provide information that would allow the Commission to complete its inquiry.

The facts relating to the original lawsuit, including evidence partially captured on video, have now become familiar. On Election Day 2008, two members of the New Black Panther Party for Self Defense (NBPP or the Party) appeared at a polling site in Philadelphia wearing paramilitary garb. One of the Party members carried a nightstick and witnesses reported that racially offensive and threatening statements were made to poll watchers and poll workers. These actions resulted in the U.S. Department of Justice (DOJ or the Department) filing a lawsuit against these individuals, as well as the NBPP and its leader, who was alleged to have encouraged and endorsed the intimidating conduct. Although the suit was uncontested, and a default was entered, the Department unilaterally dismissed the claims against three of the defendants and reduced the injunctive relief sought against the fourth.

The Department has argued that the change was based on a review of the totality of the circumstances and was simply a matter of career people disagreeing with other career people about the adequacy of the evidence under the pertinent law. Evidence obtained by the Commission, however, has called this version of events into serious doubt. First, two members of the NBPP trial team, Christopher Coates and J. Christian Adams, have testified before the Commission that the lawsuit was strong and that there was no legally sound reason to reverse course. Second, internal Department documents obtained by the Commission show that an independent review of the facts and legal arguments undertaken by career attorneys in the Appellate Section resulted in a recommendation that the case proceed without change. Third, evidence obtained pursuant to a Freedom of Information Act lawsuit by a third party indicates that this matter was not simply a difference of opinion between career attorneys. Instead, the record of communications within the Department appears to indicate that senior political appointees played a significant role in the decision making surrounding the lawsuit. The involvement of senior DOJ officials by itself would not be unusual, but the Department's repeated attempts to obscure the nature of their involvement and other refusals to cooperate raise questions about what the Department is trying to hide.

In their appearances before the Commission, which the Department attempted to prevent, trial team members Coates and Adams presented testimony that both raises concerns about the current enforcement policies of the Department and provides a possible explanation for

the reversal in the course of the NBPP litigation. In sum, they indicated that there is currently a conscious policy within the Department that voting rights laws should not be enforced in a race-neutral fashion. In their testimony, they gave numerous specific examples of open hostility and opposition to pursuing cases in which whites were the perceived victims and minorities the alleged wrongdoers. This testimony includes allegations that some career attorneys refuse to work on such cases; that those who have worked on such cases have been harassed and ostracized; and that some employees, including supervisory attorneys and political appointees, openly oppose race-neutral enforcement of voting rights laws.

Mr. Coates and Mr. Adams testified that this hostility to race-neutral enforcement influenced the decisionmaking process in the NBPP case. The disposition of the Panther case, Mr. Coates testified, was the result of anger on the part of acting political appointees and other attorneys arising from a "deep-seated opposition to the equal enforcement of the Voting Rights Act against racial minorities and for the protection of white voters who had been discriminated against."[2]

These serious accusations deserve to either be proven or exposed as false. While the Department has issued general statements that it enforces the laws without regard to race, these assurances do not confirm, deny, or explain the specific allegations of misconduct raised by Mr. Coates and Mr. Adams.[3] Unfortunately, the Department has thus far refused to address many of these specific claims or to provide the type of information that would allow the Commission to properly review the decision making relating to the NBPP lawsuit.

The Commission's interest arose from the notoriety of the incident and the unusual dismissal of uncontested claims. This led the Commission to issue letters to the Department dated June 16 and June 22, 2009, requesting that the Department explain the basis for its actions. This initial correspondence to the Department merely requested an explanation. It was anticipated that the Department would either explain its decision to dismiss most of the charges, or that the inquiry might spur reconsideration of the Department's actions. The Commission's longer-term investigation, begun in September 2009, resulted from the Department's initial, conclusory response that was largely unresponsive to the Commission's specific requests for information.

What was not anticipated was the extent of the Department's lack of cooperation. At various times the Department alleged it would provide no information because the matter was being reviewed by its Office of Professional Responsibility. At other times, the Department raised a wide variety of legal privileges, many of which seemed to have no relevance to the current investigation. Although the Department eventually began to provide some information, including 4,000 pages of documents, much of the information provided either did not relate

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[2] Coates Testimony, *supra* note 1, at 23.

[3] Attorney General Holder has stated, "The notion that we are enforcing any civil rights laws – voting or others – on the basis of race, ethnicity or gender is simply false." Mike Levine, *Holder Vows Equal Enforcement, Calls Allegations to Contrary "Simply False,"* FOX NEWS.COM, Oct. 4, 2010, http://politics.blogs.foxnews.com/2010/10/04/holder-vows-equal-enforcement-calls-allegations-contrary-simply-false (last visited Oct. 19, 2010). *See also* Letter from Thomas E. Perez, Asst. Atty. Gen., U.S. Dep't of Justice, to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (Aug. 11, 2010), *available at* http://www.usccr.gov/NBPH/AR-M620U_20100811_173009.pdf.

to the New Black Panther Party litigation, involved matters that were already public, or involved prior voter intimidation lawsuits. While useful, this information did not address the core of the Commission's inquiry as to why the NBPP lawsuit had been challenged internally.

The lack of cooperation by both the Department, as well as the members of the New Black Panther Party, leaves this investigation with many questions. Nonetheless, the existing evidence is useful in shedding light on many of these questions. The purpose of this report is to summarize the information collected by the Commission as of this date.

The report is in six parts. Part I examines what is known about what occurred on Election Day 2008. Part II examines the course of the lawsuit, the explanations provided by the Justice Department regarding the same, and describes the extent to which political appointees acknowledge that they played a part in the decision making. This section also examines allegations that the NAACP Legal Defense and Education Fund played a part in the decision to dismiss the lawsuit.

Part III of the report examines the accusations of Mr. Coates and Mr. Adams relating to the Department's Civil Rights Division as a whole, as well as prior claims and allegations of politicization within the Voting Rights Section. Part IV then summarizes ongoing discovery disputes between the Commission and the Department as to the proper scope of this investigation, while Part V reviews the prior enforcement of Section 11(b) cases. Lastly, Part VI presents the Commission's Interim Findings and Recommendations. A separate Appendix provides background information about the New Black Panther Party.

PART I: Factual Background

A. Election Day 2008

On November 4, 2008, two members of the New Black Panther Party for Self Defense ("the NBPP" or "the Party") positioned themselves outside the entrance to the Fairmount Street polling site located in Philadelphia, Pennsylvania. Their names are Minister King Samir Shabazz, the commander of the Philadelphia Chapter of the NBPP, and his chief of staff, Jerry Jackson.

The men were dressed in paramilitary uniforms consisting of black pants, black shirts, and black jackets, as well as combat boots and berets. Their clothing bore a NBPP insignia, as well as symbols of rank within the New Black Panther Party. The higher-ranking party member, King Samir Shabazz, carried a nightstick secured by a lanyard wrapped around his hand.[4] Mr. Shabazz was observed occasionally slapping the nightstick in his free hand in a menacing manner and pointing the weapon at people located at the polling site.[5] According to witness testimony, Jackson and Shabazz stood shoulder to shoulder in front of the entrance to the polling place and were positioned in such a way that voters had to pass within arm's length of them to gain access.[6] Shabazz and Jackson were observed to be moving in concert and at one point closed ranks to attempt to block a poll watcher from gaining access to the polling entrance.[7] Their presence was caught on video.[8]

During their time at the polling site, a series of racial epithets were directed at those at the polling location. This included statements calling poll watchers "white devils"[9] and "white supremacists and crackers" and general statements such as "fuck you cracker" "how you [sic] white mother [expletive] gonna like being ruled by a black man?;" and "now you will see what it means to be ruled by the black man, cracker."[10]

Video evidence and witness statements indicate that King Samir Shabazz was the only Party member identified as carrying a weapon, i.e., the nightstick. Yet, witnesses indicated that at no point did Jackson attempt to disassociate himself from Mr. Shabazz. Instead, Jackson and Shabazz were observed acting in concert. No witness heard Mr. Jackson request that Mr.

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[4] *See* Apr. 23, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 47 (testimony of Chris Hill), *available at* http://www.usccr.gov/NBPH/04-23-2010_NBPPhearing.pdf [hereinafter "Hill Testimony"].
[5] *See id.* at 47; Apr. 23, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 57 (testimony of Bartle Bull), *available at* http://www.usccr.gov/NBPH/04-23-2010_NBPPhearing.pdf [hereinafter "Bull Testimony"].
[6] *See* Apr. 23, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 36 (Testimony of Mike Mauro), *available at* http://www.usccr.gov/NBPH/04-23-2010_NBPPhearing.pdf [hereinafter "Mauro Testimony"]; Hill Testimony, *supra* note 4, at 50.
[7] *See* Mauro Testimony, *supra* note 6, at 36; Hill Testimony, *supra* note 4, at 47.
[8] *See* Video: YouTube.com, "Security" Patrols Stationed at Polling Places in Philly (2008), http://www.youtube.com/watch?v=neGbKHyGuHU (last visited Oct. 19, 2010); Video: YouTube.com, Fox News- Black Panthers Guarding Polling Site (2008), http://www.youtube.com/watch?v=JwNDMdrqKcc (last visited Oct. 19, 2010).
[9] *See* Mauro Testimony, *supra* note 6, at 38; Hill Testimony, *supra* note 4, at 49.
[10] *See* Memorandum from Christopher Coates et al. to Grace Chung Becker, at 6 (Dec. 22, 2008), *available at* http://www.usccr.gov/NBPH/DOJmemo_12-22-08_rerecommendedlawsuitagainstNBPP.pdf [hereinafter "J. Memo"]; *see also* Mauro Testimony, *supra* note 6, at 39; Hill Testimony, *supra* note 4, at 58.

Shabazz either put away the nightstick or cease making inflammatory and racially abusive comments.[11] The latter information is important inasmuch as Mr. Jackson was a certified poll watcher serving on behalf of the Democratic Party and presumably had training as to what constitutes improper behavior at a polling site.

The fact that Jackson and Shabazz acted in concert is consistent with other evidence relating to their relationship. As is more fully discussed in the Appendix, Jackson is the chief of staff to King Samir Shabazz. In a documentary produced by National Geographic,[12] they are often observed working together, posing with weapons, and standing within feet of each other as Shabazz makes threats of violence.

Witnesses testified before the Commission that they observed voters turned away from the polling place due to the presence of the NBPP members.[13] For example, Christopher Hill, a Republican poll watcher, testified before the Commission to the following:

> People were put off when – there were a couple of people that walked up, couple of people that drove up, and they would come to a screeching halt because it's not something you expect to see in front of a polling place. As I was standing on the corner, I had two older ladies and an older gentleman stop right next to me, ask what was going on. I said, "Truthfully, we don't really know. All we know is there's two Black Panthers here." And the lady said, "Well, we'll just come back." And so, they just walked away. I didn't see anybody other than them leave but I did see those three leave.[14]

Similar testimony was provided by Bartle Bull, who was serving on that date as part of a roving legal team on behalf of Senator John McCain's presidential campaign. Mr. Bull has extensive experience in political campaigns and a record of supporting the voting rights of minorities. Among his past activities, Mr. Bull indicated that he had served on the Lawyers' Committee for Civil Rights Under Law in Mississippi in the 1960s; was the publisher of the Village Voice; was the New York campaign manager for Senator Robert Kennedy's presidential campaign in 1968; was a campaign worker on behalf of Charles Evers' campaign for Governor of Mississippi; was the 1976 New York State campaign manager for Jimmy Carter's presidential campaign; was the 1980 chairman for the New York Democrats for Edward Kennedy; was the chairman of New York Democrats for both Mario Cuomo and

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[11] *See* Mauro Testimony, *supra* note 6, at 37; Hill Testimony, *supra* note 4, at 50.
[12] *Inside the New Black Panthers* (National Geographic television broadcast 2009).
[13] While factually relevant, proof of whether voters, or those aiding voters, were actually intimidated is legally unnecessary for purposes of establishing liability under § 11(b) of the Voting Rights Act. As noted by one legal authority who formerly served in the Civil Rights Division:

> Congress's explanations of the purposes behind Section 11(b) support the view that neither proof of *intent* to intimidate nor proof of any actual *effect* of voter intimidation must be shown to establish a violation of Section 11(b).

J. Gerald Hebert, Rattling the Vote Cage – Part I, The Campaign Legal Center Blog, http://www.clcblog.org/blog_item-245.html (Aug. 8, 2008) (emphasis in original) (last visited Oct. 21, 2010).
[14] Hill Testimony, *supra* note 4, at 50-51.

Hugh Carey; and that he worked for Ramsey Clark's Senate campaign. As to the 2008 election, Mr. Bull indicated that he was chairman of New York Democrats for John McCain.

Mr. Bull was interviewed by Department of Justice personnel on Election Day, as well as in preparation for the lawsuit eventually filed by the Department. In a declaration prepared for use in the lawsuit he stated, in part:

> I watched the two uniformed men confront voters, and attempt to intimidate voters. They were positioned in a location that forced every voter to pass in close proximity to them. The weapon [a nightstick] was openly displayed and brandished in sight of voters.
>
> I watched the two uniformed men attempt to intimidate, and interfere with the work of other poll observers whom the uniformed men apparently believed did not share their preferences politically.
>
> In my opinion, the men created an intimidating presence at the entrance to a poll. In all of my experience in politics, in civil rights litigation, and in my efforts in the 1960's to secure the right to vote in Mississippi through participation with civil rights leaders and the Lawyers Committee for Civil Rights Under Law, I have never encountered or heard of another instance in the United States where armed and uniformed men blocked the entrance to a polling location. Their clear purpose and intent was to intimidate voters with whom they did not agree. Their views were, in part, made apparent by the uniform of the organization the two men wore and the racially charged statements they made. For example, I have heard the shorter man make a statement directed toward white poll observers that "you are about to be ruled by the black man, cracker." To me, the presence and behavior of the two uniformed men was an outrageous affront to American democracy and the rights of voters to participate in an election without fear. It would qualify as the most blatant form of voter intimidation I have encountered in my life in political campaigns in many states, even going back to the work I did in Mississippi in the 1960's. I considered their presence to be a racially motivated effort to intimidate both poll watchers aiding voters, as well as voters with whom the men did not agree.[15]

The Department trial team prepared a memorandum dated December 22, 2008 to justify the filing of a possible civil lawsuit. These memoranda are typically called "J Memos" within the Department. The J Memo summarized Department interviews of various witnesses at the polling place. Although the Department has refused to turn over to the Commission the

[15] Declaration of Bartle Bull at 2-3, United States v. New Black Panther Party for Self-Defense et al., No. 09-0065 SD (E.D. Pa., executed Apr. 7, 2009) (not filed), *available at* http://michellemalkin.cachefly.net/michellemalkin.com/wp/wp-content/uploads/2009/05/bull-declaration_04-07-20092.pdf (last visited Oct. 21, 2010).

actual witness statements without any plausible justification,[16] the summary provided in the J Memo presumably reflects the contents of witness statements taken by the trial team[17]:

> [Republican poll watcher Mike] Mauro told us that he watched voters arrive at the polling location and exhibit manifest surprise and apprehension at the presence of the Black Panthers. Mauro also stated that he saw black voters congregate away from the entrance to the polling location and speak about the presence of the Black Panthers. He recalls them saying words to the effect of "what is going on there?" Mauro also witnessed an elderly black woman approaching the polls and exhibiting apprehension as she approached the scene. Attorney poll watcher Harry Lewis told us he saw voters appear apprehensive about approaching the polling location entrance behind the Black Panthers. We received similar information from [Republican poll watcher Joe] Fischetti. Officer Alexander said that he received a call from dispatch about reports of "voter intimidation" at the polling place. He said he saw individuals gathered within sight of the polling entrance, but they did not attempt to enter. Officer Alexander did not interview any voters while he was at the polling location.[18]

In addition to the threats and actions directed toward Republican poll watchers outside the building, the New Black Panther Party members also made threats to those serving as Republican poll watchers inside the polling site.[19] Although registered as Democrats,[20] Larry and Angela Counts, husband and wife, served as paid Republican poll watchers at the Fairmount Street location. They had performed similar services in prior elections.[21] Statements made by Republican poll workers and Department of Justice records both reflect that the Counts indicated that the NBPP members had called them "race traitors" and threatened that "if [they] stepped outside of the building, there would be hell to pay."[22] The Republican Party representatives also indicated that the Counts had told them that they took these threats seriously, and that they would not leave the building until the NBPP members had left.[23]

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[16] Witness statements are not likely to contain legal analysis or deliberations that would justify the assertion of a legal privilege precluding disclosure. Moreover, to the extent such analysis or deliberations exist, they could be redacted so as to allow the release of the witnesses' factual observations.

[17] Due to the Department's failure to provide the underlying supporting documentation, the Commission has been unable to independently verify whether the representations as to the content of witness statements contained in the J Memo are accurate.

[18] J. Memo, *supra* note 10, at 6.

[19] Under § 11(b) of the Voting Rights Act, it is illegal to threaten poll watchers. *See* 42 U.S.C. § 1973i(b).

[20] *See* Deposition of Larry Counts at 5, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 12, 2010, *available at* http://www.usccr.gov/NBPH/LarryCountsDepositionTranscript.pdf [hereinafter "L. Counts Deposition"]; Deposition of Angela Counts at 4, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 12, 2010, *available at* http://www.usccr.gov/NBPH/AngelaCountsDepositionTranscript.pdf [hereinafter A. Counts Deposition].

[21] *See* L. Counts Deposition, *supra* note 20, at 5; A. Counts Deposition, *supra* note 20, at 4.

[22] *See* Hill Testimony, *supra* note 4, at 47-48; *see also* J. Memo, *supra* note 10, at 5-6.

[23] *See* Hill Testimony, *supra* note 4, at 48.

The Department trial team summarized the evidence relating to the threats made against Mr. and Mrs. Counts in the previously-referenced J Memo. It provided:

> The events which precipitated reports about the Black Panthers' presence were statements made by [King] Samir Shabazz or [Jerry] Jackson, or both, to poll watchers for the Republican Party, and a complaint by an unspecified voter about the presence of the Black Panthers. [Republican poll worker Wayne] Byman was at 1221 Fairmount Street for a short time and saw the Black Panthers. He characterized their presence as "menacing and intimidating." Byman told us they "were the type you don't confront unless you are ready for a confrontation." He reported their presence to Joe Fischetti, an attorney poll watcher for the Republican Party. Fischetti then arrived at 1221 Fairmount Street and encountered the Black Panthers and two African-American poll watchers for the Republican Party, Larry Counts and his wife Angela Counts, who were assigned there. The Counts' had credentials entitling them to enter and remain in the polling place. Fischetti described Larry Counts as scared and worried about his safety at the polling place. Counts, according to Fischetti, huddled away from the Panthers' presence and kept looking over his shoulder as he spoke to Fischetti. Counts described to Fischetti his concern about leaving the polling place at the end of the day given the presence of the Panthers. Fischetti also described the Black Panthers' presence as alarming and said members of the local community present at the time also seemed alarmed and annoyed by the Panthers. Fischetti made a call concerning the situation to the Philadelphia Republican Party headquarters that resulted in an incident report. [Republican videographer Steve] Morse, back at headquarters, also separately received a telephone complaint from a voter concerning a man with a "billy club" at 1221 Fairmount Street.
>
> Larry and Angela Counts, the husband and wife poll workers, confirmed that they were afraid to leave the polling place until the Black Panthers had departed. This is consistent with the behavior of Counts as described to us by Fischetti. Angela Counts said she kept looking out the window at the Black Panthers with concern. She said she wondered what might occur next and if someone might "bomb the place." Lunch was brought to them, instead of them leaving to get it themselves. Larry and Angela Counts told us that when they finally departed the polling place, they first checked to see if the Black Panthers were still deployed outside. They told us that they left only because the Black Panthers had departed.[24]

The Commission took the depositions of Larry and Angela Counts on January 12, 2010, long after the claim against three NBPP defendants had been dismissed and the scope of the

[24] J. Memo, *supra* note 10, at 5-6.

injunction sought against the fourth had been reduced. Their testimony to the Commission varied greatly from what was represented in the J Memo, as well as from the statements made by other Republican poll watchers. In their sworn depositions, Mr. and Mrs. Counts stated that they had not seen members of the New Black Panther Party at the polling site.[25] In addition, both denied speaking with anyone from the Republican Party about the Panthers.[26] Further, Mr. Counts even contended that he had never been interviewed by the Justice Department.[27] His testimony on this latter point was contradicted by his wife, however, who indicated that they each had been interviewed by a team from the Federal Bureau of Investigation (FBI) and the Department of Justice several months after the election.[28]

Other than the simple passage of time, the only known change in circumstance that might have affected the testimony of Mr. and Mrs. Counts was the dismissal of the suit as to three of the defendants. The Counts live less than four miles from the Fairmont Street polling location and would likely be aware of the New Black Panther Party members' activities in Philadelphia in recent years. If the J Memo and statements by Republican poll watchers are to be believed, the Counts were threatened by, and afraid of, the New Black Panther Party members. If the Counts' subsequent testimony before the Commission is to be believed, they never saw the Black Panther Party members (who were just outside the entrance of the building), never spoke to any Republican Party representatives (who made contemporaneous reports of such conversations) and, if Mr. Counts is to be believed, never even spoke to anyone from the Department of Justice (although both the J Memo and his wife indicate that such an interview occurred).[29] These claims of ignorance contrast with the documented statements the Counts appear to have given to the Department. The extent of the newly claimed ignorance is captured in the following colloquy with Mr. Counts during his deposition:

> QUESTION: When did you become aware that [the Party] members had arrived?
>
> COUNTS: I wasn't aware. All I know when I was inside, all I saw was the news people outside, and I didn't see anybody. I didn't see anybody outside. Nobody said nothing to me about anything. I didn't go outside. All I just saw the news people outside. I don't know whether they were just there for the election, talking to the election people outside, or whatever. But as far as telling me, I didn't see nobody come inside or outside.[30]

The discrepancy between these versions of events can likely be resolved by the Department releasing the witness statements obtained from Mr. and Mrs. Counts as part of the

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[25] *See* L. Counts Deposition, *supra* note 20, at 11-12, 15; A. Counts Deposition, *supra* note 20, at 18, 25-26.
[26] *See* L. Counts Deposition, *supra* note 20, at 14, 17-18; A. Counts Deposition, *supra* note 20, at 11, 19.
[27] *See* L. Counts Deposition, *supra* note 20, at 19.
[28] *See* A. Counts Deposition, *supra* note 20, at 23-24.
[29] *See* J. Memo, *supra* note 10, at 5-6; A. Counts Deposition, *supra* note 20, at 23-24.
[30] L. Counts Deposition, *supra* note 20, at 8-9.

Department's investigation. Such records should help address whether Mr. and Mrs. Counts were intimidated or targeted by the NBPP members.

The Commission attempted to interview and take the deposition of as many people as it could locate who were identified as having been at the polling site.[31] Among them was Ronald Vann, who had served as a Democratic poll watcher with Jerry Jackson during prior elections.[32] Mr. Vann indicated that Election Day 2008 was the first time that he had noticed Jerry Jackson wearing his Panther uniform.[33] When questioned as to whether, as a certified poll watcher, he had requested that Jackson ask King Samir Shabazz to put away the nightstick or cease making inflammatory statements, he responded as follows:

> QUESTION: If you were flabbergasted – I want to make sure, and I know you kind of hinted before, if you were flabbergasted, why didn't you go up to Jerry and say, "Why don't you ask your friend to leave?"
>
> VANN: Mr. Black[wood], some things unsaid. If I said something to Jerry, it would be an argument, so I don't even want to go there. My thing is keep my mouth shut, stay out of it, and that's the best method.[34]

This statement was consistent with Mr. Vann's expressed intention that he was not going to interfere with Mr. Jackson's activities.

> QUESTION: Did anybody express concern to you about Jerry and his friend?
>
> VANN: Well, you know, I mean people was talking about all the publicity going on about the police and the news media and stuff like that and the guy with the stick.
>
> But, you know, my thing is I just listen, keep my mouth shut. This way can nobody come back and say, "Mr. Vann said this," or "Mr. Vann said that." Sometimes it's just best to keep your mouth shut.
>
> QUESTION: Did you even talk to Jerry until the ward leader got there?
>
> VANN: Kept my mouth shut.

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[31] One witness of strong interest is an unidentified white woman who is shown on video at the polling site, directly behind Mr. Jackson and Mr. Shabazz. Throughout her time on camera, she is shown speaking on a cell phone. Unfortunately, none of the witnesses interviewed by Commission staff could identify this woman.
[32] *See* Deposition of Ronald Vann at 4-5, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 11, 2010, *available at* http://www.usccr.gov/NBPH/RonaldVannDepositionTranscript.pdf [hereinafter "Vann Deposition"].
[33] *See id.* at 6.
[34] *Id.* at 19.

> QUESTION: I'm just asking. You didn't talk to Jerry at all and you didn't call the ward leader or anybody else at the Democratic Party to say, "We have a problem here"?
>
> VANN: No.[35]

Mr. Vann may have been somewhat intimidated himself.

Mr. Vann did confirm, however, that King Samir Shabazz was armed with a nightstick, and that he was observed smacking the stick in his hand.[36] While he indicated that, in his opinion, King Samir Shabazz should not have been present,[37] he also stated that he did not report him to the police.[38] Mr. Vann also indicated that the voting judge at the site did not take any steps to address the situation.[39] Finally, Mr. Vann confirmed that Mr. Jackson remains an election poll watcher for the Democratic Party to this day.[40]

Eventually the police arrived at the polling site. Their arrival and confrontation with Mr. Shabazz and Mr. Jackson were caught by a Fox News team that had arrived.[41] Mr. Shabazz was ordered to leave the site. It is unclear, however, whether he surrendered his nightstick or kept the weapon in his possession.[42] Mr. Jackson was allowed to remain on the scene. According to the J Memo of December 2008, the police believed that Mr. Jackson had a right to remain at the property due to his status as a poll watcher.[43]

The actions of the New Black Panther Party members quickly achieved notoriety due to the fact that their presence was filmed by a videographer hired by the Republican Party,[44] as well as by a Fox News team that arrived on the scene.[45] These broadcasts became widely available through television rebroadcasts and YouTube video clips on the Internet. At least in part because of this notoriety, a Department of Justice roving legal team met with several of the witnesses who observed the events of Election Day.[46] Despite a subpoena issued by the Commission, the statements taken on that date have not been provided to the Commission by the Department.

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[35] *Id.* at 21-22.
[36] *See id.* at 12, 16, 22.
[37] *See id.* at 17.
[38] *See id.* at 18.
[39] *See id.* at 24-25.
[40] *See id.* at 10. *See also* Watcher's Certificate of Jerry Jackson, Commonwealth of Pa., County of Phila., *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf (scroll to p. 29)
[41] *See* Vann Deposition, *supra* note 32, at 23.
[42] *See* Mauro Testimony, *supra* note 6, at 41; Bull Testimony, *supra* note 5, at 58.
[43] *See* J. Memo, *supra* note 10, at 4.
[44] *See id.* at 3-4.
[45] *See* Video: YouTube.com, "Security" Patrols Stationed at Polling Places in Philly (2008), http://www.youtube.com/watch?v=neGbKHyGuHU (last visited Oct. 19, 2010); Video: YouTube.com, Fox News, Black Panthers Guarding Polling Site (2008), http://www.youtube.com/watch?v=JwNDMdrqKcc (last visited Oct. 19, 2010).
[46] *See* Mauro Testimony, *supra* note 6, at 42-43.

In addition to the Election Day interviews, trial team members J. Christian Adams and Spencer Fisher interviewed many of the witnesses who had been at the polling site. Some of these interviews were later summarized in Declarations by such witnesses as Bartle Bull, Chris Hill, Wayne Byman and Mike Mauro.[47] Regrettably, the Department has declined to provide the statements taken by the trial team to the Commission.

[47] *See* Declaration of Bartle Bull, United States v. New Black Panther Party for Self-Defense et al., No. 09-0065 (E.D. Pa., executed Mar. 31, 2009) (not filed), *available at* http://www.usccr.gov/NBPH/DeclarationofBartleBull(3-31-09).pdf; Declaration of Christopher Hill, United States v. New Black Panther Party for Self-Defense et al., No 09-0065 (E.D. Pa., executed Apr. 1, 2009) (not filed), *available at* http://www.usccr.gov/NBPH/DeclarationofChristopherHill(4-1-09).pdf; Declaration of Wayne Bynam [sic], United States v. New Black Panther Party for Self-Defense et al., No. 09-0065 SD (E.D. Pa., executed Apr. 1, 2009) (not filed), *available at* http://www.usccr.gov/NBPH/DeclarationofWayneByman(4-1-09).pdf; Declaration of Michael Mauro, United States v. New Black Panther Party for Self-Defense et al., No. 09-0065 SD (E.D. Pa., executed Mar. 31, 2009) (not filed), *available at* http://www.usccr.gov/NBPH/DeclarationofMichaelMauro(3-31-09).pdf.

PART II: The New Black Panther Party Litigation

A. History of The Lawsuit

Following its investigation of the facts and circumstances surrounding the Election Day incident, the Department of Justice trial team prepared a Justification Memorandum ("J Memo") dated December 22, 2008.[48] The memorandum was directed to the then-Acting Assistant Attorney General, Grace Chung Becker. The memorandum was signed by Christopher Coates, the Chief of the Voting Section,[49] Robert Popper, the Deputy Chief, and attorneys J. Christian Adams and Spencer R. Fisher.[50]

The memorandum summarized the evidence collected by the trial team and discussed theories of liability. It recommended a civil lawsuit pursuant to Section 11(b) of the Voting Rights Act[51] and requested authorization to file a complaint against the New Black Panther Party for Self Defense, its Chairman, Malik Zulu Shabazz, and the two NBPP members present at the Fairmount Street polling site on Election Day, King Samir Shabazz and Jerry Jackson.[52] These recommendations were approved.[53]

The lawsuit itself was filed in the U.S. District Court for the Eastern District of Pennsylvania on January 7, 2009.[54] The Complaint charged each of the four defendants with (i) intimidation of voters (Count I); (ii) attempted intimidation of voters (Count II); (iii) intimidation of individuals aiding voters (Count III); and (iv) attempted intimidation of individuals aiding voters (Count IV).

Each of the defendants was served with the Complaint, but none of the defendants filed an answer. The allegations were uncontested. The failure to file a response is particularly curious given that the Chairman of the NBPP, Malik Zulu Shabazz, is an attorney, and the

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[48] J. Memo, *supra* note 10.

[49] The legal expertise and professionalism of Mr. Coates has been recognized. He has received the Attorney General's Special Achievement and Meritorious Performance Award, the Civil Rights Division's Walter Barnett Memorial Award for Excellence in Advocacy, the Environmental Justice Award from the Georgia Environmental Organization, and the Thurgood Marshall Decade Award from the Georgia NAACP.

[50] In his testimony before the Commission, J. Christian Adams stated that "[i]t's customary practice in the Department that you do not attach your name to a document that you disagree with." July 6, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 17 (Testimony of J. Christian Adams), *available at* http://www.usccr.gov/NBPH/07-06-2010_NBPPhearing.pdf [hereinafter "Adams Testimony"],

[51] 42 U.S.C. § 1973i(b).

[52] *See* J. Memo, *supra* note 10, at 12-13.

[53] According to Assistant Attorney General Thomas Perez, the Department had considered criminal charges, but decided that a civil suit was the appropriate course. *See* May 14, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 18 (Testimony of Thomas E. Perez), *available at* http://www.usccr.gov/NBPH/05-14-2010_NBPPhearing.pdf [hereinafter "Perez Testimony"]; Statement of Thomas E. Perez, Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, at 5, Before the U.S. Comm'n on Civil Rights, May 24, 2010, *available at* http://www.usccr.gov/NBPH/Perez_05-14-2010.pdf [hereinafter "Perez Statement"].

[54] Complaint, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-CV-065-SD (E.D. Pa. Jan. 8, 2009), *available at* http://www.usccr.gov/NBPH/COMPLAINT-USAvNBPP.pdf.

fact that Jerry Jackson apparently had consulted with Philadelphia attorney Michael Coard.[55] Subsequent papers filed in the case reflect that Mr. Coard was copied on pleadings,[56] but he never formally entered an appearance and he did not file an answer on behalf of either Jerry Jackson or King Samir Shabazz.

Under the terms of the Federal Rules of Civil Procedure, the failure to contest allegations contained in a civil complaint has important legal ramifications. Specifically, Federal Rule of Civil Procedure 8(b)(6) provides, in part, that an "allegation – other than one relating to the amount of damages – is admitted if a responsive pleading is required and the allegation is not denied." Accordingly, the failure of the defendants to contest allegations contained in the complaint served to establish liability as to each.[57]

On April 17, 2009, the Court entered an order of default and gave the Justice Department until May 1, 2009 to file a motion for default judgment.[58] The motion for default judgment was necessary for the Department to specify the ultimate remedy it was seeking as to each of the defendants. In the Complaint, the Department indicated that it was seeking a permanent injunction that would prohibit voter intimidation at *any* polling site. As set forth in the Complaint:

> [T]he Plaintiff, United States of America, prays for an order that:
>
> * * *
>
> Permanently enjoins Defendants, their agents and successors in office, and all persons acting in concert with them, from deploying athwart the entrance to polling locations either with weapons or in the uniform of the Defendant New Black Panther Party, or both, and from

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[55] *See* Adams Testimony, *supra* note 50, at 109; *see also* Supplemental Interrogatory Responses of the Dep't of Justice at 6-7, Apr. 16, 2010 (Supplemental Response to Interrogatory No. 17), *available at* http://www.usccr.gov/NBPH/LetterfromHunttoUSCCRprovidingsupplementalresponses_04-16-10.pdf [hereinafter "Supp. Interrog. Responses"].

[56] *See* Motion for Extension of Time to Comply with This Court's Order of April 20, 2010, United States v. New Black Panther Party for Self-Defense, No. 2:09-cv-065-SD (E.D. Pa. May 1, 2009), *available at* http://www.usccr.gov/NBPH/MotionforExtensionofTimetoComplywithCourtsOrderofApril20,2009.pdf; Motion for Default Judgment, United States v. New Black Panther Party for Self-Defense, No. 2:09-cv-065-SD (E.D. Pa. May 15, 2009), *available at* http://www.usccr.gov/NBPH/MotionforDefaultJudgmentreKingSamirShabazz.pdf.

[57] *See* Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2d Cir. 1992) (". . . a party's default is deemed to constitute a concession of all well-pleaded allegations of liability . . ."); Steinberg v. Int'l Criminal Police Org., 672 F.2d 927, 933, n.2 (D.C. Cir. 1981) (Wright, J., concurring) ("[O]n default for failure to answer or otherwise defend, well-pleaded factual allegations of the pleading that relate to liability . . . will be taken as true."); GMA Accessories, Inc. v. BOP, LLC, 2009 WL 2634771, at *1 n.1 (S.D.N.Y. 2009) ("[B]ecause [defendant] did not respond to the Complaint, they are deemed to have admitted the factual allegations concerning liability contained therein.").

[58] Order, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-CV-065-SD (E.D. Pa. Apr. 17, 2009), *available at* http://www.usccr.gov/NBPH/OrderforGovernmenttofileMotionforDefaultJudgment.pdf.

> otherwise engaging in coercing, threatening, or intimidating, behavior at polling locations during elections.[59]

On April 28, 2009, the Department provided notice to the defendants of the Department's intent to file for default judgment.[60] It was at this point, after liability had been conceded, and only days before the motion for default judgment was due, that objections to the lawsuit were raised internally within the Justice Department. Specifically, it is alleged that the Acting Assistant Attorney General for Civil Rights, Loretta King, and the Acting Deputy Assistant Attorney General for Civil Rights, Steven Rosenbaum, raised objections and began the process by which three of the defendants were to be dismissed and the remedy sought against the fourth defendant was to be substantially reduced. What follows is an examination of the process whereby the direction of the lawsuit was reversed.

Because the Department has refused to provide information relating to the internal deliberations and decisionmaking process regarding the NBPP lawsuit, the following discussion is based on a combination of the limited information obtained independently by the Commission, testimony by a former Department official regarding how these types of decisions are made, press reports, and the testimony of trial team members Christopher Coates and J. Christian Adams.

In addition to the above, this discussion also includes references to information obtained by a third party, Judicial Watch, pursuant to a lawsuit it filed against the Department pursuant to the Freedom of Information Act (FOIA).[61]As of September 20, 2010, Judicial Watch received an index from the Department that describes the number and variety of internal contacts between the trial team, the Civil Rights Division, the office of the Associate Attorney General, and others with regard to the NBPP litigation.[62]

To the extent possible, the source of each item of information is identified. While it has not been possible for the Commission to verify all of the information that will be described

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[59] Complaint at 8, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-CV-065-SD (E.D. Pa. Jan. 8, 2009), *available at* http://www.usccr.gov/NBPH/COMPLAINT-USAvNBPP.pdf.

[60] *See* Letter from Spencer R. Fisher, Trial Atty., Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Malik Zulu Shabazz, Chairman, New Black Panther Party for Self-Defense (Apr. 28, 2009), *available at* http://www.usccr.gov/NBPH/LettersfromSFisher2DefendantsreEntryofDefault.pdf; Letter from Spencer R. Fisher, Trial Atty., Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Jerry Jackson (Apr. 28, 2009), *available at* http://www.usccr.gov/NBPH/LettersfromSFisher2DefendantsreEntryofDefault.pdf; Letter from Spencer R. Fisher, Trial Atty., Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Malik Zulu Shabazz, (Apr. 28, 2009), *available at* http://www.usccr.gov/NBPH/LettersfromSFisher2DefendantsreEntryofDefault.pdf; Letter from Spencer R. Fisher, Trial Atty., Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Minister King Samir Shabazz a/k/a Maurice Heath (Apr. 28, 2009), *available at* http://www.usccr.gov/NBPH/LettersfromSFisher2DefendantsreEntryofDefault.pdf.

[61] *See* Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 10-CV-851-RBW (D.D.C.).

[62] As is discussed *infra* in Part IV, from the time of its initial discovery requests to the Department, the Commission has sought a similar log with regard to those documents that the Department has refused to provide based on a claim of privilege or other objection. Although Judicial Watch obtained such information pursuant to its FOIA litigation, the Department has refused to provide similar information to the Commission.

below, the allegations presented are of such seriousness that they need to be addressed and presented to the public.

According to *The Weekly Standard*, the trial team first learned of concerns by higher Department officials on April 29 when Acting Deputy Assistant Attorney General for Civil Rights, Steven Rosenbaum, informed the trial team: "I have serious doubts about the merits of the motion for entry of a default judgment and the request for injunctive relief."[63] The article indicated that Mr. Rosenbaum stated: "Most significantly, this case raises serious First Amendment issues, but the papers make no mention of the First Amendment."[64] The article further indicated that the nature of the questions raised by Mr. Rosenbaum seemed to reflect that he was "not familiar with the case and had not read the detailed memorandum accompanying the draft order."[65]

The Weekly Standard article further indicated that the trial team responded the same day with an e-mail addressing each of Mr. Rosenbaum's concerns. The article states:

> The trial team was surprised by the email and answered Rosenbaum point by point in a response sent that same evening. They corrected his misstatements and explained in answer to his First Amendment concerns, "We are not seeking to enjoin the making of those (or any) statements. We plan to introduce them as evidence to show that what happened in Philadelphia on Election Day was planned and announced in advance by the central authority of the NBPP, and was a NBPP initiative." They pointed out that dressing in military garb did not raise First Amendment concerns when "used with the brandishing of a weapon to intimidate people going to the polling station." They concluded: "We strongly believe that this is one of the clearest violations of Section 11(b) [of the Voting Rights Act] the Department has come across. There is never a good reason to bring a billy club to a polling station. If the conduct of these men, which was video recorded and broadcast nationally, does not violate Section 11(b), the statute will have little meaning going forward."[66]

In his testimony before the Commission, Mr. Adams confirmed that such an e-mail was sent,[67] but refused to confirm its contents due to alleged privileges previously raised by the

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[63] Jennifer Rubin, *Friends in High Places*, WEEKLY STANDARD, June 12, 2010, *available at* https://www.weeklystandard.com/articles/friends-high-places (last visited Oct. 21, 2010). The index produced in the *Judicial Watch* litigation reflects a series of e-mails between Mr. Rosenbaum and Mr. Coates between April 28 and April 30, 2009.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *See* Adams Testimony, *supra* note 50, at 26. In his testimony before the Commission, Mr. Coates noted that such memo was written, but also refused to testify as to its substance. *See* Coates Testimony, *supra* note 1, at 59-62.

Department.[68] At the same time, the index provided in the *Judicial Watch* litigation shows that e-mails on these subjects were sent in the time frame described in the above article.[69]

The Weekly Standard article alleged that Mr. Coates and Mr. Popper subsequently met with Mr. Rosenbaum and Loretta King, the Acting Assistant Attorney General for Civil Rights. The article describes these meetings as "two days of shouting."[70]

In their appearance before the Commission, Mr. Coates and Mr. Adams were careful to explain that they would not go into the substance of any deliberations because of the Department's assertions of privilege.[71] Yet both witnesses did provide some corroboration for *The Weekly Standard*'s account of events:

> QUESTION: The press reports, that same article that I referenced before from *The Weekly Standard*, also indicated that, right after Mr. Rosenbaum made his objections, after a response was prepared by the trial team, there was 'two days of yelling.' Can you confirm that?
>
> ADAMS: Yelling was part of it. There were other things, profanity, tossing of papers at each other, all-nighters.
>
> QUESTION: All-nighters by the trial team?
>
> ADAMS: Correct.
>
> QUESTION: Defending their position?
>
> ADAMS: Correct.[72]

While the substance remains undisclosed, the result of these discussions is clear. The trial team was ordered to seek a continuance from the court requesting that the Department be given until May 15, 2009 for the filing of the motion for default.[73]

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[68] Both Mr. Coates and Mr. Adams testified that they were limiting their testimony due to the Department's assertion of a deliberative process privilege as to the NBPP litigation. *See* Coates Testimony, *supra* note 1, at 11; Adams Testimony, *supra* note 50, at 10-11.

[69] Civil Rights Division (CRT) Index of Withheld Documents at 2, 6-7, Judicial Watch v. Dep't of Justice, No. 10-851 (D.D.C.), Sept. 15, 2010, *available at* http://www.judicialwatch.org/files/documents/2010/jw-v-doj-vaughn-09152010.pdf (last visited Oct. 20, 2010) [hereinafter "Judicial Watch *Vaughn* Index"].

[70] *See* Rubin, *supra* note 63. The index produced in the *Judicial Watch* litigation reflects the following summary of a May 4, 2009 e-mail from Coates to King and Rosenbaum: "Section Chief [Coates] and Deputy Section Chief [Popper] [email] to their AAG [King] and DAAG [Rosenbaum] supervisors with candid statements about an earlier meeting discussing specific factual matters and clarification of issues in a draft memorandum of law for the NBPP litigation." Judicial Watch *Vaughn* Index, *supra* note 69, at 9 (Doc. No. 20(a)) (emphasis added).

[71] *See* Adams Testimony, *supra* note 50, at 10-11.

[72] *Id.* at 26-27.

[73] *See* Motion for Extension of Time to Comply with This Court's Order of April 20, 2010, United States v. New Black Panther Party for Self-Defense, No. 2:09-cv-065-SD (E.D. Pa. May 1, 2009), *available at* http://www.usccr.gov/NBPH/MotionforExtensionofTimetoComplywithCourtsOrderofApril20,2009.pdf.

On May 6, 2009, after the continuance was granted, the trial team submitted a Remedial Memorandum to Loretta King which addressed questions that had been raised regarding the basis for liability and the remedies being sought.[74] These issues had not been raised by the defendants, who had not contested the lawsuit. Instead, each of the objections had been raised by Department officials after a default had been entered.

According to *The Weekly Standard* article, disputes with the trial team continued after the May 6 Remedial Memorandum was submitted.[75] In his testimony before the Commission, Mr. Coates described the situation as follows:

> QUESTION: In a magazine article about the *New Black Panther* case, it was alleged that there were two days of yelling as arising out of the time that the case got continued. Can you tell us anything about that?
>
> COATES: Well, in terms of the – I won't tell you what the discussions were. I will tell you that I became so frustrated with the process that I did use profanity. It wasn't the first time that I've ever used profanity, but it was not my customary way of speaking to my supervisors at the Division level. And I used the "bs" word that Mr. Adams identified in his testimony. And so, to that extent, that yelling went on.
>
> QUESTION: Aside from use of profanity or not, did that arise out of the fact that it appeared that Mr. Rosenbaum had not been reading the background materials supplied by the trial team for his review?
>
> COATES: No. It arose because the accusation had been – was made against me and Mr. Popper that wasn't true.
>
> QUESTION: Can you tell us what that accusation was?
>
> COATES: No, I can't.[76]

At this stage of the debate, the four members of the career trial team, Mr. Coates, Mr. Popper, Mr. Adams and Mr. Fisher, remained unanimous in their recommendation that the case should proceed against all four defendants. Faced by this opposition, Ms. King and Mr. Rosenbaum took the extraordinary step of requesting a review by the Appellate Section of a matter that was in default.[77] In their testimony before the Commission, both Mr. Coates and

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[74] *See* Memorandum from Christopher Coates et al. to Loretta King (May 6, 2009), *available at* http://www.usccr.gov/NBPH/DOJremedialmemo_05-06-09_reproposedinjunction.pdf [hereinafter "Remedial Memo"].

[75] *See* Rubin, *supra* note 63.

[76] Coates Testimony, *supra* note 1, at 55-56. Mr. Coates testified that he would not discuss certain topics, stating: "I will not answer questions which will require me to disclose communications in the Panther case that are protected by the deliberative process privilege." *Id.* at 11.

[77] According to the index in the *Judicial Watch* litigation, Mr. Rosenbaum requested a review by the appellate section on May 7, 2009. A series of e-mails in the index indicates that Mr. Rosenbaum forwarded to Diana Flynn a copy of the draft remedial memorandum, his own analysis and opinion of the development of different

Mr. Adams indicated that they were unaware of any similar review in their tenure at the Department.[78] Other former Department officials have also indicated that they had never heard of an Appellate Section review being conducted in a case in which the defendants had conceded liability.[79]

The requested review was undertaken by career Appellate Section attorney Marie McElderry and Appellate Section chief Diana Flynn, also a career official.[80] While the Appellate Section analysis examined the strengths and weaknesses of the lawsuit, and indicated that the trial court might require proceedings in addition to the filing of a motion for a default judgment, the analysis concluded as follows:

> We can make a reasonable argument in favor of default relief against all defendants and probably should, given the unusual procedural situation. The argument may well not succeed at the default stage, and we should expect the district court to schedule further proceedings. But it would be curious not to pray for the relief on default that we would seek following trial. Thus we generally concur in Voting's recommendation to go forward, with some suggested modifications in our argument, as set out below.[81]

Despite the Appellate Section's recommendation, and the fact that six career attorneys were now on record that the case should proceed, the trial team was instructed that the lawsuit should be dismissed as to defendants Jerry Jackson, the New Black Panther Party, and its Chairman, Malik Zulu Shabazz.[82] As to the relief sought against the remaining defendant, King Samir Shabazz, the Department substantially limited the injunctive relief sought. Whereas the complaint had sought a permanent injunction with a potentially national scope, the final request sought only an injunction through November 15, 2012 precluding King Samir Shabazz from displaying a weapon within 100 feet of any polling location in Philadelphia.[83]

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approaches under consideration, the trial team's analysis and detailed responses to questions on the merits, as well as draft pleadings, witness statements, and legal research.

[78] *See* Coates Testimony, *supra* note 1, at 52; Adams Testimony, *supra* note 50, at 34.

[79] *See* Statement of Gregory G. Katsas at 10, Apr. 23, 2010, *available at* http://www.usccr.gov/NBPH/Katsas_04-23-2010.pdf [hereinafter "Katsas Statement"]; Affidavit of Hans A. von Spakovsky at 2, July 15, 2010, *available at* http://www.usccr.gov/NBPH/vonSpakovskyAffidavit_07-15-10.pdf [hereinafter "von Spakovsky Affidavit"].

[80] E-mail from Diana K. Flynn to Steven Rosenbaum (May 13, 2009), *available at* http://www.usccr.gov/NBPH/DOJcomments_05-13-09_reproposeddefaultjudgment.pdf.

[81] *Id.*

[82] *Cf.* Jerry Markon & Krissah Thompson, *Dispute Over New Black Panthers Case Causes Deep Divisions*, WASH. POST, Oct. 22, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/22/AR2010102203982.html (last visited Nov. 9, 2010) ("Legal experts have called the reversal exceedingly rare, especially because the defendants had not contested the charges.").

[83] *See* Order, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-cv-065-SD (E.D. Pa. May 18, 2009), *available at* http://www.usccr.gov/NBPH/OrdergrantingMotionforDefaultJudgmentandenjoinderreKingSamirShabazz.pdf (granting motion for default judgment and injunction).

Original Relief Sought	**Relief Ultimately Obtained**
An order that: "Permanently enjoins Defendants, their agents and successors in office, and all persons acting in concert with them, from deploying athwart the entrance to polling locations either with weapons or in the uniform of the Defendant New Black Panther Party, or both, and from otherwise engaging in coercing, threatening, or intimidating, behavior at polling locations during elections." (Complaint, United States v. New Black Panther Party for Self-Defense et al., entered Jan. 8, 2009)	An order providing that: "Defendant Minister King Samir Shabazz is enjoined from displaying a weapon within 100 feet of any open polling location on any election day in Philadelphia, Pennsylvania, or from otherwise engaging in coercing, threatening, or intimidating behavior in violation of Section 11(b) of the Voting Rights Act." And that the Court only "maintain jurisdiction over this matter until November 15, 2012." (Proposed Default Judgment Order, United States v. Minister King Shamir Shabazz, entered May 15, 2009)

B. The Department's Explanations

In his testimony before the Commission, Assistant Attorney General for Civil Rights Thomas Perez acknowledged that no new facts had come to light between the time the case had been filed and the time it was dismissed.[84] That is to say, the six career line attorneys, and those who overruled them, were looking at the same set of facts.

In explaining the Department's reversal, Mr. Perez testified that the decision to overrule the position of the six line attorneys was "based on a review of the totality of the circumstances,"[85] and simply represented the "kind of robust interaction [that] is part of the daily fabric of the Department of Justice."[86] He stated: "[R]easonable people can look at the same set of facts and reach different conclusions. Career people can disagree with career people. And that's precisely what happened in this case."[87]

In his testimony before the Commission, Christopher Coates disagreed:

> . . . I have always been flabbergasted that anyone would make such a claim regarding the *New Black Panther* case. People can have

[84] *See* Perez Testimony, *supra* note 53, at 21-22, 27, 53; *see also* Adams Testimony, *supra* note 50, at 106-07.
[85] Perez Testimony, *supra* note 53, at 23.
[86] *Id.* at 25.
[87] *Id.* at 27.

> differences about a number of things, but we had eyewitness testimony.
>
> We had videotape that there were two people standing in uniform in front of a polling place in violation of the distance required by Pennsylvania law, as I recall, for people to be away from the polling place. One of them had a weapon.
>
> They were hurling racial slurs, including to white voters, "How do you think you're going to feel with a black man ruling over you?" at the voters. They were standing in close proximity to each other to block the ingress into the polling place.
>
> The 11(b) of the Voting Rights Act prohibits attempts to intimidate or coerce or threaten. It doesn't even require that the actual intimidation or coercion or threat occurred. It requires that no number of people be intimidated but just that there was an attempt in intimidation.
>
> And I've never been able to understand how anyone could accuse us of not having a basis in law and fact for bringing a straightforward 11(b) claim in circumstances where the evidence was so compelling.[88]

This disagreement as to the merits of the lawsuit requires an examination of the reasons the Department has given as to why on the course of the litigation was reversed. The Department was not required to explain to the court why it decided to dismiss its claims against Defendants Jerry Jackson, the New Black Panther Party, and its Chairman, Malik Zulu Shabazz. Nonetheless, internal Department memoranda and the testimony of Assistant Attorney General Thomas Perez provide an indication of the Department's concerns and reasoning. These are examined in turn.

i. First Amendment Concerns

The existing record reflects that Mr. Rosenbaum originally raised First Amendment concerns with the trial team after a default had been entered.[89] These concerns were responded to, at length, in both the Remedial Memo and in the Appellate Section review.[90] In both instances, the career attorneys argued that any First Amendment concerns could be successfully addressed and would not preclude a default judgment.

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[88] Coates Testimony, *supra* note 1, at 57-58.
[89] *See* Rubin, *supra* note 63; Adams Testimony, *supra* note 50, at 24-25.
[90] This issue may also have been addressed in an e-mail by the trial team prepared in response to the doubts originally expressed by Mr. Rosenbaum on April 29, 2009. The Vaughn index shows a series of e-mails on those dates between Mr. Rosenbaum and Mr. Coates and this was the subject of testimony by Mr. Adams and Mr. Coates that trial team members worked all night to prepare a response. *See* Adams Testimony, *supra* note 50, at 26-27; Coates Testimony, *supra* note 1, at 60.

As to the scope of the initial injunction sought by the Department, the potential relief sought in the Complaint focused on conduct not protected by the First Amendment. The proposed restrictions were directed at the behavior of the NBPP members, with no direct prohibition on speech. Even if the scope of the injunction was a matter of legitimate debate, however, such concerns would not have justified the dismissal of all claims against three of the defendants. Instead, the same limited restrictions approved by the Department as to King Samir Shabazz could have been applied to the other defendants.

Gregory Katsas, former Acting Associate Attorney General who once supervised the Civil Rights Division, explained in his prepared testimony submitted to the Commission why he believes there were no serious First Amendment concerns:

> The alleged conduct of Minister Shabazz and Mr. Jackson was not constitutionally protected. To begin with, the First Amendment does not protect intimidation in any context, even if carried out through speech or expressive conduct. See *Virginia* v. *Black*, 538 U.S. 343, 360 (2003). Moreover, to prevent against voter intimidation, states may prohibit even pure political speech around entrances to polling places. See *Burson v. Freeman*, 504 U.S. 191, 196-210 (1992) (plurality opinion) (upholding ban on such speech within 100 feet of entrance); *id* at 213 (Scalia, J., concurring in the judgment) ("restrictions on speech around polling places on Election Day are as venerable a part of the American tradition as the secret ballot").
>
> The alleged conduct of Malik Shabazz and the New Black Panther Party, in directing and ratifying the conduct of Minister Shabazz and Mr. Jackson, also was unprotected. Even in cases involving some activity protected by the First Amendment, a supervisor "may be held liable for unlawful conduct that he himself authorized or incited." *NAACP* v. *Claiburne Hardware Co.*, 458 U.S. 886, 920 n.56 (1982). And a political party or advocacy group, "like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority." *Id.* at 930.[91]
>
> Finally, the relief requested would have raised no significant First Amendment problems. In its original complaint, DOJ asked the court for an order that "[p]ermanently enjoins Defendants, their agents and successors in office, and all persons acting in concert with them, from deploying athwart the entrance to polling locations either with weapons or in the uniform of the Defendant New Black Panther Party, or both, and from otherwise engaging in coercing, threatening, or intimidating, behavior at polling locations during elections."[92] The first clause describes the specific unlawful conduct committed or authorized by the defendants, and the second clause describes

[91] See *infra* Part II(B)(iii) for a discussion of the NBPP's joint liability for the actions of King Samir Shabazz and Jerry Jackson.

[92] Complaint at 8, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-CV-065-SD (E.D. Pa. Jan. 8, 2009), *available at* http://www.usccr.gov/NBPH/COMPLAINT-USAvNBPP.pdf.

> more generally the conduct of intimidating voters "at polling locations during elections." Neither clause plausibly encompasses constitutionally protected conduct.[93]

During his live testimony before the Commission, Mr. Katsas defended and elaborated on these views.[94]

The Department's concern about the First Amendment rights of § 11(b) defendants also appears to be somewhat inconsistent. On the current record, it was Mr. Rosenbaum who raised purported concerns about the First Amendment rights of the New Black Panther defendants. Yet, several years earlier, Mr. Rosenbaum was part of the trial team that filed an 11(b) suit in the case *United States of America v. North Carolina Republican Party, et al.*, 91-161 CIO-5-F (E.D.N.C.). In that suit, the Department sought to preclude both the North Carolina Republican Party and the Helms for Senate Committee from mailing misleading postcards, a type of conduct more closely aligned with the First Amendment than wielding a nightstick at a polling site.

ii. Jerry Jackson

The information collected by the trial team evidenced a long-established relationship between King Samir Shabazz and Mr. Jackson. Their depiction as commander and subordinate, as captured in a National Geographic documentary (discussed more fully in the Appendix), is a matter of public record. The two are shown acting in tandem, in uniform, posing with firearms and issuing threats of violence. The actions and relationship of the pair in the documentary are analogous to what occurred at the polling place on Fairmount Street. In both instances, Mr. Jackson and King Samir Shabazz move in concert, as part of a team.

The nature of their joint liability is reflected in the fact that at no point in the internal memoranda of the Department was a distinction drawn between the potential liability of King Samir Shabazz and that of Mr. Jackson. The J Memo and the Remedial Memo prepared by the trial team, as well as the review prepared by the Appellate Section, did not even raise, let alone address, the issue. For these career attorneys, Jackson and Shabazz apparently were never regarded as anything but equally liable. Indeed, on the existing record, neither Mr. Rosenbaum nor Ms. King appears to have sought any legal analysis on the issue prior to the decision to dismiss the claims against Mr. Jackson.

In his written statement submitted as part of his testimony before the Commission, Assistant Attorney General Thomas Perez indicated that the basis of dismissing the claim against Mr. Jackson was as follows:

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[93] Katsas Statement, *supra* note 79, at 11-12.
[94] *See* Apr. 23, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 174-176 (Testimony of Gregory Katsas), *available at* http://www.usccr.gov/NBPH/04-23-2010_NBPPhearing.pdf [hereinafter "Katsas Testimony"].

> The Department concluded that the allegations in the complaint against Jerry Jackson, the other defendant present at the Philadelphia polling place, did not have sufficient evidentiary support. The Department's determination was based on the totality of the evidence. In reaching this conclusion, the Department placed significant weight on the response of the law enforcement first responders to the Philadelphia polling place on Election Day. A report of the local police officer who responded to the scene, which is included in the Department's production to the Commission, indicates that the officer interviewed Mr. Jackson, confirmed that he in fact was a certified poll watcher, and concluded that his actions did not warrant his removal from the premises.[95]

The Department's decision to place "substantial weight" on the judgment of the local police officer is curious. First, if the police officer's actions were determinative, the case against King Samir Shabazz should have been dismissed as well. The police officer did not arrest Mr. Shabazz. Instead, Mr. Shabazz was simply directed to leave the premises. Under the rationale relied upon by Mr. Perez, the failure of the police to take formal action against Mr. Shabazz should have resulted in the dismissal of the claims against him, as was done with Mr. Jackson.

Second, local police officers are not charged with enforcement of the federal Voting Rights Act. The distinction between local law enforcement and the Department's enforcement of federal laws was captured in the testimony of trial team members Christopher Coates and J. Christian Adams before the Commission.

Mr. Coates testified as follows:

> The primary reason cited by the Division for not obtaining injunctive relief against Black Panther Jerry Jackson, who stood at the Philadelphia polling place in uniform with fellow Panther King Samir Shabazz but without a weapon, was that a Philadelphia police officer came to the polling place, made the determination that King Samir Shabazz had to leave the polling place, but that Black Panther Jackson could stay because he was a certified Democratic poll watcher.
>
> During my 13 and a half years in the Voting Section, I cannot remember another situation where a decision not to file a Voting Rights Act case, much less to dismiss pending claims and parties, as happened in the *New Black Panther Party* case, was made, in whole or in part, on a determination of a local police officer.
>
> In my experience, officials in the Voting Section and the Civil Rights Division always reserved for themselves, and correctly so, the determination as to what behavior constitutes a violation of federal law

[95] Perez Statement, *supra* note 53, at 8; *see also* Perez Testimony, *supra* note 53, at 69-71.

> and what does not. One of the reasons for this federal preemption of the determination of what constitutes a Voting Rights Act violation is that local police officers are normally not trained in what constitutes a Voting Rights Act violation.[96]

Mr. Adams added the following:

> QUESTION: Okay. Okay. The police, I believe, when they came and told the – Mr. Shabazz, the one with the billy club, that he had to vacate the premises, they let Mr. Jackson stay. Does the fact that Mr. Jackson was a poll-watcher have any bearing on his liability?
>
> ADAMS: No. Thank heavens, no. I mean, otherwise, you would appoint as poll-watchers the biggest and baddest thugs you have and give them credentials to roam about the community, nor does the fact that the police let him stay have anything to do with it.
>
> The federal government has never taken the position, and hopefully never will, that local law enforcement officials can opine on matters of federal law. We have entirely different laws that we enforce.
>
> QUESTION: Okay.
>
> ADAMS: And the Philadelphia police don't enforce federal voting rights statutes.
>
> QUESTION: So you don't have to defer to the Philadelphia police.
>
> ADAMS: Of course not.[97]

In sum, it is difficult to see why a police officer's decision about potential criminal activity would determine liability in a civil suit. It should again be noted that the dismissal occurred despite the fact that Mr. Jackson, who was represented by counsel, did not contest the lawsuit. Whatever the opinion of the local police as to possible criminal culpability under local laws, even Mr. Jackson did not question his civil liability under federal § 11(b).

iii. Post-Election Response Of The New Black Panther Party

One of the subjects of this investigation is the degree of responsibility of the New Black Panther Party for Self Defense, and its Chairman, Malik Zulu Shabazz, for the events that occurred on Fairmount Street on Election Day 2008. In the lawsuit, it is alleged that the Party and Malik Zulu Shabazz:

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[96] Coates Testimony, *supra* note 1, at 26-27.
[97] Adams Testimony, *supra* note 50, at 89-90.

> managed, directed, and endorsed the behavior, actions and statements of Defendants Samir Shabazz and Jackson at 1221 Fairmount Street on November 4, 2008… Prior to the election, Defendant New Black Panther Party for Self-Defense made statements and posted notice that over 300 members of the New Black Panther Party for Self-Defense would be deployed at polling locations during voting on November 4, 2008 throughout the United States. After the election, Defendant Malik Zulu Shabazz made statements adopting and endorsing the deployment, behavior, and statements of Defendants Samir Shabazz and Jackson at 1221 Fairmount Street in Philadelphia, Pennsylvania.[98]

In his testimony before the Commission, Assistant Attorney General for Civil Rights Thomas Perez stated that these claims "did not have sufficient evidentiary support."[99] He further indicated that the Department had taken into consideration that the Party had specifically disavowed the actions at the polling site in the Department's decision to dismiss claims against both the Party and Malik Zulu Shabazz.[100]

> As it relates to the national party… there is no vicarious liability so that – and the post-election statements from the national party that they didn't condone the activities: Statements of that nature were very relevant in the determination that we could not sustain the evidentiary burden against the national party.[101]

According to Mr. Perez, it was based on this reasoning that, despite the fact that neither the NBPP nor Malik Zulu Shabazz, who is an attorney, contested the allegations in the Complaint, the Department proceeded to dismiss the claims against both the Party and Mr. Shabazz.

The position of Mr. Perez is contrary to those with the most direct knowledge about the case. All four career attorneys of the trial team indicated that there was sufficient evidence to proceed to judgment against both the Party and Malik Zulu Shabazz. This position was also supported by the two career attorneys from the Appellate Section who reviewed the claim. In addition, the Commission heard the testimony of Gregory Katsas, who previously held a series of high-level positions in the Department, including that of Acting Associate Attorney General, which supervises the Civil Rights Division. Both in his written statement[102] and in his oral testimony before the Commission,[103] Mr. Katsas said that a judgment could have been obtained against both the Party and its Chairman under general principles of agency law.[104]

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[98] Complaint at 3, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-CV-065-SD (E.D. Pa. Jan. 8, 2009), *available at* http://www.usccr.gov/NBPH/COMPLAINT-USAvNBPP.pdf.
[99] Perez Testimony, *supra* note 53, at 20.
[100] *See id.* at 23-24, 96.
[101] *Id.* at 103; *see also* Perez Statement, *supra* note 53, at 6.
[102] *See* Katsas Statement, *supra* note 79, at 7.
[103] *See* Katsas Testimony, *supra* note 94, at 159.
[104] *See* Katsas Statement, *supra* note 79, at 7.

In an attempt to establish the extent of the Party's involvement on Election Day 2008, the Commission subpoenaed King Samir Shabazz, Jerry Jackson, and Malik Zulu Shabazz. The first two individuals, who had been present at the polling site in Philadelphia, asserted their rights against self-incrimination under the Fifth Amendment of the U.S. Constitution and refused to testify.[105] As of the date of this report, Malik Zulu Shabazz remains under subpoena, but refuses to testify, contesting the subpoena in the U.S. District Court for the District of Columbia.[106]

Faced with this lack of cooperation, the Commission reviewed publicly available sources to attempt to determine the extent of the Party's programs and activities on Election Day 2008. This included attempting to determine: Did the Party organize a poll security program? If so, what steps were taken to organize or train Party members? What was the degree of control of the Party over its members relating to such activities? And what activities were sanctioned by the Party and what activities were prohibited?

The publicly available information provided few clear answers to these questions. Instead, the Commission was presented with a series of confusing and contradictory statements by the Party and its Chairman, Malik Zulu Shabazz. An examination of these statements is nonetheless useful, as they raise serious questions as to the sincerity of the Party's expressions of regret and whether the Department reasonably relied on such statements to justify the dismissal of the suit as to the Party and its Chairman.

In a statement posted on the New Black Panther Party website, dated November 4, 2008 but possibly posted after that date, the Party indicated that "[it] does not now nor ever has, engaged in any form of voter intimidation."[107] The notice goes on to state that the Party had "over 350 of its members on the ground in 15 cities in order to ensure that people of color particularly our women, youth and elders, are ensured their right to vote and in order to provide security protecting our people in the face of real and confirmed Neo-Nazi, Skinhead, KKK, Aryan Nation and other White Supremacist threats."[108] The statement then directly addresses the incident in Philadelphia:

> Specifically, in the case of Philadelphia, the New Black Panther Party wishes to express that the actions of people purported to be members do not represent the official views of the New Black Panther Party and are not connected nor in keeping with our official position as a party.

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[105] *See* Deposition of King Samir Shabazz at 4-6, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 11, 2010, *available at* http://www.usccr.gov/NBPH/KingSamirShabazzDepositionTranscript_01-11-10.pdf; Deposition of Jerry Jackson at 6-8, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 11, 2010, *available at* http://www.usccr.gov/NBPH/JerryJacksonDepositionTranscript_01-11-10.pdf.

[106] *See* U.S. Comm'n on Civil Rights v. Shabazz, No. 1:10-mc-00232 (D.D.C.).

[107] New Black Panther Party, The NBPP Issues Official Statement re: Election 2008 and Voter Intimidation 11/4/08, http://www.newblackpanther.com/statement-voterintimidation_phillychapter.html (last visited Mar. 30, 2010). This statement is no longer publicly available on the New Black Panther Party's website. A copy of the statement is on file with the U.S. Commission on Civil Rights.

[108] *Id.*

> The publicly expressed sentiments and actions of purported members do not speak for either the party's leadership or its membership.[109]

The statement then notes that, "The New Black Panther Party does not issue threats of violence to those who we may not agree with."[110]

Only three days after the election, Malik Zulu Shabazz appeared on the Fox News program, "The Strategy Room."[111] In that interview, Mr. Shabazz made statements that contradicted the representations contained in the Party's statement on its website.

First, Mr. Shabazz alleged that white supremacists created the incident on Fairmount Street:

> RICK LEVENTHAL: …All right. So, first and foremost, because probably most of the people watching have seen some portion of it [videos of King Samir Shabazz and Jerry Jackson on Election Day], what was your reaction to that?
>
> SHABAZZ: After my investigation into that case, I have found that those members were responding to members of the Aryan Nation and the Nazi Party who were voting Republican and who were at those polling stations really intimidating black voters.
>
> RICK LEVENTHAL: Whoa, whoa, whoa. You're saying that there were white members of, there were Aryans living in that district who went to vote in that polling place?

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[109] *Id.*

[110] *Id.* The above statement raises several questions:

- The statement is dated November 4, 2008, Election Day, but it is unclear if the statement was actually posted on that date. Neither the efforts of the Department, nor of the Commission, were able to establish the actual date of posting.[110]
- The notice makes reference to the actions in Philadelphia being attributed to "purported members." Even as of Election Day, a national broadcast had shown the video images of King Samir Shabazz and Jerry Jackson. These members were well known to Party members and Malik Zulu Shabazz. Was this an attempt at deniability?
- The statement that, "The New Black Panther Party does not issue threats of violence to those we may not agree with," is demonstrably false. King Samir Shabazz has issued blunt threats of violence of which Malik Zulu Shabazz was surely aware. Yet no suspension resulted from these earlier incidents.

While the statement indicates that the party had some form of voter plan in place (the reference to 350 members being on the ground in 15 cities), and makes reference to the party's "official position," there has been no explanation of what exactly the party had planned for Election Day and in what way King Samir Shabazz and/or Jerry Jackson violated the Party's "official position." If the "official position" would have exonerated the Party, why wasn't it made public and provided to the Department?

[111] *The Strategy Room* (Fox News Internet broadcast Nov. 7, 2009), *available at* http://video.foxnews.com/v/3917372/dr-malik-shabazz (last visited Oct. 21, 2010).

> SHABAZZ: I don't know if they were voting, but they were there. They were in the parking lot, they had Nazi insignia on their arms, and…
>
> RICK LEVENTHAL: This is absolutely the first I've heard of this.
>
> SHABAZZ: That is the absolute truth. And those men were not wrong, that they were there…
>
> RICK LEVENTHAL: Dr. Shabazz, why wouldn't anyone there tell me that? What they told me was that that gentleman in the Black Panther uniform was a poll watcher who was just there to greet voters. There was never any mention from any one of the people who I spoke with that day at that location who said anything about anyone from an Aryan Nation or any white supremacist being there.
>
> SHABAZZ: I can only tell you what my investigation has uncovered. Yes, one of the members of the Party, he lived there, he was a poll watcher, and there are other elders and grandmothers that we have interviewed that have told of the intimidation that was taking place that day. And so those men were there to try to stop something, not start something.[112]

When he was asked whether he had any evidence of the existence of white supremacists, the following exchange took place:

> RICK LEVENTHAL: Dr. Shabazz, do you have any film or pictures of the presence of these Nazis at the Philadelphia polling place? Any evidence whatsoever?
>
> SHABAZZ: You check our website soon, coming out.
>
> RICK LEVENTHAL: Oh, soon. You're gonna have pictures of them?
>
> SHABAZZ: Well, we're gonna have interviews with the elders. You know, the elderly who were at that polling site were really thanking the New Black Panther Party for being there because they were the only security they had on that day.[113]

Mr. Shabazz also stated, "I can tell you at that polling site that there were neo-Nazis at the polling site, as God is my witness."[114]

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[112] *Id.*
[113] *Id.*
[114] *Id.*

The testimony developed by the Commission indicates that the allegations claiming the presence of white supremacists at the polling site are false. Commission witnesses Chris Hill, Mike Mauro, Bartle Bull and Ronald Vann all testified that there was no evidence of white supremacists at the polling site.[115] In addition, despite Mr. Shabazz's representations, no evidence substantiating the presence of white supremacists has ever been posted on the Panthers' website or otherwise made publicly available.

Finally, Mr. Shabazz seemed to agree with the statement on the Party's website that: (i) the Panthers were organized and appeared at numerous polling sites; (ii) the only problem had been at the Fairmount Street polling place; and (iii) the problem at Fairmount Street was the cause of white supremacists.

> RICK LEVENTHAL: Did you know that there were Black Panthers in Philadelphia, because when we called your office that day we were told that you had Black Panthers at other polling locations around the country but no one in Philadelphia.
>
> SHABAZZ: Well, once we did our research we figured out that there were members of the Party not only in Pennsylvania but many areas. I mean, obviously we don't condone bringing billy clubs to polling sites. But when we found out that this was an emergency response to some other skinhead and white supremacist activity at that polling site, then there was some explanation for that.[116]

In the J Memo of December 22, 2008, the trial team indicates that Malik Zulu Shabazz was interviewed by the Department about the incident. However, the references in the J Memo do not provide much detail about the interview. The document simply notes that Shabazz stated that "[t]here were members of the party in many areas [on Election Day]" and that he "specifically endorsed the use and display of the weapon at 1221 Fairmount Street by Samir Shabazz . . . ."[117] In his testimony before the Commission, trial team member J. Christian Adams indicated that Malik Zulu Shabazz had "said the weapon was necessary."[118]

Although in the previously-cited Fox News "Strategy Room" interview Malik Zulu Shabazz acknowledges that the actions of King Samir Shabazz at the polling place were improper, there is no evidence that the Party imposed any sanction or discipline at that time. Instead, it appears that the alleged imposition of discipline was delayed until January 7, 2009, over two

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[115] *See* Mauro Testimony, *supra* note 6, at 39; Hill Testimony, *supra* note 4, at 51; Bull Testimony, *supra* note 5, at 59; Vann Deposition, *supra* note 32, at 21; *see also* L. Counts Deposition, *supra* note 20, at 19; Adams Testimony, *supra* note 50, at 21.

[116] *The Strategy Room* (Fox News Internet broadcast Nov. 7, 2009), *available at* http://video.foxnews.com/v/3917372/dr-malik-shabazz (last visited Oct. 21, 2010).

[117] J. Memo, *supra* note 10, at 7.

[118] Adams Testimony, *supra* note 50, at 21-22.

months after Election Day, the same date the Justice Department filed its lawsuit against King Samir Shabazz, Jerry Jackson, the Party, and Malik Zulu Shabazz.[119]

On that date, a new notice was evidently posted on the Party's website. The statement, in whole, reads as follows:

> **Public Notice Regarding Philadelphia Chapter Suspension 1/7/09**
> **NBPP Official Statement**
>
> Philadelphia Chapter of the New Black Panther Party is suspended from operations and is not recognized by the New Black Panther Party until further notice.
>
> The New Black Panther Party has never, and never will, condone or promote the carrying of nightsticks or any kind of weapon at any polling place. Such actions that were taken were purely the individual actions of Samir Shabazz and not in any way representative or connected to the New Black Panther Party. On that day November 4th, Samir Shabazz acted purely on his own will and in complete contradiction to the code and conduct of a member of our organization. We don't believe in what he did and did not tell him to do what he did, he moved on his own instructions.
>
> It is true that volunteers in the New Black Panther Party successfully served as poll watchers all over the country and helped get the Black vote out. We were incident free. We are intelligent enough to understand that a polling place is a sensitive site and all actions must be carried out in a civilized and lawful manner.
>
> Certainly no advice from the leadership of the New Black Panther Party was given to Samir Shabazz to do what he did, he acted on his own. This will be the New Black Panther Party's Only Statement on the matter.[120]

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[119] Press Release, U.S. Dep't of Justice, Justice Department Seeks Injunction Against New Black Panther Party (Jan. 7, 2009), *available at* http://www.justice.gov/opa/pr/2009/January/09-crt-014.html (last visited Oct. 21, 2010).

[120] New Black Panther Party, Public Notice Regarding Philadelphia Chapter Suspension 1/7/09 NBPP Official Statement, http://www.newblackpanther.com/statement-voterintimidation_phillychapter.html (last visited Mar. 30, 2010). This statement is no longer publicly available on the New Black Panther Party's website. A copy of the statement is on file with the U.S. Commission on Civil Rights. As with the Party's other statements, questions arise out of the notice dated January 7, 2009.

- On its face, it appears that the suspension of the Philadelphia Chapter only occurred after the Department's lawsuit was filed. Yet, the actions of King Samir Shabazz and Jerry Jackson were known to the Party and Malik Zulu Shabazz no later than November 7, 2008, the date of the Fox News "Strategy Room" interview. Why was the suspension not imposed earlier?

The sincerity of the alleged repudiation and suspension was called into question by a subsequent speech given by Malik Zulu Shabazz in November 2009, at a party conference in Dallas.[121] The Party Chairman appears in his uniform, with four stars on his lapel, and surrounded by Party members in paramilitary garb. During that speech, less than a year after the alleged suspension of King Samir Shabazz and the Philadelphia Chapter, Malik Zulu Shabazz stated:

> And, for the record, for the record, for inside the Party, King Samir is welcome back in the New Black Panther Party. King Samir is welcome. [applause] . . . And so he served a little suspension, but that suspension is up. I still charge it to his head and not our heart. He's still our brother. We're not gonna throw our brother away for no damn devils. [applause] No, but we also had to move in a way that gets this beast off our back and to get everything dropped.[122]

Elsewhere in his speech, Malik Zulu Shabazz seems to indicate that the Party's post-election statements and actions were taken to avoid liability. He stated:

> They only had video evidence on Samir. They didn't have no evidence that I directed the operation. They had no evidence -- they say brother Jerry didn't have a baton and he was a poll watcher. The New Black Panther Party moved in a way where they couldn't say that the Party

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- There is no reference to the presence of white supremacists justifying the use of a nightstick. Should this have not raised questions in the Department as to whether the Party's alleged repudiation was credible? Did no one at the Department question the Party's changing positions?
- The notice contends that, "The New Black Panther Party has never, and never will, condone or promote the carrying of nightsticks or any kind of weapon at any polling place."[120] Yet the Party's own website and publications, as well as the media interviews with King Samir Shabazz and Malik Zulu Shabazz, all reflect that Party members have arms training, and often appear with weapons. Given the general encouragement of armed status, what specific instructions, if any, were given with regard to Election Day activities?
- The statement contends that King Samir Shabazz acted in "contradiction to the code and conduct of a member of our organization." Yet the rules and principles of the Party posted on its website in no way address electoral matters or polling activities. What code is the statement referring to? Given the past record of King Samir Shabazz making threats of violence (S*ee* Appendix), what steps were taken to prevent their reoccurrence?
- The statement notes that, "volunteers in the New Black Panther Party successfully served as poll watchers all over the country and helped get the Black vote out."[120] If this statement is true, and the Party planned and organized Election Day activities, the instructions, training, and orders given to the Party members should be readily available and logically would have been produced to the Department as part of an argument for dismissal of the lawsuit. No such evidence has been forthcoming and the Party did not challenge the allegations in the suit. Why not?

[121] *See* Video: YouTube.com, New Black Panther Party 20 Year Reunion: Dr. Malik's Keynote Part #10 (2010), http://www.youtube.com/user/NewBlackPantherTV#p/u/16/1Oo65qHi4nQ (last visited Dec. 28, 2010) [hereinafter "Shabazz Speech Part 10"]; Video: YouTube.com, New Black Panther Party 20 Year Reunion: Dr. Malik's Keynote Part #11 (2010), http://www.youtube.com/user/NewBlackPantherTV#p/u/15/BEBpERVmU94 (last visited Dec. 28, 2010[hereinafter "Shabazz Speech Part 11"].

[122] Shabazz Speech Part 11, *supra* note 122 (emphasis added).

> had condoned doing that. And so the Justice Department changed hands into the Obama administration and the Justice Department leadership changed into the hands of a black man by the name of Eric Holder, and they took a look at it and they threw most of everything out.[123]

In the same speech, Malik Zulu Shabazz made light of the fact that King Samir Shabazz had a weapon at the polling site.

> And I've always been of the belief that Bush had vowed that before he left office he would try to trap us or something. And as strong as we were, we were still too wise to run in his traps, or into his traps. So on the last days of his administration, on the last day, November 4, 2008, he gets what he wants, some little weak charge on the New Black Panther Party of voter intimidation, sayin' that we were in front of a polling place with a baton. Now, what would we look like in front of a polling place with a baton? You know we don't carry batons. Psyche. I'm just playin'. [laughter][124]

Lastly, in the same speech, Malik Zulu Shabazz gave the fullest explanation, to date, of what the Panthers were allegedly attempting to do on Election Day:

> We went out there to help the elders. We went out there to pass out flyers, and went out there to pass out some information to our brothers and sisters. That was our orders. And we went out, and for the most part we did that well. It's just that the New Black Panther Party sometimes, whatever we do, we just tend to do it kind of strong, you know what I mean? [laughter] Sometimes, whatever we do, sometimes we just do it just real strong, and sometimes it can even be too black and too strong. And so what happened was, one of our men, one of our brothers, who's my little brother and I love, King Samir Shabazz, just was a little bit too strong and he was caught out there at the polling place with a nightstick, at the polling place, and the John McCain campaign rode up on him with some cameras and some poll watchers and jumped all over the issue and all over the brother.[125]

The contradictory and seemingly tactical nature of the statements made by Malik Zulu Shabazz raise serious questions that call for additional investigation. On the one hand, he clearly acknowledges that the Party planned Election Day activities at polling sites and that there was some form of instruction or orders relating to conduct. At the same time, serious questions exist as to whether his alleged condemnations and suspension of King Samir Shabazz, made only after the lawsuit was filed, were genuine. By his own words, the alleged

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[123] *Id.* (emphasis added).
[124] Shabazz Speech Part 10, *supra* note 122.
[125] Shabazz Speech Part 11, *supra* note 122.

acts of discipline appear to have been taken strictly "in a way that gets this beast off our back and to get everything dropped."

The following questions need to be addressed. What was the Party's program for Election Day? What training was given? What rules or code of conduct were established? What activities were to occur? Why didn't the Party suspend King Samir Shabazz immediately? What was the basis for the claims relating to the alleged presence of white supremacists? Was this merely a tactic, or was there any substance to the claim? And, finally, if the Party and Malik Zulu Shabazz did not believe they had any liability, why did they not defend the lawsuit brought by the Department?

Even if these questions cannot be answered, a fuller explanation should be provided by the Department as to why the opinions of the trial team and the Appellate Section were disregarded. Regardless of the NBPP's post-election comments, the Party's control and discipline over its members, would seem to present a strong case that general principles of agency would bind the Party for the acts of Jerry Jackson and King Samir Shabazz.[126]

The Department has indicated that the decision to dismiss the claim against the Party and its Chairman was made in part because of "post-election statements from the national party that they didn't condone the activity." As presented in this report, substantial doubt exists as to whether the Party's condemnation of King Samir Shabazz was anything but a subterfuge. It strains credulity to believe that the Department decided to dismiss the claims against the Party and its Chairman based on statements that, at a minimum, were contradictory, self-serving and, with regard to the white supremacist allegations, demonstrably false.

C. The Response of Christopher Coates

As reflected above, in his testimony before the Commission, Christopher Coates challenged many of the specific explanations provided by the Department to justify its reversal of the NBPP litigation. In addressing the Department's overall position, he posed the following hypothetical:

> To understand the rationale of these articulated reasons for gutting this case, the *Panther* case, one only has to state the facts in the racial reverse. Assume that two members of the Ku Klux Klan, one of which lived in an apartment building that was being used as a polling place, showed up at the entrance in KKK regalia and that one of the Klansmen was carrying a billy stick. Further assume that the two Klansmen were yelling racial slurs at black voters, who were a minority of the people registered to vote at that particular polling place and that the Klansman was blocking ingress to the polling place. Assume further that a local policeman came on the scene and determined that the Klan with the billy

[126] The Appendix to this report details Mr. Jackson's and Mr. Shabazz's compliance with, and conformance to, NBPP policies generally.

> club must leave but that the other Klansman could stay because he was a certified poll watcher for a local political party.
>
> In those circumstances, ladies and gentlemen, does anyone seriously believe that the Assistant Attorney General for Civil Rights would contend that, on the basis of the facts and the law, the Civil Rights Division did not have a case under the Voting Rights Act against the hypothetical Klansman that I described because he resided in the apartment building where the polling place was located or because he was allowed to stay at the polling place by a local police officer because he was a poll watcher?[127]

As is described more fully in Part III of this report, Mr. Coates believes the change in direction of the NBPP litigation was not based on the specifics of the case, but instead was the product of ongoing hostility to the race-neutral enforcement of voting rights laws in the Civil Rights Division.

D. Decision Making By Political Appointees

The Commission does not question the responsibility of political appointees to review, and in many instances, to overrule the decisions of career lawyers in the Department. But it is the Commission's responsibility in a case like this to investigate, evaluate, and report on whether the Commission believes the ultimate decision was based on impermissible factors. If no plausible explanation is offered for overruling numerous career lawyers, it raises questions as to whether the purported explanation is accurate and/or legitimate.

In the present case, the Department has taken the position that the decisions regarding the ultimate fate of the NBPP litigation were made by career attorneys Loretta King and Steven Rosenbaum.[128] Ms. King and Mr. Rosenbaum are indeed career attorneys at the Department. At the time the decisions were made with regard to the litigation, however, both Ms. King and Mr. Rosenbaum were temporarily serving in political positions. Specifically, Ms. King was serving as the Acting Assistant Attorney General for Civil Rights, and Mr. Rosenbaum was serving as the Acting Deputy Assistant Attorney General for Civil Rights. It has been argued that, under the Vacancies Reform Act,[129] Ms. King and Mr. Rosenbaum were, in fact, political appointees.[130]

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[127] Coates Testimony, *supra* note 1, at 29-30.

[128] In his testimony before the Commission, Assistant Attorney General Thomas Perez stated, "The judgment in this case to proceed in the way that was chosen was made by Steve Rosenbaum and ultimately by Loretta King based on a review of the totality of the circumstances." Perez Testimony, *supra* note 53, at 23.

[129] 5 U.S.C. § 3345 et seq.

[130] Under the Vacancies Reform Act, when there is a vacancy in a position that requires Senate approval, such as Assistant Attorney General for Civil Rights, the "President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity." Rubin, *supra* note 63.

The Department does not share this interpretation.[131] In responses to discovery requests to the Commission, the Department contends:

> Career supervising attorneys [Loretta King and Steven Rosenbaum] who have over 60 years of experience at the Department between them decided not to seek relief against three other defendants after a thorough review of the facts and applicable legal precedent. The Department implemented that decision. Political considerations had no role in that decision and reports that political appointees interfered with the advice of career attorneys are false.[132]

At the same time, the Department has acknowledged that high-ranking political appointees at the Department were at least aware of the decision of Ms. King and Mr. Rosenbaum and did not object to the dismissal of the three defendants or the reduction of the relief sought against the fourth defendant.

> Consistent with the Department's practice, the attorney serving as Acting Assistant Attorney General for Civil Rights [Loretta King] informed Department supervisors of the Division's decisions related to the case. The Department supervisors [in the office of Associate Attorney General Thomas Perrelli] did not overrule that attorney.[133]

As a result of the FOIA lawsuit brought by Judicial Watch, additional information has been uncovered regarding contacts between the Civil Rights Division and the Office of the Associate Attorney General and others. The index of withheld documents provided by the Department strongly suggests that, contrary to the above assertion, senior political appointees outside the Civil Rights Division actively participated in the decision making regarding the litigation.

As discussed previously, there were two main decision points with regard to the fate of the litigation. The first was just before May 1, 2009, the original date that a motion for default judgment was required to be filed by the Department. The second was just before May 15, 2009, the ultimate date when the motion for default judgment was due, following the granting of a continuance. The index provided in the *Judicial Watch* litigation reflects a substantial increase in the involvement of political appointees in the decisionmaking process on or about both dates.

With regard to the original May 1 deadline, the index reflects that the Acting Deputy Assistant Attorney General for Civil Rights, Steve Rosenbaum, exchanged eight e-mails on

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[131] *See* Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights (Sept. 24, 2010), *available at* http://www.usccr.gov/NBPH/09-24-10_Blackwood.pdf.

[132] Discovery Response of the U.S. Dep't of Justice at 4, Jan. 11, 2010 (Response to Interrogatory No. 4), *available at* http://www.usccr.gov/correspd/1-12-10_DOJResponse2Subpoena.pdf [hereinafter "Discovery Responses"].

[133] *Id.* at 5 (Response to Interrogatory No. 4); *see also* Jerry Seper, *Justice Appointee OK'd Panther Reversal*, WASH. TIMES, July 30, 2009, at A01.

April 30, 2009 with Sam Hirsch, a political appointee who was serving as a Deputy Associate Attorney General.[134] Mr. Hirsch reports directly to Thomas Perrelli, the Associate Attorney General, and third-highest official within the Department. These communications included Mr. Rosenbaum's "detailed response and analysis of the proposed draft filings"[135] as well as discussions regarding said drafts "and legal strategy and merits of NBPP litigation."[136]

The index also reflects that, on the same date, Mr. Hirsch reported developments in the NBPP case directly to Mr. Perrelli. These communications are described in the index as: "Emails forwarding and discussing draft filings for the pending NBPP litigation. Emails start with a discussion of proposed filings, and of the merits and legal arguments underlying them."[137] In addition, it is reported that Mr. Hirsch provided a "briefing on the current status of litigation and provid[ed] his opinion on the development of different approaches under consideration."[138] The description then indicates that, as to the latter communication: "Email is then forwarded within OASG [the Office of the Associate Attorney General] with comment and noting need to discuss."[139]

As the May 15 deadline approached, the index reflects that Mr. Rosenbaum and Mr. Hirsch were again in contact. Between May 8 and May 14, 2009, there were 10 e-mails between them.[140] These messages seem to indicate that Mr. Hirsch actively sought information and provided direction to Mr. Rosenbaum. The index summarizes a series of e-mails between the parties dated May 12, 2009 as follows: "DAAG [Rosenbaum] provides OASG in charge of CRT [Hirsch] with requested follow-up information and confirmation that additional actions would be conducted by Criminal Section Chief per his request."[141] Thereafter, on the day before the filing deadline, the index reflects that Mr. Rosenbaum provided Mr. Hirsch with "revised proposed draft documents for review and analysis."

These communications continued up to the last minute. As late as May 15, 2009, the day the motion for default judgment was due, the record reflects that Mr. Hirsch was overseeing edits to the pleadings to be filed with the court.[142]

The index also reflects that Mr. Perrelli was kept informed of the change in course in the litigation. On May 14, 2009, Mr. Perrelli and Mr. Hirsch shared updates on the status of the case. In one of these e-mails, it is suggested that Mr. Perrelli's office had been consulting with the Office of the Deputy Attorney General (ODAG), the second-highest office in the

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[134] *See* Judicial Watch *Vaughn* Index, *supra* note 69, at 5-8 (Doc. Nos. 13(a), 14(a), 17(a)-(f)).
[135] *Id.* at 6 (Doc. No. 14(a)).
[136] *Id.* at 7 (Doc. No. 17(a)).
[137] *Id.* at 53 (Doc. No. 100(a)).
[138] *Id.* (Doc. No. 101(a)).
[139] *Id.*
[140] *See id.* at 21, 25-27, 29-30 (Doc. Nos. 36(a), 44(a), 49(a), 50(a)-(d), 55(b), 55(d) & 57(a)).
[141] *Id.* at 27 (Doc. Nos. 50(a)-(d)). In his testimony before the Commission, Mr. Coates, the Chief of the Voting Section, indicated that he had no knowledge of any participation by the Criminal Section in the decision making process. *See* Coates Testimony, *supra* note 1, at 54.
[142] DOJ Motion for Summary Judgment in Judicial Watch litigation, Document 11-3, p. 55 (Docs. No. 67 and 68).

Department, then headed by David Ogden. The index provides the following summary: "Email asking for update on the NBPP litigation between officials in OASG [Office of the Associate Attorney General], and noting ODAG's [Ogden's] current thoughts on the case."[143]

The communications between Mr. Hirsch and Mr. Perrelli continued up through the court deadline of May 15, 2009. On e-mails of that date, Mr. Hirsch provided Mr. Perrelli with "the status of deliberations,"[144] updates "regarding edits to court papers,"[145] as well as "Emails forwarding and presenting legal analysis from CRT Appellate Section attorneys on questions presented from the CRT Front Office…"[146]

While the Department has refused to reveal the content of the various emails between the Civil Rights Division and Mr. Hirsch, and between Mr. Hirsch and Mr. Perrelli, the number, timing, and subject matter of such communications appear to reflect a level of participation by senior political appointees that is at odds with representations by the Department that senior career attorneys made the ultimate decision to override the opinions of the trial team and appellate section attorneys who supported seeking a default judgment as to all four NBPP defendants.

The Department has also acknowledged that the Attorney General was made aware of the decision making with regard to the NBPP litigation. The Department represented the following:

> The Attorney General was made generally aware by the then-Acting Assistant Attorney General for Civil Rights [Loretta King] and the Associate's staff that the Civil Rights Division was considering the appropriate actions to take in the *New Black Panther Party* litigation. The Associate Attorney General [Thomas Perrelli] likely provided a brief update to the Attorney General on the timetable for the Civil Rights Division's decision. The Attorney General did not make the decisions regarding any aspect of the *New Black Panther Party* litigation, including which claims to pursue or the scope of relief to seek.[147]

Finally, the Commission requested information as to communications by or between the Department and the Executive Office of the President regarding the NBPP litigation. The Department responded as follows:

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[143] Judicial Watch *Vaught Index*, *supra* note 69, at 53 (Doc. No. 102). It is unclear from this passage whether the use of the word "current" is meant to indicate that Mr. Ogden may have made prior comments on the case. The index reflects no other references to communications with ODAG.
[144] *Id.* at 54 (Doc. No. 104(a)).
[145] *Id.* at 55 (Doc. No. 106(c)).
[146] *Id.* at 30 (Doc. Nos. 57(a) and 103(a)).
[147] Supp. Interrog. Responses, *supra* note 55, at 5 (Apr. 16, 2010) (Supplemental Response to Interrogatory No. 6).

> On January 7, 2009, the day that the Civil Rights Division filed its complaint against the four defendants, the Department's press office notified the Executive Office of the President about a press release it issued on the filing of the case … The Department has identified no other communication relating to this litigation with the Executive Office of the President prior to the May 18, 2009 court judgment enjoining Minister King Samir Shabazz and dismissing the three other defendants. The Department is aware of no information that might suggest that the Executive Office of the President had a role in any litigation decision in this case.[148]

At present, despite the subpoena issued to the Department, DOJ has not turned over the direct evidence regarding its management-level communications and decision making about the NBPP litigation other than (i) the above statements submitted by the Department, and (ii) the information provided to Judicial Watch in response to its FOIA lawsuit. Accordingly, it is not currently possible to verify the accuracy of the Department's version of such communications, although the timing, frequency, and captions of such communications cast considerable doubt on several of the Department's claims.

In an effort to understand the normal decisionmaking process in DOJ, the Commission received testimony from the former Acting Associate Attorney General Gregory Katsas. Mr. Katsas described the normal decisionmaking process within the Department in cases like the NBPP litigation. He testified that he "would expect that OASG [the Office of Associate Attorney General, then held by Thomas Perrelli] was kept routinely apprised of significant developments in the [NBPP] litigation" and, moreover, that he "would expect that OASG played a far more active role in these decisions [to dismiss] than it likely played in its initial decision to file the case."[149] He explained:

> The initial decision – to file a straightforward and seemingly strong voter intimidation lawsuit – would not likely have raised concerns with OASG. In contrast, the decisions at the end of the case would have been anything but straightforward. They amounted to nothing less than a decision by DOJ,

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[148] *Id.* at 5-6 (Supplemental Response to Interrogatory No. 15). *See also* Letter from Ronald Weich, Asst. Atty. Gen., Office of Legislative Affairs, U.S. Dep't of Justice, to Congressman Lamar Smith (Feb. 25, 2010), *available at* http://www.usccr.gov/correspd/LetterfromWeich2Smithredecision-makingNBPP_02-25-10.pdf. While there has been some speculation of additional contacts with the White House, these allegations remain unsubstantiated. *See* Editorial, *Panther Politics: White House Interference Derails Justice?*, WASH. TIMES, Jan. 19, 2010, at B01, *available* at http://www.washingtontimes.com/news/2010/jan/19/panther-politics/ (last visited Oct. 20, 2010).

For reports on meetings between Thomas Perrelli and Cassandra Butts, see Editorial, *Annotated Panther Timeline*; WASH. TIMES, Jan. 19, 2010, at B01, *available at* http://www.washingtontimes.com/news/2010/jan/19/annotated-timeline/ (last visited Oct. 20, 2010). For an additional timeline, including Thomas Perrelli meetings in White House, see Hans A. von Spakovsky, *The New Black Panthers and the White House*, NATIONAL REVIEW ONLINE, Jan. 19, 2010, http://article.nationalreview.com/421518/the-new-black-panthers-and-the-white-house/hans-a-von-spakovsky (last visited Oct. 20, 2010).

[149] Katsas Statement, *supra* note 79, at 8-9.

> following a change in presidential administrations, to reverse legal positions asserted in a pending case. Such reversals are extremely rare – and for good reason: they inevitably undermine DOJ's credibility with the courts, and they inevitably raise suspicion that DOJ's litigating positions may be influenced by political considerations. Accordingly, while a new Administration obviously has wide discretion to change its enforcement priorities and even its litigating positions in new cases, it is extremely rare for DOJ to shift course so dramatically in the course of a pending case.
>
> Several considerations specific to the *New Black Panther Party* case would have exacerbated these general concerns. For one thing, DOJ did not merely abandon some of its claims in the course of ongoing and contested litigation; instead, it abandoned most of its claims after a default by all of the defendants, and an entry of that default pursuant to Federal Rule of Civil Procedure 55(a). I cannot think of any other instance when that has occurred. Moreover, the New Black Panther Party had endorsed President Obama in the 2008 election, and Mr. Jackson, during the events at issue, apparently was a registered poll watcher for the Democratic Party. Those facts inevitably would raise suspicion that the highly unusual decision to abandon a defaulted case was politically motivated, and that suspicion, in turn, would have heightened the sensitivity of deliberations within DOJ.
>
> For these reasons, I believe that OASG would have been actively involved in deliberations about whether to reverse positions in the *New Black Panther Party* litigation.[150]

As of the date of this report, Judicial Watch has announced that it has filed another Freedom of Information Act lawsuit against the Department of Justice to obtain records relating to any meetings between Associate Attorney General Thomas Perrelli and White House officials regarding the NBPP lawsuit.[151]

E. Possible Involvement By The NAACP Legal Defense and Educational Fund

During the course of this investigation, allegations appeared that the NAACP Legal Defense and Educational Fund ("NAACP Legal Defense Fund") had communicated with the Department regarding the course of the NBPP litigation. Such allegations raise concerns,

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[150] *Id.* at 9-10.

[151] *See* Press Release, Judicial Watch, Judicial Watch Sues DOJ for Documents Detailing White House Involvement in Black Panther Case Dismissal (Sept. 22, 2010), *available at* http://www.judicialwatch.org/news/2010/sep/judicial-watch-sues-doj-documents-detailing-white-house-involvement-black-panther-case (last visited Oct. 20, 2010); Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 1:10-cv-1606 (D.D.C.).

inasmuch as outside influence might, at least in part, explain the abrupt reversal in policy relating to the litigation.[152]

As part of its discovery requests, the Commission sought information with regard to any contacts by the Department with outside third-parties including, specifically, Kristen Clarke of the NAACP Legal Defense Fund.[153] Although the Department has consistently raised assertions of privilege relating to internal decision making, no such privilege exists with regard to third-party contacts. In response to the Commission's interrogatory request, the Department indicated that it had "identified no communication, oral or otherwise, with Kristen Clarke of the NAACP Legal Defense Fund relating to this litigation prior to the May 18, 2009 court judgment enjoining Minister King Samir Shabazz and dismissing the three other defendants."[154]

The basis of the request was a media report that Department officials and the NAACP Legal Defense Fund had communicated about the fate of the lawsuit. In a July 2009 article in *The Washington Times*, it was reported:

> Kristen Clarke, Director of Political Participation at the NAACP Legal Defense Fund in Washington … confirmed to The Times that she talked about the case with lawyers at the Justice Department and shared copies of the complaint with several persons. She said, however, her organization was "not involved in the decision to dismiss the civil complaint."[155]

The Commission deposed Ms. Clarke. In her testimony, she acknowledged only limited, non-substantive contacts with the Department with regard to the New Black Panther Party litigation. The following colloquy took place:

> CLARKE: I learned about the fact that the filing, the fact that this case was filed, from a Justice Department attorney.
>
> QUESTION: And who was that?
>
> CLARKE: Yvette Rivera.
>
> QUESTION: And who is she?

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[152] According to an article in the *Washington Post*, Assistant Attorney General Thomas Perez confirmed that restoring relations between the Civil Rights Division and certain civil rights groups is a priority for the administration. John Payton, president of the NAACP Legal Defense Fund, "said the relationship is much improved. 'When we call them, they listen, he said.'" Jerry Markon, *Justice Dept. Steps Up Civil Rights Enforcement*, WASH. POST, June 4, 2010.

[153] *See* U.S. Comm'n on Civil Rights Discovery Requests to U.S. Dep't of Justice at 10, Dec. 8, 2009 (Interrogatory No. 12), *available at* http://www.usccr.gov/correspd/DISCOVERYREQUESTStoJosephHuntreNBPP.pdf [hereinafter "U.S.C.C.R. Discovery Requests"].

[154] Supp. Interrog. Responses, *supra* note 55, at 5 (Supplemental Response to Interrogatory No. 12).

[155] Seper, *supra* note 133.

CLARKE: She is an attorney in the Civil Rights Division of the Department in the Voting Section. . . .

QUESTION: . . . Well, tell me when you learned about it approximately.

CLARKE: I believe it was on January 8th of 2009.

QUESTION: And how did you learn that?

CLARKE: Through a phone call.

QUESTION: Who called who?

CLARKE: She called me.

* * *

QUESTION: And what did she say to you and what did you say to her?

CLARKE: This case had been filed. That was the extent of the phone call.

QUESTION: Okay. Did you subsequently have any other contacts with anybody at the Justice Department with regard to the litigation?

CLARKE: No.

* * *

QUESTION: Can you tell me what Exhibit A is?

CLARKE: Exhibit A is an email that was sent to me on January 13th.

QUESTION: 2009, correct?

CLARKE: 2009. That's correct.

QUESTION: And then the email appears to be from Judith Reed. Who is she?

CLARKE: Judith Reed is an attorney in the Civil Rights Division of the Justice Department.

> QUESTION: And is it typical for Ms. Reed to send you just news clips of this kind?
>
> CLARKE: No.
>
> QUESTION: Did you talk to Ms. Reed about the content of this email?
>
> CLARKE: No, I did not.[156]
>
> * * *
>
> QUESTION: [B]etween the time of the first email on Exhibit A, January 13, 2009 and then July 31, 2009 [the day after *The Washington Times* article], do you recall having any conversations or any communications of any kind with anybody at DOJ about the New Black Panther litigation?
>
> CLARKE: Now again as I indicated earlier, I learned about the fact of the filing from a Justice Department attorney. I received the email that we just referenced that also make mention of the fact of filing. Beyond that, there were no additional contacts about the litigation itself.[157]

While Ms. Clarke confirmed that she did talk to a reporter for *The Washington Times*,[158] she denied that the reporting set forth in the article was accurate, and claimed that she had written to *The Washington Times* requesting a correction.[159] When asked what she had said to the reporter, however, Ms. Clarke refused to say.[160]

Despite Ms. Clarke's denial, subsequent reporting in *The Weekly Standard* alleged that such contacts had indeed occurred.

> She [Kristen Clarke] spoke to a voting section attorney Laura Coates (no relation to Chris Coates) about the case at a Justice Department function. Clarke asked Coates, who she assumed was sympathetic, when the Panther case was going to be dismissed. The comment suggested that the NAACP had been pushing for such an outcome, and Coates reported the conversation to her superiors.[161]

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[156] The Department has never disclosed the contacts by Ms. Clarke with either Ms. Rivera or Ms. Reed, calling into question the sufficiency of its discovery responses to the Commission.
[157] *See* Deposition of Kristen Clarke at 15-18, U.S. Comm'n on Civil Rights, Wash., D.C., Jan. 8, 2010, *available at* http://www.usccr.gov/NBPH/KristenClarkeDepositionTranscript.pdf [hereinafter "Clarke Deposition"].
[158] *See id.* at 46.
[159] *See id.* at 13-14.
[160] *See id.* at 10-13.
[161] Rubin, *supra* note 63.

In response to this report, on June 15, 2010 the Commission requested that the Department determine "whether Laura Coates had a conversation with Ms. Clarke, the date thereof, the content of the conversation, and whether, as represented in the… article, the conversation was reported to Ms. Coates' superiors."[162] In a letter dated June 30, 2010, it was represented that "the Department of Justice has re-examined the accuracy of the Supplemental Response to Interrogatory No. 12" but "determined that the prior response remains accurate and therefore requires no amendment." [163]

During her deposition, Ms. Clarke was specifically asked if she recalled any conversation with Laura Coates:

> QUESTION: Okay. I want to make sure or follow up on one of the names I mentioned before. To be clear, did you – are you sure that you did not have a conversation with Laura Coats [sic] of the Justice Department with regard to the litigation?
>
> CLARKE: As I indicated earlier, no. I recall no such conversation with her.[164]

In his testimony before the Commission, Christopher Coates indicated that the contact between Ms. Clarke and Laura Coates had been reported to him:

> [I]t was reported to me that Ms. Clarke approached an African-American attorney who had been working in the Voting Section for only a short period of time in the Winter of 2009, before the dismissals in the *Panther* case and asked that attorney when the *New Black Panther Party* case was going to be dismissed. The Voting Section attorney to whom I refer was not even involved in the *Panther* case.
>
> This reported incident led me to believe in 2009 that the Legal Defense Fund Political Participation Director, Ms. Clarke, was lobbying for the dismissal of the *New Black Panther Party* case before it was dismissed.[165]

In his testimony, Mr. Coates also indicated a possible motive for Ms. Clarke's interest in having the NBPP litigation dismissed. Discussing the *Ike Brown* case, he testified:

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[162] Letter from David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights, to Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice (June 15, 2010), *available at* http://www.usccr.gov/NBPH/StatEnforce_06-15-10.pdf.

[163] Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice to David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights (June 30, 2010), *available at* http://www.usccr.gov/correspd/6-30-10_Hunt2Blackwood.pdf.

[164] Clarke Deposition, *supra* note 157, at 33; *see also id.* at 19.

[165] Coates Testimony, *supra* note 1, at 22-23.

> [O]ne of the groups that had opposed the Civil Rights Division's prosecution of the *Ike Brown* case the most adamantly was the NAACP Legal Defense Fund, through its Director of Political Participation, Kristen Clarke. Ms. Clarke has spent a considerable amount of time attacking the Division's decision to file and prosecute the *Ike Brown* case.[166]

Subsequent to Mr. Coates' testimony, the NAACP Legal Defense Fund submitted a letter to the Commission denying that it had either "encouraged or lobbied the Department of Justice. . . to drop or take some other action with respect to DOJ's New Black Panther Party litigation."[167] The letter further provided:

> Neither LDF nor any of its staff ever urged DOJ to take any action with respect to the New Black Panther Party litigation. LDF played no role in, and conducted no advocacy around, DOJ's New Black Panther Party litigation. Statements that LDF, or any of its staff, sought to influence the manner or to limit the scope of the litigation in any respect are false.[168]

As of this date, it is not possible to reconcile the competing versions of such contacts, due to the fact that the Department has precluded its employees from testifying before the Commission (and refused to provide all relevant emails and documents), and Ms. Clarke has refused to testify regarding certain relevant questions. At a minimum, it would be highly relevant if Laura Coates and others could testify as to whether the NAACP Legal Defense Fund was seeking to have the suit dismissed or raised other concerns about the litigation. It should also be determined if any such concerns were conveyed to Loretta King, Steven Rosenbaum, Sam Hirsch or others, and whether those concerns played a part in their decision making. Because such communications are not privileged, there is no reason that these witnesses should not be allowed to testify before the Commission on this limited topic. The matter deserves to be proven or disproven, and Department personnel should be allowed to testify before the Commission on this topic.

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[166] *Id.* at 21.
[167] Letter from Jeffrey D. Robinson, Assoc. Dir.-Counsel, Programs & Admin., NAACP Legal Defense & Educ. Fund, to Gerald A. Reynolds, Chairman, U.S Comm'n on Civil Rights (October 11, 2010), *available at* http://www.usccr.gov/NBPH/NAACPLDF_10-11-10.pdf.
[168] *Id.*

PART III: The Civil Rights Division and Race-Neutral Enforcement

A. The Testimony Of Christopher Coates and J. Christian Adams

Much of the direct evidence in this Section has been provided by former Chief of the Voting Section, Christopher Coates. His testimony includes allegations that political appointees in the Civil Rights Division have adopted policies that oppose the race-neutral enforcement of this nation's voting rights laws. His testimony also includes specific allegations that career attorneys have refused to work on cases in which the victims are white and the wrongdoers are black; that attorneys who support race-neutral policies have been harassed and ostracized; and that current supervisory attorneys and political appointees have openly opposed such race-neutral policies.

The troubling nature of these allegations of misconduct in the Division might explain why some anonymous sources within the Department have attempted to paint Coates as a disgruntled right-wing ideologue.[169] A review of his career, however, speaks for itself and paints a picture at odds with his detractors' characterization.

Before beginning his work at the Department, Mr. Coates served with the Voting Rights Project of the American Civil Liberties Union in Atlanta, Georgia. During his time there, he litigated cases on behalf of African-American clients, particularly those challenging at-large election procedures. In 1993 he argued a case before the United States Supreme Court on behalf of six African-American citizens in the local NAACP chapter in Bleckley County, Georgia.[170] For his service with the ACLU he was awarded the Thurgood Marshall Decade Award by the Georgia Conference of the NAACP, as well as an award from the Georgia Environmental Association for his representation of African-American clients opposing the installation of landfill in their neighborhood.

Mr. Coates began his career at the Department of Justice in 1996 during the Clinton administration. During that administration, he was promoted to Special Litigation Counsel and served in that position until 2005. He was later appointed Principal Deputy Chief of the Voting Section and became Chief of the Voting Section in May 2008. In 2007 he received the Hubble Award, the second-highest award given by the Civil Rights Division. In his 13 and a half years in the Voting Section, Mr. Coates indicated that there were only two cases in which he was involved that concerned white victims. It is the opposition to these two cases which forms much of this portion of the report.

i. The Decision to Testify

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[169] *See* Ryan J. Reilly, *Ex-Voting Section Chief Defends Black Panther Case at Goodbye Lunch*, MAIN JUSTICE, Jan. 8, 2010, http://www.mainjustice.com/2010/01/08/ex-voting-section-chief-defends-black-panther-case-at-goodbye-lunch/ (last visited Oct. 20, 2010); Adam Serwer, *The Battle for Voting Rights*, AM. PROSPECT, Jan. 8, 2010, http://www.prospect.org/cs/articles?article=the_battle_for_voting_rights (last visited Oct. 20, 2010).

[170] *See* Holder v. Hall, 512 U.S. 874 (1994).

In November 2009, the Commission issued subpoenas to two members of the trial team, Christopher Coates, the Chief of the Voting Section, and J. Christian Adams. Despite the statutory mandate requiring federal agencies to cooperate with the Commission,[171] the Department directed Mr. Coates and Mr. Adams not to appear before the Commission. Mr. Adams indicated that the Department told him that there was no need to comply with the Commission's subpoena because the Department had no intention of enforcing it.[172]

Despite numerous demands that the Department allow Mr. Coates and Mr. Adams to testify, the Department refused to change its position.[173] In the meantime, in January 2010, Mr. Coates was transferred to the U.S. Attorney's Office for South Carolina.

This impasse changed following the testimony of Assistant Attorney General Thomas Perez before the Commission. Although Mr. Perez had not been at DOJ during the NBPP litigation, he was selected by the Department as its representative to testify on the issue. As part of his preparation, a meeting was held the day before between Mr. Perez and several members of the trial team. Participating in the meeting were Mr. Perez, Mr. Coates (by telephone), Mr. Adams, and Robert Popper. Other Department staff were also present. Both Mr. Coates and Mr. Adams have testified that, during this meeting, they discussed the merits of the NBPP litigation.[174]

This meeting had consequences. Both Mr. Coates and Mr. Adams have testified that, despite their providing the Assistant Attorney General with detailed information about the NBPP litigation, Mr. Perez's testimony before the Commission was inaccurate.[175] As a result of the nature of Mr. Perez's testimony, Mr. Adams submitted his resignation to the Department later the same day.[176] After formally leaving the Department, Mr. Adams then complied with the pending subpoena and testified before the Commission on July 6, 2010.[177]

A similar process occurred with regard to Mr. Coates. Although he is still currently employed by the Department, he testified that he was troubled by the inaccuracies of Mr. Perez's testimony before the Commission. He did not take immediate action, however, because he

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[171] *See* 42 U.S.C. § 1975b(4)(e): "All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties."

[172] *See* Adams Testimony, *supra* note 50, at 9, 83; *see also* 42 U.S.C. § 1975a(e)(2). Adams also rebutted allegations that he was a disgruntled employee, testifying that he had received a promotion two weeks before he resigned. *See* Adams Testimony, *supra* note 50, at 70.

[173] *See* Letter from Ronald Weich, Asst. Atty. Gen., Office of Legislative Affairs, U.S. Dep't of Justice, to Congressman Frank Wolf (Oct. 15, 2010), *available at* http://www.usccr.gov/NBPH/LetterWeich2WolfreCoatestestimony_10-15-10.pdf. In a letter to Congressman Frank Wolf, the Department argued that "The disclosure of internal recommendations and deliberations would have a chilling effect on the open exchange of ideas, advice and analyses that is essential to our decisionmaking process. Based on this policy, the Department declined to authorize Mr. Coates to testify before the Commission in connection with the Commission's review of the Department's actions in *United States v. New Black Panther Party for Self Defense*, Civil Action No. 2:09-cv-0065."

[174] *See* Adams Testimony, *supra* note 50, at 68-69; Coates Testimony, *supra* note 1, at 103.

[175] *See* Coates Testimony, *supra* note 1, at 8-10; Adams Testimony, *supra* note 50, at 68-69.

[176] *See* Adams Testimony, *supra* note 50, at 69-70.

[177] He explained to the Commission he would not testify about "genuine deliberative process" for which the Department had asserted a privilege. *See id.* at 10-11.

was hopeful that revisions would be made.[178] When this did not occur, he decided that he should appear before the Commission to correct the record. He did so on September 24, 2010. Explaining his reasons for appearing before the Commission, he testified:

> I do not lightly decide to comply with your subpoena in contradiction to the DOJ's directives to me not to testify. I had hoped that this controversy would not come to this point. However, I have determined that I will not fail to respond to your subpoena and thereby fail to give this Commission accurate information pertinent to your investigation.
>
> Quite simply, if incorrect representations are going to successfully thwart inquiry into the systemic problems regarding race-neutral enforcement of the Voting Rights Act by the Civil Rights Division, problems that were manifested in the DOJ's disposition of the *New Black Panther Party* case, that end is not going to be furthered or accomplished by my sitting idly or silently by at the direction of my supervisors while incorrect information is provided.
>
> I do not believe that I am professionally, ethically, legally, much less morally bound to allow such a result to occur. In addition, in giving this testimony, I am claiming the protections of all applicable federal whistleblower statutes.[179]

ii. Hostility to Race-Neutral Enforcement

Both Mr. Coates and Mr. Adams testified that the decisions in the NBPP case should not be viewed in isolation; that it needed to be viewed in the context of overall hostility by many in the Civil Rights Division to race-neutral enforcement of the Voting Rights Act.[180] This portion of the report relates to their testimony on this topic.

Mr. Coates and Mr. Adams testified that the overwhelming number of cases on which they worked while at the Department involved the protection of minority rights. On two occasions, however, they worked on cases in which the victims were white and the defendants were black.[181] These two cases were the Ike Brown case and the New Black Panther Party litigation.[182] In the Ike Brown case, the Department filed a civil suit against Mr. Brown for violation of the Voting Rights Act. It was alleged that Mr. Brown, who is

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[178] Coates Testimony at 2, U.S. Comm'n on Civil Rights, Sept. 24, 2010, *available at* http://www.usccr.gov/NBPH/TestimonyChristopherCoates_09-24-10.pdf.
[179] Coates Testimony, *supra* note 1, at 10-11.
[180] *See* J. Christian Adams, *PJM Exclusive: Unequal Law Enforcement Reigns at Obama's DOJ*, PAJAMAS MEDIA, June 28, 2010, http://pajamasmedia.com/blog/j-christian-adams-you-deserve-to-know-%E2%80%94-unequal-law-enforcement-reigns-at-obamas-doj-pjm-exclusive/ (last visited Oct. 20, 2010); [Coates Testimony *supra* note 2, at 11-12, 23-24.
[181] *See* Adams Testimony, *supra* note 50, at 44, 49.
[182] *Id.* at 49.

black, systematically violated the rights of whites and blacks in Noxubee County, Mississippi. The matter was tried, won, and successfully defended on appeal.[183]

Mr. Coates testified that the two cases were related in that they were both opposed by many within the Department:

> To understand what occurred in the *NBPP* case, those action [sic] must be placed in the context of *United States v. Ike Brown et al.* Prior to the filing of the *Brown* case in 2005, the CRD [Civil Rights Division] had *never* filed a single case under the VRA [Voting Rights Act] in which it claimed that white voters had been subjected to racial discrimination by defendants who were African American or members of other minority groups… I am very familiar with the reaction of many employees, both line and management attorneys and support staff in both the CRD and the Voting Section, to the *Ike Brown* investigation and case because I was the attorney who initiated and led the investigation in that matter and was the lead trial attorney throughout the case in the trial court.[184]

Although the *Ike Brown* suit was successful, Mr. Coates and Mr. Adams indicated that there was a great deal of hostility within the Department to the filing and pursuit of the case. They testified to the following incidents:

- Attorneys refused to work on the Ike Brown case. At least one attorney stated, "I'm not going to work on the case because I didn't join the voting section to sue black people."[185]

- Mark Kappelhoff, the chief of the Criminal Section, at a meeting of the chiefs of the Civil Rights Division, allegedly stated about the Ike Brown case, "That's the case that has gotten us into many problems with civil rights groups."[186]

- Robert Kengle, deputy in the Voting Section, allegedly stated to Mr. Coates during a trip to investigate the Ike Brown case, "Can you believe we are being sent down to Mississippi to help a bunch of white people?"[187]

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[183] *See* United States v. Brown, 494 F. Supp.2d 440 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009).
[184] Statement of Christopher Coates at 3, U.S. Comm'n on Civil Rights, Sept. 24, 2010, *available at* http://www.usccr.gov/NBPH/TestimonyChristopherCoates_09-24-10.pdf (emphasis in original) [hereinafter "Coates Statement"].
[185] *See* Adams Testimony, *supra* note 50, at 49. Coates Statement, *supra* note 184, at 5; *see also* von Spakovsky Affidavit, *supra* note 79, at 2-3 (stating that Coates told von Spakovsky that lawyers refused to work on the Ike Brown case).
[186] Adams Testimony, *supra* note 50, at 54; *see also* Coates Statement, *supra* note 184, at 6.
[187] Adams Testimony, *supra* note 50, at 55; *see also* Coates Testimony, *supra* note 1, at 4, 103; von Spakovsky Affidavit, *supra* note 79, at 3. In a declaration submitted to the Commission in response to Mr. Coates' testimony, Mr. Kengle stated, in part:

> I do not recall making the statement to Mr. Coates "Can you believe that we are going to Mississippi to protect white voters". I certainly did express my

- Attorneys in the civil rights division allegedly told Adams that "until blacks and whites achieved economic parity in Mississippi, we had no business bringing this case." A similar comment was made by a career attorney to Mr. Coates.[188]

- A non-lawyer minority employee at the Department was "relentlessly harassed by Voting Section staff for his willingness as a minority to work on the case of *United States v. Ike Brown*."[189]

- "Others assigned to the case were harassed in other ways, such as being badgered and baited about their evangelical religious views or their political beliefs. In these instances, the victimized employee was openly assumed to espouse various political positions hostile to civil rights, simply because he worked on this case."[190]

- Adams testified: "There was outrage that was pervasive that the laws would be used against the original beneficiaries of the civil rights laws. Some people said 'we don't have the resources to do this. We should be spending our money elsewhere.' And that was how they would cloak some of these arguments."[191]

> dissatisfaction to Mr. Coates on several occasions during the trip and it is possible that during the multi-day coverage I said something to him along the lines of "Can you believe we're doing this?" However, I did not complain to Mr. Coates in sum or substance about "protect[ing] white voters" because I did not consider that to be the problem.

He further stated:

> I believed that a double standard was being applied under which complaints by minority voters were subjected to excessive and unprecedentedly demanding standards, then dismissed as not being credible, while on the other hand the Voting Section was being ordered to pursue the Noxubee complaint at face value – in a dispute over party loyalty – as a top priority. I confided my view of this double-standard to Mr. Coates and to other management-level career staff. If I made the remark to Mr. Coates "Can you believe we're doing this?" it was within this context.

Declaration of Robert A. Kengle at 1-2, Oct. 18, 2010, *available at* http://www.usccr.gov/NBPH/RAKDEC_10-18-10.pdf

Shortly after Mr. Kengle submitted his declaration, Mr. von Spakovsky submitted a response challenging many of Mr. Kengle's representations. *See* Letter from Hans A. von Spakovsky to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (Oct. 28, 2010) *available at* http://www.usccr.gov/NBPH/vonSpakovskyLetter_10-28-10.pdf.

[188] Adams Testimony, *supra* note 50, at 54; *see also* Coates Testimony, *supra* note 1, at 16.

[189] Adams Testimony, *supra* note 50, at 56-57, 93; *see also* Coates Testimony, *supra* note 1, at 6, 17. Mr. Coates also indicated that this treatment extended to the harassed employee's mother. *See id.*

[190] Adams Testimony, *supra* note 50, at 57; *see also* von Spakovsky Affidavit, *supra* note 79, at 3-4 (discussing harassment of employees).

[191] Adams Testimony, *supra* note 50, at 58.

- In another instance, "[a]nother deputy in the section said in the presence of Mr. Coates, 'I know that Ike Brown is crooked and everybody knows that, but the resources of the division should not be used in this way.'"[192]

As part of his testimony, Mr. Adams indicated that he had heard a report that Joe Rich, who was then Chief of the Voting Section, had allegedly altered a memorandum prepared by Mr. Coates that urged the filing of a suit against Ike Brown. Mr. Adams testified that he had heard Mr. Rich "omitted all of the discussion that Mr. Coates made about why a civil lawsuit was the best course of action" and made it appear that Mr. Coates only supported monitoring the situation.[193] Following this testimony, Mr. Rich submitted a declaration to the Commission in which he countered many of Mr. Adams' general allegations and specifically denied any alleged revisions to Mr. Coates' memorandum recommending that a civil suit be filed against Ike Brown.[194] Mr. Rich stated: "No recommendation made by Mr. Coates was removed or deleted from this memo."[195]

At the time Mr. Coates testified before the Commission, the allegations of Mr. Adams, and the rebuttal of Mr. Rich, were in the public record. On this topic, Mr. Coates testified as follows:

> Some time [sic], as best I recall, in the Winter of 2003 or 2004 . . . I wrote a preliminary memorandum summarizing the evidence that we had to that point and made a recommendation as to what action to take in Noxubee County. In that memorandum, I recommended that the Voting Section go forward with an investigation under the Voting Rights Act and argued that a civil injunction against Ike Brown and the local Democratic Committee was the most effective way of stopping the pattern of voting discrimination that I had observed.
>
> I forwarded this memorandum to Joe Rich, who was Chief of the Voting Section at that time. I later found out that Mr. Rich had forwarded the memorandum to the Division front office, but he had omitted the portion of the memorandum in which I discussed why it was best to seek a civil injunction in the *Brown* case. Because I am aware that Mr. Rich and Mr. Hans von Spakovsky have filed conflicting affidavits on this point with this Commission, I believe that I am at liberty to address this issue without violating DOJ privileges.
>
> I want to underscore that my memorandum in which Mr. Rich omitted portions was not the subsequent justification memorandum that sought

[192] Coates Testimony, *supra* note 1, at 102 (statement by David Blackwood).
[193] *See* Adams Testimony, *supra* note 50, at 56.
[194] *See* Declaration of Joseph D. Rich, Aug. 23, 2010, *available at* http://www.usccr.gov/NBPH/RichDeclaration_08-23-10.pdf.
[195] *Id.* Mr. Adams' version of events was corroborated by Hans von Spakovsky, former counsel to the Assistant Attorney General for Civil Rights, in his affidavit submitted to the Commission. *See* von Spakovsky Affidavit *supra* note 79, at 3.

> approval to file the case in Noxubee County, but was a preliminary memorandum that sought permission to go forward with the investigation.
>
> Nevertheless, it is my clear recollection that Mr. Rich omitted a portion of my memorandum, a highly unusual act, and that I was later informed by the Division front office that Mr. Rich had stated that the omission was because he did not agree with my recommendation that the investigation needed to go forward or that a civil injunction should be sought. Nevertheless, approval to go forward with the investigation was obtained from the Bush administration Civil Rights Division front office in 2004.[196]

In response to the testimony of Mr. Coates, Mr. Rich submitted a second declaration in which he contends that Mr. Coates' version of events is also in error.[197]

Without examining the Department's internal records, it is not possible to resolve the dispute regarding Mr. Rich definitively. Nonetheless, the nature of the above allegations reflects the contentious atmosphere within the Civil Rights Division regarding the *Ike Brown* case.

That opposition to the *Ike Brown* case existed within the Civil Rights Division is further bolstered by an article that appeared in *The Washington Post* subsequent to Mr. Coates and Mr. Adams testifying before the Commission. In this article, attorneys within the Civil Rights Division confirmed that "the decision to bring the Brown case caused bitter divisions in the voting section and opposition from civil rights groups:"[198]

> Three Justice Department lawyers, speaking on the condition of anonymity because they feared retaliation from their supervisors, described the same tensions, among career lawyers as well as political appointees. Employees who worked on the Brown case were harassed by colleagues, they said, and some department lawyers anonymously went on legal blogs "absolutely tearing apart anybody who was involved in that case," said one lawyer.
>
> "There are career people who feel strongly that it is not the voting section's job to protect white voters," the lawyer said. "The environment is that you better toe the line of traditional civil rights ideas or you better keep quiet about it, because you will not advance, you will not receive awards and you will be ostracized."[199]

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[196] Coates Testimony, *supra* note 1, at 14-15; *see also* von Spakovsky Affidavit, *supra note* 79; Hans von Spakovsky, *Enough Is Enough, Joe Rich: An Uncivil Man from the Civil Rights Division*, PAJAMAS MEDIA, Sept. 20, 2010, http://pajamasmedia.com/blog/enough-is-enough-joe-rich-an-uncivil-man-from-the-civil-rights-division/ (last visited Nov. 9, 2010).

[197] *See* Declaration of Joseph D. Rich, Oct. 20, 2010, *available at* http://www.usccr.gov/NBPH/RichDeclaration_10-20-10.pdf.

[198] Markon & Thompson, *supra* note 82.

[199] *Id.*

In each instance, the above allegations relate to comments made, or actions taken, during the Bush administration. Mr. Coates and Mr. Adams testified that similar opinions were more recently expressed by high-level attorneys (political appointees and management) during the Obama administration.

Mr. Coates described the following:

> When I was Chief of the Voting Section in 2008, and because I had experienced, as I have described, employees in the Voting Section refusing to work on the *Ike Brown* case, I began to ask applicants for trial attorney positions in their job interviews whether they would be willing to work on cases that involved claims of racial discrimination against white voters as well as cases that involved claims of racial discrimination against minority voters. For obvious reasons, I did not want to hire people who were politically or ideologically opposed to the equal enforcement of the voting statutes the Voting Section is charged with enforcing.
>
> The asking of this question in job interviews did not ever to my knowledge cause any problems with applicants to whom I asked that question and, in fact, every applicant to whom I asked the question responded that he or she would have no problem working on a case involving white victims, such as the Ike Brown case.
>
> However, word that I was asking applicants that question got back to Loretta King. In the spring of 2009, Ms. King, who had by then been appointed the Acting Assistant Attorney General for Civil Rights by the Obama administration, called me to her office and specifically instructed me that I was not to ask any other applicants whether they would be willing to, in effect, race-neutrally enforce the Voting Rights Act.
>
> Ms. King took offense that I was asking such a question of job applicants and directed me not to ask it because I do not believe she supports equal enforcement of the provisions of the Voting Rights Act and she has been highly critical of the filing and the civil prosecution of the *Ike Brown* case.[200]

In addition to the actions of Loretta King, both Mr. Coates and Mr. Adams described a series of statements by Julie Fernandes, a Deputy Assistant Attorney General for Civil Rights. Mr. Coates testified to the following:

> In September 2009, Ms. Fernandes held a meeting to discuss enforcement of the anti-discrimination provisions of Section 2 of the Voting Rights Act. At this meeting, one of the Voting Section trial

[200] Coates Testimony, *supra* note 1, at 19-20.

> attorneys asked Ms. Fernandes what criteria would be used to determine what type of Section 2 cases the Division front office would be interested in pursuing.
>
> Ms. Fernandes responded by telling the gathering there that the Obama administration was only interested in bringing traditional types of Section 2 cases that would provide equality for racial and language minority voters. And then she went on to say that this is what we are all about or words to that effect.
>
> When Ms. Fernandes made that statement, everyone in the room, talking about the conference room on the seventh floor, where the Voting Section is located, understood exactly what she meant: no more cases like *Ike Brown* and no more cases like the *New Black Panther Party* case.
>
> Ms. Fernandes reiterated that directive in another meeting held in December 2009 on the subject of federal observer election coverage, in which she stated to the entire group in attendance that the Voting Section's goal was to ensure equal access for voters of color or language minority.[201]

The Department has never denied that Ms. Fernandes made the above representations, and Ms. Fernandes has refused to respond to media inquiries about the alleged statement. Following a *Washington Post* article that ran on October 23, 2010, on the *NBPP* dispute, the *Post* reporters engaged in an online question-and-answer session. The following exchange took place:

> QUESTION: The Justice Department has never denied that Jule [sic] Fernandes said the things that multiple witnesses have alleged about not enforcing civil rights laws equally. Did you ask the DOJ if she said it or not, and what do you think of their response?
>
> REPORTER: Hi, thanks for the chat. Yes I asked the Justice Department several times if she said it. Their response was to say that their policy is to enforce the laws equally, without regard to race. I can't really "assess" their response, because that gets into personal opinion, and I don't do that. I will say that they never directly answered the question. It is something that Mr. Coates had alleged, and as we wrote, Ms. Fernandez declined to comment.[202]

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[201] *Id.* at 32-33.

[202] Live Q&A: New Black Panther Case: Voter Intimidation at Philadelphia Voting Location in 2008, Oct. 22, 2010, http://live.washingtonpost.com/black-panther-party-10-22-10.html (last visited Nov. 9, 2010) (discussion with Jerry Markon and Krissa Thompson).

Mr. Coates and Mr. Adams also testified that Ms. Fernandes supported selective enforcement of provisions of the National Voter Registration Act. Specifically, Mr. Adams testified that, during a meeting on November 30, 2009,

> Deputy Assistant Attorney General Julie Fernandes, when asked about Section 8 [of the National Voter Registration Act],[203] said, 'We have no interest in enforcing this provision of the law. It has nothing to do with increasing turnout, and we are just not going to do it.' Everybody in the Voting Section heard her say it.[204]

On this topic, Mr. Coates testified that Ms. Fernandes' statement regarding non-enforcement of the list maintenance requirement appeared to have been adopted as Department policy. He testified:

> In June 2009, the Election Assistance Commission issued a biannual report concerning what states appeared not to be in compliance with Section 8's list maintenance requirements.
>
> The report identified eight states that appeared to be the worst in terms of their noncompliance with the list maintenance requirement of Section 8.
>
> These were states that reported that no voters have been removed from any of their voters' lists in the last two years. Obviously this is a good indication that something is not right with the list maintenance practices in a state.
>
> As Chief of the Voting Section, I assigned attorneys to work on this matter. And in September 2009, I forwarded a memo to the Division front office asking for approval to go forward with the Section 8 list maintenance investigations in these states.
>
> During the time that I was Chief, no approval was given to this project. And it is my understanding that approval has never been given for that Section 8 list maintenance project to date. That means that we have entered the 2010 election cycle with eight states appearing to be in major noncompliance with list maintenance requirements of Section 8 of the NVRA. And, yet, the Voting Section, which has the responsibility to enforce that law, has yet to take any action.

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[203] According to Adams, "Section 8 is a general obligation to do [voter] list maintenance. In other words, no dead people can be on the voter rolls, no duplicates, people who have moved away. They have to be taken off the rolls." Adams Testimony, *supra* note 50, at 63-64.

[204] *Id.* at 64; *see also id.* at 76-77, 96; Coates Testimony, *supra* note 1, at 33-35. Before her appointment to the Justice Department, Ms. Fernandes had voiced objections regarding enforcement of § 8. *See generally Voting Section of the Civil Rights Division of the U.S. Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 62 (2007), *available at* http://judiciary.house.gov/hearings/printers/110th/38637.PDF (last visited Dec. 28, 2010).

> From these circumstances, I believe that Ms. Fernandes's statement to the Voting Section in November 2009 not to, in effect, initiate Section 8 list maintenance enforcement activities has been complied with.[205]

Finally, Mr. Coates testified that the hostility to race-neutral enforcement of the voting rights laws was also reflected in the Department's actions regarding the pre-clearance requirements of Section 5 of the Voting Rights Act.

> If anyone doubts that the Civil Rights Division and the Voting Section have failed to enforce the Voting Rights Act in a race-neutral manner, one only has to look at the enforcement of Section 5's pre-clearance requirements.
>
> The statutory language of Section 5 speaks in terms of protecting all voters from racial discrimination. But the Voting Section has never interposed an objection under Section 5 to a voting change on the ground that it discriminated against white voters in the 45-year history of the Act.
>
> This failure includes no objections in the many majority-minority jurisdictions in the covered states. Indeed, the personnel in the Voting Section's unit which handles Section 5 submissions are instructed only to see if the voting change discriminates against racial, ethnic, and language minority voters.
>
> This practice of not enforcing Section 5's protections for white voters includes jurisdictions, such as Noxubee County, Mississippi, where the *Ike Brown* case arose, where white voters are in the racial minority. It is in those jurisdictions that the Voting Section's failure to apply Section 5's protections for white minority voters is particularly, in my opinion, problematic.
>
> On two occasions while I was Chief of the Voting Section, I tried to persuade officials at the Division level to change this policy so that white voters would be protected by Section 5 in appropriate circumstances, but to no avail. I believe that present management at both the Division and the Section are opposed to the race-neutral enforcement of Section 5 and continue to enforce those provisions in a racially selective manner.[206]

Without addressing the specific allegations of either Mr. Coates or Mr. Adams, the Department contends that it enforces the civil rights laws in a race-neutral fashion. In correspondence to the Commission, Assistant Attorney General Thomas Perez stated:

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[205] Coates Testimony, *supra* note 1, at 36.
[206] *Id.* at 24-26.

> There should be no misunderstanding: the Civil Rights Division is firmly committed to the evenhanded application of the law, without regard to the race of the victims or perpetrators of unlawful behavior. Any suggestion to the contrary is simply untrue.[207]

The position of the Department has been called into question not only by the testimony of Mr. Coates and Mr. Adams but by representations of a Department official who made comments to *Washington Post* reporters investigating the NBPP matter:

> Civil rights officials from the Bush administration have said that enforcement should be race-neutral. But some officials from the Obama administration, which took office vowing to reinvigorate civil rights enforcement, thought the agency should focus on cases filed on behalf of minorities.
>
> "The Voting Rights Act was passed because people like Bull Connor were hitting people like John Lewis, not the other way around," said one Justice Department official not authorized to speak publicly, referring to the white Alabama police commissioner who cracked down on civil rights protesters such as Lewis, now a Democratic congressman from Georgia.[208]

Such representations raise further doubts as to whether officials within the current Civil Rights Division have unilaterally limited the types of cases the Division will enforce.

iii. The Connection with the New Black Panther Party Lawsuit

In prior sections of this report, the factual arguments raised by the Department to justify the reversal in course of the NBPP litigation were examined. These arguments were challenged by the testimony of Christopher Coates and J. Christian Adams, and often at odds with internal DOJ documents received independently by the Commission. None of this evidence, however, presented a motive as to why the Department would reverse its course even though the NBPP defendants had conceded liability.

In his testimony before the Commission, Mr. Coates explained that he believes the change in course of the NBPP litigation was a direct result of the overall hostility within the Civil Rights Division to the neutral enforcement of voting rights laws.

> It is my opinion that the disposition of the Panther case was ordered because the people calling the shots in May 2009 were angry at the filing of the *Brown* case and angry at the filing of the *Panther* case. That anger

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[207] See Letter from Thomas E. Perez. Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Gerald A. Reynolds, U.S. Comm'n on Civil Rights (Aug. 11, 2010), available at http://www.usccr.gov/NBPH/AR-M620U_20100811_173009.pdf.

[208] Markon & Thompson, *supra* note 82.

> was the result of their deep-seated opposition to the equal enforcement of the Voting Rights Act against racial minorities and for the protection of white voters who had been discriminated against.
>
> Ms. King, Mr. Rosenbaum, Mr. Kappelhoff, Ms. Clarke, a large number of the people working in the Voting Section and in the Civil Rights Division and many of the liberal [interest] groups at work in the civil rights field believe incorrectly but vehemently that enforcement of the protections of the Voting Rights Act should not be extended to white voters but should be extended only to protecting racial, ethnic, and language minorities.
>
> The final disposition of the *Panther* case, even in the face of a default by the defendants, was caused by this incorrect view of civil rights enforcement, and it was intended to send a direct message, in my opinion, to people inside and outside the Civil Rights Division. That message is that the filing of voting cases like the *Ike Brown* case and the *New Black Panther Party* case would not continue in the Obama administration.
>
> The disposition of the *Panther* case was not required by the facts developed during the case or the applicable case law, as has been claimed, but was because of this incorrect view of civil rights enforcement that is at war with the statutory language of the Voting Rights Act, which is written in a race-neutral manner, and at war with racially fair enforcement of federal law.[209]

The recent lawsuit by Judicial Watch indicates that documentary evidence exists which reflects frequent communications between the Civil Rights Division and political appointees within the Office of the Associate Attorney General and elsewhere. These communications should be provided, and the testimony of appropriate Department officials taken, to either prove or disprove these serious accusations.

iv. Reducing the Authority of Chris Coates

As further evidence of hostility to the Ike Brown and New Black Panther Party cases, Mr. Adams indicated that distrust of Mr. Coates began shortly after President Obama's Inauguration. He stated that, at that time, Acting Deputy Assistant General Steven Rosenbaum began to closely monitor Mr. Coates' work product.

> ADAMS: And at this time period, Rosenbaum was reviewing absolutely everything that Coates was doing, everything. And so he had a heavy workload because he was essentially acting in large status as the chief of the Voting section in place of Coates. So I can understand that Mr. Rosenbaum was probably backed up.

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[209] *Id.* at 23-25.

> QUESTION: All right. What you just mentioned, that Mr. Rosenbaum was monitoring Mr. Coates, when did that begin?
>
> ADAMS: After the inauguration and Mr. Rosenbaum moved into that position...
>
> QUESTION: All right. So it wasn't just the *Black Panther* case that precipitated this dispute or being reviewed. It was shortly after the election that Mr. Rosenbaum was overseeing Mr. Coates -- how do you put it -- rather closely or excessively closely?
>
> ADAMS: That's the gentle way... [E]very single paper that would go to court would have to be reviewed by Mr. Rosenbaum, which was a departure from the previous eight years, at least, the previous four years in my personal experience. No front office in my mind would have ever had the time to do that sort of thing, but they found it.[210]

Mr. Coates described the situation as follows:

> QUESTION: When Mr. Adams was here and testified, he indicated that after the election, when President Obama was elected, you were rather closely supervised. Could you describe what happened after the election?
>
> COATES: The relationships, the relationship, between Ms. King and Mr. Rosenbaum and I were not good. That relationship was not good.
>
> And as the -- as I continued to serve in the capacity as the Chief of the Voting Section, my -- the responsibilities and powers that a section chief in the Civil Rights Division normally has, such as assigning particular lawyers to cases, assigning the particular deputies to supervise cases, things of that sort, that those powers were taken away as the months went by in 2009, after the Obama administration came to power in January of 2009.[211]

Mr. Coates testified that his authority continued to diminish:

> [M]y powers to run the Section, to assign cases, to assign deputies, was being substantially reduced to where I believe that, by the late Fall of 2009, that I was serving as Chief only in name and that the decisions

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[210] Adams Testimony, *supra* note 50, at 41-42. The index produced in the *Judicial Watch* litigation reflects that all draft pleadings relating to the decision to limit the NBPP litigation were reviewed not only by Mr. Rosenbaum, but by members of the office of the Associate Attorney General as well. *See* Judicial Watch *Vaughn* Index, *supra* note 69, at http://www.judicialwatch.org/files/documents/2010/jw-v-doj-vaughn-09152010.pdf.

[211] Coates Testimony, *supra* note 1, at 48-49.

> were being made by other management people in the Section and at the Division level.
>
> And, of course, as a manager who has -- who is blamed when things go wrong, you don't want to be in a situation where you're supposed to be running a section when, in fact, you're not. And so I took that into consideration.
>
> I took into consideration I knew that a number of people in the Section did -- in the Division, I mean, the managers in the Division, some of them, did not want me as the Chief, including Ms. King, quite frankly, Mr. Rosenbaum, quite frankly.
>
> And there were a number of the people in the civil rights groups who did not want me as Chief of the Voting Section. And some of those groups, as I have described, have significant influence, I believe, in the Obama administration.[212]

At this stage in this investigation, the very serious allegations raised by Mr. Coates and Mr. Adams have been partially corroborated. Former Department attorneys Karl Bowers,[213] Hans von Spakovsky,[214] Asheesh Agarwal, Mark Corallo and Robert Driscoll[215] have all concurred that a generally hostile attitude toward race-neutral enforcement of civil rights laws exists among many career attorneys and some specific incidents of harassment have also been corroborated. Efforts to obtain evidence relating to the current administration's policies regarding race-neutral enforcement, however, have been met with extraordinary resistance by the Department.

The nature of these charges paints a picture of a Civil Rights Division at war with its core mission of guaranteeing equal protection of the laws for all Americans. During the Bush administration, the press reported ideological conflict within the Division.[216] If the testimony before the Commission is true, the current conflicts extend beyond policy differences to encompass allegations of inappropriately selective enforcement of laws, harassment of dissenting employees, and alliances with outside interest groups, at odds with the rule of law.

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[212] *Id*. at 64-65.
[213] *See* Sworn Statement of Karl S. Bowers, Jr., Jul. 15, 2010, *available at* http://www.usccr.gov/NBPH/BowersStatement_07-15-10.pdf.
[214] *See* von Spakovsky Affidavit, *supra* note 79.
[215] *Breaking: A Third Former DOJ Official Steps Forward to Support J. Christian Adams (Updated)*, PAJAMAS MEDIA, July 6, 2010, http://pajamasmedia.com/blog/breaking-former-doj-officials-stepping-forward-to-support-j-christian-adams/?singlepage=true (Last visited Dec. 28, 2010).
[216] *See* OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION (2008), *available at* http://www.justice.gov/oig/special/s0901/final.pdf (last visited Oct. 20, 2010); OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), *available at* http://www.justice.gov/oig/special/s0807/final.pdf (last visited Oct. 20, 2010).

These issues need to be thoroughly investigated and properly resolved or public confidence in the Civil Rights Division will be seriously eroded.[217]

As part of any such review, it must be determined if the allegations of Mr. Coates and Mr. Adams regarding the alleged current hostility to race-neutral enforcement of civil rights laws are true. The best way to accomplish this task is to allow Department witnesses to appear before the Commission. Only then can Congress and the Administration determine what steps are necessary to re-establish public faith in the Civil Rights Division.

B. Prior Claims Of Voter Intimidation

In describing the decisions with regard to the New Black Panther Party litigation, the Department has indicated that potential voter intimidation cases that arose during the Bush administration underwent a similar process, sometimes resulting in matters that were not pursued. For example, in his written statement which accompanied his testimony before the Commission, Assistant Attorney General for Civil Rights Thomas Perez stated:

> One example is the recent instance we have identified that most clearly resembles the facts in [the NBPP case]. The Civil Rights Division received a complaint from a national civil rights organization regarding a matter in Pima, Arizona alleging that during the 2006 election, three well-known anti-immigration advocates – one of whom was wearing a gun – allegedly intimidated Latino voters at a polling place by approaching several persons, filming them, and advocating against printing voting materials in Spanish. In that instance, the Department declined to bring any action for alleged voter intimidation.[218]

Details of the alleged incident in Pima to some extent mirror the Fairmount Street incident in 2008. The incident in Pima was described as follows:

> Volunteer election monitors say three men armed with a video camera and a gun were intimidating voters at various polling stations throughout Tucson during voting on Tuesday.

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[217] By letter dated September 13, 2010, Glenn A. Fine, the Inspector General for the Department of Justice, provided notice to Congressmen Lamar Smith and Frank Wolf that his office was opening an investigation into "the types of cases brought by the Voting Section and any changes in these types of cases over time; any changes in Voting Section enforcement policies or procedures over time; whether the Voting Section has enforced the civil rights laws in a non-discriminatory manner; and whether any Voting Section employees have been harassed for participating in the investigation or prosecution of particular matters." Letter from Glenn Fine, Inspector Gen., U.S. Dep't of Justice, to Congressman Frank Wolf (Sept. 13, 2010), *available at* http://www.usccr.gov/NBPH/LetterFine2Wolfreenforcementcivilrightslaws_09-13-10.pdf.

[218] Perez Statement, *supra* note 53, at 3.

> From about 9:45 a.m. to noon, the men approached Hispanic voters as they attempted to enter Iglesia Bautista Kairos . . . said Diego Bernal, a lawyer with the Mexican American Legal Defense Fund.
>
> * * *A third man, wearing an American flag T-shirt and camouflage shorts, stood nearby with his hand on a handgun in a holster strapped around his hips, he said.
>
> * * *
> "It's pure, old-fashioned voter intimidation," he said. "If shoving a videotape [sic] in your face while someone with a gun stands next to you isn't intimidation, I don't know what is."[219]

The activities of Russ Dove and Roy Warden, two of the men involved in the alleged Pima voter intimidation, have been monitored by the Southern Poverty Law Center (SPLC). In a 2006 story called *Deadly Force* from the SPLC website:

> [A] Glock 9mm on his hip, and a bullhorn to amplify his outrage, Roy Warden . . . emerged this spring as one of the country's most controversial, volatile, and, many believe, dangerous characters of the anti-immigration movement. Along with . . . Russ Dove, a former militia leader and convicted car thief . . . Warden has burned and trampled Mexican flags in public, nearly started at least one riot, regularly wreaked havoc on Tucson City Council proceedings, and E-mailed a death threat to a prominent local public defender.[220]

Another press report presented a different version of events, claiming that only one man was carrying a gun, that he never came within 150 feet of any polling locations, and that he never had any interactions with voters.[221]

At this stage, the extent of the investigation undertaken by the Department with regard to the incident in Pima is unknown. In addition, the Commission has no information relating to the decisionmaking process that led to the determination not to pursue the matter federally. In their testimony before the Commission, J. Christian Adams indicated that he had no connection with the case,[222] while Christopher Coates had only a limited knowledge of what

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[219] Claudine Lomonaco, *Anti-Immigrant Activists Accused of Voter Harassment*, TUCSON CITIZEN, Nov. 7, 2006, *available at* http://tucsoncitizen.com/morgue/2006/11/07/31837-anti-immigrant-activists-accused-of-voter-harassment/ (last visited Oct. 20, 2010).
[220] Southern Poverty Law Center, *Deadly Force*, INTELLIGENCE REPORT, fall 2006, *available at* http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2006/fall/deadly-force?page=0,0 (last visited Oct. 20, 2010).
[221] *See* Quin Hillyer, *First Democratic Congressman Calls for Charges Against Black Panthers*, WASH. TIMES WATER COOLER, July 27, 2010, http://www.washingtontimes.com/blog/watercooler/2010/jul/27/first-democratic-congressman-calls-charges-against/ (last visited Oct. 20, 2010).
[222] *See* Adams Testimony, *supra* note 50, at 72.

had occurred.[223] In any case, this is an additional area of inquiry that should be included as part of this investigation.[224]

[223] *See* Coates Testimony, *supra* note 1, at 86-90. Coates testified, "I learned about it after it occurred and after it came to the Department. So I can talk to you more about it in 2008 than I can 2006 and 2007." He then described what knowledge he had about the case. *Id.* at 87.

[224] Other allegations of voter intimidation that were not ultimately pursued by DOJ include a cross-burning incident in Grand Coteau, Louisiana and mailings targeted at immigrants in Orange County, California. These also may be proper areas of inquiry.

PART IV: The Department's Lack of Cooperation and the Commission's Difficulty in Securing Cooperation Required by Law

A. Summary of Commission Information Requests and Department Responses

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. Among its statutory duties, the Commission is charged with investigating complaints alleging that citizens have been deprived of their right to vote by reason of race, color, religion, sex, age, disability, or nation origin. In addition, the Commission is required to appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws.

In accomplishing these tasks, Congress gave the Commission two main tools. First, Congress mandated that "All federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties."[225] Second, the Commission was granted the power to "issue subpoenas for the attendance of witnesses and the production of written or other matter."[226] The Commission, however, does not have express authority to enforce its own subpoenas. Instead, the relevant statute provides that it is "the Attorney General [who] may in a Federal court . . . obtain an appropriate order to enforce the subpoena."[227]

In most cases, granting the Department of Justice sole discretion whether to enforce the Commission's subpoenas is of little consequence. Comity and good faith are presumed. When the Department is the subject of a Commission investigation, however, a potential conflict of interest exists.

As is reflected in the present case, the statutory mandate requiring federal agencies to cooperate with the Commission has much less force when the recalcitrant agency is the Department of Justice. The Department may refuse to provide information or witnesses safe in the knowledge that it will never enforce a subpoena against itself.

As more fully described below, the inability to appeal to an independent authority to enforce the Commission's information requests leaves the Justice Department as the sole arbiter of what will be produced. This is a situation of particular concern when the Department's enforcement policies are under scrutiny. The record in this case proves the point. The Department has provided only limited cooperation with the Commission, and attempted to prevent Christopher Coates and J. Christian Adams from testifying.[228] Absent the production of materials and information by third parties, the Department and its policies would have avoided the scrutiny that the Commission's charter requires.

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[225] 42 U.S.C. § 1975b(e).
[226] 42 U.S.C. § 1975a(e)(2).
[227] *Id.*
[228] While the Department has provided about 4,000 pages of documents, most of these relate to either already public documents, or documents relating to other voter intimidation cases. While useful, the documents provided do not go to the core issue of the decision making relating to the New Black Panther Party litigation. Indeed, the Department has gone so far as to withhold witness statements from the Commission and has yet to provide witnesses or information about alleged instructions by Deputy Assistant Attorney General Julie Fernandes or similar comments as to which no privilege could apply.

i. Initial Letters and the Basis for an Expanded Inquiry

The Commission's interest in the New Black Panther Party litigation began shortly after three of the defendants were dismissed from the case on May 15, 2009. In a letter sent on June 16, 2009, the Commission asked the Department to detail (i) its rationale for dismissing most of the case, (ii) its evidentiary and legal standards in voter intimidation cases, and (iii) any similar cases where the Civil Rights Division unilaterally dismissed charges against defendants.[229] The Department responded on July 24 that three of the defendants were dismissed because it was determined "after a careful and thorough review of the matter,"[230] that the "facts and the law" did not support pursuing claims against them.

The Commission found the Department's letter to be "largely non-responsive" to its specific questions and requests for information in which to form its own judgment on the matter.[231] The Commission next sought all documents relating to the NBPP case, including witness statements taken by the Department regarding the incident in Philadelphia.[232] On September 9, the Department informed the Commission that the NBPP matter had been referred to the Office of Professional Responsibility (OPR), and that the Department "will not provide further response until that review is complete."[233]

Congressmen Lamar Smith, House Judiciary Committee Ranking Member, and Frank Wolf, Ranking Member on the Commerce-Science-Justice Subcommittee, House Appropriations Committee, have pointed out that OPR restricts its investigations to whether attorneys have met basic ethical obligations, and that it is beyond the scope of OPR's duties to investigate the broader questions raised in the NBPP investigation.[234] It was also pointed out that any

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[229] Letter from Gerald A. Reynolds, Chairman, et al., U.S. Comm'n on Civil Rights, to Loretta King, Acting Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice (June 16, 2009), *available at* http://www.usccr.gov/correspd/VoterIntimidation2008LetterDoJ.pdf; *see also* Letter from Abigail Thernstrom, Vice Chairman & Ashley L. Taylor, Jr., Commissioner, U.S. Comm'n on Civil Rights, to Loretta King, Acting Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice (June 22, 2010), *available at* http://www.usccr.gov/correspd/Thernstrom_TaylorLetter2008.pdf.

[230] Letter from Portia L. Roberson, Dir., Office of Intergovernmental & Public Liaison, U.S. Dep't of Justice, to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (July 24, 2010), *available at* http://www.usccr.gov/correspd/Roberson_Reynolds-07-24-09.pdf. This letter claimed that one of the dismissed defendants, Jerry Jackson, lived at the building where the polling place was located. The Department later acknowledged that this claim was incorrect. *See* Discovery Responses, *supra* note 132, at 29-30 (Response to Document Request No. 22).

[231] *See* Letter from U.S. Comm'n on Civil Rights to Eric Holder, Atty. Gen., U.S. Dep't of Justice (Aug. 10, 2009), *available at* http://www.usccr.gov/correspd/Follow-upVoterIntimidation.pdf.

[232] The Department has not produced most of the witness statements taken by the Department in the case, including statements of poll watchers Mike Mauro, Chris Hill, Steve Morse, Wayne Byman, Joe Fischetti, Larry Counts, Angela Counts, and Harry Lewis; Republican Party officials Joe DeFelice and John Giordano; police officer Richard Alexander; and defendant Malik Zulu Shabazz.

[233] Letter from Portia L. Roberson, Dir., Office of Intergovernmental & Public Liaison, U.S. Dep't of Justice, to Gerald A. Reynolds, Chairman, et al., U.S. Comm'n on Civil Rights (Sept. 9, 2009), *available at* http://www.usccr.gov/correspd/LetterfromRoberson2ReynoldsetalrereferralDOJOfficeofProfessionalResponsibility_09-09-09.pdf.

[234] The independence of OPR and its ability to investigate sensitive cases are further called into question by reports of its ties to the White House. It was reported in February 2009 that the White House and the

potential investigation by OPR under the present circumstances is tainted by the fact that OPR reports directly to the Attorney General. As noted by Representative Wolf: "I do not believe that this office [OPR] is capable of conducting an unbiased and independent review of this case given that it reports to a political appointee – an inherent conflict-of-interest that can only be avoided by an independent inspector general (IG) investigation."[235] Similar concerns about the independence of OPR have also been raised by members of Congress with regard to investigations involving the Bush administration.[236]

Given these concerns, and the fact that OPR still has not completed its investigation, which has been pending for over a year, Representatives Smith and Wolf have repeatedly asked Department Inspector General Glenn Fine to investigate the Department's handling of the NBPP case and related issues.[237] For over a year, the Inspector General's position has been that his office does not have jurisdiction to investigate these matters because the allegations relate to Department attorneys exercising their authority to litigate and make legal decisions.[238] The two congressmen expressed their view that Mr. Fine's reading of both his jurisdiction and the NBPP matter was too narrow, as the NBPP matter is about more than litigation decisions.[239] In light of J. Christian Adams' testimony before the Commission, Representatives Smith and Wolf renewed their request for the Inspector General to investigate.[240]

Department were vetting the head of OPR, Mary Patrice Brown, for a federal judgeship. *See* Joe Palazzolo, *White House Vetting OPR Chief for Federal Judgeship*, MAIN JUSTICE, Feb. 8, 2010, http://www.mainjustice.com/2010/02/08/white-house-vetting-opr-chief-for-federal-judgeship/; Letter from Congressman Lamar Smith & Congressman Frank Wolf to Glenn A. Fine, Inspector Gen., U.S. Dep't of Justice (March 2, 2010), *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf. In addition, the attorney assigned to the investigation is alleged to have made significant political contributions to recent Democratic Party campaigns. *See* Letter from Mary Patrice Brown, Acting Counsel, Office of Prof'l Responsibility, U.S. Dep't of Justice, to Congressman Lamar Smith (Aug. 28, 2009); Hans von Spakovsky, *Investigating the Black Panther Case*, NAT'L REVIEW ONLINE, Sept. 14, 2009, http://www.nationalreview.com/corner/187130/investigating-black-panther-case/hans-von-spakovsky (last visited Oct. 21, 2010).

[235] Letter from Congressman Frank Wolf to Glenn Fine, Inspector Gen., U.S. Dep't of Justice (Jan. 26, 2010), *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf.

[236] *See* Ryan J. Reilly, *Internal DOJ Ethics Office is Broken, Panel Says*, MAIN JUSTICE, Feb. 25, 2010, http://www.mainjustice.com/2010/02/25/opr-report-shows-internal-doj-ethics-office-is-broken-say-panelists/ (last visited Oct. 20, 2010); Ryan J. Reilly, *OPR Report Kickstarts Push to Strengthen Inspector General*, MAIN JUSTICE, Mar. 19, 2010, http://www.mainjustice.com/2010/03/19/opr-torture-memos-report-kickstarts-push-to-strengthen-inspector-general/ (last visited Oct. 20, 2010).

[237] *See* Letter from Congressman Frank Wolf to Glenn Fine, Inspector Gen., U.S. Dep't of Justice (Jan. 26, 2010), *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf; Letter from Congressman Lamar Smith & Congressman Frank Wolf to Glenn A. Fine, Inspector Gen., U.S. Dep't of Justice (Mar. 2, 2010), *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf.

[238] *See* Letter from Glenn A. Fine, Inspector Gen., U.S. Dep't of Justice, to Congressman Frank Wolf (Feb. 2, 2010), *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf (citing 5 U.S.C. App. 3 § 8E(b)(3); 28 C.F.R. § 0.29c(b)).

[239] *See* Letter from Congressman Lamar Smith & Congressman Frank Wolf to Glenn A. Fine, Inspector Gen., U.S. Dep't of Justice (Mar. 2, 2010), *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf.

[240] *See* Letter from Congressman Frank Wolf to Glenn Fine, Inspector Gen., U.S. Dep't of Justice (July 14, 2010), *available* at http://wolf.house.gov/uploads/fine%207%2014_20100714124633.pdf (last visited Oct. 20, 2010); Letter from Congressman Lamar Smith to Glenn A. Fine, Inspector Gen., U.S. Dep't of Justice (Aug 3,

This most recent demand resulted in a change of position by the Inspector General. In a letter dated September 13, 2010 to Congressman Smith and Congressman Wolf, the Inspector General stated:

> Through this letter I want to inform you that the OIG plans to initiate a review of the enforcement of civil rights laws by the Voting Section of the Department's Civil Rights Division. This review will examine, among other issues, the types of cases brought by the Voting Section and any changes in these types of cases over time; any changes in the Voting Section enforcement policies or procedures over time; whether the Voting Section has enforced the civil rights laws in a non-discriminatory manner; and whether any Voting Section employees have been harassed for participating in the investigation or prosecution of particular matters.[241]

In the same letter, the Inspector General also noted that: "In response to my recent inquiry, OPR officials have informed us that they are near the end of their investigation and are beginning to draft their report of investigation."[242]

Regardless of belated actions by OPR and OIG, the Commission has an independent duty to investigate such civil rights law enforcement actions and report to Congress and the President its independent conclusions. The following sections detail the extent to which the Department has attempted to frustrate the Commission's investigation.

ii. Subpoenas Issued to Christopher Coates and J. Christian Adams

After the Commission voted on September 11, 2009 to make the NBPP investigation the subject of its annual enforcement report, and after another round of correspondence with the Department,[243] the Commission on November 18 subpoenaed two Department employees for deposition: Christopher Coates, the Chief of the Voting Section, and J. Christian Adams, a Voting Section attorney. Both attorneys had been part of the NBPP litigation team. In response, the Department told the Commission that Coates and Adams would not be permitted to "provide the Commission with any information (in writing, by testimony, or otherwise) unless and until the Department has had an opportunity to fully review and

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2010), *available at* http://republicans.judiciary.house.gov/Media/PDFs/080310_Smith%20to%20Fine.pdf (last visited Oct. 20, 2010).

[241] Letter from Glenn Fine, Inspector Gen., U.S. Dep't of Justice, to Congressman Frank Wolf (Sept. 13, 2010), *available at* http://www.usccr.gov/NBPH/LetterFine2Wolfreenforcementcivilrightslaws_09-13-10.pdf.

[242] *Id.*

[243] *See* Letter from Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights, to Eric H. Holder, Atty. Gen., U.S. Dep't of Justice (Sept. 30, 2009), *available at* http://www.usccr.gov/correspd/VoterIntimidationNBPP093009.pdf; Letter from Portia Roberson, Director, Office of Intergovernmental and Public Liaison, U.S. Dep't. of Justice to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (Nov. 16, 2009), *available at* http://www.usccr.gov/correspd/LetterfromRoberson2Reynoldsrerequestforinformation%20_11-16-09.pdf.

consider the Commission's demand."[244] The Commission was also copied on a letter from counsel for Mr. Adams, who made it clear that Adams had been ordered by the Department not to comply with the Commission's subpoena.[245] On January 29, 2010, the Commission asked the Department whether it would reconsider its position and permit Coates and Adams to testify.[246] On March 12, 2010, the Department said that it was still evaluating the request.[247]

Having not received a decision from the Department, the Commission asked the Department on March 30 to appoint a special counsel. The purpose of this request was to have an independent third party seek enforcement of the subpoenas directed to the Department and its employees. On April 16, 2010, the Department stated that it would not authorize Coates or Adams to provide testimony to the Commission. The Department did not respond to the Commission's request that a special counsel be appointed until May 13, 2010, stating that it "[did] not believe it [was] appropriate to appoint a special counsel," based on the Department's "need to protect the confidentiality of the work product of our attorneys."[248]

J. Christian Adams submitted his letter of resignation to the Department on or about May 14, due in part to what he characterized as the inaccurate testimony given by Assistant Attorney General Thomas Perez on that date to the Commission.[249] Adams's resignation was effective in June,[250] and he provided testimony to the Commission on July 6. Under oath, he testified that he resigned for two reasons: first, he believed he was placed in an untenable position in that the Department instructed him not to cooperate with a lawful subpoena issued by the Commission; and second, he believed the testimony of Perez before the Commission was inaccurate, despite Perez's having been briefed by the trial team the day before.[251] Pursuant to a majority vote of the Commission during its July 16, 2010 business meeting, the Commission offered on July 28 to limit its initial questioning of Mr. Coates to "non-deliberative statements or actions relating to whether there is a policy and/or culture within

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[244] *See* Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (Nov. 24, 2009), *available at* http://www.usccr.gov/correspd/LetterfromHunt2Reynoldsrerequestforinformation_11-24-09.pdf.

[245] *See* Letter from Jim Miles to Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice (Nov. 25, 2010), *available at* http://www.usccr.gov/correspd/LetterfromMiles2HuntreAdamstestimony_11-29-09.pdf; *see also* Adams Testimony, *supra* note 50, at 9.

[246] *See* Letter from David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights, to Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice (Jan. 29, 2010), *available at* http://www.usccr.gov/correspd/1-29-10_Blackwood2Hunt.pdf.

[247] *See* Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights (Mar. 12, 2010), *available at* http://www.usccr.gov/correspd/03-12-10_DOJ-NPPP.pdf.

[248] Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to Gerald Reynolds, Chairman, U.S. Comm'n on Civil Rights (May 13, 2010), *available at* http://www.usccr.gov/NBPH/UnfillDiscReq_05-13-10.pdf.

[249] *See* Adams Testimony, *supra* note 50, 69-70.

[250] *See* J. Christian Adams, *PJM Exclusive: Unequal Law Enforcement Reigns at Obama's DOJ*, PAJAMAS MEDIA, June 28, 2010, http://pajamasmedia.com/blog/j-christian-adams-you-deserve-to-know-%E2%80%94-unequal-law-enforcement-reigns-at-obamas-doj-pjm-exclusive/ (last visited Oct. 21, 2010).

[251] *See* Adams Testimony, *supra* note 50, at 68. Mr. Adams went on to state, "I have not said that he testified falsely. I have not said that he lied. I think he believes in some measure what he is saying." *Id.*

the Department of discriminatory enforcement of civil rights laws and whether there is a policy not to enforce Section 8 of the National Voter Registration Act."[252]
On August 11, 2010, Mr. Perez responded to the letters of July 28 and August 6, 2010. In that letter, Mr. Perez simply asserted that the Department applies civil rights laws in a race-neutral fashion (without admitting, denying, acknowledging, or attempting to explain the specific testimony to the contrary), and reiterated the Department's position that Christopher Coates would not be permitted to testify.

Like Mr. Adams, Mr. Coates testified that the information provided by Mr. Perez and the Department was misleading and inaccurate. As a result, he decided to testify before the Commission on September 24, 2010.[253] In describing his decision to appear before the Commission, he stated:

> [I] reviewed Mr. Perez's August 11th letter to the Chairman, in which he again denied your request that I be allowed to testify before you and in which he made various representations concerning the Department's enforcement practices.
>
> Based upon my own personal knowledge of the events surrounding the Division's actions in the *Panther* case, and the atmosphere that has existed and continues to exist in the Division and in the Voting Section against fair enforcement of certain federal voting laws, I do not believe these representations to this Commission accurately reflect what occurred in the *Panther* case and do not reflect the hostile atmosphere that has existed within the Division for a long time and against race-neutral enforcement of the Voting Rights Act.[254]

Given the wide discrepancy between the testimony of Mr. Perez and the testimony of Mr. Coates and Mr. Adams, a serious question exists as to whether the Department's attempt to prevent Mr. Coates and Mr. Adams from testifying was based on concerns other than protecting legitimate institutional privileges.

iii. Executive Privilege and Asserted Departmental Interests

Believing that the Department had largely failed to cooperate with its information requests, the Commission on December 8, 2009, served a subpoena on the Department propounding interrogatories and document requests. The instructions to the Department stated:

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[252] Letter from Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights, to Eric Holder, Atty. Gen., U.S. Dep't of Justice (July 28, 2010), *available at* http://www.usccr.gov/NBPH/Final_GAR_to_AGH_07-28-10.pdf; *see also* Letter from Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights, to Eric H. Holder, Jr., Atty. Gen., U.S. Dep't of Justice (Aug. 6, 2010), *available at* http://www.usccr.gov/NBPH/LetterfromChair2HolderreCoatesTest_08-06-10.pdf.

[253] Press reports indicate that the Department attempted to prevent Mr. Coates from testifying as late as the night before his appearance before the Commission. *See* Daniel Halper, *DOJ, the New Black Panther Party, and Integrity*, WEEKLY STANDARD BLOG, Oct. 1, 2010, http://www.weeklystandard.com/blogs/doj-new-black-panther-party-and-integrity (last visited Oct. 21, 2010).

[254] Coates Testimony, *supra* note 1, at 9.

> If any claim of privilege is raised relating to any document or information request, identify with specificity the privilege asserted, any legal authorities relied upon, and indicate whether any privilege so asserted can be addressed by agreements of confidentiality between the parties. If any claim of executive privilege is raised, identify the highest official within the Department connected with the specific document or information, and indicate whether the President of the United States has specifically exercised said privilege.[255]

The Department did not comply with this instruction. Many of its responses merely referred to "General Objections," which included objecting to each interrogatory and document request "to the extent they seek information protected by the attorney-client, attorney-work product, deliberative process, law enforcement, or other recognized privilege."[256] In addition, the Department seemed to create a new privilege, claiming that it was "constrained by the need to protect against disclosures that would harm its deliberative processes *or that otherwise would undermine its ability to carry out its mission*." (emphasis added)[257] The Department simply ignored the question of whether the President, or any Department official on his behalf, had invoked executive privilege.

On March 30, the Commission asked the Department to specify the specific privileges asserted, and legal authorities relied upon, to justify withholding the information requested. The Department has never done so, "apparently seek[ing] to obfuscate the basis for its refusal to provide the requested information."[258]

On April 16, the Department indicated that Assistant Attorney General Thomas Perez would agree to testify before the Commission on May 14, 2010. In anticipation of Mr. Perez's testimony, Chairman Reynolds wrote to the Attorney General on May 9, 2010, asking whether President Obama or the Attorney General had invoked executive privilege and seeking an answer prior to Perez's scheduled testimony.[259] On May 13, the day before Mr. Perez's scheduled testimony, the Department stated for the first time that President Obama had not asserted and would not assert executive privilege, which Mr. Perez reiterated in his testimony the next day.[260]

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[255] *See* U.S.C.C.R. Discovery Requests, *supra* note 153, at 3

[256] Discovery Responses, *supra* note 132, at 1.

[257] Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (Jan. 11, 2010), *available at* http://www.usccr.gov/correspd/1-12-10_Hunt2ReynoldsCL.pdf.

[258] Letter from David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights, to Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice (Mar. 30, 2010), *available at* http://www.usccr.gov/correspd/03-30-10_DOJ-NPPP.pdf.

[259] *See* Letter from Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights, to Eric Holder, Atty. Gen., U.S. Dep't of Justice (May 9, 2010), *available at* http://www.usccr.gov/NBPH/UnfillDiscReq_05-09-10.pdf.

[260] *See* Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to Gerald Reynolds, Chairman, U.S. Comm'n on Civil Rights (May 13, 2010), *available at* http://www.usccr.gov/NBPH/UnfillDiscReq_05-13-10.pdf; Perez Testimony, *supra* note 53, at 90-91.

During the May 14 hearing, Mr. Perez was questioned regarding the rationale for the Department's refusal to appoint a special counsel.[261] Perez's answer was largely non-responsive, but seemed to focus on the fact that there was no explicit statutory provision addressing the issue.[262]

As with the Department's attempt to preclude Christopher Coates and J. Christian Adams from testifying before the Commission, vague and unexplained assertions of privilege by the Department raise serious questions as to the Department's degree of cooperation and whether its explanations serve the legitimate concerns of the agency.

iv. Judicial Watch Litigation and the Failure to Identify Allegedly Privileged Documents

The discovery requests served upon the Department included an instruction requiring the Department to identify any and all documents withheld based on alleged assertion of privilege. Specifically, Instruction No. 10 of the discovery requests provides, in part:

> [F]or all documents or information withheld pursuant to an objection or a claim of privilege, identify:
> A. the author's name and title or position;
> B. the recipient's name and title or position;
> C. all persons receiving copies of the document;
> D. the number of pages of the document;
> E. the date of the document;
> F. the subject matter of the document; and the basis for the claim to privilege.[263]

This demand was followed by correspondence on behalf of the Commission dated March 30, April 1, April 26, and May 13, 2010. Despite the Commission's demands, the Department refused to detail the types of documents it claimed were privileged. Instead, on May 13, 2010 the Department asserted: "We do not intend to provide a log of withheld materials; our confidentiality interests in attorney work product are so conventional that we do not see a basis for creating a log of these materials."[264]

Despite the Department's refusal to provide a log of withheld documents to the Commission, on September 20, 2010 it was learned that just such an index had been provided by the Department to Judicial Watch as a result of a Freedom of Information Act (FOIA) lawsuit

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[261] *See* Perez Testimony, *supra* note 53, at 90.
[262] *See id*. at 90-93.
[263] U.S.C.C.R. Discovery Requests, *supra* note 153, at 2-3.
[264] Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to Gerald Reynolds, Chairman, U.S. Comm'n on Civil Rights (May 13, 2010), *available at* http://www.usccr.gov/NBPH/UnfillDiscReq_05-13-10.pdf.

filed by said organization.[265] The log provided to Judicial Watch, known as a Vaughn Index,[266] provides exactly the type of information originally requested by the Commission.[267]

The fact that the Department provided such information to Judicial Watch, but not to the Commission, is telling. The Department's duty to respond to the Commission is based on a statutory mandate requiring federal agencies to "cooperate fully" with the Commission.[268] The Department also is charged with enforcement of the Commission's subpoenas.[269] Thus, reliance on DOJ to follow the first statute above and to enforce the Commission's subpoenas in court arguably leaves the Commission without recourse in the event, as here, that the Department itself refuses to provide subpoenaed information and also refuses to even appoint a special counsel to represent the Commission's interests or independently evaluate its position.

While the Department refused to provide a log or otherwise identify the documents it has withheld documents to the Commission, the FOIA suit by Judicial Watch could not be similarly ignored. Unlike with the demands of the Commission, the Department is not the sole arbiter of what may be withheld from public scrutiny in FOIA cases. Given that the demands of both the Commission and Judicial Watch were similar in nature, the only explanation for the difference in treatment is that the information sought by the Commission could be withheld without judicial scrutiny – especially given the Commission's superior claim to the actual documents and not just an index of withheld materials. It is difficult to attribute the Department's different treatment to anything but a desire to avoid serious scrutiny into its decision making and to prevent disclosure of the extent to which political appointees played a role in the case.

As of September 20, 2010, the Commission has again renewed its demand that the Department provide a privilege log detailing those documents and information withheld pursuant to alleged claims of privilege.

v. Outstanding Discovery Issues

As of this writing, the Department has failed to produce the following information in response to the Commission's subpoenas from November and December 2009 (information similar to what the Commission has been seeking since its June and August 2009 letters):

1. The Department refused to authorize Christopher Coates and J. Christian Adams to testify before the Commission. These individuals appeared over the objections of the Department. Even then, Mr. Coates and Mr. Adams felt obligated to honor the

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[265] *See* Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 10-CV-851-RBW (D.D.C.).
[266] *See* Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).
[267] *See* Judicial Watch *Vaughn Index*, *supra* note 69.
[268] 42 U.S.C. § 1975b(e) provides, "All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties."
[269] Under the terms of 42 U.S.C. § 1975a(e)(2), "[i]n case of contumacy or refusal to obey a subpoena, the Attorney General may in a federal court of appropriate jurisdiction obtain an appropriate order to enforce the subpoena."

Department's privilege claims that some on the Commission believe are not valid in the absence of an invocation of executive privilege.

2. With regard to documents withheld, the Department has not specified the privileges being invoked, other than implying in its May 13, 2010 letter that the Department's "well-established *confidentiality interests*" (emphasis added) override the statutory command that "[a]ll federal agencies shall cooperate fully with the Commission."[270] In addition, as discussed above, the Department has refused to provide a privilege log as requested by the Commission.

3. The Department refused to provide witness statements from poll watchers Mike Mauro, Chris Hill, Steve Morse, Wayne Byman, Joe Fischetti, Larry Counts, Angela Counts, and Harry Lewis; defendant Malik Zulu Shabazz; police officer Richard Alexander; and Republican Party officials Joe DeFelice and John Giordano.[271]

4. The Department heavily redacted the FBI incident reports that have been produced.

5. The Department refused to provide the draft pleadings that were the subject of the dispute between the trial team and the management team of Loretta King and Steve Rosenbaum.[272]

6. The Department refused to provide documents constituting and concerning the communications between the trial team and Loretta King and Steve Rosenbaum, including an April 2009 memorandum referenced in a press report, prepared by the trial team in response to Mr. Rosenbaum's concerns.

7. The Department refused to provide e-mails between Civil Rights Division officials, such as Loretta King and Steven Rosenbaum, and other Department officials, such as Assistant Attorney General Thomas Perrelli, Deputy Assistant Attorney General Sam Hirsch, and Deputy Attorney General David Ogden, relating to the NBPP case.

8. There are several documents referred to in the Appellate Section memo that have not been produced: an e-mail from the Voting Section to the Civil Rights Division of May 1, 2009; a Draft Motion for Default Judgment (dated April 30, 2009); a Draft Memorandum of Law in Support of Motion for Default Judgment (dated April 30, 2009); and a Draft Proposed Order (dated May 6, 2009).

In addition, the Department has refused to answer 18 interrogatories and refused to produce documents in response to 22 requests, usually citing the amorphous General Objections, as discussed above.

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[270] 42 U.S.C. § 1975b(e).
[271] *See* J. Memo, *supra* note 10; *see also* Remedial Memo, *supra* note 74, at 4. It should be noted that the Department never produced the three memos regarding the NBPP case that the Commission has obtained. These three memos were submitted to the Commission by Congressman Frank Wolf at its April 23, 2010 hearing.
[272] *See* J. Memo, *supra* note 10, at 13 n.15.

Finally, Christopher Coates's testimony and news reports indicate that documents relevant to this investigation may have been prepared in April and May 2010. The Commission requested on October 13, 2010, that the Department provide the following documents in an expedited fashion, which the Department has not provided as of this writing: e-mails or writings prepared by Coates and J. Christian Adams in the month preceding Thomas Perez's testimony to the Commission regarding the NBPP litigation or hostility to race-neutral enforcement of the voting laws.

The scope and the extent of the disagreement between the Commission and the Department calls out for resolution by a neutral party. Under the current statutory framework, however, it is the Department that, as a practical matter, has final word as to what, if any, information will be released.

PART V: Prior Enforcement of § 11(b) of the Voting Rights Act

As part of this report, the Commission has examined prior enforcement of Section 11(b) of the Voting Rights Act, the provision used to pursue the New Black Panther Party litigation. This section reviews the terms of the statute, its legislative history and purpose, and provides a short description of each prior case brought under Section 11(b).

A. The Statute

§ 11(b) of the Voting Rights Act provides:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under [relevant sections of this title].[273]

Under the terms of the statute, one does not have to successfully intimidate voters in order to be in violation of § 11(b). An attempt to intimidate is sufficient to establish liability.[274] In addition, as acknowledged by Assistant Attorney General Thomas Perez in his testimony before the Commission, the statute protects not only voters, but poll watchers as well.[275] Accordingly, in the New Black Panther Party litigation, Section 11(b) was used as the basis for four causes of action: (1) intimidation of voters; (2) attempted intimidation of voters; (3) intimidation of individuals aiding voters; and (4) attempted intimidation of individuals aiding voters.

B. Legislative History

The legislative history of § 11(b) reflects that no intent or discriminatory motive is required to prove a violation:

> While the purpose of the VRA was to eliminate racial discrimination in voting, § 11(b) of the act does not explicitly require proof that racial discrimination motivated the intimidation, threats, or coercion …The House report on § 11(b) states that "[t]he prohibited acts of intimidation need not be racially motivated; indeed, unlike 42 U.S.C.

[273] 42 U.S.C. § 1973i(b).
[274] Perez Testimony, *supra* note 53, at 45.
[275] *Id.* at 69.

> 1971(b) (which requires proof of a 'purpose' to interfere with the right to vote), no subjective purpose or intent need be shown."[276]

In addition, at least one legal authority with experience with § 11(b) cases, a former senior Department career attorney, contends that no proof of actual effect of voter intimidation is necessary to establish a violation:

> The legislative history of this law makes clear that Congress wanted to expand the scope of voter protection by enacting a law that would bar voter intimidation. In fact, Congress's explanations of the purposes behind Section 11(b) support the view that neither proof of *intent* to intimidate nor proof of any actual *effect* of voter intimidation must be shown to establish a violation of Section 11(b). Rather, as DOJ has read the statute, an interpretation I share, plaintiffs need only show that the conduct engaged in had a tendency to intimidate, threaten or coerce a reasonable voter. Importantly, there is no requirement that to prevail under Section 11(b) that a plaintiff prove any purpose of subjective intent to intimidate.[277]

Section 11(b) was part of the original Voting Rights Act of 1965 and was later codified as 42 U.S.C. § 1973i(c). The legislative history of this section illustrates that its purpose was to assure ballot security for the expanded franchise contemplated by the Voting Rights Act. At the time the statute was passed, Congress had previously enacted a provision designed to govern expenditures to influence voting in an election for a federal official.[278] Section 1973i(c) was intended as something more than a mere replication of the existing provision. Instead, its protections were extended to include coverage of local elections held in conjunction with those for federal office.[279]

C. Penalties

As originally enacted, § 11(b) was among those sections of the Voting Rights Act which

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[276] Willingham v. County of Albany, 593 F. Supp. 2d 446, 463 (N.D.N.Y. 2006) (citing H.R. REP. NO. 89-439, at 30 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2462).
[277] J. Gerald Hebert, Rattling the Vote Cage – Part I, The Campaign Legal Center Blog, http://www.clcblog.org/blog_item-245.html (Aug. 8, 2008) (emphasis in original) (last visited Oct. 21, 2010). Mr. Hebert served at the Justice Department from 1973 to 1994. According to his website, he "served in many supervisory capacities, including Acting Chief, Deputy Chief, and Special Litigation Counsel in the Voting Section of the Civil Rights Division." He has also served part-time as a staff attorney for the national office of the Lawyers' Committee for Civil Rights Under Law and as the General Counsel to the National Redistricting Project for Congressional Democrats. *See* J. Gerald Hebert, P.C., Biography, http://www.voterlaw.com/bio.htm (last visited Oct. 21, 2010).
[278] *See* 18 U.S.C. § 597.
[279] *See* United States v. Simms, 508 F. Supp. 79, 1183 (W.D. La. 1979).

provided for fines and imprisonment for violations.[280] In 1968, this was revised, and currently the only available remedy under § 11(b) is injunctive relief.[281]

D. Past Department of Justice (DOJ) § 11(b) Litigation Initiated by DOJ

The Department of Justice reports that it has filed three civil lawsuits alleging voter intimidation under § 11(b), in addition to the New Black Panther Party case.[282] The three cases identified by the Department are *U.S. v. Harvey*, *U.S. v. North Carolina Republican Party et al*., and *U.S. v. Brown*. These cases offer little insight into the requirements or effectiveness of § 11(b). In two of the cases, the matter was decided on other grounds, with the § 11(b) claim being rejected with minimal discussion. In the third suit, the case was resolved by consent decree, with no discussion of § 11(b) or its requirements.

What follows is a brief summary of each DOJ case:[283]

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[280] The original language stated, "Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11(a) or (b), shall be fined not more than $5,000, or imprisoned not more than five years, or both." Voting Rights Act of 1965, Pub. L. No. 89-110, § 12(a), 79 Stat. 437, 443.

[281] *Civil Rights Act of 1967: Hearing on S. 1026, S. 1318, S. 1359, S. 1362, S. 1462, H.R. 2516 and H.R. 10805 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 90th Cong. (1967). During the debate in the Senate, an explanation of Amendment 554 (Dirksen Amendment) was provided by the Department of Justice. The explanation of the amendment stated that "[t]he penalty section of the Voting Rights Act of 1965 is modified to avoid duplication." STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS PART II, at 1692 (Bernard Schwartz ed., 1970).

[282] *See* Discovery Responses, *supra* note 132, at 14-16 (Response to Interrogatory No. 29).

[283] Section 11(b) suits may also be brought by private plaintiffs. The reported cases initiated by private plaintiffs tend to focus on technical issues. Nonetheless, in some of these cases the courts have provided guidance on standards for applying § 11(b). As Gregory Katsas pointed out in his testimony: There are cases holding that § 11(b) should be construed broadly rather than narrowly. *See* Jackson v. Riddell, 476 F. Supp. 849, 859 (D. Miss. 1979) (citing Whatley v. City of Vidalia, 399 F.2d 521, 525 (5th Cir. 1968)). And a case has held that no subjective intent or purpose need be shown on the part of the perpetrator. *See* Willingham v. County of Albany, 593 F. Supp. 2d 446, 462 (N.D.N.Y. 2006).

Whatley v. City of Vidalia, 399 F.2d 521 (5th Cir. 1968).

This case focused on whether 11(b) actions could be removed to federal court. The movants alleged that they were arrested by police officials while engaged in peaceful activity to encourage voter registration. The Fifth Circuit held that the matter was properly removed to federal court.

Bershatsky v. Levin, 99 F.3d 555 (2nd Cir. 1996).

Plaintiff sought injunctive relief and declaratory judgment that use of voter registration lists to select jurors infringed upon her right to vote. The Second Circuit affirmed the lower court's decision, ruling against the plaintiff.

Willingham v. Albany, 593 F. Supp. 2d 446 (N.D.N.Y. 2006).

The court dismissed a § 11(b) claim alleging that state actors manipulated the absentee ballot process. While the court held that the facts did not support the allegation of intimidation, it made the following observations relating to § 11(b).

United States v. Harvey, 250 F. Supp. 219 (E.D. La. 1966).

In *Harvey*, the U.S. sought an injunction enjoining defendants from employing coercive and intimidating economic penalties against African Americans who registered to vote, including termination of sharecropping and tenant farming relationships, eviction, termination of employment, and the imposition of rents on houses which were formerly occupied in connection with sharecropping or tenant farming agreements. The court, after questioning § 11(b)'s constitutionality, concluded that "the evidence in this case is completely and totally void of any proof of intimidation, threats, or coercion."[284] Further, the court noted that, even if the alleged acts were committed for the reasons asserted by the plaintiffs,

> [t]here is simply no way that legislation allegedly designed solely to protect the constitutionally guaranteed right to be free from discrimination in the exercise of franchise, which, in its operation, confiscates one's use of his private property and awards it to another as a penalty for the owner's individual acts of discrimination could be considered constitutional.[285]

> While the purpose of the VRA was to eliminate racial discrimination in voting, § 11(b) of the act does not explicitly require proof that racial discrimination motivated the intimidation, threats, or coercion. Thus, a plain reading of § 11(b) refutes the contention of [the defendants] that proof of racial discrimination as a motive must be shown to establish a claim under this provision. *See Hayden v. Pataki*, 449 F.3d 305, 314 (2d Cir. 2006) (noting that statutory interpretation first requires examination of the language of the statute itself). Moreover, the legislative history of that section supports this plain reading. The House report on § 11(b) states that "[t]he prohibited acts of intimidation need not be racially motivated; indeed, unlike 42 U.S.C.1971(b) (which requires proof of a 'purpose' to interfere with the right to vote), no subjective purpose or intent need be shown." H.R. REP. NO. 89-439, at 30 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2462. Research has revealed no cases directly deciding this issue. Accordingly, given the plain language and the legislative history of § 11(b), the contention of [the defendants] that this section requires proof that they were motivated by racial discrimination must be rejected. 593 F. Supp. 2d 446, 462 (N.D.N.Y. 2006).

Willing v. Lake Orion Cmty. Sch. Bd. of Trs., 924 F. Supp. 815 (E.D. Mich. 1996).

The Court dismissed an 11(b) claim brought by a school district resident alleging improprieties in the conduct of school board elections. The Court found that the plaintiff failed to state a claim.

Pincham v. Illinois Judicial Inquiry Bd., 681 F. Supp. 1309 (N.D. Ill. 1988).

Pincham, a state appellate judge, gave a speech for Operation P.U.S.H. and made statements urging black voters to vote for a particular candidate. The Inquiry Board notified Pincham that they were considering filing a complaint against him for his remarks. Pincham filed a complaint alleging that the Board's complaint violated his right to free speech and equal protection, among other things.

Pincham then tried to amend his complaint to include a claim under 11(b) claiming that the Voting Rights Act prohibits punishment of black voters for political speech, and that no similar charges have ever been made against white judges who engaged in political speech. The Court held that the § 1973i(b) claim was without merit.

[284] 250 F. Supp. 219, 237 (E.D. La. 1966).
[285] *Id*. at 228.

United States v. North Carolina Republican Party et al., No. 91-161-CIO-5-F (E.D.N.C. 1992).

In this case, a suit was filed against the North Carolina Republican Party, the Helms for Senate Committee, and various others. The Complaint alleged violations of the Voting Rights Act (11(b) and 12(d) – 42 U.S.C. 1973i(b) and 1973j(d)) and the Civil Rights Act (131(c) – 422 U.S.C. 1971(b) and 1971(c)), based on a "ballot security program" "purportedly designed to combat and deter election fraud."[286] According to the complaint, the North Carolina Republican Party sent first class mailings and post cards, targeting black voters, pertaining to voter registration and voter addresses. The postcards contained false information regarding residency requirements and eligibility to vote.[287]

The consent decree, entered into prior to trial, provided that defendants (i) "are enjoined from engaging in any activity or program which is designed, in whole or in part, to intimidate, threaten, coerce, deter, or otherwise interfere with a qualified voter's lawful exercise of the franchise;" (ii) "are enjoined from engaging in any ballot security program directed at qualified voters in which the racial minority status of some or all of such voters is a factor in the decision to target those voters;" and (iii) "shall not engage in any ballot security program unless and until such program has been determined by this Court to comply with the provisions of this decree and applicable federal law."[288] The 1992 decree was to remain in effect until December 1, 1996.

United States v. Brown, 494 F. Supp. 2d 440 (S.D.Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009).

This case involved the anti-dilution provisions of the Voting Rights Act claiming that the defendants racially manipulated the electoral process in furtherance of an intent to discriminate against white voters. The Department sought (in addition to remedies under § 2 of the Voting Rights Act) an injunction under § 11(b) permanently enjoining defendants from coercing, threatening, or intimidating persons voting or attempting to vote. The allegations accused the defendants of such actions as berating a voter for casting her ballot for an African American defendant's white opponent, coercing a voter to vote by absentee ballot, failing to provide a voter privacy in which to cast his ballot, advertising in local newspapers that certain named white individuals would be prevented from voting, and impairing or coercing individuals attempting to exercise their right to vote. In its complaint, the Department identified the following specific acts as constituting intimidation and coercion in violation of § 11(b):

> (a) During the absentee in-person voting period before the 2003 primary election, Defendant Mickens [Circuit Court Clerk of Noxubee County] received an absentee ballot that had been voted in the courthouse by an

[286] Complaint for Declaratory and Injunctive Relief at 3, United States v. North Carolina Republican Party et al., No. 91-161-CIO-5-F (E.D.N.C. Feb. 26, 1992).
[287] *Id*. at 6-8.
[288] Consent Decree at 4-5, United States v. North Carolina Republican Party et al., No. 91-161-CIO-5-F (E.D.N.C. Feb. 27, 1992).

> eligible voter. After receiving the ballot form this voter, Mickens set it aside without placing it in a sealed envelope as required by law. When this voter objected and asked that the unsealed ballot be spoiled and that she be allowed to vote a new ballot, Defendant Mickens loudly and abusively berated the voter and complained to the voter that she had cast her ballot for Defendant Mickens' white opponent. As a result of this experience, this voter has resolved never to cast another absentee ballot at the courthouse as long as Defendant Mickens remains Circuit Clerk.
>
> (b) Prior to the August 2003 primary election, Defendant Mickens and others acting in concert with him coerced a voter to vote by absentee ballot, failed to provide that voter privacy in which to case his absentee ballot at the Circuit Clerk's office, then instructed the voter on what candidates the voter should vote for, including Defendant Mickens, and looked on during the voting process to make sure that the voter followed the instruction.[289]

The court found for the plaintiff on § 2 grounds, but offered little discussion of § 11(b), noting only that, while there was a racial element to defendant's publication of a list of white voters who would be challenged if they attempted to vote in the Democratic primary, "the court does not view the publication as the kind of threat or intimidation that was envisioned or covered by Section 11(b)."[290] The court noted that "the Government has given little attention to this claim, and states that it has found no case in which plaintiffs have prevailed under this section."[291] The case was affirmed on appeal.[292]

[289] Complaint at 11-12, United States v. Brown, 494 F. Supp. 2d 440 (S.D. Miss. 2007) (No. 4:05-cv-33-TSL-LRA).
[290] 494 F. Supp. 2d 440, 477 n.56.
[291] *Id*.
[292] *See* United States v. Brown, 561 F.3d 420 (5th Cir. 2009).

PART VI: Interim Findings and Recommendation

Findings

A. The Commission's organic statute authorizes it to subpoena witnesses and the production of written material in aid of its mission, and it authorizes the Attorney General to enforce the Commission's subpoenas in federal court if any person or entity refuses to comply. It is unclear, however, whether the Commission has legal recourse if the Attorney General refuses to enforce a subpoena directed at the Department of Justice or its employees. The Commission's statute also requires that "[a]ll Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties," 42 U.S.C. § 1975b(e), but it is equally unclear whether the Commission has recourse to seek judicial enforcement of this command, absent representation from the Department of Justice.

[Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow, and Taylor voted in favor; Commissioners Melendez and Yaki voted against; Vice Chair Thernstrom was absent.]

B. Although the U.S. Department of Justice has cooperated with many previous Commission investigations and requests, the DOJ has an inherent conflict of interest when it would prefer not to cooperate fully with the Commission's investigations of DOJ actions. In the NBPP investigation that is the subject of this report, the Department of Justice refused to comply with certain Commission requests for information concerning DOJ's enforcement actions, and it instructed its employees not to comply with the Commission's subpoenas for testimony. Moreover, the Department's denial of the Commission's request for the appointment of a special counsel to help resolve the discovery disputes in federal court was communicated by a career attorney without addressing or acknowledging the Department's conflict of interest and without any indication the Commission's request was ever brought to the attention of the Attorney General.

[Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow, and Taylor voted in favor; Commissioner Yaki voted against; Commissioner Melendez abstained; Vice Chair Thernstrom was absent.]

Recommendation

Congress should consider amendments to the Commission's statute to address investigations in which the Attorney General and/or the Department of Justice have a conflict of interest in complying fully with the Commission's requests for information. Options to address a potential conflict of interest might include the following:

- Enactment of a statutory procedure by which the Commission may request the Attorney General to appoint a special counsel with authority to represent it in federal

court, which request the Attorney General must personally respond to in writing within a specified period of time.

- Enactment of a statutory provision to clarify that the Commission may hire its own counsel and proceed independently in federal court if the Attorney General refuses to enforce a subpoena or other lawful request, especially those directed at the Department of Justice, its officers, or its employees.

- A conscious decision not to alter the Commission's statute or a statutory confirmation that the Attorney General and Department of Justice can act against the Commission's interest without any particular explanation.

[Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow, and Taylor voted in favor; Commissioners Melendez and Yaki voted against; Vice Chair Thernstrom was absent.]

COMMISSIONER STATEMENTS, DISSENTS AND REBUTTALS

A. STATEMENTS

Statement of Commissioner Todd Gaziano[1]
Joined by Commissioner Kirsanow

This Interim Report is the story of a cover-up of a possible racial double standard in law enforcement in the Civil Rights Division of the U.S. Department of Justice. The usual Washington refrain is that the cover-up is always worse than the original offense. But in this case, the underlying problem may be as damning as the wrongful cover-up—and possibly worse.

Two well-placed whistleblowers have now testified before the Commission, with convincing detail, that there is a pervasive hostility to the race-neutral enforcement of the civil rights laws in the Civil Rights Division. How long-standing and how wide-spread that culture is remains unclear, but the testimony of the DOJ witnesses and other sworn statements received into evidence indicate that at least several supervising attorneys and officers in the Civil Rights Division share this race-based view of law enforcement.

Such a racial double standard in law enforcement would be at war with the very notion of a federal Civil Rights Division devoted to the equal protection of the laws. Yet, the Department of Justice is unquestionably hostile to any serious investigation of these allegations.

The Department of Justice will neither admit *nor deny* whether the alleged racialist statements and instructions to its staff were uttered by its supervising attorneys and political appointees, even though it has a statutory duty to respond to such inquiries from the Commission. The Department refuses to allow those who allegedly made or heard these statements to testify freely. The Department steadfastly refuses to produce the documents and emails that describe these and similar statements, or for that matter, documents and emails that could refute them. The Department doggedly continues to obstruct this investigation.

[1] Commissioner Kirsanow and I join each other's Statements. We also join Commissioner Heriot's Statement. The terms of office for Chairman Gerald Reynolds and Commissioner Ashley Taylor expired a few days after the adoption of the body of this report. Both Reynolds and Taylor voted to adopt the Interim Report, its findings and recommendation. Their support for the underlying investigating in numerous Commission votes is a matter of public record. At an open meeting on December 3, 2010, they expressed their view that commissioners could not submit or join any statement after the expiration of their terms. Although Chairman Reynolds joked that I could indicate that "Jerry agreed with me," no inference should be drawn from their lack of participation in commissioner statements.

Whether the Commission or some other institution succeeds in uncovering the facts relating to these matters, there is probably no more important issue to resolve in the area of federal civil rights enforcement than the truth of the whistleblowers' allegations. Until then, this Interim Report and accompanying commissioner statements will highlight what has been uncovered thus far, what questions remain unanswered, and what evidence exists but is being withheld that might be valuable in that investigation.

Introduction and Summary

On June 16, 2009, the U.S. Commission on Civil Rights sent a simple inquiry to the Department of Justice asking why it dismissed most of a voter intimidation lawsuit it had effectively won against members of the New Black Panther Party. We expected either a satisfactory explanation for the dismissal or word from the Department that it was undertaking a review of the matter. Instead, DOJ's written reply insisted that it made the right decision to dismiss the claims but offered no credible explanation for doing so and refused to supply the documents or witnesses that would allow the Commission to form its own conclusions. For the next 18 months, the Department tried to thwart the Commission's investigation in many ways, despite its statutory obligation to "cooperate fully" with our official requests for information.

After a year of DOJ's intransigence and baseless refusals to comply with our subpoenas, two Department attorneys bravely defied orders to testify before the Commission: the former Civil Rights Division Voting Section chief, Christopher Coates, and a lead trial attorney in the NBPP case, J. Christian Adams. Their testimony and the sworn affidavits from former DOJ staff portray a pervasive culture of hostility to race-neutral enforcement of civil rights laws in the Civil Rights Division. The detailed allegations include: a former section chief who doctored a memo to try to prevent a meritorious case from being filed against black defendants, racially offensive statements by several supervisors and staff, and repeated instances of harassment and intimidation directed against anyone willing to work on lawsuits against minority defendants.

Coates and Adams also assert, with substantial evidence, that this hostility is shared by several current supervising attorneys and political appointees. And they swear, without any reservation, that the reason their supervisors dismissed the New Black Panther Party lawsuit was because of their personal hostility to the race-neutral enforcement of the voting rights laws.

Notwithstanding these detailed and mutually-reinforcing allegations of wrongdoing, the Department still refuses to produce the most important documents, emails, and witnesses to the Commission. To this day, it has forbidden Coates and Adams from revealing the most crucial facts by wrongly invoking privileges that do not apply, with the implicit threat of professional ethics charges if they relate the remaining details of what they know.

This persistent interference prevented the Commission from forming definitive conclusions about some of the underlying actions and motives of Department of Justice officials. Although the Interim Report identifies key documents and emails which might

prove or disprove the charges made by Coates and Adams (see also infra), DOJ still refuses to produce them.

Until the Department is forced to disgorge the relevant witnesses and evidence, reasonable people will draw the logical conclusions from the weight of available evidence and from DOJ's seemingly guilty conduct in obstructing the investigation. Those who review the sequence of events, uncontested facts, and sworn statements before the Commission should be deeply troubled by the Department's refusal to cooperate as well as the credible testimony that offers a plausible, yet damning, explanation for what the Department has tried to hide. But it is still better that the whole truth be known, whatever that is. Thus, the stages of our investigation and the Department's unprecedented and wrongful resistance to it should be carefully examined so that others may pick up where the Commission (without the power to enforce its own subpoenas against DOJ) has run into the administration's stone wall.

Nevertheless, the Department of Justice's obstruction of the Commission's investigation did yield two modest but unusual findings of fact and one recommendation, joined by five of the seven commissioners who participated in the final decisions. Set forth in full in Part V of the Interim Report, the Commission's findings highlight the Department of Justice's conflict of interest in refusing to "cooperate fully" with the Commission's investigation as federal law requires, its refusal to appoint a special counsel to resolve its own conflict, and the lack of clear legal authority for the Commission to enforce its own subpoenas in court against DOJ when the Department refuses to comply with them and refuses to represent the Commission.

The Commission's sole recommendation is that Congress should consider the implications of a DOJ conflict of interest and refusal to cooperate and decide whether to alter the Commission's organic statute to address it. The non-exclusive suggestions for Congress to consider include:

- Consciously doing nothing;
- Requiring the Attorney General to personally respond to the Commission's request for representation or the appointment of a special counsel within a fixed number of days;
- Authorizing the Commission to litigate on its own if DOJ refuses to represent it.

In the absence of such a change in law, the Commission will continue to marshal facts and issue reports that are relevant for the nation to review.

The Original Lawsuit and Its Dismissal by DOJ

Although the circumstances that gave rise to the original lawsuit are far less important than DOJ officials' subsequent actions and the sworn testimony about their wrongful reasons for their subsequent actions, they are a necessary starting point for any investigation.[2]

As the body of this report describes in more detail, two members of the New Black Panther Party appeared at the 1221 Fairmount Avenue polling site in Philadelphia on election day 2008 wearing dark, paramilitary uniforms with combat boots, berets, and insignia of rank. That building houses an assisted living facility. Video clips of the scene were later broadcast on national news programs and posted on YouTube. King Samir Shabazz stood near the door slapping a billy club in his hand, and witnesses subsequently testified before the Commission that he spouted racially offensive and threatening comments at poll watchers, poll observers, and likely others.

Many neighborhood residents may have known of Shabazz's violent, racist views. A National Geographic documentary film on the NBPP and related hate groups featured Shabazz regularly canvassing the area with his racist tracts, and it also showed him at a neighborhood fair yelling through a bullhorn that blacks need to start killing whites and white babies.[3] A newspaper article that appeared the week before the Election Day incident described him as "one of the most recognized black militants in a city known, since the days of MOVE, for its vocal black-extremism community."[4] The attempt by Commissioners Melendez and Yaki to suggest that the paramilitary uniform worn by the NBPP thugs would not have evoked any negative feelings ignores that the uniforms were combined with threatening behavior. Their claim that no one could be intimidated by their appearance alone is wrong for other reasons as well.[5]

Jerry Jackson is Shabazz's official NBPP "deputy" in the neighborhood, and was also featured in the National Geographic documentary assisting Shabazz's racist stunts and public rants. On Election Day 2008, Jackson stood close to Shabazz in front of (and close to) the

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[2] Commissioner Heriot's observation in her accompanying statement is also correct that simple facts, or cases that might otherwise be "small potatoes," may be more helpful in illuminating underlying law enforcement policies.

[3] *Inside the New Black Panthers* (National Geographic television broadcast 2009). An excerpt of the documentary was shown at the Commission's first fact-finding hearing. See Commission Hearing Transcript (April 23, 2010).

[4] Dana Difilippo, "New Panthers' War on Whites," Philadelphia Daily News, Oct. 29, 2008.

[5] In their joint dissenting statement, Commissioners Melendez and Yaki admit that the New Black Panther Party is a racial-separatist hate group, but they claim that most residents in Philadelphia would not have known that and that they would have associated the NBPP uniform with the original Black Panther Party, which was "non-racist." The *National Geographic* documentary and the *Philadelphia Daily News* article both suggest that residents knew Shabazz and his associate to be hate-filled advocates of racial violence themselves (regardless of what they knew about the NBPP), so the addition of jackboots and paramilitary garb would only reinforce that perception. As for the dissenters' warm and fuzzy feelings toward the original Black Panther Party: "By now, a torrent of articles and books, many written by former sympathizers, has voluminously documented the Panther reign of murder and larceny within their own community. So much so that no one but a left wing crank could still believe in the Panther myth of dedicated young blacks 'serving the people' while heroically defending themselves against unprovoked attacks by the racist police." Sol Stern, "Ah, those Black Panthers! How Beautiful!" City Journal, May 27, 2003, *available at* http://www.city-journal.org/html/eon_5_27_03ss.html.

only entrance to the polling place. Witnesses testified the two moved in unison, and one witness also testified they even closed ranks when a poll watcher approached the door and made it more difficult for him to get by. Commissioners Melendez and Yaki make a fanciful effort in their dissent to depict Jackson as an innocent bystander, but the eyewitnesses paint a different picture of his conduct.[6]

At least two eyewitnesses, both of whom testified before the Commission, reported seeing some voters turn away from voting rather than run the gauntlet between the Panthers and the entrance to the polls. Two additional witnesses, one of whom testified before the Commission, reported that they saw voters hesitate or look apprehensive when approaching the entrance.[7] Whether the voters who left returned later is unknown (it is not legally necessary to show that any voters were actually prevented from voting to prove intimidation or attempted intimidation), but one witness who spoke with some of them had no doubt that their apprehension regarding the two uniformed Panthers was what caused them to leave.[8]

In early January 2009, DOJ filed a lawsuit against the two individuals at the polls, as well as against the Party and its Chairman, Malik Zulu Shabazz, for encouraging and endorsing the intimidating conduct. (Malik Shabazz said on national TV that he supported the use of the weapon at the polls to counter neo-Nazis who were there. He said he would provide evidence of the neo-Nazis' presence but never did. Other evidence of his and the Party's involvement is set forth in the body of the Interim Report and Appendix B.)[9] The suit was filed in federal district court in Philadelphia pursuant to section 11(b) of the Voting

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[6] See Testimony of Chris Hill, Bartle Bull, and Mike Mauro at the Commission Hearing on April 23, 2010. The dissent by Commissioners Melendez and Yaki repeatedly claims that Jackson did not join his NBPP superior in yelling offensive comments. Whether that is true or not (we have a limited record), it is not very important in evaluating whether he conspired with, aided, and abetted Shabazz. If a group of Klansmen in robes engaged in the exact same conduct at the polls and only one yelled racial epithets, those who were silent would not get a free pass. In such circumstances, actions speak louder than words.

[7] The dissent by Commissioners Melendez and Yaki attempts to nitpick the statements the eyewitnesses made about voters turning away or acting scared; according to the dissent, they should have been more closely questioned about the exact sequence of events that transpired. But three of the witnesses, Chris Hill, Bartle Bull, and Mike Mauro, testified before the Commission on April 23 (Hill and Bull testified they saw voters turn away; Mauro said he saw some voters hesitate and/or look apprehensive), so the dissenters could have asked them any question they wanted. It seemed like a strategic decision of theirs not to ask about the intimidated voters during the hearing, fearing that clarity would not help them defend DOJ's actions. Later, they may have forgotten the testimony and come to believe the much repeated talking point that no voter was intimidated. (It's always a risk to rely on spin rather than the actual evidence.) As late as November 19, 2010, Commissioner Yaki erroneously, and rather emphatically and rudely, denied anyone had ever testified that voters were turned away; he then was reminded of the facts. See Commission Meeting Transcript at 41-43 (Nov. 19, 2010). Shifting rapidly into reverse, the dissent now says the eyewitness testimony is unclear.

[8] See Testimony of Chris Hill at 50-51.

[9] The dissenting statement by Commissioners Melendez and Yaki oddly suggests that the Commission should have been equally as dismissive of both the NBPP's posted "national plan" to deploy 300 Panthers like Shabazz and Jackson at the polls and the lie by the NBPP chairman that neo-Nazis were at the polls in Philadelphia. But that makes no sense, even if one admits the NBPP likes to exaggerate its strength. In short, statements against interest are always treated differently in logic and law than self-serving ones. An inept militia group may lie about a lot of things, but if it announces plans for widespread acts of intimidation or other tortious conduct and it conducts at least one such act, that surely should be treated differently than a claim it later makes to evade responsibility. It also would not matter if can convince only two out of 300 followers to join in the wrongful acts in question to be jointly liable for those that take place.

Rights Act, which prohibits intimidating, and attempts to intimidate, both voters and those assisting voters, such as poll watchers.

Prior to filing the suit, the Justice Department trial team obtained witness statements, evidence about the operational structure of the NBPP, its stated nation-wide plan to "deploy" its members at the polls in November 2008, its record of racial hate incidents and objectives, and other evidence (at least some of which has never been turned over to the Commission). In preparation for trial, the trial team continued to secure other valuable evidence, including a declaration from a prominent 1960s civil rights advocate, Bartle Bull, who was an eye witness to the events in Philadelphia. In that affidavit, Bull declared that the events in Philadelphia in 2008 were "the most blatant form of voter intimidation I have ever encountered in my life … even going back to the work I did in Mississippi in the 1960s."

The lawsuit was uncontested. Even though the NBPP Chairman, Malik Shabazz, is a lawyer and at least one of the other defendants also retained a lawyer, Michael Coard, none of the defendants filed an answer or otherwise contested the detailed allegations in the complaint. Accordingly, a default was entered in the docket of the federal court, and the district judge asked the Department to file its proposed injunction against all four defendants.

It was at that point, in late April and May of 2009, that a strange turn of events began. The Department initially asked the district judge for an extension of time to file its proposed order, and then, on May 15, it unilaterally dismissed the claims against three of the defendants and greatly reduced the injunctive relief sought against Samir Shabazz – the Panther carrying the billy club. The injunction against Samir Shabazz has been, and should be, derided by any experienced litigator for its remarkable narrowness.

Many of the events of those few weeks still are not known publicly (especially the content of internal conversations—and shouting matches—that DOJ claims are privileged information), but Coates and Adams later testified about the trial team's state of disbelief regarding the position advanced by their supervisors, working all night to prepare legal memos that were not even read by some of the decision-makers who requested them, confrontational meetings, and other unusual conduct relating to the decision to dismiss the charges.

The Commission Asks for an Explanation

Responding to press reports that DOJ had unilaterally dismissed a strong voting rights case and that the circumstances were highly unusual and possibly improper,[10] the Commission sent letters to DOJ on June 16 and 22, 2009 asking for an explanation.[11] DOJ's

[10] Jerry Seper, "Career Lawyers Overruled on Voting Case," The Washington Times, May 29, 2009; Michael Tremoglie, "Dept. of Justice Drops New Black Panther Case," Philadelphia Bulletin, May 29, 2009.

[11] Letter from Commission to Loretta King, Acting Assistant Attorney General (June 16, 2009). Commissioners Thernstrom and Taylor sent a letter to Ms. King on June 22, 2009, lending their support for the June 16 letter. Members of Congress Lamar Smith and Frank Wolf also sought information from the Department about the dismissals and were met with similar resistance. *See, e.g.*, Letter from Congressman Frank R. Wolf to Attorney General Eric Holder (June 8, 2009); Letter from Congressmen Lamar Smith and Frank R. Wolf to Attorney General Eric Holder (July 17, 2009); Letter from Congressman Frank R. Wolf to Attorney General Eric Holder

answer to the Commission's initial inquiry is one of the key moments in this story. Most of the commissioners expected DOJ to either have a reasonable explanation, perhaps by revealing facts that weren't widely known, or to say that it was reviewing the decision. I hoped that, barring the revelation of some unknown facts not in the complaint, DOJ would admit its error and re-file the civil lawsuit. Either of those responses very likely would have been the end of the matter as far as the Commission was concerned, at least until the review was completed.

Instead, DOJ dug in its heels and said that the "facts and law did not support pursuing" the case.[12] Yet, DOJ did not point to any unknown facts or circumstances that would explain the dismissal. Indeed, DOJ has *never* denied or disputed the lengthy facts set forth in the original lawsuit complaint. In short, we are all looking at the same set of facts.

The reasons the Department gave for the dismissal in its initial response were not only unconvincing, they also raised new concerns about the decision. For example, the Department falsely claimed that Jerry Jackson was a resident of the apartment building where the polling place was located. Cursory research called this claim into doubt, since 1221 Fairmount Avenue is an assisted living facility—and his poll watcher's certificate (that the Department's trial team obtained) showed he lived at a different address. The Department later admitted that Jackson did not live in the building.[13] Even if he was a resident of the building, this would not entitle him to intimidate voters who showed up to vote there.[14] So this excuse made no sense whatsoever.

The Department also noted Jackson was a certified poll watcher and that local police did not order him to leave the polling place, as they had ordered fellow Panther King Samir Shabazz. But those facts are also legally irrelevant, unless they counsel in favor of maintaining the lawsuit. Certified poll watchers are not allowed to intimidate voters or other poll watchers.[15] If anything, they should be held to a higher standard of knowledge about what is lawful and what is not. That Jackson was working for the Democratic Party also cut

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(July 31, 2009); Letter from Congressmen Lamar Smith and Frank R. Wolf to Attorney General Holder (Nov. 10, 2009); Letter from Congressman Frank R. Wolf to Inspector General Glenn Fine (Jan. 26, 2010); Letter from Congressmen Lamar Smith and Frank R. Wolf to Inspector General Glenn A. Fine (Mar. 2, 2010); Letter from Congressman Frank R. Wolf to Attorney General Holder (June 8, 2010); Letter from Congressmen Darrell Issa, Lamar Smith, and Frank R. Wolf to Attorney General Holder (July 29, 2010).

[12] Letter from Portia L. Roberson, Director, Office of Intergovernmental and Public Liaison, U.S. Department of Justice, to Chairman Gerald A. Reynolds. The letter was undated, but was stamped as received on July 24, 2009.

[13] Response to Document Request No. 22, Response of the Department of Justice to U.S. Commission on Civil Rights (Jan. 11, 2010).

[14] See Testimony of Christopher Coates Before the U.S. Commission on Civil Rights at 29 (Sept. 24, 2010)("Even if it was true that Panther Jackson resided there, it should be quite clear to all that such a fact would not have provided a legal basis for intimidating voters.").

[15] Testimony of J. Christian Adams Before the U.S. Commission on Civil Rights at 89-90 (July 6, 2010):

> Q: Does the fact that Mr. Jackson was a poll watcher have any bearing on his liability?
> Adams: No. Thank heavens, no. I mean, otherwise, you would appoint as poll-watchers the biggest and baddest thugs you have and give them credentials to roam about the community . . . .

the other way when Democrats controlled DOJ, a fact noted in more than one news story. Most importantly, local police do not enforce the federal voting rights laws; nor does the Department defer to their judgment of what constitutes federal violations for rather obvious historical and other reasons.[16]

It had taken almost six weeks for the DOJ to formulate a response to the Commission's initial request for information. During that period, other newspaper stories appeared and Members of Congress called on the DOJ Inspector General to investigate. After these adverse press accounts concerning its decision and given the dueling inquiries from the Commission and Members of Congress about it, the Department had a good reason to get its facts straight. But its dismissive three-page reply on July 24 had the opposite effect. The decision was still fresh on the minds of those who made it. If these were the true grounds for the dismissal, it was a decidedly ill-advised decision that needed to be reversed. The Department should have known that also; something wasn't right about its conclusory response.

Indeed, most commissioners were taken aback by this response for substantive reasons beyond the individual factual and legal errors therein. If the facts of the NBPP case were not a clear example of voter intimidation, what would be? More significantly, DOJ's response seemed to compound the apparent error of dismissing the suit. If DOJ had a different excuse that applied only to this case, it might not threaten to create a damaging precedent.

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[16] See Coates Testimony at 27-28 (Sept. 24, 2010):

> During my 13 and a half years in the Voting Section, I cannot remember another situation where a decision not to file a Voting Rights Act case, much less to dismiss pending claims and parties, as happened in the New Black Panther Party case, was made, in whole or in part, on a determination of a local police officer.
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> In my experience, officials in the Voting Section and the Civil Rights Division always reserved for themselves, and correctly so, the determination as to what behavior constitutes a violation of federal law and what does not. One of the reasons for this federal preemption is that local police officers are not normally trained in what constitutes a Voting Rights Act violation.
>
> In addition, in the Philadelphia police incident report provided to this Commission by the DOJ, the Philadelphia police officer who came to the polling place did not determine that Black Panther Jackson's actions were not intimidating. Instead, he simply reported that Jackson was certified by the Democratic Party to be a poll watcher at the polling place and was allowed to remain.
>
> Further, as the history underlying the enactment and the extension of the Voting Rights Act shows, local police have on occasion had sympathy for persons who were involved in behavior that adversely affected the right to vote or violated the protections of the Voting Rights Act.

See also Adams Testimony at 90 (July 6, 2010) ("[N]or does the fact that police let him stay have anything to do with it. The Federal Government has never taken the position, and hopefully never will, that local law enforcement officials can opine on matters of federal law. We have entirely different laws that we enforce.").

Yet the public statement to the Commission and several Members of Congress that DOJ did not believe the conduct recited in the complaint and partially caught on video stated a cause of action for voter intimidation seemed to constitute a dangerous shift in federal enforcement policy that the Commission was duty-bound to investigate, particularly since the Commission is specially charged with investigating federal enforcement of the voting rights laws. And if DOJ's avowed legal position was correct, then the Commission thought it should expose this flaw in the Voting Rights Act of 1965 and recommend that the law be changed.[17]

The Commission Begins Its Formal Investigation

Accordingly, the Commission followed up its earlier inquiry with a letter to the Attorney General signed by six commissioners (the remaining two abstained from the vote to send the letter) expanding our inquiry and requesting documents related to the case.[18] It explained that the Commission had an independent statutory duty to evaluate the facts and the law, rather than simply accept DOJ's assertion that it had made the right decision. It noted that the Department's July 24 letter was not only largely non-responsive to the Commission's requests for information, but also that what was related was both factually wrong and "even more corrosive to the rule of law than the dismissal without comment." The letter also expressed concerns about new revelations in a front-page newspaper story of July 31 regarding the Department's dismissal of the NBPP case, including that the Associate Attorney General was involved in the decision and that an NAACP Legal Defense Fund official had urged the Department to dismiss the lawsuit. Finally, the Commission's letter reminded the Attorney General that federal law obligated the Department to "comply fully" with the Commission's requests for information in the matter.[19]

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[17] Because of the Department's stonewalling, the Commission still doesn't have a lot of the evidence the NBPP trial team collected; nor does it have the record for other alleged incidents of intimidation. Thus, the Commission agreed not to make findings on the adequacy of the law until our investigation is complete. But based on the expert and other testimony received thus far, my view is that § 11(b) is not deficient if properly enforced.

[18] Letter from the Commission to Attorney General Holder (Aug. 10, 2009). The letter was signed by Chairman Gerald Reynolds, Vice Chair Abigail Thernstrom, and Commissioners Peter Kirsanow, Ashley Taylor, Gail Heriot, and Todd Gaziano. Commissioners Michael Yaki and Arlan Melendez abstained from the vote to send the letter.

[19] Id. at 4-5:

> In addition to our authority to subpoena documents and witnesses in aid of our mission, the Commission has even broader authority to require the cooperation of federal agencies. The Commission's organic statute provides: "All Federal agencies shall fully cooperate with the Commission to the end that it may effectively carry out its functions and duties." 42 U.S.C. § 1975b(e). The Department's previous response does not answer our most basic questions, which impairs our duty to investigate potential voting deprivations and federal enforcement policies. We trust that your response to this letter will provide us with the information necessary to make significant progress with our investigation.
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> * * *
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> The Commission has a keen interest in this case because of its special statutory responsibility to study the enforcement of federal voting rights laws. We believe the Department's defense of its actions thus far undermines respect for the rule of law and raises other serious questions about the Department's law enforcement decisions. The fundamental right that the Commission is investigating—the right to vote free of racially-motivated intimidation—has

Nevertheless, on September 9, 2009, DOJ effectively gave the Commission the back of its hand, saying it would not respond further until an internal ethics investigation was complete (which is still not complete some 16 months later).[20] This is analogous to a corporation announcing it would not cooperate with or respond to a DOJ investigation regarding an oil spill until its general counsel completed an internal ethics investigation. The DOJ would not, and should not, stay its investigation; nor should the Commission. It was then that the Commission deliberated and voted to make the implications of the DOJ's actions in the Panther case the subject of its statutory enforcement report for fiscal year 2010.

Our thinking in September of 2009, at least that of most commissioners, was as follows: Given the video evidence and the unchallenged allegations in the complaint, the dismissal was highly unusual and seemingly erroneous, and thus, the burden was on DOJ to explain it. That made DOJ's refusal to cooperate even more suspicious. We knew that, given the negative press reports on the NBPP case, DOJ had every incentive to provide a plausible rationale for dismissing the suit, if one existed. The stonewalling and absence of a plausible explanation under these circumstances suggested the Department had something to hide. Our Commission has been described as "the conscience of the nation."[21] Thus, we endeavored to uncover the facts and the truth behind them, using our subpoena power if necessary.

And while we thought it unlikely that DOJ would be vindicated regarding its cramped reading of the voter intimidation provision in the Voting Rights Act, we remained open to that possibility. Indeed, regardless of whether DOJ was right about that or not, the investigative plan adopted by the Commission still required us to consider what effect the case and DOJ's statements about the law might have for potential voter intimidation cases in the future.

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been called the cornerstone of other civil rights in our democracy. Until it is complete, this investigation will remain one of the Commission's top priorities.

Vice Chair Thernstrom's cryptic and unsupported claim in her accompanying statement that the "investigation lacked political and intellectual integrity from the outset" contradicts her own prior views and actions. Not only did Vice-Chair Thernstrom send her own letter on June 22, 2009 in support of the Commission's inquiry (which was the "outset" of the investigation), but she signed the August 10, 2009 letter quoted above, which greatly expanded the scope of the Commission's investigation. That letter ends with the promise that the investigation will remain "one of the Commission's top priorities" until completed, so the designation of the investigation as the annual statutory enforcement project the next month (though opposed by Thernstrom) did not change the investigation at all. There was no expansion of the probe until August 2010, and that was in light of dramatic testimony by a DOJ civil rights lawyer of a culture of hostility to the race-neutral enforcement of the civil rights laws. Since she did not even attempt to support, explain or prove her vague claims that the process was flawed, such statements are of no value. Although the exhaustive record of our proceedings reflects that she also offered no "principled critiques" of the investigation itself, the separate Joint Rebuttal Statement by Commissioners Kirsanow, Heriot and me addresses her regrettable personal hostility to others on the Commission, which seems to have led her to make revisionist claims about the investigation that are inconsistent with her earlier statements and actions.

[20] Letter from Portia L. Roberson, Director, Office of Intergovernmental and Public Liaison to Chairman Gerald A. Reynolds (Sept. 9, 2009).

[21] Andrew Goldstein, "Can the U.S. Commission on Civil Rights Be Saved?," Time, Feb. 9, 2002.

For example, several commissioners rhetorically asked whether the Department would file suit if Klansmen in white robes or neo-Nazis in militia uniforms stood directly in front of polling place doors yelling racial epithets since the rule announced for the NBPP case might limit DOJ's range of action in future cases. It might also send exactly the wrong message to would-be intimidators, especially existing hate groups like the NBPP. If the DOJ later wanted to change its position on the scope of VRA § 11(b), its official position in the NBPP case could be cited in court to undermine its new reading of the law.[22] So even if DOJ's position was arguably defensible, the matter was an important one for us to study and report on.

Starting in November 2009, the Commission subpoenaed the former defendants in the NBPP case, other fact witnesses present at the polls on Election Day, and two DOJ trial lawyers to testify. The Commission also sent DOJ interrogatories and subpoenaed relevant documents. In response, DOJ repeatedly ordered its subpoenaed employees not to speak to the Commission, and has for the most part not answered critical questions or produced documents or emails related to the core issues in the NBPP case, particularly those that might explain the motives of those who made the decisions.[23] For months, it provided few if any justifications for its unlawful refusal to cooperate, but it eventually began to raise spurious privileges that either do not exist or do not apply in investigations by Congress or the Commission on Civil Rights.

As the body of this Interim Report details, the Commission proceeded to depose the relevant fact witnesses in Philadelphia, including poll watchers for both major parties. The two former defendants who personally engaged in the intimidating conduct, Samir Shabazz and Jerry Jackson, invoked their Firth Amendment right against self incrimination rather than provide deposition testimony. A witness may only invoke that right if he "reasonably believes" that his testimony might implicate him *criminally*; it cannot be invoked to avoid civil liability or the inconvenience of testifying.[24] Thus, if the invocation was proper, it means the former defendants in a § 11(b) civil suit believe their conduct might be criminal. The NBPP Chairman, Malik Zulu Shabazz, filed an odd motion to quash his deposition. As of the time of writing, DOJ has not succeeded in compelling his testimony, and it is not clear it has tried very hard to do so.

Although hampered by the Department's refusal to allow the Commission to interview DOJ trial attorneys or produce the exhibits, witness statements, and other evidence in the possession of DOJ, the Commission held its first hearing on April 23, 2010 relating to the facts on Election Day 2008 in Philadelphia and whether there was a sufficient basis to file the original charges. Three eye-witnesses, including the prominent civil rights attorney Bartle

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[22] Under prevailing Supreme Court doctrine, courts normally accord deference to the reasonable interpretations of statutes by the agencies tasked with administering them, see *Chevron U.S.A. v. NRCD*, 476 U.S. 837 (1984), but not if the agency's interpretation is a mere litigation position, see *United States v. Mead Corp.*, 533 U.S. 218, 238 n.19 (2001); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988). Thus, once an agency announces one interpretation of a statute, its contrary position in a future litigation might not receive judicial deference.

[23] See Note 35, *infra*, regarding the marginal public documents, manuals and other items produced instead.

[24] *United States. v. Balsys*, 524 U.S. 666, 671-72 (1998); *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).

Bull, provided powerful and convincing testimony that the former defendants had engaged in intimidating conduct, and that voters had turned away from the polling place rather than walk within a billy-club swing of the entrance. Congressman Frank Wolf testified regarding his concerns about the case and his frustration with the lack of DOJ cooperation.

Former Acting Associate Attorney General Gregory Katsas, who previously supervised the work of the Civil Rights Division, testified about which officers in the Department would normally be involved in a decision to dismiss a suit of this nature and provided expert legal testimony on whether the allegations in the original complaint constitute voter intimidation under federal law. Mr. Katsas strongly refuted the Department's suggestion in internal memos that the suit implicated the First Amendment rights of those engaging in intimidating conduct at the entrance to a polling place.[25] He also questioned the other grounds for dismissing the suit, including the Department's stated concern about the vicarious liability of the NBPP. In sum, he testified that not only did the allegations in the complaint state a strong case for violation of section 11(b), but that the testimony he heard from the fact witnesses at the hearing reinforced his conclusion that the evidence was sufficient to maintain the lawsuit against all defendants.[26]

Thus, the testimony and other evidence at the April 23 hearing left little doubt that the original lawsuit against all four defendants was factually and legally justified, which only heightened the Commission's interest in the Department's assertions to the contrary and its simultaneous refusal to allow us to interview relevant witnesses or examine contemporaneous evidence of other possible reasons of those who decided to dismiss most of the lawsuit.

DOJ's Stonewalling and Spurious Assertions of Privilege

DOJ did not allow the Commission to interview any of the officials who were involved in the decision to dismiss the charges in the NBPP case[27] and has not produced documents or emails that memorialize the reasons or motives of those who made the decision. Relevant documents and emails include those sent within the Voting Section and the Civil Rights Division and those sent between the Civil Rights Division and more senior political appointees in the Department. Nor has it produced the emails and memos listed in an index provided to Judicial Watch pursuant to a FOIA suit Judicial Watch filed to secure similar information. And most recently, the Department has specifically refused to produce memos written by Christopher Coates or Christian Adams on or about April 26, 2010 and

[25] See the Interim Report's discussion of the non-existent First Amendment issue at 33-35. The dissenting statement by Commissioners Melendez and Yaki fault the trial team's J-memo for not mentioning the First Amendment issue, but that is not a fault. It didn't mention the Constitution's Preamble either, which is equally inapplicable.

[26] Interim Report at 28; Katsas Testimony at 145.

[27] Although the Department has done a lot to mislead and/or obscure who was involved in the decision to dismiss the case, there is now strong evidence in the record that at least the following six officials were involved: Attorney General Eric Holder, then Deputy Attorney General David Ogden, Associate Attorney General Thomas Perrelli, Deputy Associate Attorney General Sam Hirsch, then Acting Assistant Attorney General Loretta King, and then Acting Deputy Assistant Attorney General Steven Rosenbaum.

May 10, 2010, and the multiple emails between Sam Hirsch and Steven Rosenbaum in April and May of 2009.[28]

The Department even refused to provide a privilege log of documents it withheld from the Commission, which it gave to Judicial Watch, although the Commission asked for such a log in its initial requests for production of documents on December 8, 2009 and many times since then. DOJ knew a judge would require such a log in its litigation with Judicial Watch, so it complied with the usual court rules. But because the Commission's ability to appear in court to enforce its subpoenas may be limited to when the Attorney General represents it,[29] the Department denied the Commission even the courtesy of listing the documents and emails it is refusing to provide, despite a statutory duty that requires more cooperation from DOJ than is due a FOIA requester.

The Department eventually asserted the following real and fictitious privileges during the Commission's investigation: attorney-client, attorney-work product, deliberative process, law enforcement, "or other recognized privilege;"[30] private information prepared by or for the Department's Office of Professional Responsibility;[31] and, most oddly, disclosures "that otherwise would undermine [the Department's] ability to carry out its mission."[32] As detailed below, even the privileges that are recognized at law (as opposed to being newly invented) are not valid against the Commission, but even if one or more of them was, the Department should have long ago waived such privilege and produced the requested documents in response to the serious and credible allegations of wrongdoing that have emerged since early July 2010.

Beyond the Commission's general subpoena power, there are two other statutes that command DOJ's cooperation. The most straightforward one states: "All Federal agencies shall cooperate *fully* with the Commission to the end that it may effectively carry out its functions and duties."[33] The Commission has no law enforcement power; its most important duty, as DOJ knows, is to collect information on other agencies' enforcement of the civil rights laws (especially federal agencies) and issue reports on them. As for the subject matter of the dispute, investigating the enforcement of federal voting rights laws is a core statutory function of the Commission,[34] deeply rooted in the Commission's history, well-known to Congress, and recognized in the legislative history of the Voting Rights Act. Thus it is arguably our highest statutory duty to independently evaluate whether the NBPP case was

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[28] See Letter from Joseph H. Hunt to Commission General Counsel David Blackwood (Nov. 12, 2010). The relevance of the requested documents is explained in the Commission's letter of October 13, 2010.

[29] 42 U.S.C. § 1975a(2) ("In case of contumacy or refusal to obey a subpoena, the Attorney General may in a Federal court of appropriate jurisdiction obtain an appropriate order to enforce the subpoena."). This presents a conflict of interest, noted in this report's findings and recommendation, whenever the subject of the subpoena is the Department or its employees and DOJ would prefer not to comply.

[30] Response of the Department of Justice to U.S. Commission on Civil Rights at 1 (Jan. 11, 2010).

[31] *Id.*

[32] Letter from Joseph H. Hunt, Director, Federal Programs Branch to Chairman Gerald A. Reynolds (Jan. 11, 2010).

[33] 42 U.S.C. § 1975b(e) (emphasis added).

[34] 42 U.S.C. § 1975a(1) (The Commission "shall investigate allegations . . . relating to deprivations . . . because of color, race, religion, sex, age, disability, or national origin; or . . . as a result of any pattern or practice of fraud; of the right of citizens of the United States to vote and have votes counted . . . .").

properly handled, which the Commission repeatedly explained in its correspondence with the Department.

The statutory command that all federal agencies "cooperate fully" with the Commission's requests contains no exception like those in the Freedom of Information Act and analogous statutes. Congress knows how to create or codify government privileges, but it chose not to create any exception to the command to comply with Commission requests. And it seems quite obvious that the inclusion of the word "fully" in the command to "cooperate fully" was intended to prevent federal agencies from picking and choosing what to produce to the Commission and still claim compliance with the Commission's statute. In short, it doesn't matter how many marginal or unhelpful documents the Department has dumped if it steadfastly refuses to produce the ones that are most revealing.[35]

Although a constitutional, "executive" privilege might be asserted by the President in appropriate circumstances (see further below), there are several reasons why the common-law privileges asserted are not valid to thwart the Commission's request for information. The first is that the common-law privileges that apply in court against non-governmental parties, such as attorney-client, work product, and the like, are not well taken against other entities in the federal government. One reason for that is that we all work for the same client—the United States government. It makes about as much sense for DOJ to assert an attorney-client privilege in response to an inquiry from the Treasury Department as to assert it against the Commission. DOJ might have fewer reasons to resist Treasury's inquiry and the separation-of-powers issues are certainly different (both Treasury and DOJ report to the President), but asserting an attorney-client privilege against the Treasury Department (or the Commission) is equally inapplicable.

The Department's own Office of Legal Counsel has issued at least two opinions, which are binding on the Department unless overruled, that came to the same conclusion and further explain why this is so. They hold that the interests served by the attorney-client privilege are subsumed within the executive privilege, which is the privilege that vindicates the separation of powers interests at stake when other government entities request information from the executive branch.[36] The OLC opinions were issued in the context of a

[35] The Department claims that its production of 4000 pages of documents to the Commission is proof of its cooperation, but only DOJ's enablers and apologists would measure the degree of cooperation by the number of pages produced rather than the highly-relevant items withheld. Any first-year litigation associate would be fired for accepting a similar story from opposing counsel. For what it is worth, almost all the documents produced are either publicly available (about 70% of the material)—such as court pleadings or newspaper articles—or correspondence with outside groups. For example, there are about 864 pages of letters from Members of Congress and others to DOJ and 350 pages of DOJ publications, including an employee manual. Yet, the Department probably could have produced 40,000 pages of marginal or non-helpful documents to the Commission with less effort than it has spent to withhold the ones that reveal the heart of the matter the Commission is investigating. The few documents that don't fit the above categories include about five witness declarations in the NBPP case that were originally heavily redacted (but not their original statements) and a few select emails that would otherwise be covered by DOJ's broad privilege claims, but that were nevertheless produced because DOJ apparently believed they helped its position.

[36] 10 Op. O.L.C. 68, 78 (April 28, 1986) ("The interests implicated under common law by the attorney-client privilege generally are subsumed by the constitutional considerations that shape executive privilege, and therefore it is not usually considered to constitute a separate basis for resisting congressional demands for

congressional inquiry, but as the Commission's general counsel explained in a letter to DOJ on December 8, 2009, the Supreme Court has equated the Commission's investigatory function to that of a congressional oversight committee.[37] That we all work for the United States government is unassailable.

In addition to the binding nature of Office of Legal Counsel opinions on DOJ and their underlying logic that only a separation-of-powers-based executive privilege applies as against other federal entities, the other reason why common-law privileges (or those made up out of whole cloth by DOJ) would not apply to defeat the Commission's requests is that Congress can always override a common-law privilege (and those made up by DOJ) and it has done so with the statutory command that all federal agencies must "cooperate fully" with the Commission. DOJ's interest in its internal ethics investigation is admirable (if genuine), and no one likes another entity's review of its actions, but those agency "interests" simply cannot override Congress's statutory determination that all federal agencies must cooperate *fully* with the Commission's legitimate requests for information.

Because no common-law or statutory privilege shields the Department from its obligation to comply with the Commission's subpoenas, the only possible exception is a constitutional "executive" privilege. The "deliberative process" and "law enforcement" privileges are recognized categories of the President's executive privilege (as are national security and foreign policy privileges, which are not at issue). Nevertheless, there are three independent reasons why *no* executive privilege shields DOJ from complying with the Commission's inquiry in the NBPP matter. It is especially ironic, however, that DOJ would even mention a "law enforcement" privilege, which is generally limited to prevent disruption of potential or on-going investigations or litigation.[38] DOJ's position is that the NBPP civil suit should never have been filed against three defendants and dismissed it against them about 20 months ago. Although section 11(b) does not have an express statute of limitations,

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information."); 6 Op. O.L.C. 481, n.24 (Aug. 2, 1982) ("[T]he interests implicated by the attorney-client privilege generally are subsumed under a claim of executive privilege when a dispute arises over documents between the Executive and Legislative Branches, and the considerations of separation of powers and effective performance of constitutional duties determine the validity of the claim of privilege.").

[37] See *Hannah v. Larche*, 363 U.S. 420, 489-90 (1960) (The concurrence noted that the Commission was "charged with responsibility to gather information as a solid foundation for legislative action," and that the hearing in question was "in effect a legislative investigation.") (Frankfurter, J, concurring). More explicitly, "Congress has entrusted the Commission with [the role of] investigating and appraising general conditions and reporting them to Congress so as to inform the legislative judgment. Resort to a legislative commission as a vehicle for proposing well-founded legislation and recommending its passage to Congress has ample precedent." *Id*. at 492-93. (Frankfurter, J, concurring). See also *Berry v. Reagan*, No. 83-3182, 1983 WL 538, *2 (D.D.C. 1983) ("[I]n making investigations and reports thereon for the information of Congress under [the Commission's statute], in aid of the legislative power, it acts as a legislative agency.") (internal citation omitted); *Buckley v. Valeo*, 424 U.S. 1, 137 (1976) (Powers and functions that "are essentially of an investigative and informative nature" fall "in the same general category as those powers which Congress might delegate to one of its own committees.").

[38] The Fifth Circuit held that the privilege only applies to on-going investigations. *In re United States Department of Homeland Security*, 459 F.3d 565, 570 n.1 (5th Cir. 2006). The Second Circuit suggested the privilege might continue beyond one investigation if "future investigations may be seriously impaired if certain information is revealed to the public." *Dinler v. City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (quotation marks omitted). Even assuming the Second Circuit is correct, those circumstance do not exist in disparate § 11(b) investigations.

federal courts would likely borrow an analogous two-year limit, which has now run on the November 2008 conduct. Thus, no legitimate law-enforcement privilege would apply, even if President Obama actually tried to invoke it.

The simplest and most powerful reason why no constitutional, executive privilege can support DOJ's stonewalling against the Commission is that DOJ eventually admitted last May that the President's executive privilege has not been invoked.[39] Because there is a separation-of-powers interest on both sides of the ledger when a separation-of-powers-based executive privilege is invoked, the Supreme Court has quite logically held that an executive privilege does not automatically exist upon the insistence of some low-level official who wishes to thwart a subpoena from another branch or entity of government. Instead, the Supreme Court has held that the President or department head acting on his behalf are the only officers who can assert an executive privilege, and it must be asserted formally and explicitly.[40]

Like its various other supposed "interests" in not complying with the Commission's subpoenas, DOJ may have a real "interest" or desire to keep its deliberations regarding past law enforcement decisions confidential. But those interests don't rise to the level of a valid privilege to defeat a Commission subpoena, unless an appropriate executive privilege has been properly invoked.[41] If the contrary proposition prevailed (if low-level agency officials could simply recite the agency's interest in the confidentiality of its deliberative process to defeat an otherwise lawful subpoena—without an invocation of executive privilege), that would effectively overrule the Supreme Court's careful and sound decision in *United States v. Reynolds* that the President or a department head must personally and formally invoke executive privilege. In short, why would the President ever take the political heat for invoking executive privilege (which is what *Reynolds* held the separation-of-powers required) if a low-level career lawyer like Joseph Hunt (who wrote most of the responses for DOJ) could simply recite the agency's "interests" in the principles the executive privilege is designed to protect? *That* would make no sense at all.

The Department's formal Office of Legal Counsel opinions are fully in accord with this analysis, for they properly explain that the "interests" that exist in the common-law privileges are subsumed within executive privilege when the request is from a government

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[39] Letter from Joseph H. Hunt, Director, Federal Programs Branch to Chairman Gerald Reynolds (May 13, 2010).

[40] See *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953) ("[The privilege] is not to be lightly invoked. There must be formal claim of privilege, **lodged by the head of the department which has control over the matter**, after actual personal consideration by that officer.") (emphasis added) (citations omitted). Executive privilege is sometimes called "Presidential" privilege. *Nixon v. Admin. Gen'l Serv.*, 433 U.S. 425, 439 (1977) ("the Presidential privilege of confidentiality"); U.S. Department of Justice, Office of Legal Counsel, Memorandum Opinion for the Associate Counsel to the President, 2001 WL 36209373, *4 (June 20, 2001) ("executive (sometimes styled 'Presidential') privilege"). Then Attorney General Michael Mukasey, rather than asserting executive privilege himself, wrote a letter to President Bush requesting that the President assert the privilege with regard to certain executive-branch documents. *Citizens for Responsibility & Ethics v. U.S. Dep't of Justice*, 658 F. Supp. 2d 217, 221 (D.D.C. 2009).

[41] The deliberative process privilege is part of executive privilege. The Supreme Court described it as "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." *United States v. Nixon*, 418 U.S. 683, 705 (1974).

entity such as Congress or the Commission. The interest exists independently of the executive privilege, but a separate privilege does not. The contrary proposition would also effectively overrule the Supreme Court's decision in *United States v. Reynolds.* And what is true for recognized common-law privileges is doubly true for vague, newly-invented privileges, to wit: that the Department may prevent any disclosure "that would otherwise undermine the ability of DOJ to carry out its mission." Many an agency would like that open-ended privilege (what does "undermine" mean?) since few officials want to disclose wrongdoing or embarrassing information, but it would be more sweeping than any current Presidential privilege, a point noted by at least one newspaper editorial board.[42] It was quite disappointing that DOJ, of all agencies, would claim such a privilege.

If the President or the Attorney General acting on his behalf personally invoked executive privilege in the future regarding the deliberations in the NBPP case, there are two other reasons why it would likely not shield most of the information sought by the Commission or Members of Congress from disclosure. The first is that the deliberative process privilege (which is the only category of executive privilege that arguably would apply) only covers certain types of high-level executive deliberations.[43] The second is that even executive privilege is not absolute. As the Supreme Court famously held during the Watergate affair, the president's executive privilege may be overcome in an investigation of wrongdoing.[44] The detailed and credible allegations of wrongdoing sworn to by DOJ lawyers (Coates and Adams) and other affiants not only would make any future invocation of executive privilege untenable, but they also strongly counsel the Attorney General to waive any other asserted privilege that he may sincerely believe exists. In short, if even a valid invocation of executive privilege is defeated by credible allegations of wrongdoing, then surely some lower species of privilege or purported "interest in confidentiality" should also yield.

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[42] Editorial: "Menacing turn in Black Panther case," The Washington Times, Jan. 13, 2010 ("Not even President Nixon at the nadir of Watergate asserted such a broad privilege against outside review.").

[43] A careful determination would have to be made between what material might arguably be covered and what is not. It does not apply to witness statements the Department is withholding. It would not apply to non-deliberative documents. Given DOJ's current testimony, it is doubtful that it would apply to most conversations between attorneys within the Civil Rights Division. This is because the Department's oft-repeated position that the decision to dismiss the NBPP suit was made exclusively by career attorneys in the Civil Rights Division would tend to undermine any later assertion that the conversations within the Voting Section or the Civil Rights Division were part of the advice provided to the President or other "high Government officials," see *Nixon* at 706, although it might apply to the advice provided to the Attorney General, Deputy Attorney General, and Associate Attorney General.

[44] See *United States v. Nixon*, 418 U.S. 683, 706 (1974) ("[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises."). Indeed, the *Nixon* case now stands for the proposition that executive privilege cannot be invoked to shield such wrongdoing; the "presumptive privilege must be considered in light of our historic commitment to the rule of law." *Id*. at 708.

Yet, the simple fact remains that DOJ has admitted that the President has not asserted executive privilege to withhold information from the Commission.[45] Thus, DOJ has not validly asserted executive privilege or any common-law or other privilege subsumed within it. In sum, it has no lawful ground to withhold witnesses, documents or emails from the Commission.

My point in describing the law requiring disclosure is two-fold: (1) so that congressional or other investigators may consider its implications going forward, and (2) to explain what conclusions the Commission began to draw from the many months of stonewalling and frivolous claims of privilege. As severe winter storms in Washington[46] gave way to spring, the continued, frustrating correspondence with the Department began to reinforce the conclusion that something much stronger than ordinary bureaucratic resistance was at play.

It is helpful to compare DOJ's behavior in the NBPP investigation with the history of cooperation between the Commission and DOJ on other reports and investigations. The level of resistance from the Department in the NBPP investigation appears to be unprecedented in the Commission's recent records and the memory of our professional staff. Normally, DOJ's cooperation—and that of other federal agencies—is open and collaborative, as it was in the first two statutory reports I was involved with on the Commission. (The first involved religious liberties in prisons; the second focused on civil rights issues relating to the mortgage crisis. The second was somewhat critical of the agencies involved, but DOJ openly cooperated with it.) On other occasions, our records show the Commission issued lengthy subpoenas to DOJ on other voting rights issues, but there was still a high degree of cooperation with the Commission's requests. The extreme lack of cooperation this year was quite unusual.

Moreover, the continuing correspondence with DOJ in the NBPP investigation showed none of the comity or professionalism normally shown by the Department. For example: the Department refused repeated requests for meetings to discuss the significant discovery impasse;[47] it would not acknowledge or answer simple questions (e.g., most recently it has refused to even acknowledge our question whether Deputy Assistant Attorney General Julie Fernandes made certain troubling statements); it wouldn't provide a log of withheld documents; and it took months for DOJ to respond to whether the Attorney General would appoint a special counsel to help resolve the conflict of interest surrounding its failure to comply with Commission subpoenas (answer: no) and whether the President had invoked executive privilege (answer: no).

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[45] Letter from Joseph H. Hunt, Director, Federal Programs Branch to Chairman Gerald Reynolds (May 13, 2010). We can reasonably infer the President or Attorney General has not secretly invoked executive privilege since May 13, including that such private invocation would contravene *Reynolds* that it must be formally claimed and "lodged."

[46] The two storms nicknamed Snowmageddon and Snowpocalypse in early February 2010 shut down the federal government for days and caused the Commission to delay its first NBPP hearing, originally scheduled for Feb. 12.

[47] There was one meeting between the Commission General Counsel and mid-level career staff at DOJ in May 2010 to allow our staff to look at a few photos and exhibits, but DOJ refused to discuss the more basic discovery disputes.

Because I used to work in DOJ's Office of Legal Counsel (in Republican and Democratic administrations) and know of the high-caliber work of the Department, the odd privilege claims raised in the NBPP investigation[48] were another indication that something was wrong. In short, when the unlawful resistance dragged on, this suggested to me that those who acted like they had a guilty mind might not just have something embarrassing to conceal, but perhaps something even more troubling to hide.

Testimony of Thomas Perez

The only witness DOJ eventually offered to appear for the Department was Assistant Attorney General for Civil Rights Thomas Perez, though the Commission did not ask for his testimony since he did not take office until well after the NBPP case was dismissed.[49] Nevertheless, the Commission welcomed Perez's testimony at a hearing on May 14, 2010 in hopes that he would shed light on some of the issues. His testimony has since been called into serious doubt in several respects, and like DOJ's initial letter to the Commission, has done more to undermine the logic of the Department's avowed position than support it.

Commissioner Heriot has addressed certain DOJ legal positions Perez was not prudent enough to abandon, including the claim that it is harder to secure a judgment when civil defendants do not contest the allegations than when they do, or that making a proffer of evidence to the judge could not cure any perceived problem with a default judgment. The notion that acting political appointees (King and Rosenbaum) were not acting *as* political appointees when they ordered the trial team to dismiss the NBPP suit is an odd one, but their political connections may be irrelevant unless they were influenced in part by a desire for other political appointments. Because Commissioner Heriot distinguishes possible political and ideological influences, I will only discuss two factual issues and the most important legal concern with Perez's testimony.

Perez repeatedly emphasized that no one higher than the acting head of the Civil Rights Division in the first half of 2009 (Loretta King) was "involved in" making the decision to dismiss the NBPP case. This testimony was highly doubtful when uttered and subject to some interesting cross-examination about the role the Attorney General and

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[48] I do not recall any suggestion the Office of Legal Counsel has endorsed the legal theories advanced by others in this matter, but it would be disappointing if pressure has been or is brought to bear on OLC to sanction them.

[49] On November 12, 2010, more than a month after the final draft of the Interim Report was sent to commissioners for review (which was already delayed more than two months by DOJ's refusal to produce Coates), the Department said it would permit King, Rosenbaum, and Fernandes to be deposed if the Commission agreed to certain conditions DOJ knew were unacceptable. The Department refused to waive its alleged privileges, rendering inquiry into the conversations and deliberations about the dismissal off limits. The Department made it clear it would not produce relevant documents and emails, severely limiting the value of any deposition. Finally, the Department kept referring to this Interim Report as a "final report" and insisted that the Commission agree to postpone its scheduled vote to adopt the Interim Report and to incorporate new testimony in a new report that DOJ could review, etc. Knowing that the our last meeting of the year was December 3, this last condition alone would have killed the Interim Report and put the Commission in violation of its statutory obligation to issue at least one such enforcement report per year. Thus, the Commission's General Counsel replied that relevant documents must be produced and the witnesses testify without such conditions, after which DOJ retracted its conditional offer to produce the witnesses.

Associate Attorney General could play in such an unusual decision, but Perez stuck by his story that these officials were merely given notice of the decision. Such a claim, if it was ever believable, has since been seriously undermined by the email logs that DOJ produced in FOIA litigation brought by Judicial Watch.[50] On crucial days in late April/early May 2009 when decisions were being made, 22 emails were sent between the acting leaders of the Civil Rights Division and senior political appointees who supervise the Division. On May 8, when an extension of time to file the injunction was granted in federal court, there was a chain of emails between Acting Deputy Assistant Attorney General Steven Rosenbaum and Deputy Associate Attorney General Sam Hirsch. On May 14, there were three emails between Hirsch and Associate Attorney General Thomas Perrelli concerning the NBPP case. On May 15, when most of the case was dismissed, there were four emails between Civil Rights Division leadership and Hirsch, and six emails between Hirsch and Perrelli.

And according to the email headers as well as the Department's invocation of relevant FOIA exemptions (for deliberative and predecisional communications), these emails contain deliberative discussions between the Division and its political supervisor about what should be done in the litigation; these are not merely emails to supervisors giving them a heads up. One contains the Deputy Attorney General's "current thoughts" about the case. The Deputy Attorney General is the second highest ranking official in the Justice Department, and I have no doubt his current thoughts were given great weight. As late as November 12, 2010, the Department's written excuse not to produce emails between the Civil Rights Division and Sam Hirsch to the Commission is that they are privileged *deliberative* emails. Yet, Perez has still not corrected his testimony to the Commission. The Department simply can't have it both ways.

To be perfectly clear, political appointees should be involved in decisions about whether to bring or dismiss important cases, especially the dismissal of a case the Department had essentially won involving a high-profile incident. And it is not a problem for political appointees to overrule six career attorneys in two offices, if their reasons are not wrongful. But what does it mean when the Department and its officials repeatedly try to obscure their involvement? And why not come clean now? The fact that Thomas Perez and others at DOJ have gone to so much trouble to mislead the public about how involved senior Obama appointees were in making the decision says a lot about how they think the public would react to the truth.

At the May 14 hearing, I asked Perez several times whether he had investigated the allegations in news reports that there was hostility to race-neutral enforcement of the civil rights laws in the Civil Rights Division. Perez tried to evade the question, but he eventually responded curtly, "We don't have people that are of that ilk" in the Division.[51] Among other contrary evidence, the Commission later received sworn testimony that Deputy Assistant Attorney General Julie Fernandes, who is Perez's senior politically-appointed deputy in charge of voting issues, had previously instructed the entire Voting Section that the Obama

[50] *Judicial Watch v. U.S. Dep't of Justice*, No. 10-cv-00851 (D.D.C. filed May 24, 2010) (Civil Rights Division Index of Withheld Documents).
[51] Testimony of Thomas Perez, Assistant Attorney General, Before the U.S. Commission on Civil Rights at 35 (May 14, 2010).

administration would bring only traditional civil rights cases on behalf of minorities.[52] Of even more relevance to the cover-up, however, we now have sworn testimony that Perez was aware when he testified that other of his deputies might be hostile to race-neutral enforcement of the law. Perez was briefed on such allegations orally and possibly in writing in the week prior to giving his testimony.[53]

In fact, Coates and Adams testified that Coates personally briefed Perez about the hostility to race-neutral enforcement of the civil rights laws the day before Perez testified before the Commission.[54] If Perez did not believe any of the stories or allegations, it still was incumbent on him to explain what steps he had taken to investigate the allegations in response to my question—or to acknowledge the stories and allegations but explain why he didn't believe them. It was misleading, at best, for him to emphatically claim there was no one "of that ilk" in his Division without more. Why wasn't he forthcoming about the incidents of harassment within his Division? Why not at least admit what he had heard and discuss it honestly? Finally, it is troubling that Perez refuses even now to admit or deny whether his deputy, Julie Fernandes, made the statements subsequently attributed to her. Under circumstances that cry out for a confirmation or denial, his silence is deafening.

Perez also repeatedly testified that the NBPP case was dismissed *solely* because the facts and the law did not support it.[55] As with DOJ's original letter to the Commission, this statement was inherently suspect for several reasons: (1) Unless the facts were different than what was stated in the complaint (and none were disputed), no honest civil rights lawyer could really believe the law did not justify the lawsuit, and if any did, that itself would be a scandal. (2) DOJ would not release the documents or allow the relevant attorneys to provide testimony that would prove or disprove whether the facts and law were the only basis for the decision. (3) Perez had a terrible time coming up with an explanation of why the facts did not support voter intimidation claims against, for example, Election Day co-conspirator Jerry Jackson. Perez repeated the lame excuse that the local police did not order Jackson to leave, which is an absurd defense to clear acts of *federal* voter intimidation for numerous historical and other reasons.[56]

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[52] Coates Testimony at 32-33.
[53] Coates Testimony at 134.
[54] Coates Testimony at 134; Adams Testimony at 68 (testifying the briefing was the day before Perez testified).
[55] See, e.g., Perez Testimony at 23, 33, 53, 63, 104, 107. Unless Perez conducted his own thorough investigation of the deliberations that took place April/May of 2009, it is unclear how he could know what the real motives or reasons were for those who made the decision. Did he quiz Attorney General Holder, Deputy Attorney General Ogden, Associate Attorney General Perrelli, and Deputy Associate Attorney General Hirsch, and read all the emails and other documents between them and his Division? We don't know. Indeed, we don't know if he had any solid basis to testify why the decision was made to dismiss the suit or whether he was simply following a script.
[56] In a belated attempt to re-interpret what Perez really meant, the dissenting statement of Commissioners Melendez and Yaki claims that Perez and DOJ only cited the police for the truth of the factual matters they related. This is not a fair reading of Perez's testimony or DOJ's earlier correspondence for several reasons. The first is that the body of the police report is about 30 words long and does not relate any facts that exonerate Jackson or anyone else. The heavily redacted FBI report of one officer's statement does not support the dissent's theory either. For example, it does not say who the police interviewed besides the defendants so the cryptic responses about who was or was not intimidated are meaningless. The second problem is that Perez and DOJ did not point to any facts in the police report or FBI interview (the FBI interview is never even mentioned) that support Perez's conclusion that Jackson's "*actions* did not warrant his removal from the premises." Perez

Testimony of Christopher Coates and Christian Adams

Besides undermining DOJ's position and leading journalists to suggest he may have committed perjury, Perez's testimony did have one dramatic consequence: J. Christian Adams, who was a lead trial attorney on the NBPP team, submitted his resignation to the Department after listening to Perez's testimony, which he later explained was "inaccurate."[57] Since DOJ had forbidden Adams to testify and he still felt lawfully obligated to comply with our subpoena, he resigned his position first and then provided whistleblower testimony on July 6, 2010.

Former Voting Section Chief Christopher Coates, who led the NBPP trial team, was also distressed by Perez's inaccurate testimony. DOJ repeatedly forbade Coates to talk to the Commission. Coates later said he hoped, after Adams testified, that the Department would amend its representations to the Commission and Congress about what happened in the Panther case.[58] Based on additional contact between his private lawyer and the Department, it became clear this was not going to happen. Coates then decided to become a whistleblower and appear before the Commission at risk to his career, since he is still a Department employee.[59] The afternoon before he testified, Congressman Frank Wolf sent a letter to Attorney General Holder cautioning against interfering with Coates's testimony.[60] Instead, the Department sent an email to Coates late that night instructing him again not to follow-through with his plans.[61] Based on memos he sent and conversations he had with his superiors, the Department knew much of what he had to say. What was the Department trying so hard to conceal? We now know.

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and DOJ rely exclusively on the fact that the police allowed Jackson to stay as proof that he had done nothing wrong. Indeed, Perez went further, stating that "The [the local police] concluded that the activities did not rise to the level of intimidation. And that was certainly a fact that was a fact of relevance." Perez Testimony at 70-71. But there is absolutely nothing the police report or FBI interview that supports this factual claim. In the absence of something more, it is embarrassing at best for DOJ to cite the particular, local police action to support their federal law enforcement decision.

[57] Adams Testimony at 69.

[58] Coates Testimony at 92-93.

[59] Coates's background is summarized in the report on page 49:

> Before beginning his work at the Department, Mr. Coates served with the Voting Rights Project of the American Civil Liberties Union in Atlanta, Georgia. During his time there, he litigated cases on behalf of African-American clients, particularly those challenging at-large election procedures. In 1993 he argued a case before the United States Supreme Court on behalf of six African-American citizens in the local NAACP chapter in Bleckley County, Georgia. For his service with the ACLU he was awarded the Thurgood Marshall Decade Award by the Georgia Conference of the NAACP, as well as an award from the Georgia Environmental Association for his representation of African-American clients opposing the installation of a landfill in their neighborhood. Mr. Coates began his career at the Department of Justice in 1996 during the Clinton administration. During that administration, he was promoted to Special Litigation Counsel and served in that position until 2005.

[60] Letter from Congressman Frank R. Wolf to Attorney General Holder (Sept. 23, 2010).

[61] Daniel Harper, "DOJ, the New Black Panther Party, and Integrity," The Weekly Standard blog, Oct. 1, 2010, *available at* http://www.weeklystandard.com/blogs/doj-new-black-panther-party-and-integrity.

Coates and Adams both felt constrained to abide by the Department's highly questionable privilege claims with regard to the NBPP case deliberations and documents,[62] but they felt free to describe the prevailing attitude regarding suits brought against black defendants generally. Both Coates and Adams described a deep-seated culture within the Civil Rights Division that is hostile to race-neutral enforcement of the law.[63] They said there is a widespread belief that cases should not be brought against blacks or other racial minorities if the victims happen to be white. And they testified that this race-based approach to law enforcement is shared by current political appointees in the Civil Rights Division.

For example, Coates and Adams both testified that Deputy Assistant Attorney General Julie Fernandes stated in a meeting with Voting Section attorneys that the Obama administration *only* wants to bring "traditional" civil rights cases on behalf of minorities.[64] Coates testified that no one in the meeting had any confusion about what she meant: there would be no more cases like the NBPP case or the Ike Brown case filed against racial minorities.[65] Fernandes also said in another meeting with Voting Section attorneys that the Obama administration is not interested in enforcing Section 8 of the National Voter Registration Act, which requires states to take ineligible voters off voter rolls.[66]

The office statements attributed to Fernandes by Coates and Adams may be incredible to most Americans (perhaps this is why Vice Chair Thernstrom said it was impossible that Fernandes would "*announce that* … unless she is some sort of moron"),[67] but the alleged remarks are entirely consistent with statements Fernandes made when she was with the Leadership Conference on Civil Rights before she joined the Obama administration. Fernandes claimed that the Voting Rights Act was not written to protect all voters regardless of race:

> 'People are wondering why aren't you bring [sic] cases with voting and African-Americans—what is the issue,' said Julie Fernandes of the Leadership Conference on Civil Rights. 'How can it be that the biggest case involving discrimination in Mississippi [*United States v. Ike*

[62] Legal ethics rules provide that a lawyer may not reveal a valid client confidence (except under certain narrow exceptions) even after the representation is over. The Department had asserted that the deliberations over the NBPP case were covered by the attorney-client privilege, and while Coates and Adams might have agreed the assertion was wrongful, disclosing an *alleged* client confidence that did not satisfy one of the exceptions would have possibly subjected Coates and Adams to the expense and harassment of bar disciplinary proceedings.
[63] See Coates Testimony at 9-10, 16-18, 20, 23-26, 31 (Sept. 24, 2010); Adams Testimony at 47-50, 54-63, 65-67 (July 6, 2010).
[64] Coates Testimony 32-33; Adams Testimony at 63-64 (July 6, 2010).
[65] Coates Testimony at 33; *United States v. Brown*, 494 F. Supp.2d 440 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009).
[66] *Id.* at 33-36; Adams Testimony at 63-64.
[67] Commission Business Meeting Transcript at 24-25, August 13, 2010 (emphasis added). It is unclear whether Vice Chair Thernstrom found it difficult to believe someone at Fernandes's level at DOJ would believe such a notion or merely that it was hard for her to believe someone like Fernandes would "announce that" at DOJ.

> *Brown and Noxubee County*] was brought on behalf of white voters ... **The law was written to protect black people.**' [68]

Nor is Fernandes alone in this wrong-headed, race-based interpretation of federal civil rights law. Commissioner Heriot notes in her accompanying statement how common that race-based view of the law is in certain academic and activist circles. And Vice Chair Thernstom should not have forgotten that two former members of our Commission (including its former Chair, Mary Frances Berry) not only held such an erroneous view, they asserted that position in a report of this Commission:

> In their statement concerning *Stotts*, once again our colleagues in the majority insist on putting blinders on society concerning the tragic present and past effects of discrimination. **Civil rights laws were not passed to give civil rights protection to *all* Americans, as the majority of this Commission seems to believe. Instead, they were passed out of a recognition that *some* Americans already had protection because they belonged to a favored group; and others, including blacks, Hispanics, and women of all races, did not because they belonged to disfavored groups.**[69]

Fernandes was also publicly critical of laws designed to protect the integrity of the ballot box because of the disparate impact she thought these measures might have on minorities.[70] In short, Fernandes was not reluctant to publicly state her belief that the civil rights laws should only be enforced on behalf of certain minorities.

Because of DOJ's privilege claims, Coates and Adams both declined to reveal the content of conversations and arguments they had with the acting officers appointed by the Obama administration to head the Civil Rights Division (Loretta King and Steven Rosenbaum) when the NBPP case was dismissed, but Coates testified plainly and without equivocation that the reason they ordered the dismissal was because they harbored hostility to cases brought against black defendants.[71] Coates said that he would return and provide the

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[68] Steven Rosenfeld, "Is the Justice Department Conducting Latino Outreach on Behalf of the GOP?," AlterNet (Oct. 22, 2007) (second bracket and ellipsis in original; emphasis added), *available at* http://www.alternet.org/story/65749/.

[69] U.S. Commission on Civil Rights, Toward an Understanding of *Stotts* 63 (Jan. 1985) (Statement of Commissioners Blandina Cardenas Ramirez and Mary Frances Berry) (emphasis added).

[70] Sylvia A. Smith, "High Court to consider Indiana law on voter ID," Fort Wayne Journal Gazette (IN), Jan. 6, 2008 ("Julie Fernandes, an analyst with the Leadership Conference on Civil Rights, said voter ID laws are akin to poll taxes….") *available at* http://www.journalgazette.net/apps/pbcs.dll/article?AID=/20080106/NEWS03/801060306/1002/LOCAL; see also Hearing Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Committee on the Judiciary, 110th Cong. at 62 (Oct. 30, 2007) (statement of Julie Fernandes, Senior Policy Analyst and Special Counsel, Leadership Conference on Civil Rights) (criticizing voter ID laws and voter integrity initiatives by DOJ), available at http://judiciary.house.gov/hearings/printers/110th/38637.PDF.

[71] Coates Testimony at 23-24 ("It is my opinion that the disposition of the Panther case was ordered because the people calling the shots in May 2009 were angry at the filing of the *Brown* case and angry at the filing of the Panther case. That anger was the result of their deep-seated opposition to the equal enforcement of the Voting

relevant context and reasons for his conclusion if the Department waived its assertion of privilege or if the privilege claims were overruled in court. Yet, on November 12, the Department again refused to waive its alleged privileges and allow Coates to testify about the conversations he had with King and Rosenbaum regarding the NBPP dismissal. Thus, the Department should not be heard to complain about the lack of detail in the attorneys' conclusions regarding the NBPP case itself.

Nevertheless, Coates's conclusion that the hostility to race-neutral enforcement of the laws is widespread in the Division is illustrated by many anecdotes he and Adams described. They provided example after example of unequal treatment or racial bias, including harassment of black employees who worked on a case in which the defendants were black. As background, the Ike Brown case was a voting rights suit brought by Christopher Coates, Christian Adams, and a few other attorneys in the Voting Section in 2005 against the leader of the Democratic Party in Noxubee County, Mississippi, which is a majority-black county. The defendants in the case were black and the victims were both black and white voters. DOJ won the case in district court and it was affirmed by the Fifth Circuit. Among other incidents, Coates and Adams described the following:[72]

- Several attorneys refused to work on the Ike Brown case. At least one attorney stated, "I'm not going to work on the case because I didn't join the voting section to sue black people."
- Joseph Rich, a former Voting Section chief, doctored a memo from Voting Section lawyers to senior Division staff, changing their recommendation to file the Ike Brown lawsuit to the opposite recommendation, due to Rich's hostility to race-neutral enforcement of the voting laws.
- Mark Kappelhoff, the chief of the Criminal Section, at a meeting of the chiefs of the Civil Rights Division, allegedly stated about the Ike Brown case, "That's the case that has gotten us into many problems with the civil rights groups."
- Coates testified that Robert Kengle, deputy chief in the Voting Section, stated to him during a trip to investigate the Ike Brown case, "Can you believe we are being sent down to Mississippi to help a bunch of white people?" Kengle recently admitted that he complained about the trip and said something like that. While he invents a wholly implausible relative-racial-need-theory excuse for his complaint, his own statement makes him sound culpable, and his newly-invented excuse has now been refuted.[73]

Rights Act against racial minorities and for the protection of white voters who had been discriminated against.").

[72] See Interim Report at 51-56. See also Coates Testimony at 13-18, 105-06.

[73] See Letter from Hans A. von Spakovsky to the Honorable Gerald A. Reynolds (Oct. 28, 2010), *refuting* Declaration of Robert A. Kengle (Oct. 18, 2010) (both are available on the Commission website). Although Kengle says he does not remember the precise words he used, he admits that he was upset that he was sent to Mississippi to monitor the local Democratic primary and he complained about it to several people, not because that trip would help whites—per se—but supposedly because there were relatively more deserving reports involving minority voters that were not being addressed. Kengle Declaration, ¶¶ 4-5. Kengle also states that he did not explain this relative-racial-need-theory for his complaints at the time because, in essence, Republican supervisors were against him. *Id*. at ¶ 5. So by his own admission, he complained about being sent to Mississippi to protect white voters, but only because he privately knew he was needed *more* to protect minority voters. Although Kengle's belated excuse for his righteous-sounding anger seems questionable on its face (especially given the serious allegations of voter fraud in the Ike Brown case), it can't stand up to even casual

- Attorneys in the civil rights division allegedly told Adams that "until blacks and whites achieved economic parity in Mississippi, we had no business bringing this case."
- A similar comment about economic parity was made by a career attorney to Mr. Coates.
- Adams testified that a non-lawyer minority employee at the Department was "relentlessly harassed by voting section staff for his willingness as a minority to work on the case of *United States v. Ike Brown*."
- Coates testified further that the minority employee's mother, who worked in another section of the Division/Department, was also harassed because her son worked on the Ike Brown case.
- Adams testified: "Others assigned to the case were harassed in other ways, such as being badgered and baited about their evangelical religious views or their political beliefs. In these instances, the victimized employee was openly assumed to espouse various political positions hostile to civil rights, simply because he worked on this case."
- Adams also testified: "There was outrage that was pervasive that the laws would be used against the original beneficiaries of the civil rights laws. Some people said 'we don't have the resources to do this. We should be spending our money elsewhere.' And that was how they would cloak some of these arguments."
- In another instance, "[a]nother deputy in the section said in the presence of Mr. Coates, 'I know that Ike Brown is crooked, and everybody knows that, but the resources of the division should not be used in this way.'"

Several of these detailed anecdotes were corroborated by both Coates and Adams, by other sworn affiants, or by an admission of someone who uttered the statement. In addition, Coates and Adams were able to relate troubling incidents concerning King and Rosenbaum that are not client confidences. The first, involving Rosenbaum, is that he did not even bother to read the comprehensive legal memo prepared by the trial team on the NBPP case before he made up his mind to dismiss the charges.[74] Given the sequence of events that led to the confrontation in question (see the full narrative in the body of this Interim Report), it certainly undermines the claim that he was interested, and only interested, in the objective

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scrutiny. As Hans von Spakovsky's letter explains—and the press releases he attaches from DOJ's website prove—DOJ greatly expanded the number of federal election monitors in 2002 (over the previous mid-term election) and in 2004 (compared to 2000). In 2004, for example, DOJ supervised 162 elections in 105 political subdivisions in 29 states with a total of 1,463 federal observers and 533 Division personnel. This was a dramatic increase (2.5 times the Clinton Administration figures for the 2000 general election) and shattered the previous record. With the exception of a few sent to Noxubee County, Mississippi between 2003 and 2006, all of the remaining observers were sent to protect the rights of racial, ethnic, and language minorities. So the truth is that Kengle was upset that *any* observers were sent to protect the rights of white voters, because any is relatively too many. How else can one explain his claim that the first and then only deployment to protect white voters (of a handful of observers) was relatively too many and a doubling of federal observers (by many hundreds) to protect against perceived threats to minority voters was too low of a percentage? Apparently to Kengle, less than 1% of staff assisting white voters is too many. That sure seems like a racial double standard to me. See also note 81, for why the dissenters' attempt to dismiss von Spakovsky's letter is sadly misguided.

[74] Adams Testimony at 30.

facts and law governing the case. It strongly suggests something other than the usual facts and law were at play.

The incident involving King followed from the refusal of some Voting Section staff to work on the Ike Brown case and the harassment of other Section staff who agreed to do so. After he secured a victory in that case, Coates began asking job applicants whether they would be willing to work on other cases brought on behalf of white victims against minority defendants. He said no one ever expressed any discomfort with the question or answered negatively. Yet, Coates testified that when Loretta King was appointed acting head of the Civil Rights Division in the Obama administration she told him that he must stop asking that question.[75] From his years working with King and her behavior in the NBPP and Ike Brown cases, Coates said he knew why the order was given: King does not believe in "race-neutrality" or the "equal enforcement of the provisions of the Voting Rights Act," and thus, she didn't want to exclude people who thought like her.[76]

Conclusion

Loretta King was unquestionably involved in the decision to dismiss the NBPP suit as acting head of the Division (she now is a Deputy Assistant Attorney General for Civil Rights under Thomas Perez). I asked Perez if he thought it would taint a decision to file or dismiss a case against a minority defendant if the decision-maker did not believe the voting rights laws should be applied against minority defendants. Perez refused to answer the question, claiming he had no people "of that ilk" in his Division. But the sworn testimony before the Commission is that Loretta King is of that ilk. The same testimony implicates Steven Rosenbaum, currently Chief of the Housing and Civil Enforcement Section, and Julie Fernandes, Perez's Principal Deputy Assistant Attorney General. And what about other senior political appointees in the Department who were involved in dismissing the NBPP suit?

Until the Department produces the relevant emails and documents from the decision makers about their basis for dismissing the NBPP case, reasonable people will draw the logical conclusion from the objective facts (that the case was very strong and should not have been dismissed), from the lack of a plausible rationale to the contrary, from the unprecedented stonewalling, from the claims of privilege that would make even Watergate figures blush, and from the detailed and credible allegations of wrongdoing by Coates, Adams, and other affiants.

Even so, neither Coates nor Adams has been allowed to tell his whole story. On October 13, 2010, the Commission asked the Attorney General to waive any alleged privilege, given the credible allegations of wrongdoing; produce the emails in the Judicial Watch email log; produce any documents that Coates and Adams wrote, especially those written on or about April 26 and May 10 to help Thomas Perez prepare for his testimony before the Commission; and allow Adams, Coates and other DOJ employees with

[75] Coates Testimony at 20.
[76] Coates Testimony at 19-21.

information about possible malfeasance to testify freely to the Commission.[77] All those requests were denied on November 12, 2010.

Nevertheless, I hold out hope that the Attorney General will review the record of the Commission's investigation and do the right thing by putting an end to the obstruction and ordering the Department to "cooperate fully" with the Commission as federal law requires.

While the Commission and others pursue this important inquiry, I also urge Attorney General Holder to issue a formal memorandum to all Department employees that they shall not make law enforcement decisions based on the race of the defendants or victims. I also believe that if there is a serious question about whether someone has made statements indicating they are opposed to such a directive, the Department should relieve the officer or employee of law enforcement responsibilities until a thorough investigation of the matter is concluded.

Rebuttal to the Statement of Commissioners Melendez and Yaki

The usually clever statements of Commissioners Melendez and Yaki follow an unfortunate pattern of interposing process objections after the report is completed that were never raised during the investigation. Yet, their joint dissent this year is even more revealing in what it does not address:

- The compelling testimony from DOJ whistleblowers that there is a pervasive hostility to the race-neutral enforcement of the law within the Civil Rights Division as well as incidents of harassment and intimidation of those who have tried to enforce the civil rights laws in a race-neutral manner.
- The refusal of DOJ to cooperate with the investigation and turn over the most important documents, emails, and witnesses—and the logical inferences that follow from such conduct.

The entire premise of the joint dissent is this: if they can come up with a plausible explanation why DOJ might have dismissed the NBPP voter intimidation claims, then the Commission was wrong to seek the actual reason for DOJ's actions. Although their attempt to come up with a plausible rationale for DOJ's actions is counterfactual and unconvincing, their approach is still more suited to a pro-administration pundit than members of the Commission with the responsibility to evaluate the actual law enforcement decisions made by DOJ. The dissenters assert that they "did not interpret all evidence in light of any foregone conclusions." That seems doubtful, but it is far more significant that they labored for 16 months to prevent the most important evidence from coming to light that could be subject to *any* interpretation.

1. DOJ Enablers.

In the main, the dissenters aided and abetted DOJ's stonewalling, for whatever reason, time after time. They voted against official letters that merely requested critical

[77] These are contained in two letters from Commission to Attorney General Holder (Oct. 13, 2010).

documents and witnesses. They opposed the original proposal to subpoena and depose any witnesses—although they now complain the Commission did not formally depose some who they secretly wanted deposed. It is certainly possible to oppose the original investigative plan yet provide constructive suggestions to improve it, but that is not a fair characterization of their efforts. The transcripts of our monthly meetings show that, from September 2009 to the present, they opposed almost every single request or other effort to obtain DOJ documents, emails, and DOJ witnesses.

There is a confused footnote in the dissent questioning why the Commission majority was interested in whether the President had invoked executive privilege,[78] but there is not even the flimsiest attempt by the dissent to justify DOJ's refusal to produce the most relevant evidence to the Commission. The dissenters even opposed the Commission's letter renewing its request for an index of the documents and emails that were withheld. Why didn't they at least want to know the nature of the documents being withheld? Were they afraid of what that would reveal?

There is no attempt in the joint dissent to defend DOJ's spurious claims of privilege, which makes sense since there is no lawful defense. On the merits of the original dismissal, the dissenters spin long-winded, counterfactual, Republican conspiracy theories DOJ never advanced, but even the dissenters are silent on DOJ's refusal to produce critical evidence. Given the nature and seriousness of the discovery disputes, the dissent's silence is quite telling.

It is even more disappointing that the dissenters, while purporting to keep an open mind, opposed almost every effort (and made no effort themselves) to secure the information from DOJ that would have tended to prove or disprove DOJ's assertions. The Department's statutory obligation to produce requested information to the Commission has no exception. All commissioners should have assisted the Commission in securing that evidence from DOJ, whatever interpretation they later placed on it. But the dissenters, who now seem interested in the most tangential minutiae about Republican poll watchers, would not join in requesting the emails from Steven Rosenbaum, Loretta King, Sam Hirsch, and others in DOJ that go to the heart of the matter the Commission has the duty to investigate: the actual reason for the law enforcement decisions at issue and whether they were well founded or illegitimate.

Even if the dissenters only objected to the form of the Commission's requests for information (which is implausible since they never offered substitute language), they also

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[78] Perhaps the dissenters would have understood why the Commission wanted to know whether executive privilege had been invoked if they read the official correspondence between the Commission and DOJ, instead of reflexively opposing every letter after August 2009. Although the reason the Commission was interested in that question is set forth in more detail in the Interim Report and this statement above (in the absence of an invocation of executive privilege, there is not even a colorable basis for DOJ to withhold information from the Commission), it was first articulated in a five-page letter sent with the first interrogatories and formal requests for production of documents from the Commission to DOJ. See the Letter from David Blackwood to Joseph Hunt, Director, Federal Programs Branch, DOJ (Dec. 8, 2009) on the Commission's website. That letter was frequently referenced in later correspondence from the Commission, for example, as a reminder that the Commission had asked for an index of withheld documents if DOJ continued to withhold them.

never sent their own letters asking for the same or similar information. Instead, they expended lots of energy and time at Commission meetings opposing the requests that were made.

2. See No Evil, Hear No Evil, and Speak *of* No Evil.

The most telling omission from the dissent, however, is almost any mention of the sworn testimony by Christopher Coates and Christian Adams of the repeated instances of harassment and intimidation of anyone in the Civil Rights Division (including minority staff) who was willing to work on voting rights cases involving minority defendants. As the Interim Report, this statement and those of Commissioners Kirsanow and Heriot detail, the testimony is both quite detailed and consistent. It was corroborated by other sworn affidavits received into evidence.

It is also corroborated by various news accounts, including racialist statements obtained from Civil Rights Division officials during an investigation by *The Washington Post*.[79] Indeed, a fair-minded reader of the *Post*'s front-page investigative reporting would conclude from that newspaper alone that there are attorneys in the Civil Rights Division who are hostile to the race-neutral enforcement of the law. That harassment was directed against those who did not share this caustic approach is also chronicled by the *Post* reporting and provides a strong reason to believe that decisions by those who hold such a racial double standard would be tainted in a case involving black defendants.[80]

Other than one sad attempt to soften the import of a troubling statement by Robert Kengle,[81] the joint dissent makes no effort to dispute the many other anecdotes regarding harassment or intimidation of those who would enforce the civil rights laws in a race-neutral manner. Nor does the dissent address the conclusion that the hostility to race-neutral enforcement of the civil rights laws is widespread in the Civil Rights Division, the evidence that Loretta King and Steven Rosenbaum share that hostility, and the direct, unequivocal

[79] Jerry Markon and Krissah Thompson, "Dispute over New Black Panthers case causes deep divisions," The Washington Post, p. 1, Oct. 22, 2010; see also Jerry Markon, "Civil rights panel postpones vote on New Black Panthers report after members walk out," The Washington Post, Oct. 29, 2010 (describing DOJ obstruction).

[80] The sworn affidavits and public testimony that was subjected to cross examination by the Commission are more valuable evidence, but for those who distrust the Commission, the *Post*'s investigative reporting is hard to dismiss.

[81] The dissent suggests that Hans von Spakovsky's Oct. 28, 2010 letter and all its attachments, see note 73 and accompanying text, which renders Robert Kengle's statement even more troubling, should be ignored because the letter is not sworn. Putting aside Commissioner Yaki's unfair personal attacks on von Spakovsky that arise from time-to-time, the dissent's attempt to dismiss his factual recitation just draws more helpful attention to it. I am confident von Spakovsky (who is my think tank colleague) would be willing to swear to the factual matters contained in his letter, but it should be noted that the dissenters have never asked that DOJ letters be disregarded because they are unsworn. The creative reason for the dissent's special rule is that von Spakovsy's letter responds to a sworn statement, but many DOJ letters also respond to sworn statements of our witnesses. And as a matter of logic, factual letters can refute sworn statements. Indeed, von Spakovsky's Oct. 28, 2010 letter almost exclusively reports factual matters and attaches DOJ press releases that are subject to independent review. I suspect the dissenters have already verified the factual matters in von Spakovsky's letter that thoroughly undermine Kengle's declaration, and that is why they attempt to dismiss it with a phony form argument rather than address its substance.

testimony that this was the reason King and Rosenbaum dismissed most of the claims in the NBPP voter intimidation lawsuit.

Because these allegations of racial double standards in law enforcement are so damning and so thoroughly undermine the central purpose of the Civil Rights Division, the absence of any analysis of them by the dissent would lead a reasonable person to conclude they have no basis to question the allegations, and they simply hope to distract as much attention from them as possible. Thus, their entire dissent has an Oz-like quality, in which the Dissenters-of-Oz invoke manufactured flames and floating faces involving irrelevant or insignificant issues, and then when the curtain of racial double standards is drawn back by the whistleblowers' testimony, they say nothing more than "pay no attention to the [DOJ wrongdoers] behind the curtain." Indeed, the analogy also fits Vice Chair Thernstrom, who at least claims to be interested in the question of whether racial double standards exist in the Civil Rights Division, but instructs everyone, as the Wizard of Oz did, to "come back tomorrow" when DOJ will tell us what to think.

Let us assume, only for the sake of argument, that the dissenters' central claims are correct, namely that: (1) there could have been a plausible reason why someone might have dismissed most of the NBPP voter intimidation lawsuit, and (2) the Commission was wasting its time trying to find out what the real reason was. Ignore also that the second proposition doesn't necessarily follow from the first. Even by their strange logic, however, the Commission still stumbled upon sworn testimony and other evidence of a pervasive culture of hostility to the race-neutral enforcement of the civil rights laws in the Civil Rights Division and possibly with other more senior DOJ officials who were involved in the NBPP dismissal. Why ignore that evidence?

Instead of confronting the unequivocal testimony that the NBPP claims were dismissed because the decisionmakers imposed a racial double standard—or seeking critical evidence from DOJ that could prove or disprove that most troubling allegation—the dissenters seem desperate to invent a new rationale that could have been a basis for someone to dismiss the case. The most important evidence of why the claims were dismissed might be in the emails that were sent by those heavily involved in the dismissal decision (Sam Hirsch, Steven Rosenbaum, and Loretta King) or the testimony of other witnesses about the deliberations regarding the decision (even Coates and Adams have not testified about that). But when DOJ does not deny that the specific racialist statements and troubling, race-based instructions were uttered, there is much less reason to doubt the basic truth of Coates's and Adams's testimony regarding the existence of a racial double standard. Given that, the dissenters' effective silence on the alleged guarantee of *un*equal justice (the most important issue the Commission has confronted in years) is deafening.

3. Belated Process Objections.

Turning to the heretofore secret process objections in the joint dissent, it's difficult not to overstate how silly they are without falling prey to their attempt to distract attention from the DOJ wrongdoers behind the curtain. Nevertheless, a brief rejoinder is possible.

First, and perhaps most importantly, the transcript of our September 11, 2009 meeting adopting the statutory report topic shows that Commissioner Yaki was asked to serve on the Discovery Subcommittee with Commissioner Kirsanow and me, but he refused to do so.[82] Although Commissioner Melendez was not in the room for part of the discussion (he had earlier walked out of the room with Commissioners Yaki and Thernstrom in an attempt to defeat a quorum), Commissioner Yaki reported that Melendez also was not willing to serve. The motion to create the Subcommittee was then amended to allow either Democratic commissioner to join the Discovery Subcommittee at any time they so chose.[83] Neither one ever did.

According to the investigative plan adopted by the Commission, the Discovery Subcommittee would advise the Chairman and General Counsel regarding what evidence to pursue and in what order, and to raise other discovery issues with the full Commission. If Commissioners Melendez or Yaki were really interested in providing constructive advice on what witnesses to depose and what evidence to obtain, they had a very effective way to do so. Instead, they refused the request to serve—preferring instead to withhold any constructive input into the discovery process and creating the wholly self-fulfilling accusation that the investigation lacked "bipartisan" support.

Even so, most of the witnesses the dissenters say they want to hear more from were interviewed by the Commission General Counsel.[84] The dissenters never asked for them to be deposed until after the report was adopted. Assuming that deposing them might have provided some slight additional evidence and that the expenditure of time and money justified the effort, the dissenters should not be heard to complain now if they didn't request it earlier. This follows the pattern from prior years. Last year, they dissented from the Commission's report on the mortgage crisis, in part, because they said a steering hypothesis was not adequately explored, but which they never raised until after the report was adopted.[85]

The dissenters also complain about the expense of the investigation, even though the expense has been less than previous years' statutory report projects.[86] It is odd they did not want to subpoena important DOJ officials who actually made the decisions at issue, but they now say we should have flown attorneys to Denmark to depose a videographer who taped the incident in Philadelphia in 2008.[87] More importantly, they have not joined the Commission

[82] Meeting Transcript at 61-62 (Sep. 11, 2009).
[83] Id. at 68-70.
[84] The General Counsel or his staff interviewed Wayne Byman, Joe Fischetti, and Mike Roman.
[85] See Statement of Gaziano, Reynolds, Kirsanow, and Taylor, U.S. Commission on Civil Rights, Civil Rights and the Mortgage Crisis, 217 (Sept. 2009), *available at* http://www.usccr.gov/.
[86] For fiscal year 2010, the Commission spent approximately $173,000 on the investigation and Interim Report, most of which were salaries to Commission employees. The cost to both the Commission and DOJ likely would have been less if DOJ hadn't expended so much effort fighting the inquiry. The Civil Rights Division budget for FY 2010 was $145.4 million. The Division has 815 positions with 399 attorneys. The Voting Section alone has 118 positions and 43 attorneys. Yet, the Section has filed a total of only four lawsuits under the Voting Rights Act in the past two years, only one of which is still being litigated. I suspect a further examination of Division's cost effectiveness would not be impressive compared to the Commission staff who worked on the NBPP investigation.
[87] The videographer, Stephen Morse, told Adams he was only on the scene in Philadelphia for 15 minutes, so it is doubtful he would have provided much useful information compared to those who where there longer.

in seeking to obtain the original written witness statements the DOJ has for these individuals, which are still being withheld. Those statements are even more relevant for the Commission's investigation than what the same witnesses might say now because it is more important to understand what DOJ officials knew or should have known at the time they dismissed the suit than to play CSI-style detective to develop a new rationale for DOJ's actions.[88]

It is highly doubtful these marginal witnesses would add anything significant to the other eye-witness accounts (the conspiratorial interpretation of an extra minute of the Philly video tape in the dissent is reminiscent of those questioning the Warren Commission's lone-gunman finding with novel, frame-by-frame analyses of the Zapruder film).[89] Nevertheless, I would support the new Commission majority if it continued the investigation and sought the witness statements and more relevant evidence from DOJ on what their actual reasons were for dismissing the NBPP claims. Otherwise, arguments about these extraneous witnesses are simply red herrings to distract attention from the Commission's central inquiry regarding why DOJ officials ordered the dismissal, and specifically, whether they were motivated by a race-based vision of civil rights enforcement.[90]

Finally, the Commission did more than enough to confirm that the original allegations in the complaint were well founded. Beyond that, it was incumbent on DOJ to explain its actions, not on the Commission to disprove every possible theory that might have motivated its actions.

4. Grasping at Straws.

Some of the remaining factual and quasi-legal claims in the dissent are hard to fathom, except as a further attempt to distract attention from the serious allegations of wrongdoing and the troubling evidence that current supervisors and political appointees in the Civil Rights Division think a racial double standard should apply in the enforcement of

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Moreover, any deposition outside the United States would have had to be voluntary, if it could have been conducted at all.

[88] DOJ has refused to provide the witnesses statements for any of the witnesses sought by the dissent, including Wayne Byman, Joe Fischetti, Stephen Robert Morse, Harry Lewis, and Justin Myers. There is reason to believe witness statements exist for at least some of them because sworn declarations were prepared for some. Since DOJ won't even provide a list of withheld documents it is impossible for us to know what statements exist.

[89] Prior to the April 23, 2009 hearing, the Commission General Counsel screened the longer National Geographic documentary film that featured the NBPP defendants and two complete videos taken of the scene in Philadelphia. All three were received into evidence in full, but only the most relevant excerpts were shown during the April 23 hearing. To ascribe some ulterior motive to the decision to show only an excerpt of two of the videos at the hearing is absurd. If the dissenters thought other portions of those tapes were highly relevant, they could have drawn it to everyone's attention. Neither they nor the DOJ witness who testified the following month did so, and no one did so for the next six months. Indeed, the dissenters could have asked the full clip to be played at any subsequent hearing or business meeting from April 23 through December 3, 2010. In any event, the complete tape has now been posted on the Commission's website for all to see that there is no there there.

[90] In addition to the documentary and email evidence that DOJ has refused to produce thus far, it would make sense next to hear the unrestricted testimony from Coates, Adams, others on the trial team, and perhaps others at DOJ. It is also safe to assume that if the DOJ had cooperated with our investigation, we would be in a much better position to know by now whether re-interviewing these witnesses would add any value.

civil rights laws. Nevertheless, here are quick reactions to some of the dissent's peculiar arguments:

- The dissent claims that the J-memo "badly inflates the evidence in the trial team's possession," but how do they know the opposite is not true? DOJ refused to produce the trial team's evidence. The dissent also tries to diminish the Division's Appellate Section's conclusions because those attorneys believed that evidence existed to back up the J-memo. The evidence discussed in the J-memo is strong enough for the career Appellate Section lawyers to conclude that the claims should not have been dismissed against any defendant, but it is also likely from the language of their memo that the Appellate Section's lawyers knew of other evidence that has not yet been produced.
- The dissenters continue to assert in part IV of their statement that "no actual voters were intimidated." *Attempted* intimidation of voters or poll watchers also violates the Voting Rights Act, so it wouldn't matter if they were right. And yet, they are wrong. They are so wedded to their false talking point that they ignore the two witnesses who testified seeing voters turn away from the polls in Philadelphia and the two others who reported seeing voters hesitate and act apprehensively about entering the polling place. Perhaps the dissent would continue to deny that voters were turned away or were intimidated if the proverbial "twenty bishops" so testified, but four uncontroverted eyewitnesses should be enough.
- The dissenters also periodically assert there is "no evidence of" or "no proof for" some other proposition, but the Commission knows no such thing. The Commission still has little knowledge of what evidence exists, except for three memos that were leaked to Congressman Frank Wolf and subsequently provided to the Commission. It would be nice if we had all the trial team's evidence and exhibits that were being prepared for trial as well as the emails relating to the decision to dismiss the claims. We don't even know whether there are hundreds or thousands of pages of *relevant* evidence on the NBPP decision,[91] even ignoring the evidence of harassment of those who rejected a racial double standard in law enforcement. We also don't know what the trial team might have been able to discover had the case been allowed to proceed to an evidentiary hearing.[92]
- What the dissenters must mean is that they can think of no evidence supporting some proposition they want to question. Commissioner Yaki's emphatic claim in November 2010 that no witness ever claimed voters were turned away (ignoring two such witnesses) shows that at least his grasp of our record is fairly spotty. But since the most relevant evidence is being withheld by DOJ, the absence of evidence in our record doesn't mean it does not exist.
- It's highly doubtful Christian Adams thought he literally "needed" to find a Republican or minority poll watcher to say that he or she was intimidated (people often express their wants as needs, as in "I need another cookie"). Voter intimidation does not require a partisan or racial component or motive, and any voting rights litigator would know that.
- It makes absolutely no difference if Adams once did believe he needed a Republican or minority witness to make his case because the allegations in the complaint were more

[91] The thousands of pages of marginal or irrelevant material DOJ did produce are described in note 35.
[92] For example, Christian Adams testified he had some leads regarding complaints that NBPP members were present at the Democratic primaries intimidating supporters of Hillary Clinton. See Adams Testimony at 22 (July 6, 2010).

than sufficient to state a strong cause of action for voter intimidation under the Voting Rights Act.

- The J-memo shows that Adams understood that Angela and Larry Counts were "African-American poll watchers *for* the Republican Party" even if he or others used the ambiguous term "Republican poll watchers" at times. Indeed, Adams knew they were registered Democrats, but it makes absolutely no difference if he didn't know that. The testimony is that the Countses told Joe Fischetti that King Samir Shabazz had called them "race traitors" and threatened them "if they stepped out of the building." The bare threat was enough to violate § 11(b), without any partisan issue involved. Beyond that, the supposed affront that motivated the threat from Shabazz was that they were blacks who worked for the Republican Party. It is possible Shabazz would have thought them even worse "race traitors" if he learned they were (black) Democrats working for the Republican Party.
- It is disappointing that DOJ selectively produces a few emails it thinks will help its story and withholds the rest, but the dissent's interpretation of Adams's emails is highly implausible. A good litigator is always looking for more evidence to bolster even a strong case, and those who communicate that they are especially eager to obtain such additional evidence are more likely to get it. The dissent's idea that Adams was "desperate" is itself desperate.
- From the few emails released, it is difficult to determine whether Adams was in more of a rush to obtain evidence in support of the NBPP lawsuit than usual (as the dissent surmises) or if that is his normal energetic style. For example, Adams testified that he doesn't "ever leave any stone unturned on these kind of cases."[93] But if Adams was trying to act more expeditiously than usual, that would make perfect sense given his knowledge of the harassment of those who worked on the Ike Brown case and the possibility that the incoming administration might appoint political supervisors who also were hostile to suits against minority defendants.
- The dissent also attempts to nitpick several statements and alleged actions by Bartle Bull, Chris Hill, and Mike Mauro, desperately trying to manufacture a Republican conspiracy theory to explain why voters might have turned away from the polls (other than the presence of the Panthers in paramilitary garb swinging a weapon in front of the door). Yet, all of this imaginative ground could have been covered in questions posed by the dissenters when Bull, Hill and Mauro appeared at our hearing to testify. It was not. The conspiracy theory is unsupported and fanciful, but it also suffers from the fact that the creative minds who dreamed it up did not think it sufficiently credible to raise with the supposed bad actors or at any of the other three hearings conducted by the Commission.[94]

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[93] Adams Testimony at 22 (July 6, 2010).

[94] The dissent also falsely alleges that "the Majority abused its powers and limited [the dissenters'] ability to question witnesses." The time limits for questioning hearing witnesses were scrupulously fair, and it was only during Coates's hearing that Chairman Reynolds heard any disagreement about when to end the questioning. The record of that hearing shows that both Commissioner Yaki *and I* wanted another round of questioning. Far from abusing his authority, Chairman Reynolds ultimately yielded to our dual requests with a compromise agreement among all commissioners as to how much extra time Commissioner Yaki and I would receive. See Hearing Transcript at 135-39 (Sept. 24, 2010). But former Chairman Reynolds surely knows by now that no good deed goes un-misrepresented.

5. The Blame Bush Ploy.

Finally, the dissenters have raised, in a rather slipshod manner, other allegations of voter intimidation during prior administrations in which no lawsuit was filed. It might not be worth responding to the dissent on these careless assertions, except that Assistant Attorney General Thomas Perez and some left-wing bloggers have also chimed in on this theme.

The most obvious response is that even assuming the characterizations of these other incidents were true, that would hardly be a defense to dismissing the NBPP case. Nevertheless, I have frequently expressed interest in comparing the NBPP facts and disposition with other cases and past DOJ investigations. The Commission actively sought such information in the investigative plan I proposed 16 months ago. Needless to say, the Commission is seriously disappointed with the inadequate response from DOJ on these other incidents. More certainly could have been produced on these other alleged incidents because I discovered more from informal sources (including newspaper stories) than DOJ provided from its records.

One relevant point of comparison is a section 11(b) victory by DOJ in February 1992 that the dissent briefly mentions. A sweeping injunction was secured against the North Carolina Republican Party and the Helms for Senate Committee because some of their staff mailed thousands of postcards that erroneously stated that voters must have lived in the precinct for at least 30 days previous to the election to be eligible to vote.[95] This precedent is relevant for four reasons. First, it undermines the "hyper-partisan-Republicans-did-the-same-thing" claim, since the case was filed and won during a Republican administration against a state Republican Party. (Clinton was elected in late 1992.) Second, it shows the Republican-led DOJ interpreted section 11(b) very broadly so that even false or misleading postcards were equated with "intimidation," and a federal judge readily upheld that interpretation.[96] Third, DOJ during that time period had no qualms about seeking a sweeping, state-wide injunction against the Republican Party on a vicarious liability theory (i.e., the Party was liable because of the individual actions of its officers and/or employees) even though there was no Party policy to send misleading postcards. Fourth, Steven Rosenbaum was one of the DOJ attorneys who secured the state-wide injunction against the Republican Party even in the absence of evidence the Party had an official policy of sending false or misleading postcards, but based purely on the actions of a few of its alleged agents.

The dissenters and Thomas Perez also cited an incident from Arizona in 2006. The allegation is that in Pima County, Arizona three men affiliated with the Minutemen intimidated Latino voters "by approaching several persons, filming them, and advocating and printing voting materials in Spanish," with one of the men carrying a gun. Depending on other facts, the alleged behavior certainly might violate § 11(b). One report says that the man

[95] *United States v. North Carolina Republican Party et al.*, No. 91-161 (E.D.N.C. filed Feb. 26, 1992).
[96] The dissent seems to argue, without any real analysis, that false postcards are more intimidating than live, racist thugs, in paramilitary uniforms, moving in concert, yelling racial epithets, and swinging nightsticks about ten-feet in front of the only door to a polling place. Even if that were so (?!), that does not mean the NBPP conduct was lawful.

carrying the gun never came within 150 feet of a polling place, had a permit to carry his gun, and never interacted with any voters.[97] That paints a different picture.

Christopher Coates testified that a DOJ attorney was sent to Pima County in 2006 to investigate the allegations.[98] Coates didn't remember much of the evidence adduced, except that he thought there was no evidence the men had entered the prohibited space around the polling place; nevertheless, he added that "anything that happens in a polling place that might keep voters from voting is a serious, serious matter."[99] He also explained that DOJ subsequently sent observes to Pima in 2008, based in part on the earlier report.[100]

It is curious Commissioner Yaki would try to obtain the relevant evidence from a man (Coates) who had been shipped off to South Carolina months earlier, did not have possession of the DOJ files, and was using vacation days from work to testify as a private citizen. DOJ should have produced the entire case file and identified those who conducted the investigation so that we might learn what evidence DOJ was able to obtain on the incident, rather than hear the one-sided and misleading snippets from Perez and other activists. All that DOJ produced was a news article, a short memo referencing the article and ordering a preliminary investigation, and a "Notice to Close File." What about all that which logically came between the first memo and the "Notice to Close File?" Surely there are memos from the attorney sent to investigate the matter, perhaps witness statements, possible pictures of the polling place, emails, and other material.Why withhold this old evidence from a now time-barred case from the Commission?

Another old allegation is that armed Mississippi state police investigating possible voter fraud in municipal elections entered elderly people's homes and asked them who they voted for, even though it is against state law to ask that question. If true, this could violate section 11(b). But the Department has produced even less on this incident regarding what evidence exists that the alleged conduct took place. Some reports are shown to be false. Some lead nowhere, even if diligently pursued. Some are not reported to DOJ. What was the evidence supporting the allegations in Mississippi? What did DOJ know and when did it know it?

In short, the strength of possible charges for the Arizona and Mississippi incidents are very unclear. It appears DOJ did not have a video of the alleged conduct in either case. The nature of any witness testimony is unknown. And in neither matter did DOJ file a strong case and then unilaterally dismiss it after a default was entered against the defendants. Nevertheless, I would still like to learn more about the strength of the evidence and the decision-making process in the Arizona and Mississippi incidents. I certainly wish DOJ had done a professional job of producing the evidence relating to these incidents, rather than

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[97] See Quin Hillyer, "First Democratic Congressman Calls for Charges Against Black Panthers," Washington Times Water Cooler, July 27, 2010, *available at* http://www.washingtontimes.com/blog/watercooler/2010/jul/27/firstdemocratic-congressman-calls-charges-against/.

[98] Coates Testimony at 88.

[99] Coates Testimony at 92.

[100] Coates Testimony at 88.

misleading the Commission (in sworn testimony) concerning what it actually knew about them.

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Statement of Commissioner Gail Heriot
Joined by Commissioners Kirsanow and Gaziano

The lawsuit underlying this investigation—*United States v. New Black Panther Party*—has been called "very small potatoes."[1] And although I might hesitate to describe a case involving fundamental voting rights in quite those terms, in some ways it was indeed small. This was not a case requiring an army of government lawyers to litigate.

But sometimes the smallest cases are the most revealing. While a large case can be so complex that it obscures the enforcement policies that underlie it, a simple case can function like a well-crafted law school hypothetical, laying bare those policies as well as the attitudes and biases of the policymakers behind them.

When the Commission decided to conduct this investigation as its annual statutorily-mandated enforcement report, I hoped and believed that it would shed useful light onto the Civil Rights Division's behind-closed-doors enforcement policies—policies that some had feared lack race neutrality. I have not been disappointed.[2] At this point, even Commissioner Michael Yaki, one of the investigation's most vituperative critics, has publicly admitted that some of the allegations of racial favoritism we have uncovered, if true, are very disturbing. Specifically, he said that if the allegations against Deputy Assistant Attorney General Julie Fernandes are true, she should be fired.

> Commissioner Yaki: "[L]et me just say this for the record. If someone made that statement within the Department of Justice, that person should be fired. That person should be tossed out on their ear in two seconds flat."[3]

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[1] See Abigail Thernstrom, The New Black Panther Case: A Conservative Dissent, National Review Online (July 6, 2010) ("Forget about the New Black Panther Case; it is very small potatoes"), available at http://www.nationalreview.com/articles/243408/new-black-panther-case-br-conservative-dissent-abigail-thernstrom. Small cases are not unusual at the Division. See United States Department of Justice, Civil Rights Division, Cases and Matter, available at http://www.justice.gov/crt/records/.

[2] The decision to conduct this investigation as the Commission's 2010 statutorily-mandated enforcement report came on September 11, 2009. See Transcript, Meeting of the U.S. Commission on Civil Rights at 70 (September 11, 2009). Prior to that date, the Commission had sent a letter of inquiry asking why the Division had decided to dismiss three of the four defendants and to request an extremely narrow remedy as to the fourth. See Letter from Commission to Loretta King, Acting Assistant Attorney General (June 16, 2009). When the response proved surprisingly inadequate, see Letter from Portia L. Roberson, Director, Office of Intergovernmental and Public Liaison to Chairman Gerald A. Reynolds (received July 24, 2009), the proposal to conduct this investigation was made and adopted. For a chronological discussion of the investigation, see Statement of Commissioner Todd Gaziano, at 90-115..

[3] Transcript, Meeting of the U.S. Commission on Civil Rights at 59 (July 16, 2010). It is unclear whether he has the same view of other troubling allegations against Division attorneys, but it is hard to imagine why he would regard them as innocuous if he viewed Fernandes's alleged statement demonstrating a lack of racial neutrality as a firing offense.

Despite this concession, at our November 19, 2010 meeting, Commissioner Yaki argued adamantly that the Commission should have chosen to investigate the bullying of young gay men and women instead. Transcript,

The most important question, therefore, is whether the allegations about Fernandes and her colleagues are true—or at least whether there is enough evidence to warrant further inquiry, since the Commission has not yet gained access to all the evidence. Let's take it step by step, beginning not with the specifics of *New Black Panther Party*, but with the big-picture allegations, since they are of the greatest concern going forward. They also help put *New Black Panther Party* in perspective.

I. There is Considerable Evidence of a Culture of Hostility to the Race-Neutral Enforcement of the Law Within the Division–Evidence that Can Only be Dismissed by Those in Basic Sympathy With that Culture.

According to two witnesses, Deputy Assistant Attorney General Fernandes announced soon after arriving at her new post that she and her fellow political appointees in the Division oppose bringing lawsuits like *United States v. Brown* and *United States v. New Black Panther Party*. Put differently, but not unfairly, she allegedly announced that staff attorneys should not bring voting rights cases against African American defendants under Section 2 or Section 11(b) of the Voting Rights Act–evidently in the belief that civil rights laws are meant to protect African Americans and other minorities and not the rights of all persons, regardless of race.

If Fernandes did issue such a directive, I believe she and her colleagues have misconstrued Section 2 and Section 11(b). The language of both is entirely race neutral, and there is every reason to believe that Congress intended it that way. Moreover, I believe they have misconstrued the Constitution, which demands that all laws and policies be race neutral except in the most unusual of circumstances. But it is unnecessary to dwell on the legal

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Meeting of the U.S. Commission on Civil Rights at 35 (November 19, 2010). The Commission's statute, however, requires it to report once a year on some issue of civil rights law *enforcement*. 42 U.S.C. 1975(a)(c)(1). As Commissioner Yaki described the topic, it does not qualify as an enforcement issue. It is also worth noting that in 2009 when we adopted the 2010 enforcement report topic, he did not suggest bullying as an alternative topic. The November 19, 2010 meeting was the first time he mentioned it—more than a year too late.

In his Joint Dissent(along with Commissioner Arlan Melendez), Commissioner Yaki appears to have implicitly backed away from his previous clear and unequivocal position that the accusations against Ms. Fernandes, if true, are very serious. Conspicuously absent from the text of that document is any mention of Ms. Fernandes. Indeed, there is hardly any mention of the alleged culture of hostility toward the race-neutral enforcement of the civil rights laws, which, in my view at least, lies at the heart of this investigation. Instead, the document focuses almost wholly on the details of the events of Election Day of 2008. It includes a few astonishing flights of fancy. At one point, for example, the dissenting commissioners suggest that a Republican poll watcher who objected to the presence of armed New Black Panther Party members at the polling station, Christopher Hill, was the real source of voter intimidation and that the New Black Panther Party members were essentially his victims. At another point, the dissenting commissioners imagine that Republican poll watchers Larry and Angela Counts may have been frightened not by the New Black Panther Party members, but by an unfounded belief that white supremacists were on their way to the 1221 Fairmount Street polling place. At a third point, they seem to be suggesting that the witnesses to this investigation have deluded themselves into believing that the fate of the Republic hinges on the success of the New Black Panther Party case. In all the ruckus they create, Ms. Fernandes is relegated to a footnote. Joint Dissentat 181-4, 180, 186, and n 54, respectively.

arguments here, since these points do not now appear to be in dispute. Assistant Attorney General Thomas E. Perez, who presumably speaks for the Department, has now agreed on the record that the voting rights laws "should always be enforced in a race neutral manner."[4] Indeed, even Commissioners Yaki and Melendez seem to endorse this view.[5]

It is worth pointing out, however, that not everyone would make that concession. Among the small and insular group of attorneys who specialize in voting rights, many of whom work for the Division, there is a significant (though in my view quite misguided) school of thought that Section 2 and Section 11(b) only apply or only should apply when minority members are victimized. Indeed, one voting rights specialist has written in a leading law review that until quite recently "almost no one thought Section 2 of the Voting Rights Act would apply to whites."[6] The author, who was writing before the New Black Panther Party incident, presumably meant almost no one in this small and insular group, which makes his statement all the more useful for the purpose of this investigation.

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[4] Transcript, Hearing of the U.S. Commission on Civil Rights at 32-36 (May 14, 2010).

In *United States v. Brown*, 494 F. Supp 2d 440 (S.D. Miss. 2007), aff'd, 561 F.3d 420 (5th Cir. 2009), the court held no trouble concluding that Section 2, which prohibits the abridgement of the right to vote on account of race, applies equally to all races. It noted that the Supreme Court had already held that Section 2, as originally enacted, "was unquestionably coextensive with the coverage provided by the Fifteenth Amendment; the provision simply elaborated upon the Fifteenth Amendment." *Chisom v. Roemer*, 501 U.S. 380, 391-92 (1991). It further noted that the Supreme Court has already held in *Rice v. Cayetano*, 528 U.S. 495, 512 (2000), that while the Fifteenth Amendment's immediate purpose was to guarantee recently-emancipated African American slaves the right to vote, "[t]he Amendment grants protection to all persons, not just members of a particular race." See *United States v. Reese*, 92 U.S. 214, 218, 23 L. Ed. 563 (1876) ("If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be'). See also *White v. Alabama*, 74 F.3d 1058, 1073-74 (11th Cir. 1996) (holding that the rights of "non-black voters" to be free from race discrimination under Section 2 were violated by a settlement agreement that apportioned state judicial offices by race); *McMillan v. Escambia County*, 748 F.2d 1037, 1042 n. 9 (5th Cir. 1984). Finally, the Court concluded that none of the amendments to Section 2 were intended to cut back on its scope. Rather, just the opposite is true. See also *Hayden v. Pataki*, 449 F.3d 305, 353 (2d Cir. 2006) (stating that "from its inception and particularly through its amendment in 1982, Congress intended that § 2 . . . be given the broadest possible reach").

Section 11(b), which prohibits the intimidation of voters or of persons urging or aiding any person to vote, doesn't even mention race. And the legislative history of the Voting Rights Act of 1965 makes it clear this was purposeful: "The prohibited acts of intimidation need not be racially motivated; indeed unlike 42 U.S.C. 1971(b) (which requires proof of a 'purpose' to interfere with the right to vote) no subjective purpose or intent need be shown." H.R. Rep. at 30 (1965). While at least one court, apparently unaware of this history, has held that proof of racial intent is necessary despite the lack of textual support for such a holding, see *Gremillion v. Rinaudo*, 325 F. Supp. 375, 376-77 (E.D. La. 1971), no court that I am aware of has ever suggested that Section 11(b) applies only to certain races.

[5] See also Dissent of Vice Chair Abigail Thernstrom at 176 (stating that if racial double standards "can be convincingly demonstrated, it will be a grave indictment of this administration").

[6] See Nathaniel Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 217 (2007) (suggesting that and attempting to explain why, among voting rights attorneys, there is a school of thought that Section 2 of the Voting Rights Act applies only when minorities are victimized and that prior to the filing of *United States v. Brown* by the Bush administration "almost no one thought section 2 of the [Voting Rights Act] would apply to whites"). For a discussion of the complicated history of the Voting Rights Act, see Abigail Thernstrom, Voting Rights—And Wrongs: The Elusive Quest for Racially Fair Elections (2009); Abigail Thernstrom, Whose Votes Count? Affirmative Action and Minority Voting Rights (1989).

Some background is essential to place the allegations against Fernandes and her colleagues in context: *United States v. Brown*, which was brought largely under Section 2 of the Voting Rights Act, and *United States v. New Black Panther Party*, which was brought under Section 11(b), were the only two voting rights cases in the Division's history to be brought against African American defendants.[7] Both cases, according to our witnesses, had been intensely controversial among career attorneys at the Division. Despite the controversy, both received authorization to move forward from the Bush administration appointees then in charge–much to the consternation of the career lawyers who objected to such lawsuits.[8]

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[7] Unlike *New Black Panther Party*, which was brought under Section 11(b), *Brown* was predicated mainly on Section 2 of the Voting Rights Act. The latter section states:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its member have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered. Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their participation in the population."

Section 2 is suited for lawsuits against persons or entities in a position to impose a "voting qualification or prerequisite to voting or standard, practice, or procedure" like the Noxubee County Election Commission, the major party institutions and persons who exercised authority under state law as election judges, poll watchers, and providers of absentee ballots.

Section 11(b), which is used less frequently, is best suited for cases like *New Black Panther Party*, in which, for the most part, the alleged wrongdoer is not acting under color of law. It reads:

> "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e)."

Section 11(b) was rejected for use by the court in *Brown*. The particular threats that had formed the basis of the Section 11(b) claim involved the publication in a local newspaper of a list of names of persons who would be challenged if they attempted to vote. The court decided that such a threat (essentially the persons would be prevented from voting only if that person were found not to be legally entitled to vote) was not cognizable under Section 11(b). Note that neither section contains any language to suggest its application only to voters of a particular race. Indeed, Section 11(b) makes no reference to race at all. See supra at n. 4.

[8] Statement of Christopher Coates 3 (September 24, 2010) ("Opposition within the Voting Section was widespread to taking actions under the [Voting Rights Act] on behalf of white voters in Noxubee County, MS ...."). Those who object to this kind of lawsuit are not confined to the Division. And some of those outside the

As a pair, the two cases had obvious similarities, but also important differences. The events in *Brown*, for example, took place in Noxubee County, Mississippi, a majority-black county where 93% of elected officials were African American. The lead defendant, while an ex-felon, was nevertheless in a position of authority--Noxubee County Democratic Executive Committee chairman Ike Brown. *New Black Panther Party*, by contrast, concerned African Americans defendants whose only claim to fame was their membership in a recognized hate group on the fringes of decent society.[9]

Nobody could in good faith call Brown "very small potatoes"—not unless all cases concerning voter fraud and harassment are starchy vegetables. The defendants in that case—Ike Brown himself, the Noxubee County Democratic Executive Committee, and the Noxubee County Election Commission–were accused of wide-ranging election wrongdoing. That wrongdoing included a massive fraudulent absentee ballot program as well as multiple instances of good old-fashioned election thuggery and much more.[10] After a two-week trial, the trial court found "ample direct and circumstantial evidence of an intent to discriminate against white voters which [had] manifested itself through practices designed to deny and/or

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Division are unguarded in their criticism. Main Justice, the on-line magazine specializing in reporting on the Department of Justice, has referred to New Black Panther Party as "Turning the Voting Rights Act on its head." See The Black Panther Case: A Legacy of Politicized Hiring, Main Justice (December 23, 2009) available at http://www.mainjustice.com/tag/j-gerald-hebert/. Facing South, the on-line magazine for the Institute for Southern Studies, used almost identical language to describe Brown. See Chris Kromm, DOJ Turns Voting Rights Act on Its Head, Facing South (May 3, 2006)(also calling the case "ridiculous"), available at http://southernstudies.org/2006/05/doj-turns-voting-rights-act-on-its.html. Another new media source called Brown "a tragi-comic inversion of the Voting Rights Act of 1965." See DOJ Wins Mississippi White Voter Suppression Case, PERRspectives (June 30, 2007), available at http://www.perrspectives.com/blog/archives/000655.htm.

[9] The Anti-Defamation League is among the organizations that have recognized the New Black Panther Party, a black nationalist organization, as a hate group. Its founder, Khallid Abdul Muhammad, established the new group after being dismissed from his position as a senior advisor to the Nation of Islam's Louis Farrakhan. Farrakhan dismissed Muhammad following a controversial 1993 speech that made questionable comments about whites, Jews, Catholics, and other African-American civil rights leaders. See Jayson Blair, "K.A. Muhammad, 53, Dies -- Ex-Official of Nation of Islam -- Obituary," *The New York Times*, February 18, 2001, available at http://www.nytimes.com/2001/02/18/nyregion/ka-muhammad-53-dies-ex-official-of-nation-of-islam.html?ref=khalidabdulmuhammad (last accessed December 17, 2010). See Appendix B of this report for additional details about the history of the New Black Panther Party.

The dissenting commissioners argue that the New Black Panther Party is a fringe group. Joint Dissent at 178. And so it is. Mercifully, the same can be said for all hate groups operating in the United States. The purpose of this investigation, however, was not to establish that the New Black Panther Party is or is not a significant threat to the security of the nation. Rather, this is an inquiry into whether the Division is committed to the race-neutral execution of the law. The question is not whether the New Black Panther Party is a fringe group. The question is whether the New Black Panther Party and its members were given the same legal treatment as would be given to fringe hate groups whose members are white—like the Ku Klux Klan and the Aryan Nations.

[10] Two examples of Brown's personal thuggery should suffice. When a poll watcher for a white candidate for sheriff attempted to explain that her candidate was legally entitled to four poll watchers at a precinct, she was told by Brown, "I said you can only have one," and "This isn't Mississippi state law you're dealing with. This is Ike Brown's law." When the poll watcher protested and asserted that her candidate planned to stand on his rights in this matter, Brown told her, "Fine, fine, have as many as you want. I'll send the police on around to arrest you." United States v. Brown, 494 F. Supp. 2d at 472 n.51. On another occasion, he threatened to arrest a candidate for office attempting to approach his polling precinct in order to vote. *Id.* at 472.

dilute the voting rights of white voters in Noxubee County."[11] A remedial injunction was issued that sharply limited the ability of Brown and his cronies to control elections in the future.[12] By contrast, *New Black Panther Party* was much simpler and would have required fewer resources to litigate even if the defendants had appeared in court to answer the allegations against them (which they did not).

Timing and the ultimate disposition of the cases were also very different, leading some observers to wonder whether, under Obama administration leadership, the Division was no longer willing to litigate Section 2 or Section 11(b) cases against African American defendants or on behalf of white voters. *Brown* was filed in 2005, tried before a federal judge in 2007, and argued on appeal in 2008. When the new administration began in 2009, there was nothing left to do except wait for the expected favorable decision of the appellate court, which came just a few weeks later. It was a done deal. *New Black Panther Party*, on the other hand, was filed in early 2009–just weeks before the new administration began. As the foregoing Sections of this Interim Report show, it ultimately took a very different course. Control of this very small case was wrested from the career attorneys who had been handling it by attorneys appointed to interim supervisory positions in the Obama administration. Under their direction and over the objections of the career attorneys, three of the four defendants were dismissed and the remedy against the fourth scaled back considerably.[13]

Fernandes, of course, did not join the Department until after these cases had been disposed of. She took part neither in the controversy over the filing of Brown nor in the battle over *New Black Panther Party's* disposition. Prior to her appointment, she was employed by a civil rights advocacy group–the Leadership Conference for Civil Rights–although she, like many lawyers working for such advocacy groups, had been employed by the Division earlier in her career.[14]

There is, however, evidence that she took a keen interest in *Brown*, even while employed by the Leadership Conference on Civil Rights. During that period, she was quoted in a political blog expressing hostility to the Division's decision to bring the case:

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[11] The evidence of intent to discriminate against white voters was indeed overwhelming. As the Court put it: "[T]here is no doubt from the evidence presented at trial that Brown, in particular, is firmly of the view that blacks, being the majority race in Noxubee County, should hold all elected offices, to the exclusion of whites; and this view is apparently shared by his 'allies' and 'associates' on the NDEC, who, along with Brown, effectively control the election process in Noxubee County. This is a view that Brown has expressed publicly and privately over the years, and one that has been the primary driving force in his approach to all matters political since his first involvement in Noxubee County politics in the 1970s." *Id.* at 449. And there was nothing subtle about it. One witness, a white Democratic poll watcher reported that Brown was not above racial electioneering at the polling place, speaking loudly that "'You've got to put blacks in office, our candidates, because we don't want white people over us anymore.'" Id. at 450.

[12] See *United States v. Brown*, 2007 U.S. Dist. Lexis 63228 (August 27, 2007), aff'd 561 F.3d 420 (5th Cir. 2009).

[13] See Part II of this Interim Report, supra at 15-47. See also infra at Section II of this Statement (examining several of the alternative, non-race explanations for why the career attorneys handling *New Black Panther Party* might have been ordered, over their objections, to abandon the case against three of the four defendants and sharply limit the remedy as the fourth).

[14] See Statement of Christopher Coates 13 (September 24, 2010).

> People are wondering why aren't you bring[ing] cases with voting and African-Americans—what it the issue," said Julie Fernandes of the Leadership Conference on Civil Rights. How can it be that the biggest case involving discrimination in Mississippi [United States v. Ike Brown and Noxubee County] was brought on behalf of white voters …The law was written to protect black people.[15]

It is unclear what caused her to conclude that the events in Noxubee could not possibly have been the most significant case of voter intimidation in Mississippi at the time. The level of wrongdoing proven in *Brown* was unusually high. It is difficult to avoid the conclusion that her view was driven by bias. As she put it herself, "The law was written to protect black people." To Fernandes this seems to have meant that the rights of blacks merit more energetic protection than the rights of non-blacks.

Her superior at the Leadership Conference on Civil Rights, president Wade Henderson, went further in his testimony before the House Judiciary Committee on March 22, 2007. In a statement that was sharply critical of the Division under the Bush Administration, he complained:

> Recently, the Civil Rights Division has come under intense scrutiny from civil rights organizations and community leaders regarding cases that have been filed that appear to extend beyond the Division's historical mandate. Perhaps the most scrutinized of these cases was the Voting Section's recent litigation on behalf of white voters in Noxubee, Mississippi. This case recently went to trial and a decision is pending. However, the Division must deal with and respond to growing distrust among minority communities who feel increasingly abandoned and marginalized by the Division's litigation choices and priorities.[16]

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[15] Steven Rosenfeld, Is the Justice Department Conducting Latino Outreach on Behalf of the GOP?, Alternet (October 22, 2007) (ellipsis and second bracketed insert in original), available at http://www.alternet.org/rights/65749/?page=1. Alternet is described in Wikipedia as "a progressive/liberal activist news service."

[16] Testimony of Wade Henderson Before the House Committee on the Judiciary (Oversight of the Civil Rights Division) 6 (March 22, 2007), available at http://judiciary.house.gov/hearings/March2007/Henderson070322.pdf.

At our hearing on September 24, 2010, Christopher Coates testified as follows:

> [E]ven after the favorable ruling in the Ike Brown case, opposition to it continued. At a meeting with Division management in 2008 ..., I pointed to the ruling in Brown as precedent supporting race-neutral enforcement of the Voting Rights Act. Mark Kappelhoff, then Chief of the Division's Criminal Section, complained that the Brown case had caused the Division, the Civil Rights Division, problems in its relation with civil rights groups.
>
> Mr. Kappelhoff is correct in claiming that a number of these groups are opposed to the race-neutral enforcement of the Voting Rights Act, that they only want the act to be enforced for the benefit of racial minorities, and that they had complained bitterly

This is not the statement one would expect from a lawyer who believes that Section 2 and Section 11(b) should be applied in a race-neutral manner. Instead, Henderson has made it clear that he believes that by bringing an action to protect white voters, the Division has "gone beyond [its] historical mandate" and somehow "abandoned and marginalized" minorities.[17]

Fernandes and Henderson were not the only civil rights advocates (and the Leadership Conference was not the only civil rights advocacy group) to object to *Brown*. Mississippi NAACP state president Derrick Johnson called the case "blatantly outrageous."[18] Similarly, the Alliance for Justice included an allegation that "the civil rights division also brought the first case ever on behalf of white voters, alleging that a black political leader in Noxubee County, Miss., was intimidating whites at the polls …" in a litany of grievances against the Bush era Division.[19] It is unclear why the bringing of *Brown* should constitute a grievance unless the Alliance for Justice believes that the Voting Rights Act should be inapplicable to white voters.

The direct evidence of the allegations concerning Ms. Fernandes's directive is as follows: At our hearing on July 6, 2010, J. Christian Adams, a career attorney in the Division who had resigned position in protest his over *New Black Panther Party* controversy, testified that Fernandes had told a gathering of lawyers from the Voting Section, including himself, that "cases are not going to be brought against black defendants for the benefit of white victims, that if somebody wanted to bring these cases it was up to the U.S. Attorney, but the

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> to the Division about the Ike Brown case. But, of course, what Mr. Kappelhoff had not factored in his criticism of the Brown case was that the primary role of the Civil Rights Division is to enforce the civil rights laws enacted by Congress, not to serve as a crowd pleaser for many of the civil rights groups.

Transcript, Hearing of the U.S. Commission on Civil Rights at 18-19 (September 24, 2010).

[17] As Fannie Lou Hamer put it, "Nobody's free until everybody's free." That should certainly include freedom from voter intimidation. It is one thing to complain that the authorities have *failed* to bring a case that would have protected African Americans that he believes should have been brought. But to complain that they did bring a case to vindicate the rights of a different group is wholly inappropriate.

[18] See Ari Shapiro, White Voters in Mississippi Allege Voting Discrimination, NPR (November 14, 2005) (quoting Mississippi NAACP state president Derrick Johnson calling *Brown* "blatantly outrageous").

[19] See The Politicization of Justice under the Bush Administration, Alliance for Justice (no date) available at http://www.afj.org/crdivision.pdf. Academics also criticized the Division for *Brown*. University of Virginia professor of politics Matthew Holden, Jr., in an academic presentation, went on at length about *Brown*, arguing that "[t]he case should never have been brought" and that politically biased reporting in the *New York Times* made the case seem more serious than it was. Although Dr. Holden did not reveal his evidence for his conclusion, he stated that "the best interpretation is that this was a case where the political appointees exercised their authority to override career line lawyers who denied the legitimacy of the case" and that "Noxubee County Republicans, white people," had somehow used their political influence to ensure that a case would be brought. A fair reading of his discussion, however, would lead one to the conclusion that his opinion was driven largely if not solely by the race of the parties to the case. Matthew Holden, Jr., The Justice Department and American Politics: Functions, Process and Question [sic] about Current Politics 4-8 (April 7, 2007).

Civil Rights Division wasn't going to be bringing it."[20] Specifically, Adams reported that Fernandes told them that the Civil Rights Division was "in the business of doing traditional civil rights work," which meant "helping minorities."[21]

In addition, Adams accused Ms. Fernandes of directing a subsequent gathering of Voting Section attorneys not to bring lawsuits to enforce Section 8 of the National Voter Registration Act–the law that requires state and local governments to undertake reasonable efforts to remove deceased, re-located and otherwise-ineligible voters from the voting rolls. According to Adams, Fernandes said, "We have no interest in enforcing this provision of the law. It has nothing to do with increasing turnout, and we are just not going to do it."[22]

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[20] Transcript, Meeting of the U.S. Commission on Civil Rights at 63-64 (July 6, 2010) (Adams' words, not a direct quote of Fernandes). Adams pointed out that since voting rights issues are not within the expertise of U.S. Attorneys' Offices, such cases were very unlikely to be filed by anyone.

[21] *Id*. Although quotation marks were not used in the transcript, this appears to be an effort by Adams to quote Fernandes' words from memory.

[22] Transcript, Meeting of the U.S. Commission on Civil Rights at 63-64. (July 6, 2010). Specifically, Section 8 of the National Voter Registration Act, which requires state and local governments to implement "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of ... the death of the registrant; or ... a change in the residence of the registrant." 42 U.S.C. section 1973gg-(6)(a)(4).

The discussion went this way:

> MR. BLACKWOOD: You mentioned Ms. Fernandes. There is a press report also that in front of the entire Voting Section, all of the career staff, she explicitly told them this administration would not be enforcing Section 8 of the National Voter Registration Act. Were you there, and did –
>
> MR. ADAMS: I was there–
>
> MR. BLACKWOOD: –she say that?
>
> MR. ADAMS: I was there for that, and it – I can tell you more about that ....
>
> MR. ADAMS: ... [A] meeting of the entire Voting Section was assembled to discuss NVRA 8. This occurred in November of 2009.
>
> Deputy Assistant Attorney General Julie Fernandes, when asked about Section 8 said, "We have no interest in enforcing this provision of the law. It has nothing to do with increasing turnout, and we are just not going to do it."
>
> Everybody in the Voting Section heard her say this. Mr. Coates heard her say it. If he were allowed to comply with the subpoena, he would testify to the exact same thing.
>
> MR. BLACKWOOD: And you heard it as well, though.
>
> MR. ADAMS: Absolutely. I was shocked. It was lawlessness.

Such a policy is partisan in the truest sense of that term. The National Voter Registration Act, also known as the Motor Voter Act, was intended as a compromise between those members of Congress whose main concern was making it easy to register (and hence increasing turnout) and those whose main concern was maintaining the integrity of the election process. While most members were concerned about both problems, those who emphasized turnout were more often Democrats, who, rightly or wrongly, perceived that high turnout would favor their candidates, while those who emphasized election integrity more often were Republicans, who, again rightly or wrongly, believed that election fraud would work against theirs. The National Voter Registration Act would never have passed without provisions that addressed both problems. De-coupling them at the enforcement stage, as Fernandes was allegedly doing, would thus be wholly inappropriate.

Commissioner Yaki has insisted, of course, that Ms. Fernandes never made the statements Adams attributed to her. Adams must be lying or he misunderstood the incidents he was reporting–or so Commissioner Yaki asked us to believe. But on September 24, 2010, Adams' allegations were specifically corroborated by Christopher Coates, who, like Adams, was testifying under oath. Coates was able to furnish the Commission with a written statement, so his accusation was more elaborate than Adams'. He read it aloud:

> Ms. Fernandes began scheduling luncheons in the conference room of the Voting Section at which the various statutes the Voting Section has the responsibility for enforcing were discussed as well as other enforcement activities.
>
> In September 2009, Ms. Fernandes held a meeting to discuss enforcement of the anti-discrimination provisions of Section 2 of the Voting Rights Act. At this meeting, one of the Voting Section trial attorneys asked Ms. Fernandes what criteria would be used to determine what type of Section 2 cases the Division front office would be interested in pursuing.
>
> Ms. Fernandes responded by telling the gathering there that the Obama administration was only interested in bringing traditional types of Section 2 cases that would provide equality for racial and language minority voters. And then she went on to say that this is what we are all about or words to that effect.
>
> When Ms. Fernandes made that statement, everyone in the room, talking about the conference room on the seventh floor, where the Voting Section is located, understood exactly what she meant: no more cases like Ike Brown and no more cases like the New Black Panther Party case.[23]

[23] Transcript, Hearing of the U.S. Commission on Civil Rights at 32-33 (September 24, 2010). According to Mr. Coates, Ms. Fernandes repeated her statement "that the Voting Section's goal was to ensure equal access for voters of color or language minority" three months later at another meeting on the subject of federal observer election coverage. *Id.* at 33. Mr. Adams also testified about this second occasion, but his testimony

was that he had heard about this incident from Mr. Coates, not that he had been present himself. Transcript, Hearing of the U.S. Commission on Civil Rights at 62 (July 6, 2010).

Coates further elaborated on this during the question and answer period:

> COMMISSIONER GAZIANO: I would like to go back to that September 29 lunch meeting that Julie Fernandes, who is the politically appointed Deputy Assistant Attorney General, led. And your testimony about that is as follows, and I quote, "Ms. Fernandes responded by telling the gathering that the Obama administration was only interested in bringing traditional types of Section 2 cases that would provide political equality for racial and language minority voters. And she went on to say that this was what we all about or words to that effect."
>
> Mr. Adams' testimony a few months ago was almost exactly the same. And you both drew almost exactly the same conclusion. Your testimony says you understood that everyone in the room -- this is your testimony -- understood exactly what she meant: no more cases like Ike Brown or NBPP. Now, by "no more cases like Ike Brown or NBPP," I don't think you mean with those names. You mean no more cases where the defendants are black or minority. Is that what you mean?
>
> MR. COATES: Right.
>
> COMMISSIONER GAZIANO: Now, it is your job as Chief of the Voting Section at that time to understand the instruction that is being given. And it is your job to make sure that people under you understand what the instruction was. You had subsequent -- by the way, this isn't deliberative process. This is an instruction, an order. You had subsequent conversations, I assume, with other employees under you. Did anyone come to any different conclusion about what Ms. Fernandes was ordering?
>
> MR. COATES: No. The people who came and talked to me -- I don't remember how many in the Section, but the people who talked to me after Ms. Fernandes gave that instruction all construed her directive in the same way that I did.
>
> COMMISSIONER GAZIANO: Okay. Well, this is Mr. Adams' understanding of what those exact same words meant, "Cases are not going to be brought against black defendants for the benefit of white victims, that if someone wanted to bring these cases, it was up to the U.S. Attorney." By the way, U.S. Attorneys aren't going to bring civil rights cases in your specialty. But, anyway, "But that the Civil Rights Division was not going to be bringing it." Is that consistent with your understanding of what she was telling you to do?
>
> MR. COATES: Yes.
>
> COMMISSIONER GAZIANO: And you say no one in your Section had any different understanding?
>
> MR. COATES: Nobody came to me and said, "Notwithstanding what Ms. Fernandes said, I think that if I come across another Ike Brown case, I would be free to investigate."
>
> COMMISSIONER GAZIANO: Well, what is the likelihood, what is the chance, you think -- is it slim, moderate, high? -- that you all misunderstood what she was saying, that her phrase, "traditional civil rights" --
>
> MR. COATES: "Traditional Section 2."

Similarly, he corroborated Adams' testimony with regard to Section 8 of the National Voter Registration Act. Again, his testimony was in greater detail than Adams':

> In November 2009, a similar lunch was held by Ms. Fernandes, probably more accurately described a brown bag lunch, at which people would bring their lunches and meet in the conference room.
>
> That meeting was held on the subject of the National Voter Registration Act. ... In discussions specifically addressing the list maintenance provision of Section 8 of the National Voter Registration Act, Ms. Fernandes stated list maintenance had to do with the administration of elections.
>
> She went on the say that the Obama Administration was not interested in that type of issue but, instead interested in issues that pertained to voter access.
>
> During the Bush Administration, the Voting Section began filing cases under the list maintenance provisions of Section 8 to compel states and local registration officials to remove ineligibles from the list. These

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> COMMISSIONER GAZIANO: Let me get the exact, "traditional types of Section 2 cases that would provide political equality for racial and language minority voters" really meant for other types of voters, too. Is there a possibility -- how likely is it that you misunderstood what she was trying to tell you?
>
> MR. COATES: No. I understood it and everybody else in the room understood it. Because the history had taken place before the Bush administration in, nobody in the Civil Rights Division had filed the kind of case that we had filed in Ike Brown and in New Black Panther Party. A new administration comes in. A woman is appointed Deputy Assistant Attorney General from the -- one of the premier civil rights groups in the country, Leadership for Civil Rights [sic]. And she comes in. And so if she had wanted, if Julie had wanted to ensure people that if you came across an Ike Brown case or New Black Panther case, bring it to the front office and we would be willing to -- they would be willing to look at it, she would have chosen different words. She chose the words that I have ascribed to her and that Mr. Adams had ascribed to her because she intended to tell people that the kind of cases that have been brought in Noxubee County and with regard to the Philadelphia Panthers is not going to continue.
>
> COMMISSIONER GAZIANO: And so your statement is these may be some sort of code word, but they weren't subtle code words. Everyone understood what they meant?
>
> MR. COATES: That's right.

Transcript, Hearing of the U.S. Commission on Civil Rights at 130-33 (September 24, 2010).

> suits were very unpopular with a number of the groups that work in the area of voting rights or voter registration.[24]

Despite this corroboration, Commissioner Yaki has continued to insist that the allegations against Ms. Fernandes lack even a modicum of credibility.[25] She simply could

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[24] *Id*. at 33-35. Mr. Coates's statement that "[Section 8] suits were very unpopular with a number of the groups that work in the area of voting rights or voter registration" rings true with me. In connection with a recent briefing, the Commission made what I viewed as an even-handed and non-controversial recommendation: "The Department of Justice should remain actively involved in, and devote adequate resources to, the investigation of voter fraud and voter intimidation." U.S. Commission on Civil Rights, Voter Fraud and Voter Intimidation at 17 (September 2007). Much to my surprise, Commissioner Yaki strongly objected. In his Statement to that report, he complained of "aggressive questioning of voters at the polls; unduly restrictive and illegal identification requirements announced by election officials; and rudeness to minorities by election workers," but argued that voter fraud is a made-up problem. He further stated:

These examples I cite are but a tip of the intimidation iceberg that lurks in the waters of the American voting system. To state that enforcement of voter fraud should receive equal treatment (and, I presume, resources) is to make a mockery of a real problem and elevate a false one. It would divert badly needed and scarce resources to chase a phantom that does not exist. Which, I am sure, is exactly what the conservative right wishes to do with the scarce funding given to the Justice Department.

> …. Rather than throw obstacles such as untested, ill-conceived voter identification requirements in the way of our citizenry, … we should be doing everything we can to encourage participation in our democracy.

Id. at 27.

[25] Transcript, Meeting of the U.S. Commission on Civil Rights 17-18 (November 19, 2010). In his remarks at that meeting, Commissioner Yaki claims the allegations of Mr. Adams and Mr. Coates (and presumably of Mr. Bowers and Mr. von Spakovsky, see infra at n 33) have been "contravened by what has actually been produced in the record." *Id*. at 18. In fact, however, nothing in the record contradicts any of the very specific allegations made by Mr. Adams and Mr. Coates, and at no point has the Department of Justice indicated that it contests anything said by either of them. The only whisper of disagreement came in the hearing testimony of Assistant Attorney General for Civil Rights Thomas Perez, who testified at a very general level that it was his policy and the policy of the Division was to administer the law race neutrally. Perez, however, was not employed by the Department of Justice until after October 6, 2009, the date of his Senate confirmation. He could not possibly have had first-hand knowledge of Ms. Fernandes's statement, which was alleged to have been made in September of 2009. Nor was he aware of the public allegations made by Mr. Adams and Mr. Coates, since his testimony occurred before theirs. At the time of his testimony, therefore, there was nothing to respond to.

Commissioner Yaki and Commissioner Melendez's Joint Dissentis remarkable for how little it addresses the allegations of Adams and Coates against Fernandes. There is nothing in the text. The only mention of the issue is buried in Footnote 54.

Footnote 54 questions Coates's credibility and appears to suggest that Coates is inclined to interpret statements as anti-white when they may not have been so intended by the speaker. As proof, they cite a supposed inconsistency between the testimony of Adams and of Coates. According to Commissioners Yaki and Melendez, "Adams described [Fernandes's] statement this way: 'we were in the business of doing traditional civil rights work, and, of course, everyone knows what that means.'" By contrast, they state, "In Mr. Coates's recollection … Ms. Fernandes explicitly told the audience what Adams said she only implied: 'My recollection is that she used the term "traditional types" of Section 2 cases and that she used the term "political equality for racial and language minority groups."'" As they describe it, Coates seems to believe that he heard an outright assertion that civil rights laws are about benefiting minorities while Adams believed that statement was only implied.

not have articulated the policies that Adams and Coates attribute to her.[26] But he has nothing upon which to base that conclusion. Two witnesses have testified under oath that they heard the statement. Both are attorneys who well understand the seriousness of their oath and the need for accuracy. The Department, on the other hand, has never denied that Ms. Fernandes made these statements.[27] To the contrary, it has only permitted staff members who could shed light on the matter—including Ms. Fernandes—to testify only under conditions that are unacceptable to the Commission.[28] As a result, Ms. Fernandes herself has not been

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The allegation of inconsistency is just plain silly. In fact, Adams's and Coates's testimony on this point is remarkably consistent. Both appear to be making an effort to remember Fernandes's actual words. Neither purports to have gotten it exactly right. Indeed the sentence fragment that the dissenting commissioners quote from the Coates Statement reads in full: "Ms. Fernandes responded by telling the gathering that the Obama administration was only interested in bringing traditional types of Section 2 cases that would provide political equality for racial and language minority voters, and she went on to say that this was what we are all about *or words to that effect*." Statement of Christopher Coates at 13-14 (emphasis added).

Both report that Fernandes used the words "traditional" to describe the kind of Section 2 cases that the front office wished to pursue. Both report that she referred to minorities in explaining her position. The sentence fragment from Adams testimony that the dissenting commissioners quote reads in full, "The statement was that we were in the business of doing traditional civil rights work, and, of course everybody knows what that means, and helping minorities—helping—litigating on their behalf." Hearing Transcript 62 (July 6, 2010). Both witnesses explain how in the context of the situation—given *Brown* and *New Black Panther Party*—everyone in the room understood the term "traditional" meant cases brought on behalf of minority members and that her directive amounted to a ban on cases on the model of *Brown* and *New Black Panther Party*. If the dissenting commissioners are looking for inconsistencies in statements made in the course of this investigation, they will need to look elsewhere.

[26] Commissioner Yaki is not the only member of the Commission to take this position.

> VICE CHAIR THERNSTROM: Well, a couple things. It seems to me it's strange. It is simply impossible to believe that Julie Fernande[s] said anything remotely like "We are not going to enforce civil rights laws when blacks are defendants."
>
> I mean, she cannot have said that. Maybe she said something that some people interpreted as saying that. But she surely didn't announce that. I mean, unless she is some sort of moron -- and she certainly could not have been speaking for the Department if she was a moron.
>
> CHAIRPERSON REYNOLDS: How do we go about settling this factual dispute over this allegation?
>
> VICE CHAIR THERNSTROM: I think we should assume that the Justice Department does not have a racial double standard? I mean, give them a break.

Transcript of Business Meeting, U.S. Commission on Civil Rights, August 13, 2010, 24-5. But see Letter from Commission to the Honorable Eric Holder (August 10, 2009) (signed by Vice Chair Thernstrom and stating that the Commission has a "keen interest" in the New Black Panther Party case and that the case "will remain one of the Commission's top priorities").

[27] In addition, the Washington Post has reported that, although the Department was willing to comment on other aspects of New Black Panther Party, "Fernandes declined to comment through a department spokeswoman" about the accusations against her. Jerry Markon & Krissah Thompson, Dispute Over New Black Panther Case Causes Deep Divisions, Washington Post (October 22, 2010).

[28] Well after this Interim Report was drafted, on November 12, 2010, the Department of Justice sent a letter to the Commission's General Counsel stating that it would permit Ms. Fernandes to testify in front of the Commission. But in that same letter, the Department refused to provide documents requested by the witness

questioned about what she said at those brown bag lunches. Nor has she been questioned about her earlier comments as a staff member at the Leadership Conference on Civil Rights. Her lips are sealed.[29]

No one has suggested that she made these statements out of the blue or that her policy preference was the result of her stint at a civil rights advocacy organization and was unusual at the Division. Rather, it is the position of the witnesses that "a hostile atmosphere" had "existed within the [Division] for a long time against racial-neutral enforcement of the Voting Rights Act."[30] Coates, who had worked for the Division for fourteen years, testified that large numbers of present and former attorneys within the Division as well as civil rights advocates outside the Division, "believe incorrectly but vehemently that enforcement of the protections of the Voting Rights Act should not be extended to white voters, but should be extended only to protecting racial, ethnic and language minorities."[31] He gave many examples, among them incidents he recalled in connection with his efforts to staff Brown:

> I talked with one career attorney with whom I had previously worked successfully in a voting case and ask[ed] him whether he might be interested in working on the Ike Brown case. He informed me in no uncertain terms that he had not come to the Voting Section to sue African American defendants. One of the social scientists who worked in the Voting Section and whose responsibility it was to do past and present research into a local jurisdiction's history flatly refused to participate in the investigation. On another occasion, a Voting Section career attorney informed me that he was opposed to bringing voting rights cases against African American defendants, such as in the Ike Brown case, until we reached a day when the socio-economic status of African Americans in Mississippi was the same as the socio-economic status of whites living there. Of course, there is nothing in the statutory language of the [Voting Rights Act] that indicates that DOJ attorneys can decide not to enforce the race-neutral provisions in the Act … until socio-economic parity is achieved

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subpoenas. The Commission maintains that the withheld documents are necessary in order for us to depose the witnesses effectively. In addition, the Department demanded that Fernandes's testimony be integrated into the Interim Report, rather than included in the final report. The effect of this demand would have been to ensure that the Interim Report would not be completed until after the terms of Chairman Gerald Reynolds and Commissioner Taylor had expired and President Obama had appointed their successors. See Letter From Joseph H. Hunt to David Blackwood, November 12, 2010 *(available at* http://www.usccr.gov/NBPH/11-12-10_BlackwoodLetter.pdf.) The Commission maintains that the withheld documents are necessary in order for us to depose the witnesses effectively.

[29] Given the importance of the allegations, one would expect not only that the Department would deny them, but that it would issue a clarification to its career attorneys in the Voting Section to ensure that any misunderstandings were corrected. As far as the Commission has been told, no such clarification has issued.

[30] Statement of Christopher Coates at 2.

[31] Statement of Christopher Coates at 9. Coates identified in particular Loretta King, Steven Rosenbaum, Mark Kappelhoff, and Kristen Clarke in this statement.

> between blacks and whites in the jurisdiction in which the case arises.[32]
>
> Two other former Civil Rights Division attorneys have filed affidavits with the Commission generally corroborating the culture of hostility to the race-neutral enforcement of the law at the Civil Rights Division.[33] In addition, three current Division attorneys appear to have spoken to a reporter for the Washington Post on the condition of anonymity and tend to confirm the existence of this culture.[34]

Moreover, the actual activities of the Voting Section have been consistent with the policy statements Ms. Fernandes is alleged to have made and not with Assistant Attorney General Thomas Perez' efforts to assure the Commission that the Division operates race

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[32] Statement of Christopher Coates at 5.

[33] See Affidavit of Karl S. Bowers, Jr., para. 8 (July15, 2010)("In my experience, there was a pervasive culture in the Civil Rights Division and within the Voting Rights Section of apathy, and in some cases outright hostility, towards race-neutral enforcement of voting rights laws among large segments of career attorneys."), available at http://www.usccr.gov/NBPH/BowersStatement_07-15-10.pdf; Affidavit of Hans A. von Spakovsky, para. 22 (July 15, 2010) ("While I was not at the Division at the time the New Black Panther Party case arose, I can confirm from my own experience as a career lawyer that there was a dominant attitude within the Division and the Voting Section of hostility toward the race-neutral enforcement of voting rights laws by many of the career lawyers and other staff.") , available at http://www.usccr.gov/NBPH/vonSpakovskyAffidavit_07-15-10.pdf

[34] The Washington Post reported:

> Coates and Adams later told the civil rights commission that the decision to bring the Brown case caused bitter divisions in the voting section and opposition from civil rights groups.
>
> Three Justice Department lawyers, speaking on the condition of anonymity because they feared retaliation from their supervisors, described the same tensions, among career lawyers as well as political appointees. Employees who worked on the Brown case were harassed by colleagues, they said, and some department lawyers anonymously went on legal blogs "absolutely tearing apart anybody who was involved in that case," said one lawyer.
>
> "There are career people who feel strongly that it is not the voting section's job to protect white voters," the lawyer said. "The environment is that you better toe the line of traditional civil rights ideas or you better keep quiet about it, because you will not advance, you will not receive awards and you will be ostracized."
>
> The 2008 Election Day video of the Panthers triggered a similar reaction, said a second lawyer. "People were dismissing it, saying it's not a big deal. They said we shouldn't be pursuing that case."

Jerry Markon & Krissah Thompson, Dispute Over New Black Panther Case Causes Deep Divisions, Washington Post (October 22, 2010).

The Commission would very much have liked to have spoken with these anonymous witnesses. But given their perception that they would be "outed" by unsympathetic persons within the Commission, I am not surprised that we did not have that opportunity.

neutrally (made long before Adams's and Coates's whistle-blowing testimony). The New Black Panther Party case was indeed disposed of over the vociferous objections of the line attorneys who had worked on the case and against the advice of career attorneys in the appellate section.[35] This is exactly what one would expect if the allegations against Ms. Fernandes were true. No further voter intimidation cases (whether brought under Section 11(b) or the more commonly used Section 2) have been filed against African American defendants—again, exactly as one would expect.[36]

Similarly, *United States v. Missouri*, the list maintenance lawsuit brought under Section 8 of the National Voter Registration Act during the Bush administration, was dropped despite the failure of Missouri to improve its efforts.[37] No further Section 8 cases under the National Voter Registration Act have been investigated or filed—just as one would expect. Coates testified about his efforts to interest the administration in such cases:

> In June 2009, the Election Assistance Commission issued a biannual report concerning what states appeared not to be in compliance with Section 8's list maintenance requirements.
>
> The report identified eight states that appeared to be the worst....
>
> These are states that reported that no voters had been removed from any of their voters' lists in the last two years. Obviously this is a good indication that something is not right....
>
> As Chief of the Voting Section, I assigned attorneys to work on this matter. And in September 2009, I forwarded a memo to the Division front office asking for approval to go forward with the Section 8 list maintenance investigations in these states.
>
> During the time that I was Chief, no approval was given to this project. And it is my understanding that approval has never been given for that Section 8 list maintenance project to date. That means we have entered the 2010 election cycle with eight states appearing to be in major noncompliance....

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[35] Christopher Coates testified that Appellate Section attorneys Marie McElderry and Diana Flynn agreed that the suit should proceed. See Transcript of September 24, 2010 at 52. Copies of the e-mails that McElderry and Flynn wrote explaining why the NBPP case should go forward are also available online at http://www.usccr.gov/NBPH/DOJcomments_05-13-09_reproposeddefaultjudgment.pdf.

[36] Also consistent with the accusation of a culture of hostility towards a race neutral application of the law is the fact that the Division has never objected to a request for pre-clearance under Section 5 of the Voting Rights Act on the ground that the proposed change had a racially discriminatory purpose or would have a racially discriminatory effect on white voters despite the fact that there are quite a few jurisdictions where minorities are in the majority and hence in control of election processes. See Statement of Christopher Coates at 12.

[37] *United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008).

> From these circumstances, I believe that Ms. Fernandes's statement to the Voting Section in November 2009 not to, in effect, initiate Section 8 list maintenance enforcement activities has been complied with.[38]

Furthermore, public comments made by present and former Division attorneys, although sometimes phrased somewhat cagily, tend to confirm that there is a significant school of thought to the effect that rights of white voters either are not covered by the Voting Rights Act or are not due the same priority as the voting rights of other voters.[39]

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[38] Coates at 35-36. Coates notes that while a letter to the Commission from Assistant Attorney General Perez states that the Division is currently conducting a number of investigations under Section 8 of NVRA, those investigation concern a different part of Section 8 and not list maintenance concerns. Id at 36.

[39] For example, in an article concerning *United States v. Brown*, the *Christian Science Monitor* quoted former Division attorney Steven Mulroy in a statement critical of the decision to file that case:

> "Traditionally, 'our primary enforcement would be on groups that had historically suffered from a legacy of discrimination,' says Professor Mulroy, the former Justice Department lawyer. 'As far as enforcement, you might not put whites in the South at the top of that list.'"

Patrik Jonsson, Mississippi Election Row Sees Race Roles Reversed, Christian Science Monitor (August 17, 2007).

Joseph Rich, chief of the Voting Section until 2005, admitted that the case against Ike Brown had legal merit, but argued that it was "'really a question of priority'" given the limited resources available to the Division. He did not mention any particular case that he regarded as more meritorious on its facts. Rather the point seemed to be that discrimination against African Americans should be given very strong priority over discrimination against whites. As Rich put it, "'The Civil Rights Division's core mission is to fight racial discrimination.'" "'That doesn't seem to be happening in this administration.'" It is unclear why he did not consider the case against Ike Brown to be fighting race discrimination. See Paul Kiel, Under Bush, Civil Rights Division Works to Protect ... Whites, TPMmuckraker (April 6, 2007). See also John Fund, Voting Rights Turnabout: A Victory for Disfranchised Mississippi Voters—And They Happen to Be White, Opinion Journal (WSJ) (July 2, 2007).

J. Gerald Hebert, a former acting chief of the Voting Section, complained, "Sadly, the only two [section 11(b) cases that have been brought by the [Bush] department have been on behalf of whites." The Black Panther Case: A Legacy of Politicized Hiring, Main Justice (December 23, 2009). Hebert's statement is highly misleading. Section 11(b) is rarely used at all. The number of cases brought over the last two decades may be countable on one hand. The "weapon of choice" is Section 2, which applies to conduct under color of law (while Section 11(b) also covers wholly private conduct). By far most of the Section 2 cases brought during the Bush administration concerned Hispanic voters, who, due to language issues, may be somewhat more likely to give rise to enforcement actions. See Testimony of John Tanner, Voting Section of the Department of Justice, Hearing Before the Subcommittee On the Constitution, Civil Rights and Civil Liberties of the Committee on the Judiciary, House of Representatives (110th Cong.) (October 30, 2007) (available at http://judiciary.house.gov/hearings/printers/110th/38637.PDF).

Finally, the Washington Post has reported:

> Civil rights officials from the Bush administration have said that enforcement should be race-neutral. But some officials from the Obama administration, which took office vowing to reinvigorate civil rights enforcement, thought the agency should focus primarily on cases filed on behalf of minorities.

Under the circumstances, it is difficult to understand how anyone could take the position that it is quite impossible that Fernandes could have given the directives she is alleged to have given. To the contrary, the evidence adduced so far is very strong that she did.

II. The Disposition of the New Black Panther Party Case Was Itself an Example of the Division's Hostility Toward the Race-Neutral Enforcement of the Law.

The most basic facts of *United States v. New Black Panther Party* are well known: On Election Day in 2008, two members of the New Black Panther Party stood immediately outside the doors of a Philadelphia polling place, dressed in paramilitary gear, one slapping a nightstick into his palm, hurling racial epithets at voters and poll workers. Rather than rehearse the details of the case and its procedural history here, I refer the reader elsewhere in this Interim Report.[40] It is worth noting, however, that Bartle Bull, a seasoned poll watcher, lawyer and former publisher of the Village Voice, who observed the incident first hand, stated that it was "the most blatant form of voter intimidation I have encountered in my life in political campaigns in many states, even going back to the work I did in Mississippi in the 1960's."[41] Even Commissioner Yaki, who has so vehemently opposed this investigation, has publicly admitted, "In my opinion there was intimidation."[42]

The issue for the Commission is: Why was the case largely abandoned? Was its unusual final disposition, over the objections of the career attorneys who originally were assigned to it, an example of the general hostility towards race neutrality in civil rights enforcement that our witnesses warned of? Or was it motivated by something else?

Part of the reason *New Black Panther Party* attracted the attention of the Commission is that it is well-suited for an examination of the Division's race neutrality. For one thing, all four of the defendants in the case had failed to appear in court to answer the allegations against them. The significance of that default is not easily overstated. One of the difficulties

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> "The Voting Rights Act was passed because people like Bull Connor were hitting people like John Lewis, not the other way around," said one Justice Department official not authorized to speak publicly, referring to the white Alabama police commissioner who cracked down on civil rights protesters such as Lewis, now a Democratic congressman from Georgia.
>
> See Jerry Markon & Krissah Thompson, "Dispute Over New Black Panthers Case Causes Deep Divisions," *The Washington Post*, October 22, 2010 (*available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/22/AR2010102203982_3.html?sid=ST2010102300136).

[40] See Parts I-II of this Interim Report.

[41] Declaration of Bartle Bull (April 7, 2009). For reasons I do not fully understand, Commissioners Yaki and Melendez challenge Bull's assessment of his experience in this regard. Bull has indeed seen a lot in his years as a poll watcher—including a polling place at which nooses had been hung on a nearby tree. Contrary to Commissioners Yaki and Melendez's understanding, Bull did not testify that the nooses were put there by white supremacists. Presumably, he did not know who placed them there—misguided, youthful pranksters, hardened criminals or someone else entirely. Bull's point was that men with a weapon standing directly in front of the doors of a polling place hurling racial epithets is as blatant and elemental form of voter intimidation as one is likely to find. Ultimately, however, it doesn't matter if the Philadelphia incident was the most blatant incident of voter intimidation he had ever seen or the fifth most blatant. It was blatant.

[42] Transcript, Meeting of the U.S. Commission on Civil Rights at 111 (April 23, 2010).

that oversight bodies have in keeping tabs on law enforcement agencies is that there is always at least one neutral-sounding reason for declining to file a case: Resources are limited. Not every meritorious case can be brought. If the New Black Panther Party case had never been brought, it is entirely possible, even likely in my opinion, that the media controversy over its ultimate disposition would never have occurred.[43] Indeed, if the project had been aborted midway through the litigation, it may have raised a few eyebrows, but it would have been difficult to gainsay Department officials if they had argued that the case was going to require more resources than Department was able to spare.

But that is not what happened. The New Black Panther Party case had been brought. An investigation had been conducted, witnesses had been interviewed, and a complaint filed.[44] Moreover, as a result of the defendants' decision not to appear, the case had essentially been won. Affidavits had been collected from witnesses in anticipation of a judgment and injunction. It required far more resources to fight the internal battle over whether to gut the case than it would have to obtain a default judgment enjoining all of the defendants from committing similar acts in the future. Whatever purpose was served by dismissing the case against three of the four defendants and limiting the remedy as to the fourth, it was not to conserve Division resources.[45] The case seems to have had symbolic value for the players on both sides of the debate.

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[43] The only fact about the New Black Panther Party case that causes me to hesitate in making that assertion is the fact that part of the incident was captured on videotape. It is thus possible that the failure to bring an enforcement action would have gotten some media attention. I remain persuaded, however, that far more likely than not, it would not have or it would have gotten very little.

[44] Commissioners Yaki and Melendez have suggested on several occasions that the speed with which Christian Adams conducted the investigation demonstrates that he wanted to file the case as expeditiously as possible. I do not know why they believe this to be so, but it would not surprise me. Government attorneys frequently have a lot to do. Moreover, Adams and Coates testified that it was common for career attorneys at the Division to oppose the race neutral application of the law and that it was Bush administration attorneys who authorized the *Brown* case. Under the circumstances, it would hardly be shocking (or inappropriate) for a career attorney interesting in applying the law neutrally to prefer to take his chances with the outgoing administration rather than the incoming one. The evidence thus far indicates that events have unfolded in a way that would vindicate that judgment, if indeed such a judgment was made. See Joint Dissentat 191.

[45] In the Department's response to our initial letter of inquiry, see Letter from Portia L. Roberson, Director, Office of Intergovernmental and Public Liaison to Chairman Gerald A. Reynolds (received July 24, 2009), it challenged the notion that a case in which the defendants have defaulted is essentially won. The letter seems to be suggesting that converting the default to a default judgment would have been a major undertaking, fraught with difficulties.

This letter convinced me that the disposition of the case might merit more careful scrutiny than I had originally judged. A default is an extremely favorable event for a plaintiff. I have seen plaintiffs' attorneys literally jump for joy at the mere possibility of a default. And if Department attorneys were suggesting otherwise, there was reason to be concerned about their judgment.

While Fed.R.Civ.P. 55 permits courts to require plaintiffs to prove their case through the use of affidavits or testimony (and it is good practice for them to do so rather than simply rubber stamp the plaintiffs' requested remedy), this is usually fairly easy, even perfunctory at times. In this case, the attorneys handling the case had already put in the work of gathering affidavits from the witnesses when control of the case was wrested from them. They had every reason to regard this as an effort to snatch defeat from the jaws of victory.

The cases cited by the Department in its letter do not suggest anything to the contrary. *United States v. $55,518.05 in U.S. Currency*, 728 F.2d 192 (3d Cir. 1983), for example, was a civil forfeiture case that proves

Add to that the fact that the case spanned two administrations, making it plausible that its ultimate disposition was the result of a change in policy.[46] No one claims that anything had changed in connection with the case itself between the time it was filed and the time that three of the four defendants were dismissed and the injunction against the fourth narrowed considerably. The witnesses had neither died nor disappeared. There had been no changes in the law. The case remained as strong as it had been the day it was filed. The only important change in circumstances was external to the case—the change in administration. That meant a different set of decision makers were calling the shots–decision makers who may have been more in sympathy with the notion that Section 2 and Section 11(b) of the Voting Rights Act should be used only to protect the interests of African Americans and other minorities.

That brings us back to the issue: What was the motive? Is the case an example of the alleged culture of hostility to the race-neutral enforcement of civil rights laws at the Division? Or is there a more benign explanation for the decision?

The Commission has no smoking gun in this case that directly demonstrates that a lack of race-neutrality motivated the disposition. But that is because Department has refused to hand over most of the documents in this case that might have allowed the Commission to track the actual thinking of the lawyers involved. The two witnesses who provided testimony to the Commission–Adams and Coates–felt compelled by the Department's claim of privilege not to answer questions concerning the fractious deliberations that apparently surrounded that disposition.[47] If there is a smoking gun, the Commission has no access to it.

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just how easy it is to secure a default judgment. It is not clear whether the trial court judge required affidavits, testimony, or other types of documents before entering the default judgment. But when the appellant sought to set aside a default judgment on grounds that would excite sympathy in the minds of many, the trial court was unmoved. The appellate court, while acknowledging that sometimes default judgments should be vacated, affirmed the trial court's decision to let it stand. Similarly, *Hritz v. Woma Corp*., 732 F.2d 1178 (3d cir. 1984), is a case in which the Court refused to set aside a default judgment, again belying the idea that it is somehow difficult to obtain. *Shields v. Zuccarini*, 254 F.3d 476 (3d Cir. 2001), is not even a default case, so it is not clear why it was cited.

The Department is correct that a default judgment is not "automatic" after the entry of default. But judgment is not "automatic" after a jury verdict either. The point is simply that the fact of the defendants' default had made the Department's job relatively easy, and it is hardly surprising that the attorneys handling the case viewed it as essentially won. Any attorney would. Moreover, the efforts put into the internal struggles over the disposition of the case dwarf the efforts that would have been necessary to wrap up the case in default.

[46] Given that the political appointees involved in the disposition–Loretta King and Steven Rosenbaum–were career attorneys put in charge of the Division, it is certainly plausible that any such change in policy was in keeping with the policy preferences of a significant number, if not a majority, of career attorneys at the Division. See *infra* at Part I of this Statement.

[47] I take no position in this Statement as to whether the assertion of privilege over matters of the deliberative process was proper. Although I am impressed by Commissioner Gaziano's discussion of the privilege issues in his Statement as well as his experience as an attorney in the Department's Office of the Legal Counsel, where these issues are frequently presented, I have not had the opportunity to study them personally. At this point, I note only (1) that the Commission has a statutory duty to investigate and report on issues of civil rights enforcement and that the Department has a statutory duty to cooperate in the Commission's investigations; (2) that the Commission's ability to conduct this investigation has been significantly impaired by the Department's unwillingness to turn over crucial documents or to allow witnesses to testify freely and (3) that any privilege

The only way to demonstrate that the race of the defendants was a contributing factor to the decision is to eliminate one by one the many alternative motivations that have been offered by the Department and its defenders.

Surprisingly, this has turned out not to be as difficult a task as it sounds. So far at least, no plausible alternative reason for the full scope of the Division's decision has been offered. Far more plausible is the testimony of Adams and Coates as well as the affidavits of Bowers and von Spakovsky that point to a general hostility toward the race-neutral application of the law at the Division.

(1) ***Jerry Jackson***: The Department advanced several reasons for why it insisted, over the objections of the career attorneys handling the case, that defendant Jerry Jackson be dismissed from the New Black Panther case despite his failure to appear in court to defend himself. Those reasons were: (a) He was a designated poll worker on behalf of the Democratic Party at the time of the incident; (b) He was a resident of the building where the

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could have been waived by the Department if it had wished to do so. See 42 U.S.C. section 1975(b)(e): "All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties."

The legislative issue addressed in this Interim Report – whether Congress should amend the Commission's authorizing statute to address the conflict of interest that arises when DOJ is asked to enforce a subpoena against itself – is a serious one. This report lays out several alternatives, each with advantages and disadvantages. See supra at 114-7. I take no position on them. I am, however, baffled by Commissioner Yaki's remark that we are somehow grabbing power that even Congress doesn't have. As he put it:

> COMMISSIONER YAKI: All I can say is that is one, I think this is an attempt to arrogate to ourselves power exceeding that of Congress and other agencies. It is very unprecedented ….

Transcript, Meeting of the U.S. Commission on Civil Rights at 58 (November 19, 2010).

It is well-established, of course, that Congress's investigatory and contempt powers are implicit in the grant of legislative power. See *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

Both the House and Senate also have authorized special standing committees to seek civil enforcement of subpoenas. See, e.g., H.Res. 1420, 94th Cong. 2d Sess. (1976) (authorizing the Chairman of the House Interstate and Foreign Commerce Subcommittee on Oversight and Investigations to intervene in *United States v. American Telephone & Telegraph*, 419 F. Supp. 454 (D.D.C. 1976)); H.Res. 899, 121 CONG. REC. 918-19 (1975) (authorizing the Chairman of the House Interstate and Foreign Commerce Subcommittee on Oversight and Investigations to intervene in *Ashland Oil Inc., v. FTC*, 409 F. Supp. 297, 307 (D.D.C. 1976)) (cited in Morton Rosenberg and Todd Tatelman, CRS Report for Congress: Congress's Contempt Power, Law, History, Practice, and Procedure (April 23, 2008) (available at http://www.fas.org/sgp/crs/misc/RL34097.pdf). The notion that we are asking for powers that even Congress doesn't have is pure nonsense.

Indeed, the notion that we are asking for increased power at all is nonsense. One of our proposed alternatives is that Congress do nothing at all to amend the applicable law. Our recommendations do not ask Congress to select a particular course of action. They merely draw the issue to Congress's attention. The most likely explanation for Commissioner Yaki's heated accusation is that he had not in fact read the (then-proposed) recommendations.

incident took place; and (c) The Philadelphia police officer who responded to the call about the incident made the determination that, unlike King Samir Shabazz, Jackson should be allowed to remain at the polling place. All three arguments are wholly without merit.

First of all, poll workers are not exempt from laws against voter intimidation. If anything, they should be held to a higher standard. They have been trained to understand that a polling place is a sensitive place at which a high level of decorum (as well as personal security) is necessary. There can be no excuse for their dressing up in paramilitary gear, blocking the doors to the polling station and shouting racial epithets at those who try to get by. As for whether Jackson should be allowed to remain at the polling station because he was a resident of the building, it should be noted that voter intimidation laws apply to building residents too. Moreover, Jackson apparently was not a resident of the building. This "fact" was apparently taken from a local news report on the incident; the building at issue is in fact a home for senior citizens, not for Jackson. A cursory examination of the case file prepared by the career attorneys originally in charge of the case would have revealed this.[48] Finally, the fact that a Philadelphia police officer ordered King Samir Shabazz to leave the premises, but let Jerry Jackson remain is irrelevant to the issue before the Division. The Philadelphia police officer made a mistake. This is something human beings are prone to. In his defense, it is unlikely that this incident was the only problem he had to deal with that day. Moreover, the police officer was not an expert in election law—as Coates, Adams and their fellow Voting Section attorneys are.

But it is inappropriate for federal officials to defer to a Philadelphia police officer on questions of federal law enforcement. As Coates testified:

> During my 13 and a half years in the Voting Section, I cannot remember another situation where a decision not to file a Voting Rights Act case, much less to dismiss pending claims and parties, as happened in the New Black Panther Party case, was made, in whole or in part, on a determination of a local police officer. In my experience, officials in the Voting Section and the Civil Rights Division always reserved for themselves, and correctly so, the determination as to what behavior constitutes a violation of federal law and what does not. One of the reasons for this federal preemption of the determination of what constitutes a Voting Rights Act violation is that local police officers are normally not trained in what constitutes a Voting Rights Act violation. In addition, in the Philadelphia police incident report provided to this Commission by the DOJ, the Philadelphia police officer who came to the polling place did not determine that Black Panther Jackson's actions were not intimidating. Instead, he simply reported that Jackson was certified by the Democratic Party to be a poll watcher at the polling place and was allowed to remain.

[48] In his Statement, Assistant Attorney General Thomas Perez appears to have abandoned this argument. See Statement of Assistant Attorney General Thomas Perez (May 14, 2010).

> Further, as the history underlying the enactment and the extension of the Voting Rights Act shows, local police have on occasion had sympathy for persons who were involved in behavior that adversely affected the right to vote or violated the protections of the Voting Rights Act… Based upon my experience, this reasoning is extraordinarily strange and an unpersuasive basis to support the Division's disposition of the Panther case.[49]

Commissioners Yaki and Melendez argue that the Division deferred not to the police officer's conclusions of law, but only to his findings of fact—that Jackson did not intimidate, threaten or coerce anybody. The problem with this argument is that the police officer made no such finding of fact. The police report indicates only that Jackson was a certified poll watcher and that he was allowed to stay.[50] We have no way of knowing whether the police officer left Jackson alone because he concluded (as a matter of fact) that Jackson was not intimidating or because he concluded (as a matter of law) that poll watchers have a right to be present at polling stations even if they have been engaging in conduct that might otherwise cross the line.[51] The argument that the Division was deferring to his finding that Jackson was not intimidating is simply frivolous. The fact that this seems to be the best anyone can offer is deeply troubling.

It is worth noting that even if the police officer had found that Jackson was not intimidating, he arrived on the scene late. The eyewitnesses who did observe Jackson agreed that he was intimidating. Take Wayne Byman, the African American Republican poll watcher who was first on the scene on the incident.[52] His declaration states:

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[49] Transcript, Hearing of U.S. Commission on Civil Rights Hearing at 27-29 (September 24, 2010).

[50] See Philadelphia Police Department, Complaint or Incident Report (November 4, 2008).

[51] Given the wording of the police report, the latter seems overwhelmingly more likely. The report records that Jackson had credentials as a poll watcher. It does not record that he, unlike King Samir Shabazz, was not menacing voters. Id. A video clip of the encounter provides further evidence that Jackson was not allowed to stay because his conduct was acceptable. When the police arrived they had no opportunity to observe any differences between the conduct of King Samir Shabazz and that of Jackson. All they could tell was that King Samir Shabazz was wielding a nightstick and that Jackson was not. This fact alone obviously did not impress them. The officer in charge demanded that both men follow him to his squad car. When Jackson did not immediately come, the officer made it crystal clear that he did indeed mean *both* men. When the police officers allowed Jackson to resume his position in front of the polling place doors, it was apparently after he had shown them his credentials, not because he had persuaded them that his conduct was less menacing than his comrade's. The police officers would surely not have taken Jackson's word for it that his conduct was less menacing. They would have interviewed the witnesses. See Video of Police Encounter with New Black Panther Party Members at Polling Place (November 4, 2008), available at http://www.youtube.com/watch?v=19pUz89FaaU.

[52] Commissioners Yaki and Melendez lament that Byman and Joseph Fischetti were not brought to Washington to testify. They quote from this Interim Report—"'[t]he Commission attempted to interview and take the deposition of as many people as it could locate who were identified as having been at the polling site'"—and argue that this statement is "at odds" with the Commission's decision not to call Byman and Fischetti as witnesses at one of the hearings held before the full Commission. But both Byman and Fischetti were interviewed by the Commission's General Counsel, David Blackwood. There is no truth to the suggestion that the Commission simply ignored these witnesses or any other witnesses. Blackwood, under the direction of the Commission's Discovery Subcommittee, made the determination that neither Byman nor Fischetti were needed as witnesses at the full Commission hearing, since what they had to say was limited and would have been duplicated by Bartle Bull, Christopher Hill and Mike Mauro, all of whom had been at the scene for a longer period of time than either Byman or Fischetti and all of whom did testify.

> On the morning of November 4, 2008, I went to the polling place at 1221 Fairmount Street in the City of Philadelphia. I there observed two men wearing black uniforms with New Black Panther Party insignia, black boots and black berets. The two men were positioned directly in front of the entrance to the polling place at 1221 Fairmount Street. … In my opinion, the two uniformed men created a menacing

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Of course, if Commissioners Yaki and Melendez had been interested in having Byman or Fischetti testify at our first hearing (or indeed at any subsequent hearing), all they would have needed to do is say so and their request would have been respected. Indeed, it is not too late. As a result of the difficulty the Commission has had in securing the cooperation of the Department, this is only an Interim Report. Not only have Yaki and Melendez chosen not to do so thus far, they have instead complained and continue to complain that the Commission was spending too much time and money on this investigation. Joint Dissentat 178. In addition, when the Commission has sought to call witnesses or to authorize the Chairman and the Discovery Subcommittee to subpoena witnesses, Commissioner Yaki voted no, and Commissioner Melendez has been absent. See, e.g., Transcript, Telephonic Meeting of the U.S. Commission on Civil Rights at 25 (October 30, 2009). On the most recent occasion, Commissioner Yaki did not simply vote no, he voted a "big resounding no." Transcript, Meeting of U.S. Commission on Civil Rights at 12 (October 8, 2010). All of this belies the dissenting commissioners' notion that "Since we did not approve the investigation at all, we would rather that no witnesses had been called. However, since an investigation was going to be done …, it should have been done in a … thorough … manner." Joint Dissentat 178-9.

Yaki and Melendez also attempt to suggest that a two-minute video showing police arriving at the scene at 1221 and questioning King Samir Shabazz and Jerry Jackson was somehow ignored, because it was not "screened" at the Commission's public meeting. The fact that a video was not "screened" does not mean it was not carefully reviewed by the General Counsel or his staff or by Commissioners. In this case, the General Counsel made the determination that the video was not important enough to devote time during the public meeting to screen it. Instead it was made available to all Commissioners in a disk. I've seen it. Obviously Commissioner Yaki and/or Commissioner Melendez and/or one or more of their assistants have seen it. I concur with the General Counsel's judgment. The description of the final seconds of the video in the Joint Dissentis overdramatic. Someone (it is not clear to me who) attempted to discourage the videographer from following the police officers who had taken King Samir Shabazz and Jerry Jackson back to their squad car for questioning. It has no bearing on the strength of the case against the defendants in *New Black Panther Party* and no bearing on the reasons the case was largely abandoned, except insofar as it tends to discredit the dissenting commissioners' arguments as to Jerry Jackson. See supra at n. 51.

I should note that the reason for the dissenting commissioners' disagreement with the majority is not that the Commission did not seek their input on such matters. Commissioner Yaki was asked to serve on the Commission's Discovery Subcommittee in order to make it bipartisan. He declined in no uncertain terms. See Transcript, Meeting of the U.S. Commission on Civil Rights at 61 (September 11, 2009). At the December 16, 2009, Commissioner Yaki was again asked to serve on the subcommittee. His response was "Absolutely not." Transcript, Meeting of the U.S. Commission on Civil Rights at 39 (December 16, 2009).

It is characteristic of Commissioner Yaki and Melendez to submit hyperbolic dissenting Statements in which they argue that one or more aspects of the research undertaken by the Commission staff have been inadequate—even when the topic is far less controversial than this one. It has been my experience, however, that they are usually careful not to air their arguments until it is too late to correct the supposed problems they complain of. Moreover, their particular complaints tend to be whimsical and misinformed. See, e.g., U.S. Commission on Civil Rights, Enforcing Religious Freedom in Prisons, September 2008, at 109-117) Statement of Commissioners Yaki and Melendez) (reciting a sometimes-quirky litany of ways in which the Commission staff's research did not satisfy them); U.S. Commission on Civil Rights, Enforcing Religious Freedom in Prisons September 2008 at 118-129 (Statement of Commissioner Heriot) (responding to this litany).

> and intimidating presence at the entrance of the polls. I intentionally attempted to avoid any contact with them, because of this menacing and intimidating presence.[53]

Similarly, Michael Mauro, an attorney and Republican poll watcher, stated in his declaration, "In my opinion, the two uniformed men created an intimidating presence at the entrance of the polls."[54]

There was clearly no need to dismiss the case against Jackson for any of the reasons cited by the Department.

(2) ***Actual Voter Intimidation:*** The Department does not argue that there was no evidence of actual voter intimidation in the New Black Panther Party incident in Philadelphia. But Commissioners Yaki and Melendez have, as have others in the media, so I address the claim, which turns out to be another easy one to rebut.[55] The answer is threefold. First, there is

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[53] Declaration of Wayne Byman (April 1, 2009) (emphasis added), available at http://www.usccr.gov/NBPH/DeclarationofWayneByman%284-1-09%29.pdf. The Department has declined to furnish the Commission with Mr. Byman's witness statement. See also Declaration of Michael Mauro (March 31, 2009) ("In my opinion, the *two* uniformed men created an intimidating presence at the entrance of the polls") (emphasis added), available at http://www.usccr.gov/NBPH/DeclarationofMichaelMauro%283-31-09%29.pdf.

[54] See Declaration of Michael Mauro (March 31, 2009) (emphasis added), available at http://www.usccr.gov/NBPH/DeclarationofMichaelMauro%283-31-09%29.pdf. Commissioners Yaki and Melendez argue that there is no evidence that Jackson personally hurled racial epithets. If so, it wouldn't matter. If two men enter a liquor store together and stand shoulder to shoulder while the one with the gun demands money, his partner's silence is certainly not enough to establish innocence. It is more than sufficient in this case that the two men "formed ranks by standing in such a way to make them a significant obstacle" for those seeking entry to the polls and "attempted to impair [Christopher Hill's] entry into the polling place." Declaration of Christopher Hill para. 4 (April 1, 2009) available at http://www.usccr.gov/NBPH/DeclarationofChristopherHill%284-1-09%29.pdf.

[55] See Joint Dissent at 198 (alleging "no actual voters were intimidated"). For claims that the defendants' conduct did not constitute voter intimidation, see, e.g.., David A. Graham, "The New Black Panther Party Is the New ACORN," Newsweek, July 14, 2010, available at http://www.newsweek.com/2010/07/14/the-new-black-panther-party-is-the-new-acorn0.html (last accessed December 9, 2010): "As voter-intimidation exercises go, this wasn't much. " *See also* David Weigel, "Second Thoughts on New Black Panthers," The Daily Dish, available at http://andrewsullivan.theatlantic.com/the_daily_dish/2010/07/second-thoughts-on-the-new-black-panthers.html (last accessed December 9, 2010): " [I]t's not pleasant to watch racist idiots yell at people as they do in a pre-election day video [Glenn] Beck keeps playing, but it's not illegal. For those of us who live in cities and have to sneak into metro stations past the Black Israelites and other such nincompoops, it's not even unusual." See also Transcript, Hearing of the U.S. Commission on Civil Rights 130 (April 23, 2010)(remarks of Vice Chair Thernstrom disagreeing that the incident was "a clear instance of intimidation"). But see also Abigail Thernstrom, Lani's Heir: The New, Old Racial Ideology of the Holder Justice Department, National Review Online (December 21, 2009)(criticizing Attorney General Holder for his "questionable judgment" in dismissing the cases against members of the New Black Panther Party "who engaged in blatant voter intimidation at a Philadelphia polling place").

Interestingly, before submitting the Joint Dissentto the Commission, Commissioner Yaki did appear to concede that voter intimidation took place in Philadelphia that day. At the April 23 hearing, he said on the record: "The fact of the matter is that -- is that I am not as -- I am not as concerned about whether or not -- relitigating the issue whether there was intimidation or not. In my opinion, there was intimidation." See Transcript of the April 23, 2010 Hearing at p. 111. It is odd, then, that much of the Joint Dissentthat he joined appears devoted precisely to such relitigation of the underlying case.

evidence of actual voter intimidation. Christopher Hill, a senior registrar at the University of Pennsylvania Hospital and certified poll watcher, testified before the Commission on April 23, 2010: [56]

> People were put off when -- there were a couple of people that walked up, couple of people that drove up, and they would come to a screeching halt because it's not something you expect to see in front of a polling place. As I was standing on the corner, I had two older ladies and an older gentleman stop right next to me, ask what was going on.
>
> I said, 'Truthfully, we don't really know.' All we know is there's two Black Panthers here." And the lady said, "Well, we'll just come back." And so they walked away. I didn't see anybody other than them leave, but I did see those three leave.[57]

Second, even if no actual voter had been intimidated, threatened, or coerced the statute prohibits attempts to intimidate, threaten or coerce too.[58] Third, the statute prohibits the intimidation of persons who aid in the vote as well as voters themselves. Christopher Hill testified that certified Republican poll worker Larry Counts "was called a race traitor for being a poll watcher,"[59] that Mr. Counts "was threatened if he stepped outside of the building, there would be hell to pay," and that as a result Counts was "pretty shaken up" and "visibly upset."[60] Hill also testified that the King Samir Shabazz and Jerry Jackson had attempted (evidently without success) to intimidate Hill himself:

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[56] Vice Chair Thernstrom emphasized at the hearing that it is not known if these voters came back and voted later and seemed to suggest that if they did their return would have some legal significance. Transcript, Hearing of U.S. Commission on Civil Rights at 97 (April 23, 2010). There is, however, no requirement that the United States prove that intimidated voters didn't come back, so it wouldn't matter if they had. Voters are not supposed to have to dodge election thugs in order to vote. It is wholly insufficient to tell them that they should have returned later. It is difficult not to doubt whether this argument would have been made if the defendants had been dressed in KKK robes.

[57] Id. at 50-1. See also Transcript, Hearing of U.S. Commission on Civil Rights 57 (April 23, 2010) (Bartle Bull testifying that he witnessed "voters" walk up, observe the situation and walk away).

[58] Section 11(b) of the Voting Rights Act, codified at 42 U.S.C. 1973(i)(g), reads: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e)."

[59] Transcript, Hearing of U.S. Commission on Civil Rights at 48 (April 23, 2010).

[60] *Id.* Larry Counts and his wife, Angela Counts, who was also a poll watcher that day, have not confirmed what Christopher Hill said about their experiences at the polling place that day. See Deposition Transcript of Larry Counts, January 12, 2010, 8-20 (*available at* http://www.usccr.gov/NBPH/LarryCountsDepositionTranscript.pdf); Deposition Transcript of Angela Counts, January 12, 2010, 9-27 (*available at* http://www.usccr.gov/NBPH/AngelaCountsDepositionTranscript.pdf). They say they never saw King Samir Shabazz or Jerry Jackson. But given that Mr. and Mrs. Counts live in the Philadelphia neighborhood where this incident took place, it should not be a surprise if they are reluctant to come forward with testimony that would corroborate Hill's statements. The Commission's own experience with defendant King Samir Shabazz suggests that he is not above attempting to intimidate those who are in some way connected to the investigation into *New Black Panther Party*. He attended the Commission hearing in Washington, D.C. on April 23, 2010 at which Bartle Bull, Christopher Hill, Michael Mauro and others testified. During the testimony, he took photographs of several of those connected to the investigation in a way

> MR. BLACKWOOD: Did he [King Samir Shabazz] say anything to you?
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> MR. HILL: Immediately started with, "What are you doing here, Cracker? And he and Mr. Jackson attempted to close ranks. I went straight between them through the door to find our poll watcher, who was inside the building at the time.

There is an abundance of evidence of the kind of threats, intimidation and coercion that are prohibited by Section 11(b), also including the affidavit of Wayne Byman, also a certified poll worker, which stated, "I intentionally attempted to avoid any contact with [the two New Black Panther Party members], because of this menacing and intimidating presence."[61] This argument is seriously put forth only by those who are unfamiliar with the law or with the record.[62]

(3) ***Racial Motivations:*** Another frequently-heard argument from some critics of the Commission's investigation (but not from the Department) is that the defendants did not intend to intimidate, threaten or coerce voters or poll watchers on the basis of race when they showed up at a majority-black voting precinct and shouted racial insults like "Now you will

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that seemed to be designed to unnerve. While such conduct may be only buffoonish in a government building in Washington, D.C., it could well seem very different to someone who lives or works in the neighborhood with King Samir Shabazz.

Commissioners Yaki and Melendez place emphasis on the fact that Mr. and Mrs. Counts testified that they are not actually Republicans, but Democrats who were being paid to be Republican poll watchers that day. It is not clear why the dissenting commissioners consider this fact to be significant. It is unlikely that Mr. and Mrs. Counts had a conversation with the members of the New Black Panther Party members about their political or ideological beliefs prior to the alleged harassment. If King Samir Shabazz and Jerry Jackson were harassing them as "race traitors" because they thought they were African American Republicans, they probably wouldn't think highly of them for working for the Republicans either. If anything, the Countses' testimony about the actual party affiliation would help explain the contradictions between Christopher Hill's testimony and their own. If the Countses were really Democrats, they may be less interested in getting involved in the lawsuit. If they are really Republicans now pretending to be Democrats, it suggests that they really have been effectively intimidated. Joint Dissentat 179-181.

[61] Declaration of Wayne Byman at para. 2 (April 1, 2009).

[62] Vice Chair Thernstrom has argued that the "legal standards that must be met to prove voter intimidation—the charge--are very high." Abigail Thernstrom, The New Black Panther Case: A Conservative Dissent, National Review Online (July 6, 2010), available at http://www.nationalreview.com/articles/243408/new-black-panther-case-br-conservative-dissent-abigail-thernstrom. It is not clear what she meant to say here. But if she meant to suggest that the standard of proof applicable to this case is any different from the standard applicable to any other civil case-–preponderance of the evidence—then she is incorrect. Her use of the term "charge" suggests she might be confusing this case with a criminal proceeding, which would indeed have a high standard of proof. As for applicable legal standards, there is no law suggesting that Section 11(b)'s use of the words "intimidate, threaten or coerce" should be read to mean "intimidate, threaten or coerce with in a particularly spectacular way." Nor is there any law requiring "any voter" to be read to mean "any twenty voters." As the Supreme Court stated in *Church of the Holy Trinity v. United States*, 143 U.S. 457, 463 (1892), "[I]t is to be assumed that words and phrases are used in their ordinary meaning." The words are themselves the applicable legal standards. Any suggestion to the contrary is incorrect.

see what it means to be ruled by the Black Man, Cracker" and "race traitor."[63] If they had intended to intimidate whites, they would have gone to a majority-white precinct, since they would have found more whites to intimidate or threaten there.[64] This does not follow. The best place to intimidate any group is where their numbers are small, not where they are large, and both white voters and black Republicans were apparently in short supply at 1221 Fairmount Street in Philadelphia that day. All one has to do is read what was said to understand that King Samir Shabazz and his comrade Jerry Jackson had racial motivations for their conduct. But even if racial motivation were difficult to prove, it wouldn't matter. The statute does not require the Department to prove racial motivations for intimidation. Indeed, the word "race" does not even appear in Section 11(b). And indeed, the legislative history of the Voting Rights Act demonstrates that this was intentional. It states, "The prohibited acts of intimidation need not be racially motivated; indeed unlike 42 U.S.C. 1971(b)(which requires proof of a 'purpose' to interfere with the right to vote) no subjective purpose or intent need be shown."[65]

(4) ***Narrow Injunction as to King Samir Shabazz:*** The Department has argued that it was obligated under the law to narrow the injunction even as to King Samir Shabazz. But having reviewed their arguments, I cannot agree that the Department was legally constrained to act as it did.

In the original Complaint, the Department had asked for a broad injunction against all defendants. It would have "[p]ermanently enjoin[ed] Defendants, their agents and successors in office, and all persons acting in concert with them, from deploying athwart the entrance to polling locations either with weapons or in uniform of the Defendant New Black Panther Party, or both, and from otherwise engaging in coercing, threatening, or intimidating behavior at polling locations during elections." Over the objections of the career attorneys originally assigned to the case, that request was severely cut back on.

I believe this initial version of the requested injunction could have been improved upon. In particular, I would have liked to see the boundaries of "poll locations" defined precisely right down to the number of feet the defendants had to keep between themselves and the actual location. The final injunction requested by the Department and granted by the court, however, went far beyond that in its narrowness. It merely required King Samir Shabazz (the other three defendants having been dismissed) to refrain from "displaying a weapon within 100 feet of any open polling location on any election day in the city of Philadelphia., or from otherwise violating 42 U.S.C. section 1973i(b)." The injunction, which was issued on May 18, 2009, was good only until November 15, 2010.[66]

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[63] The quotation "Now you will see what it means to be ruled by the Black Man, Cracker" appears in *Id.*, 58.
[64] See, e.g., Adam Serwer, "Section 11(b) and Why the NBPP Case Was Dropped," The American Prospect, July 12, 2010, *available at* http://www.prospect.org/csnc/blogs/adam_serwer_archive?month=07&year=2010&base_name=section_11b_and_why_the_nbpp_c (last accessed December 9, 2010): "My own observation is that a black polling place isn't a very productive place to go to intimidate white voters."
[65] H.R. Rep. at 30 (1965). While at least one court has held to the contrary, see *Gremillion v.Rinaudo*, 325 F. Supp. 375, 376-77 (E.D. La. 1971), it appears the court may have been unaware of this legislative history.
[66] Order, *United States v. New Black Panther Party for Self Defense*, Civil Action No. 09-65 (May 18, 2009); Judgment, *United States v. New Black Panther Party for Self Defense*, Civil Action No. 09-65 (May 18, 2009)

Such an injunction could have been easily circumvented simply by hopping a bus to the Philadelphia suburbs. It is essentially useless. The question, of course, is what would motivate the Division to seek such a toothless injunction? Does the law really demand it? Or is something else at work here?

Some have defended the narrow injunction on the ground that the court's geographic jurisdiction does not run beyond Philadelphia. This is incorrect. The United States District Court for the Eastern District of Pennsylvania includes all of eastern Pennsylvania, well beyond the Philadelphia city limits. But even if it did not, it would not matter. It is an elementary principle of equity that the court's injunctions operate in personam, not in rem, and thus a court has jurisdiction to command a defendant who is properly before it to act or refrain from acting anywhere.[67] Nationwide injunctions in appropriate cases are routine.[68] Indeed, international injunctions are common, even for state courts.[69] It is frivolous to suggest that federal (or for that matter state courts) do not have the power to issue nationwide injunctions.

Courts are usually hesitant to issue nationwide injunctions against corporate defendants whose wrongdoing was confined to one or two localized bad apples, since complying with an injunction can impose burdens on innocent players.[70] But King Samir Shabazz is not a corporation. He is a bad apple himself. There is no reason to apply such a rationale to his case.

In his Statement, Assistant Attorney General Thomas Perez cited cases that hold that "'an injunction must be no broader than necessary to achieve its desired goals,' Madsen v. Women's Health Center, 512 U.S. 753, 765 (1994)." It is not clear what he means by this. It cannot be that the goal of this litigation was to prevent voter intimidation by King Samir Shabazz in Philadelphia, but not in Pittsburgh or St. Louis. Moreover, none of the cases cited by Perez supports the proposition that it would have been inappropriate to enjoin the defendant from intimidation outside the city of Philadelphia. (Some do support the notion that the injunction should have precisely defined how close the defendant could come to a polling place, but that has nothing to do with why the ultimate injunction secured by the Division was controversial. It is the limitation to the City of Philadelphia that has astonished observers and caused them to question the Division's motives.)

The real question is whether there was sufficient reason to believe that King Samir Shabazz might engage in intimidation at a polling place in the future somewhere other than

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(emphasis added).

[67] See Douglas Laycock, Modern American Remedies 240 (2d ed. 1994) (calling it "an ancient maxim of equity that it acts *in personam*–on the person of the defendant" and that as a result a court may order a defendant "to act or refrain from acting anywhere in the world").

[68] See, e.g., *Califano v. Yamasaki*, 442 U.S. 682, 701-703 (1979).

[69] See, e.g., *Dayan v. McDonald's Corp.*, 382 N.E.2d 55 (Ill. App. 1978) (ordering McDonald's Corp. not to cancel a franchise in France).

[70] See *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730 (5th Cir. 1977) ("[A] nationwide or companywide injunction is appropriate only when the facts indicate a company policy or practice in violation of the statute").

Philadelphia, since courts will not issue injunction where there is no threat of wrongdoing.[71] But this is an easy case for that. The evidence against King Samir Shabazz on this count was more than sufficient. First, he was an adjudicated wrongdoer who had engaged in such behavior in the past. Second, he has expressed no contrition and indeed has essentially thumbed his nose at the lawsuit filed against him by the United States by declining to appear. Third, he is part of an organization that has advocated racial hatred and that purports to have deployed hundreds of its members to polling places across the country. The case for a national injunction is overwhelming.

All of this suggests that, like the decision to dismiss Jackson, the Division's decision to limit the injunction against King Samir Shabazz cannot explained by the arguments the Department has advanced.

(5) ***Liability of Malik Zulu Shabazz and the New Black Panther Party:*** The Department also takes the position that there was insufficient evidence to find Malik Zulu Shabazz and the New Black Panther Party itself civilly liable for the conduct of King Samir Shabazz and Jerry Jackson (even in a proceeding based on the defendants' default). Unlike its position on Jerry Jackson, I do not consider this position to be frivolous. Nevertheless, it persuaded neither me nor the career appellate attorneys who were requested to weigh in on the dispute between the attorneys who had been handling the case and their supervisors.[72] Even if it had persuaded us, however, it would not explain the dismissal of Jackson or the strangely narrow injunction against King Samir Shabazz.

The allegations in the complaint are in order. They stated:

> 12. Defendants New Black Panther Party for Self-Defense and Malik Zulu Shabazz managed, directed and endorsed the behavior, actions and statements of Defendants Samir Shabazz and Jackson at 1221 Fairmount Street on November 4, 2008, alleged in this Complaint. Prior to the election, the New Black Panther Party for Self-Defense made statements and posted notice that over 300 members of the New Black Panther Party for Self-Defense would be deployed at polling locations during voting on November 4, 2008, throughout the United States. After the election, Defendant Malik Zulu Shabazz made

[71] See *Humble Oil & Refining Co. v. Harang*, 262 F. Supp. 39 (E.D. La. 1966) (textbook case in which court declines to issue injunction prohibiting defendant from destroying documents in connection with the litigation on the ground that no evidence that defendant was inclined toward any such misconduct was presented).

[72] A chain of e-mails from DOJ appellate attorneys Marie McElderry and Diana Flynn on this subject has been provided to the Commission and is available on our website at http://www.usccr.gov/NBPH/DOJcomments_05-13-09_reproposeddefaultjudgment.pdf In this chain of messages, career DOJ appellate attorney Diana Flynn and Marie McElderry note some of the weaknesses in the case against Malik Zulu Shabazz and the national New Black Panther Party organization. Still, neither recommended dropping the case altogether because of these concerns. McElderry appears to think that crafting a sufficiently narrowly tailored injunction against the parties would be a sufficient way around these problems. Flynn observes that the Voting Section has evidence supporting the case against Malik Zulu Shabazz, including "discussion in the internal papers of the history of the organization with respect to voter intimidation with the use of weapons and uniforms," discussion which would support the case against them. She ultimately concluded that "we probably should not back away from these allegations."

statements adopting and endorsing the deployment, behavior and statements of Defendants Samir Shabazz and Jackson at 1221 Fairmount Street in Philadelphia, Pennsylvania.

No one disputes the authenticity of the video announcing the deployment of party members to polling stations.[73] It seems clear that the appearance of King Samir Shabazz and Jackson in Philadelphia, dressed in their makeshift uniforms with prominent New Black Panther Party insignias, was a part of that deployment effort.[74] Nor does anyone dispute the video showing an obviously sarcastic Malik Zulu Shabazz purporting to chastise King Samir Shabazz, while clearly proud of his Election Day misbehavior. Even if the former had been insufficient to convince a court that the Party and its president were the initiators of the wrongful conduct, the latter could demonstrate that the conduct had been approved and

[73] See AOL Video, http://video.aol.com/video-detail/dr-malik-shabazz/1916264308/?icid=VIDLRGOV07 (follow hyperlink to FoxNews).

[74] One of the more curious arguments made by the dissenting commissioners is that these uniforms would not have been recognized by the average voter as derivative of "the uniform of the Italian Fascist Party." Joint Dissent at 184. It is wholly unclear why they consider that significant. It appears they have misunderstood a statement made by Bartle Bull in response to a question by Commissioner Yaki. Yaki asked, "What about the uniform was it that made them intimidating?" Bull replied that the uniforms—black berets, black shirts and jackets, military-style boots and insignia—have a history behind them. "[T]his is the way paramilitaries dressed in fascist Italy and Nazi Germany …," he said. "They wore jackboots like these gentlemen. They wore caps like these gentlemen. They wore uniforms with their own regalia like these gentlemen." Commissioners Yaki and Melendez purport to take Bull to mean that the average American is specifically familiar with the uniform of the Italian Black Brigades. But that was obviously not his point, and I am surprised to have to address such an argument. Bull was pointing out that Americans are familiar with the traditions and practices of paramilitary organizations in general. Black berets have been worn not just by the Italian Black Brigades, but by Che Guevara, original Black Panthers Huey Newton and his colleagues, members of the Symbionese Liberation Army and the Provisional Irish Republican Army, and many more. Few Americans can tell you exactly what members of the Italian Black Brigades wore, just as few can tell you exactly whether an organization like the Black Beret Cadre of Bermuda even existed. But that doesn't mean they will look at two men wearing black berets, military-style boots, New Black Panther Party insignia, black pants, shirts and jacket and a night stick and not realize that they are looking at menacing thugs emulating the dress of paramilitary and similar organizations of the past. Americans are not fools. No one mistook King Samir Shabazz and Jerry Jackson for a pair of existential philosophers on their way to sip coffee at a sidewalk café in Paris.

Similarly, it is not clear why Commissioners Yaki and Melendez regard it as significant that these uniforms were not precisely uniform. Indeed, the irregularities in the uniform simply drive home the fact that these men were not peace officers there to maintain order at the polls. They were thugs.

Perhaps the oddest aspect of this argument is that only two years ago, Commissioner Yaki argued that voters could be intimidated by DOJ poll watchers' wearing dark suits. At a June 6, 2008 Commission briefing, Commissioner Yaki, who was then convinced that voter intimidation was a significant problem and that the Bush Justice Department wasn't doing enough to combat it, observed that "But anecdotally, there have been some instances where individuals from the criminal prosecutor's offices of Justice go out as monitors and some people have found them to be as intimidating, if not more intimidating, than the people who allegedly they're supposed to try to keep in check, simply because I don't know, maybe they wear the dark suits and flash a badge or what have you." U.S. Commission on Civil Rights, Transcript of Briefing, 69-70 (June 6, 2008.) Yet DOJ lawyers' suits also are not precisely alike. One DOJ lawyer from a pair of poll watchers might wear solid navy from Brooks Brothers and the other charcoal pinstripe from J. Press. It is unclear if, in the future, Commissioner Yaki will take these equally subtle sartorial distinctions into account when analyzing whether DOJ poll watchers are working together to intimidate voters.

ratified by the Party and its leader, thus clarifying that it was the conduct of the Party itself. Liability would thus ensue.

One might pause to wonder, of course, how any organization could approve and ratify the conduct of a man like King Samir Shabazz. This is a man who has been caught on tape at a Philadelphia outdoor market calling out to the crowd with a microphone, "I hate white people. All of them. Every last iota of a cracker I hate him. ... You want freedom? You're gonna have to kill some crackers. You're gonna have to kill some of their babies." Why would a reputable organization be willing to tolerate such a man in its ranks? But the New Black Panther Party is not a reputable organization, and King Samir Shabazz is not even the first member of the party to be caught on video giving a murderous racist rant. Khalid Abdul Muhammad, national chairman of the New Black Panther Party until his death in 2001 and considered by some to be the father of the movement, once told a cheering crowd:

> I said if we're going to be merciful we give 'em [whites] 24 hours in South Africa to get out of town by sundown. I said if they don't get out of town; we kill the men; we kill the women; we kill the children; we kill the babies; we kill the blind; we kill the cripple; we kill the crazy; we kill the faggots; we kill the lesbians; I said goddamnit, we kill 'em all.[75]

Sadly, it would not take a lot to convince a court that the New Black Panther Party planned, directed, approved and endorsed the actions of King Samir Shabazz and Jackson.

Some critics have suggested that Malik Zulu Shabazz and his fellow members of the New Black Panther Party have First Amendment rights to vent their rage against white people however misguided that rage may be (so long as they do it somewhere other than the entrance to a polling place). And so they have. But they who sow the wind must reap the whirlwind.[76] A court of law is well within its authority to take their statements into account in determining whether it is more likely than not that defaulting defendants King Samir Shabazz and Jerry Jackson were acting as agents of the defaulting defendants New Black Panther Party and Malik Zulu Shabazz when they stood outside the doors of the polling place at 1221 Fairmount Street. The Division was not obliged by law to dismiss the case against the New Black Panther Party or Malik Zulu Shabazz.

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[75] Malik Zulu Shabazz has called Khalid Abdul Muhammad "one of the greatest Black leaders ever to live" and "helped to shape my life and was a captain and minister over me." Charlene Muhammad, Community Tributes Khallid Abdul Muhammad, FinalCall.com News (July 21, 2005), available at http://www.finalcall.com/artman/publish/article_2110.shtml. See also New Black Panther Party for Self-Defense: Malik Zulu Shabazz Speaks at Carnegie-Mellon University, Anti-Defamation League (February 23, 2005) (quoting Malik Zulu Shabazz as stating that Jewish rabbis "set the stage for the African holocaust" and that "the very nature of white people" causes problems in the world).

[76] Hosea 8:7.

III. The Dissenting Commissioners Apparently Do Not Claim that New Black Panther Party Was Not an Example of the Division's Hostility Toward the Race-Neutral Law Enforcement; Rather They Attack a Straw Man by Arguing that the Case's Disposition Was Not Motivated By a Desire to Support Black Supremacist Groups.

Another curious aspect of their dissent is its insistence that the motives of Civil Rights Division attorneys are inherently unknowable together with the implication that any investigation into those motives is therefore illegitimate. As they put it:

> Our dissent does not attempt to make definitive claims about the motives or actions of the United States Department of Justice … past or present. We have no special insight into the hearts or minds of the people working at the Department.[77]

I know of no other occasion on which Commissioners Yaki and Melendez have shrugged their shoulders in the face of an allegation of wrongdoing and asked, "Who can ever know?" Indeed, my experience with them recently has been the opposite. In their Joint Dissent, they have been inclined to see—or at least purport to see—malicious motivations that do not exist. For example, they accuse unnamed witnesses (presumably Christian Adams and Christopher Coates) of being "disgraced and disgruntled" and out "to settle personal and political scores."[78] There is no evidence of this, and indeed the evidence shows these attorneys have particularly good records as staff members.[79] Similarly, they accuse members of the Commission of having an "illegitimate and contemptible purpose" in examining the Department's enforcement policies in connection with the New Black Panther Party incident.[80]

As the U.S. Commission on Civil Rights, it is frequently our job to investigate whether executive branch agencies are executing the law in a non-discriminatory manner and report to Congress, the President and the American people if they are not. Indeed, our statute demands that we examine the enforcement of the civil rights law by agencies like the Department. That is not always the easiest of jobs—especially when agencies shirk their statutory responsibility to cooperate with the Commission's investigation and members of the Commission itself attempt to thwart that investigation. But it is our job.

Commissioners Yaki and Melendez erect a straw man and then attack it by arguing that "we do not feel the need to adopt bizarre explanations that envision the Obama Administration doing favors for a black supremacist group." But as the dissenting commissioners surely understand, no such allegation had been made in this report. The

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[77] Joint Dissentat 177.
[78] Joint Dissentat 198
[79] Christopher Coates testified before the Commission that in 2007, he received the Civil Rights Division's second highest award (the Hubble Award) for effective advocacy. U.S. Commission on Civil Rights, Transcript of Hearing, September 24, 2010 at 47. Coates has also received awards from the Georgia Conference of the NAACP and the Georgia Environmental Association. Id. at 46-7. Adams testified that he was promoted two weeks before he resigned from the Department and that he was at the top of the federal pay scale when he left. U.S. Commission on Civil Rights, Transcript of Business Meeting, July 6, 2010 at 128.
[80] Joint Dissentat 198.

allegations are that the Division does not treat Section 2 or Section 11(b) cases like *Brown* and *New Black Panther Party* the same way they do the cases Ms. Fernandes labeled "traditional." In short, the Division treats cases differently depending upon whether defendants are black or white. The Commission has obviously never seriously (or even not-so-seriously) considered whether Assistant Attorney General Perez, Ms. Fernandes, Ms. King and Mr. Rosenbaum are chummy with the likes of the defendants in *New Black Panther Party*. I am confident that they do not travel in the same social circles.

Commissioners Yaki and Melendez also argue that this investigation and report "have been a tremendous waste of scarce government resources."[81] They argue that this investigation "was, from the very beginning, an effort to direct the resources of the Commission toward … harassing the new Administration."[82] The figure they cite—$173,000—is actually somewhat less than what the Commission has historically spent on its annual statutorily-required enforcement report. Admittedly, it does not include all the expenses that might plausibly be associated with the report. For example, it does not include the transportation and lodging expenses for Commissioners to meet on October 29, 2010 to consider this Interim Report. On that date, quorum failed because Commissioner Yaki refused to come in from the hallway to join the meeting and declaring it to be "not his problem" if the rest of the Commission could not muster a quorum. It is my hope that the taxpayer did not pay for his trip to Washington or indeed the cost to bring any of the Commissioners to Washington on that occasion.

All of this conduct in connection with the New Black Panther Party incident is quite inconsistent with Commissioner Yaki's earlier declaration that if Deputy Assistant Attorney General Julie Fernandes made the statement she is alleged by Christian Adams to have made, she "should be fired." As he so colorfully put it, "That person should be tossed out on their ear in two seconds flat." If so, how can it be that an investigation into the matter is illegitimate?[83]

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[81] Joint Dissentat 177

[82] Joint Dissentat 198.

[83] Vice Chair Thernstrom has also argued that this investigation has been somehow illegitimate, though she offers little in the way of specifics. It should be noted, however, that the Vice Chair was originally in favor of the investigation. While she was not present at the June 12, 2009 business meeting at which the Commission decided to send its June 16, 2009 letter of inquiry, she and Commissioner Ashley Taylor, Jr. (who also missed that meeting) followed up with their own joint letter of inquiry dated June 22, 2009. In it, they concurred in the Commission's original letter. Using language that was stronger than that of the Commission's original letter, the Vice Chair and Commissioner Taylor wrote, "We are gravely concerned out the Civil Rights Division's actions in this case and feel strongly that the dismissal of this case weakens the agency's moral obligation to prevent voting rights violations, including acts of voter intimidation or voter suppression." "We cannot understand the rationale for this case's dismissal," they continued, "and fear that it will confuse the public on how the Department of Justice will respond to claims of voter intimidation or voter suppression in the future."

For a more detailed response to the Vice Chair, see Joint Statement of Commissioners Peter Kirsanow, Gail Heriot and Todd Gaziano to the Vice Chair at 200-4.

IV. The New Black Panther Case Is Not Best Seen as an Effort by Partisan Political Appointees Improperly to Overrule Non-Partisan Career Attorneys; Rather Should Be Viewed as a Struggle Between Those Who Would Enforce the Laws and the Constitution in Good Faith and Those Who Prefer to Pursue Instead Their Own Policy Preferences.

Both critics and defenders of the Department's handling of the New Black Panther Party case seem to agree on one thing: When political appointees overrule the judgment of career attorneys, something is deeply wrong. The difference between them is that critics believe that this is exactly what happened with the New Black Panther Party case. Defenders, on the other hand, argue that the case is better understood as a clash between two sets of career attorneys, since Loretta King and Steven Rosenbaum, while Obama administration appointees, were originally career attorneys within the Division.[84]

Both sides have it wrong. The Constitution states that the President of the United States "shall take Care that the Laws be faithfully executed."[85] There is nothing in the Constitution about the need for his appointees to defer to the judgment of an unelected and unaccountable career staff. Rather, if political appointees see that career staff has run amok with the law and the Constitution, it is their duty to intervene.[86] Policy is supposed to be set by political appointees; it is not supposed to be set by the staff members they supervise. If indeed there is a culture of hostility toward the race-neutral enforcement of civil rights laws, it is the duty of political appointees to root it out.

In the case of the New Black Panther Party case, the problem is not that the wrong persons made the decision. The problem is that the wrong decision appears to have been

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[84] See, e.g., Statement of Assistant Attorney General Thomas E. Perez 8 (May 14, 2010). "The decisions regarding the disposition of the case ... ultimately was [sic] made by the career attorney who was then serving as the Acting Assistant Attorney General for the Civil Rights Division. Another attorney who was then serving as the Acting Deputy Assistant Attorney General who responsibility for supervising the Voting Section also participated directly in the decision-making process."

[85] U.S. Const. art. II, sec. 3, cl. 4.

[86] In evaluating arguments between career attorneys and the political appointees who manage them, it is always important to remember that "career" in this context does not mean non-partisan or non-ideological. It simply means that the employees were hired and retained under what used to be called the "civil service" procedures, which among other things, forbid consideration of the employee's political views in deciding whether to hire or fire. It has been my experience that career employees who inhabit policy-oriented parts of the federal bureaucracy, like the Division, are often highly ideological and sometimes quite partisan too.

I tend to prefer the terms "partisan" and "ideological" to the more all-encompassing "political," because I think they make a distinction that is worth making. A person is "partisan" if he is motivated by party loyalty and non-partisan if he is not. A person is "ideological" if he subscribes to a set of ideas and principles, not shared by everyone, that drive his preferences on public policy issues in an organized and predictable manner; he is non-ideological if his policy preferences are not so organized or predictable or if they are organized on the basis of such things as personal loyalties or antipathies or immediate self-interest. I do not mean either term as an insult; nor do I mean them as praise. Some ideological persons are also partisan; some are not. Some partisan persons are also ideological, some are not. As I use the term "ideological" and "partisan," I do not mean impervious to evidence, since in my experience some are and some are not, just as some non-ideological and non-partisan persons are and some are not.

made. Nobody in the Division should be deciding which cases to bring under Section 2 or Section 11(b) based on the race of the defendants–not political appointees, not career attorneys, not anybody.

Statement of Commissioner Peter N. Kirsanow[1]
Joined by Commissioner Gaziano

The Commission's investigation into the Department of Justice's ("DOJ" or "the Department") near-total dismissal of *United States v. New Black Panther Party* ("NBPP" or "NBPP case")—a voter intimidation case it had essentially won—raises troubling questions that strike at the heart of DOJ's fidelity to the Constitution's equal protection guarantee. Specifically, does the Department's Civil Rights Division ("CRD" or "the Division"), the primary entity charged with enforcing voting rights for *all* Americans, maintain or tolerate a culture in which some Americans' voting rights are deemed more worthy of protection than others based on their race? Relatedly, is there a class of defendants CRD exempts from vigorous prosecution for voting rights violations based on those same impermissible considerations? If the Civil Rights Division is permeated by a culture hostile to the race-neutral enforcement of the laws, what, if any, measures have Department officials taken to rectify the problem?

The Commission's pursuit of the answers to these questions has been stymied by a Department that has consistently tried to cultivate the public appearance of cooperation with the Commission's investigation, while engaging in a degree of stonewalling and obstruction inexplicable for an agency professing clean hands. We have heard compelling testimony from former Voting Section attorneys Christian Adams and Christopher Coates—corroborated in part by the sworn affidavits of former Department employees,[2] along with press statements made by three anonymous current Department employees too afraid to speak publicly for fear of retribution[3]—of this culture of hostility. If these collective sources

[1] Commissioner Gaziano and I join each other's Statements. We also join Commissioner Heriot's Statement.
[2] *See* Affidavit of Karl S. "Butch" Bowers, Jr., ¶ 8 (July15, 2010) ("In my experience, there was a pervasive culture in the Civil Rights Division and within the Voting Rights Section of apathy, and in some cases outright hostility, towards race-neutral enforcement of voting rights laws among large segments of career attorneys."), at http://www.usccr.gov/NBPH/BowersStatement_07-15-10.pdf; Affidavit of Hans A. Von Spakovsky, ¶ 22 (July 15, 2010) ("While I was not at the Division at the time the New Black Panther Party case arose, I can confirm from my own experience as a career lawyer that there was a dominant attitude within the Division and the Voting Section of hostility toward the race-neutral enforcement of voting rights laws by many of the career lawyers and other staff."), at http://www.usccr.gov/NBPH/vonSpakovskyAffidavit_07-15-10.pdf.
[3] Jerry Markon and Krissah Thompson, *Dispute Over New Black Panthers Case Causes Deep Divisions*, WASH. POST (Oct. 22, 2010), available at http://www.washingtonpost.com/wpdyn/content/article/2010/10/22/AR2010102203982.html?sid=ST2010102300136 ("Three Justice Department lawyers, speaking on the condition of anonymity because they feared retaliation from their supervisors, described the same tensions, among career lawyers as well as political appointees. Employees who worked on the Brown case were harassed by colleagues, they said, and some department lawyers anonymously went on legal blogs 'absolutely tearing apart anybody who was involved in that case,' said one lawyer. 'There are career people who feel strongly that it is not the voting section's job to protect white voters,' the lawyer said. 'The environment is that you better toe the line of traditional civil rights ideas or you better keep quiet about it, because you will not advance, you will not receive awards and you will be ostracized.'").

are to be believed, what emerges is the picture of a Civil Rights Division fundamentally "at war with its core mission."[4]

It is against this backdrop that the Department's reversal in the NBPP case must be considered. The case was solid on the merits, though not without its imperfections (not unusual, as far as most cases go), and no less than six career attorneys agreed that the Department should move forward with its request for default judgment.[5] Nonetheless, the case was dismissed as to three of the four defendants and the sanctions requested against the remaining defendant were dramatically reduced. To the extent that this drastic reversal of course is a window into a broader culture in the Division that is unable or unwilling to administer voting rights laws on a race neutral basis, the case is significant indeed.

If polled, I suspect that most Americans would agree with the proposition that while "the history and condition of black Americans were the impetus for the Civil Rights Division's creation and much of its work. . .its mission [today] extend[s] to all Americans."[6] (The same can be said of the Commission's present-day mission). Yet our investigation has revealed that there are many within both the career and current political ranks at DOJ who hold a very different view. Observers have noted "deep divisions within the Justice Department that persist today over whether the agency should focus on protecting historically oppressed minorities or enforce the laws without regard to race."[7] It would be difficult to explain why the *United States v. Brown* and *NBPP* cases—the only two cases ever prosecuted by the Department to protect the voting rights of whites—were the source of so much bitter consternation within the Department's ranks otherwise.

For its part, if "Step One" requires admitting that it has a problem, the Department of Justice remains in denial. It has essentially admonished us to "pay no attention to the man behind the curtain." It has refused to answer or address the specific allegations made by Coates, Adams and others in any meaningful way other than with blanket assurances of its even-handed enforcement.[8] It has also denied the Commission access to vital documents,

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[4] U.S. COMMISSION ON CIVIL RIGHTS, RACE NEUTRAL ENFORCEMENT OF THE LAW? DOJ AND THE NEW BLACK PANTHER LITIGATION: AN INTERIM REPORT 63 (2010).

[5] These attorneys included members of both the Voting and the Appellate Sections: then-Chief Christopher Coates, Deputy Chief Robert Popper, Christian Adams and Spencer Fisher (Voting) and Chief Diana Flynn and Deputy Marie McElderry (Appellate).

[6] Testimony of Theodore M. Shaw Before the United States Senate Committee on the Judiciary, *Hearing on The 50th Anniversary of the Civil Rights Act of1957 and its Continuing Importance* (Sept. 5, 2007), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=2885&wit_id=6632.

[7] Markon and Thompson, *supra* note 2.

[8] "The Civil Rights Division is firmly committed to the evenhanded application of the law, without regard to the race of the victims or perpetrators of unlawful behavior. Any suggestion to the contrary is simply untrue." Letter from Assistant Attorney General Thomas Perez to Chairman Reynolds (Aug. 11, 2010), at http://www.usccr.gov/NBPH/AR-M620U_20100811_173009.pdf . Notably, Mr. Perez was not yet at DOJ at the time the Division made its decision to dismiss the NBPP case, and thus would have no knowledge of the particulars and only limited knowledge of the existence of long-term hostility to race-neutral enforcement of civil rights laws there.

In an Oct. 4, 2010, press conference regarding unrelated matters, Attorney General Holder was asked about the Department's commitment to the race-neutral enforcement of the civil rights laws and made a blanket assertion similar to that of Mr. Perez: "The notion that we are enforcing any civil rights laws—voting or others—on the

correspondence, witnesses and other information that would have enabled us to fully complete this investigation. In so doing, it has deliberately tried to thwart the Commission's efforts, secure in its ability to do so because of the Attorney General's total discretion over whether or not to enforce Commission subpoenas coupled with the Commission's lack of recourse to a neutral third party when there are disputes, even in the face of a conflict of interest as egregious as the one presented by this case. As a result, the Commission transmits this interim report to the President and Congress with limited findings and only one recommendation directed at addressing future, similar impasses.[9] In the meantime, the Commission's investigation should continue and I encourage other entities with civil rights oversight responsibilities to undertake formal investigative efforts as well.[10]

On the merits, the Commission has gathered evidence around four principal areas of inquiry: (1) whether high-level political appointees within the Department of Justice have enunciated a policy or tolerate a practice of enforcing certain civil-rights laws in a racially discriminatory manner; (2) whether high-level political appointees within the Department of Justice have enunciated a policy or tolerate a practice of not enforcing Section 8 of the National Voter Registration Act; (3) whether there is pervasive hostility within the ranks of the Civil Rights Division toward enforcing the nation's civil-rights laws in a color-blind manner; and (4) why the Department of Justice dismissed most of the claims of voter intimidation in the New Black Panther Party voter-intimidation lawsuit after there had been an entry of default in the matter.

I. Culture of Hostility: Race-Based and Politicized Enforcement of Neutral Voting Rights Laws

On September 24, 2010, over the Department's objection, the U.S. Commission on Civil Rights heard the testimony of Christopher Coates, a distinguished, veteran career Department attorney and former Chief of the Voting Section. Mr. Coates testified to "systemic problems regarding race-neutral enforcement of the voting rights laws by the Civil Rights Division that were manifested in the DOJ's disposition of the New Black Panther Party case . . . ."[11] His testimony corroborates that of former Voting Section attorney J.

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basis of race, ethnicity or gender is simply false." Mike Levine, *Holder Vows Equal Enforcement; Calls Allegations to Contrary Simply False*, FOXNEWS.COM (Oct. 4, 2010), at http://politics.blogs.foxnews.com/2010/10/04/holder-vows-equal-enforcement-calls-allegations-contrary-simply-false.

[9] Some Commissioners have questioned on the record the Commission's issuance of an interim, rather than a final, report. That the Commission might from time to time need to issue interim reports due to the ongoing nature of its investigations was an uncontroversial proposition recognized in the earliest proposals for the Commission's existence. *See* Letter from Attorney General Herbert Brownell, Jr., to Vice President Richard M. Nixon and Speaker of the House Sam Rayburn (Apr. 9, 1956) (transmitting the Eisenhower Administration's proposal for what would become the 1957 Civil Rights Act), at http://www.eisenhower.archives.gov/Research/Digital_Documents/Civil_Rights_Civil_Rights_Act/New%20PDFs/Cabinet_Paper_CP5648310_1956_04_01.pdf.

[10] Rep. Frank Wolf, ranking member on the House Commerce-Justice-Science Appropriations subcommittee at the time our investigation began, appeared before the Commission to testify regarding his office's inquiries into the NBPP dismissal and culture of hostility at the Department. Rep. Lamar Smith, then-ranking member on the House Judiciary Committee and now Chairman, has joined Mr. Wolf in doggedly pursuing the case.

Christian Adams regarding a CRD culture hostile to the color-blind enforcement of federal voting rights laws such as the Voting Rights Act and the National Voter Registration Act.

Based on the subpoenaed witnesses' testimony, offered at great professional risk to themselves, this culture manifested itself in various ways, including, but not limited to: career attorneys allegedly refusing to work on voting rights cases involving black defendants, such as *Brown* and *NBPP*; other Voting Rights personnel objecting to the use of departmental resources to bring cases against minority defendants; still others expressing the opinion that voting rights laws should be selectively enforced so as to only protect minorities and not white victims; others citing the trouble such filings created between CRD and civil rights groups as a reason not to do so; and still others allegedly harassing individuals who worked on (and, in one instance, even the mother of an employee who worked on) *Brown*.[12] Furthermore, Coates testified that a preliminary case-justification document he prepared in *Brown* was altered to eliminate a substantial portion of his original recommendation, which advocated filing the case even though it involved black defendants.[13] There are also alleged incidents of retaliation against Mr. Coates for his willingness to bring such cases, including the effective stripping of his management duties as Voting Section Chief.[14]

More disturbingly, the culture of hostility described by Messrs. Adams and Coates was apparently not limited to rank-and-file career attorneys within the Division. Rather, their testimony shows that the tone appears to have been set from the top, permeating the ranks of Civil Rights Division management. Senior career officials such as Mr. Rosenbaum and Ms. King (who at the time of the NBPP case dismissal served in political positions pursuant to the Vacancies Reform Act), and later, political appointees such as Deputy Assistant Attorney General for Civil Rights Julie Fernandes all allegedly held, and in some notable cases, actually expressed hostility towards race-neutral enforcement of civil rights laws.[15]

The uncontroverted testimony of J. Christian Adams is that Ms. Fernandes gave instructions that the Voting Rights Section was not going to bring cases "against black

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[11] Transcript, Testimony of Christopher Coates, Hearing of the United States Commission on Civil Rights at 10 (Sept. 24, 2010), http://www.usccr.gov/NBPH/09-24-2010_NBPPhearing.pdf (hereinafter "Testimony of Christopher Coates").

[12] U.S. COMMISSION ON CIVIL RIGHTS, RACE NEUTRAL ENFORCEMENT OF THE LAW? DOJ AND THE NEW BLACK PANTHER LITIGATION: AN INTERIM REPORT 52-54 (2010).

[13] Testimony of Christopher Coates, *supra* note 10 at 15; *see also* Affidavit of Hans A. Von Spakovsky, ¶¶ 17-19, *supra* note 1.

[14] Testimony of Christopher Coates at 48-49, 64; *see also*, Transcript, Testimony of J. Christian Adams, Hearing of the U.S. Commission on Civil Rights at 41-43 (July 6, 2010), at http://www.usccr.gov/NBPH/07-06-2010_NBPPhearing.pdf.

[15] Ms. Fernandes joined the Civil Rights Division after *Brown* and *NBPP* were concluded, but was a harsh critic of race-neutral enforcement of the laws before assuming her current post there. For example, she made public statements while employed by the Leadership Conference on Civil Rights in the wake of the Department's decision to file *Brown* that align her with those who share racialist sentiments about the Department's core mission. *See* Steven Rosenfeld, *Is the Justice Department Conducting Latino Outreach by the GOP?* Alternet, Oct. 22, 2007, at http://www.alternet.org/rights/65749/?page=entire (last visited Oct. 5, 2010)). ("People are wondering why aren't you bring cases with voting and African-Americans–what is the issue,' said Julie Fernandes of the Leadership Conference on Civil Rights. 'How can it be that the biggest case involving discrimination in Mississippi [United States v. Ike Brown and Noxubee County] was brought on behalf of white voters. . . .The law was written to protect black people.'").

defendants on the benefit of white victims."[16] As the number two official in the Civil Rights Division with oversight responsibility over the Voting Section, Ms. Fernandes' statements would have been understood as an expression of Department policy by rank-and-file attorneys within the Section regarding DOJ's civil rights enforcement approach.

Messrs. Adams and Coates both testified that they understood Ms. Fernandes' alleged directive to be instituting a policy in conflict with the equal enforcement of the nation's civil rights laws. For example, Mr. Coates testified that in September 2009, Ms. Fernandes held a meeting to discuss enforcement of the anti-discrimination provisions of Section 2 of the Voting Rights Act at which she allegedly told those assembled that "the Obama administration was only interested in bringing traditional types of Section 2 cases that would provide equality for racial and language minority voters. And then she went on to say that 'this is what we are all about' or words to that effect."[17]

Mr. Coates testified that everyone in the room "understood exactly what she meant: no more cases like Ike Brown and no more cases like the New Black Panther Party case."[18] He testified further that she reiterated that directive in another, similar meeting in December 2009 regarding federal observer election coverage, during which she stated that the "Voting Section's goal was to ensure equal access for voters of color or language minorit[ies]" without reference to or emphasis on its obligations to ensure equal access for *all* voters.[19] Adams, Coates and others within the Voting Section understood this directive to mean that cases would not be brought by the Civil Rights Division against black defendants for the benefit of white victims.[20] If such a directive were in place at the Department, it would mean that factors other than the facts and the law (which Mr. Perez testified is what dictated the NBPP reversal) are at play when the Department decides whether and how to enforce certain civil rights laws—impermissible factors like the race of the defendants or victims.

Even Commissioner Yaki, who has been a persistent critic of this investigation, admitted that if such statements were made, they would be grounds for Fernandes's immediate dismissal.[21] Racialist sentiments like those attributed to Fernandes demonstrate a deeply flawed understanding of the Voting Rights Act, whose plain language protects all American voters, not just members of minority groups. Nor can the application of race-neutral statutes in a color-conscious fashion credibly be said to fall within the Department leadership's discretion over policy, priority-setting and resource allocation. Once CRD commits resources for a specific enforcement purpose—ensuring "equal access" to the ballot, for example—it treads on constitutionally treacherous ground where it identifies the beneficiaries of its enforcement efforts on the basis of race. To put it differently, it cannot announce or engage in a policy of pursuing meritorious voter intimidation cases, but only where black or other minority voters are targets of the intimidation. It similarly cannot rule out prosecuting an entire class of potential defendants on the basis of their race. Our Constitution forbids this type of gross, race-based

[16] Testimony of J. Christian Adams, *supra* note 13 at 61-63.
[17] Testimony of Christopher Coates at 32.
[18] *Id*.
[19] *Id*. at 33.
[20] *Id*. at 129-131.
[21] Testimony of J. Christian Adams, *supra* note 13 at 59.

meting out of benefits and burdens. Historic grievances and the lingering effects of past discrimination do not vitiate this basic principle. Racialist applications of the Department's prosecutorial discretion are likely to corrode the public trust and deepen, rather than lessen, perceived racial divides.

When Assistant Attorney General Thomas Perez appeared before the Commission in May 2010, he was asked whether he would investigate charges that supervising attorneys or political appointees in the Civil Rights Division made statements indicating that the Administration should not or would not bring voting rights cases for the protection of white voters or against blacks or other minorities because of their race.[22] He stated that if the Commission had such a statement it should "bring such a statement to [the Department's] attention."[23]

After Mr. Adams' testimony, Chairman Reynolds sent a letter to Mr. Perez regarding the alleged statements, inquiring about whether the Department would investigate whether Mr. Adams' allegations were accurate and requesting the testimony of Mr. Coates.[24] In Mr. Perez's subsequent response, he failed to address any of the Commission's questions with respect to Ms. Fernandes' alleged statements.[25] Following that exchange, Mr. Coates came forward and testified to the same statements having been made by Ms. Fernandes—statements made pursuant to a directive she conveyed to members of the Voting Section that the race of violators and victims is an appropriate consideration in the Division's enforcement decisions.

The uncontroverted testimony of Messrs. Coates and Adams also identify Ms. Fernandes as having explicitly told a brown-bag lunch gathering of the entire Voting Section that the administration would not enforce the list maintenance provisions of Section 8 of the National Voter Registration Act ("NVRA").[26] The purpose of Section 8 is two-fold: its list-maintenance provisions place an affirmative duty on jurisdictions to ensure that persons ineligible to vote in the jurisdiction no longer appear on its rolls (for example, those who have died) and its notice provisions set forth certain notice requirements that are to be followed by the jurisdiction in order to legally remove persons from its voter registration list.

During the Bush Administration, the Division had begun filing suits in states with jurisdictions maintaining voter registration lists with more names than actual, eligible voters in those jurisdictions and that had not scrubbed their roles in many years. When the Election Assistance Commission in 2009 identified eight states in which no voters had been removed from the rolls in over two years, an indicator of problems with the states' voter registration

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[22] Transcript, Testimony of Thomas Perez, Hearing of the U.S. Commission on Civil Rights 37, 63-64 (May 14, 2010), at http://www.usccr.gov/NBPH/05-14-2010_NBPPhearing.pdf.
[23] *Id.* at 64.
[24] Letter from Chairman Gerald A. Reynolds to Assistant Attorney General for Civil Rights Thomas Perez (July 14, 2010), at http://www.usccr.gov/NBPH/GARtoTP_07-14-10.pdf.
[25] Letter from Assistant Attorney General for Civil Rights Thomas Perez to Chairman Gerald A. Reynolds (Aug. 11, 2010), at http://www.usccr.gov/NBPH/AR-M620U_20100811_173009.pdf.
[26] Fernandes was heard saying, "We have no interest in enforcing this provision of the law. It has nothing to do with increasing turnout, and we are just not going to do it." Testimony of Christian Adams at 64; *see also* Testimony of Christopher Coates at 33-35.

list maintenance efforts according to Mr. Coates, he sought permission from the Department to conduct investigations in those states. He never received it, nor was permission granted for such investigations after he left his post as Voting Section Chief. He attributes that fact to Ms. Fernandes's directive having been followed.[27] In fact, the new Division authorities dropped a solid case—*United States v. Missouri*[28]—filed under the Bush Administration to enforce such list maintenance provisions against the habitually non-compliant state of Missouri. As Commissioner Heriot similarly notes in her concurring statement, if the dual purpose of the NVRA is to increase turnout (a priority typically emphasized by Democrats) while also requiring jurisdictions to maintain accurate rolls to prevent the opportunity for voter fraud (a priority typically emphasized by Republicans), it seems the Division under new leadership was not terribly concerned with the latter. By severing these provisions from one another, once-neutral enforcement of the NVRA becomes enforcement (or non-enforcement, as in this case) targeted for partisan advantage.

The Department declined to allow Ms. Fernandes to answer questions about these allegations herself when it ultimately refused to honor the Commission's subpoena for her appearance.[29] For her part, when asked directly by reporters, Ms. Fernandes declined to comment.[30] Because the Department has never acknowledged the statements attributed to Ms. Fernandes and has not released her to testify, the Commission lacks even basic information as to whether the Department conducted any investigation into the matter. Likewise, if Ms. Fernandes did make the statements attributed to her, the Commission has no knowledge of any steps taken by the Department to ensure that members of the Civil Rights Division do not operate under the impression that the race of violators or victims is a permissible factor in determining whether it should investigate or bring civil rights cases or that the Division is entitled to exercise its prosecutorial discretion in a way that abuses the intent of Congress by not enforcing carefully crafted laws like the NVRA aimed at carefully balancing partisan interests.

II. The Department's Questionable Dismissal of the Meritorious New Black Panther Party Case

The Commission's interim report chronicles in detail the 2008 Philadelphia polling place incident wherein two men dressed in paramilitary garb, one of them brandishing a night stick, positioned themselves at the entrance to a polling place shouting racial slurs at various individuals. The individual with the billy club (King Samir Shabazz) tapped it in his hand

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[27] Testimony of Christopher Coates, *supra* note 10, at 36.
[28] 535 F.3d 844 (8th Cir. 2008).
[29] In a letter dated November 12, 2010, the Department claimed it was prepared to offer the testimony of Julie Fernandes, Loretta King, and Steven Rosenbaum, but with limitations and on conditions that would have rendered such testimony meaningless to the Commission's investigation. Letter from Jody H. Hunt to David Blackwood (Nov. 12, 2010) (on file with the Commission, Office of the General Counsel). The Department subsequently withdrew its offer to have the witnesses testify.
[30] When *Washington Post* reporter Jerry Markon asked the Justice Department several times if Fernandes made the comments attributed to her, its response to him, which he noted did not actually answer the question, was to say that "its policy is to enforce the laws equally, without regard to race." When asked directly, Markon noted, Ms. Fernandes declined to comment. Jerry Markon and Krissah Thompson, New Black Panthers case: Voter intimidation at Philadelphia voting location in 2008, Live Q & A, *Wash. Post*, at http://live.washingtonpost.com/black-panther-party-10-22-10.html.

menacingly, according to eyewitnesses. The men were members of the New Black Panther Party for Self Defense—a recognized racial separatist hate group. During the waning days of the Bush Administration, the Civil Rights Division's Voting Section filed a civil suit in the case against the two men, the Chairman of the New Black Panther Party, and the Party itself for violations of Section 11(b) of the Voting Rights Act, which prohibits voter intimidation and attempted voter intimidation. The defendants in the case failed to appear to defend themselves, essentially admitting liability. Despite the court's entry of a default in DOJ's favor, in May 2009 the Department, under new management as the result of the 2008 presidential election, abruptly reversed course in the case. It dismissed the charges against all but one of the defendants and as to the remaining defendant, significantly weakened the original sanctions it sought against him. In its notice of dismissal, it cited as its rationale only that the defendants failed to appear and respond.[31]

Unlike other instances of intimidation or attempted intimidation, this incident was captured on videotape. It was broadcast widely on Election Day and in the days following by various media outlets. A quick look at just one of the numerous You Tube entries featuring this video shows that it has been viewed well over a million and a half million times. Since CRD is the primary entity charged with enforcing voting rights laws, including prohibitions against voter intimidation, one might expect the Department to swiftly address such a highly-visible affront to the sanctity of the polling place. Part of its goal in doing so would be to foster broader compliance with the voting rights laws. Instead, it did exactly the opposite.

The highly visible nature of the incidents giving rise to the case, the Department's curious and sudden reversal, the timing of the reversal, and the case's relationship to the Commission's core function of appraising federal laws and policies with respect to voting rights, caused it to pique this Commission's curiosity. We were concerned at the outset—and most of us remain so—about the signal the Department's treatment of the NBPP case might send to future would-be violators. Most of us assumed that the Department had either come across additional evidence that warranted the case's near-total dismissal that it would share with us or that it would reconsider its position and re-file the case against all four defendants in response to our inquiries.

We could not have been more wrong. Instead, what the Commission got in response to its initial letters was a series of shifting and odd rationales for why the reversal had occurred and subsequently why it would not provide the information the Commission requested to get at the legal and policy standards it applied in reversing course. The Department's public rationale was that it pursued the course that it had because the defendants failed to respond to the lawsuit. In a response to one of the Commission's early letters of inquiry, it then claimed that the "facts and the law" supported its dismissal. But in my questioning of Mr. Perez, he admitted that the Department adduced no new facts in the

[31] In our earliest letters of inquiry to then Acting Assistant Attorney General for Civil Rights, Loretta King, we noted the peculiarity of this rationale and its tendency to send the wrong message entirely to would-be violators "that attempts at voter suppression will be tolerated so long as the groups or individuals who engage in them fail to respond to the charges leveled against them." Furthermore, we were troubled by the fact that the rationale would "equally support dismissal of all claims in this case, not just the dismissal against some defendants." U.S. Commission on Civil Rights Letter to Loretta King (Jun. 16, 2010), at http://www.usccr.gov/correspd/VoterIntimidation2008LetterDoJ.pdf.

case between the time it notified defendants that it would file a motion for default judgment and when it then filed for an extension of time with the court to do so, only to voluntarily dismiss most of the case.

The "facts and the law" cited to justify the reversal included the following: (1) that it might be difficult to win a motion for default judgment in the case; (2) that the Department did not have a robust history of utilizing Section 11(b) of the voting rights act before; (3) that defendants had significant First Amendment interests that needed to be balanced against the Department's interest in enforcing the voting rights laws; (4) that any calls by the NBPP for its members to appear at the polls were not accompanied by directives for them to appear at those polls armed; (5) that the Party's post hoc denunciation of its members' conduct was sufficiently indicative of the Party's lack of complicity; (6) that Mr. Jackson—whose conduct differed from billy club-wielding King Samir Shabazz's only in that he did not carry a weapon—was a resident of the building wherein the polling place was located and so was entitled to be there (an assertion that turned out to be false—he did not live at the assisted living facility that was the site of the polling place); and (7) that the local police who responded to complaints about the presence of the NBPP members at the polling place permitted Mr. Jackson to remain at the polling location because he was a credentialed Democrat party poll watcher. One or more of these talking points has been repeated by members of the press, defenders of the Department's actions, and sadly, some members of our own Commission, to justify the Department's reversal.

Each of these defenses fails upon closer scrutiny and I direct readers to the concurring statement of Commissioner Heriot, in which I join, where she eviscerates some of the most egregious. Equally ineffective are suggestions that there is no evidence that voters were turned away from the polls. Commissioner Heriot addresses this point effectively as well, so I note only the obvious point that the Commission heard testimony from eyewitness Christopher Hill that directly contradicts this assertion. Again, even Commissioner Yaki, this investigation's fiercest critic, concedes that intimidation likely occurred.

After the dust settles, we are left with the impression that the NBPP dismissal was about something more than "career people disagreeing with career people," despite what Mr. Perez claimed. Former Acting Associate Attorney General Greg Katsas testified that the political leadership of the Department would have to have been consulted in the case of such a dramatic reversal, especially given the change in presidential administrations, which would have raised significant institutional interests for DOJ:

> In contrast [to the decision to bring the case], the decision at the end of the case would have been anything but straightforward. They amounted to nothing less than a decision by DOJ, following a change in presidential administrations, to reverse legal positions asserted in a pending case. Such reversals are extremely rare—and for good reason: they inevitably undermine DOJ's credibility with the courts, and they inevitably raise suspicion that DOJ's litigating positions may be influenced by political considerations. Accordingly, while a new Administration obviously has wide discretion to change its enforcement priorities and even its litigating positions in new cases,

it is extremely rare for DOJ to shift course so dramatically in the course of a pending case.[32]

I agree with Commissioner Heriot that the involvement of political appointees in the ultimate disposition of this case is not in and of itself the issue, though I do find it curious that in his testimony before the Commission, Mr. Perez seems to have gone to great lengths to attribute the decision to career people without acknowledging the role of high-level political appointees in the decision-making.[33]

What is problematic is that after dispensing with all of the non-credible explanations proffered for why the case was dismissed, the only plausible explanation pointed to by the evidence is the culture of hostility to the race-neutral enforcement of civil rights laws alleged by Adams, Coates and others. If this is not the case, the Department would have every motive to cooperate fully with this Commission's investigation. Instead, it has sought to thwart it at multiple turns.

III. Stonewalling of the Commission's Investigation by the Department of Justice

Both the interim report and Commissioner Gaziano's concurring statement, in which I join, have done a thorough job of chronicling the extraordinary lengths to which the Department has gone in withholding vital information from the Commission in hindrance of its investigation and in violation of the Congress command that it "cooperate fully" with the Commission. I will not recount all those circumstances here, except to note some of the many times where the Commission sought in good faith to find common ground with the Department over the discovery disputes and was met with bad faith in return.

For example, the Department prevented subpoenaed officials from appearing for their depositions and hearings even though it had previously supplied witnesses to the Commission in other voting rights related hearings.[34] Over a two month period, it refused no less than five separate requests regarding whether it would release Department personnel to testify with regard to the New Black Panther Party litigation saying only that it would "continue[] to evaluate the Commission's requests."[35] It instructed Coates and Adams that it would not enforce the Commission's lawful subpoenas against them and repeatedly directed them not to testify. After a significant delay, it then declined to appoint a special counsel to enforce the Commission's subpoena request, despite its obvious conflicts of interest.

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[32] Prepared Testimony of Gregory Katsas, Hearing of the U.S. Commission on Civil Rights (Apr. 23, 2010), at http://www.usccr.gov/NBPH/Katsas_04-23-2010.pdf.

[33] The privilege log obtained of Department communications related to this case by Judicial Watch show its political appointees heavily involved in discussions surrounding the ultimate disposition of this case.

[34] *See* Briefing of the U.S. Commission on Civil Rights, *DOJ Voting Rights Enforcement for 2008 US Presidential Election* (Jun. 6, 2008) (Mr. Coates, then-Acting Voting Section Chief, was permitted to appear before the Commission to discuss the Voting Section's preparations to ensure adequate election monitoring during the 2008 election cycle.).

[35] See Letter from David Blackwood to Joseph H. Hunt at 2 (Mar. 13, 2010), http://www.usccr.gov/correspd/03-30-10_DOJ-NPPP.pdf.

Furthermore, it maintained its refusal to allow Coates to testify even when the Commission took specific steps to try to accommodate some of its deliberative process privilege concerns. For example, the Commissione offered to limit its examination of subpoenaed witnesses to matters unrelated to NBPP case deliberation, i.e., whether high-level political appointees within the Department of Justice have enunciated a policy or tolerate a practice of enforcing certain civil rights laws in a racially discriminatory manner; whether high-level political appointees within the Department of Justice have enunciated a policy or tolerated a practice of not enforcing Section 8 of the NVRA; and whether there is pervasive hostility within the ranks of the Civil Rights Division toward enforcing the nation's civil rights laws in a color-blind manner. None of these matters is privileged. Again, the Department refused to fulfill its statutory obligations to cooperate with the Commission's investigation and produce the requested witnesses able to testify about these matters. Adams and Coates decided to testify despite the risk to their careers in order to correct inaccuracies in the testimony of Mr. Perez.[36] Mr. Adams resigned from the Department to do so.

When Commission staff offered to meet with Department personnel to discuss other possible discovery concerns so as to avoid extensive discovery delays over possible claims of privilege, the Department rebuffed the effort, with no such meeting ever taking place. Having rejected the opportunity to meet, the Department refused to provide any substantive response to the Commission's discovery requests relating to the New Black Panther Party litigation. It refused to identify the specific nature of the privileges it asserted and failed to provide the Commission with a requested log of items withheld, although it ultimately provided a similar log to Judicial Watch pursuant to a private lawsuit filed by the group. The Commission had to obtain that log from Judicial Watch, since the Department refused to provide it even after having turned it over in the private litigation.

IV. Conclusion

The United States Commission on Civil Rights and the Division are statutory cousins, tracing their beginnings to the same source—the Civil Rights Act of 1957. The central thrust of that Act was voting—it prohibited any interference with any individual's right to vote in a federal election, regardless of whether such interference was motivated by race or committed under the color of law—and it was adopted in the face of massive resistance in certain areas of the country to the promise of the Fifteenth Amendment. In furtherance of eliminating such impediments to the vote, the 1957 Act conferred on the Department of Justice, through the newly-created Civil Rights Division, the enforcement authority to seek injunctive relief from

[36] Transcript, Testimony of Christopher Coates at 9-10 ("Based upon my own personal knowledge of the events surrounding the Division's actions in the *Panther* case, and the atmosphere that has existed and continues to exist in the Division and in the Voting Section against fair enforcement of certain federal voting laws, I do not believe these [Perez's] representations to this Commission accurately reflect what occurred in the Panther case and do not reflect the hostile atmosphere that has existed within the Division for a long time against race-neutral enforcement of the Voting Rights Act"). Mr. Coates then noted that while he does not believe that Mr. Perez knowingly provided false testimony, Mr. Perez was not present in the Division at the disposition of the *NBPP* case and might not yet be fully aware of the long-term hostility to race-neutral enforcement within the Division. *Id*.

federal courts to prevent race discrimination in voting by both private individuals and voting authorities.

The right to vote free of interference, intimidation and coercion was perceived as a fundamental right that, once vindicated, would serve as the building block by which other rights could be secured. Voting rights thus lie at the very core of both the Division and Commission's historic mandates. In fact, data gathered by the Commission, in its earliest hearings in Alabama formed the basis for the Voting Rights Act of 1965, which included the voter intimidation provision—Section 11(b)—at the center of the New Black Panther Party case. The Division used its authority to seek injunctive relief as a powerful means of enforcing that Act. That the Department would decide to shy away from its distinguished history simply because the NBPP case involved New Black Panthers and not Klansmen seems to me a betrayal of that history and a decision fundamentally at odds with the spirit of the times in which the Division was founded, where color-blindness was a critical first principle.

Appraising federal laws and policies with respect to the equal administration of justice is also a part of the Commission's statutory charge.[37] From time to time, the Commission has had to exercise its responsibility as the "conscience of the nation" to prod enforcement entities like the Department to acknowledge where there are serious problems within its ranks that threaten its constitutional obligation to administer justice equally and without regard to factors like race. The evidence adduced by the Commission in its investigation thus far point to a culture within the Department hostile to the race-neutral enforcement of voting rights laws and the NBPP case dismissal appears, regrettably, to be a symptom of that broader culture.

[37] 42 U.S.C. § 1975a(a)(2)(B) ("The Commission shall make appraisals of the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws under the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice.").

B. DISSENTS

Statement of Vice Chair Abigail Thernstrom

New Black Panther Party Report:
Dissent of Vice Chair Abigail Thernstrom
December 19, 2010

I cannot support the majority report on the New Black Panther Party investigation.

This investigation lacked political and intellectual integrity from the outset, and has been consistently undermined by the imbalance between the gravity of the allegations and the strength of the evidence available to support such charges. Some commissioners offered serious, principled critiques of the process, and questioned the evidentiary record. Their views were contemptuously ignored by the commission's majority.

The majority charges that racial double standards govern the enforcement of the Voting Rights Act in the Holder Justice Department. If that can be convincingly demonstrated, it will be a grave indictment of this administration.

But that evidentiary showing awaits further investigation by the Department of Justice and Congress. I applaud that investigation, and hope that it will shed more light on this important question than the tendentious report provided by the commission’s majority.

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Commissioner Arlan Melendez and Commissioner Michael Yaki
Regarding

Race-Neutral Enforcement of the Law?
Department of Justice and the New Black Panther Party
An Interim Report

December 12, 2010

INTRODUCTION:

The Commission's investigation into, and this Report concerning, the New Black Panther Party ("NBPP") have been a tremendous waste of scarce government resources. They have wasted our own resources at the Commission[1] but those of the Department of Justice as well. In addition to squandering time, money and attention, the majority has further squandered the reputation of the United States Commission on Civil Rights as it spent more than a year on an Ahab-like quest to hobble the Obama Administration[2] and to attempt to rehabilitate the disgraced record of the previous Administration's Department of Justice.

Our dissent does not attempt to make definitive claims about the motives or actions of the United States Department of Justice ("Department") past or present. We have no special insight into the hearts or minds of the people working at the Department. Where we differ from our colleagues is that we did not enter into this investigation having already made up our minds that there was wrong-doing by the Department. Therefore, we did not interpret all evidence in light of any foregone conclusions or ignore any evidence that flatly contradicted any conclusions.

We cannot prove, and do not bother to try to prove, that the Obama Administration is not rife with covert NBPP sympathizers. Since there are reasonable explanations for the Department's actions, we do not feel the need to adopt bizarre explanations that envision the Obama Administration doing favors for a black-supremacist group.[3] It will suffice for us to detail and explain the short-comings with the original case, as well as short-comings in how the case and the broader issue of civil rights enforcement were discussed in the Commission hearings and in this Report. It is in this light that our comments such as, "X should have been called as a witness," should be read. Since we did not approve of the investigation at all, we

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[1]Ryan J. Reilly, *Conservative Civil Rights Commission Spent $173K Exclusively On Black Panther Query*, TPMMUCKRAKER, Oct. 25, 2010. The figure cited in the article underestimated the cost to the Commission on account of Commissioner and Commissioner Assistant salaries not being included.

[2] Ben Smith, *A Conservative Dismisses Right-wing Black Panther 'Fantasies'*, POLITICO, Jul 19, 2010, ("My fellow conservatives on the commission had this wild notion they could bring Eric Holder down and really damage the president.") *available at* http://www.politico.com/news/stories/0710/39861.html

[3]J. Christian Adams, Pigford and New Black Panthers: Friends at DOJ, Dec. 2, 2010. ("Did Perrelli's zeal to have the case dismissed have anything to do with the New Black Panther's endorsement of candidate Obama during the primaries?") *available at* http://biggovernment.com/jcadams/2010/12/02/pigford-and-new-black-panthers-friends-at-doj/

would rather that no witnesses had been called. However, since an investigation was going to be done over our objections, it should have been done in a fair. thorough, and impartial manner.

Our dissent should also not be read as a defense of the NBPP. The NBPP is a hate group whose views are as ugly as they are outlandish. We would not even bother to include this disclaimer were it not for the fact that a good deal of this Report relies on sources who maintain absurd beliefs in the out-sized significance and influence[4] of what is in reality a tiny fringe group. Among the many ironies surrounding this NBPP hullabaloo is the fact that the NBPP's exaggerated sense of its own importance (or menace) and its conspiracy theory mentality is matched (or even exceeded) by the Commission's majority and its ideological allies in the news media and in government. A further irony is the fact that, but for the constant promotion of this partisan investigation by FOX News and the USCCR, the NBPP might well have vanished into even further obscurity these last two years. We must posit that the USCCR majority has given the NBPP more media attention than it ever could have garnered or purchased on its own.

I. The Philadelphia Incident

Byman & Fischetti

Despite the presence of a videographer and multiple eye-witnesses, the details of what actually took place at the polling place at 1221 Fairmont Street in Philadelphia on Election Day 2008 remain unclear to this day. The original Justification Memo ("J Memo") sketches out a rough account of the events. Roving Republican poll monitor Wayne Byman was apparently the first person to note the presence of the NBPP members outside the polling place.[5] The J Memo suggests that Mr. Byman did not speak to the NBPP members, but merely reported their presence to another Republican poll watcher, Joe Fischetti.[6]

We were unable to question Mr. Byman about his experiences on Election Day 2008 because he was neither deposed nor called as a witness at a Commission hearing. We believe this to be at odds with the Report's claim that, "[t]he Commission attempted to interview and take the deposition of as many people as it could locate who were identified as having been

[4]Christian Adams "Friends in High Places" http://biggovernment.com/jcadams/2010/12/02/pigford-and-new-black-panthers-friends-at-doj/

[5]12-22-08 J Memo, p. 5.

[6] In his questioning of Larry Counts, General Counsel Blackwood mentions a conversation he, Mr. Blackwood, may have had with Mr. Byman, in which the latter claims to have spoken to Mr. Counts. Larry Counts Deposition, p. 18. In a series of email exchanges prior to the drafting of the J. Memo, Christian Adams expresses the importance to the case of finding an African-American poll-worker who was harassed, as well as his inability to find any. He mentions believing that he thought he knew someone who was an African-American Republican who had been harassed by the NBPP, but having interviewed that person he was mistaken. It seems likely that the person Mr. Adams spoke to was Wayne Byman. See, DoJ Doc. Request #29, p. 144-45. ("Under the Statute, a black poll watcher for you being abused or insulted is critical, and thus far, I don't have one. I thought it was [redacted], but we interviewed him and it wasn't.") Since we have no record of any conversations with Mr. Byman and the account of his contact with the Counts is at odds with both the Mr. Adams's e-mails, the J. Memo's account and Mr. Counts's sworn statement, we can only repeat that it is unfortunate that the Commission did not see fit to call Mr. Byman as a witness.

at the polling site."[7] Unfortunately, Mr. Byman was not the only person who was clearly identified as having been at the polling site whom the Commission failed to use as a witness for this Report.

The J Memo notes that Joe Fischetti was the next Republican poll watcher to arrive on the scene.[8] According to the J. Memo Mr. Fischetti saw the Panthers and also spoke to Larry and Angela Counts, whom he identified as Republican poll watchers. According to the J Memo, the Countses expressed their fear of the Panthers to Mr. Fischetti. Also according to the J Memo, Mr. Fischetti claimed that the Countses were hiding inside the polling place out of fear of the Panthers.

We cannot confirm whether the J Memo accurately reflects Mr. Fischetti's account or even whether Mr. Fischetti's account accurately reflects the events that took place. This is because the Commission also failed to depose Mr. Fischetti or call him as a witness to one of the Commission hearings. The J Memo merely states in a cursory manner that Justice Department employees subsequently questioned the Counts and that the answers given in this subsequent interview corroborated Mr. Fischetti's account. As this Report notes, the account of events in the J Memo differs sharply with the account of events described in the Commission's depositions of Mr. and Mrs. Counts.[9]

Angela & Larry Counts

This Report infers that the discrepancy between the J Memo's account and the sworn statements that the Counts made to the Commission were due to the Countses' persisting fear of the NBPP. We cannot say whether this is the case or not. We wish only to note other outstanding issues regarding the differing stories about the Counts' experiences on Election Day.

The first issue is that the DoJ employees who interviewed the Countses, J. Christian Adams and Spencer Fischer, failed to learn that the Countses were not actually Republicans, but were in fact registered Democrats.[10] Their purpose for working as poll watchers for the Republicans was not political or ideological, but rather that it was an easy job for which each would be paid $200 (plus some free meals) for remaining inside the polling place for the entire day. The failure on the part of the litigation team to uncover this very basic and significant fact about Mr. and Mrs. Counts is perhaps the result of the rushed nature of the trial team's investigation, which we will discuss at greater length later. Furthermore, the actual Party status of Mr. and Mrs. Counts raises doubts about the narrative that the trial team and some of its witnesses provided.[11]

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[7] Report, p. 11.
[8] 12-22-08 J. Memo, p. 5.
[9] Report, p. 10-11.
[10] Angela Counts Deposition, p. 4; Larry Counts Deposition, p. 5-6.
[11] In the exchange of emails noted above, Mr. Adams repeatedly stresses how crucial it was for him to substantiate rumors that the NBPP harassed a Republican poll worker or workers and called him/them "race traitor(s)." See, *supra* note 6 ("Under the Statute, a black poll watcher for you [Mike Roman, a Republican political consultant] being abused or insulted is critical, and thus far, I don't have one") The vagueness in the

Another is issue is how, when, or even whether, the NBPP might have had contact with the Countses. In none of the documents available to the Commission is a time of arrival for the NBPP members even proposed (much less confirmed).[12] According to Mrs. Counts' deposition, she and her husband arrived at 6:00 a.m. and no one, was at the polls, including the NBPP members.[13] The Countses testified that from that point on, until the end of the day, they remained inside the building. No witness has reported seeing the Countses outside of the building, nor did any witness allege that either of the NBPP members entered the polling place.

While it is true that some witnesses have alleged that the Countses were frightened by the NBPP members, none of these witnesses have provided an account of when and how the Countses supposedly were threatened. The J Memo's account of the interview of the Countses does not make it clear whether the Countses theoretically were afraid of the NBPP because they themselves were threatened by the NBPP members, or whether they were concerned about the alleged threat of white supremacists, or whether they thought that the NBPP members might cause some sort of disturbance into which the Countses might be inadvertently drawn. Inasmuch as the DoJ interviewers were convinced that the Countses were Republicans (or were desperate for them to be Republicans), and so failed to establish that the two were actually Democrats, it is also appropriate to note that the interviewers also failed to correctly establish, what, if anything, transpired between the Countses and the NBPP and what the former might have been concerned about on Election Day.

The J Memo mentions that Mrs. Counts had wondered whether someone might "bomb the place."[14] It is somewhat difficult to understand where this idea of bombing the place might have come from. Despite their violent rhetoric and penchant for displaying weapons in public, it is difficult to conceive that anyone would think that the NBPP had an interest in bombing a building or a polling place in an overwhelmingly African-American neighborhood. Perhaps the mention of a bombing was somehow associated with the rumored white supremacists whom the NBPP claim were at, or were going to be at, the polling place. However improbable the claim was that white supremacists were going to show up at the Fairmount St. polling place might be, there is at least an internal logic (and historical precedent) for a fear that white-supremacists might target groups of African-Americans with explosives, as opposed to black-supremacists doing so.

Lastly, no account has been provided as to how the NBPP members supposedly concluded that the Countses were either Republicans or were at least working for the Republican Party, if in fact they had contact with the Countses at all. Some have argued that the NBPP was attempting to bully those whom they "apparently believed did not share their

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chronology and what was said to whom (if anything), is only marginally resolved in the J. Memo that prepared shortly thereafter the noted email exchange.

[12] In DoJ Doc. Request #3, p. 6, the police incident report lists 10:40am as the time the officers intervened at the Fairmount St. polling place.

[13] Angela Counts Deposition, p. 6-7.

[14] J Memo, p. 6.

preferences politically."[15] It is not clear how this motive on the part of the NBPP was ascertained or how members of the NBPP would act, or did act, on this motive.

This is especially true in light of the fact that NBPP is a radical political organization and that some of its members—including Minister King Samir Shabazz—believe that President Barack Obama is "a puppet on a string""[16] If Mr. Shabazz believed that then-Senator Obama was going to be "the next slave master,"[17] what bearing would this have on Mr. Shabazz's alleged efforts to intimidate Republican poll-workers? The explanation seemingly embraced by the trial team was that the Countses were Republicans and the NBPP members were Democrats. Unfortunately for the majority, this explanation is at odds with the facts. Perhaps, had the trial team investigated the case more thoroughly, it would have avoided these erroneous conclusions.

Mauro, Hill & Bull

At some point after Mr. Fischetti left the polling place, Mike Mauro and Chris Hill arrived at the Fairmount St. Polling Place.[18] The record is ambiguous as to the order of events which took place after the men's arrival on the scene. The declarations which these men provided the trial team make no mention of people whom they believed to be voters stopping in front of or turning away from the polling place.[19] As a result, it is difficult to establish whether these alleged would-be voters were noticed and spoken to by Mr. Mauro and Mr. Hill either before or after Mr. Hill confronted the NBPP members and entered the polling place.

It is unclear why none of the declarations concerning alleged voter intimidation by the NBPP make any mention of the people whom Mr. Mauro and Mr. Hill claim to have seen be intimidated by the NBPP presence. The J Memo mentions that Mr. Mauro and Harry Lewis observed people they assumed to be voters stop before entering the polling place.[20] No mention of Mr. Hill's[21] or Bartle Bull's[22] similar stories are mentioned in the J Memo. The absence of these additional allegations of instances of intimidation is puzzling. In crafting a

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[15] DoJ Doc. Request #23, p. 10. (Declaration of Bartle Bull). Mr. Bull, in his declaration, states that the views of the NBPP members were "made apparent by the uniform" that the two were wearing. Inasmuch as Mr. Bull seems to have read an endorsement of Candidate Obama, for instance, into the uniform of King Samir Shabazz, it would seem the message the uniforms were meant to convey (if any) was ambiguous. The J. Memo also attributes to the NBPP members a desire to intimidate voters into supporting their preferred candidate. J. Memo, p. 11.

[16] See generally, the Anti-Defamation League's account of the NBPP: http://www.adl.org/main_Extremism/new_black_panther_party.htm?Multi_page_sections=sHeading_5

[17] Id.

[18] They were accompanied by an additional attorney-poll watcher, probably named Justin Myers. J. Memo, p. 6. For reasons undisclosed to me/us, Mr. Myers was not called to testify at our hearing, despite the fact that he was identified as an eye-witness on the scene. Another attorney-poll watcher named Harry Lewis was also on the scene. It may have been Mr. Lewis who had arrived with Hill & Mauro, and Mr. Myers arrived with videographer Stephen Robert Morse—or Morse may have arrived with a different man. The record is not clear and neither the J. Memo nor the Commission's investigation bothered to clarify.

[19] See DoJ Document Request #23, p. 6-12.

[20] J. Memo, p. 6.

[21] 4/23/2010 Hearing, p.97-99.

[22] Id., p.99.

justification for a voter intimidation case, one would think that including every credible witness statement concerning intimidated voters would strengthen the argument. Perhaps the absence was due to concerns about the credibility of some of the claims, or perhaps it might simply be due to the trial team having failed to ask all the witnesses about supposedly-intimidated voters as it moved in undue haste to put to the case together.

Also unclear from the record is what happened between Mr. Hill and the NBPP members. In his declaration,[23] Mr. Hill states:

> When I attempted to exercise my rights as a credentialed poll watcher, and enter the polling place, the two men formed ranks and attempted to impair my entrance into the polling place. They formed ranks by standing in such a way to make them a significant obstacle to my entrance . . . . I was forced to avoid their formation in order to enter the polling location. I did not make physical contact with either of them.

In the first segment of the video shot by Stephen Robert Morse, the two men do appear to be standing close together, although it would be a stretch of the imagination (or a lack of familiarity with military formations) to claim that they were in any sort of "formation"—at least at the time the video had recorded.

This account of the NBPP "forming ranks" and thereby forcing Mr. Hill to go around them, even if credible, is at odds with the account that he provided to FOX News's Rick Leventhal[24] as well as the account that he provided to the Commission: "[H]e and Mr. Jackson attempted to close ranks. I went straight between them through the door to find our poll watcher."[25] At a later point in the hearing, Mr. Hill describes his encounter with the NBPP thusly, "Not on my watch, ma'am. I was standing there. I saw these guys. They attempted to intimidate me. I'm Army Infantry. I don't intimidate."[26]

It is impossible to determine, based on our scanty and gap-laden record, whether Mr. Shabazz was immediately hostile to Mr. Hill and others, or whether Mr. Shabazz's invectives came as a result of Mr. Hill walking in between Mr. Shabazz and Mr. Jackson while the two NBPP members were standing "shoulder to shoulder, or close to shoulder to shoulder." [27] Mr. Hill stated that his encounter with the NBPP, in Mr. Hill's words, "got my Irish up."[28] The timing of events is, of course, important, since any instances of would-be voters pausing or turning away from the polls might have been a result of Mr. Hill storming between the

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[23] See DoJ Document Request #23, p. 7.

[24] http://www.youtube.com/watch?v=94b78rnWMP4&feature=related ("As I walked up they closed ranks next to each other—you know, I'm an Army veteran. That doesn't scare me—So I walked directly in between them and went inside.") Mr. Hill goes on to tell Mr. Leventhal that after he left the building, Mr. Shabazz turned to Mr. Hill and said, "We're tired of white supremacy." Considering Mr. Hill's confrontational tactics, this remark by Mr. Shabazz might have been based less on a generalized hatred of white people and more in response to Mr. Hill's provocations."

[25] 4/23/2010 Hearing Transcript, p. 47.

[26] Id., p. 98.

[27] Id., p. 33.

[28] Id., p. 109

NBPP members and the resulting fracas that ensued. Mr. Hill himself mentioned that the unidentified female poll watcher in the video claimed that it was Mr. Hill, and not the NBPP, that was intimidating voters.[29]

Unfortunately, the videographer, Mr. Morse, was not yet present on the scene in time to record any of the Republican poll watchers' interactions with the NBPP or with members of the public. The only video footage that the Commission received that is not publicly available, and that records the actions of Republican poll watchers, comes from a longer version of the video that shows the police arriving at Fairmount Street.[30] In the video edited and released by Election Journal, the police arrive, they approach the NBPP members, and then they order them to step away from the polling place. The video fades as the police officers and the NBPP members walk over to the police car.

The longer cut of the video was given to the Commission as part of its document requests from DoJ. In the video, the cell phone camera continues recording after the police begin to walk the NBPP members to their police car. Mr. Morse tries to follow the police, but almost immediately one of the officers turns to the camera and points while saying, "You stay over there." Someone off-screen, to Mr. Morse's left, says, "I got him, I got him," to the police officer. Someone then, seemingly Mr. Hill (although the audio is poor and the voice is coming off-screen) says, "Put it [the camera] down. You've got enough." The screen begins to shake, and to Mr. Morse's right, Bartle Bull is heard to shout, "Don't you threaten him with your hands. You're threatening him."

At this point the person to the left says, "Put the phone away." Mr. Bull, shouting even louder than before, says, "Don't you use your hands!" At this point, the person seems to have tried to grab Mr. Morse's arm or phone as the image on the screen moves erratically and Mr. Morse excitedly or fearfully exclaims, "I'm a [expletive] professional videographer. I was paid [unintelligible] to come from L.A. today."

The person to Mr. Morse's left seems to back away a bit and one can now see his arm and part of his shirt, which resemble the shirt that Mr. Hill is wearing earlier in the same video. The person who seems to be Mr. Hill says, "That's enough, you're gonna cause us more issues." To which Mr. Morse replies, "No I'm not!"

At this point, there is much cross-talk between the three of them. Also, at least two other voices from off-screen. Someone says, "We're on the same team." Mr. Morse says, "I work for Joe." One or two speakers are continuing to tell Mr. Morse to stop recording. One of them says, "You're [expletive] up the story. Don't [expletive] up the story." Shortly thereafter, Mr. Morse says to his interlocutors, "You guys are lawyers, I'm a videographer."

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[29] Id., p. 53 ("And all I heard her say was, 'The white guys in suits are trying to stop people from voting."). In the video footage that records the police arrival, the same woman can be heard saying to the police with regards to the NBPP members, "They're not stopping anybody." *Available at* http://www.youtube.com/user/ElectionJournal#p/f/4/IFOKnJ0oXYY

[30] 4/16/10 DoJ Documents, Bates No. 0002177. For reasons never shared with us, this polling place video was not screened as part of the video evidence presented at the first NBPP Hearing, despite the fact that several witness were featured in the video.

To which Mr. Hill responds, "And I'm the …" at which point he plays a brief recording of a bugle reveille. After a few more seconds, the clip ends.

Bartle Bull

As mentioned above, Mr. Bull's declaration makes no mention of his seeing people whom he thought were voters turning away at the sight of the NBPP members. The reason for this omission, as with the same omission in all of the other declarations, is unspecified in the record and unfortunately remains unclear.

As with Christopher Coates' testimony in this matter, much has been discussed both in the news media and in this Report concerning Mr. Bull's history of association with liberals and liberal causes. Particular emphasis has been given to Mr. Bull's time campaigning in Mississippi during the latter days of Jim Crow. In light of his experience, we are troubled by Mr. Bull's characterization of the 2008 Philadelphia incident as being worse than anything he had ever seen in Mississippi in the 1960s.[31]

Even if the NBPP actions in 2008 had lived up to the claims of the DoJ trial team, they would still be negligible when compared to the persistent fear and intimidation that millions of African-Americans endured for decades in the Deep South. Even if one were to give a narrow reading to Mr. Bull's claim, that is to say that he is comparing what he saw, in person, with his own eyes,[32] in Philadelphia, Pennsylvania, to what he saw in Midnight, Mississippi, the comparison still falls short. As Mr. Bull noted, in Midnight, Mississippi, white supremacists had left nooses hanging from trees and Mr. Bull had required that the vote be stopped until the nooses were removed.[33]

Additionally, Mr. Bull claimed that the NBPP uniforms had a clear and obvious link to the Fascist uniforms of the 1930s that would be readily apparent to the viewer. Leaving aside the fact that it is far from clear how many people in the contemporary United States would immediately recognize the uniform of the Italian Fascist Party (as opposed to Klan robes or even Nazi uniforms), in actuality, there is little in the NBPP uniform that even resembles the Italian Fascist outfit aside from the color of their respective shirts. A further irony, of course, is that Jerry Jackson and Minister King Samir Shabazz are themselves not even wearing exactly the same outfit.[34]

Lastly, there is great irony in Mr. Bull's having crossing paths with Mr. Shabazz on Election Day 2008. Mr. Bull stated that his motive for visiting polling places in Philadelphia in 2008 was a fear that hordes of fraudulent voters under the auspices of the Association of Community Organizations for Reform Now[35] would be trying to steal an election for a man

[31] 4/23/2010 Hearing Transcript, p. 116.
[32] Id., p. 117.
[33] Id., p. 116.
[34] Mr. Jackson seems to be wearing a leather jacket while Mr. Shabazz appears to be wearing a jacket of a different cut, made of some kind of synthetic material.
[35] Id., p. 123.

whom Mr. Bull refers to as "a hustler."[36] Mr. Shabazz, on the other hand, allegedly showed up at the polls to ward off an equally questionable threat of Election Day disruption by members of the Aryan Nation.

Stephen Robert Morse

Although the Commission screened the first of Mr. Morse's videos that was hosted by the website Election Journal, the Commission failed to screen all of footage in its possession that Mr. Morse had recorded. The Commission also failed to depose Mr. Morse or to invite him to testify at any of our multiple hearings. As Mr. Morse was obviously both present at the polling place and readily identifiable, this omission is worth noting as further indication of the majority's pre-investigation bias. Since then, much of the commentary around the NBPP incident has pointed to the one minute of edited video as an almost self-evident display of poll-worker intimidation.[37]

Since this investigation—at least as initially conceived—was meant to focus upon the alleged incidences of intimidation at the Fairmount Street polling place, we believe that it might have been illuminating to ask Mr. Morse to compare the intimidation that he allegedly experienced from Mr. Shabazz with the alleged intimidation, apparently at the hands of Chris Hill, , witnessed by Bartle Bull in the video mentioned above. Such an inquiry might have better clarified what key witnesses considered "intimidating behavior," as well as who was in fact engaging in the supposed intimidation.

II. The Initial Investigation/Litigation

As Commissioner Yaki noted at the September 24th, 2010 hearing, the NBPP litigation bears many signs of having been terribly rushed, especially as compared with other voting rights cases.[38] Communications between J. Christian Adams and Republican operatives reveal that, less than two weeks before the creation of the J Memo, the trial could not establish even a basic outline of the events that took in Philadelphia. The trial team had found their desired defendants, but could not find any voters or poll workers who were reportedly intimidated by them.

Ultimately, it seems that the account of the events that the trial team settled upon was provided to them by Republican political consultant Mike Roman.[39] On December 11, 2008—eleven days before the J Memo was issued--Mr. Roman offered to provide Mr. Adams with a "definitive chronology" and informed Mr. Adams that he planned to "make

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[36] *Civil Rights Attorney on Accusations vs. DOJ*, FOX News, Jul. 1, 2010, *available at* http://video.foxnews.com/v/4267253/civil-rights-attorney-on-accusations-vs-doj/ (Mr. Bull raises the specter of 400,000 "ACORN voters" in this interview as well).

[37] Despite the fact that Mr. Morse clearly fails to identify himself as a poll-watcher for the Republican Party, and instead claims to merely be a student and concerned citizen. The other puzzling thing about Mr. Morse's situation is that although the J. Memo describes him as "scared to death," of the Panthers, it was Mr. Morse who confronted Mr. Shabazz (in broad daylight surrounded by poll observers with cell phones). J. Memo, p. 6.

[38] See, 9/24/2010 Hearing, p. 118-26.

[39] Mr. Roman is, among other things, the operator of the website that hosted Stephen Robert Morse's NBPP videos. http://www.electionjournal.org/new-about-page/

contact with each [Republican voter in the precinct] to determine if they felt any intimidation at the polling location."[40] Mr. Adams described Mr. Roman's offer to interview witnesses for him as "fantastic."[41]

Mr. Adams concluded one of his emails to Mr. Roman with a comment noting that, if correctly understood, might help to explain the thinking behind the hurried NBPP litigation. Mr. Adams states, "A concern some have stated is that if something isn't done about the panther deployment in 2008, then there is nothing to stop deployment of armed hate groups at polls in future elections."[42] There is ambiguity in the statement's reference to 2008—does it refer to the year of the incident or that "something" that needs to be done? Nonetheless, the general tenor of Mr. Adams's emails with Mr. Roman and others is that of haste. Therefore, the latter interpretation is the more likely.

Regardless of the statement's minor ambiguity regarding the date, it is the conclusion of the statement that is most puzzling. Why is the NBPP litigation the *only* thing that will stop armed hate groups from appearing at polls? Obviously, an injunction against the entire Party might serve to deter NBPP members or even members of similar organizations from appearing at polling places with weapons. Although, since presumably §11(b) is not going to be repealed, it stands to reason that the choice to bring or not to bring one case does not preclude future cases.[43]

The spirit that seems to be motivating this, "Now or never!" line seems to be the theory, advanced by Bartle Bull to Megyn Kelly,[44] that there's a slow-motion putsch going on in the U.S. wherein community organizing groups, like the now-defunct ACORN, set up a conspiracy involving hundreds of thousands of illegal voters, primarily in minority neighbors. These hundreds of thousands of illegal voters carry out their conspiracy thanks to the assistance of a nation-wide deployment of hundreds of Mussolini-inspired NBPP members, this in turn earns them "friends in high places" who ignore their conspiracy and instead reward them with undeserved riches.[45] This cycle was apparently supposed to

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[40] DoJ Doc. Request #29, p. 143.

[41] Id., p. 141. In light of allegations—discussed at length below—that the Department would allow local police to have so much sway over the NBPP case, it is interesting that the Commissioners who were concerned about the local police's role, did not question Mr. Adams about Mike Roman's role in the case.

[42] Id.

[43] For example as is noted in the Report, the Bush Administration did not bring a voter intimidation case against a Minutemen militia member bearing a gun in Pima, AZ. That did not prevent the Bush Administration from later bringing a voter intimidation case against the NBPP.

[44] *Civil Rights Attorney on Accusations vs. DOJ*, FOX News, Jul. 1, 2010, *available at* http://video.foxnews.com/v/4267253/civil-rights-attorney-on-accusations-vs-doj/

[45] J. Christian Adams, Pigford and New Black Panthers: Friends at DOJ, 12/2/2010. http://biggovernment.com/jcadams/2010/12/02/pigford-and-new-black-panthers-friends-at-doj/ Since leaving the Department, Mr. Adams seems to have made a career out of promoting conspiracy theories about a nexus between community organizers, the NBPP and the Obama Administration. He has done this both as a blogger and as a lawyer for the King Street Patriots, *see e.g., at* http://www.kingstreetpatriots.org/king-street-invites-doj-to-true-the-vote-poll-watcher-training, http://www.kingstreetpatriots.org/king-street-patriots-special-meeting-august-9th, Tea Partiers: Minority Voting Drive Is The New Black Panther Party, Ryan J. Reilly, October 20, 2010, http://tpmmuckraker.talkingpointsmemo.com/2010/10/tea_partiers_minority_voting_drive_new_black_panth.php I/

continue on with increasing numbers of illegal voters added to the polls and increased wealth given to them as rewards. The recent 2010 election cycle, that featured neither armed hate groups at polling places nor ever- greater electoral success for Democrats and their supposed allies, would seem to suggest that Mr. Bull's and Mr. Adams's theories may not be well-founded.

We did not get an opportunity to question Mr. Adams about the J Memo or any other matter, because the Commission majority scheduled his hearing during the week of the July 4th holiday on very short-notice. And, as was the case with so many other seemingly-important witnesses, Mr. Roman was also not called to testify before the Commission.

The J Memo

The J Memo is filled with errors and omissions which are most likely the result of its hasty drafting and the biases of its authors. This can be seen on its first page when it describes the NBPP as "a well organized and well known group." It is true that today, thanks to the efforts of FOX News and the Commission's majority, the NBPP is much better known than it was before Election Day 2008. Presumably, the reason that the J Memo calls the NBPP "well known" is in order to provide a pretense for the trial team's claim that voters would have recognized Mr. Shabazz and Mr. Jackson as members of the NBPP (and thereby immediately associate the two of them with disturbing NBPP beliefs—which are also not terribly well-known). The truth is that most people—including the voters of Philadelphia, are and were likely to share Larry Counts's surprise that the Panthers had not long ago died away.[46] Without the immediate association of their clothing with certain ideas—as would be the case with people in Klan robes or Nazi uniforms—one cannot claim that the NBPP non-uniform, uniforms would be objectively intimidating.

As for being "well organized," that too is a stretch. The J Memo makes much of the militaristic nature of the NBPP— a characterization which this Report further repeats and emphasizes. It is true that the NBPP fetishizes military rank and title, but that does not instantly confer organization and discipline onto a group. Anybody can pin four stars onto his collar. That does not transform him into a general.[47]

The best example of the lack of discipline and organization within the NBPP can be found in the argument used to establish liability for the Party and its Chairman. Statements were made by members of the NBPP, both before and after the election, of a plan to send

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We find it both noteworthy and troubling that Mr. Adams should seek to associate himself with the website Big Government, which traffics in deceptively edited videos, including one that purported to show an Obama Administration official admitting that she discriminated against white people while carrying out her duties. It was quickly discovered that in the longer, unedited version of the video, the official's remarks make it clear that she was speaking both of a period in time prior to her work in government and that the actions she took were not discriminatory against white people. Brian Stelter, *When Race Is the Issue, Misleading Coverage Sets Off an Uproar*, N.Y. TIMES, July 26, 2010, B1. Mr. Adams's willingness to associate himself with people who have a history of mendacious race-baiting severely undermines the credibility of his accounts of racial bias at the Department.

[46] Larry Counts Deposition, p.14.

[47] Report, p. 34.

NBPP members to polling places. The number of members who were alleged to be "deployed" (to use the militaristic term favored by the J Memo) was three hundred or more.[48] Aside from the two NBPP members present at the Fairmount Street polling place, there is no record of any other NBPP members present at any polling place anywhere in the country.

If the NBPP is a hierarchical organization, and a command was given by its chairman to several hundred of its members to "deploy" to polling stations around the country, and only two "deployed," that means that the chairman's deployment had a 99% failure rate. That does not sound "well organized." It is interesting that the trial team and the Commission's majority are willing, on the one hand, to conclude from the lack of evidence of white supremacists at Fairmount Street that there were no white supremacists present, and yet, on the other hand, the lack of an NBPP presence beyond the Fairmount Street polling place is not grounds for concluding the NBPP did not have a national "deployment" plan. This inconsistency underscores the inference that the majority knew what it wanted to believe before it had the evidence to sustain such perceptions.

The simpler and truer explanation is that the NBPP and its chairman are prone to making self-aggrandizing and self-promoting statements in order to get attention and to impress the easily impressionable. The reality is that they are a marginal group of black-separatists who could not manage to meet the membership standards of the Nation of Islam. The disproportionate attention that has been paid to this group in the last year grossly exceeds their importance. To treat them as a Menace to the Republic instead of racist buffoons playing "army," is to view them as they imagine themselves.

In addition to all of the J Memo's profusion of militaristic mischaracterizations of the NBPP members,[49] [50] the J Memo also badly inflates the evidence in the trial team's possession. Having failed to find *any* voter who claimed to have been intimidated, the trial team resorted to the argument that *all* voters had in fact been intimidated—as any citizen would be who had to "run a gauntlet of billy clubs in order to vote."[51] Perhaps to leave room

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[48] J. Memo, p. 7.

[49] In addition to the variations on "deploy," (e.g. "not . . . deployed askew the entrance") the J. Memo describes the Panthers as "standing athwart," "in formation" wearing a "well-recognized military-style uniform. J. Memo, pp. 3, 10-11. These military characterizations of the NBPP seem to have been credulously adopted by Mr. Adams from statements made by Chris Hill, just as Mr. Adams relied on Mr. Hill's attestation concerning the significance of Mr. Shabazz's lanyard. J. Memo, p. 3; 4-23-2010 Hearing, p. 47. The McElderry Memo, also notes the Mr. Adams's peculiar use of the word "deploy" in the injunctive relief. McElderry Memo, p. 5.

[50] The J. Memo also inaccurately describes Mr. Jackson's conversation with FOX News reporter Rick Leventhal. The J. Memo states that Mr. Jackson told Mr. Leventhal that "no one had ever been at the polling station with a baton." J. Memo, p. 4. When asked about the presence of the nightstick, Mr. Jackson says, "Nobody here has a nightstick." When challenged by Mr. Leventhal that there's was a man with a nightstick, Mr. Jackson makes clear that he was only speaking in the present tense, saying, "I don't care about what 'was.' I'm talking about what 'is.'" Although this is a minor point, the fact that the J. Memo cannot even accurately manage to paraphrase a simple conversation casts doubt on its thoroughness in other places. An example of this is the failure to distinguish the armed, epithet-spewing Mr. Shabazz from the silent, unarmed Mr. Jackson. Instead they are described as "armed, uniformed men . . . making racial slurs." J. Memo, p. 12. As discussed further below, the failure of the trial team to consistently and accurately characterize the two men in their writing might be a partial explanation as to why they found it shocking that upon review other lawyers saw fit to distinguish Mr. Shabazz from Mr. Jackson.

[51] J. Memo, p. 11.

for the possibility that there had been voters who were harassed by Mr. Shabazz (despite the lack of evidence to that effect), the memo states, "*Many* of the threatening actions and statements by the NBPP members were specifically directed at poll watchers."[52]

None of the witnesses who testified before the Commission and who were in Philadelphia on Election Day have claimed to have witnessed the NBPP members say anything, threatening or not, to any voter, of any race. The only Commission witness to have made such a claim was the Department's former Voting Section Chief, Christopher Coates. Mr. Coates testified, "They were hurling racial slurs, including to white voters, 'How do you think you're going to feel with a black man ruling over you?' at the voters."[53] These assertions are puzzling since they are at odds with all available evidence. The fact that Mr. Coates believes white voters were the target of racial slurs hurled by both of the NBPP members—despite the absence of evidence to this effect—might help to explain his anger at the Department's decision to drop its case against Jerry Jackson and his angry outburst against Steve Rosenbaum.[54]

The Default

There is little to say about the default other than to note in passing that the Report finds it "particularly curious" that the NBPP failed to respond to the Department's lawsuit

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[52] Id., p. 12 (emphasis added). Note, the quoted passage attributes threatening actions and statements to both men. We do not dispute that Mr. Shabazz directed statements toward poll-watcher Hill, for example,, we simply wish to note that the evidence available only supports the claim that statement were only directed toward poll-watchers, and only by Mr. Shabazz.

[53] 9/24/2010 Hearing, p. 57.

[54] 7/6/2010 Hearing, p. 30. There seems to be a pattern of Mr. Coates' projection and supposed recollection of instances of white victimization. Mr. Coates claims that Robert Kengle said to him, "Can you believe we are being sent down to Mississippi to help a bunch of white people?" Id., p. 105. Mr. Kengle, in an sworn declaration sent to the Commission, denies that he said, "to help a bunch of white people." Kengle Declaration, p. 1. Mr. Kengle provides context for his comment to Mr. Coates, namely that there were many other potential cases which Mr. Schlozman and Mr. von Spakovsky were ignoring which Mr. Kengle believed were of relatively greater significance than the Ike Brown case. The race of the people involved was not what was of issue. Apparently Mr. Coates, like Mr. Adams, believes that race is always at issue in these decisions and any facially-justified explanations are mere pretense. Report, p.76 ("Adams testified: 'There was outrage that was pervasive that the laws would be used against the original beneficiaries of the civil rights laws. Some people said 'we don't have the resources to do this. We should be spending our money elsewhere.' And that was how they would cloak some of these arguments.'")

Unlike Mr. Adams however, Mr. Coates seems to believe he hears what Mr. Adams believes is only implied. For instance, concerning Julie Fernandes's alleged comment concerning "traditional civil rights," Mr. Adams describes her statement this way: "we were in the business of doing traditional civil rights work, and, of course, everybody knows what that means." 7/6/2010 Hearing, p. 62. In Mr. Adams' recollection, there was a meaning to Ms. Fernandes's statement which everyone understood (even if, like Mr. Adams, they disagreed with the implication), but it was subtext. In Mr. Coates's recollection, however, Ms. Fernandes explicitly told the audience what Mr. Adams said she only implied: "My recollection is that she used the term 'traditional types' of Section 2 cases and that she used the term 'political equality for racial and language minority groups.'" 9/24/2010 Hearing, p. 146.

It strikes us as unusual that Mr. Adams would say, "everyone knows what that means" in a case where Ms. Fernandes explicitly said what he thinks she implied. Had she explicitly proved Mr. Adams conjecture, no doubt he would have quoted her as having done so. Of course, the Commission was given the opportunity to ask Ms. Fernandes what she said. 11-12-10 Letter to Blackwood. However, the majority declined the Department's offer to allow Ms. Fernandes and others to come before the Commission. 11-15-10 Letter to Hunt.

despite the fact that Jerry Jackson and King Samir Shabazz were represented by a lawyer and Malik Zulu Shabazz is himself an attorney.[55] Based on the Commission's own unfortunate legal experience with Malik Zulu Shabazz and the ultimate non-responsiveness of the person purporting to have been representing the other two NBPP members, "disappointingly consistent" would seem to be a more accurate description of the phenomenon.

III. The Decision to Review

Members of the trial team and others claim that the Department's decision to review and reverse course in the NBPP litigation was unjustifiable and therefore based on impermissible motives and biases. Obviously, even if the review and reversal were completely justified—and we believe they were—it is impossible to prove conclusively that facially-justified actions were not taken for hidden impermissible motives. Because the stated justification for the Commission's investigation of the NBPP litigation was allegedly to look for an explanation for the review and reversal in the NBPP litigation (since the Commission's majority apparently found it inexplicable), it seems to us that offering a plausible account of the review and reversal is sufficient to satisfy what the Commission claimed it was interested in investigating.

The Obligation in Cases of Default

Critics of the Obama Administration inaccurately, yet loudly, claim that the Department had already "won" the case against the NBPP because the latter failed to respond to the suit, and that all that was left was to move for a default judgment against them. As made clear by the Assistant United States Attorney General ("AAG") Tom Perez however, the Department was under a greater and a continuing obligation:

> Although none of the defendants responded to the complaint, that did not absolve the Department of its legal and ethical obligations to ensure that any relief sought was consistent with the law and supported by the evidence. The entry of a default judgment is not automatic, and the Pennsylvania Bar Rules impart a clear duty of candor and honesty in any legal proceeding; those duties are only heightened in the type of ex parte hearing that occurred in this matter. See Pa. RPC 3.3(d). At the remedial stage, as with the liability stage, the Department remains obliged to ensure that the request for relief is supported by the evidence and the law. In discharging its obligations in that regard, the Department considered not only the allegations in the complaint, but also the evidence collected by the Department both before and after the filing of the complaint.[56]

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[55] Report, p.22, 40. Malik Zulu Shabazz seems to have an idiosyncratic view of his legal profession. He styles himself an "Attorney at War," Id., p. 129, and he also claims the title "Doctor" on account of possessing a "doctorate in jurisprudence" (i.e. a J.D.). See, *The Strategy Room* (Fox News Internet broadcast Nov. 7, 2009), *available at* http://video.foxnews.com/v/3917372/dr-malik-shabazz.

[56] Perez Statement, 5/14/2010. p. 5.

As we will discuss at greater length below, the Report contains many omissions and mischaracterizations of AAG Perez's statements to the Commission. The Report portrays the Department's internally initiated objections, review and subsequent handling of the NBPP default as mysterious.[57] AAG Perez's written statement provides many answers to questions regarding the objections, review and subsequent handling of the NBPP litigation. Despite the fact that AAG Perez provides answers to questions the Report purports an interest in, the Report does not cite AAG Perez's explanation. These omissions are telling. So long as the Commission's majority is willing to pretend that no answers have been offered, it can continue asserting that the Department is refusing to answer its questions.

Concerns about the Case

As has been noted above in our dissent and at the September hearing by Commissioner Yaki, the investigation and litigation concerning the Philadelphia incident proceeded much more rapidly than was typical of the Department's voting rights cases. This produced reasonable grounds for concern, as the development and analysis of fact and law might well have been cursory.[58] Added to that, as AAG Perez noted, the litigation was ex parte due to the NBPP non-responsiveness. Without active defense counsel examining the government's case, errors or omissions concerning fact or law—which might be more common than is typical due to the relative hastiness of the investigation and litigation—might go undiscovered. Lastly, due to the extraordinary politicization of the Civil Rights Division during the Bush Administration,[59] the long-time veteran career staff who were the acting-heads of the Division were properly suspicious of those hired or promoted during that period of politicization.[60] This is especially true of Christopher Coates, who was considered a

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[57] Report. p. 17.

[58] The best example of the legal inadequacy of the J Memo is that it makes no mention of possible First Amendment concerns. The McElderry Memo supports our contention that the J. Memo inadequately addressed serious questions concerning Party/Chairman liability and defenses arising from the First Amendment. We differ from the McElderry analysis only in that we believe it takes certain presumptions of the trial team for granted and as a result, draw the wrong conclusions. We shall discuss this further below.

[59] See generally; An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program, June 24, 2008, *available at* http://www.justice.gov/oig/special/s0806/final.pdf. An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General, July 28, 2008, *available at* http://www.justice.gov/oig/special/s0807/final.pdf; An Investigation into the Removal of Nine U.S. Attorneys in 2006, Sept. 2008, *available at* http://www.justice.gov/oig/special/s0809a/final.pdf

[60] The Report's section discussing the Vacancies Reform Act serves no useful purpose in the Report—other than to provide a legal patina for the obviously, intentionally ambiguous references to "actions of DoJ political appointees." Report, p. 37-38. *See e.g.* Jennifer Rubin, *Friends in High Places*, WEEKLY STANDARD, June 12, 2010, *available at* https://www.weeklystandard.com/articles/friends-high-places. Rhetorically, "political appointees" is meant to connote high-ranking officials and perhaps suggest a political influence, while not having to commit to providing evidence regarding any particular official or level in the Department hierarchy.

Similarly, there was a bizarre focus in this investigation on whether there was an exercise of executive privilege and if so, who invoked the privilege. See, Report, p. 73-75. Since the invocation of executive privilege is a rare thing, there should not be a presumption that the privilege has been invoked and a burden on the Executive to affirmatively note when it is *not* invoking the privilege. This investigation—presumably since it aimed to "bring Eric Holder down" was strangely focused on this privilege that would require involvement from high-ranking officials or the President himself. Since the investigation presumed these officials involvement,

"true member of the team" by one of the people most closely associated with the politicization of that period.[61]

The Report attempts to portray and explain away the objections raised against the NBPP. Since we do not believe the Report's treatment of these objections are adequate to satisfy them, we shall explain how the Report—and the Department memoranda it relies upon—are flawed.

First Amendment

Where the remedial memo errs in its treatment of First Amendment issues is in its presumption that the attire worn by the two NBPP members was the "recognizable uniform of a hate group."[62] As discussed above, neither the NBPP itself nor its varied garb was common knowledge during the 2008 election. As a result, the mere fact that either NBPP member was dressed the way he was did not amount to an objective case of intimidation (and thereby avoid falling under the protection of the First Amendment).

Steve Rosenbaum seems to be of this opinion because (as noted in the McElderry Memo, the Front Office, "does 'not seek to enjoin the wearing of the NBPP uniform at the polls.'"[63] This is an important point that the Report omits. The Report merely states that the Remedial and McElderry memos argue, "First Amendment concerns could be successfully addressed and would not preclude a default judgment." The McElderry Memo is operating on the assumption that the injunctive relief is no longer going to look like it originally did, that is to say, the Department is no longer going to ask to enjoin members of the NBPP from merely appearing at a polling place in uniform.[64]

The analysis that Ms. McElderry then pursues concerning First Amendment issues related to enjoining the wearing of uniforms is premised on there being a weapon present in addition to the uniform. She concludes that the question needs further study, but that an

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there seems to have been a presumption that they would have invoked the privilege that only they could have invoked. This seems entirely backward. See supra *note* 2.

[61] 9/24/2010 Hearing, p. 143-44. (Commissioner Yaki, quoting Bradley Schlozman). Mr. Coates, in turn, said that he considers Mr. Schlozman a friend. Id, p. 145.

[62] Remedial Memo, p. 3. As noted by the Southern Poverty Law Center's report on the NBPP, members of the original Black Panther Party are upset with the NBPP's appropriation of their Black Panther name and symbol. *See*, http://www.splcenter.org/get-informed/intelligence-files/new-black-panther-party In wearing Black Panther symbols, as they did, Mr. Jackson and Mr. Shabazz were not making clear to observers that they belonged to a racist-separatist group, but were rather (intentionally or not) sending the message that they might have been affiliated with (or sympathetic toward) the original (non-racist, non-separatist) Black Panther Party.

[63] McElderry Memo, p.5.

[64] See, Report, p. 17. ("deploying athwart the entrance to polling locations either with weapons or in the uniform of the Defendant New Black Panther Party, or both). Interestingly, Ms. McElderry seems to think that Mr. Adams's use of "deploy" is puzzling. Mr. Adams seems to use deploy in its proper way, as an action that a commander (in his imagining, Malik Zulu Shabazz) performs on their troops. But at other times the J Memo used "deploy" to mean 'standing in a military fashion' or as something that troops can do to themselves (e.g. "They were not milling about or deployed askew to the entrance." J. Memo p. 3). Some of Ms. McElderry's confusion may be the result of the fact that the original injunctive relief applied to low-ranking Mr. Shabazz and Mr. Jackson as well as to the Party and its Chairman, the latter two being presumed to be in a capacity to "deploy" their minions.

argument could be made that a weapon in the hands of someone in a uniform could be more intimidating than a weapon brandished by a person in street clothes. Her grounds for this conclusion are that a uniform may convey, "some kind of authority to take action," and so make observers more fearful because the observers would be lead to believe that the weapon is more likely to be used.[65]

We think the McElderry Memo errs slightly in its characterization of the NBPP uniforms. It is not clear (and based on her description, it seems unlikely) that Ms. McElderry had seen what the NBPP outfits look like. She takes as a given the trial team's assertion that they are "military-style." She then goes on to suggest that, being a military sort of uniform, it would strike the observer as conveying that "authority to take action." It is hard to believe that anyone looking at Mr. Shabazz at the Fairmount Street polling station would draw the conclusion that he was carrying the night-stick because he possessed some special (or in fact, any) authority to do so.

We strongly object to the gratuitous and poorly aimed charges of hypocrisy that the Report levels at Mr. Rosenbaum concerning the First Amendment. On the one hand, in the Jesse Helms case, the post cards were not merely "misleading,"[66] but implicitly threatened their recipients with criminal prosecution.[67] On the other hand, Mr. Rosenbaum, as is clear from the McElderry Memo—and even more clear from the injunction which he supported against Mr. Shabazz—does not think "wielding a nightstick at a polling site" is a form of conduct protected by the First Amendment. We would like to note that is bizarre comparison has been made elsewhere and we believe that its author, Hans von Spakovsky, should receive the recognition that he deserves.[68] Since we object to the insinuation of hypocrisy that *is* in the Report, we are relieved that the Report does not make the additional insinuation of racism found in Mr. von Spakovsky's blog post.[69]

Jerry Jackson

The Report fails to recognize a number of important distinctions regarding the treatment of Mr. Jackson in the J Memo, the Remedial Memo and the McElderry Memo. The Report describes the situation thusly:

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[65] McElderry Memo, p. 6.
[66] Report, p.25.
[67] The postcards which were largely directed to African Americans made false claims concerning voter residency requirements and warned recipients that it was a "federal crime to knowingly give false information about your name, residence or period of residence to an election official," See, *Democratic National Committee v. Republican National Committee*, 671 F.Supp.2d 575, 581 (DNJ 2009). The case cited makes reference to the earlier case that is under discussion. We would have preferred to cite the original case, but it seems not to be electronically available to the Commission at the time of drafting this dissent.
[68] Hans von Spakovsky, With Due Apologies to Abigail Thernstrom . . ., July 28, 2010, http://www.nationalreview.com/corner/233685/due-apologies-abigail-thernstrom-hans-von-spakovsky
[69] Id. (Was it because they were white? We don't know, but the contrast between how these two cases were handled by Rosenbaum is quite stark.")

> The nature of their joint liability is reflected in the fact that at no point in the internal memoranda of the Department was a distinction drawn between the potential liability of King Samir Shabazz and that of Mr. Jackson. The J Memo and the Remedial Memo prepared by the trial team, as well as the review prepared by the Appellate Section, did not even raise, let alone address, the issue.[70]

Instead of a source of reassurance, the non-existent treatment of the issue of joint liability is in fact a sign of the haste and sloppiness of the trial team's legal work. As mentioned above,[71] the J Memo does not bother to establish whether Mr. Jackson spoke to anyone other than Mr. Shabazz at the polling station prior to the arrival of the police. Since the McElderry Memo takes the facts as presented by the trial team, Ms. McElderry may have presumed that Mr. Jackson hurled racial slurs at voters or poll-workers. Since the two NBPP members are sometimes described as "armed, uniformed men," it is possible that she incorrectly assumed that both were carrying weapons. This would be consistent with her reading a presumed modifier of "with weapons" into the injunction's prohibition on both "deploying and appearing."[72]

The Report tries to strengthen its case for joint liability by repeating variations of "moving" or "acting" "in concert"[73] to describe the two NBPP members' behavior. This construction seems to have been derived from Chris Hill's description of the two men. At his hearing, Mr. Hill said of the two:

> Mr. Jackson took direction from Mr. Shabazz constantly. When he moved, Mr. Jackson moved, and it was a definite pattern. I don't know if they worked it out ahead of time, but they were definitely moving in concert. [74]

It is unclear what these synchronized moves were that made such an impression upon Mr. Hill. It is also unclear why the discipline and order on display for Mr. Hill vanished by the time Mr. Morse arrived with his cell phone camera. Even before Mr. Morse confronts Mr. Shabazz, it is apparent that the two NBPP are neither standing shoulder to shoulder, nor in any sort of military posture or formation. At Mr. Morse's approach, the two men do not "form ranks." Instead, Mr. Jackson remains standing in place while Mr. Shabazz walks around him.

If Mr. Hill either did explain or could explain the discrepancy between the NBPP members' video-recorded behavior and his eye-witness account, or if some of Mr. Morse's omitted footage contained images of the Panthers "moving in concert,"

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[70] Report, p. 25.
[71] Supra note 39.
[72] McElderry Memo, p. 5.
[73] Report, pp. 5, 6 (twice), 25.
[74] 4/23/2010 Hearing, p. 129. As we mentioned above and will discuss further below, it is interesting that those on the Commission who have expressed concern that Department dismissed its case against Mr. Jackson based on conclusions drawn by the local police, did not express equal concern that the trial team seems to have relied on Mr. Hill's conclusions about Mr. Jackson's relationship with Mr. Shabazz to have established the former's liability.

that would certainly be helpful to establish joint liability. It is also possible that the "acting in concert" that is found in the original injunction was meant as a work of catch-all in order to ensure that merely staying quiet and standing near a objectively intimidating person like the weapon-brandishing Mr. Shabazz is sufficient to trigger the injunction's issuance. Since the eventual injunction dropped that aspect, it remains unclear whether such a potentially broad and vague provision would have passed muster.

We are disappointed that the Report badly misconstrued AAG Perez's statement concerning the role the police report played in the decision to drop the case against Mr. Jackson. During AAG Perez's hearing,[75] he was repeatedly as he tried to explain why the local police report mattered to the Department. It was insinuated that the Department concluded that §11(b) did not apply to poll-workers because the local police officer, having seen Mr. Jackson's poll-watcher's credentials concluded that Mr. Jackson was not violating any voting rights laws.

AAG Perez, when he is finally allowed to speak without being interrupted, makes clear the obvious point that neither he nor the Department defer to local first responders to interpret federal law, but rather—as is obvious—local police can provide eye-witness accounts of what they themselves see and what witnesses on the scene tell them. We do not share the incredulity of some of our colleagues over the fact that the AAG and others at the Department would consider the contemporaneous reporting of a neutral third-party to be more credible that a series of contradictory accounts , made by a Partisan operative and recorded well after the events.[76]

As we have explained above, none of the poll-watchers alleged that Mr. Jackson said anything to them, much less anything threatening. This was probably heard by the police as well. The closest thing to a threatening action that has been alleged against Mr. Jackson (other than that fact that he was wearing his NBPP outfit) was that Mr. Jackson either formed or attempted to form "ranks" with Mr. Shabazz, leading Mr. Hill to either walk around the two or walk between the two.[77]

Despite the fact that AAG clearly told the Commission that the Department does not and did not rely on the VRA-expertise of local police officers, this canard was repeated during the Adams hearing.[78] It is unclear why this was done other than it

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[75] 5/14/2010 Hearing, p. 69-72.

[76] The fact that Mr. Adams and Mr. Coates also seemed to think Mr. Hill—despite his contradictory stories—was more credible that the police officers is also telling. The greater irony of Commissioner Heriot wishing that the Department favor the testimony of Mr. Hill over that of local police, is that Mr. Hill, in his on-scene interview with FOX News reporter Rick Leventhal was—like the local police—happy to distinguish between Mr. Shabazz and Mr. Jackson. In the interview, both Mr. Hill and Mr. Leventhal concur that Mr. Jackson is a poll-watcher, after which Mr. Hill says, while nodding, "And he lives here." Mr. Leventhal then says, "And he has every right to be here," to which Mr. Hill nods in agreement and adds, "And he can wear whatever he wants," which Mr. Levenahal repeats in agreement. Video available at http://www.youtube.com/watch?v=JwNDMdrqKcc.

[77] See, *supra* notes 23, 24, 25.

[78] 7/6/2010 Hearing, p. 89-90.

seems to have been a talking-point of sorts.. We find it especially hard to believe and more than a little disconcerting that Mr. Coates would devote a page[79] of his prepared remarks to suggest that AAG Perez said that the Department allowed the local police to make litigation decisions for the Department.

AAG Perez made it crystal clear: the Department interprets what the law requires. In the case of §11(b) the Department comes up with an interpretation about what conditions would need to exist for someone to be committing voter/poll-watcher intimidation. Hypothetically, the Department might interpret §11(b) to, among other things, apply to people displaying weapons or shouting racial slurs. They also might interpret §11(b) not to apply to people standing quietly, without weapons and who are wearing clothing that is not readily associated with a hate group.

Where the police (and any other credible witness) come into the process is by relating the facts as they saw them. In the case of the Philadelphia police, they saw some things, and they interviewed some people and questioned those people about what they saw. In the case of the NBPP, witnesses obviously told the police that one of the men was creating a disturbance by yelling slurs and waving a weapon while the other man just stood there. In addition to the ruckus that he was causing, the first man was standing near a polling place and was neither a voter nor a credentialed poll-watcher. The quiet man was also standing near a polling place but was a poll–watcher and was not causing a disturbance, so the police allowed him to stay. There is no indication that if Mr. Shabazz was credentialed but was also carrying on as he did, the police would have allowed him to stay at the polling place (nor that the Department would not have brought suit against him[80]). There is also no indication that had Mr. Jackson lacked poll-watching credentials, the police would have allowed him to loiter near the polling place.

The basic point is this: the police supplied an account of the facts which some in the Department found more credible than the account of the facts presented by Mr. Hill and the other Republican poll-workers. The Department lawyers then applied the law to the facts that they found most credible. This is not an inappropriate delegation of decision-making authority. This is elementary legal practice. We find it unbelievable that -experienced lawyers such as Mr. Coates and those on the Commission do not understand the distinction between “fact” and “law.”

Not wishing to believe that any of them never learned this distinction or somehow forgot it, we must conclude that they are willfully mischaracterizing AAG

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[79] Coates Statement, p. 11.

[80] AAG Perez suggests as much in his statement, “A report of the local police officer who responded to the scene, which is included in the Department’s production to the Commission, indicates that the officer interviewed Mr. Jackson, confirmed that he in fact was a certified poll watcher, and concluded that his actions did not warrant his removal from the premises.” Perez Statement, p. 8. It is clear from this passage that Perez is saying that the police officer allowed Mr. Jackson to remain not simply because of his poll-watcher certificate, but also because the latter’s actions “did not warrant his removal from the premises” (i.e. that if Mr. Jackson had behaved like Mr. Shabazz, the police would not have allowed him to remain and the Department would have treated him differently too.)

Perez. Evidence for this conclusion can be seen in the selective editing that Mr. Coates performed when reiterating what AAG Perez said at the latter's hearing. Mr. Coates says:

> In this case, however, the fact that one Philadelphia police officer did not require Black Panther Jackson to leave the area became such a compelling piece of evidence that it was cited by the Assistant Attorney General in his May 14, 2010 written statement to this Commission. There Mr. Perez stated that, "The Department placed significant weight on the responses of the law enforcement first responder to the Philadelphia polling place" in allowing Black Panther Jackson to escape default judgment and escape the entry of injunctive relief against his future actions. Based upon my experience, this reasoning is extraordinarily strange and an unpersuasive basis to support the Division's disposition of the *Panther* case.[81]

In so paraphrasing AAG Perez's statement, Mr. Coates removes the pertinent passage we quote in the previous footnote. The Report fails to point out Mr. Coates's misleading deletion from AAG Perez's statement. Mr. Coates claims that, like Mr. Adams before him, he was driven to testify before the Commission by the inaccuracies in AAG Perez's testimony and a need to set the record straight concerning the Department's actions. As a result, we find their distorted quotations of AAG Perez's written statement to be "extraordinarily strange and an unpersuasive basis to support" their claims of being honest and courageous whistle-blowers, as opposed to being simply "true members" of the von Spakovsky/Schlozman Team.

The Department's decision to not pursue the default judgments against Malik Zulu Shabazz and the Party itself are as easily explicable as the decision not to pursue a default judgment against Jerry Jackson. In fact, the argument is even easier, for as Diana Flynn notes in her email, "The most difficult case to make at this stage is against the national party and Malik Shabazz." Ultimately Flynn (and McElderry) side with pursuing the case even though they think it is weak and problematic. Their grounds for doing so focus less on the law, however, and more on the assurances from the trial team that the latter have strong evidence.[82]

The Report rests its argument for Party/Chairman complicity on the contradictory statements that members of the Party made before and after the election. The thinking seems to be, "Why would they say there's going to be a massive deployment if there wasn't going to be one?" As we mentioned above, the simplest answer is that the NBPP Chairman says whatever he thinks is most expedient at any given time and to any given audience, all in order to gain attention and followers. The more skeptical approach is simply to look at the claims: 300+ NBPP members deployed to polls in 15+ cities. Then look at the reality: two NBPP members, both at the same location in the same city. As was mentioned above, this is a less than 1% compliance rate. There need not be perfect and absolute control to

[81] Coates statement, p. 11-12.
[82] "Voting does seem to have evidence in support of the allegations." Flynn email.

create a principal-agent situation, but at only two-thirds of one-per-cent, there's probably a better chance that more members of the NBPP will accidentally run into each other at a particular polling station than showed up to either allegedly provide security on Fairmount Street, or any of the other nonsensical argument that have been presented in the course of this investigation.

Lastly, the allegations that the relief in the NBPP case was greatly reduced need to be addressed and explained. In brief, and as AAG Perez explained in the frequently ignored statement that he provided to the Commission, the original injunctive relief sought was problematic partly because it was "one-size fits all." Instead of tailoring the relief to the individual defendants, the injunction aimed at an organization that has chapters in multiple cities was the same one for a single individual residing in a single city. The fact that the relief was shrunk down from nation-wide to city-wide is the product of the decision that the NBPP could not be held liable for what Mr. Shabazz did in Philadelphia.

As for the reduction in duration: a permanent injunction with no enforcement limits is at odds with the relief received in voting rights cases such as the Ike Brown[83] case and the US v. North Carolina case.[84] In both cases, the injunctions were set to last for roughly two election cycles. The same is true of the NBPP relief. If one wants to describe the injunction Mr. Rosenbaum approved for Mr. Shabazz as a "slap on the wrist," one needs to do the same for the injunction Mr. Coates approved for Ike Brown.

IV. USCCR Investigation

We believe that this investigation was, from the very beginning, an effort to direct the resources of the Commission toward the illegitimate and contemptible purpose of harassing the new Administration. There was a time when the Commission devoted itself to bipartisan investigations of serious instances of voting rights violations. In stark contrast to our admirable past, the present Commission spent this last year devoting most of its attention to a voter intimidation case in which no actual voters were intimidated[85], and to providing an avenue by which disgraced and disgruntled remnants of the previous Administration could attempt to settle personal and political scores.

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[83] Contrary to Mr. Adams's definite- and dire-sounding prediction during his testimony before the Commission, the Department did, in fact, ask the Court on July 13, 2010 to extend the injunction in Ike Brown. (*See* United States' Motion for Additional Relief Against Defendants Ike Brown and the Noxubee County Democratic Executive Committee, U.S. v. Ike Brown, et al., Civil Action no. 4:05-cv-33). We find it noteworthy that, as with other statements made by AAG Perez, the Report completely fails to mention the fact that the relief was extended. Rather, the Report claims that AAG Perez's statements about this highly-relevant topic were merely generalized and often non-responsive. This assertion is pure fallacy.

[84] Report, p. 84.

[85] We understand that §11(b) applies to both voters and those who assist them. Even with this caveat, it is still telling that the evidence regarding the intimidation of poll-workers is either thin or contradictory enough that the trial team and members of the Commission have had to exaggerate the notoriety of the fringe NBPP in order to claim they are the equivalent of the KKK and their mere presence is objectively intimidating.

Though we did not and do not support this investigation, we do believe that for sake of the integrity of the Commission, once it was embarked upon, the investigation should have been rigorous. Of course since the aims of the investigation were at their inception illegitimate, it is perhaps inevitable that the investigation and subsequent report would have to lack rigor—otherwise the illegitimacy of the whole project would be revealed.

As we have mentioned above, many witnesses, including many who were present in Philadelphia on Election Day, were not called to testify before the Commission. When witnesses were invited to speak, the Majority abused its powers and limited our ability to question witnesses. In the case of Mr. Adams, the Majority made little effort to schedule the hearing for a date when all Commissioners could be available. In the case of Mr. Coates, the Chairman abruptly called a break in the hearing[86] the majority left the room with Mr. Coates, and when they returned, the Chairman announced that he was going to "wind this matter down" and not allow any additional questions of Mr. Coates.[87] Considering the tremendous importance that the majority had placed on Mr. Coates's appearance and the substantial amount of the hearing that was consumed by Mr. Coates reading his lengthy statement, the abbreviated amount of time permitted for questions showed a lack of interest in true inquiry. Instead, the hearing seemed much more like a mere opportunity to allow Mr. Coates to personally get his opinions into the record as opposed to having them communicated by way of Mr. Adams or "anonymous sources" to the Washington Times or the Weekly Standard.

We also wish to highlight the fact that the Report operates on the bizarre evidentiary principle that unsworn statements and blog posts should be allowed to rebut sworn statements. Joseph Rich submitted a sworn affidavit[88] challenging statements made in Mr. von Spakovsky's earlier sworn statement. In response, Mr. von Spakovsky did not submit another sworn statement (as Mr. Rich would do again to rebut claims by Mr. von Spakovsky and Mr. Adam[89]). Instead, Mr. von Spakovsky resorted to a blog post.[90] Later, Mr. von Spakovsky went on to submit an unsworn statement[91] in the attempt to challenge the sworn statement made by Robert Kengle.[92] Since Mr. von Spakovsky was willing and able to submit a sworn declaration originally, we believe that his failure to do so in his purported rebuttals to Mr. Rich and Mr. Kengle was both deliberate and suggests that neither the Report, nor anyone else, ought to be confident in their veracity.

For all of these reasons, we dissent from this report and the investigation which preceded it.

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[86] 9/24/2010 Hearing, p. 134 ("We're out of time. At this point we are going to take a break.").
[87] Id. Vice-Chair Thernstrom was subsequently able to persuade the Chairman to provide a small amount of time for additional questions.
[88] Rich Declaration 9/23/10.
[89] Rich Declaration 10/20/10.
[90] Hans von Spakovsky, *Enough Is Enough, Joe Rich: An Uncivil Man from the Civil Rights Division*, PAJAMASMEDIA,Sept. 20, 2010, http://pajamasmedia.com/blog/enough-is-enough-joe-rich-an-uncivil-man-from-the-civil-rightsdivision; Report, p. 78, fn197.
[91] von Spakovsky Letter 10/28/10.
[92] Kengle Declaration; Report p. 75, fn188.

C. REBUTTALS

Joint Rebuttal Statement of Commissioners Peter Kirsanow, Gail Heriot and Todd Gaziano in Response to the Vice Chair

We would give almost anything not to have to write this statement. All of us have long been admirers of the Vice Chair's work in civil rights, which stretches back several decades.[1] Some of those who made up the Commission's majority in adopting this report have regarded her in the past not just as a friend, but as a mentor.[2] Sadly, circumstances have made continued silence impossible. The Vice Chair has publicly accused the five commissioners who supported this investigation of having the "wild notion" that we could topple Attorney General Holder and damage President Obama.[3] Her accusation is imaginative, but untrue.

Her accompanying Statement is just four short paragraphs long—less than 150 words.[4] In it, she asserts that this investigation "lacked political and intellectual integrity from the outset." We are accused of having "contemptuously ignored" her views. But she offers no specifics. That is because the Vice Chair's accusations are inspired not by a concern for the investigation's political or intellectual integrity, but from personal pique. One by one, she has become alienated from her former allies on the Commission. In no case has this alienation had anything to do with a substantive issue. It is wholly personal.

The Vice Chair strongly supported this investigation until the day she changed her mind and stormed out of a Commission meeting over what she evidently perceived as a personal slight, and the personal slight didn't even have anything to do with the New Black Panther Party (NBPP) investigation.[5] After that she opposed the Commission's majority on almost every subject[6] and called the NBPP matter we were investigating "very small potatoes" which did not merit the time the Commission was devoting to it.[7] Her attendance at meetings dwindled as she participated in less than 45% of the official meetings and events of the Commission in 2010.[8] On those occasions she did attend, she strongly criticized the NBPP investigation:

> VICE CHAIR THERNSTROM: Well, a couple things. It seems to me it's strange. It is simply impossible to believe that [Deputy Assistant Attorney General Julie Fernandes] said anything remotely like "We are not going to enforce civil rights laws when blacks are defendants."
>
> I mean, she cannot have said that. Maybe she said something that some people interpreted as saying that. But she surely didn't announce that. I mean, unless she is some sort of moron -- and she certainly could not have been speaking for the Department if she was a moron.
>
> CHAIRPERSON REYNOLDS: How do we go about settling this factual dispute over this allegation?

> VICE CHAIR THERNSTROM: I think we should assume that the Justice Department does not have a racial double standard? I mean, give them a break.[9]

In her Statement she reverses course yet again—something that has become characteristic of the Vice Chair—and purports to applaud further investigation into the incident, so long as that investigation is by the Department itself or by Congress and not this Commission. "The majority charges that racial double standards govern the enforcement of the Voting Rights Act in the Holder Justice Department," she now writes. "If that can be convincingly demonstrated, it will be a grave indictment of this administration."

We agree with part of that statement: If a racial double standard in the Voting Section has been demonstrated (or is demonstrated in the future), it is and will continue to be a very serious matter. The Commission and its staff tried in good faith to collect all available evidence that will tend to prove or disprove it. Indeed, given the Department's refusal (1) to disclose the documents that relate specifically to deliberations over the NBPP case or (2) to allow any of the witnesses to testify as to those deliberations, we believe the Commission and its staff have done an impressive job.[10] Two career attorneys have testified at length under oath as to this racial double standard.[11] Two more attorneys have submitted affidavits supporting that testimony.

Significantly, no one at the Department has denied the sworn testimony of Christian Adams and Christopher Coates that Deputy Assistant Attorney General Fernandes has repeatedly directed career Voting Section attorneys to apply a racial double standard in its decisions to bring lawsuits.[12] And the actions of the Division—in connection with New Black Panther Party as well as with other cases—have been consistent with those allegations and not with the other attempted explanations that have been offered.

We are baffled by the Vice Chair's repeated assertions that the investigation has uncovered no evidence of wrongdoing.[13] The sworn testimony of Adams and Coates and the affidavits of Bowers and von Spakovsky are exactly that. The only interpretation of the Vice Chair's statements that we have been able to come up with is that she is looking for specific testimony in connection with the New Black Panther Party case itself. If so, Coates testified unequivocally that the case was dismissed because his superiors harbored hostility to the race-neutral application of the law, but perhaps she wants written proof from one of the decision makers. Yet, that is exactly the kind of evidence the Department has denied the Commission access to.

There may well be a smoking gun out there somewhere. But there is no way to know if it exists given that much evidence, including the direct evidence relating to the deliberations to dismiss the voter intimidation claims, is being deliberately withheld. All of this has been explained to the Vice Chair on more than one occasion. But while she currently professes interest in obtaining evidence, her statements are belied by her past conduct, when she has either refused to help or attempted to prevent the Commission's efforts to obtain it.[14]

In the meantime, the sworn allegations that have been uncovered—of an announced racial double standard policy—are more troubling than the original allegations of wrongdoing in connection with the New Black Panther Party case specifically. Unlike the accusations pertaining to the New Black Panther Party, these allegations will continue to be highly significant in the future. We cannot understand her assertion that the Commission should not even try to pursue them.[15]

Contrary to the Vice Chair's assertion, the Commission has not yet "charged" and may well never charge the Department with wrongful conduct in connection with the New Black Panther Party case. This is an Interim Report. It was the unanimous position of those who voted in favor of the report that it should not draw final conclusions about the facts of the case until all the evidence is in. Instead, this report draws Congress's attention to the evidence that has been produced thus far and what we regard as a possible flaw in the statute that chartered this Commission. (Only the Department is specifically authorized to represent the Commission in court to enforce our duly authorized subpoenas—a procedure that has proven unworkable when the subpoena is directed to the Department itself and the Department refuses to comply with it.) To call such a report "tendentious," as the Vice Chair does, is itself tendentious. We have difficulty imagining a more restrained report given the explosive nature of the subject matter.

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[1] See, e.g., Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* (1997) (co-authored with her husband, Harvard University Professor Emeritus Stephan Thernstrom).

[2] The five commissioners who supported this investigation throughout were Chairman Gerald Reynolds, Peter Kirsanow, Ashley Taylor, Jr., Gail Heriot and Todd Gaziano. Shortly after the Interim Report was approved, the terms of Chairman Reynolds and Commissioner Taylor expired. They therefore are not entitled to file statements to this report or to join in this Joint Rebuttal Statement.

[3] Ben Smith, "A Conservative Dismisses Right-Wing Black Panther 'Fantasies,'" Politico (July 19, 2010) (quoting the Vice Chair as accusing the Commission's majority as having "had this wild notion they could bring Eric Holder down and really damage the President").

[4] Statement of Vice Chair Abigail Thernstrom.

[5] Business Meeting Transcript, United States Commission on Civil Rights, 56 (September 11, 2009). The Vice Chair and Commissioner Ashley Taylor, Jr. were not present at the June 12, 2009 business meeting at which the Commission decided to send its June 16, 2009 letter to Acting Assistant Attorney General Loretta King inquiring about the Division's disposition of the New Black Panther Party case. They nevertheless followed up with their own joint letter to King dated June 22, 2009 in which they concurred in the Commission's letter. Their letter was in some ways stronger than the Commission's original letter. In it, the Vice Chair and Commissioner Taylor wrote, "We are gravely concerned about the Civil Rights Division's actions in this case and feel strongly that the dismissal of this case weakens the agency's moral obligation to prevent voting rights violations, including acts of voter intimidation or voter suppression." "We cannot understand the rationale for this case's dismissal," they continued, "and fear that it will confuse the public on how the Department of Justice will respond to claims of voter intimidation or voter suppression in the future."

On July 24, 2009, the Commission received what a majority of its members considered an inadequate response from Portia L. Roberson of the Department's Office of Intergovernmental and Public Liaison. This time, the Vice Chair was present at the meeting that considered the response. She had every opportunity to influence how that letter would be phrased. She signed the letter, dated August 10, 2009. In it, she and her Commission colleagues declared:

> The Commission has a keen interest in this case because of its special statutory responsibility to study the enforcement of federal voting rights laws. We believe the Department's defense of its actions thus far undermines respect for the rule of law and raises other serious questions about the Department's law enforcement decisions. The fundamental right that the Commission is investigating—the right to vote free of racially-motivated intimidation—has been called the cornerstone of other civil rights in our democracy. Until it is completed, this investigation will remain one of the Commission's top priorities.

All of these letters are available on the Commission's web site.

[6] On January 15, 2010, the Vice Chair voted against the decision to send a letter to the Securities and Exchange Commission asking for information about a new regulation concerning corporate board diversity that was widely criticized by opponents of racial preferences. See U.S. Commission on Civil Rights, Transcript of Business Meeting, 62 (January 15, 2010).

At two business meetings held in June and July of 2010, the Commission voted on a report, *Encouraging Minority Students in Science Careers*, that examined how racial preferences have led minority students to be disproportionately concentrated near the bottom of their college classes and thus explains their disproportionately low numbers in science and engineering. The report called on universities not to admit students with large credential deficits relative to the median student and to disclose voluntarily to admitted students information about how students with similar credentials performed academically once enrolled. Yet the Vice Chair abstained or voted against all the findings and recommendations associated with the report, save one finding about the importance of science and technology to the national economy and another about using pay incentives to recruit qualified K-12 math and science teachers. Notably, she even voted against a finding that reads: "In addition to providing other appropriate support and advice to students interested in STEM majors and careers, high school guidance counselors should advise these students about the significant impact of large deficits in academic credentials on college performance." See U.S. Commission on Civil Rights, Transcript of Business Meeting, 10-52 (June 11, 2010); U.S. Commission on Civil Rights, Transcript of Business Meeting, 107-138 (July 16, 2010).

The Vice Chair's votes on this topic are particularly curious given that she voted for every single one of the findings and recommendations that accompanied the Commission's briefing report *Affirmative Action Report in American Law Schools* (2007). U.S. Commission on Civil Rights, Transcript of Business Meeting, 107-196 (April 13, 2007). Like its science-focused successor, this report examined the mismatch problem in the law school context. Also like its successor, its recommendations called for law schools to stop admitting students with large credentials deficits relative to the mean and for voluntary disclosure of information about how students with certain credentials perform once admitted.

The Vice Chair also declined to support Commissioner Kirsanow's proposal for a briefing on the civil rights implications of eminent domain takings. U.S. Commission on Civil Rights, Transcript of Business Meeting, 41 (Dec. 3, 2010) (calling eminent domain abuse a "non-issue" at 9 and a "topic whose time has come and gone" at 25.)

[7] See Abigail Thernstrom, "The New Black Panther Case: A Conservative Dissent," National Review Online (July 6, 2010) (urging the reader to "Forget about the New Black Panther Case" and calling it "very small potatoes").

[8] See various meeting, briefing, telephonic meeting, and national conference transcripts available at the Commission's website.

[9] Business Meeting Transcript, United States Commission on Civil Rights, 24-25 (August 13, 2010).

[10] For a discussion of the wrongfulness of the Department's assertions of privilege and decision to withhold that evidence, see the accompanying Statement of Commissioner Todd Gaziano at notes 27-48 and accompanying text.

[11] Christian Adams and Christopher Coates had been ordered by the Department not to testify as to the actual deliberations surrounding the New Black Panther Party case, and they obeyed that order. Their testimony instead centered on policy directives made by political appointees and the general climate of opinion at the Division, neither of which would be covered by any asserted privilege of the Department. It is likely that Adams

and Coates would have had much to say about the deliberations surrounding the New Black Panther Party case if they had been permitted to testify. Adams quit his job in connection with the Department's actions with the New Black Panther Party case, but he still honored the Department's privilege claims regarding actual case deliberations. Coates said he would return to testify about the deliberations if permitted to do so.

[12] For a discussion of the evidence of the Division's general climate of hostility toward the race-neutral application of the law, see Statement of Commissioner Gail Heriot at 128-145, Statement of Commissioner Peter Kirsanow,at 165-169 and Statement of Commissioner Todd Gaziano at 111-115.

[13] On July 16, 2010, ten days after the hearing at which Christian Adams testified, the Vice Chair stated, "As I keep saying to members of the media who ask me about this, look, I'm an evidence girl. All I want is evidence, and so, you know, fine. At the point at which we have it, I am going to be really happy." Business Meeting Transcript, United States Commission on Civil Rights, 33 (July 16, 2010).

[14] The Vice Chair's professed interest in obtaining evidence to support or refute what she now concedes is a grave accusation is inconsistent with her actual conduct. She generally opposed the Commission's efforts to obtain evidence the Department was withholding, and she declined to develop the evidence from the two most important witnesses who appeared before the Commission. For example, Christian Adams resigned as a Department trial attorney to give testimony on the reason for the dismissal of the New Black Panther Party claims. The Vice Chair did not attend the hearing, but instead she announced to the world a few hours before the hearing began in an online op-ed that the matter the Commission was investigating was "small potatoes" unworthy of the time the Commission was devoting to it. See note 7. After Adams's testimony, she also refused to join a letter to the Department requesting that Christopher Coates—someone she previously said she "would love to hear firsthand from," see note 7—be permitted to testify. Business Meeting Transcript, United States Commission on Civil Rights, 27 (July 16, 2010). And when Christopher Coates chose to testify two months later against the advice of the Department, the Vice Chair acted out of character again. Although the Vice Chair is normally a loquacious and active questioner who yields her time to no one during Commission hearings, she didn't ask a single question of Coates. Instead, she yielded all her allotted time to Commissioner Michael Yaki.

Moreover, she declined an opportunity after Adams and Coates testified to support two letters to Attorney General Holder and to the Department requesting that they allow Coates, Adams, and other DOJ witnesses to testify to the deliberations over the New Black Panther Party case and to furnish the Commission with specific memos written by Coates and Adams and other documents on that topic. Business Meeting Transcript, United States Commission on Civil Rights (October 8, 2010) (Although the Vice Chair and Commissioner Melendez were not in attendance, the vote was officially left open for them. Commissioner Melendez took advantage of this opportunity. The Vice Chair did not.) And the Vice Chair simply ignores Adams's and Coates's testimony when she asserts there was "no evidence" of a racial double standard in the Civil Rights Division.

[15] See supra at pages 199-200 of this Joint Rebuttal Statement. Although the Vice Chair says in her Statement that she is interested in any results from investigations by Congress or the Department itself on these matters, at the December 3, 2010 Commission meeting she declined to support a motion for the Commission to continue to receive information relating to this topic.

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APPENDIX A: Background on the New Black Panther Party for Self Defense

The Election Day 2008 incident in Philadelphia raises questions as to the power the New Black Panther Party for Self Defense (NBPP) exercises over its members, as well as the extent of such control over the activities of King Samir Shabazz and Jerry Jackson on Election Day. While the Commission has attempted to depose King Samir Shabazz, Jerry Jackson, and Malik Zulu Shabazz, the first two have refused to testify, asserting their Fifth Amendment rights against self-incrimination,[1] while the Chairman of the Party, Malik Zulu Shabazz, has contested the Commission's subpoena in court. Accordingly, the following section examines the publicly available information on this issue.

The NBPP is a recognized hate group that is explicitly anti-Semitic and anti-white.[2] The NBPP is based on hierarchical principles with a military structure. Party members often appear in public wearing paramilitary uniforms and carrying weapons. According to Party rules, all panthers must learn to operate and service weapons correctly.[3] In addition, officials are given military titles and the Party advocates armed struggle and violence against its enemies.[4] Even its membership application form reflects a military-style orientation, seeking information about an applicant's military training, martial arts skills and whether one has served as a Navy Seal, Army Ranger or in other special forces.[5]

The Party openly acknowledges its hostility to police and governmental authorities. Its ten-point platform contains the following representative statements:

> We believe the Black People should not be forced to fight in the military service to defend the racist government that holds us captive and does not protect us. We will not fight and kill other people of color in the world who, like black people, are being victimized by the white racist government of America. We will protect ourselves from the force and violence of the racist police and the racist military, by any means necessary. (emphasis added)[6]

* * *

[1] *See* Deposition of King Samir Shabazz at 4-6, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 11, 2010, *available at* http://www.usccr.gov/NBPH/KingSamirShabazzDepositionTranscript_01-11-10.pdf; Deposition of Jerry Jackson at 6-8, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 11, 2010, *available at* http://www.usccr.gov/NBPH/JerryJacksonDepositionTranscript_01-11-10.pdf.

[2] The Anti-Defamation League called the NBPP "the largest organized anti-Semitic and racist black militant group in America." Anti-Defamation League, New Black Panther Party for Self Defense: Introduction, http://www.adl.org/main_Extremism/new_black_panther_party.htm (last visited Oct. 21, 2010).

[3] *See* MySpace Groups, New Black Panther Party for Self Defense, Rules of the New Black Panther Party, Rule No. 16, http://groups.myspace.com/index.cfm?fuseaction=groups.groupprofile&groupID=103327617 (last visited Oct. 21, 2010).

[4] *See* Markon & Thompson, *supra* note 82, Mike Roman, New Information Raises More Questions About DOJ and the Black Panthers, BIGGOVERNMENT.COM, http://biggovernment.com/mroman/2010/09/22/new-information-raises-more-questions-about-doj-and- the-black-panthers/ (last visted Dec. 28, 2010).

[5] New Black Panther Party, Membership Application, http://www.newblackpanther.org/newsite/membership2.html (last visited Oct. 21, 2010).

[6] New Black Panther Party, 10 Point Platform, http://www.newblackpanther.org/newsite/102.html (last visited Oct. 21, 2010).

> We believe we can end police brutality in our community by organizing black self-defense groups (Black People's Militias/Black Liberation Armies) that are dedicated to defending our Black Community from racist, fascist, police/military oppression and brutality. The Second Amendment of white America's Constitution gives a right to bear arms. We therefore believe that all Black People should unite and form an African United Front and arm ourselves for self defense.[7]

The Party even has a requirement that "If we ever have to take captives do not ill-treat them."[8]

All members must submit to the authority of officers within the Party. The Party reserves the right to impose discipline or suspend its members. As noted in its Rules:

> Every member of the New Black Panther Party throughout this country of racist America must abide by these rules as functional members of this party. Central Committee members, Central Staffs and Local Staffs, including all captains subordinated to either national, state, and local leadership of the Black Panther Party will enforce these rules. Length of suspension or other disciplinary action necessary for violation of these rules will depend on national decisions by national, state or state area, and local committees and staffs where said rule or rules of the New Black Panther Party were violated. Every member of the party must know these verbatim by heart. And apply them daily. Each member must report any violation of these rules to their leadership or they are counter-revolutionary and are also subjected to suspension by the Black Panther Party.[9]

The head of the New Black Panther Party is Malik Zulu Shabazz, designated as its chairman and "attorney at war." He often appears in the media making statements on the goals and actions of the Party. In these appearances, he often wears elaborate uniforms marked with stripes, insignia and symbols of his rank, including four stars on his lapel.[10]

The Philadelphia Chapter is recognized as a key unit within the Party. As noted by Malik Zulu Shabazz:

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[7] *Id.*
[8] MySpace Groups, New Black Panther Party for Self Defense, 8 Points of Attention, Point No. 8, http://groups.myspace.com/index.cfm?fuseaction=groups.groupprofile&groupID=103327617 (last visited Oct. 21, 2010).
[9] MySpace Groups, New Black Panther Party for Self Defense, http://groups.myspace.com/index.cfm?fuseaction=groups.groupprofile&groupID=103327617 (last visited Oct. 21, 2010).
[10] *See, e.g.*, David Holthouse, Southern Poverty Law Center, *New Black Panther Party Holds Strategy Summit*, HATEWATCH, Oct. 17, 2007, http://www.splcenter.org/blog/2007/10/17/new-black-panther-party-holds-strategy-summit/ (last visited Oct. 21, 2010).

> "We're going to be very active in Philadelphia," says Malik. "We're going to work on the minds and hearts of black people to eliminate the negative habits that keep us in a raggedy condition in Philadelphia. Philadelphia is a key city. I see it as being one of our best cities."[11]

This assertion was made in the same magazine article in which the head of the Philadelphia Chapter, King Samir Shabazz, is quoted as making virulent statements advocating violence against whites. In the article, King Samir Shabazz is described as "readying for war," wearing "battle dress" and acting as a "soldier."[12] He is quoted as describing the white man as "our open enemy." Other statements include the following:

> He's [Whitey] never going to let us live inside the Constitution," he says. "Until we realize that, we're going to remain dumb, deaf and blind. I can't wait for the day that they're all dead. I won't be completely happy until I see our people free and Whitey dead."
>
> By "dead," King means socially, economically, politically – and, if necessary, yes, physically.
>
> * * *
>
> "I'm proud to be a Panther," says King. "We won't ease up. We're going to keep putting our foot up the white man's ass until they understand completely. We want freedom, justice and muthafuckin' equality. Period. If you ain't gonna give it to us, muthafucka, we're gonna take it, in the name of freedom."[13]

The article goes on to describe that weapons training is part of King Samir Shabazz's Party duties.

> Thursday is military training night for the New Black Panthers. King goes over how to pat someone down for weapons and how to enforce security for high-ranking officials at public events. Arms training, CPR and guerilla warfare are reviewed.[14]

Although Malik Zulu Shabazz, the chairman of the Party, is also quoted in the article, and presumably was aware of these statements, there is no public indication that Malik Zulu Shabazz or the Party used its authority to discipline King Samir Shabazz in any way for the above statements.

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[11] Kia Gregory, *F*** Whitey's Christmas*, PHILA. WEEKLY, Dec. 17, 2003, *available at* http://www.philadelphiaweekly.com/news-and-opinion/cover-story/the_cats_came_back-38373074.html (last visited Oct. 21, 2010).
[12] *Id.*
[13] *Id.*
[14] *Id.*

In July 2008, the NBPP generally, and the Philadelphia Chapter in particular, were featured in a broadcast by National Geographic.[15] In the broadcast, Party members are shown marching on, and burning an American flag. Other members are shown posing with weapons.

In perhaps the most searing moments of the broadcast, King Samir Shabazz is filmed bluntly denouncing and advocating direct violence against whites. His statements include:

> I hate white people. All of them. Every last iota of a cracker, I hate him.
>
> * * *
>
> There's too much serious business going on in the black community to be out here sliding through South Street with white, dirty, cracker, whores [bleep] on our arm. And we call ourself black men with African garb on. What the hell is wrong with you, black man? . . . We keep beggin' white people for freedom. No wonder we not free. Your enemy cannot make you free, fool. You want freedom, you going to have to kill some crackers. You're going to have to kill some of their babies.[16]

Although much of the broadcast focused on King Samir Shabazz, two members who were later named in the NBPP litigation were also shown. The first of these was Jerry Jackson, who later appeared with King Samir Shabazz at the polling location on Fairmount Street. In the National Geographic broadcast, Mr. Jackson is shown playing a subordinate role to King Samir Shabazz, following his lead, working in tandem, and always appearing in his paramilitary uniform. He is described as Mr. Shabazz's chief of staff. In several scenes, Mr. Jackson poses with King Samir Shabazz with firearms. He also is shown handing out pamphlets as King Samir Shabazz made the above statement, urging the killing of "crackers" and their babies.

Also appearing in the broadcast is the Party's Chairman, Malik Zulu Shabazz. His appearance would seem to indicate that he approved of the broadcast and did not object to its contents.[17] As with the *Philadelphia Weekly* article, there is no public record that Malik Zulu

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[15] *See Inside the New Black Panthers* (National Geographic television broadcast 2009).

[16] *Id.* (beginning at the 13:34 mark). The statements of King Samir Shabazz mirror reported statements made by Malik Zulu Shabazz several years earlier:

> At an April 2002 protest outside B'nai B'rith headquarters in Washington, DC, he [Malik Zulu Shabazz] said, "Kill every goddamn Zionist in Israel! Goddamn little babies, goddamn old ladies! Blow up Zionist supermarkets!"

Richard J. Rosenthal, *The New Black Panther Mouthpiece*, FRONTPAGEMAGAZINE.COM, February 9, 2004, http://archive.frontpagemag.com/readArticle.aspx?ARTID=14294 (last visited Oct. 21, 2010).

[17] *See Inside the New Black Panthers* (National Geographic television broadcast 2009)

Mr. Shabazz was asked about King Samir Shabazz's statement about killing "crackers" in an interview with Fox News reporter Megyn Kelly. This interview occurred on July 9, 2010 while Malik Zulu Shabazz was under

Shabazz or the Party in any way repudiated or denounced the statements or actions of King Samir Shabazz in the National Geographic video, including advocating violence and posing before the camera with firearms. Given the Party's avowed powers of discipline, the lack of any such action following the inflammatory statements of King Samir Shabazz is relevant to the events that occurred on Fairmount Street and afterwards.

In sum, the publicly available evidence suggests that at no point did Malik Zulu Shabazz, or the NBPP as an organization, exert any discipline or rebuke to either King Samir Shabazz or Jerry Jackson prior to the filing of the lawsuit arising out of the events on Election Day 2008. To the contrary, Malik Zulu Shabazz and the NBPP appear to have approved and supported the arms training, threats of violence, and openly racist statements of King Samir Shabazz and his subordinate, Jerry Jackson.

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subpoena by the Commission and after J. Christian Adams had testified. The reluctance of Malik Zulu Shabazz to criticize the statements of King Samir Shabazz is captured in the following colloquy:

MEGYN KELLY: I mean, that's disgusting, isn't it, sir?

SHABAZZ: I would say that he should be careful in how he speaks, but I would still say that his words are being manipulated by a right-wing conspiracy here, and the Republicans are manipulating his words into, again, an attack on blacks and to drum up racial fears . . .

[Two voices simultaneously]

MEGYN KELLY: What part—Let me ask you, do you agree that white people . . .

SHABAZZ: . . . and to increase voter turnout.

MEGYN KELLY: Do you agree that white people should be killed, and their babies should be killed?

SHABAZZ: That is not the position of our organization, that is not the position of myself. We have an official platform and a position. That is not our position.

[Two voices simultaneously]

MEGYN KELLY: So you say that's not the position, I'm just asking you as a human being, sir. That is a disgusting comment he made, and do you agree with it, or don't you?

SHABAZZ: No, I do not agree that he should have said that, no I do not.

MEGYN KELLY: No, no, I'm not asking about whether he should have said it. I'm asking about whether you agree with the sentiment.

SHABAZZ: No, ma'am, I don't.

America Live (Fox News television broadcast July 9, 2010), *available at* http://video.foxnews.com/v/4277314/new-black-panther-party-head-responds-to-allegations (last visited Oct. 20, 2010).