UNITED STATES COMMISSION ON CIVIL RIGHTS

624 Ninth Street, N.W.
Washington, D.C. 20425

August 10, 2009

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
Washington, DC 20530

Dear Attorney General Holder:

Pursuant to our statutory mandate, we sent inquiries on June 16 and 22 to the Civil Rights Division's Acting Assistant Attorney General, Loretta King, regarding the unusual dismissal of the government's case against most of the defendants in *United States v. New Black Panther Party for Self-Defense*, Civ. No. 09-0065 SD (E.D. Pa.) (NBPP case).[1] We regret that the reply from Portia Roberson, Director of the Office of Intergovernmental and Public Liaison,[2] is largely non-responsive to our questions. To the extent it is responsive, it paints the Department in a poor light. We also reviewed correspondence between DOJ and Members of Congress who raised similar questions about the case. The July 13 letter from Assistant Attorney General Ronald Weich to House Judiciary Committee Ranking Member Lamar Smith is also non-responsive and includes what we believe to be factual errors and asserts novel and questionable legal claims. As we explain below, the DOJ's replies thus far raise new and serious questions about its civil rights enforcement decisions, which we believe we are obligated to investigate.

Moreover, news stories[3] have now raised questions about Ms. King's role in the decision to dismiss the suit against the NBPP,[4] whose members, with military-style uniforms and weapons, taunted voters with racially-intimidating comments as they approached the polls.[5] The news stories also report certain steps by senior political appointees at DOJ in approving the dismissal of most of the case and the extremely narrow injunction against the sole remaining defendant. That Associate Attorney General Thomas Perrelli, a political appointee, reportedly approved the dismissal of the suit against a Democratic poll worker raises several questions. In light of these reports, it may have been a mistake to address our initial inquiry to Ms. King or

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[1] The decision to begin our inquiry was reached during an open meeting of the U.S. Commission on Civil Rights on June 12, 2009. Chairman Reynolds, Commissioner Gaziano, Commissioner Heriot, and Commissioner Kirsanow voted to begin the inquiry with the letter that was subsequently sent on June 16 (Commissioner Melendez abstained from the vote). On June 22, Vice Chair Thernstrom and Commissioner Taylor, who were not present at the time the vote was taken, sent their own letter to Ms. King joining the request for relevant information on the case. The signatories to this letter have voted to expand the Commission's investigation as reflected herein, with Commissioners Melendez and Yaki abstaining.

[2] Ms. Roberson did not date her letter. Commission staff stamped it as received on July 24.

[3] *See, e.g.*, Jerry Seper, *No. 3 at Justice OK'd Panther Reversal*, WASH. TIMES, July 30, 2009.

[4] The New Black Panther Party for Self Defense has been identified as a hate group by the Southern Poverty Law Center and the Anti-Defamation League, among others. Southern Poverty Law Center, *Active U.S. Hate Groups in U.S.*, *available online*; Anti-Defamation League, *New Black Panther Party for Self-Defense*, *available online*; National Geographic Channel, *Inside the New Black Panthers*, *available online*. Nor is its influence small. The Anti-Defamation League claims that "it has become the largest organized anti-Semitic black militant group in America." Anti-Defamation League, *supra*.

[5] NBPP Case, No. 09-0065 (E.D. Pa. filed Jan. 7, 2009) (Compl. ¶¶ 8-11).

anyone outside your office. Under the circumstances, we ask that you personally direct the response to our voter intimidation inquiries or that you appoint another senior member of the Department to do so who does not have a conflict.

As you know, the Civil Rights Act of 1957 created both the U.S. Commission on Civil Rights and the Civil Rights Division of the U.S. Department of Justice. Just as the Department of Justice is answerable for its conduct in enforcing (or refusing to enforce) the civil rights laws, the U.S. Commission on Civil Rights is answerable for properly investigating the enforcement of those laws and reporting on the same to the President, to Congress, and to the public. The Commission has a special statutory responsibility to investigate deprivations of the right to vote, and the Commission must collect information and make appraisals of federal policies relating to racial discrimination. 42 U.S.C. § 1975a.

In our original letter, we not only sought the rationale for the Department's dismissal of the charges against the NBPP and other defendants, we also sought information to place the NBPP case in the context of other alleged voter intimidation investigations. In order for us to form an independent judgment of whether the Voting Rights Act is being properly enforced, we need to know the detailed facts of the NBPP case, not just the Department's conclusion that the acts of intimidation did not merit maintaining the ongoing suit. We also need to know the facts and disposition of other investigations. To be precise, we requested the Department's "evidentiary and legal standards for dismissing [related] charges in cases of alleged voter intimidation." We also sought information regarding "any similar cases in which the CRD has dismissed charges against a defendant."

The letter from Ms. Roberson to us repeats some of the vague conclusions sent to Members of Congress.[6] Yet, the Roberson letter provides none of the facts we need to determine whether the NBPP voter intimidation case was handled consistently with others the Department has investigated. Ms. Roberson provided no response as to whether there are "any similar cases in which the CRD has dismissed charges against a defendant" charged with voter intimidation. Nor did she respond to our request for the Department's "evidentiary and legal standards for dismissing such charges in cases of alleged voter intimidation." If the Department has no such standards, we would like to know that.

The Department's original complaint against the NBPP and several of its members alleged serious acts of racially-targeted voter intimidation, some of which were captured on video and viewed by millions of Americans. Ms. Roberson asserts that "the facts and law did not support pursuing" the suit against three defendants, but provides no factual or legal explanation why that is so. Ms. Roberson's statement that default judgments are disfavored in the Third Circuit is beside the point. When a court states that default judgments are disfavored, it doesn't mean that the defendant should get away scot free for refusing to appear; it means that the plaintiff should present evidence of the defendants' wrongdoing before the judgment is entered. In this case, the evidence of defendants' wrongdoing appears to be strong. There are reliable eyewitnesses and important evidence was captured on video. Moreover, the federal

[6] These conclusions are more than weak. We believe the public rationale offered thus far is even more corrosive to the rule of law than the dismissal without comment.

judge requested that DOJ proceed to judgment. If the Department had done what the judge requested and proffered its evidence, its judgment would not be a mere default judgment.

In our original request for information, we noted the peculiar logic of the Department's court filing that the defendants' failure to respond was the reason for its dismissal of the case against three defendants: Such an argument sends a perverse message to wrongdoers—that attempts at voter suppression will be tolerated so long as the persons who engage in them are careful not to appear in court to answer the government's complaint.

We also questioned the narrow injunction against defendant Minister King Samir Shabazz, who is seen on tape in a paramilitary uniform waving a nightstick, and who the Department alleged was taunting white voters with racially-bigoted remarks as they tried to enter the polling place. The injunction the Department says it will "fully enforce" prohibits Mr. Samir Shabazz "from displaying a weapon within 100 feet of any open polling location on any election day in the City of Philadelphia" at least until late 2012. An injunction in a civil RICO case against an individual who brandished a gun to extort money would not be limited to preventing him from brandishing guns to extort money in his hometown. The DOJ did not seem interested in preventing Mr. Samir Shabazz from brandishing weapons in suburban polling places. The terms of the injunction also do not prohibit Shabazz from carrying weapons to the polls in Philadelphia if they are, or appear to be, under his paramilitary garb. Nor does it prohibit him from making intimidating comments or blocking voters' access to the polls. In short, it does not prohibit him from engaging in any specific intimidating conduct anywhere except "displaying a weapon" at City of Philadelphia polling places (the VRA itself prohibits everyone from violating its general terms, so including that without specific prohibitions adds little or nothing).

Yet, Ms. Roberson implies that a broader injunction would not satisfy "the requirements of the First Amendment." This is a claim that we need to explore further. It is unclear what First Amendment issue would arise by enjoining the NBPP or other racial hate-groups from organizing its members again to carry any weapons (especially when dressed in paramilitary uniforms) at polling places and subject particular voters to racially-bigoted diatribes as they attempt to enter the polls. If the Department believes the injunctive authority of the Voting Rights Act does not extend this far, we need to know that, since that will likely have serious implications for the Department's enforcement of the VRA generally.[7]

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[7] We note that the Department's previous letters to the Commission and Members of Congress contain questionable factual claims that call into doubt the decision to dismiss the charges in the first place. For example, we understand that defendant Jerry Jackson was not a resident of the assisted living apartment building where the intimidation took place as the Department recently claimed, although we also do not understand why that would excuse intimidating and racially harassing voters at a polling place if it is true he resided there.

We also do not understand the weight the Department seems to place on the fact that the local police allowed Mr. Jackson to stay at that location on Election Day. Local police do not enforce the VRA and they have other concerns when they respond to a call. The DOJ officials who filed the complaint did not think the federal law turned on the local police actions that day. The Department also seems to rely on the fact that Mr. Jackson was a registered poll watcher for the Democratic Party, but that is not a defense to voter intimidation. Recent news stories have reported that Jackson was reappointed as a poll watcher four days after the Department dismissed the suit against him.

Since the Department has raised the "local-police-didn't-arrest-him" issue, notes taken by federal officials who interviewed the police and memos regarding the same are relevant to our inquiry. Witness statements taken by the

According to reports about an internal Department memo, senior political appointees also sought to secure the opinion of the Appellate Section of the Civil Division as to whether a judgment against all NBPP defendants could be defended.[8] According to the reports, the Appellate Section Chief did not agree with those seeking to have the charges dismissed. Instead, the Appellate Chief reportedly advised that the Department should pursue the default judgment against "all defendants," since the complaint was aimed at preventing "paramilitary style intimidation of voters" at polling places. The Chief noted that such an action would leave open "ample opportunity for political expression." This conclusion seems legally sound to us. We do not understand why that advice was overridden and why Ms. Roberson suggests that the First Amendment would preclude the case from proceeding against other defendants.

So that there is no mistake about the scope of our current inquiry, the Commission will seek to determine: (1) the facts giving rise to the NBPP case as well as the facts and disposition of other voter intimidation cases; (2) why the decision was made to dismiss the suit against most of the NBPP defendants and who was involved in making it; (3) why the injunction against Mr. Samir Shabazz is so narrow; (4) whether the decision in the NBPP case is consistent with DOJ policy in prior investigations or amounts to a change in policy; (5) the extent to which we believe current policy will undermine future voter-intimidation enforcement; and (6) whether we believe such policies are consistent with proper enforcement of section 11(b) of the Voting Rights Act.

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.

Accordingly, we would like you to provide the Commission the following:

1. Answers to our original requests for information on June 16.
2. Answers and documents responsive to our comments and requests above.

Department relating to Mr. Jackson's behavior are also relevant, since reports indicate that Mr. Jackson wore the same paramilitary uniform as, and stood in formation with, Mr. Samir Shabazz as they intimidated voters entering the polls. Several witnesses have publicly recounted their fear, and former civil rights movement leader Bartle Bull called the alleged acts "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 1960s." Bull Aff. ¶ 6.

There is also evidence that the New Black Panther Party and its Chairman, Malik Zulu Shabazz, managed, directed, and endorsed the behavior of the other defendants, yet the Department justifies dismissing the suit against them on the ground that the NBPP did not issue written instructions to display weapons at the polls and Mr. Zulu Shabazz later disavowed what happened in Philadelphia. Mr. Zulu Shabazz was interviewed on national television on November 7, 2008, and claimed that his activities were part of a coordinated nationwide effort, and that displaying a weapon was part of NBPP deployment. Further investigation of the coordination among the NBPP, Mr. Zulu Shabazz, and the other defendants is surely warranted, including interviewing Mr. Zulu Shabazz.

[8] Jerry Seper, *No. 3 at Justice OK'd Panther Reversal*, WASH. TIMES, July 30, 2009.

3. Answers and documents requested by Representatives Lamar Smith and Frank Wolf on July 17 and July 22, respectively.
4. A statement explaining your Office's involvement in or discussions relating to the NBPP suit, as well as those of officers and employees in the Offices of Deputy Attorney General, Associate Attorney General, Solicitor General, the Office of Legal Counsel, the Civil Division, and any individual in the Civil Rights Division.
5. An explanation of whether the Department is free to re-file the case against the three dismissed defendants and conduct full discovery.
6. Information as to whether any retaliation, negative actions, or discipline of any kind have been taken against any lawyer who developed, investigated, or litigated the case.
7. Information the Department has regarding its contacts with attorney Michael Coard, who said he was taking the case on behalf of two defendants, who obtained pleadings from the Department, and then did not file a responsive pleading. Among other matters, we would like to know the name of all Department officers and employees who communicated with Coard and the nature of their communication with him.
8. Information on any other individuals who contacted the Department regarding the New Black Panther Party litigation.

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.

We appreciate your prompt attention to this important matter, and we look forward to your response.

Sincerely,

Gerald A. Reynolds
Chairman

Abigail Thernstrom
Vice Chair

Peter Kirsanow
Commissioner

Ashley Taylor, Jr.
Commissioner

Gail Heriot
Commissioner

Todd Gaziano
Commissioner

cc: Commissioner Arlan Melendez

Commissioner Michael Yaki

The Honorable John Conyers
Chairman
Committee on the Judiciary

The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary

The Honorable Jerrold Nadler
Chairman
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

The Honorable James Sensenbrenner, Jr.
Ranking Member
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

The Honorable Frank Wolf
Ranking Member
Commerce-Justice-Science Subcommittee, Appropriations Committee

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary

The Honorable Russ Feingold
Chairman
Subcommittee on the Constitution

The Honorable Tom Coburn
Ranking Member
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