New Black Panther Investigation

Depositions

1. Jerry Jackson Deposition Transcript – November 30, 2009
2. Jerry Jackson Deposition Transcript – January 11, 2010
3. King Samir Shabazz Deposition Transcript – November 30, 2009
4. King Samir Shabazz Deposition Transcript – January 11, 2010
5. Kristen Clarke Deposition Transcript (with exhibits) – January 8, 2010
6. Ronald Vann Deposition Transcript (with exhibit) – January 11, 2010
7. Larry Counts Deposition Transcript (with exhibit) – January 12, 2010
8. Angela Counts Deposition Transcript (with exhibit) – January 12, 2010
9. Malik Zulu Shabazz – Attempt to Depose – February 2, 2010

Correspondence

1. Chairman's letter to AG Holder re unfulfilled discovery requests May 9, 2010
2. E-mail correspondence from Hunt to Blackwood re witness testimony April 16, 2010
3. Letter from Hunt to USCCR providing supplemental responses April 16, 2010
4. Letter from Blackwood to Hunt re offered testimony of Thomas Perez April 19, 2010
5. Chairman's letter to AG Holder reiterating previous requests concerning New Black Panther Party litigation April 1, 2010
6. Letter to DOJ on need to provide discovery relating to New Black Panther Party litigation, March 30, 2010
7. Letter from DOJ on discovery matters relating to the New Black Panther Party litigation, March 12, 2010
8. DOJ letter regarding discovery issues, February 26, 2010
9. Letter from Joseph H. Hunt, Director, Federal Programs Branch to Gerald A. Reynolds, Chairman, United States Civil Rights Commission, January 12, 2010
10. Response of Department of Justice, January 12, 2010
11. Letter to DOJ re New Black Panther Party Litigation, December 8, 2009
12. Discovery Request to DOJ re New Black Panther Party Litigation, December 8, 2009
13. Follow-up Letter to Attorney General Holder on Voter Intimidation and 2008 Election, September 30, 2009
14. Follow-up to Voter Intimidation 2008 Election letter to DoJ
15. Thernstrom-Taylor Letter in Support of Voter Intimidation 2008 Election Letter to DoJ
16. Voter Intimidation 2008 Election Letter to Department of Justice
17. Letter to Joseph Hunt re USCCR statutory enforcement report

Documents

1. DOJ memo 12-22-08 re recommended lawsuit against NPBB
2. DOJ remedial memo 5-6-09 re proposed injunction
3. DOJ comments 5-13-09 re proposed default judgment
4. Congressional Correspondence re NBPP: (from Rep. Wolf)

Hearing Transcripts

1. Transcript of 4-23-10 NBPP Hearing
2. Transcript of 5-14-10 NBPP Hearing

THE UNIVERSITY of MARYLAND
SCHOOL OF LAW

New Black Panther Party Investigation

Depositions

UNITED STATES OF AMERICA
COMMISSION ON CIVIL RIGHTS

+ + + + +

DEPOSITION

+ + + + +

IN RE

The Scheduled deposition of Jerry Jackson

Scheduled oral deposition of JERRY JACKSON, taken at the Hilton Garden Inn, 1100 Arch Street, Philadelphia, Pennsylvania, on Monday, November 30, 2009, commencing at approximately 9:42 a.m., pursuant to notice, when were present:

APPEARANCES:

DAVID P. BLACKWOOD, ESQ.
GENERAL COUNSEL
U.S. COMMISSION ON CIVIL RIGHTS,
OFFICE OF THE GENERAL COUNSEL
624 Ninth Street, N.W.
Suite 631
Washington, D.C. 20425
202-376-7622
dblackwood@usccr.gov

ALSO PRESENT:

Maurice Heath
a/k/a Minister King Samir Shabazz

P-R-O-C-E-E-D-I-N-G-S

(10:00 a.m.)

MR. BLACKWOOD: We are here.

My name is David Blackwood. I'm the General Counsel for the U.S. Commission on Civil Rights. And it is approximately 18 minutes of 10:00, on November 30th, and Mr. Jerry Jackson is here.

Mr. Jackson, you have indicated that you want Mr. Coard, your attorney, present before you will testify; is that correct?

MR. JACKSON: Yes. We are here today on November 30th, and I will not go on with this until my attorney is present.

MR. BLACKWOOD: Okay. And your attorney is?

MR. JACKSON: Michael Coard.

MR. BLACKWOOD: And you have attempted to reach Mr. Coard this morning?

MR. JACKSON: Yes, I have.

MR. BLACKWOOD: And you called

both his cell phone and regular office number?

MR. JACKSON: Yes.

MR. BLACKWOOD: I will also indicate that I have tried to reach Mr. Coard by calling his cell number with no success.

I would also enter into the record the e-mail messages that I traded with Mr. Coard previously in an attempt to schedule his clients to appear with him.

And at that, given your position, Mr. Jackson, I understand you are going to leave at this time?

MR. JACKSON: Yes.

MR. BLACKWOOD: All right. Thank you.

Now, let me indicate, I am not releasing you from the Subpoena. I will attempt to work with Mr. Coard to set up another date where everybody is available.

Do you understand that?

MR. JACKSON: Well, you will also send me another Subpoena to inform me of the

date.

MR. BLACKWOOD: Well, no. That's exactly why I wanted to make that clear. I won't send you a Subpoena because I'm not going to release you from the Subpoena. Although, I recognize you have the right to have an attorney.

I will send a letter. I will talk with Mr. Coard. It is Mr. Coard's duty to talk to you.

MR. JACKSON: So this Subpoena is an ongoing Subpoena?

MR. BLACKWOOD: It's ongoing. I am not going to release you. What I'm willing to say is, we are willing to schedule a new date where you and Mr. Coard are both available.

MR. JACKSON: How would I find that out?

MR. BLACKWOOD: I will send you something. But, frankly, if you have an attorney, your attorney is supposed to be the

one that notifies you what date works.

MR. JACKSON: Okay.

MR. BLACKWOOD: Okay. We will leave it at that. It is now about 16 minutes of 10:00.

And, as I say, I'm not excusing you, but I understand we need Mr. Coard present for you to testify. And I will, as you will, attempt to contact him to find another available date.

MR. JACKSON: Will I receive a deposition of this -- will I receive a copy of this statement?

MR. BLACKWOOD: I can send that to you. I will tell you, the normal procedures are, though, if Mr. Coard represents you, I send it to him and he sends it to you.

If there's an attorney involved, I, as an attorney, can only talk with the attorney or with you in the attorney's presence.

MR. JACKSON: Okay.

MR. BLACKWOOD: All right?

MR. JACKSON: All right.

MR. BLACKWOOD: Thank you.

MR. JACKSON: Thank you.

(Thereupon, at 9:45 a.m. the scheduled deposition concluded.)

CERTIFICATE

This is to certify that the foregoing proceedings in the matter of: The Deposition of Jerry Jackson

held on: November 30, 2009

at the location of: Philadelphia, Pennsylvania

were duly recorded and accurately transcribed under my direction; further, that said proceedings are a true and accurate record of the testimony given by said witness; and that I am neither counsel for, related to, nor employed by any of the parties to this action in which this deposition was taken; and further that I am not a relative nor an employee of any of the parties nor counsel employed by the parties, and I am not financially or otherwise interested in the outcome of the action.

Jennifer Bermudez

Notary Public/Reporter in and for

Commonwealth of Pennsylvania

Page 1

UNITED STATES COMMISSION ON CIVIL RIGHTS

IN RE:

NEW BLACK PANTHER PARTY

Philadelphia, Pennsylvania
Monday, January 11, 2010

TRANSCRIPT of testimony of JERRY JACKSON, as taken by and before Cherilyn M. McCollum, a Registered Professional Reporter, at the HILTON GARDEN HOTEL, 1100 Arch Street, commencing at 9:02 o'clock in the forenoon.

Page 2

B E F O R E:
(BY TELEPHONE)
ALEC DEULL, SPECIAL ASSISTANT
NICK COLTEN, SPECIAL ASSISTANT
JOHN MARTIN, SPECIAL ASSISTANT
ALISON SCHMAUCH, SPECIAL ASSISTANT
DOMINIQUE LUDVIGSON, SPECIAL ASSISTANT

A P P E A R A N C E S:
UNITED STATES COMMISSION ON CIVIL RIGHTS
OFFICE OF THE GENERAL COUNSEL
BY: DAVID P. BLACKWOOD, ESQ.
MAHA JWEIED, ESQ.
624 Ninth Street, N.W.
Suite 631
Washington, D.C. 20424
(202) 376-7622
dblackwood@usccr.gov
Attorneys for The Commission

A L S O P R E S E N T:

KIMBERLY TOLHURST, ESQ. (BY TELEPHONE)

Page 3

I N D E X

Page 4

EXAMINATION
BY MR. BLACKWOOD:
Q. If we could, it's a little after 9:00. Mr. Jackson, you're here because you received a subpoena. Is that correct?
A. Yes.
Q. And you have talked to your attorney, Michael Coard. Is that also correct?
A. Yes.
Q. Mr. Coard indicated that he wishes to attend your deposition. Is that right?
A. Yes.
Q. Okay. And he indicated, though, he has a court hearing this morning, but will be able to be here around 12-ish?
A. Yeah.
Q. Based on your representations, do you agree that we will reconvene here about 12:30?
A. Yes.
Q. With that agreement, I release you for now, not from the subpoena, but I release you to return at 12:30.
A. Thank you.
(Recess at 9:03 a.m.)

Page 5

(Resumed at 1:03 p.m.)
MR. BLACKWOOD: It is now approximately 1:00, and I would ask you to swear in the witness, please.
JERRY JACKSON, after having been first duly sworn, was examined and testified as follows:
CONTINUED EXAMINATION
BY MR. BLACKWOOD:
Q. Mr. Jackson, it's 1:00, and we have been waiting for your attorney, Michael Coard. Is that correct?
A. Yes.
Q. And you talked to Michael Coard yesterday?
A. No.
Q. When did you talk to him?
A. Talked to him -- well, it was about a week ago.
Q. Okay. In any case, you've been trying to reach him today as well?
A. Yes.
Q. As you know, we're here to -- as you've been informed in writing, we're here to

Page 6

investigate various circumstances that occurred on Election Day 2008. Do you understand that?
A. Yes.
Q. You've indicated with your conversation with me outside that you intend to plead the Fifth Amendment as to that topic?
A. That topic was dismissed. I don't have any clue really who you are, and my attorney is not here, and that's the reason that I would take the Fifth.
Q. But it is your intention to take the Fifth, correct?
A. Yes.
Q. Let me just run through -- there are some various categories of items that I was going to ask you about, and I just want to make sure that your assertion of your Fifth Amendment applies to each one of those categories.
First, you're making that assertion based on advice of counsel. Is that correct?
A. Yes.
Q. If I ask you about your Election Day activities of 2008, you would take the Fifth. Is that correct?

Page 7

A. I already took it.
Q. If I ask you questions about planning for the election by yourself and the New Black Panther Party, would you take the Fifth?
A. I already took the Fifth.
Q. And if I asked you about any investigation by the New Black Panther Party about your conduct on Election Day 2008, you would also take the Fifth. Is that correct?
A. (Witness indicating.)
Q. You have to verbalize it.
A. I took the Fifth.
Q. Okay. All right.
And that was because you believe your testimony might tend to incriminate you. Is that correct?
A. That's what the Fifth Amendment is, I think.
Q. Okay.
A. Because I don't have representation.
Q. But you have contacted Mr. Coard and he's not here?
A. Right. That's the reason that I'm taking the Fifth.

Page 8

Q. Well, it's also Mr. Coard indicated to you that you were going to take the Fifth, even if he was here, correct?
A. No.
Q. He did not?
A. No.
Q. So if Mr. Coard was here, you would not take the Fifth?
A. I would be communicating with Mr. Coard, and we would be dealing with this situation in the way that it should be dealt with, but right now I don't want to say anything. I'm taking the Fifth.
Q. Okay. Mr. Jackson, as we discussed outside, I'm going to release you from today. I'm not releasing you from the subpoena, all right. If Mr. Coard, for example, arrives in the next ten minutes, we'll come back and take your deposition, but Mr. Coard is not here and I'm working on the assumption that he's not going to be here.
A. Uh-huh.
Q. That said, we are going to take appropriate action as we see fit to get the testimony that we are seeking, but until that time,

you are free. Okay?
A. All right. Thank you.
MR. BLACKWOOD: Thank you.
(1:07 p.m.)

C E R T I F I C A T E

I, Cherilyn M. McCollum, a Certified Court Reporter and Notary Public, do hereby certify that, prior to the commencement of the examination, the witness and/or witnesses were sworn by me to testify to the truth and nothing but the truth.

I do further certify that the foregoing is a true and accurate computer-aided transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither of counsel nor attorney for any party in this action and that I am not interested in the event nor outcome of this litigation.

_____
Certified Court Reporter
XI02094
Notary Public
My commission expires 3-22-11

Dated: _____

UNITED STATES OF AMERICA
COMMISSION ON CIVIL RIGHTS

+ + + + +

DEPOSITION

+ + + + +

IN RE

The Scheduled deposition of
Maurice Heath a/k/a
Minister King Samir Shabazz

Scheduled oral deposition of MAURICE HEATH, a/k/a MINISTER KING SAMIR SHABAZZ, taken at the Hilton Garden Inn, 1100 Arch Street, Philadelphia, Pennsylvania, on Monday, November 30, 2009, commencing at approximately 9:45 a.m., pursuant to notice, when were present:

ORIGINAL

APPEARANCES:

DAVID P. BLACKWOOD, ESQ.
GENERAL COUNSEL
U.S. COMMISSION ON CIVIL RIGHTS,
OFFICE OF THE GENERAL COUNSEL
624 Ninth Street, N.W.
Suite 631
Washington, D.C. 20425
202-376-7622
dblackwood@usccr.gov

ALSO PRESENT:

Jerry Jackson

P-R-O-C-E-E-D-I-N-G-S

(9:45 a.m.)

MR. BLACKWOOD: It is now approximately a quarter of 10:00.

And I am David Blackwood, the General Counsel to the U.S. Commission on Civil Rights.

Also, before me is Mr. Heath.

Or do you prefer --

MR. SHABAZZ: Minister King Samir Shabazz.

MR. BLACKWOOD: Minister King Samir Shabazz.

His deposition was noted for 1:00 this afternoon. It is November 30th, 2009. But he has indicated, after appearing with Mr. Jackson, that he also wishes that Mr. Coard, C-O-A-R-D, his attorney, be present for his deposition.

As I understand it, Mr. Shabazz, you have attempted to reach Mr. Coard?

MR. SHABAZZ: Yes.

MR. BLACKWOOD: And it's been unsuccessful, correct?

MR. SHABAZZ: Yes.

MR. BLACKWOOD: As with Mr. Jackson, I will indicate, you have a right to have an attorney present. I'm not going to ask you any questions without your attorney present.

But I will also enter into the record that I attempted to contact your attorney, sent him several e-mails, to set a mutually available date and I have not heard from him.

And that I also have attempted to contact him today, unsuccessfully.

That said, I am not releasing you from the Subpoena, but I will agree that we will attempt to, working with Mr. Coard, reschedule your deposition for a mutually convenient date.

And as with Mr. Jackson, if you want a copy of the notes that are being typed

up now by the court reporter, I will provide that to Mr. Coard and Mr. Coard then can provide you with a copy.

Do you agree?

MR. SHABAZZ: Yes.

MR. BLACKWOOD: Now, based on the fact that we are having this conversation at this moment, I am agreeing that you do not have to appear at 1:00. Okay?

MR. SHABAZZ: All right.

MR. BLACKWOOD: And I would suggest, gentlemen, what I am going to do is, go down to Mr. Coard's office and see if he's available.

I assume he has your phone numbers if he wants to reach you?

MR. JACKSON: Yes.

MR. BLACKWOOD: Okay. Then with that said, we can close the record and I will go down and see if I can find Mr. Coard and hopefully set a date.

I appreciate you both showing up.

MR. JACKSON: All right. Thank you.

MR. BLACKWOOD: Thank you.

(Thereupon, at 9:48 a.m. the scheduled deposition concluded.)

CERTIFICATE

This is to certify that the foregoing proceedings in the matter of: The Deposition of Maurice Heath

held on: November 30, 2009

at the location of: Philadelphia, Pennsylvania

were duly recorded and accurately transcribed under my direction; further, that said proceedings are a true and accurate record of the testimony given by said witness; and that I am neither counsel for, related to, nor employed by any of the parties to this action in which this deposition was taken; and further that I am not a relative nor an employee of any of the parties nor counsel employed by the parties, and I am not financially or otherwise interested in the outcome of the action.

Jennifer Bermudez

Notary Public/Reporter in and for

Commonwealth of Pennsylvania

UNITED STATES COMMISSION ON CIVIL RIGHTS

IN RE:

NEW BLACK PANTHER PARTY

Philadelphia, Pennsylvania
Monday, January 11, 2010

TRANSCRIPT of testimony of KING SAMIR SHABAZZ, as taken by and before Cherilyn M. McCollum, a Registered Professional Reporter, at the HILTON GARDEN HOTEL, 1100 Arch Street, commencing at 1:08 o'clock in the afternoon.

B E F O R E:
(BY TELEPHONE)
ALEC DEULL, SPECIAL ASSISTANT
NICK COLTEN, SPECIAL ASSISTANT
JOHN MARTIN, SPECIAL ASSISTANT
ALISON SCHMAUCH, SPECIAL ASSISTANT
DOMINIQUE LUDVIGSON, SPECIAL ASSISTANT

A P P E A R A N C E S:
UNITED STATES COMMISSION ON CIVIL RIGHTS
OFFICE OF THE GENERAL COUNSEL
BY: DAVID P. BLACKWOOD, ESQ.
MAHA JWEIED, ESQ.
624 Ninth Street, N.W.
Suite 631
Washington, D.C. 20424
(202) 376-7622
dblackwood@usccr.gov
Attorneys for The Commission

A L S O P R E S E N T:

KIMBERLY TOLHURST, ESQ. (BY TELEPHONE)

I N D E X

MR. BLACKWOOD: Good afternoon. Before we start, if you could give your full name to the court reporter.

THE WITNESS: King Samir Shabazz.

MR. BLACKWOOD: And would you please swear him in.

KING SAMIR SHABAZZ, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BLACKWOOD:

Q. Mr. Shabazz, I appreciate your coming. You're here because you were subpoenaed. Is that correct?

A. Yes.

Q. And we've been waiting several hours now for Mr. Coard. Is that correct?

A. Yes.

Q. And you've attempted to reach Mr. Coard, but you've been unsuccessful. Is that correct?

A. Yes.

Q. In my conversations with you outside, you indicated that you intended to plead

Page 5

the Fifth Amendment in regards to the subject matters to which you were subpoenaed. Is that correct?
A. Plead the Fifth.
Q. And that is because you believe your testimony might risk incriminating you?
A. No, it's not.
Q. Let me just hit some categories about if I was going to ask this specific category whether you would and do raise the Fifth Amendment.
First, if I ask you any questions about your Election Day activities 2008?
A. Plead the Fifth.
Q. If I ask you any questions with regard to planning for the Election Day activities regarding 2008?
A. Plead the Fifth.
Q. If I ask you any questions about any investigation conducted by the New Black Panther Party with regard to your conduct?
A. Plead the Fifth.
MR. BLACKWOOD: Thank you very much. Now, as discussed, I'm not releasing you from the subpoena. I'm releasing you for

Page 6

today. If Mr. Coard, for example, makes himself available, I will be here in Philadelphia today until about noon tomorrow. So if we can reschedule this, I would appreciate it. Otherwise, we'll take whatever action we think is appropriate to have the Court order the substance of the testimony that I'm seeking to be presented, but, otherwise, you are free today.
(1:10 p.m.)

Page 7

C E R T I F I C A T E

I, Cherilyn M. McCollum, a Certified Court Reporter and Notary Public, do hereby certify that, prior to the commencement of the examination, the witness and/or witnesses were sworn by me to testify to the truth and nothing but the truth.

I do further certify that the foregoing is a true and accurate computer-aided transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither of counsel nor attorney for any party in this action and that I am not interested in the event nor outcome of this litigation.

_____
Certified Court Reporter
XI02094
Notary Public
My commission expires 3-22-11

Dated: _____

U.S. COMMISSION ON CIVIL RIGHTS

+ + + + +

DEPOSITION

IN RE:

NEW BLACK PANTHER PARTY INVESTIGATION

Friday,
January 8, 2010

Washington, D.C.

DEPOSITION OF:

KRISTEN CLARKE

called for examination by Counsel for the Commission, pursuant to Notice of Deposition,

in the offices of the United States Commission on Civil Rights, located at 624 9th St., N.W., when were present on behalf of the respective parties:

APPEARANCES:

On Behalf of the United States Commission on Civil Rights:

DAVID BLACKWOOD, ESQ.
of: U.S. Commission on Civil Rights
Office of General Counsel
624 9th Street, N.W.
Suite 631
Washington, D.C. 20425

P: (202) 376-7622
F: (202) 376-1163
E: dblackwood@usccr.gov

On Behalf of the Deponent, Kristen Clarke:

JOHN P. RELMAN, ESQ.
of: Relman & Dane, PLLC
1225 19th Street, N.W.
Suite 600
Washington, D.C. 20036-2456
P: (202) 728-1888
F: (202) 728-0848

E: jrelman@relmanlaw.com

JEFFREY D. ROBINSON, ESQ.
of: NAACP Legal Defense Fund
1444 Eye Street, N.W., 10th Floor
Washington, D.C. 20005
P: (202) 216-5567

F: (202) 682-1312

E: jrobinson@naacpldf.org

ALSO PRESENT:

COMMISSIONER TODD F. GAZIANO

COMMISSIONER MICHAEL YAKI (via telephone)

NICK COLTEN

ALEC DEULL (via telephone)

PAM DUNSTON

MAHA JWEIED

DOMINIQUE LUDVIGSON

JOHN MARTIN

ALISON SCHMAUCH (via telephone)

KIMBERLY TOLHURST

T-A-B-L-E O-F C-O-N-T-E-N-T-S

E-X-H-I-B-I-T-S

P-R-O-C-E-E-D-I-N-G-S

10:02 a.m.

MR. BLACKWOOD: On the record.

Okay. Good morning. This is David Blackwood, General Counsel of the U.S. Commission on Civil Rights. We are here for the deposition of Kristen Clarke.

I'm going to read into the record those who are present starting with myself, Dominique Ludvigson, Commissioner Gaziano, John Martin, Sr. Attorney Advisor Maha Zweied and Kim Tolhurst. Attorneys for Ms. Clarke, would you identify yourselves?

MR. RELMAN: My name is John Relman and I'm with the law firm of Relman & Dane. And with me is Jeff Robinson who is with the NAACP Legal Defense Fund.

MR. BLACKWOOD: Okay. Pam Dunston is also here to help with the technical aspects, Nick Colten, Special Assistant, and we have one Special Assistant, Alec Deull, who is on the telephone.

Good morning, Ms. Clarke.

MS. CLARKE: Good morning.

MR. BLACKWOOD: Appreciate your coming.

MS. CLARKE: Yes.

MR. BLACKWOOD: Appreciate you bringing those documents. We may be able to expedite things even faster than we thought. Let me just run through some initial things.

First, could you just state your name and where you work for the record?

MS. CLARKE: Kristen Clarke, NAACP Legal Defense and Educational Fund.

MR. BLACKWOOD: And your position there?

MS. CLARKE: I'm Co-Director of the Political Participation Group.

MR. DEULL: I'm sorry. I'm having trouble hearing. I'm sorry to interrupt.

MR. BLACKWOOD: Can you hear me, Alec?

MR. DEULL: I can hear you, yes.

You're the only person I can hear. Again, I'm sorry to interrupt.

MR. BLACKWOOD: Ms. Clarke, could you just speak in that just so we can see if he's hearing it clearly?

MS. CLARKE: Kristen Clarke, NAACP Legal Defense and Educational Fund.

MR. BLACKWOOD: Alec, could you hear that?

MR. DEULL: Barely.

(Off the record comments.)

MR. BLACKWOOD: Are you on a speaker phone, Alec?

MR. DEULL: No, and I've got the volume turned all the way up on my end.

(Off the record comments.)

MR. BLACKWOOD: Alec, Pam seems to think that the problem is at your problem because it seems to be picking up.

MR. DEULL: Okay. I can hear you and I can hear Pam. But I can barely hear Ms. Clarke and I couldn't really hear her

attorneys at all.

MR. BLACKWOOD: Okay. What we're going to try to do is switch one of the microphones and see if that works.

MR. DEULL: I appreciate it. Thank you.

COMMISSIONER GAZIANO: Is it possible to turn up the volume of her mike or something?

(Off the record comments.)

MR. BLACKWOOD: I think we can go off the record.

(Whereupon, the above-entitled matter went off the record at 10:05 a.m and resumed at 10:06 a.m.)

MR. BLACKWOOD: On the record. Now I've put before you several exhibits and let's just start with Exhibit 1 which is a copy of a Washington Times article.

(Whereupon, the above-referred to document was marked as Clarke Exhibit No. 1 for identification.)

And it's dated July 30, 2009 and I direct you to page three of that document which is the part that pertains to you about halfway down the page. If you would read to yourself the -- Well, I'll read into the record the following paragraph and then I have some questions I'd like to ask you.

"Kristen Clarke, Director of Political Participation at the NAACP Legal Defense Fund in Washington, however, 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."

DIRECT EXAMINATION

BY MR. BLACKWOOD

Q Ms. Clarke, can you tell me about that representation? First off, is it accurate?

A No, it is not.

Q Is any part of it accurate?

A I'm Co-Director of the Political Participation Group at the NAACP Legal Defense and Educational Fund. I confirmed that I received a copy of the -- I did not indicate that I talked about the case with lawyers at the Justice Department.

Q Okay. Did you -- First off, let me make a distinction between what you represented to the reporter or did not represent to the reporter and then later I want to ask about did these events actually occur one way or the other.

As far as reporting to the -- or your discussion with The Washington Times reporter, you're saying now you did not say that you had any contact with DOJ attorneys.

MR. RELMAN: Hang on a second. Let's be clear. I mean, I'm going to object to -- The subject of this deposition is communications that she had with the Department of Justice. I want to be clear.

Are you asking her about what she talked to The Washington Times reporter about or are you asking her about the accuracy of these statements that are in --

MR. BLACKWOOD: I'm taking it in two parts.

BY MR. BLACKWOOD:

Q First, I'm just asking as I understand it and we'll get your exhibit in just a minute about the letter you wrote to The Washington Times. You're saying that -- The first statement -- I'll be specific about what I'm referring to -- that you talked about the case with lawyers at the Justice Department. You did not say that to The Washington Times reporter.

A That's correct.

Q Okay.

MR. RELMAN: Well wait. Objection here. What I'm saying is that this is not an inquiry to what she talked to The Washington Times reporter about. If you want to ask her

about whether she talked to the Department of Justice, that's appropriate. But that's what we're here to talk about.

So I want to be clear. Are you asking her about the facts of whether she spoke with the Department of Justice about this matter or are you asking her about her conversation with The Washington Times reporter?

MR. BLACKWOOD: As I said before, I was making a distinction between the two. But frankly I don't care what she said to The Washington Times reporter.

MR. RELMAN: Okay. So then let's be clear then. The question then that is now pending that you have to her is what -- is it accurate that she talked with the Department of Justice.

MR. BLACKWOOD: No. Let's start first.

BY MR. BLACKWOOD:

Q Did you have a conversation with

The Washington Times reporter?

A Yes.

Q Fine. Now let's -- Why don't we skip to the last exhibit in your pile which is the letter you wrote to The Washington Times which is Exhibit E. It should be in front of you.

(Whereupon, the above-referred to document was marked as Clarke Exhibit E for identification.)

MR. RELMAN: I don't know that we have that here. We've got --

MR. BLACKWOOD: It's this letter.

MR. RELMAN: We've got Exhibit 1.

MR. BLACKWOOD: You should have Exhibits 1 and 2. I'm sorry.

Mr. Court Reporter.

(Off the record comments.)

MR. BLACKWOOD: Okay. I just want to get this out of the way because you're correct, Mr. Relman. My concern is what actually happened and not The Washington

Times.

BY MR. BLACKWOOD:

Q Exhibit E is a letter that you wrote to The Washington Times. Is that correct?

A That's correct.

Q And that reflects your position with regard to your interview with The Washington Times reporter. Is that correct?

A Yes, it does.

MR. BLACKWOOD: Okay. Thank you. Now let's talk about what context you did or did not have with the Justice Department. In regards to the following questions, I'm going to referring the case, the litigation, etc., and I'm in every instance referring to what you have in front of you as Exhibit 1. I'm sorry. It should be Exhibit 2 which is a lawsuit styled, The United States of America v. The New Black Panther Party For Self Defense, which was filed in the Eastern District of Pennsylvania. Unless I indicate

otherwise that is the lawsuit I am referring to if I use the term "lawsuit case," etc. Okay?

(Whereupon, the above-referred to document was marked as Clarke Exhibit No. 2 for identification.)

THE WITNESS: Okay.

BY MR. BLACKWOOD:

Q All right. Did you have any conversation with anyone at the Justice Department with regard to the litigation?

A I learned about the fact of filing, the fact that this case was filed, from a Justice Department attorney.

Q And who was that?

A Yvette Rivera.

Q And who is she?

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

Q And did you learn about that approximately -- Well, tell me when you

learned about it approximately.

A I believe it was January 8th of 2009.

Q And how did you learn that?

A Through a phone call.

Q Who called who?

A She called me.

Q And what was the purpose of the call?

MR. RELMAN: Objection. I mean --

MR. BLACKWOOD: Well, she didn't know the purpose.

BY MR. BLACKWOOD:

Q What did she say to you and what did you say to her?

A This case has been filed. That was the extent of the phone call.

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

A No.

MR. BLACKWOOD: Before you should

-- Let me ask. Mr. Court Reporter, she can have all the exhibits. Now the --

(Off the record comments.)

MR. BLACKWOOD: The Court Reporter just placed before you Exhibits A through D I believe which are exhibits that you brought with you here today.

(Whereupon, the above-referred to documents were marked as Clarke Exhibits A-D for identification.)

BY MR. BLACKWOOD:

Q Can you tell me what Exhibit A is?

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

Q 2009, correct?

A 2009. That's correct.

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

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

Q And is it typical for Ms. Reed to

send you just news clips of this kind?

A No.

Q Did you talk to Ms. Reed about the content of this email?

A No, I did not.

Q The next exhibit, Exhibit B, is dated July 31, 2009. I'm just giving you -- I'll ask you in a minute about that particular email. But between the time of the first email on Exhibit A, January 13, 2009 and then July 31, 2009, do you recall having any conversations or any communications of any kind with anybody at DOJ about the New Black Panther litigation?

A 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.

Q So if I -- The answer to the

question whether you talked about the case with lawyers at the Justice Department would simply be wrong. That's an incorrect statement.

A That's incorrect. Repeat the question.

Q All right. If I said that or it was represented that you had talked about the case with lawyers at the Justice Department that would be an incorrect statement.

A That's incorrect.

Q Okay. I'm going to have -- It may be very -- a lot of negative questions, but I just want to make sure about some things. So I'm going to mention some names. It sounds like I know what the answer is. But did you talk to anybody at Justice about the litigation with Loretta King?

A No.

Q Christopher Coats?

A No.

Q Laura Coats?

A No.
Q Judith Reed other than the email that you already referenced?
A No.
Q Bob Berman?
A No.
Q Spencer Overton?
A No.
Q Thank you. Next if I could reference Exhibit B. Would you tell me what that is?
A Exhibit B is an email from Judith Reed to myself dated July 31st of 2009.
Q Now that would be the day after the article ran in The Washington Times. Is that correct?
A This is the day after the July 30th article that appeared in The Washington Times.
Q Okay. And did you respond or contact Ms. Reed?
A No.

Q Why not?
A There was -- There was just no response. The article was false. Let me -- No response.
Q Okay. Who was Judith -- Why would Judith Reed be sending this to you? By that, I mean do you know Judith Reed?
A Yes, I do know her.
Q And how do you know her?
A She's a former colleague.
Q Okay. You worked at the Justice Department, correct?
A Yes.
Q All right. And that's where you knew Ms. Reed?
A Yes.
Q How long were you at the Justice Department?
A Between 2000 and 2006.
Q I'm sorry. There was a sound. Between 2000 and 2006?
A That's correct.

Q And what was your position then?

A I was a trial attorney in the Voting Section between 2000 and 2003 and a prosecutor in the Criminal Section of the Civil Rights Division between 2003 and 2006.

Q Did Ms. Reed send you other articles like this? I don't mean about the Black Panthers, but just generally she would send you emails.

MR. RELMAN: Objection. That is beyond the scope of this inquiry. Whether she sent her other emails has nothing to do with what's going on here. The proper focus, Mr. Blackwood, is communications that she had with the Department of Justice about the Black Panther litigation as you framed it. Whether she had communications with Ms. Reed on other matters is irrelevant.

MR. BLACKWOOD: Mr. Relman, to be clear, I'm not asking about the substance of any of those things. I'm trying to establish is this an uncommon occurrence to get emails

from Ms. Reed or is it common. That's the end of the question.

MR. RELMAN: You can answer that question yes or no.

THE WITNESS: I get emails all throughout the day from many sources and it's neither common nor uncommon.

BY MR. BLACKWOOD:

Q Okay. Is Ms. Reed a friend?

A Yes, she is.

Q Okay. Would you look at Exhibit C please? And if you could identify that.

A This is an email that was sent to me from Luz Lopez-Ortiz on July 31, 2009.

Q And again this includes information relating to the article that ran in The Washington Times.

A Yes, it does.

Q And who is Ms. Ortiz or Lopez-Ortiz?

A She is an attorney in the Civil Rights Division of the Justice Department.

Q And again did you know her from your prior work there?
A Yes, she's a former colleague.
Q Okay. Is she also a friend?
A Yes.
Q Okay. Did you call Ms. Ortiz or otherwise communicate with her about this email?
A I did respond to this message.
Q Okay, and we'll get to that. That's the next exhibit. Did you call her or otherwise communicate with her other than the email that you have provided?
A I --
MR. RELMAN: Objection. Are you framing --
MR. BLACKWOOD: About this particular email.
MR. RELMAN: Okay. You can answer that.
THE WITNESS: The only communication that I may have had with her was

to voice my strong reaction to The Washington Times article which contained false and misleading statements about me.

Q And that's what you told her?

A That would be the only thing that we discussed.

Q Okay. Let's go to Exhibit D then and can you identify that?

A This is the same email which includes a response from me and then a subsequent response from Ms. Lopez-Ortiz also on July 31st of 2009.

Q Okay. Now let me -- Because emails sometimes it's unclear who is saying what. I just want to make sure whether it's your understanding. The first communication from -- was from Ms. Lopez-Ortiz and she indicates "Subject: From the clips today -- interesting stuff." Correct?

A That's correct.

Q Okay, and your response is "Lies." Correct?

A That's correct.
Q All right. And then her response to you is "They are disgusting. This is C.C.'s doing." C.C. being C.C., C-C and that's the response back to you.
A Yes, that's correct.
Q Do you know who she is referring to when she says, C.C.?
A I don't know. I'm not certain.
Q Did you ask her who she meant?
A No.
Q Is it safe to say you were upset about the representations made by The Washington Times?
A Yes.
Q And that let to you sending the letter that is -- what is it -- Exhibit D?
A That's --
Q Exhibit E, correct?
A That's correct.
Q Did you follow up with -- Bear with me. Did you follow up with The

Washington Times other than the letter or did you receive any response?

MR. RELMAN: Objection. I think it goes beyond the scope of this deposition. Mr. Blackwood, what's the purpose?

MR. BLACKWOOD: I'm just trying to follow up whether The Washington Times had any representation. Counsel, I'm allowed to follow through a logical line because there may be other witnesses. If The Washington Times says, for example, they have a tape or whatever, I'd like to find out.

MR. RELMAN: How is that relevant to the inquiry here?

MR. BLACKWOOD: It goes veracity and frankly it is clearly relevant. All I'm asking -- You produced, by the way, the letter which is a letter to a third party and outside, if anything, the scope as well. I'm just asking did The Washington Times respond to your letter.

MR. RELMAN: You can answer that

yes or no.

THE WITNESS: Did they respond to this letter? No, and I thought it unfortunate that they I don't believe ever published or ran it.

BY MR. BLACKWOOD:

Q Okay, and just to be clear, so they didn't call you, they didn't run a retraction, none of these things.

A After this letter, no.

Q Okay. Now given your testimony as I mentioned before we even started, I have a variety of questions I prepared assuming the veracity of The Washington Times articles. So bear with me. I'm going to skip around some of them just to see if there are relevant questions still given your testimony.

With regard to the New Black Panther litigation, did you talk to anybody who was actively involved in that and by "that" I mean there are other parties. There's the Department of Justice. There were

also defendants. Did you talk to any of the defendants?

MR. RELMAN: Hang on one second. I just want to be clear. When you say "the New Black Panther Party litigation," you're referring now once again to the case.

MR. BLACKWOOD: That's correct.

MR. RELMAN: Okay. To the complaint.

MR. BLACKWOOD: Not to general things that we're talking about with colleagues about the validity or anything else. The parties to litigation reflected in Exhibit 2.

MR. RELMAN: Okay. You can answer.

THE WITNESS: No.

BY MR. BLACKWOOD:

Q When you were working at the Department of Justice, did you work -- I'm going to mention some names and ask if you worked or they were colleagues there.

Christopher Coats?

A Yes.

Q What was his position when you were there?

A This is -- would be back in 2003 when I left the section. My memory seems to be that he was special counsel in the Voting Section at that time.

Q How about Robert Popper?

A I don't believe I've ever worked with Mr. Popper.

Q Okay. On that email, I don't want to be redundant, but I want to be clear on Exhibit D. When Lopez-Ortiz wrote you about it's C.C.'s doing, you didn't ask in any way about who she was referring to?

MR. RELMAN: Objection. Asked and answered. You can answer it again.

THE WITNESS: No.

BY MR. BLACKWOOD:

Q But at the same time to be consistent you were saying you don't know who

C.C. is.

MR. RELMAN: Objection. That wasn't her testimony.

MR. BLACKWOOD: All right.

BY MR. BLACKWOOD:

Q If you can tell me, did you know who C.C. is or did you suspect who C.C. was?

A I don't know. I suspect.

Q Who did you suspect?

A This is just guesswork here.

Q Correct. That's right.

MR. RELMAN: No. Hang on a second. Ms. Clarke, you're not to guess. Her prior testimony said she wasn't certain who C.C. was and she's not going to guess. I'm instructing her not to guess.

BY MR. BLACKWOOD:

Q Not to guess, who did you assume?

MR. RELMAN: Again, this is not about assumptions. It's not about guesswork. You asked if she knew who C.C. was. She said she was not certain.

MR. BLACKWOOD: Counsel, I'm not certain about many things, but someone used just someone's initials to write to your client. Obviously, that person who wrote to her assumed that she would know who she was referring to.

BY MR. BLACKWOOD:

Q So I think that it is clear and relevant to ask who did you assume it meant to. I understand you don't have 100 percent certainty because it was someone else's asking. But who did you assume she was referring to?

MR. RELMAN: You can answer this question. Once again, you've already testified to it. You can answer it to the best of your ability again, but I'm cautioning you and instructing you. Do not guess or speculate as to who C.C. is.

A At the time that I saw this email I did not know who C.C. was. My only reaction again was a very strong reaction to the false

and misleading statements that are contained in The Washington Times article.

Q Okay. So you're --

A That was the only focus, my only focus, at the time of this exchange.

Q It wasn't a focus on who was C.C.

A My only focus again was a very strong reaction to the false statements that are contained in The Washington Times article. At that moment, that was the only thing that I was focused on.

Q 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 of the Justice Department with regard to the litigation?

A As I indicated earlier, no. I recall no such conversation with her.

MR. BLACKWOOD: Okay. At this time, I have no questions, although I may come back. Under our procedures, Commissioners may

ask questions in a round robin type thing. But we have one Commissioner here who is present. So, Commissioner Gaziano, I throw the floor to him. But I may come back and ask a few other questions after that.

DIRECT EXAMINATION (Cont.)

BY COMMISSIONER GAZIANO:

Q Thank you again for coming here and for your friends and attorneys. Let me begin with some of the people you said you did not speak with. Do you know Loretta King?

A Yes.

Q Okay. How do you know her?

A I used to work in the Civil Rights division of the Justice Department.

Q Okay. Do you know Laura Coats?

A Yes.

Q And who is she? What is her position?

A I do not know. I believe she's an attorney in the Voting Section. I don't know her position or role.

Q But you've worked with her.
A No.
Q Oh, you don't know. How might you have known her or do you remember?
A I believe I was introduced to her at a conference. I can't recall how I met her.
Q Okay.
A Nor do I know her well.
Q But you've known her for about how many years?
A I would estimate one to two years.
Q Okay. Did you talk to anyone in the White House --
A No.
Q -- about the New Black Panther litigation?
A No.
Q Did you talk to anyone on the Obama Transition team about the New Black Panther litigation?
A No.

MR. RELMAN: Objection. I think that goes beyond the scope of the inquiry. We're here to talk about communications with Government officials.

COMMISSIONER GAZIANO: I disagree, but let me try to explain to both you and your client why that is. As an experienced Washington hand, we often if we're trying to influence a public official and we don't personally know that public official or even sometimes if we do know that public official we know that the bank shot, the indirect route, is as effective, if not more effective, sometime. Right?

MR. RELMAN: Objection. You don't have to answer that question. Do not answer that question.

COMMISSIONER GAZIANO: Why?

MR. RELMAN: Because her views about how you influence a Government official are not relevant to this inquiry.

COMMISSIONER GAZIANO: They're

relevant to her credibility of whether she is an experienced political participation director of a major and important institution.

MR. RELMAN: I've made my objection. Do not answer that question.

COMMISSIONER GAZIANO: And I make clear that I am asking for an answer.

MR. RELMAN: Okay, and I'm saying do not answer.

COMMISSIONER GAZIANO: What is your --

MR. RELMAN: Your next question, Commissioner.

COMMISSIONER GAZIANO: No, what is your --

MR. RELMAN: She is not going to answer the question. Next question please.

COMMISSIONER GAZIANO: Is that -- Are you going to follow that advice of your --

THE WITNESS: I am going to follow my lawyer's advice.

COMMISSIONER GAZIANO: Okay. That

will speed up the process. You're not a potted plant either. So you can follow your attorney's advice or not.

BY COMMISSIONER GAZIANO:

Q Okay. Did you speak to anyone in the Obama Transition about the New Black Panther litigation?

MR. RELMAN: At what period of time are you asking her about?

COMMISSIONER GAZIANO: At any time.

THE WITNESS: No.

BY COMMISSIONER GAZIANO:

Q Did you talk to anyone at Covington & Burling who -- with the intent -- about the New Black Panther with the intent or hope that they would talk to someone in either the Justice Department, White House or the rest of the Obama Administration about the New Black Panther litigation?

MR. RELMAN: I object to the question, but you may answer it to the extent

that the question is asking if you talked to anyone with a purpose or intent of --

COMMISSIONER GAZIANO: Or hope.

MR. BLACKWOOD: Leave it at purpose and intent.

MR. RELMAN: Purpose or intent of effectuating a communication with the Department of Justice.

THE WITNESS: No.

BY COMMISSIONER GAZIANO:

Q Did you talk with anyone -- I'm not interested in who you may have talked with regarding the case if you had no intent, purpose or hope that they would communicate with the Department. But did you talk to anyone else about the New Black Panther litigation with the purpose, intent or hope that they would communicate to the White House or the Justice Department or the rest of the Administration about the litigation?

MR. RELMAN: Object to the question, but you may answer it.

THE WITNESS: No, and again any communications that I have had about this case beyond merely sharing the fact of filing have concerned the false and misleading statements that appear in The Washington Times article and subsequent editorial.

BY COMMISSIONER GAZIANO:

Q Okay. Well, go there then. I agree with our general counsel that your present assertion that the story is false is relevant and that we need to probe that at least a little bit.

Who did you speak with at The Washington Times?

MR. RELMAN: Objection. I don't understand the relevance of the reporter.

COMMISSIONER GAZIANO: It goes to the credibility of her claim that they got it wrong.

MR. RELMAN: Well.

MR. BLACKWOOD: If I might respond.

MR. RELMAN: Yes. I --

MR. BLACKWOOD: I think it is relevant in this fashion. We now have a clash of versions of events and I understand your point by saying Mr. Seper got that incorrect, Mr. Seper being the person whose byline is there. We're allowed to look into if there's a clash of versions of event going to the core of what this issue is. We're asked to follow up about what contacts they had and when they had them.

MR. RELMAN: You have specified, Mr. Blackwood, in your letter that this is about communications. This investigation, this deposition, is about communications that this witness had with the Department of Justice and I'm allowing her to answer questions with respect to the White House as well. That is the focus of this investigation.

The conversations that she had with The Washington Times are not relevant to

that inquiry.

MR. BLACKWOOD: All right.

MR. RELMAN: One of the people --

COMMISSIONER GAZIANO: If I may, it's my question time.

MR. BLACKWOOD: That's all right.

MR. RELMAN: I appreciate your clarification, but this is --

COMMISSIONER GAZIANO: Please let me respond. The Commission --

MR. RELMAN: Let me just clarify my objection in full. My objection in full is this is not an inquiry into her communications with The Washington Times. This is not what this is about.

COMMISSIONER GAZIANO: And please don't interrupt me when I'm trying to explain what the Commission's interest is. The Commission established what the scope of the investigation is pursuant to public documents that have been released and I -- Either you've gone over them or you had the ability to do

so.

The scope of our investigation is broader than you indicate. I have not been a party to some of the communications that you've had with the general counsel. I generally agree that that's the core of our focus.

But we have a -- The witness is saying here today that the facts in a newspaper report are not true. She has testified that she's spoke with the reporter. I'm certainly entitled to see whether her claim today is sound or whether it's not.

MR. RELMAN: Mr. Gaziano, let me respond because I'm going to lay out my objection. In the Notice of Deposition that was sent to us, the subject matter of the deposition is defined as "all information relating to any communications by you with the Department of Justice regarding acts of voter intimidation by the New Black Panther Party for self defense." That is the subject

matter. That's what we agreed to come here to talk about. That I understand is the focus of your inquiry.

COMMISSIONER GAZIANO: And --

MR. RELMAN: Whether -- Let me finish, Mr. Gaziano, please. Whether or what she said or what communications she had with The Washington Times reporter is not relevant. If you want to ask her whether the statements in this article are true, you're free to do that. You're free to do that and ask her if she did have communications with the Department of Justice.

But who she spoke to at The Washington Times or what she said to The Washington Times that is not the focus of this inquiry and that is not a subject matter that I'm going to have her testify about.

COMMISSIONER GAZIANO: It's a ridiculous position you're maintaining. Because what we're trying to resolve is whether the statement that The Washington

Times reporter reported that she spoke with Justice Department attorneys is true or not.

MR. RELMAN: And --

COMMISSIONER GAZIANO: And let me --

MR. RELMAN: And she --

COMMISSIONER GAZIANO: And --

MR. RELMAN: She's already testifying that --

COMMISSIONER GAZIANO: And it goes to her denial of that report, who she spoke with and what the conversation was. Furthermore, we can call Ms. Clarke back and I don't think she would like that. I don't know if -- Your firm would enjoy the fees, but I doubt that she would appreciate that. The Commission probably wouldn't appreciate that.

So we ought not to be playing games about something that is clearly central --

MR. RELMAN: Mr. Gaziano, to --

COMMISSIONER GAZIANO: -- to what

she is trying to deny.

MR. RELMAN: She's already stated she had no conversations with respect to these issues that you're interested in with the Department of Justice. That's the issue here, not what she said to The Washington Times reporter.

COMMISSIONER GAZIANO: One of the issues is whether her denial today and the denial in this letter, Exhibit E, is true. And to get at that, I would like to ask a few obviously relevant questions such who did you speak with. Was it Mr. Seper or was it someone else from The Washington Times?

MR. RELMAN: Objection, but you can answer that question.

THE WITNESS: Jerry Seper is the author of the article and, yes, the person I spoke with.

BY COMMISSIONER GAZIANO:

Q Okay. Am I correct that he initiated the telephone call to you?

A Yes.

Q Okay. What did he say relevant to -- Well, did he indicate why he was calling you?

MR. RELMAN: Objection. This goes beyond the scope of this inquiry. Don't answer that question.

COMMISSIONER GAZIANO: Are you willing to refuse to answer the question?

THE WITNESS: I'm following my counsel's advice.

COMMISSIONER GAZIANO: Okay.

BY COMMISSIONER GAZIANO:

Q Well, what did -- what was the conversation you had with him?

MR. RELMAN: Objection. This goes beyond the scope of this deposition. Don't answer that question.

COMMISSIONER GAZIANO: How is it going beyond the scope of the deposition to test the claim in this exhibit that she did not say certain things? I want to know what

she did say if she didn't say this.

BY COMMISSIONER GAZIANO:

Q What did you discuss about the New Black Panther litigation?

MR. RELMAN: Objection. I want to take a break for a moment and discuss this with co-counsel.

(Commissioner Yaki joins deposition via teleconference.)

COURT REPORTER: Is that acceptable?

MR. BLACKWOOD: Yes, we can go off the record for that purpose.

(Whereupon, the above-entitled matter went off the record at 10:40 a.m. and resumed at 10:42 a.m.)

MR. BLACKWOOD: Please go ahead back on the record.

MR. RELMAN: Okay. Thank you. I want to state my objection to the question. Let me say once again that the subject matter of this deposition is communications with the

Department of Justice. This witness has testified now in response to Mr. Blackwood's questions that she had no communications with the Department of Justice about this litigation other than what she's spoken to.

This is not an inquiry about who she talked to at The Washington Times or any other place about this litigation. This Commission has no authority to inquiry into that. It goes to core First Amendment values and issues and rights and, furthermore, this is not a libel suit against The Washington Times. So I'm instructing the witness not to answer for those reasons the question that has been put to her.

COMMISSIONER GAZIANO: Since Commissioner Yaki has joined, let me state the relevance of my question which is -- I'm not even sure that Commissioner Yaki is aware. She has -- The witness has shared a letter with us and she has also testified that the statements in The Washington Times paper are

not true. And so I am and I maintain that it is highly relevant to test the veracity of that assertion today to ask her what she did discuss with the reporter.

BY COMMISSIONER GAZIANO:

Q But based on your prior practice, I assume you are going to follow your counsel's advice and refuse to answer that question at this time.

A I'm following my counsel's advice.

Q Okay. Well, I don't know if we'll have to call you back. But for now let me move onto what may be my last question.

MR. BLACKWOOD: If I could. I was -- before we ask the next question, I was informed by the Court Reporter that we failed to have you sworn in. So I would like to have you sworn in at this time with the understanding that this applies to your testimony up to this point. Is that acceptable?

THE WITNESS: Yes.

MR. BLACKWOOD: Mr. Court Reporter.

WHEREUPON,

KRISTEN CLARKE

was called as a witness by Counsel and, having been first duly sworn, was examined and testified as follows:

MR. BLACKWOOD: Sorry.

COMMISSIONER GAZIANO: And do you reaffirm now on the record that what you've said before is also --

THE WITNESS: Yes.

BY COMMISSIONER GAZIANO:

Q Okay. I think maybe my last question at least unless other questions are raised is The Washington Times also says that you shared copies of the complaint or you forwarded copies of the complaint. Did you forward copies of the New Black Panther complaint?

A I did.

Q Okay. Who did you share copies of

the complaint with?

MR. RELMAN: Well, if this question -- If your question goes to whether she shared copies of the complaint with someone at the Department of Justice you can answer that question. If you shared copies of the complaint with anybody else, then you are not to answer that question.

COMMISSIONER GAZIANO: Let me make a two-part question.

BY COMMISSIONER GAZIANO:

Q Did you share -- I don't know why you would need to share copies of the complaint with the people at Department of Justice. But let me -- Since they initiated it, did you share/forward copies of the complaint with anyone in the Department of Justice, White House or rest of the Obama Administration?

A No.

Q Did you share copies of the complaint with anyone on the Obama Transition

Team?

A No.

Q Okay. As we've established sometimes it is more effective to try to reach someone through someone else. Did you share a copy of the complaint in the New Black Panther litigation -- Or who else did you share a copy of the complaint in the New Black Panther litigation?

MR. RELMAN: Objection. Do not answer that question. It is over broad. This is not an inquiry into her communications --

COMMISSIONER GAZIANO: Okay.

MR. RELMAN: -- with any person in the world about this litigation. It is an inquiry into whether she had communications with the Department of Justice and we have allowed questions with respect to the White House and in this case the Obama Transition Team. She's answered that question that she did not.

Otherwise, your inquiry is over

broad. You have no authority in inquire into that. It goes to core First Amendment values and you have no right to do that.

COMMISSIONER GAZIANO: Absolutely we have a right to investigate this. The scope of our discovery is even broader than the Federal rules and as you know this is relevant to federal -- But let me ask it a different way.

BY COMMISSIONER GAZIANO:

Q Did you -- Who else or did you forward a copy of the complaint with anyone with the hope, intent or purpose that it might be dismissed?

MR. RELMAN: Objection to the question as asked, but you may answer that question.

THE WITNESS: No.

BY COMMISSIONER GAZIANO:

Q Why did you forward copies of the complaint?

MR. RELMAN: Objection. First of

all, who are you referring to? Forward copies to whom?

COMMISSIONER GAZIANO: You've prevented her from answering to whom. So I just want to know for what purpose were you forwarding copies of the complaint in the New Black Panther litigation.

MR. RELMAN: You can answer that question.

THE WITNESS: For informational purposes only.

BY COMMISSIONER GAZIANO:

Q What kind of informational purposes?

A It is a practice to share information with others that they may find of interest.

Q Sure. Sometimes you share a funny joke because you want to provide humor. Sometimes you provide professional advice because -- What was your purpose? What type of information were you hoping to share in

forwarding the complaint in the New Black Panther litigation?

A Again, merely sharing the fact of filing with others who may have found it interesting that a federal voting rights case had been filed.

Q Hm. Isn't it easier to just write in an email a case was filed than to actually attach a complaint?

MR. RELMAN: Objection. That question has no bearing on this investigation whatsoever.

COMMISSIONER GAZIANO: It has a bearing on her previous answer which says to merely alert them to the fact of filing and not anything contained herein.

MR. RELMAN: Mr. Commissioner, I'm sorry. This is just wasting our time here. You know, the question about whether it is more effective to simply say a complaint's been filed than to forward it is, the complaint itself, a question that serves no

purpose or intent if the inquiry here is to find out if she had communications with the Department of Justice which she said she did not have.

Next question please. Don't answer that.

COMMISSIONER GAZIANO: I'm trying to follow up on her answer. Are you --

BY COMMISSIONER GAZIANO:

Q Why else besides informing them of the fact that the complaint was filed -- What other reasons did you have to forward the complaint?

MR. RELMAN: She -- If you had any other reasons, you can answer the question.

THE WITNESS: I -- There is no other purpose.

COMMISSIONER GAZIANO: No other purpose. Okay. Well, I think I will rest at that point.

MR. BLACKWOOD: Commissioner Yaki, do you have any questions? Commissioner Yaki.

COMMISSIONER YAKI: Yes, I'm here. I'm sorry. I was momentarily stupefied by the line of questioning that was going on. The -- I really don't have any questions per se.

Well, I'm going to ask a question. If counsel objects I will -- well, I'll ask my question right now.

DIRECT EXAMINATION (Cont.)

BY COMMISSIONER YAKI:

Q Ms. Clarke, my name is Michael Yaki. I'm a member of the U.S. Commission on Civil Rights. Just so you know for the record, I have serious qualms about the nature of this investigation and my question goes really not to your percipient knowledge of --

Well, let me ask you this question. Number one, Ms. Clarke, you were not present at Philadelphia during the time of the events alleged in the Department of Justice complaint, were you?

A No, I was not.

Q You were not a percipient witness

-- Is it fair to say you were not a percipient witness to the events that went on in Philadelphia? Is it not?

MR. RELMAN: I'm sorry. I didn't understand that.

MS. DUNSTON: Commissioner Yaki, this is Pam. That's not coming over clear. Can you restate that please?

COMMISSIONER YAKI: Yes.

BY COMMISSIONER YAKI:

Q Is it fair to say you were not percipient witness to the events in Philadelphia that were alleged at the time of the complaint?

MR. RELMAN: I'm sorry. This is counsel. Commissioner, I apologize. I just don't understand the term you're using "percipient," as I understand it, witness. Could you rephrase that?

COMMISSIONER YAKI: Okay.

BY COMMISSIONER YAKI:

Q You were not physically present to

witness any of the events in Philadelphia?

A No, I was not.

Q Were you -- May I ask a more open-ended question? You are -- you have some expertise in the laws surrounding voting rights. Would that be a fair characterization?

A Yes.

Q It is? My question goes to this. Prior to the complaint and prior to the events alleged in the complaint against the New Black Panther Party, in your experience as a lawyer engaged in -- prior to the time of the filing of the New Black Panther Party, prior to the events alleged at the time of the New Black Panther Party complaint, in your expertise as a voting rights lawyer, can you recall incidents, any incident, prior to that incident, prior to that time in which you believe that there were violations of Section 11(b) of the Voting Right Act?

MR. RELMAN: I'm going to object

to the question. It goes beyond the scope of the deposition. I'm going to instruct the witness not to answer.

COMMISSIONER YAKI: Okay. That's fine.

BY COMMISSIONER YAKI:

Q One last question, Ms. Clarke. Did you involve a -- Were you involved in and when I say involved, did you review and at suggestions to or were consulted for the filing of the New Black Panther Party complaint?

MR. RELMAN: You can answer that question.

THE WITNESS: I didn't catch the latter part of your question, Commissioner. By whom?

BY COMMISSIONER YAKI:

Q Were you -- Before a complaint was filed, did you review the complaint brought by the Black Panther Party?

A No, I did not.

COMMISSIONER YAKI: Okay. That's all the questions I have.

MR. BLACKWOOD: I just have one question to clarify matters.

BY MR. BLACKWOOD:

Q Did you receive -- You've got a copy of the complaint. Did someone send to you or did you get it yourself?

A I obtained it myself.

MR. BLACKWOOD: Thank you. Okay. I have no further questions.

Does anyone have any further questions before we terminate the deposition?

COMMISSIONER GAZIANO: Just to follow up on yours.

BY COMMISSIONER GAZIANO:

Q From the court? Where did you obtain the complaint?

A We did an internal -- We made an internal effort to track it down through PACER perhaps. I'm not sure exactly how.

Q So you're not sure. There was

someone --

A It was an internal -- internally obtained.

Q So perhaps some one on your staff obtained it. Is it the --

A A paralegal on my staff tracked down a copy of the complaint. I'm not sure if she got it from PACER.

Q So it's possible it was a public source. Is it possible it was --

A It was absolutely a public source.

COMMISSIONER GAZIANO: Okay. Thank you.

MR. BLACKWOOD: With that, the deposition is concluded. Thank you very much.

THE WITNESS: You're very welcome.

MR. BLACKWOOD: Off the record.

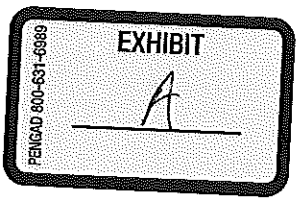
(Whereupon, the taking of deposition in the above-entitled matter was concluded at 10:56 a.m., signature having not been waived.)

From: "Reed, Judith (CRT)" <Judith.Reed@usdoj.gov>
To: "KRISTEN CLARKE" <kclarke@NAACPLDF.ORG>
Date: 1/13/2009 1:04 PM
Subject: FW: Phila story

Don't know if you were aware of this latest lawsuit; below is a news article as well

Justice Department Seeks Injunction Against New Black Panther Party
Lawsuit Seeks to Prohibit Voter Intimidation in Future Elections
WASHINGTON - The Justice Department today filed a lawsuit under the Voting Rights Act against the New Black Panther Party for Self-Defense and three of its members alleging that the defendants intimidated voters and those aiding them during the Nov. 4, 2008, general election.
The complaint, filed in the United States District Court in Philadelphia, alleges that, during the election, Minister King Samir Shabazz and Jerry Jackson were deployed at the entrance to a Philadelphia polling location wearing the uniform of the New Black Panther Party for Self-Defense, and that Samir Shabazz repeatedly brandished a police-style baton weapon.
"Intimidation outside of a polling place is contrary to the democratic process," said Acting Assistant Attorney General Grace Chung Becker. "The Voting Rights Act of 1965 was passed to protect the fundamental right to vote and the Department takes allegations of voter intimidation seriously."
According to the complaint, party Chairman Malik Zulu Shabazz confirmed that the placement of Samir Shabazz and Jackson in Philadelphia was part of a nationwide effort to deploy New Black Panther Party members at polling locations on Election Day. The complaint alleges a violation of Section 11(b) of the Voting Rights Act of 1965, which prohibits intimidation, coercion or threats against "any person for voting or attempting to vote." The Department seeks an injunction preventing any future deployment of, or display of weapons by, New Black Panther Party members at the entrance to polling locations.
The New Black Panther Party for Self-Defense, which claims active chapters nationwide, is distinct from the Black Panther Party founded by Bobby Seale in the 1960s.
The Civil Rights Division enforces the Voting Rights Act of 1965. To file complaints about discriminatory voting practices, including acts of harassment or intimidation, voters may call the Voting Section of the Civil Rights Division at 1-800-253-3931. More information about the Voting Rights Act and other federal voting laws is available on the Department of Justice's web site at www.usdoj.gov/crt/voting/index.htm.

> From afar, it looks like witness intimidation
> By DANA DiFILIPPO
> Philadelphia Daily News
> difilid@phillynews.com 215-854-5934
> On Election Day, two black supremacists stood watch over a Fairmount
> polling site.
> City police didn't charge them with any crime. And the District
> Attorney's Office received no complaints about their behavior.
> But the feds, from their D.C. digs 120 miles away, nonetheless
> delivered a big smackdown this week when the U.S. Department of
> Justice sued the pair - plus their group, the New Black Panther Party,
> and its chairman - alleging voter intimidation.
> The New Black Panther Party, in turn, suspended its Philadelphia
> chapter, issuing a "public notice" characterizing chapter president
> Minister King Samir Shabazz as a rogue who acted without the
> organization's approval when he brought a nightstick on his Election
> Day surveillance mission.
> "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," the notice stated. "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. [But] 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

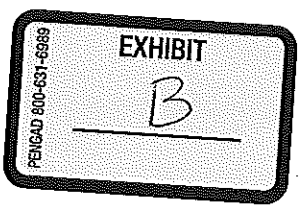


> and lawful manner."
> The saga on Nov. 4 started when Shabazz and Jerry Jackson, a New Black
> Panther Party member who also is a member of the 14th Ward's
> Democratic Committee, showed up at the polling site at 12th Street and
> Fairmount Avenue.
> Yesterday, Shabazz said that he had visited that site because "the
> community asked" for him.
> "We had gotten calls earlier that morning that people in the community
> were getting harassed by neo-Nazis and skinheads," he said. "We were
> asked to secure the area, and that's what we done. We weren't saying
> anything; we weren't doing anything to violate anyone's civil rights
> or right to vote. Even the mayor and the D.A. spoke out on our behalf,
> somewhat."
> Several news and amateur videos of the supremacists show them standing
> in black berets, boots and military garb, occasionally talking with
> news reporters. In one online video, a man can be seen nonchalantly
> entering the building behind the Panthers.
> But according to the feds' nine-page complaint filed Wednesday,
> Shabazz menacingly tapped a nightstick in his hand throughout his
> "deployment" there. The complaint further charges that Shabazz and
> Jackson tried to block access to the building and hurled racial
> threats and insults at white and black voters and poll workers.
> Party chairman Malik Zulu Shabazz also was named in the complaint but
> wasn't present at the Fairmount site on Election Day.
> The complaint charges that the Panthers violated the Voting Rights Act
> of 1965, which prohibits intimidation, coercion or threats against
> voters. The feds want an injunction barring the Panthers from sending
> members - especially those with weapons - to polling places during
> future elections.
> "Intimidation outside of a polling place is contrary to the democratic
> process," Acting Assistant Attorney General Grace Chung Becker said in
> a prepared statement. "The Voting Rights Act of 1965 was passed to
> protect the fundamental right to vote, and the Department takes
> allegations of voter intimidation seriously."
> Scot Montrey, a spokesman for the department's civil-rights division,
> declined to say what sparked the federal complaint, when local
> authorities had decided that no offense had occurred.
> "Generally, we let the legal filings speak for themselves," Montrey
> said.
> The presence of a weapon typically elevates what some might view as
> free speech to an intimidation offense, one justice source said.
> Shabazz is a familiar presence to many who pass by the Clothespin
> statue near City Hall; he often spends weekday afternoons there,
> selling the New Black Panther Party's $2 newspaper and preaching to
> passers-by.
> He declined to say yesterday whether the chapter suspension would
> alter his plans to spread his extremist message, which includes a
> black-separatist call to destroy whites. He also refused to reveal how
> he would respond to the complaint and chapter suspension.
> "A wise general never reveals his tactics," Shabazz said.
> Jackson couldn't be reached for comment.
> The New Black Panther Party, which officials have labeled a hate
> group, is different from the Black Panther Party founded by Bobby
> Seale in the 1960s, which emphasized self-help programs for blacks. *
>

From: "Reed, Judith (CRT)" <Judith.Reed@usdoj.gov>
To: "KRISTEN CLARKE" <KCLARKE@NAACPLDF.ORG>
Date: 7/31/2009 12:03 PM
Subject: unwanted fame?

Rep Smith Seeks Answers From DOJ In Voter Intimidation Case. The Washington Times <http://www.washingtontimes.com/news/2009/jul/31/senior-republican-wants-answers-panther-party-case/> (7/31, Seper) reports that Rep. Lamar Smith (R-TX), the ranking Republican on the House Judiciary Committee, "wants a closed-door briefing with the head of the Justice Department's Voting Rights Section on Friday over the department's decision to seek a dismissal in a voter intimidation case against the New Black Panther Party." Smith "Smith said he has been unsuccessful since May in getting answers on whether political appointees were involved in the dismissal of three of four counts in the case after the Justice Department had won default judgments on all counts and why the department has refused to respond to congressional inquiries on the investigation." Citing a report Thursday in the Washington Times <http://www.washingtontimes.com/news/2009/jul/30/no-3-at-justice-okd-panther-reversal/?feat=home_cube_position1> , Smith "said Associate Attorney General Thomas J. Perrelli knew about discussions to dismiss the complaint, but the Justice Departments responses to Congress 'make no mention of his involvement in the decision-making process. Instead, they continually refer to vague justifications for the Obama Justice Departments actions, none of which include a legitimate explanation for why a case would be dropped,' he said. 'It is clear that political appointees at the Justice Department allowed career employees to be pressured to drop a case against the presidents political allies. That is politicizing justice and it undermines democracy.'" Rep. Frank Wolf (R-VA), "said on the House floor Thursday he was 'deeply troubled by the Department of Justices questionable dismissal of an important voter intimidation case in Philadelphia, where I grew up and my father was a policeman.'" Justice Department spokeswoman Tracy Schmaler "said the department has tried to cooperate with Congress and agreed to a meeting with" Wolf "and career attorneys 'in which they made a good-faith effort to respond to his inquiries about this case. We will continue to try to clear up any confusion Congressman Wolf has about this case.'"

More Commentary. The Washington Times <http://www.washingtontimes.com/news/2009/jul/31/hack-panthers/?feat=article_related_stories> (7/31) editorializes, "The Justice Department's decision to drop an already-won voter-intimidation case against members of the New Black Panther Party merits multiple, independent investigations." The Times continues, "So far, the Justice Department has stonewalled legitimate inquiry. It has yet to provide records sought by this newspaper back in May." Justice Department spokesman Tracy Schmaler "refused several times to say whether department lawyers consulted with any outsiders. Yet Kristen Clarke of the NAACP Legal Defense Fund confirmed that she talked about the case with Justice Department lawyers. Ms. Schmaler said she would not talk about 'internal deliberations.' But if they consulted with outside groups, those deliberations by definition are not just internal."



From: "Lopez-Ortiz, Luz (CRT)" <Luz.V.Lopez-Ortiz@usdoj.gov>
To: "KRISTEN CLARKE" <KCLARKE@NAACPLDF.ORG>
Date: 7/31/2009 12:16 PM

Subject: from the clips today --interesting stuff

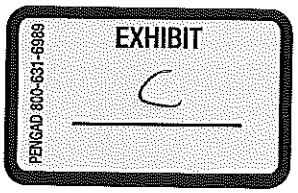
Rove Finishes Testimony, Discusses US Attorney Dismissals. Former Bush advisor Karl Rove finished his second day of closed-door testimony before the House Judiciary Committee yesterday, and the Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073002023.html?hpid=topnews> (7/31, Johnson) and the New York Times <http://www.nytimes.com/2009/07/31/us/politics/31rove.html?hp> (7/31, A14, Johnston) report this story and on a joint interview Rove did with the newspapers this month with the understanding that reports be embargoed until after his testimony. Both articles cast doubt on Rove's assertion that he played a small role in the dismissal of nine US Attorneys in late 2006.

Under the headline "E-Mails Show Larger White House Role In Prosecutor Firings," the Post reports that according to e-mails it has obtained, Rove "and other high-ranking figures in the Bush White House played a greater role than previously understood in the firing of federal prosecutors almost three years ago." Citing the e-mails "and new interviews with key participants," the Post reports that these materials "provide new information about efforts by political aides in the Bush White House, for example, to push a former colleague as a favored candidate for one of the U.S. attorney posts. They also reflect the intensity of efforts by lawmakers and party officials in New Mexico to unseat the top prosecutor there." In the interview, Rove "described himself as merely passing along complaints by senators and state party officials to White House lawyers." The Post notes that Assistant U.S. Attorney Nora R. Dannehy "continues to investigate whether the firings of the prosecutors and the political firestorm that followed could form the basis of possible criminal charges such as making false statements or obstruction of justice."

Under the headline "Rove Says His Role In Prosecutor Firings Was Small," the Times reports that Rove "said in a recent interview that he had sought status reports about vacancies in prosecutors' offices, pushed subordinates to find a job for a former deputy and monitored plans for dismissals as they evolved after Mr. Bush's re-election in 2004," but "said he played only a peripheral role in the removal of the prosecutors" and said "that he could not answer one of the central unanswered questions that the panel has hoped to resolve: whether it was the White House that directed the Justice Department to remove the prosecutors." The Times notes that a "statement from the Judiciary Committee on Thursday suggested that" Rove "might not have fully described his role in the matter in the earlier interview, with reporters for The New York Times and The Washington Post. In the interview, Mr. Rove also provided a selection of office e-mail messages about the issue. 'It's hardly surprising that Mr. Rove would minimize his involvement in the U.S. attorney firings or that selectively leaked documents would serve his version of events,' the statement said."

The AP <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073003354.html> (7/31) also reports on Rove's testimony.

Rep Smith Seeks Answers From DOJ In Voter Intimidation Case. The Washington Times <http://www.washingtontimes.com/news/2009/jul/31/senior-republican-wants-answers-panther-party-case/> (7/31, Seper) reports that Rep. Lamar Smith (R-TX), the ranking Republican on the House Judiciary Committee, "wants a closed-door briefing with the head of the Justice Department's Voting Rights Section on Friday over the department's decision to seek a dismissal in a voter intimidation case against the New Black Panther Party." Smith "Smith said he has been unsuccessful since May in getting answers on whether political appointees were involved in the dismissal



of three of four counts in the case after the Justice Department had won default judgments on all counts and why the department has refused to respond to congressional inquiries on the investigation." Citing a report Thursday in the Washington Times <http://www.washingtontimes.com/news/2009/jul/30/no-3-at-justice-okd-panther-reversal/?feat=home_cube_position1> , Smith "said Associate Attorney General Thomas J. Perrelli knew about discussions to dismiss the complaint, but the Justice Departments responses to Congress 'make no mention of his involvement in the decision-making process. Instead, they continually refer to vague justifications for the Obama Justice Departments actions, none of which include a legitimate explanation for why a case would be dropped,' he said. 'It is clear that political appointees at the Justice Department allowed career employees to be pressured to drop a case against the presidents political allies. That is politicizing justice and it undermines democracy.'" Rep. Frank Wolf (R-VA), "said on the House floor Thursday he was 'deeply troubled by the Department of Justices questionable dismissal of an important voter intimidation case in Philadelphia, where I grew up and my father was a policeman.'" Justice Department spokeswoman Tracy Schmaler "said the department has tried to cooperate with Congress and agreed to a meeting with" Wolf "and career attorneys 'in which they made a good-faith effort to respond to his inquiries about this case. We will continue to try to clear up any confusion Congressman Wolf has about this case.'"

More Commentary. The Washington Times <http://www.washingtontimes.com/news/2009/jul/31/hack-panthers/?feat=article_related_stories> (7/31) editorializes, "The Justice Department's decision to drop an already-won voter-intimidation case against members of the New Black Panther Party merits multiple, independent investigations." The Times continues, "So far, the Justice Department has stonewalled legitimate inquiry. It has yet to provide records sought by this newspaper back in May." Justice Department spokesman Tracy Schmaler "refused several times to say whether department lawyers consulted with any outsiders. Yet Kristen Clarke of the NAACP Legal Defense Fund confirmed that she talked about the case with Justice Department lawyers. Ms. Schmaler said she would not talk about 'internal deliberations.' But if they consulted with outside groups, those deliberations by definition are not just internal."

Supreme Court

Alexander To Support Sotomayor. The AP <http://news.yahoo.com/s/ap/20090730/ap_on_go_su_co/us_sotomayor_alexander;_ylt=AkRiEWceq.7JS0KzKUesg55p24cA;_ylu=X3oDMTJ0ZG52NzdpBGFzc2V0A2FwLzIwMDkwNzMwL3VzX3NvdG9tYXlvcl9hbGV4YW5kZXIEcG9zAzEwBHNlYwN5bl9wYWdpbmF0ZV9zdW1tYXJ5X2xpc3QEc2xrA25vM3JlcHVibGljYQ--> (7/31, Davis) reports, "The Senate's No. 3 Republican announced Thursday he'd break with the rest of his party's leaders to support Supreme Court nominee Sonia Sotomayor, who's in line to become the first Hispanic justice." Sen. Lamar Alexander "said he was voting for President Barack Obama's nominee despite his differences with her, particularly on gun rights." Said the GOP senator, "Even though Judge Sotomayor's political and judicial philosophy may be different than mine, especially regarding Second Amendments rights, I will vote to confirm her because she is well qualified by experience, temperament, character and intellect to serve." The Politico <http://www.politico.com/news/stories/0709/25610.html> (7/31, Raju) notes that "Alexander criticized then-Sen. Barack Obama and Democratic senators for voting against John Roberts's nomination for chief justice in 2005, 'solely because they disagreed with what Sen. Obama described as Roberts's "overarching political philosophy,"' adding, ""Today, it would be equally wrong for me to vote against Judge Sotomayor solely because she is not on my side on some issues."

Length Of Floor Debate Still Undecided. The Hill <http://thehill.com/leading-the-news/sotomayor-vote-date-uncertain-2009-07-30.html> (7/31, Rushing) reports, "There is little doubt that...Sotomayor will be confirmed next week. But it's unclear when it will happen." Republicans "have proposed the idea of a four-day debate on the nominee, with most of their 40 members planning to speak on Sotomayor's fitness for the court. But Democrats say no more than two days should be necessary." The Hill adds, "Hanging over the negotiations between Minority Leader Mitch McConnell (R-Ky.) and Majority Leader

Harry Reid (D-Nev.) is the Senate's precious deadline of adjourning for its monthlong August recess on or before Friday, Aug. 7. A prolonged schedule on Sotomayor could push that into the weekend, particularly since appropriations bills will also be vying for floor time."

WPost Praises Graham. The Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073003328.html> (7/31, 652K) editorializes, "In what has become a rare phenomenon, a United States senator rose above partisan backbiting and interest-group pressures to support a Supreme Court nominee put forth by the other party. In casting his vote for...Sotomayor Tuesday in the Senate Judiciary Committee, Sen. Lindsey O. Graham (R-S.C.) struck a blow for comity, decency and intellectual honesty." Adds the Post, "More Republican senators should do likewise." Sotomayor "may not be their nominee of choice, but as Mr. Graham has noted, elections have consequences."

SCOTUS Asked To Review Civil Rights-Era Case. The AP <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073002277.html> (7/31, Elliott) reports from Jackson, MS, "The U.S. Supreme Court should decide whether a reputed Ku Klux Klansman should have been tried on a kidnapping charge 43 years after two black men were abducted and slain in rural Mississippi, a federal appeals court said Thursday." The AP continues, "A majority of the 5th U.S. Circuit Court of Appeals said other Civil Rights Era cold cases could be affected by a Supreme Court ruling on whether time had run out for prosecutors to charge James Ford Seale. Seale, now 73, was convicted in 2007 of abducting two 19-year-old friends who authorities said were beaten, weighted down and thrown, possibly still alive, into a Mississippi River backwater in 1964." The AP adds, "Since the conviction, Seale's case has worked its way through the 5th Circuit, including an acquittal that was overturned. The 5th Circuit wants the nation's high court to decide whether the statute of limitations on kidnapping passed in the decades between the crime and Seale's conviction. Federal prosecutors had opposed the issue being presented to the Supreme Court."

From: "Lopez-Ortiz, Luz (CRT)" <Luz.V.Lopez-Ortiz@usdoj.gov>
To: "KRISTEN CLARKE" <KCLARKE@NAACPLDF.ORG>
Date: 7/31/2009 1:10 PM
Subject: RE:

They are disgusting. This is CC's doing.

-----Original Message-----
From: KRISTEN CLARKE [mailto:KCLARKE@NAACPLDF.ORG]
Sent: Friday, July 31, 2009 12:45 PM
To: Lopez-Ortiz, Luz (CRT)
Subject: Re:

lies.

>>> "Lopez-Ortiz, Luz (CRT)" <Luz.V.Lopez-Ortiz@usdoj.gov> 7/31/2009 12:12 PM >>>

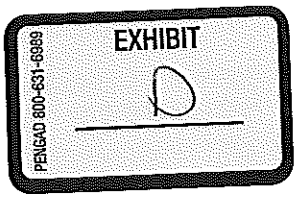
Subject: from the clips today --interesting stuff

Rove Finishes Testimony, Discusses US Attorney Dismissals. Former Bush advisor Karl Rove finished his second day of closed-door testimony before the House Judiciary Committee yesterday, and the Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR20090

73002023.html?hpid=topnews> (7/31, Johnson) and the New York Times <http://www.nytimes.com/2009/07/31/us/politics/31rove.html?hp> (7/31, A14, Johnston) report this story and on a joint interview Rove did with the newspapers this month with the understanding that reports be embargoed until after his testimony. Both articles cast doubt on Rove's assertion that he played a small role in the dismissal of nine US Attorneys in late 2006.

Under the headline "E-Mails Show Larger White House Role In Prosecutor Firings," the Post reports that according to e-mails it has obtained, Rove "and other high-ranking figures in the Bush White House played a greater role than previously understood in the firing of federal prosecutors almost three years ago." Citing the e-mails "and new interviews with key participants," the Post reports that these materials "provide new information about efforts by political aides in the Bush White House, for example, to push a former colleague as a favored candidate for one of the U.S. attorney posts. They also reflect the intensity of efforts by lawmakers and party officials in New Mexico to unseat the top prosecutor there." In the interview, Rove "described himself as merely passing along complaints by senators and state party officials to White House lawyers." The Post notes that Assistant U.S. Attorney Nora R. Dannehy "continues to investigate whether the firings of the prosecutors and the political firestorm that followed could form the basis of possible criminal charges such as making false statements or obstruction of justice."

Under the headline "Rove Says His Role In Prosecutor Firings Was Small," the Times reports that Rove "said in a recent interview that he had sought status reports about vacancies in prosecutors' offices, pushed subordinates to find a job for a former deputy and monitored plans for dismissals as they evolved after Mr. Bush's re-election in 2004," but "said he played only a peripheral role in the removal of the prosecutors" and said "that he could not answer one of the central unanswered questions that the panel has hoped to resolve: whether it was the White House that directed the Justice Department to remove the prosecutors." The Times notes that a "statement from the Judiciary Committee on Thursday suggested that" Rove "might not have fully described his role in the matter in the earlier interview, with reporters for The New York Times and The Washington Post. In the interview, Mr. Rove also provided a selection of office e-mail messages about the issue. 'It's hardly surprising that Mr. Rove would minimize his involvement in the U.S. attorney firings or that selectively leaked



documents would serve his version of events,' the statement said."
The AP
<http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR20090

73003354.html> (7/31) also reports on Rove's testimony.

Rep Smith Seeks Answers From DOJ In Voter Intimidation Case. The Washington Times
<http://www.washingtontimes.com/news/2009/jul/31/senior-republican-wants

-answers-panther-party-case/> (7/31, Seper) reports that Rep. Lamar Smith (R-TX), the ranking Republican on the House Judiciary Committee, "wants a closed-door briefing with the head of the Justice Department's Voting Rights Section on Friday over the department's decision to seek a dismissal in a voter intimidation case against the New Black Panther Party." Smith "Smith said he has been unsuccessful since May in getting answers on whether political appointees were involved in the dismissal of three of four counts in the case after the Justice Department had won default judgments on all counts and why the department has refused to respond to congressional inquiries on the investigation." Citing a report Thursday in the Washington Times
<http://www.washingtontimes.com/news/2009/jul/30/no-3-at-justice-okd-pan

ther-reversal/?feat=home_cube_position1> , Smith "said Associate Attorney General Thomas J. Perrelli knew about discussions to dismiss the complaint, but the Justice Departments responses to Congress 'make no mention of his involvement in the decision-making process. Instead, they continually refer to vague justifications for the Obama Justice Departments actions, none of which include a legitimate explanation for why a case would be dropped,' he said. 'It is clear that political appointees at the Justice Department allowed career employees to be pressured to drop a case against the presidents political allies. That is politicizing justice and it undermines democracy.'" Rep. Frank Wolf (R-VA), "said on the House floor Thursday he was 'deeply troubled by the Department of Justices questionable dismissal of an important voter intimidation case in Philadelphia, where I grew up and my father was a policeman.'" Justice Department spokeswoman Tracy Schmaler "said the department has tried to cooperate with Congress and agreed to a meeting with" Wolf "and career attorneys 'in which they made a good-faith effort to respond to his inquiries about this case. We will continue to try to clear up any confusion Congressman Wolf has about this case.'"
More Commentary. The Washington Times
<http://www.washingtontimes.com/news/2009/jul/31/hack-panthers/?feat=art

icle_related_stories> (7/31) editorializes, "The Justice Department's decision to drop an already-won voter-intimidation case against members of the New Black Panther Party merits multiple, independent investigations." The Times continues, "So far, the Justice Department has stonewalled legitimate inquiry. It has yet to provide records sought by this newspaper back in May." Justice Department spokesman Tracy Schmaler "refused several times to say whether department lawyers consulted with any outsiders. Yet Kristen Clarke of the NAACP Legal Defense Fund confirmed that she talked about the case with Justice Department lawyers. Ms. Schmaler said she would not talk about 'internal deliberations.' But if they consulted with outside groups, those deliberations by definition are not just internal."

Supreme Court

Alexander To Support Sotomayor. The AP
<http://news.yahoo.com/s/ap/20090730/ap_on_go_su_co/us_sotomayor_alexand

er;_ylt=AkRiEWceq.7JS0KzKUesg55p24cA;_ylu=X3oDMTJ0ZG52NzdpBGFzc2V0A2FwLz
IwMDkwNzMwL3VzX3NvdG9tYXIvcl9hbGV4YW5kZXIEcG9zAzEwBHNlYwN5bl9wYWdpbmF0ZV
9zdW1tYXJ5X2xpc3QEc2xrA25vM3JlcHVibGljYQ--> (7/31, Davis) reports, "The Senate's No. 3 Republican announced Thursday he'd break with the rest of his party's leaders to support Supreme Court nominee Sonia Sotomayor, who's in line to become the first Hispanic justice." Sen. Lamar Alexander "said he was voting for President Barack Obama's nominee despite his differences with her, particularly on gun rights." Said the

GOP senator, "Even though Judge Sotomayor's political and judicial philosophy may be different than mine, especially regarding Second Amendments rights, I will vote to confirm her because she is well qualified by experience, temperament, character and intellect to serve." The Politico <http://www.politico.com/news/stories/0709/25610.html> (7/31, Raju) notes that "Alexander criticized then-Sen. Barack Obama and Democratic senators for voting against John Roberts's nomination for chief justice in 2005, 'solely because they disagreed with what Sen. Obama described as Roberts's "overarching political philosophy,"' adding, ""Today, it would be equally wrong for me to vote against Judge Sotomayor solely because she is not on my side on some issues."

Length Of Floor Debate Still Undecided. The Hill <http://thehill.com/leading-the-news/sotomayor-vote-date-uncertain-2009-07-30.html> (7/31, Rushing) reports, "There is little doubt that...Sotomayor will be confirmed next week. But it's unclear when it will happen." Republicans "have proposed the idea of a four-day debate on the nominee, with most of their 40 members planning to speak on Sotomayor's fitness for the court. But Democrats say no more than two days should be necessary." The Hill adds, "Hanging over the negotiations between Minority Leader Mitch McConnell (R-Ky.) and Majority Leader Harry Reid (D-Nev.) is the Senate's precious deadline of adjourning for its monthlong August recess on or before Friday, Aug. 7. A prolonged schedule on Sotomayor could push that into the weekend, particularly since appropriations bills will also be vying for floor time."

WPost Praises Graham. The Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073003328.html> (7/31, 652K) editorializes, "In what has become a rare phenomenon, a United States senator rose above partisan backbiting and interest-group pressures to support a Supreme Court nominee put forth by the other party. In casting his vote for...Sotomayor Tuesday in the Senate Judiciary Committee, Sen. Lindsey O. Graham (R-S.C.) struck a blow for comity, decency and intellectual honesty." Adds the Post, "More Republican senators should do likewise." Sotomayor "may not be their nominee of choice, but as Mr. Graham has noted, elections have consequences."

SCOTUS Asked To Review Civil Rights-Era Case. The AP <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073002277.html> (7/31, Elliott) reports from Jackson, MS, "The U.S. Supreme Court should decide whether a reputed Ku Klux Klansman should have been tried on a kidnapping charge 43 years after two black men were abducted and slain in rural Mississippi, a federal appeals court said Thursday." The AP continues, "A majority of the 5th U.S. Circuit Court of Appeals said other Civil Rights Era cold cases could be affected by a Supreme Court ruling on whether time had run out for prosecutors to charge James Ford Seale. Seale, now 73, was convicted in 2007 of abducting two 19-year-old friends who authorities said were beaten, weighted down and thrown, possibly still alive, into a Mississippi River backwater in 1964." The AP adds, "Since the conviction, Seale's case has worked its way through the 5th Circuit, including an acquittal that was overturned. The 5th Circuit wants the nation's high court to decide whether the statute of limitations on kidnapping passed in the decades between the crime and Seale's conviction. Federal prosecutors had opposed the issue being presented to the Supreme Court."

National Office
99 Hudson Street, Suite 1600
New York, NY 10013

T 212 965 2200
F 212 226 7592

LDF
DEFEND EDUCATE EMPOWER

Washington, D.C. Office
1444 Eye Street NW, 10th Floor
Washington, DC 20005

T 202 682 1300
F 202 682 1312

Richard Miniter
Editorial Page Editor
3600 New York Ave NE
Washington, DC 20002
Tel: (202) 636-4876
Fax: (202) 715-0037
Email: yourletters@washingtontimes.com

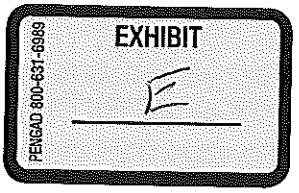
July 31, 2009

Dear Mr. Miniter:

This letter is intended to correct misstatements in the Washington Times July 30 article: *No. 3 at Justice OK'd Panther reversal* and July 31 editorial: *Hack Panthers*. I did not indicate to any Washington Times reporter that I ever had any discussion with Department of Justice attorneys about a lawsuit that they filed against members of the New Black Panther Party. Nor have I ever engaged in advocacy to any Department of Justice official regarding this case or urged that the Department take a position on this case, one way or the other. While this lawsuit is not one that I have closely followed, I did confirm to the Washington Times that the NAACP Legal Defense and Educational Fund, Inc. has long believed, and continues to believe, that it is vitally important for the Department of Justice to investigate and pursue claims of voter intimidation to ensure minority voters' access to the polls.

Thanks,

Kristen Clarke
Co-Director, Political Participation Group



UNITED STATES COMMISSION ON CIVIL RIGHTS

IN RE:

NEW BLACK PANTHER PARTY

Philadelphia, Pennsylvania
Monday, January 11, 2010

TRANSCRIPT of testimony of RONALD VANN, as taken by and before Cherilyn M. McCollum, a Registered Professional Reporter, at the HILTON GARDEN HOTEL, 1100 Arch Street, commencing at 10:03 o'clock in the forenoon.

B E F O R E:
(BY TELEPHONE)
JOHN MARTIN, SPECIAL ASSISTANT
DOMINIQUE LUDVIGSON, SPECIAL ASSISTANT

A P P E A R A N C E S:
UNITED STATES COMMISSION ON CIVIL RIGHTS
OFFICE OF THE GENERAL COUNSEL
BY: DAVID P. BLACKWOOD, ESQ.
MAHA JWEIED, ESQ.
624 Ninth Street, N.W.
Suite 631
Washington, D.C. 20424
(202) 376-7622
dblackwood@usccr.gov
Attorneys for The Commission

I N D E X

E X H I B I T S

RONALD VANN, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BLACKWOOD:

Q. Good morning, Mr. Vann.
A. Good morning.
Q. Appreciate your coming.
A. Thank you for having me.
Q. As you know, you and I talked before about some of the activities by the New Black Panther Party on Election Day as well as what Department of Justice looked into. I want to ask you, you were there on Election Day, right?
A. That is correct.
Q. What was your capacity?
A. A poll watcher.
Q. That was for the Democratic Party?
A. That's correct.
Q. How often have you served as a poll watcher?
A. I've served numerous times during an election.
Q. Four, five times?
A. Four, five times.

Page 5

Q. Do you get paid for that?
A. Yes.
Q. How much?
A. About $75.
Q. And usually -- do you work with Mr. Jackson?
A. Yes.
Q. And that's Jerry Jackson, correct?
A. That's correct.
Q. Mr. Jackson is a member of the New Black Panther Party. Is that right?
A. I have no idea.
Q. Are you a member of New Black Panther Party?
A. Not at all.
Q. On Election Day 2008, Mr. Jackson showed up wearing a black -- what I would describe as a Black Panther uniform: black pants, black shirt, black jacket, and black beret. Right?
A. Yes.
Q. Is that the first time he wore his uniform to --
MR. BLACKWOOD: Who is there?
MR. MARTIN: John.

Page 6

MS. JWEIED: Who else joined?
MS. LUDVIGSON: Dominique.
MR. BLACKWOOD: We'll give you the name.
BY MR. BLACKWOOD:
Q. Had he ever wore a uniform before?
A. I have no idea.
Q. The times you've worked for them, did he wear his uniform at the polling place?
A. I never really took notice. Sometimes you have a jacket on or have a coat. If he do have a black uniform, you couldn't see it. Only thing you could see is bottom.
Q. Because he'd have an overcoat?
A. Exactly.
Q. Now, you were wearing a green and white jacket?
A. Green and white jacket.
Q. And that had the white stripes on it?
A. That is correct.
Q. Describe the polling place. Not physically, but who is where?
By the way, it's at 1221 Fairmount,

Page 7

right?
A. That is correct.
Q. Excuse me.
A. You have people that's outside giving out pamphlets. You have people inside that's signing up to vote, okay.
Q. But the people handing out pamphlets, they have to stay a certain distance from the door. Is that correct?
A. That's correct.
Q. Who is inside?
A. You have -- you have the people that work the polls.
Q. Those are people that work for the city?
A. Right. The judge and couple other people that's inside.
Q. Okay. And what about the poll watchers?
A. Well, the poll watchers are around the place. You know, like me myself, I'm outside, I'm inside, I'm outside, I'm inside.
Q. What do you view your role is as a poll watcher?

Page 8

A. To make sure everything is no trouble. No one is jumping in the line. No one in there to cause mass confusion.
Q. And you were an official for the Democratic Party, correct?
A. That is correct.
Q. Is that an elected position?
A. Yes.
Q. How does the election occur?
A. To get the position?
Q. Yes.
A. A petition, and you go around in the neighborhood and you ask people to, you know, sign a petition, and they sign it. And you take it back to the state representative, and they take it from there.
Q. And who actually votes on whether you get to be a poll watcher?
A. That's a good question. I don't know how that works. You sign the petition, and you give it to the representative, and he does the rest. Now, who decides whether you're a poll watcher or not I don't know. Unless the commissioner.

Page 9

Q. And the commissioner is what? Is he like a block captain?
A. No. Commissioner is like -- the voter commission.
Q. A what?
A. A voter commission.
Q. Voter, okay.
A. Yeah.
Q. Are you part of your block organization?
A. No.
Q. Okay. You're not a block captain?
A. No, no. Just a committee person.
Q. What's the committee?
A. Committee person, he is like trying to keep the neighborhood clean. Trying to keep the drugs out of the neighborhood. Trying to keep people looking to see whose house they can break in or what cars they can break in, that sort of thing.
Q. It's still affiliated with the Democratic Party?
A. Yes.
Q. By way of an example -- I'm not going to make this an exhibit -- this is a watcher

Page 10

certificate and this one is for Jerry Jackson.
A. I have one.
Q. Each election you get one, too?
A. That is correct.
Q. After the presidential election in 2008, did Mr. Jackson continue to serve as a poll watcher?
A. Yes.
Q. About how many elections?
A. What is it? It was one more, I think, after.
Q. Was that a -- bear with me.
A. For the district attorney.
Q. Or a judge I think it might have been.
A. District attorney or judges.
Q. A judge of the Common Pleas Court, does that sound familiar, May 19, 2009?
A. Maybe so.
Q. But it was a local election?
A. Yeah, local.
Q. On that election did Mr. Jackson come in his black uniform?
A. I don't recall. I don't know.

Page 11

Q. Now, I've seen -- unfortunately, we don't have a wi-fi connection here, but I have seen a tape, and I wasn't sure it was you, but I saw a gentleman in a green jacket.
A. Yes, it was me.
Q. Did Mr. Jackson arrive in his uniform or did he change there?
A. I don't know.
Q. Did he come with his friend?
A. I don't know that either.
Q. All right. I believe the other gentleman is Minister King Samir Shabazz.
A. I don't know him.
Q. Never seen him before?
A. I've seen him, but I don't know him.
Q. Where have you seen him?
A. In the neighborhood.
Q. Does he live in that neighborhood?
A. No, I don't think he does.
Q. Jerry Jackson does?
A. Jerry Jackson does.
Q. Do they seem to be friends?
A. I don't know that either.
Q. Have you seen them doing things,

Page 12

like handing out leaflets?
A. You know, I'll tell you, I don't get in people's business. What Jerry Jackson does with his friends or whatever he wears, that's his business. My thing is my business and I'm better off that way. Now, I don't mean no disrespect, of course. If that Jerry's friend, then Jerry has a right that he wants to be his friend.
We working the polls and I'm doing what I'm supposed to be doing. Jerry working the polls and he doing what he supposed to be doing. Only thing I observed was the guy that with him had the stick and was doing the stick like this now. Wasn't swinging at anyone, he was just --
Q. Smacking it in his hand?
A. Right. Then the police was called.
Q. Who called the police, do you know?
A. I have no idea. The police was called. The police came. Police asked him, "What you doing with the stick?" and whatever he said to the police. He put the stick away and they left.
Q. And he left, too?
A. He left, too.
Q. And that's the smaller gentleman?

Page 13

A. Yeah.
Q. The video -- let me back up. Inside the facilities there were also Republican poll watchers, right?
A. I don't know who they were.
Q. Did you see --
A. There was other people there.
Q. What did they look like? If you recall.
A. I don't remember.
Q. Was it an African-American couple?
A. It was one African-American, one Caucasian.
Q. Who was which?
A. The female was Caucasian.
Q. Okay.
A. I think -- I think it was another female or it was another male African-American. I'm not quite sure.
Q. But a total of two: one male, one female?
A. That I can remember.
Q. Have you ever seen them before?
A. No.

Page 14

Q. Do you know whether they were members of the Republican Party one way or the other?
A. I didn't ask.
Q. So you just didn't talk to them?
A. No, no. I spoke, I mean, you know, but -- "Where you from? Who are you?" I didn't --
Q. You didn't introduce yourself?
A. No. "How you doing?" and that was it.
Q. Now, there came a time, as you mentioned, the police came at one point.
A. Uh-huh.
Q. And I've seen some videos. There is also a white woman wearing a little blue jacket that's talking on a cell phone. Do you know who I'm referring to?
A. (No response.)
Q. Let me see if I have a picture. Were you in contact with Democratic -- I assume there is a headquarters that you report to.
A. There is a ward that I report to.
Q. The ward leaders, you check in with them by phone?

Page 15

A. They come and may check things going smoothly.
Q. Kind of like a roving team?
A. Yes.
Q. Would the ward leader be by himself?
A. Depends. May be by himself or someone with him.
Q. Who was that person?
A. Arthur Green.
Q. Was Mr. Green driving an SUV around?
A. Yes.
Q. There is one scene showing you and Mr. Green and Jerry Jackson talking to each other. Was that about the incident that occurred?
A. I have no idea.
Q. Mr. Jackson at the time was writing something down. Do you recall what you all were discussing?
A. I don't remember that neither.
Q. Okay. Well, we'll see if we can get a picture of it. You don't remember, though, a young white woman who was chatting behind Jerry Jackson and the other gentleman constantly on the telephone?

Page 16

A. I remember a woman was there. It was a Caucasian woman and it was either an African-American woman or an African-American male. I can't really --
Q. You mean two different people?
A. There was so much going on that day that --
Q. When did all this start?
A. Well, as far as I can recollect, we was all standing out. I'm inside, I'm outside, I'm inside, I'm outside. Jerry Jackson and his friend was outside. I think a couple of people came in to vote or something or something to that effect, and the guy had the stick and doing the stick like this and --
Q. I'm just going -- smacking it in his hand, right?
A. Yeah.
Q. Did the voters come in and complain about it?
A. I guess they did, because I wouldn't be sitting here now.
Q. Did you hear anybody complain about it?

Page 17

A. No, I didn't hear no one complain about it.
Q. Did you go outside to Jerry and say, "Hey, your friend should knock this off"?
A. No, I just mind my business. People going to do what they want anyway, so. I feel that the guy shouldn't have been there. That's my personal business. I don't matter.
Q. The guy you're talking about is the guy with the nightstick?
A. Yeah, he shouldn't have been there.
Q. Did Jerry ever come inside?
A. Yeah, he came in and out. He was in and out.
Q. I guess I'm really talking about the time that the police got there. That was pretty early in the morning, or do you recall?
A. I think it was somewhere in the afternoon probably. Around lunchtime. Vaguely.
Q. What time do the polls open?
A. What, 7:00?
Q. I'm asking you. I don't know.
A. 7:00.

Page 18

Q. Jerry was there because that was his job, right?
A. Yes.
Q. Was his friend there the whole time?
A. I don't know. Because I didn't get there until late.
Q. What time did you get there?
A. I got there about maybe nine.
Q. Was Jerry there with his friend at that time?
A. Yes.
Q. Just to be clear, you didn't talk to him, "Hey, Jerry, what is your friend doing here with a nightstick?"
A. Uh-uh.
Q. I'm sorry. You have to say no.
A. Oh, okay. No.
Q. Did you report the fact that this guy was there with a nightstick to your ward leader?
A. No. I didn't report it. But with all the publicity, somebody reported it.
Q. And after -- was it after the police came your ward leader showed up?

Page 19

A. Yes.
Q. And what did the ward leader say?
A. I don't know what he said to Jerry, but I know he said to me, "Man, what's going on around here?"
And I'm like, "What you mean?"
You know, "Like the TV news reporters and police. What's going on?"
I'm like -- I'm flabbergasted.
Q. 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?"
A. Mr. Black, 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.
Q. Okay. One of the things that I heard on the tape is the Fox reporter I think at one point say, "Somebody has called the police on us," the reporters.
Do you know if anybody called the

Page 20

police on them?
A. I don't know.
Q. He pointed -- he turned around and pointed to someone standing behind him. It wasn't you. I think it was a white man with a lanyard on his chest.
Do you recall anybody like that working the polls that day?
A. Vaguely.
Q. Would that be the judge?
A. No, no.
Q. Okay.
A. Uh-uh.
Q. Let's go back to the white woman again who is behind --
MS. JWEIED: It's not working.
MR. BLACKWOOD: Before we break, I have a photo of it downstairs.
Off the record a second.
(Discussion held off the record.)
MR. BLACKWOOD: Okay. Back on the record.
BY MR. BLACKWOOD:
Q. I'm sorry. We're going to try to

Page 21

get a photo of the woman I'm referring to.
Was there any -- did you see any evidence of a white supremacist group or skinheads showing up?
A. I mean, people coming in to vote. I mean --
Q. No, no, I mean specifically was there any white group or, you know, white supremacists out there trying to stir up the voters or block people?
A. I don't know, sir.
Q. You didn't see it?
A. I didn't see it. I didn't see it.
Q. Did anybody express concern to you about Jerry and his friend?
A. 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 shout. 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.

Page 22

Q. Did you even talk to Jerry until the ward leader got there?
A. Kept my mouth shut.
Q. 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"?
A. No.
Q. Going back from when you arrived, I just want to make sure I was clear. I understand you didn't get there until around nine. Jerry's friend was already there, correct?
A. That's correct.
Q. And he already had his nightstick out and was hitting it with his hand?
A. Right.
Q. Okay.
When the ward leader got there, did you overhear what Jerry or the ward leader was saying?
A. No.
Q. Did you see anyone turn away from the polls?
A. No, not that I can remember. No. I don't think.
Q. And you were inside and outside?
A. I'm all over the place.
Q. Okay.
Did you call the police at any time?
A. No.
Q. Do you know if anybody else called the police?
A. Someone did.
Q. But did you hear, for example, someone call the police or someone say, "I am going to call the police"?
A. When the police arrive, only thing police say is someone called. That's the only thing the police said. You know, I just stayed out of it.
Q. What were the Republican poll watchers doing throughout this time?
A. I don't recall.
Q. The couple that we mentioned before who were serving as Republican poll watchers, did they stay inside the building most of the time?
A. I don't recall.
Q. At some point the Fox News person arrives. Do you recall when that person got there?
A. I don't recall that neither. It was so many people there, Fox, 6, 10.
Q. When you say 6 and 10, those are TV channels?
A. TV channels.
Q. So there was more than just Fox here?
A. That I can recall, yes.
Q. Fox is -- what channel are they?
A. 29.
Q. And so 6 and 10 are what, NBC and CBS?
A. Yes.
Q. Did you give any interviews to any of them?
A. No.
Q. If you could, walk me back again. Who was the judge inside the polling place?
A. The judge is Jeannie. She's a judge.
Q. How do you spell her name?
A. J-e-a-n -- what is it? You can spell it a number of ways. J-a-n-i-e or

Page 23

Page 24

Page 25

J-e-a-n-n-i-e.
Q. And that's her last name?
A. Just the first name.
Q. Do you know her last name?
A. I don't know her last name.
Q. Did she do anything that you're aware of?
A. No. Not that I can remember.
Q. And the ward leader, again, you didn't call him, he just showed up?
A. Well, yeah, he checking up on the polls and stuff like that. He's like a rover, you know, just doing his rounds.
Q. Here we go. We'll mark this as an exhibit later on, but see that white woman in the background?
A. Okay.
Q. She's got like a long T-shirt on and a small jacket.
A. Okay.
Q. And she's got a cell phone on.
A. Okay.
Q. I mean, cell phone to her ear. Do you recall seeing her?

Page 26

A. I do.
Q. Do you know who she was?
A. No, I don't.
Q. Do you know if she's a Democratic -- working with the Democratic Party?
A. I don't know who she is.
Q. So you never went up to her?
A. No.
Q. Okay.
A. I mean, I know she was there, but I didn't know who she were.
MR. BLACKWOOD: Tell you what, why don't we make that Exhibit 1.
(Exhibit 1 marked for identification.)
BY MR. BLACKWOOD:
Q. Sir, who we're referring to is the woman on the lower left-hand side --
A. Let me ask you, how did I get caught up in this mess?
Q. Well, I will tell you. We are trying to learn who was there, and, frankly, if I had her name, I'd probably want to talk to her. Nobody implies you did anything improper one way or

Page 27

the other. We are trying to talk to everyone at the polling place.
A. I don't have time to get mixed up in anybody else's mess.
Q. If you could identify that person, I'd like to talk to her.
A. I don't know who she is. I don't have a clue who she is. I remember her being there, but I don't know who she is.
Q. She wasn't there when you arrived?
A. She might have been.
Q. You don't even recall?
A. I don't recall.
Q. She's not someone you've seen before on other elections?
A. Uh-uh.
Q. And she hasn't been there since 2008?
A. Right, since then.
Q. Did you speak to anybody from the Department of Justice?
A. No.
MR. BLACKWOOD: Tell you what, just wait a second. We'll step outside and be right

Page 28

back in.
(Recess at 10:25 a.m.)
(Resumed at 10:26 a.m.)
BY MR. BLACKWOOD:
Q. Just one more question. Are you aware of whether DOJ tried to speak to you?
A. No one tried to speak with me. The only one that called me was you.
Q. Okay.
A. You're the only one.
MR. BLACKWOOD: All right. Are there any commissioners on the phone?
Okay. I don't hear any, so thank you, Mr. Vann. I very much appreciate your coming down here.
(10:26 a.m.)

C E R T I F I C A T E

I, Cherilyn M. McCollum, a Certified Court Reporter and Notary Public, do hereby certify that, prior to the commencement of the examination, the witness and/or witnesses were sworn by me to testify to the truth and nothing but the truth.

I do further certify that the foregoing is a true and accurate computer-aided transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither of counsel nor attorney for any party in this action and that I am not interested in the event nor outcome of this litigation.

_____
Certified Court Reporter
XI02094
Notary Public
My commission expires 3-22-11

Dated: _____

EXHIBIT
Exhibit 1
1-11-10 CMH
PENGAD 800-631-6989

Obama's corruption of civil rights law

Dennis Byrne
on 12.29.09 | no comments

1 tweet retweet Share

In the Obama administration, try to apply the civil rights laws equally and you're gone. That was the experience of the justice department attorney who pressed charges against a group of Black Panthers that were intimidating voters in a Pennsylvania polling place. (Story is here.)

Christopher Coates, the department's veteran voting rights section chief, has been "detailed" (duties unknown) for 18 months to the U.S. Attorney's office in South Carolina. The department is trying to pass off the transfer as having nothing to do with his enforcement of the voting rights act against the Black Panthers; the effort is utterly unconvincing.

The incident was captured on video (below) and widely circulated on YouTube, raising a national furor. Despite the clear evidence before everyone's eyes, political appointees in Obama's justice department dismissed the charges. The U.S. Commission on Civil Rights sought to investigate the dismissal, but has been rebuffed by Obama's justice department.

This is serious stuff. The message is clear to career administrators: Try to enforce the law in a fair and impartial way, and you're *gone*. Political interference of the enforcement of our laws--as Democrats correctly reminded us during the Bush administration--is unacceptable. Congress, in its oversight function, should get to the bottom of this miscarriage of justice. But because all the committees are control by Democrats, it won't.

SEARCH CHICAGO NOW
Search
Dennis Byrne's Barbershop All of Chicago Now

Get Dennis Byrne's Barbershop RSS Feed

SUBSCRIBE VIA EMAIL
Go

CHICAGONOW.COM ON DIGG
Upcoming Popular
25 Jay Cutler, Old School Football [Video]
1 2009 Year In Review Tattoos
1 Putting Them to the Test: The Top Ten Alternatives to Craigl

CHICAGONOW.COM ON FACEBOOK
ChicagoNow on Facebook
Become a Fan
ChicagoNow has 5,563 Fans
Kevin Pawel Cheryl Joe Christina

UNITED STATES COMMISSION ON CIVIL RIGHTS

IN RE:

NEW BLACK PANTHER PARTY

Philadelphia, Pennsylvania
Tuesday, January 12, 2010

TRANSCRIPT of testimony of LARRY COUNTS, as taken by and before Cherilyn M. McCollum, a Registered Professional Reporter, at the HILTON GARDEN HOTEL, 1100 Arch Street, commencing at 9:08 o'clock in the forenoon.

B E F O R E:
(BY TELEPHONE)
MICHAEL YAKI, COMMISSIONER
ALEC DEULL, SPECIAL ASSISTANT
NICK COLTEN, SPECIAL ASSISTANT
JOHN MARTIN, SPECIAL ASSISTANT

A P P E A R A N C E S:
UNITED STATES COMMISSION ON CIVIL RIGHTS
OFFICE OF THE GENERAL COUNSEL
BY: DAVID P. BLACKWOOD, ESQ.
MAHA JWEIED, ESQ.
624 Ninth Street, N.W.
Suite 631
Washington, D.C. 20424
(202) 376-7622
dblackwood@usccr.gov
Attorneys for The Commission

A L S O P R E S E N T:

KIMBERLY TOLHURST, ESQ. (BY TELEPHONE)

I N D E X

E X H I B I T S

LARRY COUNTS, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BLACKWOOD:

Q. Appreciate you being here.

Mr. Counts, just so you're aware, we have some special rules because we are a commission. Any deposition with regard to an individual remains private unless and until we use it in a report or as part of a hearing. So we don't release what happens here unless it's part of a hearing.

Can you give your full name and your address.

A. Larry Counts, 3413 North Lee Street, Philadelphia, Pennsylvania, 19134.

Q. And where are you employed?

A. I'm not employed.

MR. BLACKWOOD: Who is here?

MS. TOLHURST: Kim.

BY MR. BLACKWOOD:

Q. All right. And did there come a time that you were working at 1221 Fairmount for

Page 5

the 2008 presidential election?
A. Yes.
Q. In what capacity?
A. I was a poll watcher.
Q. And that was for the Republican Party?
A. Yes, I think so.
Q. Are you a registered Republican?
A. No, I'm a Democrat.
I can't -- I can't really recall was it for a Democratic or a Republican that I was, you know, working the poll for, but I'm a Democrat.
Q. Okay. Do you recall how you got selected as a poll watcher?
A. Through a friend. They had -- they had asked me, you know, would I like to be -- work for the polls even, like, passing literature or possibly have a chance to be a poll watcher. Then when that day came, they said I could be a poll watcher.
Q. Did you get paid for it?
A. Yes.
Q. How much?
A. I think it was $200.

Page 6

Q. You didn't have to get elected to get the poll watching position?
A. No.
Q. It was just a job?
A. Yes.
Q. And your wife was with you at that time?
A. Yes.
Q. And did she also get $200?
A. Yes.
Q. Have you ever worked as a poll watcher before?
A. Yes.
Q. Approximately how many times?
A. Once. Once before that.
Q. At the Fairmount Avenue place?
A. No, a different place.
Q. At that time were you still living in the City of Philadelphia?
A. Yes.
Q. So you've -- you worked as a poll watcher at least once before. Have you worked subsequently --
A. No.

Page 7

Q. -- as a poll watcher?
When you worked before, were you also with your spouse?
A. Yes.
Q. Do you recall when it was?
A. No, I -- a few years back.
Q. Was it the 2004 presidential election?
A. It could have been 2004.
Q. Let's talk about that day, Election Day 2008. When did you get to the polls?
A. When did I get there?
Q. Yes.
A. Between 6 and 7. Between 6 and 7:00.
Q. Did you have to check in with anybody to let them know that you were there?
A. Yes. Yes, I had to sign in. We had to check with somebody once we got there and notify them we were poll watchers.
Q. Was that the election judge?
A. Yes.
Q. Do you know who the election judge was?

Page 8

A. No.
Q. This neighborhood where you worked as a poll watcher, is that near where you lived?
A. Pretty fair where I live at, but not -- not in like a mile area. Like a couple miles.
Q. A couple miles?
A. Yes, a few miles.
Q. It's not in the same voting district, right?
A. No.
Q. Did you have to check in with anybody from the Republican Party?
A. No.
Q. When you got to the polling place, was anybody from the New Black Panther Party already there?
A. No.
Q. When did they arrive?
A. I don't know when they arrived. I was -- once I got there, I stayed inside the whole time.
Q. When did you become aware that members had arrived?

Page 9

A. 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.
Q. So you stayed inside the building the whole time?
A. Yes.
Q. And from where you were sitting you couldn't see outside the building?
A. No. It was like -- the windows was like -- like a walled-off area. I couldn't see straight out front.
Q. Walk me through what the building -- where you are in relationship to the building. If I come in through the entrance --
A. Yeah, I'm facing this way. My back is facing towards the wall.
Q. All right. But are you down a

Page 10

hallway or what?
A. No. Once like -- once I -- like once I come through the door -- like once I come through the door, it's like -- I go straight to the left and there is a room right there. It's got a little area right there.
Q. All right. So it's around the --
A. Around the corner.
Q. You come in the entrance, it's around the corner, and that's where the voting room is?
A. Yes.
Q. And that's where you are?
A. Right.
Q. How are you and your wife situated?
A. We're -- like right there at the doors.
Q. Okay. Right near the door?
A. Yes.
Q. But you can't see outside the entrance?
A. No. Once you get inside and go around, you can't see outside.
Q. So did you actually ever see any of

Page 11

the Black Panthers?
A. No, I never seen them. I told the guy when they came to my house that I never see any of the Black Panthers.
Q. Who came to your house?
A. The guy that gave me these papers.
Q. Oh, the processor for us?
A. Yes, yes.
Q. Okay.
You mentioned, though, you became aware that there were some newspaper – I'm saying newspaper, but reporters were outside?
A. Yeah. The news people that were there, they came to the front door, they came in, and then they went back out. That's the only way I saw them.
Q. Okay. So you saw reporters come into the entrance?
A. Right.
Q. Was anybody telling you anything about there's -- there are people outside?
A. No. Wasn't no commotion inside.
Q. I'm sorry?
A. There wasn't no kind of commotion

Page 12

inside.
Q. All right.
But people weren't coming inside and saying there was anybody outside?
A. No, not that I hear of.
Q. Let me run you through some -- because there are videos of the situation outside.
A. Right.
Q. Did you ever become aware -- and I know I've asked this, but let me run through it -- did you become aware that members of the New Black Panther Party were outside?
A. No.
Q. Okay. Did you become aware --
A. I didn't know what they would be wearing. Would they have regular clothes or --
Q. Well, I'm not going to --
A. Oh, oh.
Q. I'm asking you.
A. Oh, no.
Q. All right. Do you know whether the police were outside?
A. Police?
Q. And I'm asking not just did you see

Page 13

them, but did people tell you, for example, that the police were outside?
A. Yes, I heard that police was outside.
Q. Okay. Who told you that?
A. I heard that from -- who that? Couple people at the door when the news people was coming in, they said the police was out there with the news people.
Q. Okay. Did you ask them why they're here?
A. No. I ain't ask no questions. I was just -- I just stayed inside. I figured wasn't none of my business to ask questions what was going on out there, if anything was. My main concern was just stay inside.
Q. What did you understand was your job -- what were your duties as a poll watcher?
A. Just to count people that come in.
Q. Did Mr. Wayne -- do you know who Wayne Byman is?
A. No.
Q. All right.
So you don't recall if Mr. Byman

Page 14

came in and spoke to you early in the morning about there are members of the Black Panther Party outside?
A. No. No, I don't.
Q. Did anybody from the Republican Party come in and speak to you during Election Day?
A. No.
Q. Let me be specific. There is a tall gentleman who was wearing a white shirt and blue jeans. His name is Chris Hill. Did he come in and speak to you?
A. Not that I recall, no.
Q. I'll be explicit. If Mr. Hill is on videotape saying that he spoke to you and you indicated that you were afraid, you don't recall any statement like that to Mr. Hill?
A. No. I had no reason to be afraid. No.
Q. Had you ever heard of the New Black Panther Party before Election Day?
A. No. I mean, I heard of Black Panthers before that to now -- to just now. I ain't even know they exist anymore. They dead, you know.

Page 15

Q. Okay.
Since Election Day have you seen any pictures of what went on outside the polling place?
A. No.
Q. Let me show you what we'll marked as Exhibit 1.
(Exhibit 1 marked for identification.)
BY MR. BLACKWOOD:
Q. Mr. Counts, I only want you to refer to the photo at the bottom of that scene.
A. Is it all right if I get my glasses?
Q. No, go ahead.
A. I ain't never seen these two guys.
Q. Okay. Just to be explicit so it's on our written record, there appear to be two members of the -- I won't even say they're definitely members of the New Black Panther Party, but the two gentlemen there in dark black uniforms and one of them has a nightstick. You don't recall seeing either one of those gentlemen on Election Day. Is that right?
A. No.
Q. There is a white woman pictured in

Page 16

the background. She's wearing a white T-shirt and a dark jacket talking on a cell phone. Had you ever seen her before?
A. I don't know. She could have -- she could have -- could have walked in the building because there was a few, like, white females coming in and out of the building. She could have been one of ones that walked in. I don't recall seeing her, but she could have been one that walked in the building.
Q. Did you talk to her?
A. No.
Q. You have no idea who she is?
A. I don't know who she is.
Q. Now, during the whole time -- you were there all day Election Day?
A. Yes.
Q. And you never heard anybody inside the election room say that there is two members of the Black Panther Party outside?
A. No. Nobody was, you know, communicating or talking about no Black Panthers on the inside.
Q. Let me just run through some names

Page 17

and see if you know these individuals.
Robert Vann?
A. (Witness indicating.)
Q. Jerry Jackson?
I'm sorry. You have to answer.
A. Oh, no.
Q. Let me ask it again. Robert Vann, have you ever met him, or do you know that name?
A. No.
Q. Jerry Jackson?
A. I don't know him either. I never heard of them names neither.
Q. Now, a Republican team, if you will, arrived and they were shown outside the building. Some of them, as I mentioned, said they came in and spoke to you. But you don't recall that?
A. No. No, sir.
Q. It would have been either, as I mentioned before, a gentleman who is tall, thin, wearing a white shirt with blue jeans.
A. Uh-huh.
Q. You don't recall anybody like that?
A. No.
Q. Or it was a young gentleman, also

Page 18

white, who was wearing a blue suit.
A. No, I can't recall none of them or first names.
Q. The two names were -- the first man was Chris Hill.
A. Right.
Q. The second man in a suit, his name was Mike Mauro. But you don't recall talking to him as well?
A. No.
Q. The third name -- early in the morning a man by the name of Wayne Byman indicated that he came to see you. Wayne Byman is an African-American man. He said he spoke to you around 8 or 9 in the morning. You don't recall that?
A. Nobody spoke to me.
Q. Mr. Counts, I sent you two letters, one on October 26th and one on November 19th. These letters.
Is there a reason you didn't respond?
A. I tried -- I tried -- it was a number on there, wasn't it?

Page 19

Q. Yes.
A. I tried to call the number, but nobody ever answered the phone. I did call. Once I read the letter, I tried to call. I tried to respond to the letter.
Q. Okay. So the first -- well, strike that.
Did you ever talk to anybody from the Department of Justice?
A. No.
Q. Did you see any white supremacists that day?
A. No.
Q. Did anybody from the New Black Panther Party contact you after the election about what occurred on Election Day?
A. No.
Q. Do you know who called the police?
A. No.
Q. Did you ask anybody to call the police?
A. No.
Q. Were you reluctant to testify today?
A. No.

Page 20

Q. This is a somewhat personal question, but are you taking any medication that would affect your ability to testify today?
A. I have my medication, but I didn't take it.
Q. Were you on that medication during Election Day?
A. Yes.
Q. What is it?
A. [redacted]
Q. And what are those for?
A. [redacted]
Q. Did you see any voters turned away at the polling site?
A. No.
Q. Did anybody who came in to vote indicate that they were concerned or worried about their safety?
A. No.
Q. Did you talk to any voters?
A. No, they just came in, got in line, voted, got back out.
Q. So nobody talked to you about any

complaints, any concerns?
A. No.
MR. BLACKWOOD: Commissioner Yaki, do you have any questions? Commissioner?
COMMISSIONER YAKI: Sorry, sorry. I hit the wrong mute button. No, I have no questions.
MR. BLACKWOOD: Then thank you, Mr. Counts. I very much appreciate you're coming today.
(9:25 a.m.)

C E R T I F I C A T E

I, Cherilyn M. McCollum, a Certified Court Reporter and Notary Public, do hereby certify that, prior to the commencement of the examination, the witness and/or witnesses were sworn by me to testify to the truth and nothing but the truth.

I do further certify that the foregoing is a true and accurate computer-aided transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither of counsel nor attorney for any party in this action and that I am not interested in the event nor outcome of this litigation.

_____
Certified Court Reporter
XI02094
Notary Public
My commission expires 3-22-11

Dated: _____

EXHIBIT 1 1/12/10 CMM PENGAD 800-631-6989

Obama's corruption of civil rights law

Dennis Byrne
on 12.29.09 | no comments

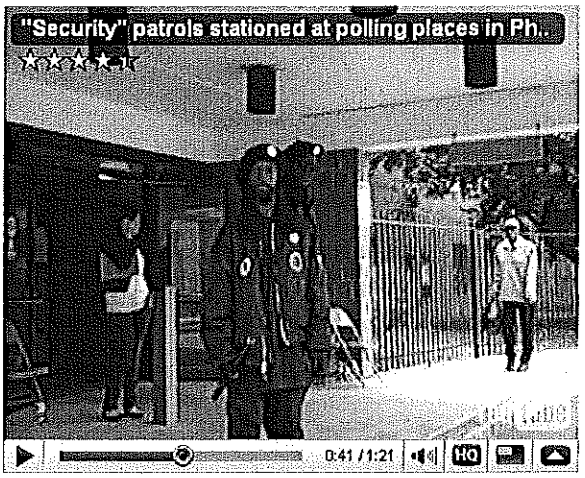
1 tweet retweet Share

In the Obama administration, try to apply the civil rights laws equally and you're gone. That was the experience of the justice department attorney who pressed charges against a group of Black Panthers that were intimidating voters in a Pennsylvania polling place. (Story is here.)

Christopher Coates, the department's veteran voting rights section chief, has been "detailed" (duties unknown) for 18 months to the U.S. Attorney's office in South Carolina. The department is trying to pass off the transfer as having nothing to do with his enforcement of the voting rights act against the Black Panthers; the effort is utterly unconvincing.

The incident was captured on video (below) and widely circulated on YouTube, raising a national furor. Despite the clear evidence before everyone's eyes, political appointees in Obama's justice department dismissed the charges. The U.S. Commission on Civil Rights sought to investigate the dismissal, but has been rebuffed by Obama's justice department.

This is serious stuff. The message is clear to career administrators: Try to enforce the law in a fair and impartial way, and you're *gone*. Political interference of the enforcement of our laws--as Democrats correctly reminded us during the Bush administration--is unacceptable. Congress, in its oversight function, should get to the bottom of this miscarriage of justice. But because all the committees are control by Democrats, it won't.



SEARCH CHICAGO NOW
Search
Dennis Byrne's Barbershop All of Chicago Now

Get Dennis Byrne's Barbershop RSS Feed

SUBSCRIBE VIA EMAIL
Go

CHICAGONOW.COM ON DIGG
Upcoming Popular
25 Jay Cutler, Old School Football [Video]
1 2009 Year In Review Tattoos
1 Putting Them to the Test: The Top Ten Alternatives to Craigl

CHICAGONOW.COM ON FACEBOOK
ChicagoNow on Facebook
Become a Fan
ChicagoNow has 5,563 Fans
Kevin Pawel Cheryl Joe Christina

Page 1

UNITED STATES COMMISSION ON CIVIL RIGHTS

IN RE:

NEW BLACK PANTHER PARTY

Philadelphia, Pennsylvania
Tuesday, January 12, 2010

TRANSCRIPT of testimony of ANGELA COUNTS, as taken by and before Cherilyn M. McCollum, a Registered Professional Reporter, at the HILTON GARDEN HOTEL, 1100 Arch Street, commencing at 9:26 o'clock in the forenoon.

Page 2

B E F O R E:
(BY TELEPHONE)
MICHAEL YAKI, COMMISSIONER
ALEC DEULL, SPECIAL ASSISTANT
NICK COLTEN, SPECIAL ASSISTANT
JOHN MARTIN, SPECIAL ASSISTANT

A P P E A R A N C E S:
UNITED STATES COMMISSION ON CIVIL RIGHTS
OFFICE OF THE GENERAL COUNSEL
BY: DAVID P. BLACKWOOD, ESQ.
MAHA JWEIED, ESQ.
624 Ninth Street, N.W.
Suite 631
Washington, D.C. 20424
(202) 376-7622
dblackwood@usccr.gov
Attorneys for The Commission

A L S O P R E S E N T:

KIMBERLY TOLHURST, ESQ. (BY TELEPHONE)

Page 3

I N D E X

Page 4

ANGELA COUNTS, after having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BLACKWOOD:

Q. Mrs. Counts, would you please state your full name and address for the record.
A. Angela Counts, 3413 North Lee Street.
Q. And are you employed?
A. No.
Q. The questions I'm going to ask you about are what occurred on Election Day in 2008. You were working at 1221 Fairmount?
A. Yes.
Q. And as a poll watcher?
A. Yes.
Q. For what party were you working for?
A. Republican.
Q. Are you registered as a Republican?
A. No.
Q. Are you registered as a Democrat?
A. Yes.
Q. And had you ever worked as a poll

Page 5

watcher before?
A. Yes.
Q. How many times?
A. About three or four times.
Q. Is that usually with your husband?
A. Yes.
Q. Always with your husband or --
A. Well, no. Sometimes -- we both are poll watchers. But that was the second time they put us together. Normally we're not in the same location.
Q. Okay. So you had worked with him together as a team in 2004, or do you recall when it was?
A. I don't know what year it was, but I know we did work together before.
Q. And you generally work for the Republicans?
A. Yes.
Q. Have you ever worked for the Democrats?
A. No.
Q. How did you get the job?
A. It was through Ms. Denise. I

Page 6

believe she passed. But she worked with -- he's a minister. I can't remember -- I can't think of his name right now. But I know Ms. Denise was the one that started us with being poll watchers. I can't think of --
Q. Did she have an Italian last name?
A. No, I don't know. I just know her name was Ms. Denise.
Q. Okay.
And do you get paid to be a poll watcher?
A. Yes.
Q. How much did you get in 2008?
A. I believe $200.
Q. Okay.
When did you arrive -- now, going back to Election Day in 2008 --
A. Okay.
Q. -- around what time did you all arrive?
A. 6:00, I believe.
Q. And you arrived together?
A. Yes.
Q. Was anybody from the New Black

Page 7

Panther Party there when you arrived?
A. Nobody was there when we arrived. When we arrived at like -- nobody was outside, like no voters.
Wait. I don't know -- I don't know if we arrived at 6 or 7. I know it was early in the morning.
Q. Did you get there before the polls actually opened?
A. Yes. Yes, we got there before they opened, because they opened the machines while we were there. But there was nobody, like, outside, nobody around.
Q. Could you describe for us the physical layout. For example, I come up to Fairmount; I go through the doors. Where are you going to be?
A. We were at the left. When you go in, you go around, and it was a desk there, and there was a door right -- like around the front of the desk where the security is, there was a door right on the side that goes right through the doors, and the voting machines was in there.
Q. Is this a nursing home or a

Page 8

retirement home?
A. I don't know if it's a nursing home or a retirement home. I know it's like elderly people in there.
Q. And from where you were sitting could you see the entrance?
A. No. No. We were -- when you go around and go in, it was like a -- we could see like -- it was like a wall right here and we were sitting right here in the corner, and you can see, like, the glass. We could see out the window.
Q. Of the entrance?
A. No, we couldn't see the entrance.
Q. Okay. You could see out a window on the side?
A. Right, right.
Q. Did there come a time when people indicated that there was some kind of disturbance out front?
A. Well, we saw when the cops came. We didn't hear, because where we were we couldn't hear anything, because when the people were coming in, they had lines, like, at the door. Like, we couldn't even get out the entrance because the

Page 9

doorway was so crowded with people, the line coming in to vote.
Q. And that was first thing in the morning?
A. As soon as they opened up, yes.
Q. Okay.
And tell me about when the police arrived.
A. That's all we saw was the police arrive, but we didn't know what was going on.
Q. Did either of you get up to look outside to see what was happening?
A. No. No.
Q. How did you know that the police had arrived?
A. We saw them through the window.
Q. Oh, through that side window --
A. Yes, that's where we were looking out the window when we saw -- we didn't know something was going on because we couldn't see. We just saw when the police came, and I said to Larry, I said, "The cops are here. I wonder what's going on."
And we just sat there watching out

Page 10

the windows, but we couldn't, like, stay watching because we had to watch -- you know, like poll watchers. We were watching the people coming in to vote and everything.
Q. And just so the record is clear, the window that you looked out to see the police was the side window in the voting room, not the front entrance?
A. Right.
Q. Okay.
Did anybody tell you what was going on?
A. No. Well, the people were talking. People were talking, but -- we heard them say the Panthers was there, but they didn't tell us, like come in and to talk to us, because we didn't talk to the people.
Q. When you say "the people," who --
A. Like the voters. They were talking as they were coming in, like saying stuff. They were talking to each other and we heard them, but nobody came in, like, and said to us, "The Panthers are here." Nobody did that.
Q. Okay. So you were just overhearing

Page 11

other people talk about it?
A. Yes, yes.
Q. Did either you or your husband contact anybody about what you were hearing from people saying that the Panthers were outside?
A. No.
Q. Did you ever speak to a Mr. Wayne Byman?
A. I don't know.
Q. He's an -- he's African-American. He claims he came by early in the morning and saw the Black Panthers there and then talked to you.
A. No.
Q. Okay.
A. Nobody talked to me about the Panthers. I don't know anything about the Panthers. Nobody came to me and said anything. I just overheard the people when they were coming in.
Q. Right.
A. But talk to anybody, I didn't talk to anybody, because we were informed when we became poll watchers that we don't talk to anybody, and they introduced us to the guy that would be coming by to check on us.

Page 12

Q. Who was that guy?
A. I can't remember his name, but he was at the office where Ms. Denise was. And he was the one that, like, took us over there. When we had to go down -- we were poll watchers downtown one time, and, like, wherever we had to go, he would drop us off to our locations. And we know him because he was always -- it was always the same guy.
But he didn't talk to us about the Panthers because he didn't know anything about the Panthers. He came, he bought us lunch and coffee, but --
Q. Do you know who was that?
A. I can't remember his name.
Q. Do you know what he looks like?
A. Yes.
Q. Could you describe him?
A. He was a Caucasian guy. He was, like, muscular build. He drove, like, a sports car.
I mean, I don't know if I'm helping you or not, but I don't know -- that's all I know.
Q. About how old is he?

Page 13

A. Probably about early 40's, something. I don't know.
Q. And he's the one that -- and you had worked with him before?
A. Yes.
Q. Was that at the election that you mentioned before that you and your husband had worked at together?
A. Yes.
Q. So he drives you there --
A. He drove us. We were in Center City one time and he dropped us off down there to our location because he had to go down and check to see if, you know, all the people were there. And he said he was -- we had went to the office where he was at and he dropped -- he said he would drop us off down there.
Q. Okay. And in 2008 he drops you off, right?
A. No, he didn't drop us off in 2008.
Q. Let's talk about 2008 then.
A. Okay.
Q. All right.
But he at least worked with you?

Page 14

A. Yes.
Q. All right. Did he bring you lunch?
A. He brought us coffee and doughnuts.
Q. What, in the morning?
A. Yes.
Q. At that time did he tell you anything about any incidents or anything going on outside?
A. No. There was nothing going on when he came the first time.
The second time when he came was when the -- like -- but the crowd had died down when he came. And he was asking was everything okay. And we was like, yeah, everything was fine, because nothing happened inside. Whatever happened happened outside.
But we couldn't even see because we couldn't even see the front to see what was going on. We could see from the side. I saw, like, the news channels out there and, like, the cameras. I could see the cameras from the side, but over here we couldn't see anything, so I don't know what was going on out front.
Q. Did he tell you what he had

Page 15

observed?
A. No. I don't think he observed anything. He wasn't there when all that was going on. When he came, everything had died down.
Q. Let me back up so I understand the timing. The first time is he's bringing you coffee and doughnuts?
A. Right.
Q. The second time is --
A. But he came, like, lunch -- the first time he came was, like, in the morning just to make sure we were there. He talked to us to make sure everything was okay. He asked us were we there when the machines opened, stuff like that, and then he left. He told us he would be back to check on us.
And then he came back -- when he came back at lunchtime, that's when everything -- the commotion and everything, like, had died down, like the cops were gone. You could see people were out there talking, but there was nothing going on when he came.
Q. Did the reporters stay out there for a while longer?

Page 16

A. They were there for a while, yes.
Q. Okay. So they stayed much longer than the police?
A. Yes.
Q. Was there any sort of system, if you had seen any irregularities or problems, for you to contact the Republican Party?
A. No, there was nothing that we needed to contact them for.
Q. No, I know what you're saying.
A. Okay.
Q. But was there a method by which you were supposed to contact them?
A. Yes.
Q. All right. And what was that?
A. If anything happened, like if anybody came in there, like, trying to be disruptive or anything, we were supposed to call them.
Q. And you had what, cell phones to call?
A. Yes.
Q. Okay.
And your view is that only mattered

Page 17

if it happened inside the polling place itself?
A. No, because I couldn't see what was going on outside, so I didn't know what to tell them. What was I going to tell them if I called? The cops were outside?
We were told not to go outside. Like, we were told to stay inside; we were poll watchers, to stay inside and watch the polls. If something's going on outside and I leave to go outside, then who's watching the polls inside?
So we just stayed inside, but we kept watching to see, you know, if whatever was going on outside was going to come in. We kept looking around the people out the door and we couldn't see anything. It was so crowded at the doorway to get in.
Q. At the morning?
A. In the morning, yes.
Q. Okay.
Let me just show you what's been marked as Exhibit 1.
A. Okay.
Q. And only for the purposes of looking at that photo at the bottom.

Page 18

A. I didn't see this.
Q. That's what I'm trying to find out.
This is just a still part of a video that was taken about the outside of the building.
A. Okay.
Q. And did you ever see any of the two black gentlemen before?
A. No.
Q. And you didn't see them that day either, correct?
A. No.
Q. The white woman standing behind them, her face is somewhat obscured, but she's wearing the white T-shirt and short jacket talking on the cell phone, did you ever see her before?
A. No.
Q. Let me mention some names and give you some descriptions and tell me whether you saw these individuals that day.
A. Okay.
Q. There was a tall white man wearing a long white shirt and blue jeans. I believe his name was Chris Hill. Did he ever come in to speak to you or your husband?

Page 19

A. I don't remember -- I can't -- I really can't remember, but nobody came in to talk to us.
Q. Okay. Nobody?
A. No, just the man that we worked with. Like, we didn't talk to anybody. We didn't talk to anybody. Nobody came in to talk to us.
The most I found out about this is when they came to my house asking me questions. And I was like, I didn't even know what was going on. I heard the people talking about it, but to see it for myself, I didn't see anything.
Q. Okay. The people that were coming in that you were overhearing, what were they saying?
A. They were saying something about the -- they heard that the Panthers was out there and the cops was out there, and they was trying to see what was the cops going to do. That's what we heard the people saying.
But when me and Larry looked out the window -- because we even walked, like, further down in the room, because it was a big window, trying to go down as far as we could go to see what

Page 20

we could see, and we still couldn't see. Because I guess the way the building is made, we couldn't see the front. It guess because it goes around like that and it's like a wall right here, we couldn't see around the front. We couldn't see anything.
Q. The entrance kind of sticks out?
A. Yes.
Q. So that kind of blocked your view from that side room?
A. Yes.
Q. Did any of those people that you overheard, did they indicate any concern?
A. No. They were still voting. The people came in and voted regardless. It didn't break up the line. It didn't stop the people from voting. They still came in.
Q. Was there any indication what time the Panthers left?
A. I don't know. I never saw them there, so I don't know what time they left.
Q. Did you ever introduce or meet the Democratic poll watchers there?
A. Yes.
Q. So you met Mr. Vann?

Page 21

A. I don't remember names, but I did meet some people there.
Q. Do you recall what they looked like?
A. One of them was -- there was a Caucasian man there and there was an African-American guy there from the Democrat Party.
Q. Was the African-American man wearing a green jacket with white stripes on the shoulder?
A. Oh, I don't know.
Q. Don't recall?
A. I can't remember. No.
I saw a lot of people on that day.
Q. Did you ever talk to the election judge at all?
A. Yes.
Q. Did the election judge ever at any point get outside -- get up and look outside to see what was happening?
A. Oh, I don't remember, sir.
Q. Okay. The Caucasian man that you say was a Democratic worker, what position did he have?
A. He was a poll watcher, also.
Q. Do you know whether he called the police?

Page 22

A. I have no idea. Where he was sitting, I couldn't see him calling the police, because he was sitting -- Larry and I was on this side. The doorway was here. He was sitting in the corner over there. So we saw more than what he could see. So I couldn't see him calling the police and he couldn't see what we could see.
Q. So you were closer to the window?
A. Right.
Q. He was on the other side of the room --
A. There was no window over there. He was, like, in the corner against the wall, just like that. He couldn't see no more -- and we could see -- the people were coming in and the line was here. He couldn't even see us from the line.
So if he called the police, I don't know why he called the police, because all he could see was the crowd coming in. He couldn't see what we could see. And what we saw, you know, was like the cops and the camera. That's all we saw. We couldn't see the people.
Q. So it's safe to say you don't know

Page 23

who called the police?
A. Right. I have no idea.
Q. Okay.
You had mentioned just a minute ago some people came to talk to you about it. Do you know who they were?
A. Came to talk -- oh, to my house?
Q. Yes.
A. The FBI. The FBI came. And somebody else came, but I can't remember who they are. Like, they came up to talk to us and they asked us questions about it.
Q. Can you describe the other people?
A. What other people?
Q. White? Black?
A. They were white. Two white gentlemen.
Q. Two white guys. And those were the FBI agents?
A. One was the FBI and one said he was a -- something else. I don't know what he was.
Q. From the Department of Justice?
A. Yes.
Q. Heavyset? Young? Old? Or you just

Page 24

don't remember?
A. One was an older guy, like an older man, thin build. And the other one was a younger guy.
Q. And there's just the two of them?
A. Yes.
Q. Did they talk to your husband as well?
A. Yes.
Q. And about how soon after the election was that?
A. That was like this year sometime. I would say probably about June.
Q. June of --
A. July.
Q. Of 2009?
A. Yes.
Q. Okay.
The election is in November, and it was about six, seven months after that?
A. Right.
Q. Okay.
And did you give a statement?
A. No. I told them I didn't -- I told

Page 25

them like I'm telling you, I didn't know anything. We didn't see anything; we didn't know anything.
And I asked him, like, why -- we told them -- because when we was leaving -- when we were leaving from the site where we were poll watchers, the guy that I was telling you about that came to check on us, like, we were telling him, like, we didn't know, like, what was going on outside. And he said don't worry about it because we didn't know anything. We didn't know what was going on, and I wasn't going to lie and make up something. The people said it, but we couldn't see it. You know, and that's, like, hearsay. I'm hearing what you're saying, but I can't see what you're talking about it. And he said, "Don't worry about. It's okay."
And then, like, later on I'm wondering, like, why the people coming to my house when I told people we don't know what was going on? I told Larry, "I'm not going to lie and tell them we saw something we didn't see."
These are the Panthers right here?
Q. That's my understanding, yes.
A. I never saw these people. I never

Page 26

saw none of this. I didn't see these people like this. I never saw none of that.
Q. You stayed in your room?
A. We stayed in the room.
From where we were at, I never saw them outside. If I saw them, I would say I saw them.
If I saw them, I wouldn't have known who they was anyway. I don't know who the Panthers are.
Q. Okay. Did you hear about any incident involving white supremacists that day?
A. No.
Q. Did anybody from the Black Panther Party contact you after the election?
A. No, uh-uh.
Q. And just to be clear, when the FBI and some other man met you, they didn't ask you to sign any statement?
A. No.
Q. Did you see or hear any voters being turned away?
A. No.
Q. Did anybody indicate to you -- and I

Page 27

understand you're inside -- that people were turning away from the polls?
A. No.
MR. BLACKWOOD: Commissioner Yaki, do you have any questions?
COMMISSIONER YAKI: No, I don't.
MR. BLACKWOOD: Thank you very much. I very much appreciate you taking the time.
THE WITNESS: You're welcome.
(9:45 a.m.)

Page 28

C E R T I F I C A T E

I, Cherilyn M. McCollum, a Certified Court Reporter and Notary Public, do hereby certify that, prior to the commencement of the examination, the witness and/or witnesses were sworn by me to testify to the truth and nothing but the truth.

I do further certify that the foregoing is a true and accurate computer-aided transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither of counsel nor attorney for any party in this action and that I am not interested in the event nor outcome of this litigation.

_____
Certified Court Reporter
XI02094
Notary Public
My commission expires 3-22-11

Dated: _____

EXHIBIT 1 1/12/10 CMM PENGAD 800-631-6989

Obama's corruption of civil rights law

Dennis Byrne
on 12.29.09 | no comments

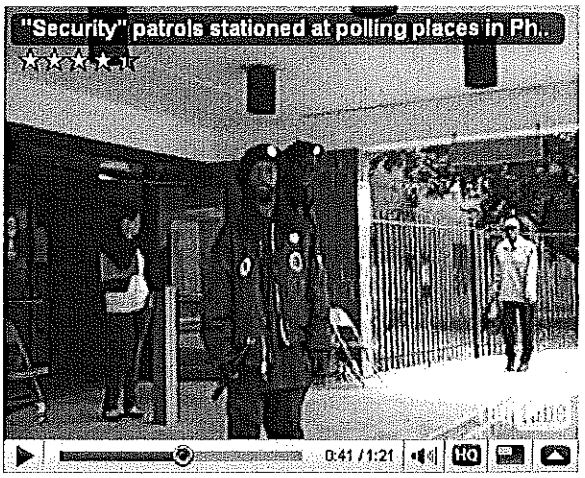
1 tweet retweet Share

In the Obama administration, try to apply the civil rights laws equally and you're gone. That was the experience of the justice department attorney who pressed charges against a group of Black Panthers that were intimidating voters in a Pennsylvania polling place. (Story is here.)

Christopher Coates, the department's veteran voting rights section chief, has been "detailed" (duties unknown) for 18 months to the U.S. Attorney's office in South Carolina. The department is trying to pass off the transfer as having nothing to do with his enforcement of the voting rights act against the Black Panthers; the effort is utterly unconvincing.

The incident was captured on video (below) and widely circulated on YouTube, raising a national furor. Despite the clear evidence before everyone's eyes, political appointees in Obama's justice department dismissed the charges. The U.S. Commission on Civil Rights sought to investigate the dismissal, but has been rebuffed by Obama's justice department.

This is serious stuff. The message is clear to career administrators: Try to enforce the law in a fair and impartial way, and you're *gone*. Political interference of the enforcement of our laws--as Democrats correctly reminded us during the Bush administration--is unacceptable. Congress, in its oversight function, should get to the bottom of this miscarriage of justice. But because all the committees are control by Democrats, it won't.



SEARCH CHICAGO NOW
Search
Dennis Byrne's Barbershop All of Chicago Now

Get Dennis Byrne's Barbershop RSS Feed

SUBSCRIBE VIA EMAIL
Go

CHICAGONOW.COM ON DIGG
Upcoming Popular
25 Jay Cutler, Old School Football [Video]
1 2009 Year In Review Tattoos
1 Putting Them to the Test: The Top Ten Alternatives to Craigl

CHICAGONOW.COM ON FACEBOOK
ChicagoNow on Facebook
Become a Fan
ChicagoNow has 5,563 Fans
Kevin Pawel Cheryl Joe Christina

UNITED STATES AMERICA

COMMISSION ON CIVIL RIGHTS

+ + + + +

DEPOSITION

IN THE MATTER OF:	
NEW BLACK PANTHER PARTY	

Tuesday,
February 2, 2010

Washington, D.C.

DEPOSITION OF:

MALIK ZULU SHABAZZ

called for examination by Counsel for the U.S. Commission on Civil Rights, pursuant to Notice of Subpoena/Agreement of Counsel, in the offices of the U.S. Commission on Civil Rights, located at 624 Ninth Street, N.W., when were present on behalf of the respective parties:

ORIGINAL

APPEARANCES:

On Behalf of the US Commission on Civil Rights:

DAVID P. BLACKWOOD, ESQ.
Office of the General Counsel
of: U.S. Commission on Civil Rights
624 Ninth Street, N.W.
Washington, D.C. 20425
(202) 376-7622

On Behalf of the Witness:

MALIK ZULU SHABAZZ, pro se
(did not appear)
4043 Clay Place, N.E.
Washington, D.C. 20019

ALSO PRESENT:

Todd Gaziano, Commissioner (via telephone)
Michael Yaki, Commissioner (via telephone)
Alec Deull, Assistant (via telephone)
Nick Colten, Staff
Pam Dunston, Staff
Tim Fay, Staff
Maha Jweied, Staff
John Martin, Staff
Alison Schmauch, Staff
Kimberly Tolhurst, Staff
Michele Ramey

P R O C E E D I N G S

10:01 a.m.

MR. BLACKWOOD: Good morning. This is David Blackwood, the General Counsel for the U.S. Commission on Civil Rights.

It is now a little after 10:00 o'clock on February 2nd, 2010.

Could the person who just came on line please identify themselves?

(conference call tone)

COMMISSIONER GAZIANO: Todd Gaziano.

MR. BLACKWOOD: Okay. For the record, the following people are present: John Martin, Alison Schmauch, Nick Colten, Tim Fay. On the telephone are: Commissioner Gaziano and special assistant Alec Deull.

It is, as I say, a little after 10:00 o'clock and, at the moment, our witness is not present.

We are going to be here for at least 20 minutes waiting --

(conference call tone)

MR. BLACKWOOD: Who else is on line?

COMMISSIONER YAKI: Commissioner Yaki just joined.

MR. BLACKWOOD: Commissioner Yaki, I have started the deposition. We're just going on the record. Our witness is not present.

COMMISSIONER YAKI: I see.

MR. BLACKWOOD: What I just said is that we will wait approximately 20 minutes to see if he appears.

I also went on the record that I had sent a letter asking him to confirm that he would appear; and asking if he had counsel to confirm that; and, 3, if he was going to assert the Fifth Amendment, that he also acknowledge that. I received no response.

So, that said, we are going to just sit here and wait for the witness.

(Whereupon, the proceeding went

off the record from 10:02 a.m. to 10:26 a.m.)

MR. BLACKWOOD: Okay, we are back on the record. This is, again, David Blackwood, General Counsel at the U.S. Commission on Civil Rights.

It is 10:25 on February 2nd, 2010. We are here for the deposition and return of documents involving Dr. Malik Zulu Shabazz.

Dr. Shabazz has not appeared. It is, as I say, 10:26. The deposition was scheduled for 10:00 o'clock.

The record should also reflect that on January 25, 2010 I sent a letter to Dr. Shabazz by certified regular mail as well as by email requesting that he confirm that he'd appear for his deposition and that he indicate whether he was going to assert any Fifth Amendment rights and whether he would be represented by counsel. I received no response to that letter.

Based on this record, we will be requesting that the Department of Justice

enforce this subpoena and the document request.

I'm going to close the record at this time unless any of the Commissioners wish to make any additional statement.

COMMISSIONER YAKI: It's time to wrap this puppy up.

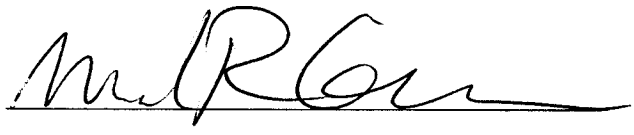
MR. BLACKWOOD: Then the record is closed.

Thank you, Mr. Court Reporter and, thank you, everyone else.

(Whereupon, the proceeding was concluded at 10:27 a.m.)

CERTIFICATE

This is to certify that the foregoing proceedings in the matter of: The Deposition of Malik Zulu Shabazz held on: February 2, 2010 at the location of: Washington, DC were duly recorded and accurately transcribed under my direction; further, that said proceedings are a true and accurate record of the testimony given by said witness; and that I am neither counsel for, related to, nor employed by any of the parties to this action in which this deposition was taken; and further that I am not a relative nor an employee of any of the parties nor counsel employed by the parties, and I am not financially or otherwise interested in the outcome of the action.



Notary Public/Reporter in and for

District of Columbia

My commission expires

March 31, 2011

THE UNIVERSITY of MARYLAND
SCHOOL OF LAW

New Black Panther Party Investigation

Correspondence

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

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

May 9, 2010

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Holder:

This letter addresses many unfulfilled discovery requests relating to the U.S. Commission on Civil Rights' ("Commission") investigation of the implications of the U.S. Department of Justice's ("Department") actions in the New Black Panther Party ("NBPP") litigation. It also raises several important questions regarding the proffered testimony of Assistant Attorney General Thomas Perez before the Commission, all of which require satisfactory resolution with sufficient time before the Commission's scheduled May 14 hearing to ensure that Mr. Perez's appearance will be worthwhile. To avoid another delay, we would appreciate a meaningful response to this letter by noon on Tuesday, May 11.

The Commission has been patient during its now eleven-month-long investigation. Despite its statutory duty to cooperate fully with the Commission's inquiry, the Department has repeatedly delayed the production of critical documents and information. When it has provided information, the Department appears to have done so only to maintain the appearance of cooperation and has timed its production of voluminous, but largely non-responsive documents to prevent adequate review by the Commission before critical junctures in the Commission's scheduled proceedings. It has further refused outright to provide answers and documents to some of the Commission's most critical questions and requests, and has refused to permit its employees with substantive knowledge of this case to cooperate with the Commission's subpoenas. Most recently, it has essentially ignored our General Counsel's request for a meeting with Department representatives regarding unresolved discovery disputes, despite the Department's earlier agreement to schedule such a meeting. Nevertheless, in good faith and despite the fact that it is out of turn, the Commission has been willing to accept the Department's proffer of Mr. Perez's testimony.

While it appreciates that the Department has made Mr. Perez available, the Commission needs answers and/or assurances with respect to the following in advance of the Assistant Attorney General's testimony so as to adequately prepare:

(1) *Is Mr. Perez available to testify for a longer or additional period of time?* The Department has indicated that Mr. Perez may only be free to testify for 90 minutes on May 14. This is unlikely to be sufficient for his oral statement and for eight commissioners to adequately

question him. If Mr. Perez cannot reserve three hours to testify on May 14, the Commission could probably reschedule his appearance on or around its next scheduled in-person meeting date of June 11. Alternatively, Mr. Perez could appear on May 14 and on or around the date of the Commission's next in-person meeting. If none of those options is possible for Mr. Perez, we request that the Department substitute the Associate Attorney General, who supervised the Civil Rights Division during the time period critical to the decisions in this case and was informed of and approved the litigation decisions at issue, at either the May 14 hearing or on or around the Commission's June 11 meeting date.

(2) *Will the Department commit to providing other witnesses to the Commission within a reasonable period of time, and if so, whom will it permit to provide testimony?* The Department needs to confirm that Mr. Perez will not be the only Department employee or official permitted to provide testimony to the Commission. The Assistant Attorney General was not with the Department during the conduct of the NBPP litigation and his direct knowledge of the case is therefore limited. However, there are other officials with far more direct knowledge of the actions taken in the NBPP litigation and others with experience investigating and litigating other voter intimidation incidents. For example, according to the Department's Response to Interrogatory No. 4 and Supplemental Interrogatory Response Nos. 1 and 6, Associate Attorney General Thomas Perrelli supervised the Civil Rights Division during the time when the decisions were made to dismiss three defendants and file for a narrow injunction against the fourth in this case. The responses also show that Mr. Perrelli was informed of the decisions when they were being made and may have briefed others like you on the Civil Rights Division's decision. Senior, career litigators in the Voting Section could also answer important questions about the facts in the NBPP litigation (even if the Department instructs them not to discuss internal deliberations) as well as key questions regarding prior (and now closed) investigations, which evidence is sought by the Commission.

(3) *Has President Obama or you formally invoked executive privilege to prevent the disclosure of information to the Commission?* The Department continues to object to answering questions and providing documents on vague "deliberative process" grounds, but that is insufficient to override DOJ's statutory duty to comply "fully" with the Commission's requests unless the President's constitutional executive privilege has been properly invoked, and even then, the privilege is not absolute.[1] The Supreme Court has stated plainly that executive privilege must be invoked personally by the President or a department head.[2] The Commission is entitled to know whether executive privilege actually has been invoked, by whom, and what the process will be to discuss selective waiver for various answers and documents.

(4) *Will the Department appoint a special counsel to enforce the Commission's subpoenas for the appearance of Department witnesses?* The Commission is examining the manner in which the Department handled the New Black Panther Party litigation. In furtherance of this examination, the Commission has asked the Department to enforce subpoenas that have been issued to Department employees. The Department has refused to do so. We believe the

[1] *United States v. Nixon*, 418 U.S. 683, 706 (1974).

[2] *See United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). Executive 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." *Id.* (citations omitted).

Department is in an untenable position regarding such enforcement. Yet we have received no response to our request for the appointment of a special counsel with the authority to litigate on behalf of the Commission to seek enforcement of Commission subpoenas. We renew our request for the appointment of a special counsel with no interest in the outcome of the case. In the alternative, the Department should explain why it does not believe that there is a conflict sufficient to warrant the appointment of a special counsel

(5) *Finally, will Mr. Perez come to the Commission's hearing prepared to testify knowledgeably about the above issues, as well as the following?*

- If executive privilege has been invoked, the process to consider waiver of alleged privileges for information and documents that are central to the Commission's investigation and do not seriously implicate Department interests.

- All Department officials involved in the decision (regardless of the deliberations or the deliberative process details) to dismiss aspects of the NBPP lawsuit and their degree of knowledge of the facts that gave rise to the lawsuit.

- The purpose and scope of the OPR investigation, what actions or incidents prompted it, when it will be completed, and whether it is primarily investigating the original filing decision or the decision to dismiss.

- The scope and applicability of section 11(b) of VRA and 18 U.S.C. § 245(b), as well as the remedies available under these statutes.

- Past reports and investigations of voter intimidation.

- Other examples of cases (voting rights or otherwise) in which the Department abandoned all or most of it claims not in the course of ongoing and contested litigation, but after default by defendants and an entry of that default pursuant to the Federal Rules of Civil Procedure.

- The specific First Amendment issues implicated by defendants' appearance or conduct that the Department has asserted justified its dismissal against three defendants and its pursuit of a narrow injunction binding the fourth.

- The relevance of one of the defendant's credentials as an official poll watcher to the decision to dismiss the case against him.

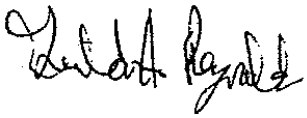
In addition to the issues discussed above, an appendix to this letter is attached which lists outstanding discovery disputes. The Department has offered to meet with representatives of the Commission to discuss and resolve these disputes. To reduce the need for additional hearings, such meeting must occur as early as practicable next week, but not later than Wednesday, May 12. Documents provided to the Commission as a result of this meeting would have to be delivered to the Commission by close of business on Wednesday, May 12, to provide any chance for even cursory review before the May 14 hearing.

Finally, we would appreciate answers in writing to the above by noon on Tuesday, May 11, for the Commission to evaluate whether Mr. Perez's testimony can reasonably be expected to

advance its investigation, which it has undertaken pursuant to its statutory authority to, among other things, assess the Department's enforcement of the Voting Rights Act.

Thank you for your attention to these matters.

Sincerely,



Gerald A. Reynolds
CHAIRMAN

Attachment

Appendix

Outstanding Discovery Issues in the New Black Panther Party (NBPP) Voter Intimidation Investigation

GENERAL DISCOVERY ISSUES

1. DOJ has refused to permit subpoenaed employees to provide testimony.
2. DOJ has not answered whether it will appoint a special counsel to seek to enforce the Commission's subpoenas against the Department.[1]
3. DOJ has failed to say whether it has invoked executive privilege, who has invoked it, and as to which document or issue it has been invoked.[2]
4. With regard to documents withheld, DOJ has failed to specify the privilege being invoked to withhold the document.[3]
5. DOJ has not provided a privilege log for documents withheld.[4]
6. Redacted declarations, incident reports, and other documents.
7. Although Assistant Attorney General Thomas Perez has been offered to testify, "he is not at liberty to discuss internal deliberations."[5]
8. DOJ has said it "is 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**."[6]
9. DOJ says it "has provided documents responsive to the Commission's requests . . . through the date of the court's May 18, 2009 order entering judgment . . . . To the extent that any documents after this date provide additional information that is **material** to the Department's decision to obtain relief against [Minister King Samir Shabazz] and to dismiss claims against the other three defendants, we have provided those documents as well. We have not included documents that post-date the May 18, 2009 ruling resolving the litigation and that do not provide additional information **material** to the Commission's examination of decisions in that litigation."[7]

DOCUMENTS KNOWN OR BELIEVED TO EXIST

1. Incident reports with regard to the events in question
2. Any reports of other instances of voter intimidation by the NBPP during the 2008 election
3. Any reports received from third parties with regard to the activities, practices, or actions of the NBPP during the 2008 election

<u>Documents Referred to in the memo from Christopher Coates et al. to Grace Chung Becker (Dec. 22, 2008)</u>

Witness statements (not signed Declarations) for the following:

4. Mike Mauro

---

[1] *See* Letter from David Blackwood to Joseph Hunt of March 30, 2010.
[2] *See* Instruction No. 10, Interrogatories and Document Requests (Dec. 8, 2009); Letter from Blackwood to Hunt of Dec. 8, 2010.
[3] *See* Instruction No. 10, Interrogatories and Document Requests (Dec. 8, 2009).
[4] *See* Letter from Blackwood to Hunt of March 30, 2010; Letter from Gerald Reynolds to Eric Holder of April 1, 2010.
[5] *See* Letter from Hunt to Blackwood of April 16, 2010.
[6] *See* Letter from Joseph Hunt to Gerald Reynolds of Jan. 11, 2010 (emphasis added).
[7] Letter from Joseph Hunt to David Blackwood of April 16, 2010 (emphasis added).

5. Chris Hill
6. Steve Morse
7. Police Officer Richard Alexander
8. Joe DeFelice
9. John Giordano
10. Wayne Byman
11. Joe Fischetti
12. Larry Counts
13. Angela Counts
14. Harry Lewis
15. Malik Zulu Shabazz[8]

16. Draft Notice Letter to defendants
17. Draft Consent Decree

Documents Referred to in Appellate Section memo (email from Diana Flynn to Steven Rosenbaum of May 13. 2009)

18. Email from Voting Section to Civil Rights Division sent on or about May 1, 2009
19. Memo from Coates et al. to Loretta King (May 6, 2009) (submitted to Commission by Rep. Wolf)
20. Draft Motion for Default Judgment (dated April 30, 2009)
21. Draft Memorandum of Law in Support of Motion for Default Judgment (dated April 30, 2009)
22. Draft Proposed Order (dated May 6, 2009)

UNFULFILLED REQUESTS FOR PRODUCTION OF DOCUMENTS

Document Request Nos. 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 25, 26, 27, 38, 39, 48, and 49

UNANSWERED INTERROGATORIES

Interrogatory Nos. 2, 5, 8, 10, 11, 14, 19, 20, 21, 30, 33, 37, 39, 40, 42, 43, 44, 45, and 46

[8] *See also* Memo from Coates et al. to Loretta King at 4 (May 6, 2009).

David Blackwood

From: Goldberg, Arthur (CIV) [Arthur.Goldberg@usdoj.gov]
Sent: Friday, April 16, 2010 5:41 PM
To: David Blackwood
Subject: Letter responding to request for testimony

Mr. Blackwood:

Immediately below is the text of a letter from Jody Hunt regarding the Commission's request for testimony from the Department of Justice. We are sending this to you in email format because we are having computer problems this afternoon and wanted to be sure you received this today. A hard copy of this letter is being sent via first class mail as well.

Arthur R. Goldberg

Assistant Director

Federal Programs Branch

Civil Division

U.S. Department of Justice

202 514-4783

Dear Mr. Blackwood:

This letter responds to the March 30, 2010 request of the United States Commission on Civil Rights for the Department of Justice to identify a witness to testify at a hearing related to the Commission's planned statutory enforcement report for Fiscal Year 2010. This also responds to your earlier requests for testimony from two career Department employees, Christopher Coates, a Civil Rights Division attorney currently on detail to the United States Attorney's Office for the District of South Carolina, and J. Christian Adams, a trial attorney in the Voting Section of the Civil Rights Division.[1] 1/[The Commission's initial request sought information regarding specific subjects. Your March 30, 2010 letter modified that request to seek testimony regarding the "internal deliberations of the Department relating to the *New Black Panther Party* litigation." This letter responds to all of these requests for testimony from Department witnesses.]

As Department staff explained in your telephone conversations yesterday, we have been working to identify a Department witness for the Commission's hearing and are prepared to make available Assistant Attorney General for Civil Rights Thomas E. Perez. The Commission's March 30, 2010 letter requested testimony from Department employees regarding "the internal deliberations of the Department relating to the *New Black Panther Party* litigation," but our understanding from your conversations yesterday with Department staff is that the Commission's core focus is the decision to dismiss certain claims from that case. While Mr. Perez would testify on that decision and the factors that informed it, he is not at liberty to discuss internal deliberations. Based on the conversation with you yesterday, we understand that the Commission is amenable to having the Assistant Attorney General appear on a separate panel from other witnesses, as is customary for testimony from Assistant Attorneys General, and to work with us to accommodate his schedule on May 14.

The Department carefully considered the request for testimony from Messrs. Coates and Adams pursuant to 28 C.F.R. §§16.21-16.29 and in accordance with the Department's effort to cooperate with the Commission, but will not authorize these employees to testify before the Commission. As we explained, the Department has a longstanding institutional need to protect against disclosures of internal recommendations and deliberations of Department employees, particularly those related to prosecutorial decisions. Such disclosures would have a chilling effect on the open exchange of ideas, advice, and analyses that is essential to the decisionmaking process. It is critical that Department attorneys, particularly career line attorneys, be free to express their opinions and fulfill their responsibilities without fear that they will be subjected to individual examination by either Congress or federal agencies. In addition, we note that to the extent the Commission seeks factual information, that information is being provided through the extensive documents provided to the Commission, the interrogatory responses and supplementary interrogatory responses, and the testimony that will be offered by Mr. Perez. Neither Mr. Coates nor Mr. Adams made the decisions that the Commission wishes to examine. The Assistant Attorney General brings to bear the information of the Civil Rights Division as a whole, and therefore is in a better position to provide the information the Commission seeks.

We are confident that the testimony of the Assistant Attorney General and our responses to the Commission's requests for documents and information should satisfy the Commission's inquiry consistent with our institutional interests.

As discussed during your telephone conversations with Department staff yesterday, Assistant Attorney General Perez is available to testify May 14, 2010, pursuant to the mutually acceptable timing and format arrangements discussed. We appreciate the Commission's patience while the Department has undertaken consideration of the Commission's requests.

Sincerely,

Joseph H. Hunt

Director

Federal Programs Branch

Civil Division

U.S. Department of Justice

Civil Division

Washington, D.C. 20530

April 16, 2010

VIA HAND-DELIVERY AND ELECTRONIC MAIL

Mr. David P. Blackwood
General Counsel
United States Commission On Civil Rights
624 Ninth Street, N.W.
Washington, DC 20425

Re: United States Commission on Civil Rights' Planned Statutory Enforcement Report

Dear Mr. Blackwood:

I am writing to supplement the responses of the Department of Justice ("Department") to the December 8, 2009 requests of the United States Commission on Civil Rights ("Commission") and also to respond to your letter of March 30, 2010 and Chairman Reynolds' letter to the Attorney General of April 1, 2010.

At the outset, please be assured that the Department has consistently sought to respond to the Commission's requests in a good faith and cooperative manner, and has devoted considerable resources in identifying documents and information responsive to the Commission's extensive requests, some of which seek information spanning several decades. The Department's responses to the Commission's interrogatories and requests are based on our review of the relevant documents, and have been prepared in consultation with the career officials in the Civil Rights Division who made the decision in *United States v. New Black Panther Party for Self-Defense*, Civ. Action No. 09-cv-0065 ("Philadelphia Section 11(b) case"), to pursue an injunction against the only defendant in the case alleged to have brought a weapon to the polls and to dismiss voluntarily the other defendants. In addition, we have solicited information from offices outside the Civil Rights Division, including the Federal Bureau of Investigation, the United States Attorney's Office for the Eastern District of Pennsylvania, the Office of the Inspector General, the Office of Professional Responsibility, the Office of Legislative Affairs, the Office of Public Affairs, and other senior management offices of the Department.

At the Commission's request, the Department previously provided over 2,000 pages of documents, which we now supplement with still additional documents and interrogatory responses enclosed herewith. These materials set forth, among other things:

- facts relevant to the Department's litigation of the Philadelphia Section 11(b) case;
- information gathered by the Federal Bureau of Investigation concerning the events that gave rise to the Department's Philadelphia Section 11(b) case;
- other information concerning the reasons for the Department's decision to obtain an injunction against one defendant, and to dismiss claims against three other defendants, in the Philadelphia Section 11(b) case;
- information about other cases in which the Department has asserted claims under Section 11(b) of the Voting Rights Act;
- a detailed description of the Department's authority and procedures for investigating and prosecuting violations of voting rights laws; and
- specific examples of complaints received from the public regarding potential voting rights violations.

The Department is herewith providing additional documents and information consistent with the need to protect confidential and privileged information. The enclosed supplemental documents and information are responsive to Document Request Nos. 3, 12, 14, 20, 23, 24, 29, 30, 32, 33, 40, 44, 50, and Interrogatory Nos. 1, 4, 6, 7, 12, 15, 16, 17, 18, 22, 23, 24, 34, 38, 41.

The Department has endeavored to be responsive to the Commission's inquiries consistent with the Department's institutional interests in protecting against disclosure of internal deliberations. To this end, we have provided documents responsive to the Commission's requests that pertain to the Philadelphia Section 11(b) case through the date of the court's May 18, 2009 order entering judgment against Minister King Samir Shabazz and resolving the case. To the extent that any documents after this date provide additional information that is material to the Department's decision to obtain relief against Minister King Samir Shabazz and to dismiss claims against the other three defendants, we have provided those documents as well. We have not included documents that post-date the May 18, 2009 ruling resolving the litigation and that do not provide additional information material to the Commission's examination of decisions in that litigation.

To provide the Commission with as much information as possible, consistent with the need to protect against disclosures that would harm the Department's deliberative processes (particularly those related to prosecutorial decisions), we have provided certain documents in redacted form. Still other documents have been redacted if they discuss matters unrelated to the

subjects of the Commission's inquiry and therefore are deemed not responsive to any request. To the extent that any documents identify private individuals or lower-level Department personnel, we request that the Commission protect their identity and maintain the confidentiality of all such documents (as you expressed a willingness to do in your March 30, 2010 letter). In addition, the Department has identified approximately 850 pages of photographic and other images that the trial lawyers collected from various sources (including the Internet) over the course of the Philadelphia Section 11(b) case. Because some of the images are graphic, or depict particular individuals, including minors, whose identities are not known to the Department, the Department will make these materials available to the Commission for viewing at our offices upon request rather than by further distribution.

Finally, the Department remains willing to meet with the Commission if it has questions about the Department's responses. We had explained that such a meeting would be most productive after the Commission had received and reviewed our initial responses to its requests, which we provided on January 11, 2010. At that time, we also asked the Commission to inform us after reviewing those responses whether it still wished to meet, and we were unaware that the Commission remained interested in scheduling a meeting until your most recent letter of March 30, 2010.

We trust that the information provided herewith will be of further assistance to the Commission. The Department is responding in a separate letter to the Commission's request for hearing testimony. The Department appreciates your patience while we completed our search for information responsive to the Commission's various requests.

Sincerely,

Joseph H. Hunt/DRB

Joseph H. Hunt
Director
Federal Programs Branch
Civil Division

Enclosures

SUPPLEMENTAL INTERROGATORY RESPONSES OF THE DEPARTMENT OF JUSTICE

Subject to the General Objections and the limitations discussed in the Department's written correspondence with the Commission on January 11, February 26, and April 14, 2010, the Department hereby supplements its interrogatory responses provided to the United States Commission on Civil Rights on January 11, 2010:

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 1: The Department's litigation team attorneys in *United States v. New Black Panther Party for Self-Defense*, Civil Action No. 2:09-cv-0065, were Christopher Coates, then-Chief of the Voting Section of the Civil Rights Division, and attorneys Robert Popper, Spencer Fisher, and J. Christian Adams. Decision-making authority over the litigation was exercised by the litigation team, as well as then-Acting Assistant Attorney General Grace Chung Becker, then-Principal Deputy Assistant Attorney General Lisa Krigsten, then-Acting Assistant Attorney General Loretta King, and then-Acting Deputy Assistant Attorney General Steven H. Rosenbaum.[2] Then-Associate Attorney General Kevin O'Connor, Associate Attorney General Thomas J. Perrelli, and their respective staffs supervised the Civil Rights Division during the relevant time period. *See* 28 C.F.R. § 0.19.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 4: Although none of the defendants responded to the complaint, that did not absolve the Department of its obligation 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 defendant's failure to respond does not eliminate the plaintiff's obligation to ensure that it has a valid case based on the facts and law. *See, e.g.*, Pa. Rules of Prof'l Conduct 3.3(d). At the remedial stage, as with the liability stage, the

---

[2] Ms. Becker, Ms. Krigsten, Mr. O'Connor and his staff, and Mr. Perrelli and his staff were political appointees at the time. The other named individuals are career employees.

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 Civil Rights Division considered not only the allegations in the complaint, but also the evidence collected both before and after the filing of the complaint.

The complaint alleged that the Party "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." Compl. ¶ 12. Notably, the complaint did not allege that those statements or the notice called for any Party member to display weapons at polling locations or do anything that would violate Section 11(b). Nor was there any allegation in the complaint that Malik Zulu Shabazz made any such statement in advance of the election. The complaint did allege that the Party and Malik Zulu Shabazz "managed" and "directed" "the behavior, actions and statements of Defendants Samir Shabazz and [Jerry] Jackson at [the Philadelphia polling place], alleged in this Complaint." Compl. ¶ 12. The Division concluded, however, that the evidence in its possession did not support this allegation.

The complaint also alleged that the Party and Malik Zulu Shabazz endorsed the alleged activities at the Philadelphia polling place after the election. Even assuming that a post-event endorsement is sufficient, as a matter of law, to impose Section 11(b) liability, the Division found the evidence on this allegation to be insufficient to meet its burden of proof.

The Division considered, for example, the statements made by Malik Zulu Shabazz in a television interview on November 7, 2008. The Division also considered that the Party posted the following statement dated November 4, 2008 on its web site: "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. The publicly expressed sentiments and actions of purported members do not speak for either the party's leadership or its membership." As of May 2009, the Division had information indicating that this statement was posted prior to the filing of the civil action. A separate statement posted on the Party website, dated January 7, 2009 (the same date that the complaint was filed), reported the suspension of the Philadelphia chapter because of these activities.

With regard to the alleged activities at the Philadelphia polling place, the Division considered all available information, including signed statements of poll observers or poll watchers at the polling place. The Division considered a video, posted on YouTube, shot on Election Day by an individual who described himself as being a concerned citizen from the University of Pennsylvania, showing individuals entering and leaving the polling place without having their access impeded or obstructed by either Jerry Jackson or Minister King Samir Shabazz.

The Division concluded that the evidence collected supported the allegations in the complaint against Minister King Samir Shabazz. This evidence included his display of a nightstick at the polling place during voting hours.

The Division concluded that the evidence against Jerry Jackson, the other defendant present at the Philadelphia polling place, did not warrant seeking an injunction against him. Philadelphia police came to the polling place, assessed the situation and decided to direct Minister King Samir Shabazz to leave the polling place and allow Jackson, who was a certified

poll watcher, to stay outside the polling place.

In sum, based on the information available in May 2009, the Department decided to seek an injunction against defendant Minister King Samir Shabazz, who is the only individual known to the Department to have brought a weapon to a polling place in Philadelphia, Pennsylvania during voting hours on November 4, 2008. The Department decided to voluntarily dismiss the Section 11(b) claims against the three other defendants based on its review of the totality of the evidence and the applicable legal precedent. Political considerations played no role in that decision.

The district court found that the United States had alleged that Minister King Samir Shabazz "stood in front of the polling location at 1221 Fairmont Street in Philadelphia, wearing a military style uniform, wielding a nightstick, and making intimidating statements and gestures to various individuals, all in violation of 42 U.S.C. § 1973i(b)," (Order of May 18, 2009 at 1), and entered judgment "in favor of the United States of America and against Minister King Samir Shabazz, enjoining Minister King Samir Shabazz from displaying a weapon within 100 feet of any open polling location in the City of Philadelphia, or from otherwise violating 42 U.S.C. § 1973i(b)." Judgment (May 18, 2009). The federal court retains jurisdiction over its enforcement until 2012. The Department considers this injunction tailored appropriately to the scope of the violation and the requirements of the First Amendment, and will fully enforce the injunction's terms. Section 11(b) does not authorize other kinds of relief, such as criminal penalties, monetary damages, or other civil penalties.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 6: The Department has identified the following with respect to communications with the Attorney General before the May 18, 2009 order in the case: The Attorney General was made generally aware by the then-Acting Assistant Attorney General for Civil Rights 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 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.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 7: Although primary responsibility for the litigation resided with the Voting Section of the Civil Rights Division, individuals from the Appellate Section of the Civil Rights Division also were consulted. In addition, the Criminal Section of the Civil Rights Division was consulted about the underlying facts and the decision not to pursue federal criminal charges. *See also* Supplemental Response to Interrogatory No. 1, *supra*.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 12: The Department has 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.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 15: 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 in the case. A copy of that communication is being produced in response to Document Request No. 32. 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.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 16: The Department supplements its response to this Interrogatory by reference to the documents produced in response to Document Request No. 33. The Department has identified no other communications relating to this litigation with any Member of Congress 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 any Member of Congress had a role in any litigation decision in this case.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 17: The Department has identified the following communication with Michael Coard: On March 13, 2009, Department attorney J. Christian Adams contacted Michael Coard, whom he understood represented Defendant Jerry Jackson. Mr. Coard indicated to Mr. Adams that he had agreed to represent Mr. Jackson but needed "to get some homicide cases out of the way." Dkt. No. 12-2 in *United States v. New Black Panther Party for Self-Defense*, Case No. 2:09-cv-00065-SD (E.D. Pa.) (Declaration in Support of Request to Enter Default of Jerry Jackson). Mr. Adams informed Mr. Coard that his client had not responded to the complaint in *United States v. New Black Panther Party for Self-Defense*, and that the United States was considering seeking entry of a

default judgment. *Id.*

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 18: The decision regarding the disposition of the *New Black Panther Party* case, both seeking an injunction as to one defendant and voluntarily dismissing three other defendants, ultimately was made by the career attorney then serving as the Acting Assistant Attorney General for the Civil Rights Division. Another career attorney who was then serving as the Acting Deputy Assistant Attorney General with responsibility for supervising the Voting Section, also participated directly in the decision-making process. These two career Civil Rights Division attorneys have over 60 years of experience at the Department between them, and each worked in the Voting Section at some point during their careers.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 22: The Department supplements its response of January 11, 2010 by reference to documents produced herewith in response to Document Request Nos. 3, 20, and 23.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 23: The Department supplements its response of January 11, 2010 by reference to documents produced herewith in response to Document Request Nos. 3.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 24: *See* Supplemental Response to Interrogatory No. 4, *supra.*

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 34: The then-Acting Deputy Assistant Attorney General for Civil Rights advised the trial lawyers on the *United States v. New Black Panther Party for Self-Defense* matter that a ministerial filing did not require approval by the Front Office. After being so advised, the trial lawyers filed the preliminary filing

of default with the clerk's office in April 2009 without seeking such approval.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 38: The Associate Attorney General supervises the Civil Rights Division. *See* Supplemental Response to Interrogatory No. 1, *supra*. As is customary with complex or potentially controversial issues, the then-Acting Assistant Attorney General for Civil Rights advised the Associate Attorney General that she was making a case-based assessment of how to proceed in this case, engaged in discussions about how to proceed with the Associate Attorney General's staff, and informed the Associate's office of her decision before it was implemented. We have not identified any communication between the then-Acting Assistant Attorney General for Civil Rights and the then-Deputy Attorney General about the *New Black Panther Party* case prior to the May 18, 2009 court judgement.

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 41: *See* Supplemental Response to Interrogatory No. 18, *supra*.

UNITED STATES COMMISSION ON CIVIL RIGHTS

624 NINTH STREET, NW, WASHINGTON, DC 20425
www.usccr.gov

April 19, 2010

VIA E-MAIL, REGULAR MAIL, AND FAX (202-616-0222)

Joseph H. Hunt, Esq.
Director, Federal Programs Branch
Civil Division
United States Department of Justice
20 Massachusetts Avenue, NW
Washington, DC 20001

Dear Mr. Hunt:

Reference is made to your e-mail communication of April 16, 2010 regarding testimony by DOJ officials before the U.S. Commission on Civil Rights.

Please be informed that the Commission welcomes the offer of testimony by Thomas E. Perez, the Assistant Attorney General for Civil Rights, to occur on May 14, 2010.

Please have a representative contact the undersigned with regard to the timing of Mr. Perez's availability. As discussed among the parties, it is agreed that Mr. Perez will appear on a separate panel from other witnesses, and that we will work to accommodate his schedule.

At the same time, it should be understood that, while Mr. Perez may decline to answer various questions relating to the New Black Panther Party litigation, this in no way limits the questioning by Commissioners.

Lastly, while it is acknowledged that the Department has decided not to authorize Mr. Coates and Mr. Adams to testify before the Commission, the agreement to hear testimony from Mr. Perez does not constitute a waiver as to the Commission's ongoing interest in hearing the testimony of Mr. Coates, Mr. Adams, and possibly other relevant Department officials.

Sincerely,

David P. Blackwood
General Counsel

cc: Chairman Gerald A. Reynolds
Vice Chair Abigail Thernstrom
Commissioner Todd F. Gaziano
Commissioner Gail Heriot
Commissioner Peter N. Kirsanow
Commissioner Arlan D. Melendez
Commissioner Ashley L. Taylor, Jr.
Commissioner Michael J. Yaki
Martin Dannenfelser, Staff Director

UNITED STATES COMMISSION ON CIVIL RIGHTS

624 NINTH STREET, NW, WASHINGTON, DC 20425 www.usccr.gov

April 1, 2010

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

Dear Attorney General Holder:

I write concerning the U.S. Commission on Civil Rights' nine-month old investigation into the circumstances surrounding *United States v. New Black Panther Party for Self-Defense*, Civ. No. 09-0065 SD (E.D. Pa.) ("NBPP"), the Department of Justice's ("Department") decision to dismiss the case against all but one defendant, and its decision-making in similar, past voter intimidation cases.[1] While it has made an effort to appear to be cooperating with the Commission, the Department has repeatedly refused to provide the Commission with basic information regarding the NBPP case, which is contrary to its statutory obligation to cooperate with the Commission,[2] and its recent assurances to the Senate Judiciary Committee.[3] Accordingly, I would appreciate a direct response from you by April 12, 2010, stating whether the Department will cooperate with this investigation, as is required by law. If it is your intention that the Department cooperate, please direct your subordinates to do so and release the employees the Commission has called to testify.

By now, many of the underlying facts of the NBPP case are well known. On May 15, 2009, the Department made the unusual decision to dismiss a voter intimidation lawsuit against three defendants and to obtain a narrow injunction against the fourth. Two defendants were captured on video blocking access to the polls, harassing voters and poll workers, and using racial epithets. One of the defendants brandished a night stick. They wore paramilitary uniforms bearing the insignia of the New Black Panther Party, an organization that has been branded a black-supremacist organization. Bartle Bull, a veteran of the civil rights movement, called it

[1] At a public meeting on September 11, 2009, the Commission voted to make its review of the implications of the NBPP matter the subject of its annual enforcement report. Five commissioners voted in favor, and Commissioners Thernstrom, Melendez, and Yaki were not present for the vote.

[2] Since its founding in 1957, the Commission has taken seriously its special charge to investigate efforts to interfere with the right of citizens to vote and to report to the President, Congress and the public the federal agencies' effectiveness in enforcing civil rights laws such as the Voting Rights Act, among others. *See* 42 U.S.C. § 1975a. Recognizing the importance of the Commission's charge, Congress statutorily mandated that "All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties." *Id.* § 1975b(e).

[3] *See* Attorney General's Answers to Questions for the Record Posed by the Senate Judiciary Committee (March 22, 2010), Response to Question 81d(ii)-(iv) ("The Department seeks to be as responsive as possible. . .to requests from the U.S. Commission on Civil Rights.").

"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.

The defendants never answered the complaint and the Department could have moved for a default judgment, which career lawyers responsible for the case in both the Voting and Appellate Sections, reportedly recommended. Instead, the Department overruled its career attorneys by voluntarily dismissing the charges against all of the defendants except the one who had brandished a nightstick. The Department then sought an injunction against this defendant that orders him to refrain from displaying a weapon within 100 feet of polling places, in Philadelphia only, until November 2012.

In the Commission's earliest correspondence, and at various times thereafter, it noted the dangerous precedent the Department appears to have established by the manner in which it exercised its discretion in this case. Our concern is that by its actions, the Department—the entity charged with the even-handed and vigorous safeguarding of Americans' voting rights—appears to have failed to prosecute this case in a robust manner. In so doing, it appears to have provided hate groups of every ilk a precedent that will assist them in avoiding liability for voter intimidation. It appears further that the Department is comfortable with this precedent and is willing to apply the same standard going forward. The Department's full cooperation is necessary to understand its actions.

Two months ago the Commission asked the Department whether it would permit certain of its employees with knowledge of the case to testify at a Commission hearing on the matter. Thus far, the Commission has not received a response to this request. In addition, the Department has failed to provide responsive or satisfactory answers to the Commission's interrogatories and document requests submitted to the Department in early December 2009—almost four months ago. Instead, the bulk of the documents that the Department has provided thus far are publicly available and do not relate to the core issue of why the Department drastically changed the scope and nature of the relief it sought in the NBPP litigation.

The Department appears to have decided to treat the Commission's request almost as if it were made pursuant to the Freedom of Information Act rather than the Commission's enabling statute, and has persisted in withholding critical information despite its stated commitment to transparency. Rather than disclose the requested documents, the Department has asserted vague and generalized privileges that have no application in this context, such as the attorney-client and attorney-work product privileges. The Department has further contended that it "is constrained by the need to protect against disclosures . . . that otherwise would undermine its ability to carry out its mission . . . ,"[4] an amorphous privilege that would seemingly justify the Department's precluding any review of its decision making under any circumstances. Moreover, the Department has rebuffed each offer made by the Commission to meet to discuss and resolve these disputes.

As a result, the actual basis for the Department's continued refusal to cooperate with the Commission remains unclear. For example, has the President invoked executive privilege over

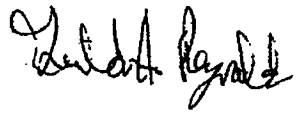
[4] Letter from Joseph H. Hunt to Gerald A. Reynolds (Jan. 11, 2010).

the materials that the Commission is seeking? If that is the case, the President or the Attorney General must so state.

To date, the Department has communicated with the Commission through its designee in the Federal Programs Branch, Mr. Hunt, and you will find attached to this letter recent correspondence from Commission General Counsel David Blackwood to Mr. Hunt. However, a critical juncture in this investigation has been reached that now requires your direct response. As you know, the ultimate enforcement of Commission subpoenas rests with you as the Attorney General. The Department's continued refusal to provide the requested information will lead to a conflict of interest whereby the target of a subpoena (the Department) can evade its statutory obligation to the Commission by refusing to respond to or enforce the Commission's subpoena. At this point, you are the only official at the Department that can prevent that untenable circumstance from occurring. Similarly, your permission is likely required to release Department employees to testify at the Commission's hearing, scheduled for April 23, 2010. Accordingly, please inform the Commission by April 12, 2010, whether you will cooperate with its investigation and whether you will release Department employees to testify so that we may plan our hearing accordingly.

Thank you for your attention to these matters. I am eager to resolve the current impasses and sincerely hope that you can assist the Commission in forging a mutually acceptable solution.

Respectfully submitted,



Gerald A. Reynolds
CHAIRMAN

Attachment

UNITED STATES COMMISSION ON CIVIL RIGHTS

624 NINTH STREET, NW, WASHINGTON, DC 20425 www.usccr.gov

March 30, 2010

VIA FAX (202-616-0222) AND E-MAIL AND REGULAR MAIL

Joseph H. Hunt, Esq.
Director, Federal Programs Branch
Civil Division
United States Department of Justice
20 Massachusetts Avenue, NW
Washington, DC 20001

Dear Mr. Hunt:

This letter is in reply to the responses of the Department of Justice ("the Department") to the discovery requests propounded by the U.S. Commission on Civil Rights ("the Commission") regarding the circumstances surrounding the New Black Panther Party litigation as well as related voting rights concerns.

The Commission first sent a letter to the Department on June 16, 2009, seeking information regarding the Department's decision to dismiss most of the charges filed against the defendants in the New Black Panther Party lawsuit. The Commission subsequently sent letters on August 10 and September 30 seeking similar information. The Department provided little information in response to these letters. Accordingly, the Commission was compelled to issue a subpoena to the Department on December 8, 2009. The discovery requests accompanying the subpoena sought information not only with regard to the New Black Panther Party lawsuit, but also with regard to historical efforts by the Department to enforce protections against voter intimidation.

Unfortunately, as of this date, the Department has provided little of substance relating to the New Black Panther Party litigation. Although the Department consistently asserts that it is cooperating with the Commission, this appears to be more a matter of public relations than fact. For example, while the Department notes that it has produced approximately 2,000 pages of documents, these records were overwhelmingly addressed to historical matters. None of the records related to the issue of why the Department drastically changed the scope and nature of the relief it sought with regard to the New Black Panther Party litigation. Indeed, the only documents produced relating to said investigation were the pleadings and related correspondence. To say the least, this failure is not in keeping with the statutory mandate that the Department "fully cooperate with the Commission to the end that it may effectively carry out its functions and duties." 42 U.S.C. § 1975b(e).

As you are aware, the Commission initiated its investigation after the Department dismissed claims against all but one defendant in the New Black Panther Party litigation. This step was taken despite the fact that a default had been entered and none of the defendants had even raised a defense to the lawsuit. On its own, the dismissal of these claims raised serious issues.[1] These concerns increased when subsequent press reports indicated that senior career officials of both the Voting Rights and Appellate sections, who had urged that the matter proceed to a default judgment, had been overruled by political appointees. No explanation for this decision making has been provided, despite the fact that the Commission's initial inquiry was made in June of 2009.[2]

Since the Commission began its investigation, the Department has engaged in an unprecedented campaign to preclude the Commission from investigating a matter of civil rights enforcement squarely within the Commission's statutory mission. Instead, the Department has consistently sought to obstruct and delay the Commission's investigation.

- The Department prevented subpoenaed officials from appearing for their depositions. During the pendency of this investigation, one of these witnesses was transferred to South Carolina, outside the scope of the Commission's subpoena power for its scheduled hearing.

- The Department has refused the Commission's repeated requests that it indicate whether it will release Department personnel to testify with regard to the New Black Panther Party litigation. There have been five separate requests made to the Department since January 29, 2010, with no result. Yet, as late as March 12, 2010, the Department still contends that it "continues to evaluate the Commission's requests ..."

- When the Commission requested that Department personnel meet with Commission staff to discuss potential discovery concerns, so as to avoid delays over possible claims of privilege, the Department rebuffed this effort and no such meeting has taken place.

---

[1] As noted in prior correspondence, the dismissal of claims against those who do not even oppose the allegations in the pleadings sends the perverse message that hate groups engaged in voter intimidation are actually better off if they do not respond to the charges filed against them.

[2] The Department has implied that the Commission's inquiry about a particular incident is unprecedented. This is inaccurate. As with the present matter, the Commission has previously reviewed specific incidents in the context of examining broader civil rights issues. *See, e.g., Voting Irregularities in Florida During the 2000 Presidential Election* (2001); *Report of Investigation: Ogala Sioux Tribe, General Election* (1974); *Police Practices and Civil Rights in New York City* (2000); *Police-Community Relations in San Jose* (1980). *See also United States v. O'Neil*, 619 F.2d 222 (3d Circuit 1980).

- 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.

As the above demonstrates, the claims by the Department that it is working in good faith with the Commission ring hollow. This is best demonstrated by the Department's disregard of the Commission's instructions relating to its discovery requests, as well as the types and nature of the privileges raised by the Department in its response.

In this regard, the Department completely ignored Commission instruction number 10 regarding any privileges that might be asserted by the Department. Said instruction required, in part, that:

> If any claim of privilege is raised relating to any document or information request, [the Department must] identify with specificity the privilege asserted, any legal authorities relied upon, and indicate whether any privilege so asserted can be addressed by agreement 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.

Rather than complying with this requirement, the Department instead raised a series of "general objections" that were so broad and vague as to be meaningless. These "general objections" encompassed a laundry list of objections, including the Privacy Act, the attorney-client privilege, the attorney-work product privilege, the deliberative process privilege, as well as any "other recognized privilege."

By failing to provide any supporting context or explanation for the assertion of such privileges, the Department apparently seeks to obfuscate the basis for its refusal to provide the requested information. There is not even a pretense of a credible explanation.[3]

---

[3] The failure to provide such information is particularly curious given the Department's past practices in providing similar information to congressional committees over the years.

> [I]n the last 85 years Congress has consistently sought and obtained deliberative prosecutorial memoranda, and the testimony of line attorneys, FBI field agents and other subordinate agency employees regarding the conduct of open and closed cases in the course of innumerable investigations of Department of Justice activities. These investigations have encompassed virtually every component of the DOJ, and all officials, and employees, from the Attorney General down to subordinate level personnel.

Even more brazen is the assertion, contained in the cover letter accompanying the Department's response, that the "Department is constrained by the need to protect against disclosures ... that otherwise would undermine its ability to carry out its mission ..." This assertion appears to have been made out of whole cloth and seemingly attempts to create a self-defining privilege that justifies the Department in preventing any review of its decision making. Ironically, the assertion of such a broad and all-encompassing privilege undermines the ability of the U.S. Commission on Civil Rights to carry out its mission.[4]

Even a quick survey of the Department's failure to provide information reflects objections for which no privilege exists.

- The Department refused to identify the personnel, and even the sections, that worked on the case.[5]

- The Department refused to provide incident reports with regard to the events giving rise to the case.[6]

- The Department refused to identify reports of other instances of voter intimidation by members of the New Black Panther Party, if any, during the 2008 election.[7]

- The Department refused to describe reports received from third parties with regard to the activities, practices, or actions of the New Black Panther Party.[8]

- The Department refused to provide any video evidence obtained by the Department during the course of its investigation.[9]

- In response to Interrogatories 2, 5, 18, and 24, and Document Requests 8, 14, and 38, the Department claimed that the phrase "reduce the relief sought" (referring to

---

CRS Report for Congress, Congressional Investigations of the Department of Justice, 1920-2007: History, Law, and Practice, p. 2 (Oct. 3, 2007). As the CRS notes, "[a]n inquiring committee need only show that the information sought is within the broad subject matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern." *Id.*

[4] The blanket assertions of privilege, and the failure to provide specific answers to discovery requests, seem to reflect an unfortunate pattern by the Department. As you are aware, the U.S. District Court for the District of Kansas recently sanctioned the Department for the failure to provide adequate responses to discovery, including raising improper objections and overly broad assertions of privilege. *See United States of America v. Sturdevant*, Civil Action 07-2233-KHV-DJW (Order of December 30, 2009).

[5] Response to Interrogatories No. 1, No. 7.

[6] Response to Document Request No. 4.

[7] Response to Interrogatory No. 20.

[8] Response to Interrogatory No. 23; Document Request No. 7.

[9] Response to Document Request No. 24.

> the New Black Panther litigation) is "vague, ambiguous, and subject to different interpretations" even though, on their face, the pleadings in the case reflect that the Department reduced the relief sought against the defendants.[10]

The above list is by no means exhaustive. However, even this partial list illustrates a willful pattern of attempting to use alleged privileges to mask a pattern of non-cooperation.

The Department's alleged privileges are particularly disturbing in light of existing Department policy with regard to the enforcement of administrative subpoenas. In a report prepared by the Department, it is noted that:

> The Supreme Court has construed administrative subpoena authorities broadly and has consistently allowed expansion of the scope of administrative investigative authorities, including subpoena authorities, in recognition of the principle that overbearing limitations of these authorities would leave administrative entities unable to execute their respective statutory responsibilities.[11]

In the present case, the U.S. Commission on Civil Rights has been granted the authority to investigate federal agencies on issues of civil rights enforcement. Those refusing to assist the Commission in its mission bear a heavy burden to justify such failure.

---

[10] The complaint sought the following relief:

> 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 of America v. New Black Panther Party for Self Defense et al*, entered January 8, 2009)

Subsequently, the Department limited its claim to a single defendant and sought substantially reduced injunctive relief:

> Defendant Minister King 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 ...

(Proposed Default Judgment Order, *United States of America v. Minister King Shamir Shabazz*, entered May 15, 2009). The length of the injunction was also substantially reduced, only running through November 2012.

[11] Office of Legal Policy, DOJ, Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities (May 13, 2002).

Although the Department's existing discovery responses fall short of even a minimum level of cooperation, the Commission requests the following actions to resolve the existing impasse.

1. Currently, the ultimate enforcement of Commission subpoenas rests with the Attorney General. 42 U.S.C. § 1975a(e)(2). Where, as here, the Department refuses to cooperate with a Commission subpoena, the Department is placed in the untenable position of seeking an enforcement action against itself and an inherent conflict of interest arises. Given this conflict, the Department is requested to appoint a special counsel, or other neutral party acceptable to both parties, to seek enforcement.

2. No later than April 16, 2010, appropriate Department officials should meet with Commission staff to delineate the alleged applicability and scope of any privileges raised by the Department. At a minimum, the Department, prior to said meeting, should provide the Commission with a privilege log providing legal justification for its assertion of privilege relating to specific documents and information, as was required pursuant to the Commission's instruction number 10 contained in the original discovery requests. If claims of executive privilege are being asserted, the official asserting said privilege must be identified.

3. The Commission is scheduled to hold a hearing on April 23 to hear testimony on both the events of Election Day as well as the Department's handling of the New Black Panther Party litigation. It is requested that the Department identify and designate a witness to appear at said hearing for the purposes of testifying with regard to the internal deliberations of the Department relating to the New Black Panther Party litigation. In addition, the Department is requested to release those Department officials currently under subpoena to testify with regard to same. In the event that the Department refuses to provide a witness on this topic, and/or allow the subpoenaed witnesses to testify, it is requested that the Department detail, in writing, the reasons for its refusal to do so.

Thank you for your attention to these matters.

Sincerely,

David P. Blackwood
General Counsel

UNITED STATES COMMISSION ON CIVIL RIGHTS

624 NINTH STREET, NW, WASHINGTON, DC 20425 www.usccr.gov

March 30, 2010

VIA FAX (202-616-0222) AND E-MAIL AND REGULAR MAIL

Joseph H. Hunt, Esq.
Director, Federal Programs Branch
Civil Division
United States Department of Justice
20 Massachusetts Avenue, NW
Washington, DC 20001

Dear Mr. Hunt:

This letter is in reply to the responses of the Department of Justice ("the Department") to the discovery requests propounded by the U.S. Commission on Civil Rights ("the Commission") regarding the circumstances surrounding the New Black Panther Party litigation as well as related voting rights concerns.

The Commission first sent a letter to the Department on June 16, 2009, seeking information regarding the Department's decision to dismiss most of the charges filed against the defendants in the New Black Panther Party lawsuit. The Commission subsequently sent letters on August 10 and September 30 seeking similar information. The Department provided little information in response to these letters. Accordingly, the Commission was compelled to issue a subpoena to the Department on December 8, 2009. The discovery requests accompanying the subpoena sought information not only with regard to the New Black Panther Party lawsuit, but also with regard to historical efforts by the Department to enforce protections against voter intimidation.

Unfortunately, as of this date, the Department has provided little of substance relating to the New Black Panther Party litigation. Although the Department consistently asserts that it is cooperating with the Commission, this appears to be more a matter of public relations than fact. For example, while the Department notes that it has produced approximately 2,000 pages of documents, these records were overwhelmingly addressed to historical matters. None of the records related to the issue of why the Department drastically changed the scope and nature of the relief it sought with regard to the New Black Panther Party litigation. Indeed, the only documents produced relating to said investigation were the pleadings and related correspondence. To say the least, this failure is not in keeping with the statutory mandate that the Department "fully cooperate with the Commission to the end that it may effectively carry out its functions and duties." 42 U.S.C. § 1975b(e).

As you are aware, the Commission initiated its investigation after the Department dismissed claims against all but one defendant in the New Black Panther Party litigation. This step was taken despite the fact that a default had been entered and none of the defendants had even raised a defense to the lawsuit. On its own, the dismissal of these claims raised serious issues.[1] These concerns increased when subsequent press reports indicated that senior career officials of both the Voting Rights and Appellate sections, who had urged that the matter proceed to a default judgment, had been overruled by political appointees. No explanation for this decision making has been provided, despite the fact that the Commission's initial inquiry was made in June of 2009.[2]

Since the Commission began its investigation, the Department has engaged in an unprecedented campaign to preclude the Commission from investigating a matter of civil rights enforcement squarely within the Commission's statutory mission. Instead, the Department has consistently sought to obstruct and delay the Commission's investigation.

- The Department prevented subpoenaed officials from appearing for their depositions. During the pendency of this investigation, one of these witnesses was transferred to South Carolina, outside the scope of the Commission's subpoena power for its scheduled hearing.

- The Department has refused the Commission's repeated requests that it indicate whether it will release Department personnel to testify with regard to the New Black Panther Party litigation. There have been five separate requests made to the Department since January 29, 2010, with no result. Yet, as late as March 12, 2010, the Department still contends that it "continues to evaluate the Commission's requests ..."

- When the Commission requested that Department personnel meet with Commission staff to discuss potential discovery concerns, so as to avoid delays over possible claims of privilege, the Department rebuffed this effort and no such meeting has taken place.

---

[1] As noted in prior correspondence, the dismissal of claims against those who do not even oppose the allegations in the pleadings sends the perverse message that hate groups engaged in voter intimidation are actually better off if they do not respond to the charges filed against them.

[2] The Department has implied that the Commission's inquiry about a particular incident is unprecedented. This is inaccurate. As with the present matter, the Commission has previously reviewed specific incidents in the context of examining broader civil rights issues. *See, e.g., Voting Irregularities in Florida During the 2000 Presidential Election* (2001); *Report of Investigation: Ogala Sioux Tribe, General Election* (1974); *Police Practices and Civil Rights in New York City* (2000); *Police-Community Relations in San Jose* (1980). *See also United States v. O'Neil*, 619 F.2d 222 (3d Circuit 1980).

- 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.

As the above demonstrates, the claims by the Department that it is working in good faith with the Commission ring hollow. This is best demonstrated by the Department's disregard of the Commission's instructions relating to its discovery requests, as well as the types and nature of the privileges raised by the Department in its response.

In this regard, the Department completely ignored Commission instruction number 10 regarding any privileges that might be asserted by the Department. Said instruction required, in part, that:

> If any claim of privilege is raised relating to any document or information request, [the Department must] identify with specificity the privilege asserted, any legal authorities relied upon, and indicate whether any privilege so asserted can be addressed by agreement 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.

Rather than complying with this requirement, the Department instead raised a series of "general objections" that were so broad and vague as to be meaningless. These "general objections" encompassed a laundry list of objections, including the Privacy Act, the attorney-client privilege, the attorney-work product privilege, the deliberative process privilege, as well as any "other recognized privilege."

By failing to provide any supporting context or explanation for the assertion of such privileges, the Department apparently seeks to obfuscate the basis for its refusal to provide the requested information. There is not even a pretense of a credible explanation.[3]

---

[3] The failure to provide such information is particularly curious given the Department's past practices in providing similar information to congressional committees over the years.

> [I]n the last 85 years Congress has consistently sought and obtained deliberative prosecutorial memoranda, and the testimony of line attorneys, FBI field agents and other subordinate agency employees regarding the conduct of open and closed cases in the course of innumerable investigations of Department of Justice activities. These investigations have encompassed virtually every component of the DOJ, and all officials, and employees, from the Attorney General down to subordinate level personnel.

Even more brazen is the assertion, contained in the cover letter accompanying the Department's response, that the "Department is constrained by the need to protect against disclosures ... that otherwise would undermine its ability to carry out its mission ..." This assertion appears to have been made out of whole cloth and seemingly attempts to create a self-defining privilege that justifies the Department in preventing any review of its decision making. Ironically, the assertion of such a broad and all-encompassing privilege undermines the ability of the U.S. Commission on Civil Rights to carry out its mission.[4]

Even a quick survey of the Department's failure to provide information reflects objections for which no privilege exists.

- The Department refused to identify the personnel, and even the sections, that worked on the case.[5]

- The Department refused to provide incident reports with regard to the events giving rise to the case.[6]

- The Department refused to identify reports of other instances of voter intimidation by members of the New Black Panther Party, if any, during the 2008 election.[7]

- The Department refused to describe reports received from third parties with regard to the activities, practices, or actions of the New Black Panther Party.[8]

- The Department refused to provide any video evidence obtained by the Department during the course of its investigation.[9]

- In response to Interrogatories 2, 5, 18, and 24, and Document Requests 8, 14, and 38, the Department claimed that the phrase "reduce the relief sought" (referring to

---

CRS Report for Congress, Congressional Investigations of the Department of Justice, 1920-2007: History, Law, and Practice, p. 2 (Oct. 3, 2007). As the CRS notes, "[a]n inquiring committee need only show that the information sought is within the broad subject matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern." *Id.*

[4] The blanket assertions of privilege, and the failure to provide specific answers to discovery requests, seem to reflect an unfortunate pattern by the Department. As you are aware, the U.S. District Court for the District of Kansas recently sanctioned the Department for the failure to provide adequate responses to discovery, including raising improper objections and overly broad assertions of privilege. *See United States of America v. Sturdevant*, Civil Action 07-2233-KHV-DJW (Order of December 30, 2009).

[5] Response to Interrogatories No. 1, No. 7.

[6] Response to Document Request No. 4.

[7] Response to Interrogatory No. 20.

[8] Response to Interrogatory No. 23; Document Request No. 7.

[9] Response to Document Request No. 24.

> the New Black Panther litigation) is "vague, ambiguous, and subject to different interpretations" even though, on their face, the pleadings in the case reflect that the Department reduced the relief sought against the defendants.[10]

The above list is by no means exhaustive. However, even this partial list illustrates a willful pattern of attempting to use alleged privileges to mask a pattern of non-cooperation.

The Department's alleged privileges are particularly disturbing in light of existing Department policy with regard to the enforcement of administrative subpoenas. In a report prepared by the Department, it is noted that:

> The Supreme Court has construed administrative subpoena authorities broadly and has consistently allowed expansion of the scope of administrative investigative authorities, including subpoena authorities, in recognition of the principle that overbearing limitations of these authorities would leave administrative entities unable to execute their respective statutory responsibilities.[11]

In the present case, the U.S. Commission on Civil Rights has been granted the authority to investigate federal agencies on issues of civil rights enforcement. Those refusing to assist the Commission in its mission bear a heavy burden to justify such failure.

---

[10] The complaint sought the following relief:

> 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 of America v. New Black Panther Party for Self Defense et al*, entered January 8, 2009)

Subsequently, the Department limited its claim to a single defendant and sought substantially reduced injunctive relief:

> Defendant Minister King 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 ...

(Proposed Default Judgment Order, *United States of America v. Minister King Shamir Shabazz*, entered May 15, 2009). The length of the injunction was also substantially reduced, only running through November 2012.

[11] Office of Legal Policy, DOJ, Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities (May 13, 2002).

Although the Department's existing discovery responses fall short of even a minimum level of cooperation, the Commission requests the following actions to resolve the existing impasse.

1. Currently, the ultimate enforcement of Commission subpoenas rests with the Attorney General. 42 U.S.C. § 1975a(e)(2). Where, as here, the Department refuses to cooperate with a Commission subpoena, the Department is placed in the untenable position of seeking an enforcement action against itself and an inherent conflict of interest arises. Given this conflict, the Department is requested to appoint a special counsel, or other neutral party acceptable to both parties, to seek enforcement.

2. No later than April 16, 2010, appropriate Department officials should meet with Commission staff to delineate the alleged applicability and scope of any privileges raised by the Department. At a minimum, the Department, prior to said meeting, should provide the Commission with a privilege log providing legal justification for its assertion of privilege relating to specific documents and information, as was required pursuant to the Commission's instruction number 10 contained in the original discovery requests. If claims of executive privilege are being asserted, the official asserting said privilege must be identified.

3. The Commission is scheduled to hold a hearing on April 23 to hear testimony on both the events of Election Day as well as the Department's handling of the New Black Panther Party litigation. It is requested that the Department identify and designate a witness to appear at said hearing for the purposes of testifying with regard to the internal deliberations of the Department relating to the New Black Panther Party litigation. In addition, the Department is requested to release those Department officials currently under subpoena to testify with regard to same. In the event that the Department refuses to provide a witness on this topic, and/or allow the subpoenaed witnesses to testify, it is requested that the Department detail, in writing, the reasons for its refusal to do so.

Thank you for your attention to these matters.

Sincerely,

David P. Blackwood
General Counsel

UNITED STATES COMMISSION ON CIVIL RIGHTS
OFFICE OF THE GENERAL COUNSEL

FACSIMILE TRANSMITTAL SHEET

TO: JOSEPH H. HUNT, ESQ.	FROM: DAVID P. BLACKWOOD
COMPANY: DOJ	SENDER'S DIRECT LINE: 202-376-7622
FAX NUMBER: 202-616-0222	DATE: MARCH 30, 2010
PHONE NUMBER: 202-514-1259	TOTAL NO. OF PAGES, INCLUDING COVER: 7
RE: NEW BLACK PANTHER PARTY	

☑ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

The information contained in this transmission is considered confidential and privileged attorney work-product, and is intended only for the use of the individual or party named above. If the reader of this message is not the intended recipient, or the employee, agent or designated person responsible for delivery of this transmission to its intended recipient, you are hereby placed on notice that the dissemination, distribution or duplication of this communication is strictly prohibited. If you have received this communication in error, please notify the Commission immediately at the telephone number specified above, and return the original message to us at the below-listed address via U.S. Postal Service.

624 NINTH STREET, NW, SUITE 620 WASHINGTON, DC 20425
TELEPHONE: 202-376-8351 · FACSIMILE: 202-376-1163 · www.usccr.gov

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	2848	
CONNECTION TEL		96160222
CONNECTION ID		
ST. TIME	03/30 13:12	
USAGE T	01'05	
PGS. SENT	7	
RESULT	OK	

U. S. Department of Justice

Civil Division

Washington, D.C. 20530

Joseph H. Hunt
Director

Telephone
(202) 514-1259
Fax: (202) 616-0222

March 12, 2010

VIA ELECTRONIC MAIL AND FIRST-CLASS U.S. MAIL

Mr. David P. Blackwood
General Counsel
United States Commission On Civil Rights
624 Ninth Street, N.W.
Washington, D.C. 20425

Re: United States Commission on Civil Rights' Planned Statutory Enforcement Report

Dear Mr. Blackwood:

By letter dated February 26, 2010, I advised you that the Department of Justice ("Department") was not prepared to respond to the request of the United States Commission on Civil Rights ("Commission") for hearing testimony from Department employees [redacted] and [redacted]. I explained that the Commission's request requires thoughtful consideration of how to strike the appropriate balance between the Department's desire to cooperate with the Commission and the protection of the Department's confidentiality interests, but that the Department is sensitive to the Commission's timetable, and therefore would provide a response as soon as possible. You subsequently requested the Department's response on or before March 12, 2010 even though the Commission hearing was rescheduled for April 23, 2010.

We are not in a position to meet this timetable for the response, although the Department has expended and continues to expend substantial resources responding to the Commission's requests for documents, interrogatory answers, and testimony. For example, Department personnel across various Department components have expended numerous hours searching for and reviewing records to determine what may be responsive to the document requests directed at the Department on December 8, 2009. That effort did not cease when the Department provided the Commission with responses to interrogatories and nearly 2000 pages of documents on January 11, 2010. The Department's supplemental production of documents on February 26, 2010 resulted from an ongoing evaluation of whether the Department could provide further information to the Commission while protecting the Department's confidentiality interests. And that effort remains underway today.

The Department continues to evaluate the Commission's requests, including with respect to the provision of testimony. As you know, when the Commission originally requested testimony for the hearing, initially scheduled for February 12, 2010, you asked that the Department respond only one week before that date. The hearing was subsequently rescheduled for April 23, 2010, which is still six weeks from now. There should be sufficient time between now and the date of the hearing for the Department to provide further supplementation of its response to the Commission's requests for documents and interrogatories, if any, and to convey its decision concerning the provision of testimony. The Department remains sensitive to the Commission's desire to proceed with its inquiry, and thus is moving forward in a manner that will permit it to provide further supplementation and to respond to your request for testimony in advance of the Commission's April 23, 2010 hearing.

We appreciate your continued patience as we proceed in an effort to accommodate the legitimate interests of both the Commission and the Department.

Sincerely,

Joseph H. Hunt
Director
Federal Programs Branch
Civil Division

U.S. Department of Justice

Civil Division

Washington, D.C. 20530
Telephone:
(202) 514-1259
Fax: (202) 616-0222

February 26, 2010

VIA E-MAIL AND FED EX

Mr. David P. Blackwood
General Counsel
United States Commission On Civil Rights
624 Ninth Street, N.W.
Washington, D.C. 20425

Re: United States Commission on Civil Rights' Planned Statutory Enforcement Report

Dear Mr. Blackwood:

I am writing to update you on the status of the Department of Justice's ("Department") consideration of the United States Commission on Civil Rights' ("Commission") requests for information, including hearing testimony, regarding the Department's enforcement of federal laws against voter intimidation.

As you know, the Department regards the protection of the right to vote as one of its top priorities. The Department therefore has strived to be as responsive as possible to the Commission's requests related to its planned statutory enforcement report on enforcement of Section 11(b) of the Voting Rights Act. Unlike past Commission investigations related to the Department's enforcement of civil rights laws, the current investigation is largely focused on the single prosecution captioned *United States v. New Black Panther Party for Self Defense*, Civil Action No. 2:09-cv-0065 (E.D. Pa.). The Department is constrained by the need to protect against disclosures that would harm the deliberative processes behind the enforcement decisions in that action.

The Commission's requests concerning this matter therefore have required thoughtful consideration of how the Department can continue its practice of voluntary cooperation with the Commission consistent with the confidentiality interests that the Department routinely protects. The Department's effort to strike the appropriate balance here has required time for that consideration, and although the Department is not yet in a position to respond to the requests for hearing testimony, the Department has determined that it has additional information it can

provide. When the Department responded to the Commission's requests by providing documents and interrogatory responses on January 11, 2010, I advised that the Department might later supplement its response to the extent it had any additional responsive non-confidential information. To that end, in its ongoing evaluation of the Commission's requests, the Department has determined that it can provide additional documents responsive to the Commission's Document Request Nos. 1, 33, and 44. Those documents are provided on the enclosed CD.

Please know that the Department is sensitive to the Commission's desire to proceed with its inquiry, including the rescheduling of the postponed February 12, 2010 hearing. I will provide you with the Department's decision regarding whether to authorize the requested hearing testimony as soon as possible. For the reasons explained herein, however, neither the Department nor the Commission would be well served by a premature decision.

We hope that the enclosed information and this status update are helpful to the Commission. If you have any questions, please do not hesitate to contact me.

Sincerely,

Joseph H. Hunt
Director
Civil Division
Federal Programs Branch

Enclosure

U.S. Department of Justice

Civil Division

Washington, D.C. 20530
Telephone:
(202) 514-1259

January 11, 2010

Via Email and FedEx

Mr. Gerald A. Reynolds, Chairman
United States Commission On Civil Rights
624 Ninth Street, N.W.
Washington, D.C. 20425

Re: United States Commission on Civil Rights' Planned Statutory Enforcement Report

Dear Chairman Reynolds:

With this letter and enclosures, the Department of Justice ("Department") is responding to the December 8, 2009, request of the United States Commission on Civil Rights ("Commission") for information regarding the Department's enforcement of federal laws against voter intimidation. The Department is doing so in accordance with its ongoing practice of voluntary cooperation with the Commission.

Protection of the right to vote is one of the Department's top priorities, and the Department wishes to be as responsive as possible to requests for information about its law enforcement activities in this area. In that regard, the Commission's requests have necessitated extensive searches of the Department's records, which are ongoing. Please note that the Department is 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, and therefore is responding to the extent that it can do so without disclosure of attorney work product or other privileged information. The Department continues to evaluate whether it can provide further responses consistent with the need to protect privileged information and may supplement this response at a later date.

In light of the Commission's particular interest in an action brought by the Department under Section 11(b) of the Voting Rights Act, *United States v. New Black Panther Party for Self Defense*, Civil Action No. 2:09-cv-0065 (E.D. Pa.), and some confusion about its resolution, we wish to clarify the facts regarding the pending injunction in the litigation. In that case, the Department obtained an injunction against Minister King Samir Shabazz, who is the only individual known to the Department to have brought a weapon to a polling place in Philadelphia,

Pennsylvania during voting hours on Election Day 2008. The court order obtained by the Department enjoins this defendant from engaging in such activity as well as any other activity that violates the anti-intimidation provision of the Voting Rights Act. That provision, Section 11(b), does not authorize criminal penalties or any other kinds of relief beyond an injunction. The injunction remains in effect until 2012, and the Department intends to fully enforce the injunction's terms.

We hope that the enclosed information is helpful. If you have any questions, please do not hesitate to contact me.

Sincerely,

Joseph H. Hunt
Director
Federal Programs Branch

Enclosures

cc: David P. Blackwood, General Counsel

Date: January 11, 2010

To: U.S. Commission on Civil Rights
David P. Blackwood, General Counsel

From: United States Department of Justice

Subject: U.S. Commission on Civil Rights' Statutory Enforcement Report on the Implications of DOJ's Actions in the New Black Panther Party Litigation for Enforcement of Section 11(b) of the Voting Rights Act

RESPONSE OF THE DEPARTMENT OF JUSTICE

Without waiving any applicable privileges or objections, the Department of Justice ("the Department") pursuant to 42 U.S.C. § 1975b(e) hereby responds to the interrogatories and document requests propounded by the United States Commission on Civil Rights ("the Commission") in connection with the above-referenced report.

GENERAL OBJECTIONS

1. The Department objects to each and every Interrogatory and Document Request to the extent they seek information the disclosure of which would violate a statute, regulation, or Executive Order.

2. The Department objects to each and every Interrogatory and Document Request to the extent they seek information protected from disclosure by the Privacy Act.

3. The Department objects to each and every 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.

4. The Department objects to each and every Interrogatory and Document Request to the extent they seek disclosure of work product contained in the litigation file for *United States v. New Black Panther Party for Self Defense*, Civil Action No. 2:09-cv-0065 (E.D. Pa.).

5. The Department objects to each and every Interrogatory and Document Request that seeks information prepared by or for the Department's Office of Professional Responsibility, to the extent such information is privileged or Privacy Act protected.

6. The Department objects to each and every Interrogatory and Document Request to the extent they seek information not reasonably related to or in furtherance of the Commission's

exercise of its statutory authority set forth in 42 U.S.C. § 1975a.

7. The Department objects to each and every Interrogatory and Document Request to the extent they impose burdens inconsistent with or in addition to those required by 42 U.S.C. § 1975b(e).

Notwithstanding the General Objections, each of which is incorporated by reference as if set forth fully in each Response below, and using December 8, 2009 (the date of the Commission's request) as the date by which to search for and provide information, the Department states as follows, reserving the right to supplement or later amend its response:

INTERROGATORY NO. 1:

Identify all DOJ personnel who have worked on the New Black Panther Party litigation. This request includes, but is not limited to: (i) those DOJ personnel who interviewed witnesses in Philadelphia on election day; (ii) all DOJ personnel directly assigned to said litigation; (iii) those individuals who exercised decision-making authority relating to same; and (iv) all individuals in the appellate section who reviewed any aspect of said litigation. For each individual identified, indicate whether said person is a career or political employee.

RESPONSE:

See General Objections.

INTERROGATORY NO. 2:

Identify and describe in detail the decision-making process within DOJ relating to the New Black Panther Party litigation. This request includes, but is not limited to, the decision-making processes that: (i) led to the initial filing of said litigation; (ii) the decision to seek a default; (iii) the decision to delay seeking a default judgment; (iv) the decision to seek review by the appellate section; (v) the decision to review the relief sought in the original complaint; and

(vi) the decision to dismiss certain defendants and to reduce the relief sought against the remaining defendant.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Interrogatory on grounds that the phrase "reduce the relief sought" is vague, ambiguous, and subject to different interpretations.

INTERROGATORY NO. 3:

Describe the process for investigating and evaluating voter intimidation cases within the Department, including the determination of whether to pursue litigation. If this process was not followed to any extent with regard to the New Black Panther Party litigation, identify and describe the manner in which the process was not followed.

RESPONSE:

The Department of Justice may receive allegations of possible voter intimidation from a variety of sources, including but not limited to, newspaper or other media accounts, complaints from organizations or groups, citizen calls or letters, referrals from state or local officials, referrals from other federal agencies, or Congressional inquiries. Within the Department, such a complaint may fall within the criminal jurisdiction of the Election Crimes Branch of the Public Integrity Section of the Criminal Division or the Criminal Section of the Civil Rights Division, or within the civil jurisdiction of the Voting Section of the Civil Rights Division. Upon receipt of such a complaint by the Department, in most cases each of these components will review the allegations contained in the complaint and make a determination of whether it has jurisdiction to pursue the complaint, as well as whether to investigate the allegations. A determination to investigate is based on a review of the facts as well as a decision whether to allocate limited Department resources to such an investigation. In some cases, the Department may decide to pursue the complaint from both a criminal and civil perspective. However, in such a case, care will be taken on the civil side to ensure that the criminal investigation and potential litigation is

not compromised in any manner. If a decision to investigate is made, Department personnel conduct the necessary investigation. Following such investigation, a decision is made whether to pursue criminal or civil litigation in federal court as appropriate. In each case or matter, decisions on investigation and/or prosecution are made based on its unique facts and the application of existing law to this set of facts.

INTERROGATORY NO. 4:

With regard to the New Black Panther Party litigation, identify and describe in detail: a) the factors involved in the initial charging decision; b) the factors involved in the decision not to pursue a default judgment against three of the initial four defendants; and c) the factors involved in the decision to limit the preventative relief sought against Minister King Samir Shabazz (a/k/a Maurice Heath) to a Philadelphia-based injunction.

RESPONSE:

In *United States v. New Black Panther Party for Self Defense*, Civil Action No. 2:09-cv-0065 (E.D. Pa.), the United States obtained an injunction against Defendant Minister King Samir Shabazz, who held a nightstick in front of a polling place in Philadelphia, Pennsylvania during voting hours. The court order obtained by the Department enjoins this defendant from engaging in such activity, as well as any other activity that violates the anti-intimidation provision of the Voting Rights Act. Section 11(b) does not authorize other kinds of relief, such as monetary damages or civil penalties. The injunction remains in effect until 2012, and the Department will fully enforce its terms. To our knowledge, this defendant is the only person who brought a weapon to the Philadelphia polling place on Election Day.

Career supervising attorneys 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.

Consistent with the Department's practice, the attorney serving as Acting Assistant Attorney General for Civil Rights informed Department supervisors of the Division's decisions related to the case. The Department supervisors did not overrule that attorney.

Although none of the defendants responded to the complaint, that did not absolve the government of its obligation to ensure that any relief sought is consistent with the facts and the law and supported by the evidence. The entry of a default judgment is not automatic, and the defendant's failure to respond does not eliminate the plaintiff's obligation to ensure that it has a valid case based on the facts and law. The Federal Rules of Civil Procedure incorporate a strong policy of resolving disputes on the merits. Following that policy, the Court of Appeals for the Third Circuit has explained that it does not favor entry of defaults or default judgments. *United States v. $55,518.05 in U.S. Currency*, 728 F.2d 192, 194 (3d Cir. 1984). Instead, the appellate court prefers that "cases be disposed of on the merits whenever practicable." *Hritz v. Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984). Moreover, even if a court granted a default judgment on liability, the court still would need to decide whether the evidence supported entering an injunction.

INTERROGATORY NO. 5:

Identify all communications, whether oral or written, within the Department relating to the New Black Panther Party litigation. This request includes, but is not limited to, communications concerning (i) the initial decision to file the complaint; (ii) the merits of said litigation; (iii) the decision to seek a default; (iv) the decision to delay seeking a default judgment; (v) the decision to seek review by the appellate section; (vi) the decision to review the relief sought in the original complaint; and (vii) the decision to dismiss certain defendants and to reduce the relief sought against the remaining defendant.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Interrogatory on grounds that the phrase "reduce the relief sought" is vague, ambiguous, and

subject to different interpretations.

INTERROGATORY NO. 6:

Identify and describe in detail any communications by anyone in the Department with the Attorney General of the United States with regard to the New Black Panther Party litigation.

RESPONSE:

See General Objections.

INTERROGATORY NO. 7:

Identify each and every section within the Department of Justice that reviewed or worked on any portion of the New Black Panther Party litigation. For each such section, describe the work or analysis performed.

RESPONSE:

See General Objections.

INTERROGATORY NO. 8:

Identify and describe in detail all documents provided to the appellate section as part of its review of the New Black Panther Party litigation.

RESPONSE:

See General Objections.

INTERROGATORY NO. 9:

Identify all other voter intimidation cases that have been reviewed by the appellate section prior to trial or the entry of a default judgment.

RESPONSE:

As a routine matter, the Appellate Section of the Department is consulted by the litigating sections of the Civil Rights Division on issues that arise during the course of a litigation. The Department does not generally maintain or compile records of such consultations and cannot identify each and every consultation that has occurred according to either the type of case or the stage in the case when the consultation took place.

INTERROGATORY NO. 10:

Identify and describe in detail any First Amendment concerns raised by the appellate section with regard to the New Black Panther Party litigation.

RESPONSE:

See General Objections.

INTERROGATORY NO. 11:

Identify and describe in detail whether the appellate section, in reviewing the New Black Panther Party litigation, raised any distinction between one who intimidates voters as a poll watcher and one who intimidates voters, but is not a poll watcher.

RESPONSE:

See General Objections.

INTERROGATORY NO. 12:

Identify and describe in detail all communications, whether oral or written, by or between the Department and any outside third parties with regard to the New Black Panther Party litigation. This request includes, but is not limited to, all communications with Kristen Clarke of the NAACP Legal Defense Fund.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Interrogatory on grounds of burdensomeness because the Department is unable to describe every communication with a third party related to the New Black Panther Party litigation. As a general practice, the Department makes every effort to respond to any contact from a third party about voter-intimidation or other Civil Rights concerns. Elected officials, the press, NGOs, and members of the public all have had contact with the Department about that case. The Department responds to this Interrogatory by reference to the documents produced in response to Document Request Nos. 29 and 33, *infra*.

The Department's search to date has not yielded any information related to a communication with Kristen Clarke.

INTERROGATORY NO. 13:

Describe in detail the purpose of DOJ contacts with outside third parties with regard to the New Black Panther Party litigation as well as the authority used to justify such contacts.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Interrogatory on grounds of burdensomeness because the Department is unable to describe the purpose of every contact with a third party related to the New Black Panther Party litigation. The Department has had such contacts with elected officials, the press, and the public for the purpose of being responsive to inquiries from these parties. Other contacts have been for the purpose of investigating the claims in *United States v. New Black Panther Party for Self Defense*, Civil Action No. 2:09-cv-0065 (E.D. Pa.).

INTERROGATORY NO. 14:

Identify and describe in detail all other instances in which DOJ has consulted with outside third parties with regard to voter intimidation cases.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Interrogatory on grounds that the term "consulted" is undefined and ambiguous and that the Interrogatory is burdensome. On many occasions, the Department has communicated in some fashion with third parties regarding voter intimidation cases. The Department is unable to describe with particularity each such instance.

INTERROGATORY NO. 15:

Identify all communications, whether oral or written, by or between the Department and any member of the Executive Office of the President and/or the White House with regard to the New Black Panther Party litigation.

RESPONSE:

See General Objections.

INTERROGATORY NO. 16:

Identify all communications, whether oral or written, by or between the Department and any member of Congress with regard to the New Black Panther Party litigation.

RESPONSE:

The Department responds in part to this Interrogatory by reference to the documents produced in response to Document Request No. 33, *infra*.

INTERROGATORY NO. 17:

Identify and describe in detail all communications by or between the Department and any of the following individuals: (i) Michael Coard; (ii) Malik Zulu Shabazz; (iii) Minister King Samir Shabazz (a/k/a Maurice Heath); and (iv) Jerry Jackson.

RESPONSE:

The Department responds to this Interrogatory by reference to the documents produced in response to Document Request Nos. 35-37, *infra*. The Department's search to date has not identified any communications with Michael Coard.

INTERROGATORY NO. 18:

Identify and describe in detail all facts upon which you rely to support your contention that the decision to dismiss certain defendants and reduce the relief sought in the New Black Panther Party litigation was made by career employees at the Department including, but not limited to, the identity of the career employee(s) you contend made said decision.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Interrogatory on grounds that the phrase "reduce the relief sought" is vague, ambiguous, and subject to different interpretations. *See* Response to Interrogatory No. 4, *supra*.

INTERROGATORY NO. 19:

For the period from January 1, 2009, identify all investigations conducted by the Department with regard to the NBPP, and/or any related individuals or entity.

RESPONSE:

See General Objections.

INTERROGATORY NO. 20:

Identify and describe in detail any reports received by the Department as to other alleged incidents of voter intimidation (and/or other voting-related improprieties) by members of the NBPP during the 2008 election.

RESPONSE:

See General Objections.

INTERROGATORY NO. 21:

Describe in detail all interviews conducted by you, or on your behalf, with any witnesses relating to the actions of the NBPP in Philadelphia during the 2008 presidential election.

RESPONSE:

See General Objections.

INTERROGATORY NO. 22:

Describe in detail the investigation conducted by you, or on your behalf, relating to the actions of the NBPP in Philadelphia during the 2008 presidential election.

RESPONSE:

See General Objections.

INTERROGATORY NO. 23:

Describe in detail any reports, summaries of events or descriptions received by you from any third party with regard to the activities, practices and/or actions of the NBPP and/or the individuals named as defendants in the New Black Panther Party litigation.

RESPONSE:

See General Objections.

INTERROGATORY NO. 24:

Identify and describe in detail all additional facts learned by you, subsequent to the filing of the complaint in the New Black Panther Party litigation, that influenced the Department's decision to drop three of the defendants as parties and to reduce the relief sought.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Interrogatory on grounds that the phrases "reduce the relief sought" and "additional facts" are vague, ambiguous, and subject to different interpretations. *See also* Response to Interrogatory No. 4, *supra*.

INTERROGATORY NO. 25:

Identify and describe in detail any and all federal statutes, rules, regulations, and/or policies the Department enforces that in any way relate to voter intimidation.

RESPONSE:

The Department is strongly committed to the enforcement of laws aimed at protecting the right of citizens to vote. There are both civil and criminal federal statutes enforced by the Department that relate to voter intimidation. Criminal statutes that can be enforced by the Department against voter intimidation include the following: 18 U.S.C. § 594, which prohibits intimidating, threatening or coercing anyone, or attempting to do so, with the purpose of interfering with an individual's right to vote or not to vote in a federal general election; 18 U.S.C. § 609, which prohibits the use of military authority to influence the vote of a member of the Armed Forces or to require a member of the Armed Forces to march to a polling place, or attempts to do so; 18 U.S.C. § 610, which prohibits the intimidation or coercion of a federal employee's "political activity," which includes voting; 18 U.S.C. § 241, which prohibits conspiracies to, among other things, intimidate any person in the free exercise of any right or

privilege secured by the Constitution or federal law, including the right to vote; 18 U.S.C. § 242, which prohibits deprivation under color of law of a right secured by the Constitution or federal law, including voting; and 18 U.S.C. § 245(b)(1)(A), which makes it illegal to use or threaten to use physical force to intimidate individuals from, among other things, voting or qualifying to vote. In addition, Section 12 of the National Voter Registration Act (NVRA), 42 U.S.C. § 1973gg-10(1), makes it a federal crime to intimidate, threaten or coerce, or attempt to intimidate, threaten or coerce any person for: (1) registering to vote, or voting, or attempting to register or vote; (2) aiding any person in so doing; or (3) exercising any right under the NVRA. *See* 28 C.F.R. §§ 0.50, 0.55.

With regard to civil law enforcement, the Voting Section of the Civil Rights Division enforces Section 11(b) of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973i(b). This statute prohibits anyone, whether or not acting under color of law, from intimidating, threatening, or coercing, or attempting to intimidate, threaten, or coerce, any person for voting or attempting to vote or for aiding any person to vote or attempt to vote or for exercising any powers or duties under certain sections of the Voting Rights Act. Section 12(d) of the Voting Rights Act, 42 U.S.C. § 1973j(d), provides for the filing of a civil action by the Attorney General to secure preventive relief for a violation of such statute. The Voting Section also has jurisdiction to enforce 42 U.S.C. § 1971(b), part of the Civil Rights Act of 1957, which prohibits anyone, whether or not acting under color of law, from intimidating, threatening, or coercing, or attempting to intimidate, threaten, or coerce, any person for voting or attempting to vote in a federal election. Where appropriate, the Voting Section may also consider whether it has civil jurisdiction over complaints of voter intimidation or harassment under other sections of the Voting Rights Act, such as the protections of Section 2, 42 U.S.C. § 1973.

INTERROGATORY NO. 26:

For the period from January 1, 1995 through the present, identify all staff currently devoted full- or part-time to investigating and/or litigating voter intimidation matters.

RESPONSE:

During the specified period of time, the Department is not aware of any staff who have been devoted full-time solely to investigation and/or litigation of voter intimidation matters. However, during that period, the attorney staff of the Voting Section of the Civil Rights Division has been assigned as necessary to investigate and, as appropriate, litigate voter intimidation matters. Likewise, during the specified period of time, the attorney staff of the Public Integrity Section of the Criminal Division and the Criminal Section of the Civil Rights Division has been assigned as necessary to investigate and, as appropriate, litigate voter intimidation matters. In addition, where appropriate, agents of the Federal Bureau of Investigation may be assigned to investigate voter intimidation matters.

INTERROGATORY NO. 27:

Since the inception of the Voting Rights Act, describe the procedures and/or mechanisms in place within the Department to receive, investigate, and resolve complaints regarding voter intimidation. How have these mechanisms evolved over time and what procedures are currently in place?

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Interrogatory on grounds of burdensomeness and materiality because this Interrogatory requests information dating back to 1965. These mechanisms have remained basically the same over time and have not substantially evolved. *See* Response to Interrogatory No. 3, *supra.*

INTERROGATORY NO. 28:

Describe the Voting Section's ICM system used to track investigative matters and cases. If any additional or more recent telephone, electronic, or other tracking systems are used, describe those systems.

RESPONSE:

The Department responds to this Interrogatory by referring the Commission to the September 30, 2009 GAO Report to Congress: *DOJ's Civil Rights Division: Opportunities Exist to Improve Its Case Management System and Better Meet Its reporting Needs* (GAO-09-938R), which can be found at the following link: http://www.gao.gov/new.items/d09938r.pdf

At various points in time, the Voting Section has used various other informal methods for compiling or tracking cases and matters.

INTERROGATORY NO. 29:

Since the inception of the Voting Rights Act, identify by year the number of voter intimidation complaints (i) received, (ii) investigated, and/or (iii) litigated by the Department, as well as the outcomes of same.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Interrogatory on grounds of burdensomeness and materiality insofar as it seeks information dating back to 1965. The Voting Section does not appear to have maintained or compiled generally or consistently overall data about intimidation complaints received and investigated.

To its knowledge, the Department has filed four civil lawsuits alleging voter intimidation under Section 11(b) of the Voting Rights Act: 1) *United States v. Harvey*, C.A. No. 3323 (E.D. La.) - Section 11(b) claim denied, 250 F. Supp. 219 (E.D. La. 1966); 2) *United States v. North Carolina Republican Party, et al.*, C.A. No. 91-161-CIV-5-F (E.D.N.C.) - resolved by Consent Decree 2/27/1992; 3) *United States v. Brown* - Section 11(b) claim rejected, 494 F. Supp. 2d 440, 477 n. 56 (S.D. Miss. 2007); 4) *United States v. New Black Panther Party, et al.*, C.A. No. 09-cv-

0065-SD (E.D. Pa.) - notice of voluntary dismissal as to three defendants entered 5/15/09 and default judgment granting injunctive relief as to one defendant entered 5/18/2009. The Department also responds by enclosing documents related to the above-referenced actions.

The vast majority of all voting rights related criminal investigations are assigned to, and handled by, the Criminal Division of the Department of Justice. However, a small percentage of voting related offenses are principally assigned to the Civil Rights Division to conduct, handle, or supervise. Records of complaints historically reviewed by the Criminal Section may not be complete since computerized coding is relatively recent. However, a due and diligent search of paper records was conducted and the following information is responsive to the question:

Year	
1972	1 complaint received, reviewed/investigated, and closed.
1975	1 complaint received, reviewed/investigated, and closed.
1981	1 complaint received, reviewed/investigated, and ultimately prosecuted resulting in conviction.
1986	1 complaint received, reviewed/investigated, and ultimately prosecuted resulting in dismissal by the court at the close of the government's case-in-chief.
1990	3 complaints received, reviewed/investigated, and closed
1991	2 complaints received, reviewed/investigated, and closed.
1992	3 complaints received, reviewed/investigated, and closed.
1993	4 complaints received, reviewed/investigated, and closed plus one complaint with an unidentified date which most likely stems from 1993 and which was reviewed/investigated, and closed.
1994	2 complaints received, reviewed/investigated, and closed.
1998	1 complaint received, reviewed/investigated, and closed.
1999	2 complaints received, reviewed/investigated, 1 closed and 1 ultimately prosecuted resulting in dismissal by the court at the close of the government's case-in-chief.
2000	3 complaints received, reviewed/investigated, closed.
2001	1 complaint received, reviewed/investigated, and closed.
2002	1 complaint received, reviewed/investigated, and closed.

2003	1 complaint received, reviewed/investigated, and closed.
2006	7 complaints received, reviewed/investigated, and 5 closed, 1 prosecution pending, 1 investigation pending.
2007	1 complaint received, reviewed/investigated, and closed.
2008	48 complaints received, reviewed/investigated, 42 closed, 1 prosecuted resulting in convictions, 1 prosecution pending, 4 investigations pending.

INTERROGATORY NO. 30:

For each complaint listed in response to Interrogatory 29, describe: (i) the facts alleged; (ii) DOJ's investigatory actions; (iii) the basis of decision to pursue (or not) formal investigation; (iv) the basis to initiate litigation (or not); and (v) the basis for pursuit of ultimate resolution obtained.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Interrogatory on grounds of burdensomeness and materiality insofar as it seeks information dating back to 1965. The Department responds to this Interrogatory by reference to the produced documents related to the following actions identified in the Response to Interrogatory No. 29: (1) *United States v. Harvey*; (2) *United States v. North Carolina Republican Party, et al.*; (3) *United States v. Brown*; and (4) *United States v. New Black Panther Party, et al. See also* Response to Interrogatory No. 29, *supra*.

INTERROGATORY NO. 31:

Of those complaints listed in Interrogatory 29, how many have been investigated and/or litigated under 42 U.S.C. § 1973i(b), either solely or in conjunction with another statute or constitutional provision? Identify same.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Interrogatory on grounds of burdensomeness and materiality insofar as it seeks information

dating back to 1965. As to the following actions identified in the Response to Interrogatory No. 29, the Department responds: (1) *United States v. Harvey*; 42 U.S.C. § 1973i(b) claim in conjunction with claim under 42 U.S.C. § 1971(b); (2) *United States v. North Carolina Republican Party, et al.*, 42 U.S.C. § 1973i(b) claim in conjunction with claim under 42 U.S.C. § 1971(b); (3) *United States v. Brown*, 42 U.S.C. § 1973i(b) claim in conjunction with claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973; and (4) *United States v. New Black Panther Party, et al.*, 42 U.S.C. § 1973i(b) claim. *See also* Response to Interrogatory No. 29.

INTERROGATORY NO. 32:

Explain the Voting Section's understanding of the elements and standards of a § 1973i(b) case.

RESPONSE:

The Department responds to this Interrogatory by reference to the court filings prepared by the Department in the following litigation identified in the Response to Interrogatory No. 29: (1) *United States v. Harvey*; (2) *United States v. North Carolina Republican Party, et al.*; (3) *United States v. Brown*; and (4) *United States v. New Black Panther Party, et al.*

INTERROGATORY NO. 33:

In a newspaper article in The Washington Times dated July 30, 2009, it is stated:

> Associate Attorney General Thomas J. Perrelli, the No. 3 official in the Obama Justice Department, was consulted and ultimately approved the decision in May to reverse course and drop a civil complaint accusing three members of the New Black Panther Party of intimidating voters in Philadelphia during November's election...

Do you acknowledge that the aforesaid characterization is accurate? If you do not acknowledge that said characterization is accurate, describe all facts upon which you rely to support your contention.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Interrogatory on grounds that the term "aforesaid characterization" is ambiguous and potentially

subject to different interpretations. *See* Response to Interrogatory No. 4, *supra.*

INTERROGATORY NO. 34:

In The Weekly Standard magazine dated August 10, 2009, it is contended that:

> In April [2009], a preliminary filing of default was filed by Justice lawyers with the court clerk. No concern or objection was raised within Justice. This decision was approved by both the Acting Assistant Attorney General for Civil Rights, Loretta King, and Steve Rosenbaum, previously Acting Deputy Assistant Attorney General for Civil Rights and recently returned to his post as Section Chief for Housing.

Do you acknowledge the characterization that both Loretta King and Steve Rosenbaum approved the filing of a request for default in the New Black Panther Party litigation is accurate? If you do not agree that the aforesaid characterization is accurate, state all facts upon which you rely to support your contention.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Interrogatory on grounds that the aforesaid characterization is ambiguous and potentially subject to different interpretations. *See* Response to Interrogatory No. 4, *supra.*

INTERROGATORY NO. 35:

Identify and describe in detail the basis for referring issues relating to the New Black Panther Party litigation to DOJ's Office of Professional Responsibility (OPR), including, but not limited to, an identification and description of any suspected acts of prosecutorial misbehavior or ethical breach which you believe require investigation. If there is an alternative basis for investigation by OPR, please identify and describe same.

RESPONSE:

Members of Congress requested that this matter be referred to the Department's Inspector General, who referred it to the Department's Office of Professional Responsibility, and that office initiated an investigation.

INTERROGATORY NO. 36:

Identify and describe in detail the alleged jurisdictional basis for the Department's Office of Professional Responsibility to review the decision-making process relating to the New Black Panther Party litigation.

RESPONSE:

The Office of Professional Responsibility ("OPR") is responsible for investigating allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice, as well as allegations of misconduct by law enforcement personnel when such allegations are related to allegations of attorney misconduct within the jurisdiction of OPR. *See* 28 C.F.R. § 0.39.

INTERROGATORY NO. 37:

Identify and describe in detail any other instances in which DOJ argued that existence of an OPR investigation was a sufficient basis to cease Department cooperation with an inquiry and/or investigation by members of Congress and/or a federal investigatory agency such as the U.S. Commission on Civil Rights. Provide citations to all authorities upon which the Department relies to support its position.

RESPONSE:

In addition to the General Objections, the Department objects to this Interrogatory on grounds that its premise is incorrect. The Department is cooperating with all inquiries into this matter.

INTERROGATORY NO. 38:

Do you acknowledge that Assistant Attorney General for Civil Rights Loretta King discussed the New Black Panther Party litigation with Deputy Attorney General David W. Ogden and Associate Attorney General Thomas J. Perrelli? If so, describe in detail said communications.

RESPONSE:

See Response to Interrogatory No. 4, *supra*.

INTERROGATORY NO. 39:

In a letter dated July 24, 2009 to Gerald A. Reynolds, the Chairman of the United States Commission on Civil Rights, DOJ official Portia L. Roberson indicated:

> We believe this injunction [in the Black Panther Party litigation] is tailored appropriately to the scope of the violation and the requirements of the First Amendment.

Please identify and describe in detail the First Amendment concerns arising out of the New Black Panther Party litigation including, but not limited to, whether such concerns related to (i) verbal comments made by the NBPP defendants; (ii) the weapon(s) carried by the same; (iii) the uniforms worn by said individuals; and/or (iv) a combination of any of the aforesaid. Cite all authorities upon which you rely to support your concerns.

RESPONSE:

The Department endeavors to ensure that all of the relief it proposes in litigation accords with the First Amendment as well as other provisions of the U.S. Constitution.

INTERROGATORY NO. 40:

Identify and describe in detail any other voter intimidation cases in which concerns were raised within the Department about the First Amendment rights of those believed to have intimidated voters.

RESPONSE:

See Response to Interrogatory No. 39, *supra*.

INTERROGATORY NO. 41:

In a letter dated July 24, 2009 to Gerald A. Reynolds, the Chairman of the United States Commission on Civil Rights, DOJ official Portia L. Roberson stated:

> The decision was made after a careful and thorough review of the matter by the Acting Assistant Attorney General for Civil Rights, a career employee with nearly 30 years experience in the Department, including nearly 15 years as the career Deputy Assistant Attorney General for Civil Rights.

With regard to said statement, is it the position of the Department of Justice that the Acting Assistant Attorney General for Civil Rights was the ultimate decision maker with regard to New Black Panther Party litigation? If not, please identify any and all additional officials, as well as their role in said litigation.

RESPONSE:

See Response to Interrogatory No. 4, *supra*.

INTERROGATORY NO. 42:

Identify and describe in detail in what way, if any, Jerry Jackson's status as a poll watcher affected the Department's decision to dismiss him as a defendant in the New Black Panther Party litigation, including, but not limited to, whether status as a poll watcher excuses potential or alleged acts of voter intimidation.

RESPONSE:

See General Objections.

INTERROGATORY NO. 43:

Identify each witness interviewed by the Department relating to the incident that occurred on election day, 2008, in Philadelphia involving the NBPP.

RESPONSE:

See General Objections.

INTERROGATORY NO. 44:

Identify all career employees in the Civil Rights Division who recommended the ultimate relief sought in the New Black Panther Party litigation.

RESPONSE:

See General Objections.

INTERROGATORY NO. 45:

Identify all career employees in the Civil Rights Division who objected to the ultimate relief sought in the New Black Panther Party litigation.

RESPONSE:

See General Objections.

INTERROGATORY NO. 46:

Identify all persons not otherwise identified in your own answers to the above discovery requests who have personal knowledge of the circumstances surrounding (i) the election day activities of the NBPP; (ii) the Department's investigation of same; (iii) the New Black Panther Party litigation; (iv) the Department's decision-making process relating to said litigation; and/or (v) the resulting OPR investigation.

RESPONSE:

See General Objections.

INTERROGATORY NO. 47:

With respect to the November 2008 elections, it was reported that a major party congressional candidate in Orange County mailed a letter to 24,000 registered Latino voters that may have been designed to intimidate them from voting. The letter, written in Spanish, falsely stated that immigrants may not vote, and that the letter also declared "there is no benefit in voting." MALDEF asked DOJ to investigate.

With regard to said incident:

(a) What division of DOJ, if any, received the complaints about these alleged acts of voter intimidation?

(b) Was Section 11b, 42 U.S.C. § 1973i(b) considered as a potential legal strategy to pursue?

(c) What action, if any did DOJ take in these actions?

RESPONSE:

The Department responds to this Interrogatory by reference to enclosed documents. *See also* Response to Document Request No. 44, *infra*.

INTERROGATORY NO. 48:

With respect to the November 2008 elections, it was reported that in Tucson alleged anti-migrant activists wore dark clothing with a badge-like emblem and carried a handgun in a holster. In addition, the men involved attempted to ask Latino voters questions, write down their personal information, and videotaped them and their license plates as they went to cast their vote. A man named Russell Dove, a local anti-migrant activist, acknowledged his participation in the effort to intimidate Latino voters.

With regard to said incident:

(a) What division of DOJ, if any, received the complaints about these alleged acts of voter intimidation?

(b) Was Section 11b, 42 U.S.C. § 1973i(b) considered as a potential legal strategy to pursue?

(c) What action, if any, did DOJ take in these actions?

RESPONSE:

The Department responds to this Interrogatory by reference to enclosed documents. *See also* Response to Document Request No. 44, *infra*.

INTERROGATORY NO. 49

With respect to the November 2008 elections, in Grand Coteau, Louisiana, in a racially heated mayoral election, a five-foot cross was erected outside the town hall, and lit on fire, on November 3, 2006. This was staged on public property, and many African Americans felt the cross-burning was a tool to intimidate minority voters from freely exercising their right to vote.

With regard to said incident:

(a) What division of DOJ, if any, received the complaints about these alleged acts of voter intimidation?

(b) Was Section 11b, 42 U.S.C. § 1973i(b) considered as a potential legal strategy to pursue?

(c) What action, if any, did DOJ take in these actions?

RESPONSE:

The Department responds to this Interrogatory by reference to enclosed documents. *See also* Response to Document Request No. 44, *infra*.

DOCUMENT REQUEST NO. 1:

Since the inception of the Voting Rights Act, all materials used to train Agency staff on voter intimidation issues.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Document Request on grounds of burdensomeness and materiality insofar as it seeks information dating back to 1965. The Department encloses responsive documents yielded by its search to date.

DOCUMENT REQUEST NO. 2:

Since the inception of the Voting Rights Act, all documents and/or print-outs from tracking systems or other databases identifying and detailing the progress of complaints, investigations, and/or litigation involving voter intimidation.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Document Request on grounds of burdensomeness and materiality insofar as it seeks information dating back to 1965. The Department refers the Commission to the documents produced in response to Document Request No. 44, *infra*.

DOCUMENT REQUEST NO. 3:

Any and all documents describing the facts of the New Black Panther Party litigation.

RESPONSE:

The Department encloses responsive documents yielded by its search to date. *See also* Response to Document Request No. 50, *infra*.

DOCUMENT REQUEST NO. 4:

Any and all documents providing incident reports or witness statements with regard to the circumstances which gave rise to the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 5:

All documents evidencing any investigation conducted by the Department, or on its behalf, relating to the actions of the NBPP in Philadelphia during the 2008 presidential election.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 6:

All documents evidencing any reports of alleged voting intimidation (or other voting-related improprieties) by members of the NBPP, other than those that gave rise to the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 7:

All documents evidencing any reports or summaries of events or descriptions received by you from any third party with regard to the activities, practices and/or actions of the NBPP generally, and/or those named as defendants in the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 8:

All documents evidencing any additional facts learned by you, subsequent to the filing of the complaint in the New Black Panther Party litigation, that influenced the Department's decision to drop three of the defendants as parties and to reduce the relief sought.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Document Request on grounds that the phrase "reduce the relief sought" is vague, ambiguous,

and subject to different interpretations.

DOCUMENT REQUEST NO. 9:

Any and all documents evidencing communications by or between any member of the Voting Rights Section and Loretta King relating to the NBPP and/or the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 10:

Any and all documents evidencing communications by or between any member of the Civil Rights Division and David W. Ogden relating to the NBPP and/or the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 11:

Any and all documents evidencing communications by or between any member of the Civil Rights Division and Thomas J. Perrelli relating to the NBPP and/or the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 12:

Any and all documents evidencing communications by anyone within the Department with the Attorney General of the United States with regard to the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 13:

Any and all internal memoranda evaluating potential charges in the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 14:

Any and all internal memoranda or other documents evidencing the decision (or potential decision) to dismiss any defendants, or reduce the relief sought, against any defendant in the New Black Panther Party litigation.

RESPONSE:

In addition to the General Objections, the Department objects to this Document Request on grounds that the Document Request is burdensome and that the phrase "reduce the relief sought" is vague, ambiguous, and subject to different interpretations.

DOCUMENT REQUEST NO. 15:

All documents evidencing the original investigative memo (a/k/a the "J Memo") relating to the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 16:

All documents evidencing communication by or between any member of the Civil Rights Division and the appellate section relating to the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 17:

All documents evidencing any review by the appellate section of any aspect of the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 18:

All documents evidencing any other voter intimidation cases that have been reviewed by the appellate section prior to trial or the entry of a default judgment.

RESPONSE:

See General Objections; *see also* Response to Interrogatory No. 9, *supra*.

DOCUMENT REQUEST NO. 19:

All documents submitted to DOJ's Office of Professional Responsibility as part of the investigation relating to the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 20:

All documents evidencing any research or investigation by DOJ with regard to the New Black Panther Party and/or its affiliates.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 21:

A copy of the DOJ publication "Federal Prosecution of Election Offenses."

RESPONSE:

The Department encloses a copy of the Department of Justice publication *Federal Prosecution of Election Offenses*, which is also available at the website address: http://www.justice.gov/criminal/pin/docs/electbook-rvs0807.pdf.

DOCUMENT REQUEST NO. 22:

All documents evidencing your contention, as set forth in the letter of July 24, 2009 from Portia L. Roberson to Gerald A. Reynolds, Chairman of the United States Commission on Civil

Rights, that "Jerry Jackson...was a resident of the apartment building where the polling place was located..."

RESPONSE:

The Department no longer contends that Jerry Jackson was a resident of the building where the prohibited activities occurred. The Department subsequently corrected the statement referenced in this Document Request. *See* Letter to Honorable Jeff Sessions from Ronald Weich (Sept. 9, 2009) produced in response to Document Request No. 33, *infra*.

DOCUMENT REQUEST NO. 23:

All documents relating to your investigation of the circumstances which gave rise to the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 24:

All video evidence obtained by the Department relating to the New Black Panther Party generally, as well as the actions of the New Black Panther Party in Philadelphia on election day, 2008.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 25:

All documents evidencing concern over First Amendment implications of voter intimidation cases. This request includes, but is not limited to, the circumstances surrounding the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 26:

All documents evidencing any other voter intimidation cases in which concerns were raised within the Department about the First Amendment rights of those alleged to have intimidated voters.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 27:

All documents evidencing any other voter intimidation cases in which the status of an individual as a poll watcher affected the Department's decision to dismiss or lessen charges relating to voter intimidation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 28:

All documents evidencing the decision to limit injunctive relief in the New Black Panther Party litigation to a single municipality and only through November 2012.

RESPONSE:

The Department refers the Commission to the Memorandum in Support of Motion for Default Judgment produced in response to Document Request No. 50, *infra*.

DOCUMENT REQUEST NO. 29:

All documents evidencing communications by or between the Department and any third parties relating to the New Black Panther Party litigation, including, but not limited to, communications with Kristen Clarke of the NAACP Legal Defense Fund.

RESPONSE:

The Department encloses responsive documents yielded by its search to date.

DOCUMENT REQUEST NO. 30:

Any and all documents detailing Department protocol with regard to third-party contacts relating to pending litigation.

RESPONSE:

The Department responds to this Document Request as follows: Department employees are subject to various federal regulations which guide their conduct. These include, but may not be limited to, 28 C.F.R. Part 45 (DOJ Employee Responsibilities); 5 C.F.R. § 735 (Employee Responsibilities and Conduct for the Executive Branch); 5 C.F.R. § 2635 (Standards of Ethical Conduct for Employees of the Executive Branch); 5 C.F.R. § 3801 (Supplemental Standards of Ethical Conduct for Employees of the Department of Justice); 28 C.F.R. Part 77 (Ethical Standards for Attorneys for the Government); and 28 C.F.R. § 50.2 (Release of Information by Personnel of the Department of Justice Relating to Criminal and Civil Proceedings). In addition, each Department attorney is subject to rules and regulations of the state bar(s) of which he or she is a member. The above-referenced regulations are publicly available.

DOCUMENT REQUEST NO. 31:

All documents evidencing all other instances in which DOJ has consulted with outside third parties, with no pre-existing role or relationship, with regard to voter intimidation cases.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Document Request on the ground that the term "consulted" is ambiguous. However, in an effort to assist the Commission, the Department refers the Commission to the documents produced in response to Document Request Nos. 29 and 33, *infra*, which reflect communications with third parties.

DOCUMENT REQUEST NO. 32:

Any and all documents evidencing communications by or between the Department and any member of the Executive Office of the President and/or the White House with regard to the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 33:

Any and all documents evidencing communications by or between the Department and any member of Congress with regard to the New Black Panther Party litigation.

RESPONSE:

The Department encloses responsive documents yielded by its search to date.

DOCUMENT REQUEST NO. 34:

Any and all documents evidencing communications by or between the Department and Michael Coard.

RESPONSE:

The Department's search to date has yielded no documents responsive to this Document Request.

DOCUMENT REQUEST NO. 35:

Any and all documents evidencing communications by or between the Department and Malik Zulu Shabazz.

RESPONSE:

The Department encloses responsive documents yielded by its search to date.

DOCUMENT REQUEST NO. 36:

Any and all documents evidencing communications by or between the Department and Minister King Samir Shabazz (a/k/a Maurice Heath).

RESPONSE:

The Department encloses responsive documents yielded by its search to date.

DOCUMENT REQUEST NO. 37:

Any and all documents evidencing communications by or between the Department and Jerry Jackson.

RESPONSE:

The Department encloses responsive documents yielded by its search to date.

DOCUMENT REQUEST NO. 38:

All documents evidencing your contention that the decision to dismiss defendants and to reduce the relief sought in the New Black Panther Party litigation was made by career employees at the Department.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Document Request on grounds that the phrase "reduce the relief sought" is vague, ambiguous, and subject to different interpretations. The Department encloses responsive documents yielded by its search to date related to the decision to dismiss three defendants in *United States v. New Black Panther Party for Self Defense*, Civil Action No. 2:09-cv-0065 (E.D. Pa.).

DOCUMENT REQUEST NO. 39:

Any and all documents evidencing draft complaints or pleadings with regard to the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 40:

All documents evidencing communications by or between the Voting Rights Section and any other portion of the Department with regard to the New Black Panther Party litigation.

RESPONSE:

See General Objections.

DOCUMENT REQUEST NO. 41:

All documents evidencing any legal analysis relating to the New Black Panther Party litigation.

RESPONSE:

The Department refers the Commission to the Department's filings produced in response to Document Request No. 50, *infra*.

DOCUMENT REQUEST NO. 42:

All documents evidencing the procedures and/or mechanisms in place within the Department, since the inception of the Voting Rights Act, to receive, investigate, and/or resolve complaints regarding voter intimidation.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Document Request on grounds of burdensomeness and materiality insofar as it seeks information dating back to 1965. The Department encloses responsive documents yielded by its search to date. *See also* Response to Document Request No. 1, *supra.*

DOCUMENT REQUEST NO. 43:

All documents evidencing claims within the Voting Section's ICM system relating to voter intimidation cases and/or the New Black Panther Party litigation.

RESPONSE

The Department refers the Commission to the documents produced in response to Document Request No. 44, *infra.*

DOCUMENT REQUEST NO. 44:

All documents evidencing voter intimidation complaints received, investigated, or litigated by the Department, from the inception of the Voting Rights Act to the present.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Document Request insofar as it seeks information dating back to 1965 on grounds of burdensomeness and materiality. The Department encloses responsive documents yielded by its search to date.

DOCUMENT REQUEST NO. 45:

All documents evidencing the Voting Section's understanding of the elements and standards of a Section 1973i(b) case.

RESPONSE:

In addition to the General Objections, the Department specifically objects to this Document Request insofar as it seeks information dating back to 1965 on grounds of burdensomeness and materiality. The Department refers the Commission to the documents produced in Response to Interrogatory No. 29, *supra*.

DOCUMENT REQUEST NO. 46:

All documents evidencing DOJ attempts to pursue actions pursuant to Section 1973i(b).

RESPONSE:

The Department encloses responsive documents yielded by its search to date.

DOCUMENT REQUEST NO. 47:

All documents evidencing the jurisdictional basis for the Department's Office of Professional Responsibility to review the decision-making process relating to the New Black Panther Party litigation.

RESPONSE:

The Department refers the Commission to 28 C.F.R. § 0.39 and Attorney General Order 1931-94. A copy of Attorney General Order 1931-94 can be found at http://www.justice.gov/ag/readingroom/agencymisconducta.htm.

DOCUMENT REQUEST NO. 48:

All documents evidencing any other instances in which DOJ argued that the existence of an OPR investigation was a sufficient basis to stop an inquiry and/or investigation by Congress and/or a federal investigatory agency such as the U.S. Commission on Civil Rights.

RESPONSE:

In addition to the General Objections, the Department objects to this Document Request on grounds that its premise is incorrect. The Department is cooperating with all inquiries into this matter.

DOCUMENT REQUEST NO. 49:

All documents discussing or examining the legal authority (or otherwise) of the Department to cease cooperation with members of Congress and/or the U.S. Commission on Civil Rights based on a pending investigation by the Office of Professional Responsibility. This request includes, but is not limited to, the OPR investigation related to the New Black Panther Party litigation.

RESPONSE:

In addition to the General Objections, the Department objects to this Document Request on grounds that its premise is incorrect. The Department is cooperating with all inquiries into this matter.

DOCUMENT REQUEST NO. 50:

All documents evidencing the pleadings filed in the New Black Panther Party litigation.

RESPONSE:

The Department encloses responsive documents yielded by its search to date.

DOCUMENT REQUEST NO. 51:

All documents evidencing that Jerry Jackson was, or is, a registered poll watcher in Philadelphia.

RESPONSE:

The Department encloses a responsive document yielded by its search to date.

UNITED STATES COMMISSION ON CIVIL RIGHTS

624 NINTH STREET, NW, WASHINGTON, DC 20425
www.usccr.gov

December 8, 2009

VIA HAND DELIVERY

Joseph H. Hunt, Esq.
Director, Federal Programs Branch
Civil Division
United States Department of Justice
20 Massachusetts Avenue, NW
Washington, DC 20001

Re: United States Commission on Civil Rights' Statutory Enforcement Report on the Implication of DOJ's Actions in the New Black Panther Party Litigation for Enforcement of Section 11(b) of the Voting Rights Act

Dear Mr. Hunt:

Reference is made to your letter of November 24, 2009, relating to the above-noted matter.

Pursuant to your request that future communications from the U.S. Commission on Civil Rights ("the Commission") be directed to you, enclosed please find a set of Interrogatories and Requests for Production of Documents relating to the above-noted matter. These requests are accompanied by a subpoena directed to the Department.

In your letter, you seem to contend that there is a question of the Commission's authority to issue subpoenas to the Department or its employees. In this regard, your attention is directed to 42 U.S.C. § 1975a(e)(2). This provision grants the Commission the authority to issue subpoenas for the attendance of witnesses and the production of written documents or other materials. This provision in no way prohibits or excludes requests directed to federal agencies or their employees.[1] Indeed, you should be aware that, as recently as 2004, the Commission issued a subpoena, signed by then-Chair Mary Frances Berry, directed to R. Alex Acosta of the Civil

[1] A conflict of interest may exist with regard to the Department's enforcement of Commission subpoenas directed to the Department of Justice. Under 42 U.S.C. § 1975a(e)(2), the decision whether to initiate a judicial action to enforce a subpoena issued by the Commission rests in the discretion of the Attorney General. This would put the Attorney General in the untenable position of seeking an action against a Department under his supervision. Accordingly, in the event a conflict develops, it is suggested that the agency heads consult as to possible alternative methods to resolve such dispute.

Rights Division.[2] In that instance, the Department met with staff from the Commission and fully cooperated in producing the requested information.

In the present case, beginning in June 2009, the Commission has consistently requested the voluntary production of information from the Department, without any success. It was only after the Department, by letter dated September 9, 2009, formally indicated that no information would be forthcoming (pending completion of an investigation by the Office of Professional Responsibility), and subsequently ignored the Commission's letter of September 30, 2009, that subpoenas were issued by the Commission. While your letter refers to an ongoing "dialogue" between the Department and the Commission, it is the dearth of cooperation on the part of the Department that has resulted in the Commission's need to issue subpoenas.

There is particularly no justification for the ongoing delay in producing documents relating to past voter intimidation investigations. Despite DOJ's contention that there are few reported cases, the Commission has repeatedly explained its need for documents relating to all past investigations, filings, settlements, consent decrees, etc. in order to assess whether the DOJ's actions in the NBPP case constitute a change of policy.

In making the attached interrogatory and document requests, we are both mindful of the sensitivity of the subject matter involved and aware that, in response to similar requests, the Department has raised various concerns and matters of privilege. While such considerations carry weight, cooperation with Commission investigations is a mandatory statutory obligation. *See* 42 U.S.C. § 1975b(e) ("All federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties."). Moreover, due to the unique investigative role of the Commission – akin to that of a congressional committee[3] – disclosure to the Commission of the information sought is both proper and required.

---

[2] Indeed, in discussing the Commission's policies with regard to subpoenas, Ms. Berry has stated:

> We [the Commission] subpoena everyone who comes before us, and we do that even though some people are willing.

Transcript of Commission Meeting of January 11, 2002, p. 7.

[3] Numerous courts have likened the Commission's investigatory function to that of a congressional oversight committee. *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). *See also 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.")

In this regard, production of the requested documents and information to the Commission is in keeping with the practice of disclosure to congressional committees over the years.

> [I]n the last 85 years Congress has consistently sought and obtained deliberative prosecutorial memoranda, and the testimony of line attorneys, FBI field agents and other subordinate agency employees regarding the conduct of open and closed cases in the course of innumerable investigations of Department of Justice activities. These investigations have encompassed virtually every component of the DOJ, and all officials, and employees, from the Attorney General down to subordinate level personnel.

CRS Report for Congress, Congressional Investigations of the Department of Justice, 1920-2007: History, Law, and Practice, p. 2 (Oct. 3, 2007).[4] As the CRS notes, "[a]n inquiring committee need only show that the information sought is within the broad subject matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern." *Id*.

In addition, while the Commission's investigation primarily concerns the Department's policies, procedures, standards and actions in enforcing section 11(b) of Voting Rights Act, the fact that the Attorney General has referred this matter to the Office of Professional Responsibility (OPR) raises questions regarding the possibility of misconduct, as have related press reports. As reflected on the agency's website, "OPR reviews allegations of attorney misconduct involving violation of any standard imposed by law, applicable rules of professional conduct, or Departmental policy." Given the nature of OPR's jurisdiction, any perceived misconduct within its purview relating to matters of civil rights enforcement strengthens the requisite nature of the Commission's discovery requests and weakens any claim that matters must be protected from review. *See In re Sealed Case*, 121 F.3d 729, 738 (D.D.C. 1997); CRS Report at 31.

As to possible concern regarding revelations of government decision-making considerations, press reports indicate that the Department consulted with outside third parties, such as Kristen Clarke of the NAACP Legal Defense Fund. No privilege exists that would allow disclosure by the Department of information to an outside group, but prohibit same to an investigatory agency with a statutory mandate.[5]

---

[4] Because the closest corollary to a Commission investigation is an investigation by a congressional committee, the CRS memorandum is uniquely instructive in analyzing other possible objections to the disclosure of information.

[5] To the extent that the Department does seek to assert any privilege, the attached discovery requests require that each and every assertion of an alleged privilege identify with specificity the nature of the privilege raised, the basis for the assertion, and any legal authorities in support thereof. In addition, the instructions require that the Department indicate whether any claim of executive privilege has been specifically authorized by the President. *See* Instruction No. 10.

But to the extent that some documents or other communications may involve internal pre-decisional deliberative discussions, it should be understood that: (1) as between the Commission and the Department the only legal privilege that exists is the President's constitutionally-based executive privilege,[6] (2) the executive privilege must be invoked by the President, or possibly by a Department Head on the President's behalf, (3) the President should not routinely invoke executive privilege, and may not do so to shield potential wrongdoing, and (4) the President's executive privilege is not absolute and should not be read broadly to frustrate the core functions of an investigative agency.

With regard to documents or communications that arguably might fall within the President's executive privilege, we ask that you confirm early on whether the President has chosen to invoke executive privilege to shield particular information from the Commission. If not, there is no reason to argue about what is and is not subject to that privilege.

Lastly, you have requested information relating to the Commission's deliberation regarding this matter. In this regard, please be informed that the Commission's authorization of the subpoenas occurred on October 30, 2009, but the Commission has discussed and approved previous information requests at several of its meetings, as reflected in previous letters to the Department. Copies of the applicable transcript(s) will be provided under separate cover when finalized. As to coordination with the Department regarding information that might eventually become publicly disclosed, please be informed that affected agencies are given the opportunity to review Commission reports prior to their release pursuant to the agency's internal Administrative Instruction 1-6.

We look forward to working with the Department to facilitate the provision of the requested materials to the Commission, while at the same time addressing any legitimate confidentiality concerns. To that end, it is requested that you please contact the undersigned to schedule a meeting in the next two weeks to (i) identify those discovery requests as to which there is no dispute; (ii) resolve any legitimate concerns that might exist; and (iii) reschedule the previously-noted depositions of Department personnel. In addition, prior to any such meeting, it is requested that you please identify any specific instance in which the pendency of an OPR investigation

[6] With regard to the existence of other common-law privileges, the Department's Office of Legal Counsel has opined that with regard to inter-branch investigations "the interests implicated by the attorney-client privilege generally are subsumed under a claim of executive privilege . . ., and the considerations of separation of powers and effective performance of constitutional duties determine the validity of the claim of privilege." 6 U.S. Op. Off. Legal Counsel 481, n.24 (Aug. 2, 1982). Attorney-client privilege "is not usually considered to constitute a separate basis [from executive privilege] for resisting congressional demands for information." 10 U.S. Op. Off. Legal Counsel 68, 78 (April 28, 1986). Indeed, Congress has never taken the position, nor have the courts held, that congressional investigators must recognize the attorney-client privilege when conducting an investigation that involves the executive branch. Whether to recognize such a claim rests within the sound discretion of the congressional committee. From a separation of powers perspective, the President's claim of privilege is even weaker with respect to the Commission, half of whose Commissioners are appointed by the President.

precluded the disclosure of requested information from Congress or an independent federal agency.

Thank you for your anticipated cooperation.

Sincerely,

David P. Blackwood
General Counsel

Attachments

cc: Chairman Gerald A. Reynolds
Vice Chair Abigail Thernstrom
Commissioner Todd F. Gaziano
Commissioner Gail Heriot
Commissioner Peter N. Kirsanow
Commissioner Arlan D. Melendez
Commissioner Ashley L. Taylor, Jr.
Commissioner Michael J. Yaki
Martin Dannenfelser, Staff Director

DATE: December 8, 2009

TO: U.S. Department of Justice
c/o Joseph H. Hunt, Director, Federal Programs Branch

FROM: U.S. Commission on Civil Rights
David P. Blackwood, General Counsel

SUBJECT: U.S. Commission on Civil Rights' Statutory Enforcement Report on the Implications of DOJ's Actions in the New Black Panther Party Litigation for Enforcement of Section 11(b) of the Voting Rights Act

Pursuant to 42 U.S.C. § 1975a(e)(4) and § 1975b(e), the United States Commission on Civil Rights (the "Commission"), through its General Counsel, David P. Blackwood, requests that the U.S. Department of Justice answer fully, in writing and under oath, each of the following Interrogatories and Document Requests and serve a copy of the responses and objections, if any, on counsel for the Commission on or before January 11, 2010 at the offices of the U.S. Commission on Civil Rights, 624 Ninth Street, N.W., Suite 620, Washington, DC 20425.

INSTRUCTIONS AND DEFINITIONS

1. These requests for information seek information available to the U.S. Department of Justice and its employees, agents, and representatives.
2. The United States Commission on Civil Rights shall be referred to as the "U.S. Commission on Civil Rights," the "Commission," or the "agency."
3. The United States Department of Justice shall be referred to as "DOJ" or the "Department."
4. The Civil Rights Division of the United States Department of Justice shall be referred to as "the Civil Rights Division."

5. The Voting Rights Section of the Civil Rights Division of the United States Department of Justice shall be referred to as "the Voting Rights Section."

6. The New Black Panther Party for Self-Defense shall be referred to as "NBPP" or the "New Black Panther Party."

7. "The New Black Panther Party litigation" shall refer to the case styled The United States of America v. New Black Panther Party for Self Defense, et al., Civil Action No. 2:09-cv-0065 in the Untied States District Court for the Eastern District of Pennsylvania.

8. If any document responsive to this request was, but is no longer, in your possession, custody or control, please furnish a description of each such document and indicate the manner and circumstances under which it left your possession, custody, and control and state its present location and custodian, if known.

9. If for any request there is no responsive document in the Department's possession, custody, or control, state whether documents that would have been responsive were destroyed or mislaid, and, if so, the circumstances under which they were destroyed or mislaid.

10. State the basis for any objection to responding to any discovery request, together with any legal authorities or precedents upon which DOJ relies to support said objection. In the event that the Department objects to only part of a discovery request, the Department is required to furnish all information requested by the discovery request that is not included within the partial objection.

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.

In addition, for 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 claimed privilege.

11. These discovery requests are continuing in nature, and to the extent that DOJ acquires new information on or before April 2, 2010 that is responsive to these requests, the Department is required to supplement its response.

12. Where the name or identity of a person is requested, please provide the full name, home and business addresses, and home and business telephone numbers of such person. If the name requested is that of a corporation, please state the full name of the corporation, where it is incorporated, and its principal place of business.

13. Where knowledge or information in possession of a party is requested, such request includes the knowledge of the party's agents, employees, representatives, officers and, unless privileged, its attorneys.

14. The pronoun "you" refers to the party to whom these Interrogatories are addressed and to the persons mentioned in paragraph "13" above.

15. The terms "identify," "identity" and "identification," when referring to a natural person, mean to provide an identification sufficient to serve such person with process to require his or her attendance in federal district court, and shall include without limitation his or her full name, present or last known address, present or last known business affiliation, title or occupation, and each of his or her positions during the applicable period of time covered by any answer referring to such person. When used in reference to a writing or document, the referenced terms (including, without limitation, any business records) mean to give a sufficient characterization of such writing or document so as to properly identify it in a subpoena issued pursuant to the Federal Rules of Civil Procedure, and shall include, without limitation, the following information with respect to each document:

    A) the date appearing on such document, and if it has no date, the answers shall so state and shall give the date or approximate date such document was prepared;

    B) the identity or descriptive code, file number, bates number, title or label of such document;

    C) the general nature and description of such document, and if it was unsigned, the answer shall so state and shall identify the person or persons who prepared it;

D) the name of the person to whom each such document was addressed and the name of each person other than such addressee to whom such document or copies thereof were given or sent;

E) the name and address of the person having present possession, custody or control of such document; and

F) whether or not any draft, copy or reproduction of such document contains any postscripts, notations, change or addendum not apparent on the document itself, and if so, the answer shall give the description of each draft, copy or reproduction.

17. Provide the following information in chronological order with respect to each oral communication which is the subject matter in whole or in part of any discovery request addressed to you:

A) who was present;

B) the date thereof;

C) where the oral communication occurred;

D) what was said by each person during such conversation, and the order in which it was said, identifying what was said by each person involved in the conversation.

18. The term "person" as used herein means, in plural as well as singular, any natural person, firm, association, board, agency, department, partnership, corporation, or other form of legal entity, unless the context indicates otherwise.

19. The terms "writing" and/or "document" as used herein means all records, papers, books, transcriptions, pictures, drawings or diagrams of any nature, whether transcribed by hand or some mechanical, electronic, photographic or other means, as well as sound reproductions of oral statements or conversations by whatever means made, whether in your actual or constructive possession or control or not, relating or pertaining in any way to the subject matters in connection with which

it is used and includes originals, file copies, or other copies no matter how prepared and all drafts prepared in connection with such writing, whether used or not, including by way of illustration and not by way of limitation, the following: books, records, lists, receipts, contracts, agreements, expense accounts, sound and tape recordings, records of electronic communications (whether in electronic form or otherwise), memoranda (including written memoranda of telephone conversations and other conversations, discussions, meetings, agreements, acts and activities), minutes, plans, diaries, computer printouts, calendars, desk pads, scrapbooks, notebooks, letters, communications, correspondence, bulletins, complaint circulars, forms, opinions or reports of consultants, pamphlets, notices, statements, journals, summaries or reports of investigations or negotiations, postcards, telegrams, telex messages, reports, intra-office or inter-office communications, test results, findings or reports, and any and every other method by which information is recorded and/or transmitted, including, but not limited to, any recorded, transcribed, punched, computerized, filmed, and/or graphic matter, however produced and/or reproduced, filings with any agency, department or court, photostats, microfilm, maps, deposition transcripts, affidavits, and all other writings whether prepared by you for your own use or for transmittal or received by you. If any such writings and/or documents are maintained in folders, produce the file folders containing such data, including the precise order in which such items are contained in the file folder and all wording on each such file folder.

20. The term “present time” as used herein means the date on which these discovery requests were served on the Department.

21. The term “the facts upon which you rely,” used in reference to any allegation or legal theory, contention, denial, etc., refers to a full and complete statement of all evidence within your knowledge upon which the Department relies to support its position or statements. It also requires the Department to “identify,” pursuant to Paragraph “15” above, those individuals with knowledge of these facts and all documents reflecting these facts relied upon by you, and if the facts relied upon are related to an oral communication, then provide a statement of (i) the name, address, and business position of each and every person who participated in such communication, whether a speaker, hearer, or overhearer; (ii) the date, time and place of such oral communication; and (iii) the subject matter of such oral communication with sufficient particularity to reveal and make understandable each and every subject matter referred to and the subject of each such oral communication. The failure of any discovery request which requests “the facts upon which you rely” to request the identity of individuals or documents, or to state the substance of any oral communication upon which you rely, should not be construed as a waiver of the requirements set forth in this paragraph.

22. “Communication” means any oral or written exchange of words, thoughts, or ideas between two or more persons, whether person-to-person, in a group, by telephone, by letter, by electronic mail, by telex, or by any other process. All such communications in writing shall include, without limitation, printed, typed, hand written or other readable documents, correspondence, memos, reports, contracts, both initial and subsequent diaries, log books, minutes, notes, studies, surveys and forecasts.

23. When appropriate in the context of a discovery request or a response thereto, the singular shall mean the plural, and the masculine gender shall mean the feminine, and vice versa.

24. The terms “and” and “or” shall be interpreted conjunctively or disjunctively so as to require, in each context, the most complete and inclusive response.

25. Whenever in response to these discovery requests, reference is made to a natural person, state his or her full name and present address, if known, and the present or last known business position and affiliation.

26. Unless otherwise indicated, these discovery requests refer to the time, place and circumstances of the occurrence mentioned or complained of in the pleadings to the New Black Panther Party litigation, as well as the related DOJ investigation and decision-making process relating to said litigation.

27. If any responsive documents are available electronically, please provide a current Internet address whereby such document may be downloaded or otherwise obtained.

INTERROGATORIES

1. Identify all DOJ personnel who have worked on the New Black Panther Party litigation. This request includes, but is not limited to: (i) those DOJ personnel who interviewed witnesses in Philadelphia on election day; (ii) all DOJ personnel directly assigned to said litigation; (iii) those individuals who exercised decision-making authority relating to same; and (iv) all individuals in the appellate section who reviewed any aspect of said litigation. For each individual identified, indicate whether said person is a career or political employee.

2. Identify and describe in detail the decision-making process within DOJ relating to the New Black Panther Party litigation. This request includes, but is not limited to, the decision-making processes that: (i) led to the initial filing of said litigation; (ii) the decision to seek a default; (iii) the decision to delay seeking a default judgment; (iv) the decision to seek review by the appellate section; (v) the decision to review the relief sought in the original complaint; and (vi) the decision to dismiss certain defendants and to reduce the relief sought against the remaining defendant.

3. Describe the process for investigating and evaluating voter intimidation cases within the Department, including the determination of whether to pursue litigation. If this process was not followed to any extent with regard to the New Black Panther Party litigation, identify and describe the manner in which the process was not followed.

4. With regard to the New Black Panther Party litigation, identify and describe in detail: a) the factors involved in the initial charging decision; b) the factors involved in the decision not to pursue a default judgment against three of the initial four defendants; and c) the factors involved in the decision to limit the preventative relief sought against Minister King Samir Shabazz (a/k/a Maurice Heath) to a Philadelphia-based injunction.

5. Identify all communications, whether oral or written, within the Department relating to the New Black Panther Party litigation. This request includes, but is not limited to, communications concerning (i) the initial decision to file the complaint; (ii) the merits of said litigation; (iii) the decision to seek a default; (iv) the decision to delay seeking a default judgment; (v) the decision to seek review by the appellate section; (vi) the decision to review the relief sought in the original complaint; and (vii) the

decision to dismiss certain defendants and to reduce the relief sought against the remaining defendant.

6. Identify and describe in detail any communications by anyone in the Department with the Attorney General of the United States with regard to the New Black Panther Party litigation.

7. Identify each and every section within the Department of Justice that reviewed or worked on any portion of the New Black Panther Party litigation. For each such section, describe the work or analysis performed.

8. Identify and describe in detail all documents provided to the appellate section as part of its review of the New Black Panther Party litigation.

9. Identify all other voter intimidation cases that have been reviewed by the appellate section prior to trial or the entry of a default judgment.

10. Identify and describe in detail any First Amendment concerns raised by the appellate section with regard to the New Black Panther Party litigation.

11. Identify and describe in detail whether the appellate section, in reviewing the New Black Panther Party litigation, raised any distinction between one who intimidates voters as a poll watcher and one who intimidates voters, but is not a poll watcher.

12. Identify and describe in detail all communications, whether oral or written, by or between the Department and any outside third parties with regard to the New Black Panther Party litigation. This request includes, but is not limited to, all communications with Kristen Clarke of the NAACP Legal Defense Fund.

13. Describe in detail the purpose of DOJ contacts with outside third parties with regard to the New Black Panther Party litigation as well as the authority used to justify such contacts.

14. Identify and describe in detail all other instances in which DOJ has consulted with outside third parties with regard to voter intimidation cases.

15. Identify all communications, whether oral or written, by or between the Department and any member of the Executive Office of the President and/or the White House with regard to the New Black Panther Party litigation.

16. Identify all communications, whether oral or written, by or between the Department and any member of Congress with regard to the New Black Panther Party litigation.

17. Identify and describe in detail all communications by or between the Department and any of the following individuals: (i) Michael Coard; (ii) Malik Zulu Shabazz; (iii) Minister King Samir Shabazz (a/k/a Maurice Heath); and (iv) Jerry Jackson.

18. Identify and describe in detail all facts upon which you rely to support your contention that the decision to dismiss certain defendants and reduce the relief sought in the New Black Panther Party litigation was made by career employees at the Department including, but not limited to, the identity of the career employee(s) you contend made said decision.

19. For the period from January 1, 2009, identify all investigations conducted by the Department with regard to the NBPP, and/or any related individuals or entity.

20. Identify and describe in detail any reports received by the Department as to other alleged incidents of voter intimidation (and/or other voting-related improprieties) by members of the NBPP during the 2008 election.

21. Describe in detail all interviews conducted by you, or on your behalf, with any witnesses relating to the actions of the NBPP in Philadelphia during the 2008 presidential election.

22. Describe in detail the investigation conducted by you, or on your behalf, relating to the actions of the NBPP in Philadelphia during the 2008 presidential election.

23. Describe in detail any reports, summaries of events or descriptions received by you from any third party with regard to the activities, practices and/or actions of the NBPP and/or the individuals named as defendants in the New Black Panther Party litigation.

24. Identify and describe in detail all additional facts learned by you, subsequent to the filing of the complaint in the New Black Panther Party litigation, that influenced the Department's decision to drop three of the defendants as parties and to reduce the relief sought.

25. Identify and describe in detail any and all federal statutes, rules, regulations, and/or policies the Department enforces that in any way relate to voter intimidation.

26. For the period from January 1, 1995 through the present, identify all staff currently devoted full- or part-time to investigating and/or litigating voter intimidation matters.

27. Since the inception of the Voting Rights Act, describe the procedures and/or mechanisms in place within the Department to receive, investigate, and resolve

complaints regarding voter intimidation. How have these mechanisms evolved over time, and what procedures are currently in place?

28. Describe the Voting Section's ICM system used to track investigative matters and cases. If any additional or more recent telephone, electronic, or other tracking systems are used, describe those systems.

29. Since the inception of the Voting Rights Act, identify by year the number of voter intimidation complaints (i) received, (ii) investigated, and/or (iii) litigated by the Department, as well as the outcomes of same.

30. For each complaint listed in response to Interrogatory 29, describe: (i) the facts alleged; (ii) DOJ's investigatory actions; (iii) the basis of decision to pursue (or not) formal investigation; (iv) the basis to initiate litigation (or not); and (v) the basis for pursuit of ultimate resolution obtained.

31. Of those complaints listed in Interrogatory 29, how many have been investigated and/or litigated under 42 U.S.C. § 1973i(b), either solely or in conjunction with another statute or constitutional provision? Identify same.

32. Explain the Voting Section's understanding of the elements and standards of a § 1973i(b) case.

33. In a newspaper article in The Washington Times dated July 30, 2009, it is stated that:

> Associate Attorney General Thomas J. Perrelli, the No. 3 official in the Obama Justice Department, was consulted and ultimately approved the decision in May to reverse course and drop a civil complaint accusing three members of the New Black Panther Party of intimidating voters in Philadelphia during November's election …

Do you acknowledge that the aforesaid characterization is accurate? If you do not acknowledge that said characterization is accurate, describe all facts upon which you rely to support your contention.

34. In The Weekly Standard magazine dated August 10, 2009, it is contended that:

> In April [2009], a preliminary filing of default was filed by Justice lawyers with the court clerk. No concern or objection was raised within Justice. This decision was approved by both the Acting Assistant Attorney General for Civil Rights, Loretta King, and Steve Rosenbaum, previously Acting Deputy Assistant Attorney General for Civil Rights and recently returned to his post as Section Chief for Housing.

Do you acknowledge the characterization that both Loretta King and Steve Rosenbaum approved the filing of a request for default in the New Black Panther Party litigation is accurate? If you do not agree that the aforesaid characterization is accurate, state all facts upon which you rely to support your contention.

35. Identify and describe in detail the basis for referring issues relating to the New Black Panther Party litigation to DOJ's Office of Professional Responsibility (OPR), including, but not limited to, an identification and description of any suspected acts of prosecutorial misbehavior or ethical breach which you believe require investigation. If there is an alternative basis for investigation by OPR, please identify and describe same.

36. Identify and describe in detail the alleged jurisdictional basis for the Department's Office of Professional Responsibility to review the decision-making process relating to the New Black Panther Party litigation.

37. Identify and describe in detail any other instances in which DOJ argued that the existence of an OPR investigation was a sufficient basis to cease Department

cooperation with an inquiry and/or investigation by members of Congress and/or a federal investigatory agency such as the U.S. Commission on Civil Rights. Provide citations to all authorities upon which the Department relies to support its position.

38. Do you acknowledge that Assistant Attorney General for Civil Rights Loretta King discussed the New Black Panther Party litigation with Deputy Attorney General David W. Ogden and Associate Attorney General Thomas J. Perrelli? If so, describe in detail said communications.

39. In a letter dated July 24, 2009 to Gerald A. Reynolds, the Chairman of the United States Commission on Civil Rights, DOJ official Portia L. Roberson indicated:

> We believe this injunction [in the New Black Panther Party litigation] is tailored appropriately to the scope of the violation and the requirements of the First Amendment.

Please identify and describe in detail the First Amendment concerns arising out of the New Black Panther Party litigation including, but not limited to, whether such concerns related to (i) verbal comments made by the NBPP defendants; (ii) the weapon(s) carried by same; (iii) the uniforms worn by said individuals; and/or (iv) a combination of any of the aforesaid. Cite all authorities upon which you rely to support your concerns.

40. Identify and describe in detail any other voter intimidation cases in which concerns were raised within the Department about the First Amendment rights of those believed to have intimidated voters.

41. In a letter dated July 24, 2009 to Gerald A. Reynolds, the Chairman of the United States Commission on Civil Rights, DOJ official Portia L. Roberson stated:

> The decision was made after a careful and thorough review of the matter by the Acting Assistant Attorney General for Civil Rights, a career employee with nearly 30 years experience in the Department, including

> nearly 15 years as the career Deputy Assistant Attorney General for Civil Rights.

With regard to said statement, is it the position of the Department of Justice that the Acting Assistant Attorney General for Civil Rights was the ultimate decision maker with regard to New Black Panther Party litigation? If not, please identify any and all additional officials, as well as their role in said litigation.

42. Identify and describe in detail in what way, if any, Jerry Jackson's status as a poll watcher affected the Department's decision to dismiss him as a defendant in the New Black Panther Party litigation, including, but not limited to, whether status as a poll watcher excuses potential or alleged acts of voter intimidation.

43. Identify each witness interviewed by the Department relating to the incident that occurred on election day, 2008, in Philadelphia involving the NBPP.

44. Identify all career employees in the Civil Rights Division who recommended the ultimate relief sought in the New Black Panther Party litigation.

45. Identify all career employees in the Civil Rights Division who objected to the ultimate relief sought in the New Black Panther Party litigation.

46. Identify all persons not otherwise identified in your answers to the above discovery requests who have personal knowledge of the circumstances surrounding (i) the election day activities of the NBPP; (ii) the Department's investigation of same; (iii) the New Black Panther Party litigation; (iv) the Department's decision-making process relating to said litigation; and/or (v) the resulting OPR investigation.

47. With respect to the November 2008 elections, it was reported that a major party congressional candidate in Orange County mailed a letter to 24,000 registered Latino voters that may have been designed to intimidate them from voting. The letter,

written in Spanish, falsely stated that immigrants may not vote, and that the letter also declared "there is no benefit in voting." MALDEF asked DOJ to investigate.

With regard to said incident:

(a) What division of DOJ, if any, received the complaints about these alleged acts of voter intimidation?

(b) Was Section 11b, 42 U.S.C. § 1973i(b) considered as a potential legal strategy to pursue?

(c) What action, if any, did DOJ take in these actions?

48. With respect to the November 2008 elections, it was reported that in Tucson alleged anti-migrant activists wore dark clothing with a badge-like emblem and carried a handgun in a holster. In addition, the men involved attempted to ask Latino voters questions, write down their personal information, and videotaped them and their license plates as they went to cast their vote. A man named Russell Dove, a local anti-migrant activist, acknowledged his participation in the effort to intimidate Latino voters.

With regard to said incident:

(a) What division of DOJ, if any, received the complaints about these alleged acts of voter intimidation?

(b) Was Section 11b, 42 U.S.C. § 1973i(b) considered as a potential legal strategy to pursue?

(c) What action, if any, did DOJ take in these actions?

49. With respect to the November 2008 elections, in Grand Coteau, Louisiana, in a racially heated mayoral election, a five-foot cross was erected outside the town hall, and lit on fire, on November 3, 2006. This was staged on public property, and many

African Americans felt the cross-burning was a tool to intimidate minority voters from freely exercising their right to vote.

With regard to said incident:

(a) What division of DOJ, if any, received the complaints about these alleged acts of voter intimidation?

(b) Was Section 11b, 42 U.S.C. § 1973i(b) considered as a potential legal strategy to pursue?

(c) What action, if any, did DOJ take in these actions?

DOCUMENT REQUESTS

The following documents are requested:

1. Since the inception of the Voting Rights Act, all materials used to train Agency staff on voter intimidation issues.
2. Since the inception of the Voting Rights Act, all documents and/or print-outs from tracking systems or other databases identifying and detailing the progress of complaints, investigations, and/or litigation involving voter intimidation.
3. Any and all documents describing the facts of the New Black Panther Party litigation.
4. Any and all documents providing incident reports or witness statements with regard to the circumstances which gave rise to the New Black Panther Party litigation.
5. All documents evidencing any investigation conducted by the Department, or on its behalf, relating to the actions of the NBPP in Philadelphia during the 2008 presidential election.
6. All documents evidencing any reports of alleged voting intimidation (or other voting-related improprieties) by members of the NBPP, other than those that gave rise to the New Black Panther Party litigation.
7. All documents evidencing any reports or summaries of events or descriptions received by you from any third party with regard to the activities, practices and/or actions of the NBPP generally, and/or those named as defendants in the New Black Panther Party litigation.
8. All documents evidencing any additional facts learned by you, subsequent to the filing of the complaint in the New Black Panther Party litigation, that influenced the

Department's decision to drop three of the defendants as parties and to reduce the relief sought.

9. Any and all documents evidencing communications by or between any member of the Voting Rights Section and Loretta King relating to the NBPP and/or the New Black Panther Party litigation.
10. Any and all documents evidencing communications by or between any member of the Civil Rights Division and David W. Ogden relating to the NBPP and/or the New Black Panther Party litigation.
11. Any and all documents evidencing communications by or between any member of the Civil Rights Division and Thomas J. Perrelli relating to the NBPP and/or the New Black Panther Party litigation.
12. Any and all documents evidencing any communications by anyone within the Department with the Attorney General of the United States with regard to the New Black Panther Party litigation.
13. Any and all internal memoranda evaluating potential charges in the New Black Panther Party litigation.
14. Any and all internal memoranda or other documents evidencing the decision (or potential decision) to dismiss any defendants, or reduce the relief sought, against any defendant in the New Black Panther Party litigation.
15. All documents evidencing the original investigative memo (a/k/a the "J Memo") relating to the New Black Panther Party litigation.

16. All documents evidencing communication by or between any member of the Civil Rights Division and the appellate section relating to the New Black Panther Party litigation.
17. All documents evidencing any review by the appellate section of any aspect of the New Black Panther Party litigation.
18. All documents evidencing any other voter intimidation cases that have been reviewed by the appellate section prior to trial or the entry of a default judgment.
19. All documents submitted to DOJ's Office of Professional Responsibility as part of the investigation relating to the New Black Panther Party litigation.
20. All documents evidencing any research or investigation by DOJ with regard to the New Black Panther Party and/or its affiliates.
21. A copy of the DOJ publication "Federal Prosecution of Election Offenses."
22. All documents evidencing your contention, as set forth in the letter of July 24, 2009 from Portia L. Roberson to Gerald A. Reynolds, Chairman of the United States Commission on Civil Rights, that "Jerry Jackson … was a resident of the apartment building where the polling place was located …"
23. All documents relating to your investigation of the circumstances which gave rise to the New Black Panther Party litigation.
24. All video evidence obtained by the Department relating to the New Black Panther Party generally, as well as the actions of the New Black Panther Party in Philadelphia on election day, 2008.

25. All documents evidencing concern over First Amendment implications of voter intimidation cases. This request includes, but is not limited to, the circumstances surrounding the New Black Panther Party litigation.
26. All documents evidencing any other voter intimidation cases in which concerns were raised within the Department about the First Amendment rights of those alleged to have intimidated voters.
27. All documents evidencing any other voter intimidation cases in which the status of an individual as a poll watcher affected the Department's decision to dismiss or lessen charges relating to voter intimidation.
28. All documents evidencing the decision to limit injunctive relief in the New Black Panther Party litigation to a single municipality and only through November 2012.
29. All documents evidencing communications by or between the Department and any third parties relating to the New Black Panther Party litigation, including, but not limited to, communications with Kristen Clarke of the NAACP Legal Defense Fund.
30. Any and all documents detailing Department protocol with regard to third-party contacts relating to pending litigation.
31. All documents evidencing all other instances in which DOJ has consulted with outside third parties, with no pre-existing role or relationship, with regard to voter intimidation cases.
32. Any and all documents evidencing communications by or between the Department and any member of the Executive Office of the President and/or the White House with regard to the New Black Panther Party litigation.

33. Any and all documents evidencing communications by or between the Department and any member of Congress with regard to the New Black Panther Party litigation.
34. All documents evidencing communications by or between the Department and Michael Coard.
35. All documents evidencing communications by or between the Department and Malik Zulu Shabazz.
36. All documents evidencing communications by or between the Department and Minister King Samir Shabazz (a/k/a Maurice Heath).
37. All documents evidencing communications by or between the Department and Jerry Jackson.
38. All documents evidencing your contention that the decision to dismiss defendants and to reduce the relief sought in the New Black Panther Party litigation was made by career employees at the Department.
39. Any and all documents evidencing draft complaints or pleadings with regard to the New Black Panther Party litigation.
40. All documents evidencing communications by or between the Voting Rights Section and any other portion of the Department with regard to the New Black Panther Party litigation.
41. All documents evidencing any legal analysis relating to the New Black Panther Party litigation.
42. All documents evidencing the procedures and/or mechanisms in place within the Department, since the inception of the Voting Rights Act, to receive, investigate, and/or resolve complaints regarding voter intimidation.

43. All documents evidencing claims within the Voting Section's ICM system relating to voter intimidation cases and/or the New Black Panther Party litigation.
44. All documents evidencing voter intimidation complaints received, investigated, or litigated by the Department, from the inception of the Voting Rights Act to the present.
45. All documents evidencing the Voting Section's understanding of the elements and standards of a Section 1973i(b) case.
46. All documents evidencing DOJ attempts to pursue actions pursuant to Section 1973i(b).
47. All documents evidencing the jurisdictional basis for the Department's Office of Professional Responsibility to review the decision-making process relating to the New Black Panther Party litigation.
48. All documents evidencing any other instances in which DOJ argued that the existence of an OPR investigation was a sufficient basis to stop an inquiry and/or investigation by Congress and/or a federal investigatory agency such as the U.S. Commission on Civil Rights.
49. All documents discussing or examining the legal authority (or otherwise) of the Department to cease cooperation with members of Congress and/or the U.S. Commission on Civil Rights based on a pending investigation by the Office of Professional Responsibility. This request includes, but is not limited to, the OPR investigation related to the New Black Panther Party litigation.
50. All documents evidencing the pleadings filed in the New Black Panther Party litigation.

51. All documents evidencing that Jerry Jackson was, or is, a registered poll watcher in Philadelphia.

David P. Blackwood
General Counsel
U.S. Commission on Civil Rights
624 Ninth Street, NW
Washington, DC 20425
202-376-7622

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing United States Commission on Civil Rights' Interrogatories and Requests for Documents was hand-delivered on this _____ day of December, 2009 to:

U.S. Department of Justice
c/o Joseph H. Hunt
Director, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, DC 20001

_____
David P. Blackwood

UNITED STATES COMMISSION ON CIVIL RIGHTS

624 NINTH STREET, NW, WASHINGTON, DC 20425 www.usccr.gov

September 30, 2009

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

Re: U.S. Commission on Civil Rights Review and Report on the Implications of Enforcement Actions in *United States v. New Black Panther Party for Self-Defense*, Civ. No. 09-0065 SD (E.D. Pa.) (NBPP case)

Dear Attorney General Holder:

The Commission requests that you instruct Department officials to fully cooperate, as 42 U.S.C. § 1975b(e) requires, with our overdue information requests in the above-referenced matter. To that end, we also ask you to identify an individual who will exercise the substantive authority to coordinate the Department's responses to our current and future requests.

Pursuant to formal proceedings, the Commission initiated an inquiry into the implications of the Department's enforcement actions in the NBPP case as reflected in our letters to DOJ of June 16 and 22. We received a largely non-responsive letter from Portia Roberson in late July and none of the documents we requested. On August 7, the Commission voted 6-0, with two members abstaining, to expand its investigation by sending a follow-up letter to the Department. On August 10, the Commission addressed its letter to you, explaining our need for the information. For example, we stressed our need for information on previous voter intimidation investigations so that we could determine whether the Department's action in the NBPP case constitutes a change in policy and, if so, what the implications of that change might be.

At our most recent meeting on September 11, 2009, the Commission voted to make its review of the implications of the NBPP matter the subject of its annual enforcement report. The Commission was aware that the Department's Office of Professional Responsibility (OPR) had initiated an inquiry into some aspects of the NBPP case to determine whether further review is warranted. Although a letter from Ms. Roberson of September 9 expresses the Department's desire to delay any response to the Commission until the OPR investigation is complete, you may rest assured that the Commission will be sensitive to OPR's internal ethics review as we move forward with our own inquiry. As the discussion at our recent meeting indicates, the Commission will work to accommodate any legitimate concerns the Department may have regarding specific requests for information once the Department begins its production.

The Commission has a special statutory responsibility to investigate voting rights deprivations and make appraisals of federal policies to enforce federal voting rights laws. The Commission must form an independent judgment regarding the merits of the NBPP enforcement actions (regardless of how the decisions were made) and the potential impact on future voter-intimidation enforcement by the Department. Accordingly, Congress has provided, in a provision with no statutory exceptions, that, "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).

It is important to note that many aspects of the Commission's inquiry have no connection with the matters subject to OPR's jurisdiction. As set forth in our August 10 letter, the Commission will seek to determine:

1) the facts and the Department's actions regarding prior voting intimidation investigations;
2) the underlying conduct in Philadelphia giving rise to the NBPP case;
3) whether the decision in the NBPP case is consistent with departmental policy or practice in prior cases or amounts to a change in policy or practice;
4) the extent to which current policy or practice as reflected in the NBPP case may encourage voter intimidation; and
5) whether that policy or practice is consistent with proper enforcement of section 11(b) of the Voting Rights Act.

The Commission may also seek to determine whether any decisions in the case were induced or affected by improper influences. Thus, there may be some areas of potential overlap with OPR's internal review, including an examination of the decision-making process in the case. With regard to these questions, if there are concerns as to the timing or content of specific discovery requests, the Commission will work with the Department to resolve them in a prompt and satisfactory manner. In addition to my personal availability to speak with your representatives, the Commission has appointed a subcommittee of commissioners to focus on any discovery issue that might arise in our investigation.

Accordingly, please identify the individual with substantive responsibility for the production of documents, scheduling of interviews and any possible depositions. If you have not done so by October 14th, however, it will be necessary for us to propound our interrogatories and interview requests directly on the affected Department personnel.

Thank you in advance for your cooperation and prompt reply to these requests.

Sincerely,

Gerald A. Reynolds
Chairman

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

---

[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]

---

[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
Subcommittee on the Constitution

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

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

June 22, 2009

Ms. Loretta King
Acting Assistant Attorney General
Office of the Assistant Attorney General, Main
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Ms. King:

On June 16, 2009 your office was sent a letter signed by four of our colleagues at the U.S. Commission on Civil Rights. (Attached.) We are writing today to lend our support for that letter. The letter was sent in relation to the Civil Rights Division's dismissal of a lawsuit against individuals who were caught on video engaging in voter suppression as members of the New Black Panther Party.

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 vote suppression. We cannot understand the rationale for this case's dismissal 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.

We join with our colleagues in requesting further information on the Division's rationale for dismissing this case and the evidentiary and legal standards utilized in dismissing other charges of alleged voter intimidation.

Sincerely,

Abigail Thernstrom
Vice Chairman

Ashley L. Taylor, Jr.
Commissioner

Cc: Christopher Coates, Chief, Voting Rights Section
Arlan Melendez, Commissioner
Michael Yaki, Commissioner
Representative Lamar Smith (TX)

Attachment: June 16, 2009 Letter to Ms. Loretta King

UNITED STATES
COMMISSION ON
CIVIL RIGHTS

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

June 16, 2009

Ms. Loretta King
Acting Assistant Attorney General
Office of the Assistant Attorney General, Main
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Ms. King:

One of the U.S. Commission on Civil Rights' first official projects upon its establishment by the Civil Rights Act of 1957—the same act that created the Civil Rights Division—was to convene hearings in Alabama to look for evidence of racial discrimination in voting there. Witness after witness testified of efforts to interfere with their right to vote, whether by threats, intimidation, coercion, trickery or the erection of legal or other impediments. The data gathered by the Commission formed the basis for the Voting Rights Act of 1965, which is unequivocal in its command that "no person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten or coerce any person from voting or attempting to vote" or from aiding a voter. 42 U.S.C. § 1973i (2009). Investigating such claims and bringing them to the attention of enforcement entities such as the Department of Justice are a part of the Commission's statutory mandate to this day. 42 U.S.C. § 1975a (2009).[1] Our mandate also includes investigating and reporting to the President and Congress on how well federal agencies are enforcing the nation's civil rights laws.

So it is with great confusion that we[2] learn of the Civil Rights Division's recent decision to dismiss a lawsuit against defendants who were caught engaging in attempted voter suppression the likes of which we haven't witnessed in decades. Specifically, defendants were caught on video blocking access to the polls, and physically threatening and verbally harassing voters during the November 4, 2008 general election. They wore uniforms bearing the insignia of the New Black Panther Party, described by the Division as a "black-supremacist organization," and one of them actually brandished a nightstick in plain view of voters and poll observers. Complaint ¶¶ 9, 13. Furthermore, the Division's own complaint alleges that defendants "made statements containing racial

[1] In 2006, for example, the Commission called upon then-Attorney General Gonzalez to fully and vigorously investigate reports that Spanish-surnamed individuals in Orange County received correspondence seeking to intimidate them from voting in the mid-term elections that year.

[2] The decision to send this letter was arrived at in an opening meeting of the United States Commission on Civil Rights on June 12, 2009 by majority vote of the Commissioners present. The vote was 4 to 0 with one member abstaining. The signatories to this letter all voted in favor of the motion.

threats and racial insults." Complaint ¶ 10. Their behavior was such that an experienced attorney and veteran of the civil rights movement, Bartle Bull, called it "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.

Though it had basically won the case and could have submitted a motion for default judgment against the Party and its members for failing to respond to the Division's complaint, the Division took the unusual move of voluntarily dismissing the charges as against all but the defendant who waived the nightstick. Yet even as to that remaining defendant, the only relief the Division requested was weak—an injunction prohibiting him from displaying a weapon within 100 feet of any polling place in Philadelphia. It has since been revealed that one of the defendants had been carrying credentials as a member of, and poll watcher for, the local Democratic committee.

In its notice of dismissal, the Division cites as its rationale only the fact that defendants failed to appear and respond. That makes no sense, for at least two reasons. First, the Division's public rationale would send the wrong message entirely—that attempts at voter suppression will be tolerated and will not be vigorously prosecuted so long as the groups or individuals who engage in them fail to respond to the charges leveled against them. Second, that rationale would equally support dismissal of all claims in this case, not just the dismissal against some defendants.

In its forthcoming report on Justice's efforts to protect the voting rights of citizens in the 2008 election, the Commission commends the Department for its willingness, through the Voting Section, to play an aggressive and proactive role in preventing voting rights violations, *including voter intimidation*, and credits the Division for its expanded election-monitoring functions. But such efforts ring hollow if they are not accompanied by swift, decisive action to prosecute obvious violators, regardless of their race or political party (or that of their victims), to the fullest extent of the law. The vigorous defense of our democratic system demands no less.

Accordingly, as an initial matter, please advise the Commission of the Division's rationale for dismissing the charges against defendants and of its evidentiary and legal standards for dismissing certain charges in cases of alleged voter intimidation. Also, please advise us of any similar cases in which CRD has dismissed charges against a defendant.

Thank you for your prompt attention to this matter. If you have any questions regarding this request, please contact my Counsel and Special Assistant, Dominique Ludvigson, at (202) 376-7626 or at dludvigson@usccr.gov.

Sincerely,

Gerald A. Reynolds
Chairman

Peter Kirsanow
Commissioner

Gail Heriot
Commissioner

Todd Gaziano
Commissioner

cc: Christopher Coates, Chief, Voting Section
Abigail Thernstrom, Commissioner
Arlan Melendez, Commissioner
Ashley Taylor, Commissioner
Michael Yaki, Commissioner

UNITED STATES COMMISSION ON CIVIL RIGHTS

624 NINTH STREET, NW, WASHINGTON, DC 20425
www.usccr.gov

June 15, 2010

VIA E-MAIL AND REGULAR MAIL

Joseph H. Hunt, Esq.
Director, Federal Programs Branch
Civil Division
United States Department of Justice
20 Massachusetts Avenue, NW
Washington, DC 20001

Re: United States Commission on Civil Rights Statutory Enforcement Report

Dear Mr. Hunt:

As you may recall, as part of its discovery requests directed to the Department of Justice, the U.S. Commission on Civil Rights sought information with regard to any contacts by the Department with outside third parties, including specifically Kristen Clarke of the NAACP Legal Defense Fund, relating to the New Black Panther Party (NBPP) litigation. See Interrogatory No. 12 (December 8, 2009).

In response, the Department indicated that it had "identified no communication, oral or otherwise, with Kristen Clarke or the NAACP Legal Defense Fund relating to the litigation prior to the May 18, 2009 court judgment enjoining Minister King Samir Shabazz and dismissing the three other defendants."

In a recent article in *The Weekly Standard* magazine,[1] it is represented that Voting Section attorney Laura Coates had a conversation with Kristen Clarke in which the NBPP litigation was discussed. Specifically, the article in question states:

> An attorney for the NAACP, Kristen Clarke, has admitted that she spoke to department attorneys about the case and shared the complaint with others. (In a deposition she also said that a department lawyer sent her news clippings of the case.) She 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

[1] Jennifer Rubin, *Friends in High Places*, WEEKLY STANDARD (June 21, 2010), http://www.weeklystandard.com/articles/friends-high-places.

> 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.

Given the above, it is requested that the Department review the accuracy of its prior discovery response regarding this topic. Specifically, it is 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 above article, the conversation was reported to Ms. Coates' superiors. This request includes any and all documentary evidence reflecting any such communications.

Given that the Commission's inquiries to the Department have been pending since December 2009, it is requested that you please expedite a response to the above inquiry. Inasmuch as any Department communications with Ms. Clarke and/or the NAACP Legal Defense Fund do not present any issue of privilege, there is no basis for delay.

Please do not hesitate to contact me should you have any questions.

Sincerely,

David P. Blackwood
General Counsel

cc: Chairman Gerald A. Reynolds
Vice Chair Abigail Thernstrom
Commissioner Todd F. Gaziano
Commissioner Gail Heriot
Commissioner Peter N. Kirsanow
Commissioner Arlan D. Melendez
Commissioner Ashley L. Taylor, Jr.
Commissioner Michael J. Yaki
Martin Dannenfelser, Staff Director

Faith Burton, Esq.
Special Counsel
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

THE UNIVERSITY of MARYLAND
SCHOOL OF LAW

New Black Panther Party Investigation

Documents

Memorandum

Subject:	Recommended Lawsuit Against the New Black Panther Party for Self-Defense and Three Individual Members for Violations of Section 11(b) of the Voting Rights Act DJ #166-62-22	**Date:**	December 22, 2008

To: Grace Chung Becker
Acting Assistant Attorney General

From: Christopher Coates
Chief, Voting Section

Robert Popper
Deputy Chief

J. Christian Adams
Trial Attorney

Spencer R. Fisher
Law Clerk

Recommendation

We recommend that you authorize us to file the attached complaint against the New Black Panther Party for Self-Defense, an unincorporated association, Chairman Malik Zulu Shabazz, Minister King Samir Shabazz, and Jerry Jackson. On Election Day, Tuesday, November 4, 2008, two members of the New Black Panther Party for Self-Defense ("NBPP") deployed at the entrance to a polling place in Philadelphia, Pennsylvania wearing military-style uniforms. They possessed and brandished a weapon. They directed racially-based threats at poll watchers. The national leader of the NBPP subsequently endorsed the Election Day behavior of the party members and said their deployment was part of a larger NBPP effort. We believe the deployment of uniformed members of a well-known group with an extremely hostile racial agenda, combined with the brandishing of a weapon at the entrance to a polling place, constitutes a violation of Section 11(b) of the Voting Rights Act which prohibits types of intimidation, threats, and coercion. We propose seeking a remedy that prohibits the members of the NBPP from deploying athwart the entry of polling places in future elections.

I. Factual Background

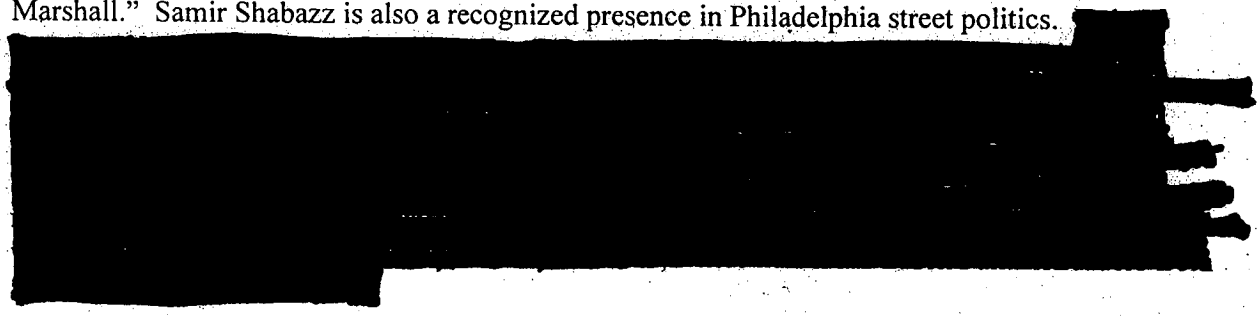
A. The New Black Panther Party for Self-Defense is a well organized and well known group with an openly hostile racial agenda.

The NBPP's members and leaders openly advocate violence against members of a particular racial group. As part of its on-going monitoring activities of various groups, the Southern Poverty Law Center has described the NBPP as an active black-separatist group constituting a "federation of as

many as 35 chapters in at least 13 cities with informal links to certain Black Muslims." S. Poverty Law Ctr., Intelligence Report: Snarling at the White Man (2000), http://www.splcenter.org/intel/intelreport/article.jsp?aid=214 (last visited Nov. 10, 2008). The NBPP is recognized as a group "[e]schewing the health clinics and free breakfast programs of the original [Black] Panthers . . . to focus almost exclusively on hate rhetoric about Jews and whites." Id. The Anti-Defamation League has cataloged a lengthy list of anti-Semitic statements by the NBPP's current chairman, Dr. Malik Zulu Shabazz. See Anti-Defamation League, http://www.adl.org/learn/ext_us/malik_zulu_shabazz/ (follow link to "In His Own Words"; see also link to NBPP) (last visited Dec. 19, 2008). Bobby Seale, a founding member of the original Black Panther Party, has accused the NBPP of being a "black racist hate group," as evidenced by the NBPP showing up heavily armed at demonstrations and preaching violent, racist, and extremist views on its web site. See S. Poverty Law Ctr., supra; see also FOXNews.com, New Black Panthers of a Different Stripe, http://www.foxnews.com/story/0,2933,65535,00.html (last visited Nov. 10, 2008).

The leadership and organization of the NBPP extends to a women's league called the "Panther Queens" and a children's organization called the "Panther Youth" which their website characterizes as "the future of our people." (Attach. B, photographs of the leadership and organization of the NBPP.) The leadership includes, as described at the NBPP website, [Chairman and] Attorney-at-War Malik Zulu Shabazz, National Field Marshall Najee Muhammad, National Minister of Culture Zayid Muhammad, National Youth Minister Divine Allah, and National Minister of Justice Imam Akbar Bilal. Id. A tribute to deceased NBPP "Black Power General Dr. Khallid Abdul Muhammad" is also located on the leadership page.[1]

Minister King Samir Shabazz, a.k.a. Maurice Heath, is the chairman of the Philadelphia chapter of the NBPP. (Attach. A, Figure 1.) He identifies his rank within the NBPP as a "Field Marshall." Samir Shabazz is also a recognized presence in Philadelphia street politics.



A Philadelphia Daily News article pertaining to the Philadelphia chapter of the NBPP was published the week before the election on October 29, 2008. The article stated that Samir Shabazz "is one of the most recognizable black militants in a city known, since the days of MOVE, for its vocal black-extremism community." Dana DiFilippo, New Panthers' War on Whites, Phila. Daily News, Oct. 29, 2008, at 4, available at http://www.philly.com/philly/news/20081029_New_Panthers

---

[1] In 1993, following a speech at Kean College New Jersey, in which he referred to Jews as "bloodsuckers", labeled Pope John Paul II a "no-good cracker" and advocated the murder of white South Africans, the United States Senate voted 97-0 to censure Muhammad, and the United States House of Representatives in a special session passed a House Resolution. After Muhammad was dismissed from the Nation of Islam by Minister Louis Farraakhan, who found the statements too extreme, Muhammad formed the New Black Panther Party for Self-Defense. See J. Blair, K.A. Muhammad, 53, Dies; Ex-Official of Nation of Islam, N.Y. Times, Feb. 21, 2001.

__war_on_whites.html. Statements attributed to Samir Shabazz were published in the article. The article stated: "'the only thing the cracker understands is violence,' said Samir Shabazz, whose face also bears the tattoos 'Freedom,' 'BPG' (Black Power Gang) and 'NBPP'." Id. Further, the article attributed to Samir Shabazz the statements "the only thing the cracker understands is gunpowder" and "I'm about the total destruction of white people. I'm about the total liberation of black people. I hate white people. I hate my enemy." Id. The article also attributed a statement to Samir Shabazz that he "listens to 'revolutionary, cracker-killing hip-hop' on his headphones." Id.

B. The NBPP's presence at a Philadelphia polling place on Election Day was well documented.

On Election Day, November 4, 2008, at a polling place in Philadelphia, PA in Ward 14, Division 4 (The Guild House, 1221 Fairmount St.) two members of the NBPP, Samir Shabazz and Jerry Jackson, were positioned directly in front of (approximately 8 to 15 feet), and close to, the entrance to the polling location. (Attach. A, Figures 2 & 3.) Because of the configuration of the sidewalk and landscaping, every voter entering the polling place would necessarily pass within a few feet of the men.[2] Further, the men were standing side-by-side, facing outward, as if stationed there as guards or sentries. They were not milling about or deployed askew to the entrance. Instead, they were positioned such that any voter would necessarily pass within their radius. Moreover, as discussed in detail below, the men brandished a weapon. Consequently, every voter necessarily had to pass within the mens' armed purview, and within a distance at which the weapon could potentially be swung to hit them.[3]

Both Samir Shabazz and Jackson were wearing the NBPP's uniform. Their uniforms consisted of black berets, black tunics with various NBPP insignia, and battle dress uniform (BDU) pants which were bloused into black combat boots. Samir Shabazz wore rank insignia on his collar consistent with a Captain in the United States Armed Forces. Samir Shabazz also possessed a black billy club, or baton, approximately two feet in length. The grip of the baton was contoured and there was a leather lanyard, or a thong, on the end to wrap around his wrist. Witness Chris Hill, a Republican poll watcher and Army infantry veteran, indicated that Samir Shabazz deployed his hand through the thong and wrapped the slack tight around his wrist.[4]

The presence of the uniformed Black Panthers at the entrance to the polling place was documented by Republican Party videographer Steve Morse. See Google Video,

---

[2] Samir Shabazz and Jackson were both at times within and beyond the state statutory limit which prohibits unauthorized parties within ten feet of the entrance to a polling place. This is a matter of state law, however, and irrelevant in this case for the purposes of analyzing the behavior under the Voting Rights Act.

[3] The best estimate of the total number of those who voted at the precinct is 580. This is the sum of the number of votes for Senator Barack Obama (568) and Senator John McCain (12). This is the highest total of votes for any of the contests on the ballot. It is unclear, however, if this sum includes any absentee votes.

[4] These details are not insignificant. According to Hill, the grip and the leather thong allow the person using a baton to swing and thrust with more force and greater abandon without the fear of dropping the weapon.

http://video.google.com/ (search "Black Panthers Philadelphia"; then follow "Black Panther patrols intimidating voters in Philadelphia" hyperlink) (last visited Dec. 7, 2008). We also have obtained original digital files of Samir Shabazz's deployment and brandishing of the baton or nightstick. These digital files have a higher level of definition and clarity than the videos placed on Google Video, Youtube, and other internet video sites. As Morse approached and asked the men what they were doing at the polling place, Samir Shabazz began tapping the baton in his hand and identified himself as "security." Id. The weapon was never holstered, but was moved about and at times tapped against his leg. The baton was also used to point at individuals with whom the Black Panthers were having antagonistic discussions.

A second video, apparently shot a short time later, showed Philadelphia police arriving on the scene and approaching the two men. See Google Video, http://video.google.com/ (search "Black Panthers Philadelphia"; then follow "Police confront Black Panthers who are intimidating voters in Philadelphia" hyperlink) (last visited Nov. 10, 2008). Police officer Richard Alexander is seen in the video. We interviewed Officer Alexander and he told us that he received a call from police dispatch about reports of "voter intimidation" at a polling place. Officer Alexander arrived with a partner, Officer Hazel. Officer Alexander said that when he arrived he saw Samir Shabazz and Jackson 10 to 12 feet from the entrance to the polling place. The video shows Officer Alexander and Officer Hazel, approach the Black Panthers and requesting that they "step over to the car." Jackson does not comply and Officer Hazel says "we aren't asking." The men then follow. Officer Alexander told us that he said to Samir Shabazz and Jackson, "you can't be out here intimidating voters." Samir Shabazz and Jackson denied they were intimidating voters. Officer Alexander said that Samir Shabazz wore various NBPP insignia on his uniform. Officer Alexander told us he concluded that they should not be standing athwart the entrance to a polling place with a weapon and ordered them to disperse. Samir Shabazz did so, but Jackson had poll watching credentials allowing him to stay. Jackson did not retain the weapon when Samir Shabazz departed. Republican poll watcher Mike Mauro, an attorney, recalls that he saw the police officers confiscate the weapon from Samir Shabazz. Officer Alexander stated that Shabazz complained to him that his removal from the polling location was "another white man trying to bring the black man down."

A FOX News reporter also responded to the scene and shot video. See Google Video, http://video.google.com/ (search "Black Panthers Philadelphia"; then follow "Rick Leventhal of Fox News confronts Black Panther" hyperlink) (last visited Nov. 10, 2008). Video from that encounter (also readily available on elsewhere on the internet) shows the news team approaching and questioning the remaining man, Jackson, who was still standing in front of the entrance to the polling place. Id. When questioned about the presence of the other man and the baton, Jackson said no one had ever been at the polling station with a baton and claimed he didn't know what the reporter was talking about. Id. Witnesses we spoke with indicated that Samir Shabazz and Jackson were deployed at the poll for some time with the baton prior to the video being taken.

C. Poll watchers and attorneys were deployed to various polling locations on Election Day both to observe and to aid voters.

Attorney Joe DeFelice, an employee of the Pennsylvania Republican Party, was responsible for the deployment of poll watchers to polling locations in Philadelphia on Election Day. This program deployed both attorneys and non-attorneys as poll watchers. While the primary purpose of the Election Day monitoring program was to observe and document any behavior at the polls which was illegal or unwelcome, another purpose was to aid voters, according to DeFelice and others. Attorney

John Giordano, the Election Day operations director for southeastern Pennsylvania, trained the poll watchers. He said that one of the purposes of the poll watching program was to aid particular voters should they encounter difficulties in casting a ballot.[5]

Wayne Byman, an African-American, was a Republican Party poll watcher deployed in the program managed by DeFelice. He described how he would aid voters on Election Day. Byman noted that, in Pennsylvania, he could identify the political party of a voter through the registration books at a polling location. He also has identified voters' party affiliations by speaking to them. Byman said he "would introduce myself to the voter if I saw they had any problem casting a ballot." He attempted to resolve their problems with the goal of allowing them vote. He made direct appeals to the election officials on behalf of voters, both at the polling location and by telephone to the Board of Elections. Byman stated that he "help[ed] the voter by telling the voter what they need to do to get their vote counted. I can [also] get the voter to present their case to the election judges." Byman could testify in detail about how was trained to, and how he did, aid voters on Election Day.

Mauro said that, during his training, he was "specifically instructed that part of their job was to help voters." He stated "we were told that if a voter was denied the right to vote, we were allowed to speak to the voter and answer questions." In sum, Giordano, Defelice, Byman, and Mauro are witnesses with knowledge of how aiding voters was one of the purposes of the poll watcher program.

D. Reports concerning the NBPP's presence at the polling place were made by poll watchers on the scene.

The events which precipitated reports about the Black Panthers' presence were statements made by Samir Shabazz or Jackson, or both, to poll watchers for the Republican Party, and a complaint by an unspecified voter about the presence of the Black Panthers. 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. 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

---

[5] Giordano was recently Counsel to the Assistant Attorney General in the Environmental and Natural Resources Division and an Assistant United States Attorney in the Eastern District of Virginia before that.

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.

After these complaints were received, Mauro, Justin Myers, and Hill were deployed to the polling location by headquarters. Mauro stated that they were deployed because of a report that "one of our poll watchers was being harassed [by the Black Panthers]." Hill noted that he received a report that the Black Panthers had confronted Counts and called him a "race traitor." After Mauro, Myers, and Hill arrived, they approached the entrance to the polling place. Samir Shabazz, when engaging and speaking with Mauro and his fellow poll watchers, tapped the baton in the palm of his other hand. Hill told us that the leather thong on the end of the baton was wrapped around Shabazz's hand while he did this. Mauro heard the Black Panthers call him and his poll watching colleagues "white supremacists." Mauro said that Samir Shabazz also yelled at the poll watchers "fuck you cracker" as he alighted. When Hill sought to enter the polling location, he said Jackson and Shabazz formed ranks, meaning stood side by side to create a larger obstacle to Hill's entry into the polls.[6] The weapon was in plain view as Hill approached. Hill reported that as he departed the polling place, Samir Shabazz yelled "how you [sic] white mother fuckers gonna like being ruled by a black man?" Meyers told us the Black Panthers called him a "cracker" and opined that Meyers would "soon know what it was like to be ruled by the black man." Meyers, "found the guy to be intimidating." Morse, the videographer, also said that he was "scared to death" of the Black Panthers. Hill, Meyers, Mauro, Byman, and Morse are witnesses with knowledge concerning intimidation and threats by NBPP members.

E. Witnesses observed voters reacting to the Black Panthers at the polling place.

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 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.

---

[6] Hill had credentials allowing him inside the polling location. He successfully entered the building.

F. The leadership of the NBPP endorsed the polling place deployment in Philadelphia.

We interviewed by telephone Chairman Malik Zulu Shabazz from his Washington D.C. law office.[7] He told us, "there were members of the party in many areas [on Election Day]." According to an interview with Fox News Zulu Shabazz, said that there were more than 300 Panthers deployed in several cities across the U.S. to ensure the voting process went fairly and smoothly.[8] See AOL Video, http://video.aol.com/video-detail/dr-malik-shabazz/1916264308/?icid=VIDLRVGOV07 (follow hyperlink to FoxNews) (last visited Dec. 18, 2008). Zulu Shabazz told Fox News that the NBPP is comprised "of thousands" with a "very active grass roots." Id. Zulu Shabazz also specifically endorsed the use and display of the weapon at 1221 Fairmount Street by Samir Shabazz in our telephone conversation with him as well as in an the interview with Fox News. See id. For his part, the NBPP leader has claimed that his members were at the polling place merely to quell voter intimidation by white supremacists. See id.; see also FOXNews.com, Party Leader Says Black Panther Presence at Polls Provoked by 'Neo-Nazis',http://elections.foxnews.com/2008/11/07/party-leader-says-black-panther-presence-polls-provoked-neo-nazis/ (last visited Nov. 10, 2008).

No witness we interviewed said they saw any skinheads or white supremacists at 1221 Fairmount Street. When we spoke by telephone to Zulu Shabazz on December 5, 2008, he said he was still gathering facts about the presence of skinheads at the polls. We also attempted to contact Jackson to obtain his version of events. Jackson did not return our telephone call. We were unable to find contact information for Samir Shabazz. Based on our interviews with poll watchers, Officer Alexander, and Zulu Shabazz, we do not find merit to the claims that there were white supremacists active at the polling location at 1221 Fairmount Street or anywhere else in the City of Philadelphia on November 4, 2008. This excuse would likely be presented by the defendants to offer a motivation other than an intent to intimidate; but this reason must be plausible to have any weight, and in our investigation we found it to be implausible.

II. Section 11(b) of the Voting Rights Act

Section 11(b) of the Voting Rights Act (VRA) of 1965, 42 U.S.C. § 1973i(b) (2000), provides as follows:

> 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 1973a(a), 1973d, 1973f, 1973g, 1973h, or 1973j(e) of this title.

---

[7] As Shabazz is not the given name of either Malik Zulu Shabazz or Samir Shabazz, they are apparently unrelated.

[8] We were unable to ascertain where or whether the NBPP actually deployed any other members at polling locations throughout the United States.

Section 11(b) protects both voters and those "aiding" voters. Unlike other sections of the Voting Rights Act, it does not require state action. It is a broad prohibition against intimidating, threatening, or coercive behavior pertaining to the process of voting.

Cases brought under Section 11(b) have been uniformly unsuccessful. But see Jackson v. Riddell, 476 F.Supp. 849, 859-60 (N.D. Miss. 1979) (finding that Section 11(b) "is to be given an expansive meaning."); Whatley v. City of Vidalia, 399 F.2d 521, 525-26 (5th Cir. 1968) (noting that Section 11(b) was intended to expand rights protected by 42 U.S.C. § 1971(b)). In fact, of the fewer than ten cases reported as being brought under Section 11(b), no plaintiff has ever won.

Cases brought under Section 11(b) have failed for two reasons. First, courts have held that the behavior alleged does not constitute a genuine threat, coercion, or intimidation. At one extreme, actual violence would seem to be the clearest example of a Section 11(b) violation. But no plaintiff has brought a case alleging actual violence. Second, courts have at times read into the statute an additional requirement that neither its plain language nor its legislative history supports, namely, that plaintiffs must prove racial intent. See, e.g., Willing v. Lake Orion Cmty. Schs., 924 F.Supp. 815, 820 (E.D. Mich. 1996) (finding that no claim exists under Section 11(b) "[a]bsent a claim of any racial or other intentional invidious discrimination[.]") Indeed, the legislative history of 11(b) suggests that Congress specifically intended to eliminate any necessity to prove racial intent.[9] Regardless, we believe that both of these historic barriers to plaintiffs' success in Section 11(b) cases are overcome in this matter. First, the deployment of armed and uniformed members of the NBPP who brandish a weapon will likely satisfy the high factual burden placed on plaintiffs to show a genuine threat, coercion, or intimidation. Second, if a court were to require evidence of racial intent, it would likely be established by the express racist agenda of the NBPP and the racial slurs and comments directed at various individuals by Samir Shabazz and Jackson at the polls.

Most recently, the Department litigated and lost a Section 11(b) claim in United States v. Brown, 494 F. Supp.2d 440, 477 n. 56 (S.D. Miss. 2007).[10] In Brown, the Department presented two sets of evidence to establish a violation of Section 11(b). First, the defendant, Ike Brown, published a list of 174 voters in a newspaper. Brown stated that they might be subject to challenge if they attempted to vote. A witness for the United States whose name appeared on the list testified at trial that she feared she would be arrested if she attempted to vote. She therefore stayed home on Election Day. Second, "Brown confronted [a white voter attempting to vote] and in a loud voice, ordered him to get away from the entrance to the building. When [the voter] refused, Brown summoned law enforcement, and [Deputy Sheriff] Terry Grasseree appeared." Id. at 472.

---

[9] On June 1, 1965, the House Judiciary Committee reported its version of the bill which would become the Voting Rights Act of 1965. Section 11(b) of the House committee bill was similar to the provision in the Senate-passed bill. In discussing Section 11(b), the House report stated that:

> 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). One difference between the two versions of Section 11(b) was that the House committee extended coverage to persons urging or aiding others to vote.

[10] The Department won a claim brought under Section 2 in this case.

The district court ruled against the United States and found that this evidence was not sufficient to find a violation Section 11(b). The court noted:

> The Government contends that Brown's public 'threat' to challenge persons on the list of 174 white voters if they attempted to vote in the 2003 Democratic primary violates Section 11(b) of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973i(b), which prohibits anyone from intimidating, threatening or coercing any person from attempting to vote. Although the court does conclude that there was a racial element to Brown's publication of this list, the court does not view the publication as the kind of threat or intimidation that was envisioned or covered by Section 11(b).

Id. at 472.

Regarding the threat to arrest the voter attempting to vote and the subsequent appearance of law enforcement, the district court noted Brown may have "mistakenly believed Coleman [a candidate] was in violation of the thirty-foot rule." Id. at 472. Instead of finding Brown liable for violating Section 11(b), the district court merely suggested that a "fair-minded person" would "have inquired before ordering [Coleman] to leave, and certainly before calling for law enforcement." Id.[11]

In United States v. Harvey, 250 F. Supp. 219 (E.D. La. 1966), the court heard another case brought under section 11(b) by the Department. The Department alleged that, in violation of Section 11(b) and § 1971(b), the defendants terminated sharecropping and tenant-farming relationships with blacks who had registered to vote, evicted such persons from rental homes, and discharged them from salaried jobs. Id. at 221-22. The court first concluded the applicability of the intimidation statutes to state and local elections exceeded Congress' power. See id. at 225-26, 236-37; but see United States v. Simms, 508 F. Supp. 1179, 1186-87 (W.D. La. 1979) (rejecting Harvey's constitutional analysis). The court further held that even if Congress had such power, the plaintiff had failed to prove the intimidation allegation since its entire claim rested on nothing more than the termination of a business relationship shortly after the complainants registered to vote. Id. at 231-37.

In Gremillion v. Rinaudo, 325 F. Supp. 375, 376-77 (E.D. La. 1971), an unsuccessful black candidate brought an action to set aside the results of a 1970 primary election for school board, alleging various irregularities, including intimidation by a uniformed police officer who assisted white and black voters in the voting booth. The court stated that the purpose of the VRA was to "protect voters from an actual or potential denial or abridgement of their right to vote only where the basis for the infringement was racial discrimination." Id. at 378. The court dismissed the only claim brought by plaintiffs which implicated Section 11(b) (the claim of intimidation based on assistance from a uniformed, white officer), holding that the officer's presence, without anything more, did not constitute a general violation of the VRA on its face. Id.

---

[11] The Department approved the filing of a complaint in United States v. North Carolina Republican Party, (E.D.N.C., No. 91-161-CIV-5-F, filed February 26, 1992) under Section 11(b). This case involved the potential of an election day challenge program. The challenge program included a mailing to voters which stated they may be asked on election day about how long they resided at their residence. The case was not litigated and the defendants entered into a consent decree before discovery began.

In Pincham v. Illinois Judicial Inquiry Board, 681 F. Supp. 1309, 1314-17 (N.D. Ill. 1988), the district court refused to allow the plaintiff to amend his complaint to include a claim under Section 11(b). The court made its finding on a number of bases, including the fact that the plaintiff had made "no allegation that the defendants intended to intimidate, threaten, or coerce Justice Pincham." Id. at 1317. The Section 11(b) claim was based on the defendant Board bringing a disciplinary action against the black plaintiff, Judge Pincham, for statements he made in a political campaign. Id. at 1312.

What actions constitute satisfaction of the statutory terms "intimidate, threaten, or coerce" in Section 11(b) have never been precisely defined. As discussed above, courts have opined what does not constitute "intimidate, threaten or coerce" under Section 11(b). Based on these cases, the following facts would most likely not constitute violations of Section 11(b): termination of a voter's lease contracts, contractual eviction from homes, termination of employment, or termination of a business relationship for exercising the franchise (Harvey), police officers in a polling place assisting voters (Gremillion), election improprieties (Willing), regulatory enforcement actions for statements made in political campaigns (Pincham), threats to arrest voters and the summoning of law enforcement officials, in the absence of clear evidence of intent; published threats to challenge named voters; and subjective fears that said named voters might be arrested if they tried to vote (Brown).

The meaning of "intimidate, threaten, or coerce" was explored, however, in a case not brought under Section 11(b), United States v. McLeod, 385 F.2d 734, 741 (5th Cir. 1967).[13] In McLeod, the Fifth Circuit reversed the district court's dismissal of an action seeking an injunction against the mass arrest of blacks seeking to vote or register to vote as well as police surveillance of private associations active in registering black voters. The district court had found "that each of the allegedly coercive acts was justified – that the surveillance of the mass meetings was necessary to keep order and to protect the Negroes" and that the mass arrests were warranted. Id. at 739. On appeal, the Fifth Circuit said "[i]t is difficult to imagine anything short of physical violence which would have a more chilling effect on a voter registration drive than the pattern of baseless arrests and prosecutions revealed in this record." Id. at 740-41. "We hold that the trial judge clearly erred in failing to find that the defendants' acts threatened, intimidated, and coerced the prospective Negro voters in Dallas County." Id. at 741; see also NAACP v. Thompson, 357 F.2d 831, 838 (5th Cir. 1966) (characterizing "arrest[s] en masse on frivolous or unfounded charges" as intimidation.).

III. Legal & Factual Analysis

A. Brandishing a deadly weapon at the entrance to a polling place and related actions and statements by the uniformed members of the NBPP constituted acts designed to intimidate, threaten, or coerce those voting or attempting to vote.

Section 11(b) broadly prohibits intimidation pertaining to voting. It states: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce . . . any person for voting or attempting to vote." § 1973i(b). Standing athwart the entrance to a polling place in formation and brandishing a weapon in the presence of voters and poll watchers objectively violates Section 11(b), because a fact-finder would likely conclude that brandishing a weapon could have no

[13] McLeod was an action brought under, among others, § 1971(b). Both § 1971(b) and Section 11(b), § 1973i(b), use the same language, "intimidate, threaten, or coerce" pertaining to voting.

effect other than to intimidate, threaten, or coerce.[14] The well-recognized military-style uniform, complete with insignia, patches and bloused combat boots; the notoriety of the party and the individuals involved; and the many statements advocating racially-motivated violence made by the party and the individuals involved, would all reinforce this conclusion.

The evidence at trial obviously would include the many, nationally publicized digital video recordings of the incident, as well as the direct testimony of the many eyewitnesses named herein. The statements and racial comments by the NBPP members involved in the incident, both prior to and on Election Day, are very likely to be deemed non-hearsay admissions by a party opponent. The evidence would include the testimony of the Philadelphia police, who concluded that the NBPP members were sufficiently intimidating to the poll watchers, the voters, or both, to order them dispersed and to confiscate their weapon. The evidence also would include expert testimony about the NBPP, their stated mission, and their rhetoric.

We would argue at trial that the evidence objectively establishes a violation of Section 11(b). It is shocking to think that a United States citizen might have to run a gauntlet of billy clubs in order to vote. Where this occurs, we would argue that no further, special, or subjective harm need be proved. Stated differently, we would argue that all voters arriving at this polling location were subject to intimidation by the very fact of having to endure the implied physical threat posed by armed, uniformed individuals, of uncertain intentions, standing in formation in front of the polling place.

Notwithstanding this point, we also would proffer evidence showing that the intimidating behavior was particularly directed at two classes of voters, who were, in fact, intimidated. The most obvious targets of intimidation were the white voters in the precinct, a class of citizens about whom Shabazz and the NBPP have made statements expressing extreme racial hostility. Further, the NBPP's actions were directed at African-American voters who were not inclined to vote for the candidate favored by the NBPP. The threatening actions described represent an effort to impose racial solidarity on black voters in an election where race was regularly discussed. Accordingly, the evidence at trial would include testimony concerning the reactions of both white and black voters who came to the polling station to vote.

---

[14] Deployment and movement of the baton by Samir Shabazz likely constitutes "brandishment" of a deadly weapon. See United States v. Johnson, 931 F.2d 238, 240 (3d Cir. 1991) ("dictionary defines 'brandish' as 'to shake or wave (a weapon) menacingly,' and gives as synonyms 'flourish' and 'wave.'"); see also United States v. Marin, 523 F.3d 24, 30 (1st Cir. 2008) (United States argued exiting a vehicle with a billy club constituted admissible evidence creating inference that drug dealer recognized potential use of weapon may further drug business.); United States v. Koon, 833 F. Supp. 769, 781 (C.D. Cal. 1993) (United States argued and district court agreed that single handed baton was a dangerous weapon capable of inflicting death or serious bodily injury under sentencing guidelines.) Pennsylvania does not specifically criminalize the act of brandishing so no state statute or case defines what constitutes brandishing. Cf. Iowa Code § 723A.1(h)(1) (criminal brandishment is "display of a dangerous weapon, with intent to . . . intimidate."). The federal sentencing guidelines, however, define brandishing as "all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person." U.S. Sentencing Guidelines Manual § 1B1.1.

Finally, we would assert a second claim under Section 11(b), on the ground that Samir Shabazz, Jackson, and the NBPP attempted to intimidate, threaten or coerce voters. Section 11(b) provides that "[n]o person, . . . shall . . . attempt to intimidate, threaten, or coerce any person for voting or attempting to vote," regardless whether the attempt was successful. This language, which was specifically added by the House of Representatives, was designed to give Section 11(b) a broader reach. Whatever the actual effect of the defendants' conduct, the foregoing evidence amply demonstrates that they attempted to intimidate, threaten, and coerce voters.

The totality of the evidence should make a compelling case for a violation of Section 11(b). Indeed, it is difficult to imagine what could constitute a violation of Section 11(b) if armed, uniformed men standing in formation at the entrance to a polling location making racial slurs does not violate the statute. The facts in this case may present the clearest case for a violation of Section 11(b) that any plaintiff has brought in the 44-year history of the law.

B. Brandishing a deadly weapon at the entrance to a polling place and related actions and statements by the uniformed members of the NBPP constituted acts designed to intimidate, threaten, or coerce those aiding voters.

Section 11(b) also protects those who aid voters or urge them to vote. Section 11(b) of the Voting Rights Act provides that: "No person . . . shall . . . 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." § 1973i(b). The statute prohibits both the attempt to intimidate those aiding voters, as well as actual intimidation. We believe that the evidence supports a separate cause of action against the NBPP concerning the intimidation of those deployed to aide voters.

Republican poll watchers were, in part, deployed to aid voters. It is true that the deployment had broader purposes, but there is cumulative and credible evidence that aiding voters was one purpose of the deployment. Byman provided specific detail about how he identified and aided voters who encountered difficulty at the polls.

Many of the threatening actions and statements by the NBPP members were specifically directed at poll watchers. Republican Party poll watcher Larry Counts was subject to abuse. Videos show that Samir Shabazz, when engaging and speaking with Mauro and his fellow poll watchers, tapped the baton in the palm of his other hand. Other shots show Samir Shabazz using the baton to point at them. The Black Panthers also altered their positioning to threaten poll watchers. When Hill sought to enter the polling location, he said both Samir Shabazz and Jackson formed ranks, meaning stood side by side in front of Hill to create a larger obstacle to his entry into the polls. Meyers said the Black Panthers called him a "cracker" and opined that Meyers would "soon know what it was like to be ruled by the black man." The Black Panthers directed racially tinged profanity at nearly all of the poll watchers at one time or another. This evidence should demonstrate both that the defendants attempted to, and they did, intimidate, threaten, and coerce those aiding others who were trying to vote.

IV. Conclusion

For the reasons given above, we believe that Section 11(b) was violated by Samir Shabazz, Zulu Shabazz, Jackson, and the NBPP when armed and uniformed members were deployed at the entrance to polling place. Section 11(b) was violated because their behavior was objectively intimidating and threatening to voters; because they attempted to intimidate and threaten, and did, in

fact, intimidate and threaten, voters, and those attempting to assist voters. We recommend authorization to file the attached complaint against the New Black Panther Party for Self-Defense, an unincorporated association, Chairman Malik Zulu Shabazz, Minister King Samir Shabazz, and Jerry Jackson.[15] We propose seeking a remedy that prohibits members of the NBPP from deploying in front of polling places in future elections.

Approved: _____

Disapproved: _____

Comments:

[15] We have attached a notice letter and consent decree as per our usual practice. We recommend, however, that you consider foregoing the sending of the notice letter and the attempt to negotiate the consent decree in this case. The nature of the NBPP is such that the letter and consent decree may not be received seriously or addressed in good faith by the defendants, who may instead seek to gain favorable publicity by publishing these documents and/or characterizing their contents in a tendentious manner. Accordingly, we recommend that you consider simply authorizing the commencement of a lawsuit.

Memorandum

Subject:	Remedial Memorandum Concerning Proposed Injunction Order DJ #166-62-22	Date:	May 6, 2009

To: Loretta King
Acting Assistant Attorney General

From: Christopher Coates
Chief, Voting Section

Robert Popper
Deputy Chief

J. Christian Adams
Spencer R. Fisher
Trial Attorneys

Summary

This memorandum will discuss whether, under the applicable law and defenses, we believe that an injunction, in the form attached, is appropriate against each of the named defendants in United States v. New Black Panther Party for Self-Defense, No. 09-0065 (E.D. Pa. filed Jan. 7, 2009). In sum, we believe that the attached proposed injunction order is appropriate.

The facts of this case are set out in the Complaint in this action and the j-memo, and in detail in the discussion below where appropriate. In brief, Defendants King Samir Shabazz and Jerry Jackson stood side by side at a polling location at 1221 Fairmount Street in Philadelphia, Pennsylvania, on election day, November 4, 2008. Shabazz brandished a nightstick, or billy club, and pointed it at observers. Shabazz and Jackson uttered racial slurs and taunts in the presence of voters and those aiding voters. When one person aiding voters sought to enter the polling location, Shabazz and Jackson moved to block his path.

On election day, Shabazz and Jackson were members of the New Black Panther Party for Self-Defense, and Shabazz was the head of its Philadelphia chapter. The national chairman is Defendant Malik Zulu Shabazz. The plan to post party members at polling places was announced in advance by the party. After the events at 1221 Fairmount Street on November 4 made national news, Malik Zulu Shabazz defended the conduct of the two men, on television and to Department attorneys. However, the party, on its website, later disclaimed the conduct of the two men, and announced the suspension of the Philadelphia chapter.

The violent and racist views of the New Black Panther Party for Self-Defense are well-documented. The Southern Poverty Law Center has described the party as an active black-separatist group "[e]schewing the health clinics and free breakfast programs of the original [Black] Panthers . . . to focus almost exclusively on hate rhetoric about Jews and whites." S. Poverty Law Ctr., Intelligence Report: Snarling at the White Man (2000), http://www.splcenter.org/intel/intelreport/

article.jsp?aid=214 (last visited Nov. 10, 2008). In 1993, Khalid Muhammad, then a member of the Nation of Islam, gave a speech at Kean College New Jersey, in which he referred to Jews as "bloodsuckers," labeled Pope John Paul II a "no-good cracker" and advocated the murder of white South Africans. In the ensuing controversy he was dismissed from the Nation of Islam by Minister Louis Farraakhan, who found the statements too extreme. Muhammad then joined the New Black Panther Party for Self-Defense. See J. Blair, K.A. Muhammad, 53, Dies; Ex-Official of Nation of Islam, N.Y. Times, Feb. 21, 2001.

The party's current chairman, Defendant Malik Zulu Shabazz, has made many anti-Semitic statements, duly catalogued by the Anti-Defamation League. See Anti-Defamation League, http://www.adl.org/learn/ext_us/malik_zulu_shabazz/ (follow link to "In His Own Words"; see also link to party) (last visited Dec. 19, 2008). As one of many examples, during a protest in front of B'nai B'rith, a Jewish service organization, in Washington, D.C. (April 20, 2002), he led chants of "death to Israel," "the white man is the devil," and "Kill every goddamn Zionist in Israel! Goddamn little babies, goddamn old ladies! Blow up Zionist supermarkets!" Id.

Defendant King Samir Shabazz "is one of the most recognizable black militants in a city known, since the days of MOVE, for its vocal black-extremism community." Dana DiFilippo, New Panthers' War on Whites, Phila. Daily News, Oct. 29, 2008, at 4, available at http://www.philly.com/philly/news/20081029_New_Panthers__war_on_whites.html. Statements attributed to Samir Shabazz and published in the article include: "the only thing the cracker understands is violence"; "the only thing the cracker understands is gunpowder"; and "I'm about the total destruction of white people. I'm about the total liberation of black people. I hate white people. I hate my enemy." Id.

Our Complaint alleging violations of Section 11(b) of the Voting Rights Act, 42 U.S.C. § 1973i(b), was filed on January 7, 2009. Defendants have defaulted. We now propose seeking a default judgment and the following injunctive relief (see attached proposed order):

> Defendants, their agents, and successors in office, and all persons acting in concert with them who receive actual notice of this order, by personal service or otherwise, are permanently enjoined and restrained from deploying or appearing within 200 feet of any polling location on any election day in the United States with weapons, and from otherwise engaging in coercing, threatening, or intimidating behavior in violation of Section 11(b) of the Voting Rights Act, 42 U.S.C. § 1973i(b).

After discussing the propriety of the foregoing relief with respect to each class of defendant in turn, this memorandum will analyze two potential defenses: (1) whether certain defendants' post-complaint renunciation of the conduct of those at the Philadelphia polling station at issue is sufficient to convince the Court not to issue an injunction, and (2) whether First Amendment concerns counsel against an injunction for any of the defendants.

I. The behavior of Defendants King Samir Shabazz and Jerry Jackson warrants the proposed remedy.

A permanent injunction barring the armed presence at polling places clearly may be issued against Defendants King Samir Shabazz and Jerry Jackson. The United States, even without the benefit of discovery, has voluminous evidence that the Defendants King Samir Shabazz and Jackson

violated or attempted to violate Section 11(b). Most obviously, while brandishing a weapon they physically interfered with the lawful ingress of a person aiding voters. The two Defendants were positioned at the entrance to a polling location. Upon observing the approach of Christopher Hill, they formed ranks, that is, stood in a line with the widest point blocking the approach of Hill. Hill would testify that they intentionally blocked his path and sought to intimidate him.

Defendant King Samir Shabazz brandished a weapon and this action alone constitutes intimidation or coercion. The Third Circuit has noted that brandishing a weapon, even without accompanying verbal threats, is an intimidating act because of the potential for violence. "We agree with the [First Circuit] . . . that a person may brandish a weapon to advise those concerned that he possesses the general ability to do violence, and that violence is imminently or immediately available." United States v. Johnson, 199 F.3d 123, 127 (3d Cir. 1999). In fact, Shabazz may have gone beyond merely brandishing the weapon. "Pointing a weapon at a specific person or group of people, in a manner that is explicitly threatening, is sufficient to make out 'otherwise use' of that weapon. We hold this is true when any dangerous weapon is employed: It need not be a firearm." Id. Differentiating the pointing of a stick from mere brandishment allowed the use of sentencing enhancements because the weapon was "otherwise used." Similarly, witness statements demonstrate that Shabazz pointed the weapon and tapped it in his hand while engaging various individuals protected by Section 11(b) in a menacing fashion.

In addition to attempting to physically interfere with the rights of protected voters and the brandishing or use of a weapon, Defendants King Samir Shabazz and Jerry Jackson violated Section 11(b) because a reasonable person would find their actions to be an objective attempt to intimidate voters or those aiding voters. The use of a recognizable uniform of a hate group known to advocate racially-motivated murder, whether or not constitutionally protected, bolsters this finding. Moreover, the Defendants shouted racial slurs at voters and assistors protected by Section 11(b).

The Department should seek a remedy that prevents this behavior from recurring. The Defendants should be prohibited from possessing weapons in proximity to a polling location. The District Court has broad powers to fashion such a remedy. See Local 28 of Sheet Metal Workers' Intern. Assn. v. EEOC, 478 U.S. 421, 482 (1986) (appointment of administrator to oversee union policies upheld.); see also United States v. Brown, 561 F.3d 420, 435-437 (5th Cir. 2009).

II. The behavior of the Defendant Malik Zulu Shabazz warrants the proposed remedy.

Defendant New Black Panther Party for Self-Defense chairman Malik Zulu Shabazz should be enjoined from organizing and participating in future deployment of an intimidating party presence at the polls. His culpability in this case is not simply because he is chairman of the New Black Panther Party for Self-Defense or that he made statements about the matter. Instead, a remedy against Malik Zulu Shabazz is warranted not only because he oversaw and helped organize the deployment, but also because he endorsed and ratified the events in Philadelphia.

Prior to the election, the New Black Panther Party for Self-Defense announced a polling place deployment of party members. "We will be at the polls in the cities and counties in many states to ensure that the enemy does not sabotage the black vote, which was won through the blood of the martyrs of our people," said one party official. Statements by the New Black Panther Party on election day confirm this intention. A "Statement by Dr. Malik Shabazz, Esq, leader of Black Lawyers For Justice and attorney for the New Black Panther Party for Self-Defense" was published on

November 4, 2008. It said: "The NBPP will also patrol election sites nationwide to counter voter intimidation & other threats of violence against Blacks. . . . ON ELECTION DAY, TUESDAY, NOVEMBER 4th, We will be at the polls in the cities and counties in many states."

On November 7, 2008 Defendant Malik Zulu Shabazz endorsed the behavior by the two Philadelphia defendants, simultaneously and continuously identifying them as party members. He said "one of the members of the party" was in Philadelphia at the polls. "Those men were there to stop something, not start something." See FOXNews.com, The Strategy Room, http://www.foxnews.com/story/0,2933,65535,00.html (last visited May 4, 2009). "We were there to counter" skinhead activity. Id. (emphasis added). "There were members of the party not only in Pennsylvania but in many areas. Obviously we don't condone bringing billy clubs to polling sites. But when we found out this was an emergency response to some other skinheads . . . there was some explanation for that. That's not something that we normally do, but it was an emergency response."[1] Id. (emphasis added). When asked how many members are in the party, Malik Zulu Shabazz said on November 7, 2008, "there are thousands. There are thousands of us and our supporters all around the country." Id.

Aside from these public statements, Malik Zulu Shabazz admitted to us directly his involvement in the events in Philadelphia and stated that they were part of a nationwide effort. We interviewed Shabazz by telephone on December 4, 2008. He told us, "there were members of the party in many areas [on election day]." He also endorsed the use of the nightstick. Zulu Shabazz's statements constitute evidence of his involvement with the deployment of party members both in Philadelphia and around the nation.

Malik Zulu Shabazz admitted that he was involved in the polling place deployment plan, and subsequently endorsed and ratified the behavior in Philadelphia, defending the actions in Philadelphia even after the full extent of the behavior was known. "[U]nder general rules of agency law, principals are liable when their agents act with apparent authority." American Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 566 (1982). The Supreme Court in the antitrust case of American Society of Mechanical Engineers, Inc. noted that liability could be imparted to a principal for statements of an agent. "The apparent authority theory has long been the settled rule in the federal system." Id. at 567. While these cases usually involve torts, contracts or commercial transactions, "[i]n a wide variety of areas, the federal courts, . . ., have imposed liability upon principals for the misdeeds of agents acting with apparent authority." Id. Other cases noted by the Supreme Court where apparent authority applies range from common law fraud to statutory securities fraud. Id. The Voting Rights Act, with Congress' broad remedial protections, should not be interpreted more narrowly than these other areas of law.

Therefore, Defendant Malik Zulu Shabazz should be subject to an injunction for two reasons. First, he is liable because of his admitted involvement and supervision as chairman of a plan to deploy party members to polling locations, and, in the case in Philadelphia, armed party members. Second,

---

[1] Based on our interviews we did not find merit to the claims that there were white supremacists active at the polling location at 1221 Fairmount Street or anywhere else in the City of Philadelphia on November 4, 2008. There are also no press or police reports, or reports to the Voting Section, indicating that any such activity took place.

he is liable because he ratified and endorsed the illegal behavior of his agents in Philadelphia and well-settled principals of agency justify an injunction lying against him.

III. The New Black Panther Party for Self-Defense is properly enjoined by the proposed remedy.

Under Rule 17(b)(3)(A) of the Federal Rules of Civil Procedure, the New Black Panther Party for Self-Defense, an unincorporated association, is a jural entity subject to suit and injunctive relief based upon the relief sought in this case under federal law.[2] See Underwood v. Maloney, 256 F.2d 334, 337-38 (3d Cir. 1958) ("It follows, therefore, that under Rule 17(b) an unincorporated association must sue or be sued as an entity in the United States District Court for the Eastern District of Pennsylvania."); see also Satterfield v. Borough of Schuylkill Haven, 12 F. Supp. 2d 423, 431 (E.D. Pa. 1998). "Unincorporated associations are generally formed by the voluntary action of a number of individuals or corporations who associate themselves together under a common name for the accomplishment of some lawful purpose."[3] 6 Am. Jur. 2d Associations and Clubs § 5 (2008); see also United States v. The Rainbow Family, 695 F. Supp. 294 (E.D. Tex. 1988) (order determining the Rainbow Family, although informal and loosely-knit, had sufficiently tangible structure to render it subject to suit under Rule 17(b)).

The scope of the injunctive relief the United States seeks is proper because the United States is not seeking to hold members or individuals associated with the New Black Panther Party for Self-Defense liable for mere membership in the party. In other words, the injunctive relief the United States seeks is a prospective remedy, and would only be enforced against members of the party not named in the Complaint in the circumstance of future violations.[4] Cf. Town of W. Hartford v. Operation Rescue, 792 F. Supp. 161, 170 (D. Conn. 1992) (issuing a permanent injunction against, inter alia, Operation Rescue, named members involved in the actions in the case, and "officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them, or any one or more of them who receive actual notice of this order by personal service or otherwise."); see also Ne. Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1347-48 (3d Cir. 1989) (finding a district court's determination that it could not enjoin concerted conduct under Pennsylvania law in error and remanding for further consideration).

In any future effort to enforce this injunction, the United States would likely be required to establish its case by demonstrating that such persons had notice and were acting in concert with, or in

---

[2] The law was designed to permit an unincorporated association to be dealt with as an entity or as a class. See United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344 (1922).

[3] "Historically, labor unions, political parties, social clubs, religious organizations, environmental societies, athletic organizations, condominium owners, lodges, stock exchanges, and veterans have all been recognized as unincorporated associations." Scott E. Atkinson, The Outer Limits of Gang Injunctions, 59 Vand. L. Rev. 1693, 1700-01 (2006).

[4] Rule 65(d) of the Federal Rules of Civil Procedure provides that an injunction is binding upon "parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

support of, the party.[5] Such evidence would likely be similar in many respects to the evidence the United States has collected in the case at bar regarding the activities of Defendants King Samir Shabazz, Jerry Jackson, and Malik Zulu Shabazz. Instructive is Aradia Women's Health Center v. Operation Rescue, 929 F.2d 530, 531 (9th Cir. 1991), in which the Ninth Circuit Court of Appeals addressed an appeal from an order imposing civil contempt sanctions upon individuals who took part in a demonstration blocking access to an abortion clinic. A previous district court order had "provided for sanctions . . . for each prospective violation of the order by any defendant or person acting in concert with any defendant having notice of the injunction." Id. The Ninth Circuit affirmed the district court's determination that the individuals, none of whom had been parties to the injunction action, had acted in concert with Operation Rescue (an unincorporated association). Id. at 533. The court noted that "the record [was] replete with evidence of Operation Rescue's activities, including publication of a newsletter, showing it to be an organization with stated purposes and operating through affiliates in numerous states . . . . Nor can there be any question from this record that these appellants acted in concert with Operation Rescue." Id.

IV. The apparent renunciation of the events of election day and the suspension of the Philadelphia chapter are not impediments to the United States' proposed remedy.

Internet statements on the New Black Panther Party's website posted after the Complaint in this action was filed disclaim the behavior of King Samir Shabazz and Jerry Jackson in Philadelphia. The disclaimers appear in two places. The first is in a section dated "11/04/08," though the following statement (among others) was added after this lawsuit was filed on January 7, 2009:

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

New Black Panther Party for Self-Defense, http://www.newblackpanther.com/statement-voterintimidation_phillychapter.html (last visited May 5, 2009). The second statement is contained in a section entitled, "Public Notice Regarding Philadelphia Chapter Suspension 1/7/09 NBPP Official Statement." It says:

> 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

---

[5] "Injunctions that purport to apply to all persons with actual notice of the injunction—regardless of whether or not those persons are acting in concert with or on behalf of those enjoined—have been struck down as overbroad." Atkinson, supra, at 1700-01.

> 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.

Id.

We do not know at present the precise extent to which these statements were drafted by, or represent the views, of Malik Zulu Shabazz. Nevertheless, it is reasonable to conclude that his position as chairman means that these statements would not have been posted without some form of approval from him (or other officers of the organization).

The disclaimers conflict both with Malik Zulu Shabazz's televised statements and with his private statements to Department lawyers, insofar as he volunteered on those occasions that the actions were taken by party members and that he endorsed them. The two statements also conflict with each other, in that the first statement refers to the actors as "purported members," while the second statement says that the Philadelphia chapter is "suspended." A chapter can only be suspended if previously it was affiliated. Indeed, we plan to introduce the second statement at any hearing in order to establish that a relationship did exist on election day.

In any event, these statements would not form a basis for a court to deny our requested injunction. In all cases where it seeks an injunction, a plaintiff retains the burden to "satisfy the court that relief is needed. . . . that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.'" United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). "In determining whether there is a danger of recurrence, a court may consider the bona fides of the expressed intent to comply, the effectiveness of the discontinuance, and, in some cases, the character of past violations." FTC v. Davison Assocs., Inc., 431 F. Supp. 2d 548, 560 (W.D. Pa. 2006) (action under section 13(b) of the Federal Trade Commission Act; citing W.T. Grant Co.). On the other hand, it is a defendant's burden to show that a case is moot on account of remedial action.[6] That burden is substantial:

---

[6] Note that we are considering here the potential mootness challenge specifically based on Defendants' remedial statements and action. We are not considering a potential broad-based mootness challenge based on the fact that electoral events are inherently short-lived and the election is over. That kind of challenge would be addressed by invoking the doctrine that Defendants' conduct is "capable of repetition yet evading review," which doctrine applies where "(1) the challenged action is, in its duration, too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." Merle v. United States, 351 F.3d 92, 95 (3d Cir. 2003) ("This controversy, like most election cases, fits squarely within the 'capable of repetition yet evading review' exception to the mootness doctrine.")

> The standard for "determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." . . . Moreover, the party alleging mootness bears the "heavy," even "formidable" burden of persuading the court that the challenged conduct cannot reasonably be expected to resume.

United States v. Gov't of V.I., 363 F.3d 276, 285 (3d Cir. 2004) (citations omitted).

In particular, remedial actions that appear to be responses to threatened or pending litigation do not favor a finding that conduct will not recur. "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." United States v. Or. State Med. Soc'y, 343 U.S. 326, 333 (1952); see also Bowers v. City of Phila., No. 06-CV-3229, 2007 WL 219651 at *32 (E.D. Pa. Jan. 25, 2007) (cessation of conduct "strongly suggests that the cessation was connected in large part to the instant litigation, a circumstance that does not favor a finding that the conduct is unlikely to recur."); Gov't of V.I., 363 F.3d at 285 ("The timing of the contract termination – just five days after the United States moved to invalidate it, and just two days before the District Court's hearing on the motion – strongly suggests that the impending litigation was the cause of the termination.").

Applying this law to the facts of the instant case, it is clear that the post-complaint disclaimers will not enable Defendants to avoid our injunction. We can show "some cognizable danger of recurrent violation, something more than the mere possibility" of recurrence. W.T. Grant Co., 345 U.S. at 633. We have Defendants' repeated expressions of violent intentions and of approval of violent methods. Aside from their very explicit statements, we have photographic evidence documenting the party's propensity to pose with and brandish weapons. We know and can document, for example, that they brought weapons to a political rally in Texas. We can offer expert opinion that one of the party's distinguishing characteristics is its proclivity to send members to political hot spots with weapons. [redacted] We know that Defendants have not renounced their violent exhortations and images, their racial rhetoric, or their intention to get their members to the polls in future elections. While it has denounced the events in Philadelphia, the party has not described any practical steps, procedures, or training it will implement to avoid this kind of incident. This entire discussion, moreover, takes place in the context of strong indications that the disclaimers are not trustworthy, because (1) they are inconsistent with endorsing statements made by Malik Zulu Shabazz both on television and to Department attorneys, (2) they are inconsistent with each other, (3) they are inconsistent with earlier versions, and were back-dated, and (4) they were issued the same day as, and obviously in response to, the filing of this lawsuit. See Davison Assocs., Inc., 431 F. Supp. 2d at 560 ("a court may consider the bona fides of the expressed intent to comply").

For their part, Defendants cannot meet their "heavy," "formidable," and "stringent" burden of establishing mootness by making it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Gov't of V.I., 363 F.3d at 285 (citations omitted). Even if Defendants were to appear at the default hearing, we do not know how they possibly could show this.

They certainly would be unable to do so by means of statements and a suspension issued after the lawsuit was commenced.

V. The First Amendment is not an impediment to the United States' proposed remedy.

The proposed injunction may be defended against a First Amendment challenge in two different ways.

A. The Defendants' conduct is not protected speech.

We can argue that the First Amendment is not implicated by the proposed remedy because First Amendment speech is not affected as Defendants' were not engaged in activity typically deserving of protections. Simply put, there is no First Amendment right to violate the law by illegitimately engaging in voter intimidation during an election directly in front of a polling place.[7]

Defendants in another case, United States v. Brown, made a similar First Amendment argument to the district court and Fifth Circuit Court of Appeals. The Court of Appeals rejected the Defendants' First Amendment arguments and upheld injunctions against presence at the polls and communication with poll workers. Brown, 561 F.3d at 436-38. In Brown, the United States sought and obtained a remedy that barred the defendant from the polling location and prohibited him from speaking with poll workers about the administration of the election. This remedial request was based on a liability finding that the defendant had improperly run primary elections in violation of Section 2 of the Voting Rights Act. The United States also sought the ban on defendant's polling place presence, save to vote, as a way to ensure that the defendant would not meddle with the administration of the election. The United States also sought and obtained an injunction stripping the defendants of all powers of election administration.

Both the district court and Fifth Circuit rejected arguments that any First Amendment liberty interest was implicated by the injunction. It is important to note that neither the district court nor the Fifth Circuit engaged in any heightened scrutiny analysis, and did not require any compelling interest to justify the remedy. Instead, the courts found that no First Amendment rights were implicated by the remedy.

The Fifth Circuit upheld the polling place ban and prohibition on speaking with poll workers. "Brown is only enjoined from communicating with poll managers regarding their electoral duties and the counting of ballots. The facts of the 2003 and 2007 elections make plain the need for these limitations; in both instances, Brown's statements, whether spoken or scribbled on post-it notes, resulted in poll managers improperly terminating the counting of absentee ballots and selectively rejecting absentee ballots." Brown, 561 F.3d at 438. Because Brown had violated the Voting Rights Act by speaking with poll workers and giving them instructions in violation of the law, there was no First Amendment liberty interest in banning future communications with poll workers. Similarly, the remedy sought against the Defendants in this case would prohibit them from again intimidating voters by creating an intimidating presence at the polls. Creating an intimidating presence at a polling place

---

[7] Similarly, fighting words are punishable because they amount to an assault rather than communication of ideas. See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (characterizing fighting words as "personal abuse").

by blocking the entrance, shouting threatening statements, and brandishing a weapon is simply not protected by the First Amendment.

The Fifth Circuit in Brown also upheld an injunction against defendant's mere presence at the polls and at the circuit clerk's office two weeks prior to an election. In Mississippi, there is no prohibition on anyone being allowed at the polls during the counting of the votes and processing of absentee ballots. "Similarly necessary based on Brown's conduct is the order's restricting Brown's presence at the polling place [except to vote or if appointed as a poll watcher.]" Brown, 561 F.3d at 438. The Fifth Circuit found this physical ban did not implicate the First Amendment. "Again, insofar as defendants assert that these provisions restrict their freedom of expression, they fail to explain what expressive conduct Brown will engage in at the Circuit Clerk's office or within the polling places at the specifically restricted times." Id. at 438.

Finally, the Fifth Circuit upheld stripping the defendants of all powers to administer primary elections. Defendants argue the injunction stripping them of all power to run primary elections "is too broad and deprives them of their First Amendment rights to free expression and association. Defendants, however, fail to explain how delegating these duties to the Referee-Administrator interferes with such rights." Brown, 561 F.3d at 437. Because the remedy affected the "mechanics of administering a primary election," the First Amendment was not implicated. Id. Similarly, there is no First Amendment right to be positioned at the entrance of a poll with an intimidating weapon. Restrictions on this sort of behavior impairs the mechanics of how close one may get to voters when seeking to intimidate and threaten them.

The Third Circuit adopted similar reasoning and characterized criminal or illegal behavior as outside the protection of the First Amendment in United States v. Dickens, 695 F.2d 765, 772 (3d Cir. 1982). In upholding a conviction under RICO over defendants' objection to the government's contention that the robberies were committed to finance defendants' religious Black Muslim organization, this court stated, "[t]he First Amendment, which guarantees individuals freedom of conscience and prohibits governmental interference with religious beliefs, does not shield from government scrutiny practices which imperil public safety, peace or order." Id.

In Brown, the Fifth Circuit noted, "defendants' own conduct has rendered the remedial order's terms necessary to right the § 2 violation." 561 F.3d at 436. In this case, the Defendant New Black Panther Party for Self-Defense and its named members have rendered a remedial order necessary which prohibits them from repeating their behavior from election day 2008. Any proposed future remedy would enjoin specific illegal behavior from the past.

B. Assuming Defendants' conduct is protected speech, the proposed injunctive remedy would be upheld.

Even if the Defendant's conduct is categorized as speech protected by the First Amendment, it can be restricted in the manner set out in the proposed order as a viewpoint-neutral and content-neutral time, place, and manner restriction because the order "burdens no more speech than necessary to serve a significant government interest." Madsen v. Women's Health Center, 512 U.S. 753, 765 (1994) (upholding a 36-foot buffer zone as applied to the street, sidewalks, and driveways "as a way of ensuring access to the clinic" where throngs of protesters would congregate in close proximity to the clinic); see also Schenk v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 380 (1997) (upholding 15-foot fixed buffer zones necessary to ensure access, but striking down floating buffer zones around

people entering and leaving abortion clinics). Here, the significant governmental interests are many, including: ensuring the right of individuals to vote freely for the candidate of their choice without being threatened, intimidated, or coerced and, more generally, providing access to polling places and ensuring the public safety of polling sites.[8] The proposed injunction is appropriately tailored to this end preventing coercing, threatening, or intimidating behavior, thus closely tracking the requirements of federal law under Section 11(b), at polling locations during elections.

The injunction includes a prohibition on appearing with weapons within 200 feet of open polling locations during elections by Defendants. These restrictions, unlike the floating buffer zones around individuals struck down in Schenk, are fixed at open polling locations during the conduct of elections and would burden no more speech than necessary to ensure that federal law, under Section 11(b), is not violated. A proposed injunction need not be the least restrictive or the least intrusive means of furthering the government's interests. See Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989). The proposed injunctive relief here has no application outside of the area in the direct proximity to entrances to polling places during the conduct of elections and does not "burden substantially more speech than is necessary to further the government's legitimate interests." Id. at 799. Absent such limitations it is likely that the Defendants' activities, if considered speech, would constitute prohibited voter intimidation. Thus, the scope of the restrictions constitute a proper fit to remedy the substantial violations alleged.

In Northeast Women's Center, Inc. v. McMonagle, 939 F.2d 57 (3d Cir. 1991), a case pre-dating the Supreme Court's decisions in Madsen and Schenck, the Third Circuit addressed the constitutionality of an injunctive remedy issued against a group of anti-abortion activists.[9] Id. at 60. The McMonagle court noted that the plaintiff had not challenged the protesters' rights to free speech, but their illegal and tortious conduct. Id. The McMonagle court affirmed the injunctive remedy issued by the district court in nearly all respects finding no abuse of the district court's discretion.[10] Id. at 65. In response to the defendant's challenge under the First Amendment, the court first stated that "[t]he district court found that McMonagle, and his group had engaged in acts of violence,

---

[8] The Madsen Court found that numerous significant government interests were protected by the injunction in that case. These included the State's interest in: (1) protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy; (2) ensuring public safety and order, promoting the free flow of traffic on public streets and sidewalks, and protecting the property rights of all citizens; (3) ensuring residential privacy; and (4) analogously, protecting "captive" patients from targeted picketing. See Madsen, 512 U.S. at 767-69.

[9] The McMonagle court previously noted that the district court properly instructed the jury that "the First Amendment does not offer a sanctuary for violators. The same constitution that protects the defendants' right to free speech, also protects the Center's right to abortion services and the patients' rights to receive those services." 868 F.2d at 1349.

For a complete recitation of the detailed injunctive remedy issued in the McMonagle case see Ne. Women's Center, Inc. v. McMonagle, 749 F. Supp. 695, 698 (E.D. Pa. 1990).

[10] The remedy "barred, inter alia, 'picketing, demonstrating, or using bullhorns or sound amplification equipment at the residences of plaintiff's employees or staff." The court remanded the district court's selection of a 2500-foot protected zone on this type of home picketing. See McMonagle, 939 F.2d at 65.

intimidation, and trespass. The right of a court to enter an injunction restricting the form and location of expressive activity is particularly clear in such a context." Id. at 62. The court then determined that the injunction was content-neutral. Id. at 63. It regulated when, where, and how an anti-abortion activist could speak, not what he could say and "ma[d]e no mention whatsoever of abortion or any other substantive issue," but "merely restrict[ed] the volume, location, timing, and violent or intimidating nature of his expressive activity." Id. Further, the injunctive remedy, permitting inter alia, six protesters at a time within 500 feet of the Center, was narrowly tailored and left open alternative methods of communication. Id. at 64-65.

The Supreme Court has also upheld even content-based restrictions on electioneering in close proximity to the polls. See Burson v. Freeman, 504 U.S. 191, 193 (1992). In striking down a law which prohibited election day endorsements by newspapers, the Court noted the challenged statute "in no way involve[d] the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there." Mills v. Alabama, 384 U.S. 214, 218 (1966).

In Burson, the Court held that, even where the establishment of a 100-foot zone in which no political campaigning could occur was not a content-neutral time, place, and manner restriction, Tennessee had a compelling interest in protecting the right of citizens to vote freely for candidates of their choice, and a compelling interest in election integrity. Id. at 197-99. The campaign-free zone was narrowly tailored to achieve the compelling interest of preventing the harassment of voters. "This Court has recognized that the right to vote freely for the candidate of one's choice is of the essence of a democratic society." Burson, 504 at 199 (internal citation omitted). Further,

> [a]pproaching the polling place under this system [unregulated elections of the 19th Century] was akin to entering an open auction place. As the elector started his journey to the polls, he was met by various party ticket peddlers who were only too anxious to supply him with their party tickets. Often the competition became heated when several such peddlers found an uncommitted or wavering voter. [] Sham battles were frequently engaged in to keep away elderly and timid voters of the opposition. [] In short, these early elections were not a very pleasant spectacle for those who believed in democratic government.

Id. at 202 (internal citations & quotations omitted). The electioneering restrictions were upheld because they helped ensure the right to vote freely. "Today, all 50 States limit access to the areas in or around polling places . . . . In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud." Id. at 206.

Conclusion

We request authorization to file a motion for default judgment seeking the issuance of the proposed injunction order against Defendants Minister King Samir Shabazz, Jerry Jackson, Malik Zulu Shabazz, and the New Black Panther Party for Self-Defense.

From: Flynn, Diana K (CRT)
Sent: Wednesday, May 13, 2009 11:54 AM
To: Rosenbaum, Steven (CRT)
Cc: Coates, Christopher (CRT); McElderry, Marie K (CRT)
Subject: New Black Panther Party FW: Comments on the proposed default judgment filings in NBPP

We have been asked to provide comments on the Voting Section's proposed motion and papers in support of default judgment and relief. Marie McElderry and I have reviewed the papers and discussed. Her comments, which also reflect my views, are below. I add the following observations:

1. 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.

2. The fact that *Chamberlain's* minimal standard for entry of a default judgment may be satisfied does not entitle us to one. See Marie's discussion of the case law below. The district court will retain considerable discretion to withhold relief on default and schedule a hearing. Given that we are seeking relief against political organizations and members in areas central to First Amendment activity, it is likely that the court will not order relief absent such further proceedings. That said, the procedural posture leaves few good alternatives to filing in support of such relief now.

3. By far, the most difficult case to make at this stage is against the national party and Malik Shabazz. There is discussion in the internal papers of the history of the organization with respect to voter intimidation with the use of weapons and uniforms. If the Voting Section opts for seeking relief against the national defendants at this stage, we suggest including that history in our supporting Memorandum. Our case against the nationals may be a bit of a reach, particularly at this stage, particularly because of First Amendment concerns. But we already brought the case and made the allegations. See *COMPLAINT*, par. 12. I assume that this reflects the Division's policy judgment that it is appropriate to seek such relief after trial. We probably should not back away from those allegations just because defendants have not appeared. And Voting does seem to have evidence in support of the allegations.

4. We would NOT say that First Amendment defenses are irrelevant at this stage. (Contra, *MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT at 4).* The court should anticipate likely defenses and so should we. See Marie's detailed discussion

below. We think a discussion of the narrowness of the proposed relief, which is generally discussed throughout the memorandum, can be used explicitly at this point to explain why First Amendment defenses are unlikely to prevail. In other words we can argue up front that the proposed order is carefully crafted to avoid any First Amendment concerns. Emphasis can be placed on the fact that our proposal is designed to prevent the paramilitary style intimidation of voters, and otherwise leaves open ample opportunity for political expression.

The First Amendment concerns Steve expressed earlier are well-taken, and I think proceeding against the nationals is a very close call. But it appears to us that there is a basis for the relief we seek, and the unusual posture of the case probably requires that we say the relief is appropriate on default. In any event, we should expect to be required to try these issues.

Marie may make some additional suggestions to the wording of the papers, if permitted.

From: McElderry, Marie K (CRT)
Sent: Tuesday, May 12, 2009 5:15 PM
To: Flynn, Diana K (CRT)
Subject: Comments on the proposed default judgment filings in NBPP

Comments on proposed filings re default judgment in *United States* v. *New Black Panther Party For Self-Defense*, No. 2:09-cv-0065 SD (E.D. Pa.)

We have been asked to comment on whether the United States should seek injunctive relief against all defendants, and, if so, what relief we should request. As I understand the situation, the documents Voting proposes to file are the Motion for Default Judgment (dated April 30), the Memorandum of Law in Support of Motion for Default Judgment (dated April 30), and the proposed Order (dated May 6). Further support for these filings is contained in the May 6 internal Remedial Memorandum Concerning Proposed Injunction Order.

Standard for obtaining default judgment. An overarching principle that we need to keep in mind is that the Third Circuit "does not favor entry of defaults or default judgments." *U.S.* v. *$55,518.05 In U.S. Currency*, 728 F.2d 192, 194 (3d Cir. 1984). Rather, it is its "preference that cases be disposed of on the merits whenever practicable." *Hritz* v. *Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984).

Our proposed Memorandum of Law relies on the three-part test in *Chamberlain* v. *Giampapa*, 210 F.3d 154, 164 (3d Cir. 2000), as governing a district court's determination whether a default judgment is proper. As the Third Circuit more recently acknowledged in an unreported decision, however, *Chamberlain* cites *U.S.* v. *$55,518.05, supra*, as the source of that standard, and *$55,518.05* is a case where a defendant sought to overturn a default judgment. *Hill* v. *Williamsport Police Dept.*, 69 Fed. Appx. 49, 51 (3d Cir. 2003). In *Hill*, the court noted that "both major treatises on federal practice and procedure, as well as the Ninth Circuit, set out additional factors to those listed in *Chamberlain* as appropriate for consideration when ruling on motions to grant default judgments." 69 Fed. Appx. at 51 n.3.[1] Among those factors are "whether material issues of fact or issues of substantial public importance are at issue," "how harsh an effect a default judgment might have," and "the strong policy of the Federal Rules of Civil Procedure." *Ibid.*

Nonetheless, the court in *Hill* determined that it is bound to follow *Chamberlain* in determining whether a district court has abused its discretion in deciding whether to issue a default judgment in the first place. The problem with importation of the three-part test to that context is that step two of the test requires the court to determine "whether the defendant appears to have a litigable defense," and that determination is complicated where, as here, the defendant has totally failed to file a response to the complaint (as opposed to having filed late). Our proposed Memorandum of Law, pg. 4, alludes to that complication by quoting the unreported decision in *Nationwide Mutual Insurance Company* v. *Starlight Ballroom Dance Club, Inc.*, 175 F. Appx. 519, 522 (3d Cir. 2006) ("The second factor is the 'threshold issue in *opening* a default judgment.'"). We then take the position that the presence or absence of a meritorious defense "has no relevance at this stage of the proceedings." Memo. at 4. That is not actually the case, however, since the Court will be following *Chamberlain*.

In any event, I think that we can get over that hurdle by anticipating, as we do in our May 6 internal Remedial Memorandum, possible defenses that might be raised, *i.e.*, First Amendment claims and the post-litigation

denunciation of the conduct of the Philadelphia chapter by the Party (and possibly by Malik Zulu Shabazz). I believe that the district court will anticipate such possible defenses and will want to know how we would address them. Indeed, by the time we file this motion and/or the court sets a hearing, the defendants may file something raising those or other defenses. Given that the court is bound to follow the three-part test, I think that we need to address in the Memorandum in support of the Motion at least those defenses that we have already identified.

I am also not sure that we have made a sufficient showing that we would be prejudiced by denial of a default judgment. When we filed the Complaint, we assumed that we would be engaging in the usual course of litigation, including discovery and filing of legal briefs. The opportunity to receive a judgment without pursuing all of those steps would be a benefit to us, but I am not sure that the court will be persuaded that we would be prejudiced by having to try the case on the merits, which is the preferred method of proceeding under Third Circuit case law. Especially in a case such as this, which is not cut and dried, I think the court will feel that its judgment would be informed by a more deliberate process.

Whether the unchallenged facts constitute a legitimate cause of action against the Party and its national leader. I have some reservations about whether we have a sufficient factual basis to state a claim against the Party and Malik Zulu Shabazz. Paragraph 12 of the Complaint alleges that they "managed, directed, and endorsed the behavior, actions and statements of Defendants Samir Shabazz and Jackson." The May 6 internal memorandum refers to an announcement made in advance of the November 4 election of a "plan to post party members at polling places." But nowhere do I see that we can show that either the Party or Malik Zulu Shabazz suggested, counseled, or endorsed the bringing or brandishing of weapons in advance of what happened in Philadelphia. Assuming that the main behavior we seek to enjoin is bringing weapons to the polls, I am not convinced that we can establish a basis for an injunction against the Party or Malik Shabazz by showing that the Party has violent and racist views against non-blacks and Jews. The additional information discussed on page 8 of the May 6 internal memorandum about

the Party's past actions of bringing weapons to political rallies may, however, be the basis for an argument that both the Party and Malik Shabazz should reasonably have known that the Philadelphia defendants might believe they were authorized to carry weapons to the polls, but I am not sure that would be sufficient to justify the relief we are seeking.

As I read our justification for relief against the Party and Malik Shabazz, it is based largely on Malik Shabazz's statements *after* the events in Philadelphia in which he defended the actions of King Samir Shabazz and Jerry Jackson on national television as based on the alleged presence of members of the Aryan brotherhood or the American Nazi party at that particular polling place. In addition, the Voting Section is relying on admissions made by Malik Shabazz to members of the section. It is unclear how we would present that evidence to the court. That "endorsement," however, is complicated by the statements on the Party's website renouncing the events in Philadelphia and suspending the Philadelphia chapter. It appears that we may have difficulty proving when those statements were added. At least as to the Party, those statements could be an impediment to proving a violation at all, not just an impediment to injunctive relief.

What type of injunctive remedy should be sought. Certainly, we have established a sufficient basis for the very limited injunctive relief that is recited in the proposed order dated April 30 against defendants King Samir Shabazz and Jerry Jackson. But I understand that such a limited injunction will not accomplish very much.

As to those "Philadelphia" defendants, however, the proposed order dated May 6 goes somewhat further. It seeks to enjoin defendants "from deploying or appearing within 200 feet of any polling location on any election day in the United States with weapons." Presumably, both deploying and appearing are meant to be modified by "with weapons." It is not clear what we mean by deploying, especially since the Voting Section indicated in its May 1, 2009, email that, in light of discussions with the Front Office, it does "not seek to enjoin the wearing of the NBPP uniforms at the polls." According to most dictionary definitions, the term "deploy" is used mainly in the context of

troops. I think it suggests that the military-type uniforms used by the Party are an integral part of what we want to enjoin, regardless of our stated intent not to seek to enjoin the wearing of those uniforms.

It appears that, at least as to the Philadelphia defendants, the violation we have alleged encompasses not only bringing the weapon, but also the intimidating atmosphere created by the uniforms, the military-type stance, and the threatening language used. I have not had time to do a comprehensive analysis of the First Amendment implications of attempting to enjoin members of the New Black Panther Party (or any other hate group, such as the American Nazi Party or the Klan) from wearing their uniforms at the polls on election day. The Supreme Court has stated that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas* v. *Johnson*, 491 U.S. 397, 406 (1989) (flag-burning case). It may not, however, "proscribe particular conduct *because* it has expressive elements."

In this case, Party members' wearing of the uniform would likely be viewed as "expressive conduct." It would be relevant, then, to know whether the government has asserted an interest in regulating the wearing of the uniform that is unrelated to the suppression of expression. Here, the government's predominant interest, as expressed in 42 U.S.C. 1973i(b), is preventing intimidation, threats, and coercion (or attempts to do so) against voters or persons urging or aiding persons to vote or attempt to vote. Part of the intimidation in this case is wearing a military-style uniform, which suggests some kind of authority to take action. That aspect of the uniform could theoretically be separated from the particular message that this uniform is intended to convey, *e.g.*, racial hatred. Thus, appearing at the polls in such a uniform with a weapon is more intimidating than appearing in street clothes with a weapon. Interestingly, all three of the Declarations that we propose to present to the court focus on a combination of the uniform and the weapon. None of them mentions the third element of intimidation, *i.e.*, the verbal threats and racial taunts and slurs.

The April 30 Memorandum in support of our Motion addresses the

possible First Amendment claims of the Philadelphia defendants in the context of whether injunctive relief would harm them, *i.e.*, the third part of the traditional test for obtaining an injunction. Memo. at 13-14. As to those defendants, our arguments appear to be sufficient to support the narrow injunction that the Voting Section was seeking as of April 30. It is obviously a closer question whether it would also support either Paragraph V of the May 6 proposed order, either as presently worded using the word "deploy," or a proposed order that explicitly mentions the Party uniform in some way.

As discussed above, my problems with applying Paragraph V to the Party and Malik Shabazz involve whether we have enough evidence to show that they violated the statute. If a decision is made that the evidence is sufficient, I would suggest a separate paragraph in the order for injunctive relief against these defendants that is narrowly tailored to the scope of their violation. That violation is described at various points of the Complaint as "deployment of armed and uniformed personnel at the entrance to [a] polling location," which involves the organization and planning of such activities involving the members of the Party. This portion of the injunction should therefore be geared to enjoining those actions. We might also want to ask the court to order these defendants to undertake some type of procedures or training, such as mentioned on page 8 of the May 6 internal Remedial Memorandum, that would make abundantly clear that the national organization and its leaders do not endorse intimidation, threats or coercion of voters or those who are urging or aiding them to vote.

Marie K. McElderry
Appellate Section
Civil Rights Division

---

1 As the concurring judge in *Hill* pointed out, the Eighth Circuit does not use

the three-part test outside of the context where a party against whom default has been entered has moved to set aside the judgment. 69 Fed. Appx. at 53.

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

RANKING MEMBER—COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD

CO-CHAIR—TOM LANTOS
HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

June 8, 2009

241 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–4610
(202) 225–5136

13873 PARK CENTER ROAD
SUITE 130
HERNDON, VA 20171
(703) 709–5800
(800) 945–9653 (IN STATE)

110 NORTH CAMERON STREET
WINCHESTER, VA 22601
(540) 667–0990
(800) 850–3463 (IN STATE)

wolf.house.gov

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave NW Rm 5111
Washington DC 20530

Dear Attorney General Holder:

I am troubled by your recent decision to drop the Department of Justice's lawsuit against the "New Black Panther Party for Self-Defense," a militant supremacist organization and hate group, and its two members who threatened voters as part of a national voter intimidation effort on Election Day last November.

According to the DOJ complaint, two uniformed men stood outside a polling station located at 1221 Fairmont Street in Philadelphia, Pennsylvania, brandishing weapons to intimidate voters. New Black Party Chairman and self-proclaimed "Attorney at War" Malik Zulu Shabazz confirmed that the placement of these men, Samir Shabazz and Jerry Jackson, in front of the polling station was part of a nationwide effort to position armed party members at precincts.

The complaint also stated that Samir Shabazz "pointed the weapon at individuals, menacingly tapped it [on] his other hand, or menacingly tapped it elsewhere. This activity occurred approximately eight to fifteen feet from the entrance to the polling station." Additionally, both men made "racial threats and racial insults at both black and white individuals" and made "menacing and intimidating gestures, statements, and movements directed at individuals who were present to aid voters," according to witness statements in the DOJ complaint. One of the witnesses, an experienced civil rights attorney who worked with Charles Evers in Mississippi, has publicly called this "the most blatant form of voter intimidation" he has ever seen.

On January 7, the Department of Justice appropriately filed suit in the U.S. District Court in Philadelphia against three men and the New Black Panther Party for Self-Defense under the Voting Rights Act. In the department's news release, Acting Assistant Attorney General Grace Chung Becker stated, "The Voting Rights Act of 1965 was passed to protect the fundamental right to vote and the Department takes allegations of voter intimidation seriously."

THIS STATIONERY PRINTED ON PAPER MADE OF RECYCLED FIBERS

I worry that the department's commitment to protecting the "fundamental right to vote" is wavering under your leadership. I fail to understand how you could dismiss a legitimate case against a party that deployed armed men to a polling station – one of whom brandished a weapon to voters – who harassed and intimidated voters, and could then decide that such actions do not constitute a violation of section 11(b) of the Voting Rights Act of 1965, which prohibits "intimidation, coercion, or threats" against voters. What message does this send to other like-minded groups -- whoever their target -- about this administration's commitment to voting rights?

None of the defendants filed an answer to the lawsuit, which means that legally they admitted all of the allegations in the complaint. Yet your department dismissed the suit it had already won by default against three of the defendants. Not only did the department dismiss the civil suit, but it has also failed to criminally prosecute the defendants. The actions of these defendants are all violations of criminal provisions of the U.S. Code that prohibit intimidating, threatening and coercing voters. This is outlined on pages 54-63 of "Federal Prosecution of Election Offenses," the handbook provided by the Public Integrity Section of the Criminal Division to Justice Department prosecutors. These defendants could have (and should have) been charged under a number of provisions, including 42 U.S.C §1973gg-10(1); 18 U.S.C. §§ 241, 242, 245(b)(1)(A), and 594.

In 2006, then-Senator Barack Obama called such intimidation tactics "deplorable," citing similar intimidation of Native American voters in South Dakota in 2004 and a number of other incidents targeting African American voters. Your inexplicable dismissal of the civil case and the failure to file a criminal prosecution flies in the face of the president's stand on voting rights and sullies the good name of your department. It calls into question your commitment to protecting all voters and guaranteeing that they can exercise their franchise freely without fear.

The American people and this Congress deserve a full and transparent accounting of your decision to drop this case.

Best wishes.

Sincerely,

Frank R. Wolf
Member of Congress

FRW:tc

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

RANKING MEMBER—COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD

CO-CHAIR—TOM LANTOS
HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

July 8, 2009

241 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-4610
(202) 225-5136

13873 PARK CENTER ROAD
SUITE 130
HERNDON, VA 20171
(703) 709-5800
(800) 946-9653 (IN STATE)

110 NORTH CAMERON STREET
WINCHESTER, VA 22601
(540) 667-0990
(800) 850-3463 (IN STATE)

wolf.house.gov

The Hon. John Conyers
Chairman
House Judiciary Committee
2138 Rayburn HOB
Washington, DC 20515

The Hon. Lamar Smith
Ranking Member
House Judiciary Committee
2142 Rayburn HOB
Washington, DC 20515

Dear Chairman Conyers and Ranking Member Smith:

I write to urge the House Judiciary Committee to hold a hearing on Attorney General Eric Holder's decision to dismiss the Department of Justice's (DOJ) case against the New Black Panther Party for voter intimidation on November 4, 2008. The dismissal of this case, which civil rights activist Bartle Bull called, "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," merits congressional attention, if only to force the department to explain its decision to dismiss this case.

Following the department's surprising dismissal, I sent the attorney general the enclosed letter requesting additional information regarding his decision. Additionally, the U.S. Commission on Civil Rights, which I oversee as ranking member of the House Commerce-Justice-Science Appropriations subcommittee, voted unanimously to send the enclosed letters to the department on June 16 and June 22. To date, neither the commission nor I have received any response to our inquiries.

Upon his installation as attorney general, Eric Holder declared, "**We will protect the civil rights of our fellow citizens, all of our fellow citizens** – in the workplace, in the housing market, in our educational institutions **and in the voting booth,** as well as in their day to day lives." I believe that the House Judiciary Committee has an obligation to determine whether Mr. Holder's deeds match his words, especially in light of the many unanswered questions posed by the Commission on Civil Rights and members of Congress.

Thank you for your consideration. Please do not hesitate to contact me at 5-5136 if I can provide additional information on my inquiry regarding the dismissal of this case.

Best wishes.

Sincerely,

FRANK R. WOLF
Member of Congress

THIS STATIONERY PRINTED ON PAPER MADE OF RECYCLED FIBERS

Congress of the United States
Washington, DC 20515

July 9, 2009

The Honorable Glenn A. Fine
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Inspector General,

We write today to request that you investigate whether improper political considerations led the Justice Department to dismiss a voter intimidation case it previously brought against the New Black Panther Party and two individuals affiliated with it. Following the dismissal, Judiciary Committee Ranking Member Lamar Smith and Ranking Member Frank Wolf each submitted letters to the Justice Department requesting information regarding the decision to drop the voter intimidation charges. To date, the Department has not responded to either request. Copies of the letters are attached.

The dismissal of the Department's case against the New Black Panther Party raises significant concerns about possible politicization of the Justice Department. The case in question was filed by the Department against members of the New Black Panther Party and two individuals affiliated with it. Significantly, one of those individuals carried credentials indicating he was a member of the local Democratic Committee. As both of our letters recount, the individuals are alleged to have engaged in brazen acts of voter intimidation outside of polling locations in Philadelphia, Pennsylvania, on Election Day 2008. After reviewing the facts, the Justice Department brought charges against the two individuals and the Party under the Voting Rights Act.

Despite the fact that a judge essentially ruled in favor of the Justice Department's complaint when the defendants failed to respond to the allegations, the Civil Rights Division under the Obama Administration decided to dismiss the case instead of obtaining a default judgment. We are unaware of any changes in the facts underlying this case between the Department's filing of its initial complaint and the subsequent filing of its motion to dismiss. Nor are we aware of any allegations of prosecutorial misconduct in the bringing of the initial complaint.

PRINTED ON RECYCLED PAPER

As Inspector General of the Justice Department, you spent more than a year investigating allegations of wrongful political influence in the removal of several U.S. Attorneys. Allegations of wrongful political influence by Obama Administration officials in the dismissal of a voting rights case are equally important and should be subject to an equally thorough investigation.

Voter intimidation threatens the very core of democracy. The American people need to know that the Justice Department takes seriously cases of voter intimidation, regardless of the political party of the defendants. We respectfully request that you open an investigation into the dismissal of the Black Panther Case and report to Congress.

We appreciate your timely consideration of our request.

Sincerely,

Lamar Smith
Ranking Member
House Judiciary Committee

Frank Wolf
Ranking Member
Commerce, Justice, Science Subcommittee
House Appropriations Committee

F. James Sensenbrenner
Ranking Member
Constitution, Civil Rights, Civil Liberties
Subcommittee
House Judiciary Committee

John Culberson
Member of Congress

Steve King
Member of Congress

Robert Aderholt
Member of Congress

Trent Franks
Member of Congress

Jo Bonner
Member of Congress

Louie Gohmert
Member of Congress

Jim Jordan
Member of Congress

JOHN CONYERS, JR., Michigan
CHAIRMAN

HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
PEDRO, PIERLUISI, Puerto Rico
LUIS V. GUTIERREZ, Illinois
BRAD SHERMAN, California
TAMMY BALDWIN, Wisconsin
CHARLES A. GONZALEZ, Texas
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
DANIEL B. MAFFEI, New York
LINDA T. SANCHEZ, California
DEBBIE WASSERMAN SCHULTZ, Florida
"VACANT"

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

LAMAR S. SMITH, Texas
RANKING MINORITY MEMBER

F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
DANIEL E. LUNGREN, California
DARRELL E. ISSA, California
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
THOMAS ROONEY, Florida
GREGG HARPER, Mississippi

May 28, 2009

Ms. Loretta King
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
Washington DC 20530

Dear Ms. King,

It has come to my attention that on Election Day 2008, several members of the New Black Panther Party intimidated voters at a polling place in Philadelphia. These members brandished a baton in a threatening manner and made verbal threats to potential voters. After investigating the incident, the Civil Rights Division filed a complaint against the New Black Panther Party and several of its members for violations of Section 11(b) of the Voting Rights Act, which prohibits any "attempt to intimidate, threaten, or coerce" any voter and those aiding voters.

I understand that neither the New Black Panther Party nor its members filed a response to the complaint or any motion. As a result, the federal judge directed the Division to file a motion for a default judgment against the Party and its members. Instead of submitting the default judgment against the Party and its members to the court for signature, however, I understand the Division voluntarily moved to dismiss the complaint, even though it had effectively won the case.

This case was an uncontested lawsuit against defendants including one who, by the terms of the Division's own complaint, had "made statements containing racial threats and racial insults at both black and white individuals," and who "made menacing and intimidating gestures, statements, and movements directed at individuals who were present to aid voters." That individual, Jerry Jackson, had been carrying credentials as a member of the local Democratic committee. The Division sought relief only against the one defendant who carried and waived a baton on Election Day, and not against Mr. Jackson, and it sought only to enjoin that defendant from "displaying a weapon within 100 feet of any open polling location" in Philadelphia.

These actions raise a number of troubling questions. For example, why did the Civil Rights Division voluntarily dismiss a lawsuit that it had effectively already won, against defendants who were physically threatening voters? Is the Division concerned that this dismissal will encourage the New Black Panther Party, or other groups, to intimidate voters? Why did the Division seek such limited relief against a defendant who was actually carrying and brandishing a weapon at a polling station on Election Day? What role did the change of administrations play in the unusual resolution of voluntarily dismissing a case on which the Division had already prevailed?

In an effort to obtain answers to these and related questions, I request that the appropriate employees of the Division brief my staff regarding this lawsuit and the circumstances surrounding its dismissal. I am also requesting all non-privileged documents relating to the Division's dismissal of the suit.

Please respond to Crystal Jezierski, minority chief oversight counsel, or Paul Taylor, minority chief counsel on the Subcommittee on the Constitution, Civil Rights, and Civil Liberties at (202) 225-6906 by June 19 to arrange the briefing and the document delivery.

Thank you for your prompt consideration of this request.

Sincerely,

Lamar Smith

Lamar Smith
Ranking Member

cc: The Honorable Ron Weich
The Honorable John Conyers, Jr.
The Honorable Jerrold Nadler
The Honorable F. James Sensenbrenner, Jr.

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

RANKING MEMBER—COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD

CO-CHAIR—TOM LANTOS
HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

June 8, 2009

241 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-4610
(202) 225-5136

13873 PARK CENTER ROAD
SUITE 130
HERNDON, VA 20171
(703) 709-5800
(800) 945-9653 (IN STATE)

110 NORTH CAMERON STREET
WINCHESTER, VA 22601
(540) 667-0990
(800) 850-3463 (IN STATE)

wolf.house.gov

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave NW Rm 5111
Washington DC 20530

Dear Attorney General Holder:

I am troubled by your recent decision to drop the Department of Justice's lawsuit against the "New Black Panther Party for Self-Defense," a militant supremacist organization and hate group, and its two members who threatened voters as part of a national voter intimidation effort on Election Day last November.

According to the DOJ complaint, two uniformed men stood outside a polling station located at 1221 Fairmont Street in Philadelphia, Pennsylvania, brandishing weapons to intimidate voters. New Black Party Chairman and self-proclaimed "Attorney at War" Malik Zulu Shabazz confirmed that the placement of these men, Samir Shabazz and Jerry Jackson, in front of the polling station was part of a nationwide effort to position armed party members at precincts.

The complaint also stated that Samir Shabazz "pointed the weapon at individuals, menacingly tapped it [on] his other hand, or menacingly tapped it elsewhere. This activity occurred approximately eight to fifteen feet from the entrance to the polling station." Additionally, both men made "racial threats and racial insults at both black and white individuals" and made "menacing and intimidating gestures, statements, and movements directed at individuals who were present to aid voters," according to witness statements in the DOJ complaint. One of the witnesses, an experienced civil rights attorney who worked with Charles Evers in Mississippi, has publicly called this "the most blatant form of voter intimidation" he has ever seen.

On January 7, the Department of Justice appropriately filed suit in the U.S. District Court in Philadelphia against three men and the New Black Panther Party for Self-Defense under the Voting Rights Act. In the department's news release, Acting Assistant Attorney General Grace Chung Becker stated, "The Voting Rights Act of 1965 was passed to protect the fundamental right to vote and the Department takes allegations of voter intimidation seriously."

THIS STATIONERY PRINTED ON PAPER MADE OF RECYCLED FIBERS

I worry that the department's commitment to protecting the "fundamental right to vote" is wavering under your leadership. I fail to understand how you could dismiss a legitimate case against a party that deployed armed men to a polling station – one of whom brandished a weapon to voters – who harassed and intimidated voters, and could then decide that such actions do not constitute a violation of section 11(b) of the Voting Rights Act of 1965, which prohibits "intimidation, coercion, or threats" against voters. What message does this send to other like-minded groups -- whoever their target -- about this administration's commitment to voting rights?

None of the defendants filed an answer to the lawsuit, which means that legally they admitted all of the allegations in the complaint. Yet your department dismissed the suit it had already won by default against three of the defendants. Not only did the department dismiss the civil suit, but it has also failed to criminally prosecute the defendants. The actions of these defendants are all violations of criminal provisions of the U.S. Code that prohibit intimidating, threatening and coercing voters. This is outlined on pages 54-63 of "Federal Prosecution of Election Offenses," the handbook provided by the Public Integrity Section of the Criminal Division to Justice Department prosecutors. These defendants could have (and should have) been charged under a number of provisions, including 42 U.S.C §1973gg-10(1); 18 U.S.C. §§ 241, 242, 245(b)(1)(A), and 594.

In 2006, then-Senator Barack Obama called such intimidation tactics "deplorable," citing similar intimidation of Native American voters in South Dakota in 2004 and a number of other incidents targeting African American voters. Your inexplicable dismissal of the civil case and the failure to file a criminal prosecution flies in the face of the president's stand on voting rights and sullies the good name of your department. It calls into question your commitment to protecting all voters and guaranteeing that they can exercise their franchise freely without fear.

The American people and this Congress deserve a full and transparent accounting of your decision to drop this case.

Best wishes.

Sincerely,

Frank R. Wolf
Member of Congress

FRW:tc

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 13, 2009

The Honorable Frank R. Wolf
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Wolf:

This responds to your letter, dated June 8, 2009, concerning *United States v. New Black Panther Party for Self-Defense, Civ. No. 09-0065 SD (E.D. Pa.)*, a case filed to enforce Section 11(b) of the Voting Rights Act of 1965, 42 U.S.C. § 1973i(b).

This case was filed on January 9, 2009. The United States obtained an injunction against a defendant who held a nightstick in front of a polling place in Philadelphia, Pennsylvania. The injunction is tailored appropriately to the scope of the violation and the requirements of the First Amendment, and the Department will fully enforce the terms of the injunction.

The Department voluntarily dismissed the Section 11(b) claims against three other defendants named in the complaint because the facts and the law did not support pursuing those claims against them. That decision was made after a careful and thorough review of the matter by the Acting Assistant Attorney General for Civil Rights, a career employee with nearly 30 years experience in the Department, including nearly 15 years as the career Deputy Assistant Attorney General for Civil Rights.

Although, as you note, these defendants failed to respond to the complaint, that does not mean the Department "had effectively won the case" against them. The Court of Appeals for the Third Circuit "does not favor entry of defaults or default judgments." *United States* v. *$55,518.05 In U.S. Currency*, 728 F.2d 192, 194 (3d Cir. 1984). Rather, it is its "preference that cases be disposed of on the merits whenever practicable." *Hritz* v. *Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984); *see also Hill* v. *Williamsport Police Dept.*, 69 Fed. Appx. 49, 51 n.3 (3d Cir. 2003) (factors to consider in granting a default judgment include "whether material issues of fact or issues of substantial public importance are at issue"). Accordingly, an entry of a default judgment in the district court is not automatic. Moreover, even if a court were to grant a default

judgment on liability, the court still would need to assess the propriety of any requested injunction. *Broadcast Music, Inc.* v. *Sprint Mount Area Bavarian Resort, Ltd.*, 555 F. Supp. 2d 537, 543 (E.D. Pa. 2008) (granting injunctive relief following entry of default judgment only after considering propriety of remedy sought); *cf. Shields* v. *Zuccarini*, 254 F.3d 476, 482 (3d Cir. 2001) (identifying factors a court must consider before granting permanent injunctive relief).

Section 11(b) prohibits intimidation, threats or coercion of "any person for voting or attempting to vote, or ... for urging or aiding any person to vote or attempt to vote." The United States is authorized to enforce Section 11(b) through civil litigation and to obtain declaratory and injunctive relief. For a variety of reasons, including the limited remedies available under Section 11(b), the Department has filed only three cases under this provision in the three decades for which we have reliable records on the subject. Indeed, in the 44 years since Congress passed the Voting Rights Act, fewer than 10 reported cases have ever been brought by any party prior to the case in question.

In *U.S. v. New Black Panther Party for Self-Defense*, the district court found that the United States had alleged that Minister King Samir Shabazz "stood in front of the polling location at 1221 Fairmont Street in Philadelphia, wearing a military-style uniform, wielding a nightstick, and making intimidating statements and gestures to various individuals, all in violation of 42 U.S.C. § 1973i(b)," Order, dated May 18, 2009, at 1, and entered judgment "in favor of the United States of America and against Minister King Samir Shabazz, enjoining Minister King Samir Shabazz 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. § 1973i(b)." Judgment, dated May 18, 2009. We believe this injunction is tailored appropriately to the scope of the violation and the requirements of the First Amendment. We intend to enforce fully the terms of this injunction. Section 11(b) does not authorize other kinds of relief, such as monetary damages or civil penalties.

The United States had, prior to these rulings, voluntarily dismissed claims against the three other defendants named in the complaint: The New Black Panther Party for Self-Defense ("the Party"), Malik Zulu Shabazz and Jerry Jackson. The Department considered not only the allegations in the complaint, but also the evidence that had been amassed by the Department to support those allegations.

The complaint alleges that the Party "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." Complaint, para. 12. Notably, the complaint does not allege that those statements or the notice called for any Party member to display weapons at polling locations or do anything that would violate Section

11(b). Nor is there any allegation in the complaint that Malik Zulu Shabazz made any such statement in advance of the election.

The complaint does allege that the Party and Malik Zulu Shabazz "managed" and "directed" "the behavior, actions and statements of Defendants Samir Shabazz and [Jerry] Jackson at [the Philadelphia polling place], alleged in this Complaint." Complaint, para. 12. The Department considered the evidence developed to support this allegation and concluded that the factual contentions in the complaint did not have sufficient evidentiary support.

The complaint also alleges that the Party and Malik Zulu Shabazz "endorsed" the alleged activities at the Philadelphia polling place after the election. Even assuming that a post-event "endorsement" is sufficient to impose Section 11(b) liability, the Department found the evidence on this allegation to be equivocal. The Party posted statements on its web site specifically disavowing the Philadelphia polling place activities and suspending the Party's Philadelphia chapter because of these activities.

With regard to the alleged activities at the Philadelphia polling place, the Department concluded that the allegations in the complaint regarding Samir Shabazz, the person holding the nightstick, were sufficient to state a claim under Section 11(b) and that the evidence developed supported those allegations. As noted above, we therefore sought and obtained a judgment against this defendant and appropriately tailored injunctive relief.

The Department decided not to proceed with its claims against Jerry Jackson, who was a resident of the apartment building where the polling place was located and was certified by city officials as a poll watcher. The local police officers who were called to the polling place ordered Samir Shabazz to leave the polling place, but allowed Jackson to remain. Considering the contemporaneous response of the local police officers to Jackson's activities, as well as the evidence developed to support the allegations against Jackson, the Department concluded that the factual contentions in the complaint did not have sufficient evidentiary support.

In response to your question about why criminal charges were not brought regarding this matter, the Department determined in 2008 that the conduct at issue did not present a prosecutable violation of any of the relevant federal statutes. As you know, the standard of proof to successfully pursue a criminal matter is significantly higher than that associated with a civil case.

We can assure you that the Department is committed to comprehensive and vigorous enforcement of both the civil and criminal provisions of federal law that prohibit voter intimidation. We continue to work with voters, communities, and local law enforcement to ensure that every American can vote free from intimidation, coercion, or threats.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of assistance with this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

Congress of the United States
Washington, DC 20515

July 17, 2009

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

Dear Attorney General Holder:

Thank you for the July 13, 2009, letter we received from Assistant Attorney General Ronald Weich responding to our concerns about the Department's highly unusual (if not unprecedented) dismissal of its Voting Rights Act (VRA) lawsuit against the New Black Panther Party and its members in the wake of the district court's offer to grant the United States a default judgment. We appreciate the Department's response and commitment to brief us and other members on this case. In advance of those briefings, we would like to share with you in more detail some specific concerns we have about the Department's actions in this matter. We ask that the Department be prepared to address these questions when it briefs Members of Congress on this matter in the coming weeks.

The Department maintains that the decision to dismiss the case against three Defendants – the New Black Panther Party, its Chairman, Malik Zulu Shabazz, and Jerry Jackson – was fully justified. This conclusion is based, in part, on the view that the New Black Panther Party's publicly announced plan to position several hundred of its members at polling places on election day did not violate Section 11(b) of the VRA because the announcement did not go so far as to expressly call on party members to "display weapons" at the polls. The fact that at least one New Black Panther Party member actually appeared at a polling place on Election Day with a weapon, and another member stood side-by-side in formation with his armed colleague in an effort to intimidate potential voters, does not change the Department's analysis.

However, to suggest that the New Black Panther Party failed to contravene the VRA merely because it avoided any reference to "weapons" in its pre-Election Day announcement eviscerates critical civil rights protections and establishes a dangerous precedent. Is the Justice Department's position now that a paramilitary organization is free to send its members en masse to polling places – in uniform no less – without fear of legal repercussions, as long as there is no explicit mention of weaponry? Had the Ku Klux Klan or Aryan Brotherhood made a similar announcement prior to November 4, 2008, would the Civil Rights Division have viewed the group's failure to mention weapons as an exculpatory omission?

PRINTED ON RECYCLED PAPER

A violation of Section 11(b) does not require the use of weapons, or even the threat to use weapons. The appearance of uniformed members (at least one of whom was armed) of the New Black Panther Party is exactly the kind of conduct that Section 11(b) was intended to address. The fact that the New Black Panther Party was clever enough not to publicly call for the use of weapons does not – nor should not – absolve the organization of liability.

The Department's response also states that the Division did not find sufficient evidence that the New Black Panther Party and Malik Zulu Shabazz managed, directed, or endorsed the behavior of the other Defendants. This conclusion appears, however, to be directly contradicted by statements made by Mr. Shabazz on national television on November 7, 2008. In an interview, Mr. Shabazz claims that his activities in Philadelphia were part of a nationwide effort involving hundreds of party members, and that the display of the weapons was a necessary part of the New Black Panther Party deployment.

It could be argued that this admission, standing alone, should settle the issue. At a minimum, however, the Department should have responded by at least conducting a deposition of the Defendants and engaging in some minimal discovery to determine the full composition and character of the Defendants' intimidating activities. For the Department to state that there was not sufficient evidence to support proceeding against a party chairman who admits that weapons were part of a nationwide deployment is remarkable. It is unclear from your response whether or not Civil Rights Division attorneys actually interviewed Mr. Shabazz, and, if so, what the results of that interview were. We have a strong suspicion that, given Mr. Shabazz's statements to the national media, any interview conducted by Civil Rights Division attorneys would have yielded similarly useful evidence. The fact that the Defendants did not respond to the complaint, however, leads us to believe that no discovery took place in the case.

In addition, we wonder whether the videos and statements that can be found on the Internet, produced by organizations such as the Anti-Defamation League, were considered to provide context to the violent nature of the New Black Panther Party deployment on November 4, 2008. If so, we would request that you provide the undersigned a list of the videos and statements that the Department considered before dismissing the case against the New Black Panther Party and Malik Zulu Shabazz.

Additionally, the Department maintains that the case was dismissed because the New Black Panther Party disavowed the actions in Philadelphia *after* the election. Yet on May 4, 2009, the Civil Rights Division filed a response to a motion for partial summary judgment by the defendants in a housing discrimination lawsuit in Kansas that took exactly the opposite position. In *U.S. v. Sturdevant*, the defendants argued that the case should be dismissed because they fired the employee accused of discriminatory conduct, had not authorized such conduct, and no longer owned the apartment property where the

discrimination occurred. The Department argued in its response brief that the case should not be dismissed because there were still disputed issues of material facts regarding which of the defendants' employees were ultimately responsible for monitoring and correcting the employee's discriminatory conduct, when the defendants knew about the discrimination, and what steps were taken to correct the problem. The Department's brief in that case also argued that even if the defendants were *now disavowing* the discriminatory actions of their former employee, there were no assurances that the defendants' failure to "train, monitor, and discipline" the former employee would not be repeated with other employees at other properties owned by the defendants. *See United States v. Sturdevant,* Case No. 2:07-02233 (D. Kan.), United States' Response to the AIMCO Defendants' Motion for Partial Summary Judgment, pages 10-12.

The same principle is at play in the New Black Panther Party case. By not engaging in discovery and eschewing a default judgment, the Department has no assurances that the New Black Panther Party will not engage in exactly the same type of behavior again. Nor are there any assurances that the New Black Panther Party will "train, monitor, and discipline" its members so that the behavior that occurred in Philadelphia will not be repeated in future elections. In fact, we would not be surprised if the members of the New Black Panther Party will likely be encouraged to engage in similar activities given the likely minimal deterrent effect of the sactions levied against it after its reprehensible conduct last fall.

Turning to Defendant Jerry Jackson, your letter cites a variety of reasons for the voluntary dismissal. One of these is the "contemporaneous response" of the local Philadelphia police officers as justifying the dismissal against Mr. Jackson, in so far as they did not arrest or remove him. We urge you to reconsider this position. Whether or not Federal law has been violated is not determined by the behavior of local law enforcement officials, and we are unaware of the Civil Rights Division ever taking such a position before. In this vein, we would request that you provide any interview notes members of the career trial team made upon interviewing the local police officers. These attorneys' interview notes regarding their impressions of the local police officers is of critical importance given the weight the Department placed upon the officers' actions when deciding to dismiss the charges against Mr. Jackson.

Reports indicate that the Department had sworn statements from multiple victims that Mr. Jackson stood in formation with the armed Defendant, Samir Shabazz, and attempted to block the entrance to the polls. Messrs. Jackson and Shabazz were identically dressed. Their military uniforms alone were intimidating. Others, including voters, witnessed their behavior. We thus ask that you provide us with the executed sworn statements of witnesses Bartle Bull, Christopher Hill, Michael Mauro, and any other witnesses of which we may be unaware.

The Department's response also suggests that the First Amendment was somehow implicated by a publicly announced nationwide plan to position paramilitary members of an organization at the entrance to a polling location. However, he First Amendment would implicate only the scope of any remedy, not underlying liability. For example, statements and party activities may be protected by the First Amendment, but would still be admissible evidence to show that the Voting Rights Act was violated. Although the Defendants may have exercised their First Amendment Rights in making statements that they intended to implement a nationwide plan to place uniformed members at the entrance to polls, such statements would still be admissible to demonstrate liability even if they cannot be enjoined.

In addition to the above questions we would also ask that the Department be prepared to reply to the following questions:

- Is the FBI aware of the activities of the Defendants, and if so, what is its assessment of their behavior and threatening nature? Does the FBI share your characterization of the response of local law enforcement officials on the scene, assuming it is accurate?

- What did the Department do to determine the extent of New Black Panther Party members deploying in other locations throughout the United States before dismissing the case? Did the Department's political appointees inquire about the possibility of a nationwide Panther deployment?

- Although the Department maintains that there was insufficient evidence to proceed to default against the New Black Panther Party and its Chairman Malik Zulu Shabazz, we are not aware thatany discovery was conducted by the Department. Why, then, would the Department not simply have informed the District Court that it did not wish a default finding against the three defendants and instead wished to proceed to full discovery? This approach would have enabled the Department to resolve any evidentiary uncertainties and ensure a vigorous enforcement of voter intimidation statutes.

- Has the Department provided all communications with third-party interest groups about the case? For example, if memoranda or emails from third-party interest groups were sent to the Department or any official at the Department, such documents would not be privileged as you well know.

- Did Department staff apart from the four-person career trial team engage in any discussions with Defendants or their representatives? Did current Department political appointees conduct discussions with the Defendants or their agents prior to January 20? If so, have they recused themselves? Are there any career

attorneys in the Voting Section or the Civil Rights Division who worked on the case besides the four Section attorneys named on the pleadings?

- What specific new facts did the Department learn between the filing of the complaint and its dismissal that caused the Civil Rights Division lawyers who had approved the filing of the suit in January to change their position and decide that the suit could not be maintained against those defendants against whom the suit was dismissed? How did the Department come to learn about those specific facts?

We appreciate your attention to this important matter and look forward to the Department's briefing.

Sincerely,

Lamar Smith
Ranking Member
Committee on the Judiciary

Frank R. Wolf
Ranking Member
Commerce-Justice-Science
Subcommittee House Appropriations
Commitee

cc: The Honorable John Conyers, Jr.

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

RANKING MEMBER – COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD

CO-CHAIR – TOM LANTOS HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

July 22, 2009

241 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-4610
(202) 225-5136

13873 PARK CENTER ROAD
SUITE 130
HERNDON, VA 20171
(703) 709-5800
(800) 945-9653 (IN STATE)

110 NORTH CAMERON STREET
WINCHESTER, VA 22601
(540) 667-0990
(800) 850-3463 (IN STATE)

wolf.house.gov

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave NW Rm 5111
Washington DC 20530

Dear Attorney General Holder:

Veteran civil rights activist Bartle Bull, who managed campaigns for Robert F. Kennedy in New York in1968 and other prominent Democratic state candidates, recently opined, "Martin Luther King did not die to have people in jack boots with billy clubs, block the doors of polling places... And neither did Robert Kennedy. It's an absolute disgrace." The disgrace Bull refers to is your unwarranted dismissal of *U.S. v. the New Black Panther Party for Self-Defense, Malik Zulu Shabazz, Minister King Samir Shabazz aka Maurice Heath, and Jerry Jackson.*

My commitment to voting rights is without question. In fact, in 1981 upon my vote for the Voting Rights Act, the *Richmond Times-Dispatch* published the enclosed editorial, "A More Offensive Law," castigating me for my vote when every other member of the Virginia congressional delegation opposed it. The editorial chastised me stating, "Mr. Wolf will be partly to blame [for federal voting rights oversight]."

During my meeting Monday with Ms. Loretta King and Mr. Steven Rosenbaum of the Civil Rights Divisions, they refused to answer my questions claiming the "privileged" nature of the information. I would remind you that such defenses do not apply to requests from members of Congress. The Freedom of Information Act (FOIA) includes a provision that states quite clearly that most of the FOIA exemptions – including deliberative process – do not apply to requests from Congress. *See* 5 U.S.C. § 552(d). This exemption has been affirmed by at least two D.C. Circuit opinions, which hold that FOIA requests from individual members of Congress satisfy the congressional request requirement and thus render any FOIA exemptions inapplicable. See *Murphy v. Department of the Army*, 613 F.2d 1151, 1157 (D.C. Cir. 1979); *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 974 n.16 (D.C. Cir. 1980); see also *Rockwell Int'l Corp. v. U.S. Department of Justice*, 235 F.3d 598, 603 (D.C. Cir. 2001) (noting that disclosure of deliberative process memo to member of Congress did not waive FOIA exemption as to member of general public because FOIA carved out Congress from the statute's disclosure obligation exemptions).

Accordingly, I would respectfully reiterate my requests for the following information and documents:

THIS STATIONERY PRINTED ON PAPER MADE OF RECYCLED FIBERS

1. Why am I being prevented from meeting with the trial team on this case?

2. What was the nature of Acting Assistant Attorney General for Civil Rights Loretta King's communication, if any, with you, Deputy Attorney General Ogden, or Associate Attorney General Perrelli's offices prior to the case dismissal?

3. Did you, Deputy Attorney General Ogden, or Associate Attorney General Perrelli approve (or express reservations about) the dismissal of this case and/or sign-off on any communication with regard to the dismissal? If so, will those communications be provided to members?

4. Mr. Ronald Weich's letter of July 13 states that Ms. King is a 30-year career employee and was acting in that capacity when the case was dismissed.

   However, I understand that the Vacancy Reform Act characterizes her position at the time, Acting Assistant Attorney General for Civil Rights, as a "Presidential appointment with Senate confirmation" (PAS) and in that capacity she would be acting in a political capacity, *assuming the Office of the Associate Attorney General, Deputy Attorney General or Attorney General also did not opine on the matter*. Could you please clarify?

5. The former attorney general was a signatory to the complaint. Are you a signatory to any legal document or internal directive regarding the dismissal of this case?

6. In an affidavit taken by your department, civil rights activist Bartle Bull states, "I have never encountered or heard of another instance in the United States where armed men blocked the entrance to a polling location," and "It would qualify as the most blatant form of voter intimidation I have encountered in my life."

   According to DOJ's own interpretation of 18 U.S.C. § 594 in its "Federal Prosecution of Election Offenses" manual (p. 56): "Section 594 prohibits intimidating, threatening, or coercing anyone, or attempting to do so, for the purpose of interfering with an individual's right to vote or not vote in any [federal] election."

   a. Do you believe that this and other witness testimony fails to support issues of "intimidation, threatening, or coercing" behavior on the part of the defendants?

   b. On what grounds did you find that the appearance of members of a widely recognized hate group wearing paramilitary-style uniforms did not constitute intimidation?

c. What precedent does this set for other like-minded groups -- whoever their target -- about federal enforcement of voter intimidation by hate groups outside of polling stations?

d. If showing a weapon, making threatening statements, and wearing paramilitary uniforms in front of polling station doors does not constitute voter intimidation, at what threshold of activity would these laws be enforceable?

7. Mr. Weich's letter cites uncertainty as to the outcome of "default judgments" as your justification for dismissal of the charges against Jerry Jackson, Malik Zulu Shabazz, and the New Black Panther Party.

   The letter also alleges that the body of evidence amassed further informed your decision to dismiss this case. Will you provide Members with:

   a. Copies of the sworn statements by witnesses?

   b. An inventory of video evidence?

   c. Examples of such evidence that influenced dismissal?

   d. The names of individuals and third-party groups contacted and any documents that they provided in prosecuting this case?

8. Did the department contact the Southern Poverty Law Center and/or Anti-Defamation League, which list the New Black Panther Party as a hate group along with the KKK and American Nazi Party? If so, with whom did the department speak?

9. Is certainty of favorable judgment a new precedent for this department?

10. Did the signatories of the complaint concur with your decision to dismiss?

11. Mr. Weich's letter cites the local police officer's decision not to remove Jerry Jackson because he was a resident of the apartment building and certified by city officials as a poll watcher.

    It has come to my attention that your justification that Jackson lived at the building where the polling place was located is false. The polling place was at a high-rise at 1221 Fairmount Street in Philadelphia, a senior living facility called the Guild House. Jackson, I understand, resides at 813 North Parks Street in Philadelphia and has never resided at 1221 Fairmount Street.

a. Please explain this discrepancy. Did your office do its due diligence before dismissing this case or responding to members?

b. Do you believe that Jerry Jackson's affiliation, uniform, statements, and behavior at 1221 Fairmont Street on November 4 are justified since he was a registered poll watcher?

c. Is it the policy of this Justice Department that any individual registered as a poll watcher may wear any form of uniform, brandish weapons, make unsolicited comments to voters, or loiter at the polls?

d. Does the Department believe that the possession of papers allowing one to be present at a polling place also allows the holder to violate Section 11(b) of the VRA?

e. Was Jerry Jackson registered as a poll watcher with a particular political party or campaign? If so, which one?

f. Was that political party or campaign interviewed with regard to Jackson's role in this complaint? If so, were they aware and did they condone his appearance on November 4?

g. In a video of the event, Jackson and Shabazz state that they are providing "security" for the polling precinct. Who authorized them to provide these services and under what authority?

12. Mr. Weich's letter states that the dismissal was based, in part, on the view that the New Black Panther Party's publicly announced plan to position several hundred of its members at polling places on Election Day did not violate Section 11(b) of the VRA because the announcement did not go so far as to expressly call on party members to "display weapons" at the polls.

    How do you justify this response given that a violation of Section 11(b) does not require the use of weapons, or even the threat to use weapons?

13. Mr. Weich's letter asserts that evidence does not support the complaint regarding Malik Zulu Shabazz and the party "endorsing" or directing the "behavior, actions, and statements" of Shabazz and Jackson.

    However, it would seem that the confession *on national television* by Malik Zulu Shabazz on November 7, 2008, flatly contradicts your assertion. Mr. Shabazz unequivocally claims that his activities in Philadelphia were part of a nationwide effort

involving hundreds of party members, and that the use of the weapons was a necessary part of the Black Panther deployment.

a. Given Jackson and Shabazz's open membership in Malik Zulu Shabazz's New Black Panther Party, how do you justify that post-event endorsement of their actions is not sufficient to impose Section 11(b) liability?

b. Even if this connection is not entirely certain, why would you not allow the court to render judgment on this to make such a determination?

14. Specifically, you cite the Party's "disavowal" of Shabazz and Jackson actions on its Web site as your justification for dismissing these charges.

a. Was this disavowal posted on the Web site before or after DOJ filed its complaint?

b. On what date was the disavowal posted and who was the author?

c. How does this disavowal negate Malik Zulu Shabazz's earlier public declarations that his party coordinated efforts to have party members posted in front of polling locations?

15. Can you provide an example of another case, whether civil rights, tax, anti-trust, or criminal enterprise, when the defendants' post-behavior disavowal resulted in the department similarly dismissing the case?

16. It is my understanding that Mr. Steven Rosenbaum brought a voter intimidation case against the North Carolina Republican Party in 1992 based on misleading postcards.

Could you please provide the complaint, justification memo, and consent decree in this case as well as any additional documents that discuss First Amendment implications?

17. Mr. Weich's letter states that you believe the injunction against Samir Shabazz "is tailored appropriately to the scope of the violation" – enjoining Shabazz from "displaying a weapon within 100 feet of any open polling location on Election Day in the City of Philadelphia."

The letter also states that "Section 11(b) does not authorize other kinds of relief, such as monetary damages or civil penalties."

a. Why is the injunction from displaying weapons in front of polling places only limited to the City of Philadelphia and not extended to other cities that fall within

the Eastern District of Pennsylvania, such as Allentown, Reading, Lancaster and Bethlehem?

b. What will happen if Shabazz brandishes a weapon at a polling place in another city?

c. Is it true that this injunction stands only through Election Day 2012?

d. What is the precedent for limiting this injunction to one geographic location?

Please consider these questions as an addendum to my July 17 letter with House Judiciary Committee Ranking Member Lamar Smith.

Sincerely,

Frank R. Wolf
Member of Congress

Cc: Nelson Hermilla, Chief
FOIA/PA Branch
Civil Rights Division
NALC, Room 311
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

BEST AVAILABLE COPY

Richmond Times-Dispatch

JOHN STEWART BRYAN III, *Publisher*
[illegible], *Executive Editor*
[illegible], *Managing Editor*
EDWARD GRIMSLEY, *Editor of the Editorial Page*

Thursday, October 15, 1981

A More Offensive Law

A recent news story from Washington reported that Tenth District Republican Rep. Frank R. Wolf didn't want to talk about his vote in favor of extending the odious federal Voting Rights Act. No wonder. There is absolutely no way that he can justify this endorsement of a measure that officially brands Virginia a second-class state and denies Virginians some of their most precious political rights. Mr. Wolf was the only Virginia congressman to support the bill when it moved through the House of Representatives last week.

Grossly unfair in its present form, the Voting Rights Act would be made even more offensive by changes the House approved. The despicable preclearance provision, which now is subject to periodic reconsideration, would become a permanent feature of the law. Under this provision, covered states and localities must obtain federal approval of any law, action or decision that might affect the voting rights or strength of minorities, especially blacks. The House's new version outlines a procedure by which a state might, theoretically, purify itself and gain exemption from the act. But the process is so cumbersome and vague that it is likely to prove to be worthless. One important aspect of the act that would remain unchanged in the House version is its inequitable selectivity. The act's harsh impact would continue to fall mainly on the South. Efforts to persuade the House to apply the act uniformly throughout the nation were unsuccessful.

Indeed, the House was unwilling to make even the slightest gesture toward fairness. As the bill had emerged from the House Judiciary Committee, it provided that any state or locality seeking to obtain exemption from its coverage would have to get the approval of the United States District Court in Washington. Sixth District Republican Rep. M. Caldwell Butler, one of the principal leaders of the valiant but vain fight against the act, offered an eminently sensible amendment that would have permitted states and localities to sue for relief in a local federal district court. The necessity to go to Washington, he argued, would be so costly and cumbersome that many communities would be discouraged from even attempting to qualify for exemption. But the House overwhelmingly rejected his proposal.

Not in many years has Virginia followed the kinds of restrictive voting practices that originally inspired the Voting Rights Act. Not in many years has Virginia attempted to abridge the right of its black citizens to vote. Yet if the House bill prevails, Virginia, and most of the South, will continue to be treated as wards of the federal government and denied political rights that the rest of the nation freely exercises. And Mr. Wolf will be partly to blame.

Fortunately, the House bill faces considerable opposition in the Senate. And Virginia's two representatives in that body — Senators Harry F. Byrd Jr. and John Warner — can be counted on to support, enthusiastically and aggressively, efforts to transform the Voting Rights Act from a selectively punitive measure into a fair and reasonable law.

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

RANKING MEMBER--COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD

CO-CHAIR--TOM LANTOS
HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

July 31, 2009

241 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-4610
(202) 225-5136

13873 PARK CENTER ROAD
SUITE 130
HERNDON, VA 20171
(703) 709-5800
(800) 945-9653 (IN STATE)

110 NORTH CAMERON STREET
WINCHESTER, VA 22601
(540) 667-0990
(800) 850-3463 (IN STATE)

wolf.house.gov

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave NW Rm 5111
Washington DC 20530

Dear Attorney General Holder:

In light of the troubling reports of political influence in the enclosed article from yesterday's *Washington Times*, as well as the many unanswered questions to members of Congress, I implore you to re-file the voter intimidation case against the New Black Panther Party and other defendants so that impartial judges -- not political benefactors -- may rule on the merits of this case. Given your declaration on July 22 that the department's Civil Rights Division is "back and open for business," I would urge you to demonstrate your commitment to enforcing the law above political interests by re-filing.

My commitment to voting rights is unquestioned. In 1981, I was the only member -- Republican or Democrat -- of the Virginia delegation in the House to vote for the Voting Rights Act and was harshly criticized by the editorial page of the *Richmond Times Dispatch*, and when I supported the act's reauthorization in 2006, I was again criticized by editorial pages.

Given my consistent support for voting rights throughout my public service, I hope you can understand why I am particularly troubled by the dismissal of this case. The video evidence of the defendants' behavior on Election Day, as well as a January National Geographic Channel documentary, "Inside: The New Black Panther Party," should leave no question of the defendants' desire to intimidate or incite violence.

The ramifications of the dismissal of this case were serious and immediate. Defendant Jerry Jackson received a new poll watcher certificate, a copy of which I have enclosed, on May 19, 2009, immediately after the case was dismissed. Mr. Jackson faced no consequences for his blatant intimidation and promptly involved himself in the next election. Is that justice served?

As you will read in the enclosed memorandum of opinion from the Congressional Research Service's American Law Division, there is no legal impediment that would prevent you from re-filing this case. Unlike a criminal case, a civil case seeking an injunction against the other defendants could be brought again at any time. According to the memo provided to me, "It appears likely that the Double Jeopardy Clause would not bar a subsequent civil action against the [New Black Panther] Party or most of its members," and "second, because the United States voluntarily dismissed its suit against the Party and two of the three individual members before those defendents had filed an answer or motion to dismiss the suit, the previous action had not moved sufficiently beyond preliminary steps so as to implicate the Double Jeopardy Clause."

THIS STATIONERY PRINTED ON PAPER MADE OF RECYCLED FIBERS

I was surprised to learn from *The Washington Times* report of the existence of the enclosed correspondence from the chief of the department's Appellate Division recommending that the department proceed with the case and the default judgment. These opinions were never disclosed to me or other members of Congress by the department in its previous responses to questions regarding the dismissal of the case. According to the report:

> "Appellate Chief Diana K. Flynn said in a May 13 memo obtained by The Times that the appropriate action was to pursue the default judgment unless the department had evidence the court ruling was based on unethical conduct by the government.
>
> "She said the complaint was aimed at preventing the 'paramilitary style intimidation of voters at polling places elsewhere' and Justice could make a 'reasonable argument in favor of default relief against all defendants and probably should.' She noted that the complaint's purpose was to 'prevent the paramilitary style intimidation of voters while leaving open 'ample opportunity for political expression.'
>
> "An accompanying memo by Appellate Section lawyer Marie K. McElderry said the charges not only included bringing the weapon to the polling place, but creating an intimidating atmosphere by the uniforms, the military-type stance and the threatening language used. She said the complaint appeared to be 'sufficient to support the injunctions' sought by the career lawyers.
>
> "The government's predominant interest is preventing intimidation, threats and coercion against voters or persons urging or aiding persons to vote or attempt to vote, she said."

Given that both the department's trial team and the Appellate Division argued strongly in favor of proceeding with the case, I can only conclude that the decision to overrule the career attorneys Associate Attorney General Thomas Perrelli, or other administration officials, was politically motivated. This report further confirms my suspicions that the Department of Justice under your watch is becoming increasingly political.

It is imperative that we protect all Americans right to vote. This is a sacrosanct and inalienable right of any democracy. The career attorneys and Appellate Division within the department sought to demonstrate the federal government's commitment to protecting this right by vigorously prosecuting any individual or group that seeks to undermine this right. The only legitimate course of action is to allow the trial team to bring the case again and allow the our nation's justice system to work as it was intended -- impartially and without bias.

Sincerely,

Frank R. Wolf
Member of Congress

Commonwealth of Pennsylvania

COUNTY OF PHILADELPHIA

WATCHER'S CERTIFICATE

THIS CERTIFICATE AUTHORIZES THE INDIVIDUAL TO WATCH IN ANY WARD / DIVISION IN PHILADELPHIA

THIS WILL CERTIFY That Mary Jackson residing at 813 N. Park Ave, has been regularly appointed as a **WATCHER** in the 17 Ward for the 04 Election Division of Philadelphia, representing, Joyce Gilmore Candidate for Judge of Common Pleas Court on the **DEMOCRATIC BALLOT** to serve at a Primary Election to be held May 19, 2009.

Witness our hand and official seal

Note - Each candidate is entitled to two Watchers per Division in his or her District, but no candidate or party shall be represented by more than one Watcher in the same voting room at any time.

COUNTY BOARD OF ELECTIONS

Margaret M. Tartaglione
MARGARET M. TARTAGLIONE, Chairman

ANTHONY CLARK, Commissioner

JOSEPH J. DUDA, Commissioner

16-68 (Rev. 1/09) - DEMOCRATIC

Congressional Research Service

MEMORANDUM July 30, 2009

To: Hon. Frank Wolf
Attention: Thomas Culligan

From: Anna Henning, Legislative Attorney, 7-4067

Subject: **Application of the U.S. Constitution's Double Jeopardy Clause to Civil Suits**

This memorandum responds to your request for an analysis of the application of the Double Jeopardy Clause to successive civil suits in federal courts. In particular, it examines the clause's potential application in the context of a civil suit brought against the New Black Panther Party for Self-Defense or its members, against whom the United States had previously brought an action for injunctive relief. In sum, it appears likely that the Double Jeopardy Clause would not bar a subsequent civil action against the Party or most of its members.

Double Jeopardy Clause: Application to Civil Penalties

The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb."[1] It has been interpreted as prohibiting only successive punishments or prosecutions that are criminal in nature.[2] However, some penalties designated as "civil" by statute have been found to be sufficiently "criminal" to implicate double jeopardy concerns. In other words, whether a particular punishment is criminal or civil may require an interpretation of congressional intent and the extent to which the penalty can be characterized as penal in nature.[3]

Factors that courts consider when determining whether a penalty is criminal in nature include: (1) "whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment – retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the

[1] U.S. Const. amend. V. Although federal proceedings are the focus of this analysis, the Supreme Court has held that the Double Jeopardy Clause also applies to the states. See Benton v. Maryland, 395 U.S. 784 (1969).

[2] *See* Breed v. Jones, 421 U.S. 519, 528 (1975) ("In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution").

[3] Hudson v. United States, 522 U.S. 93, 99 (1997) ("Even in those cases where the legislature 'has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect,' ... as to 'transform what was clearly intended as a civil remedy into a criminal penalty.'") (quoting United States v. Ward, 448 U.S. 242, 248 (1980); Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).

alternative purpose assigned."[4] However, Congress' designation of a penalty as "civil" creates a presumption which must be overcome by clear evidence to the contrary.[5] Thus, civil penalties are not typically found to be criminal in nature. For example, in *Hudson v. United States*, the U.S. Supreme Court held that monetary assessments and an occupational debarment order did not implicate the Double Jeopardy Clause, because neither type of penalty constituted a "criminal punishment."[6]

Regardless of the nature of the penalty sought, the Double Jeopardy Clause does not bar a subsequent action if no more than preliminary proceedings commenced in the prior action.[7] Typically, an action must have reached at least the stage where jury members have been sworn (in a jury trial) or where the first evidence has been presented to the judge (in a bench trial).

Application to a Subsequent Suit Against the New Black Panther Party for Self-Defense or its Members

In January 2009, the U.S. Department of Justice filed a civil suit in a U.S. district court against the New Black Panther Party for Self-Defense and three of its members.[8] The suit was brought by the Department's Civil Rights Division pursuant to the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et. seq.*, which prohibits intimidation of "any person for voting or attempting to vote" and authorizes the Attorney General to bring civil actions to obtain declaratory judgment or injunctive relief to prohibit such actions.[9] The Department alleged that members of the Party had intimidated voters and those aiding them during the November 2008 general election and sought an injunction banning the Party from deploying or displaying weapons near entrances to polling places in future elections.[10] However, after the Department obtained an injunction barring one member's future use of weapons near polling places, it voluntarily dismissed its suit against the Party and the other members.[11]

For two reasons, it appears likely that the Double Jeopardy Clause would not prohibit the Justice Department from bringing a similar suit on the same or similar grounds against at least the Party and the individual members for whom the previous suit was dismissed. First, it is likely that a court would find that the injunctive relief sought in the previous action constitutes a civil, rather than criminal, punishment.

---

[4] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

[5] *Hudson*, 522 U.S. at 100 ("'[o]nly the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.") (quoting *Ward*, 448 U.S. at 249).

[6] 522 U.S. 93 (1997).

[7] *See, e.g.*, Ludwig v. Massachusetts, 427 U.S. 618 (1976) (holding that the Double Jeopardy Clause did not bar a conviction imposed as part of a two-tiered system wherein a defendant's speedy trial motion had been denied and he had been convicted and then he was convicted in a second trial after appeal).

[8] United States v. New Black Panther Party, No. 2:09-cv-0065 (E.D.Penn. filed Jan. 7, 2009).

[9] 42 U.S.C. § 1973i(b) ("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"); 42 U.S.C. § 1973gg-9(a) ("The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as is necessary to carry out this subchapter").

[10] Department of Justice, Press Release, *Justice Department Seeks Injunction Against New Black Panther Party*, Jan. 7, 2009, http://www.usdoj.gov/opa/pr/2009/January/09-crt-014.html.

[11] The United States dismissed the suits pursuant to Federal Rule of Civil Procedure 41(a)(1)(A), which authorizes a plaintiff to voluntarily dismiss a suit without a court order if a defendant has not yet served either an answer to the plaintiff's complaint or a motion for summary judgment. The New Black Panther Party and two of the three individual members who had been sued had not yet filed an answer or a motion for summary judgment in the case.

Although Congress' designation of the injunctive relief actions as a civil penalty is not ultimately dispositive, it is unlikely, based on the seven factors noted previously, that injunctive relief sought by the Justice Department would be viewed as sufficiently criminal in nature so as to overcome the presumption in favor of accepting Congress' characterization. Most importantly, the injunctions seem to have been primarily designed to prohibit the use of guns at polling places for the purpose of implementing the purposes of the Voting Rights Act, rather than to impose punishment on the defendants.

Second, because the United States voluntarily dismissed its suits against the Party and two of the three individual members before those defendants had filed an answer or motion to dismiss the suit, the previous action had not moved sufficiently beyond preliminary steps so as to implicate the Double Jeopardy Clause. With respect to the one member against whom an injunction was obtained, this second factor would not apply. However, due to the likely characterization of the injunction as a civil penalty, it remains unlikely that a subsequent action would be barred.

From: Flynn, Diana K (CRT)
Sent: Wednesday, May 13, 2009 11:54 AM
To: Rosenbaum, Steven (CRT)
Cc: Coates, Christopher (CRT); McElderry, Marie K (CRT)
Subject: New Black Panther Party FW: Comments on the proposed default judgment filings in NBPP

We have been asked to provide comments on the Voting Section's proposed motion and papers in support of default judgment and relief. Marie McElderry and I have reviewed the papers and discussed. Her comments, which also reflect my views, are below. I add the following observations:

1. 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.

2. The fact that *Chamberlain's* minimal standard for entry of a default judgment may be satisfied does not entitle us to one. See Marie's discussion of the case law below. The district court will retain considerable discretion to withhold relief on default and schedule a hearing. Given that we are seeking relief against political organizations and members in areas central to First Amendment activity, it is likely that the court will not order relief absent such further proceedings. That said, the procedural posture leaves few good alternatives to filing in support of such relief now.

3. By far, the most difficult case to make at this stage is against the national party and Malik Shabazz. There is discussion in the internal papers of the history of the organization with respect to voter intimidation with the use of weapons and uniforms. If the Voting Section opts for seeking relief against the national defendants at this stage, we suggest including that history in our supporting Memorandum. Our case against the nationals may be a bit of a reach, particularly at this stage, particularly because of First Amendment concerns. But we already brought the case and made the allegations. See *COMPLAINT*, par. 12. I assume that this reflects the Division's policy judgment that it is appropriate to seek such relief after trial. We probably should not back away from those allegations just because defendants have not appeared. And Voting does seem to have evidence in support of the allegations.

4. We would NOT say that First Amendment defenses are irrelevant at this stage. (Contra, *MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT at 4).* The court should anticipate likely defenses and so should we. See Marie's detailed discussion

below. We think a discussion of the narrowness of the proposed relief, which is generally discussed throughout the memorandum, can be used explicitly at this point to explain why First Amendment defenses are unlikely to prevail. In other words we can argue up front that the proposed order is carefully crafted to avoid any First Amendment concerns. Emphasis can be placed on the fact that our proposal is designed to prevent the paramilitary style intimidation of voters, and otherwise leaves open ample opportunity for political expression.

The First Amendment concerns Steve expressed earlier are well-taken, and I think proceeding against the nationals is a very close call. But it appears to us that there is a basis for the relief we seek, and the unusual posture of the case probably requires that we say the relief is appropriate on default. In any event, we should expect to be required to try these issues.

Marie may make some additional suggestions to the wording of the papers, if permitted.

From: McElderry, Marie K (CRT)
Sent: Tuesday, May 12, 2009 5:15 PM
To: Flynn, Diana K (CRT)
Subject: Comments on the proposed default judgment filings in NBPP

Comments on proposed filings re default judgment in *United States* v. *New Black Panther Party For Self-Defense*, No. 2:09-cv-0065 SD (E.D. Pa.)

We have been asked to comment on whether the United States should seek injunctive relief against all defendants, and, if so, what relief we should request. As I understand the situation, the documents Voting proposes to file are the Motion for Default Judgment (dated April 30), the Memorandum of Law in Support of Motion for Default Judgment (dated April 30), and the proposed Order (dated May 6). Further support for these filings is contained in the May 6 internal Remedial Memorandum Concerning Proposed Injunction Order.

Standard for obtaining default judgment. An overarching principle that we need to keep in mind is that the Third Circuit "does not favor entry of defaults or default judgments." *U.S.* v. *$55,518.05 In U.S. Currency*, 728 F.2d 192, 194 (3d Cir. 1984). Rather, it is its "preference that cases be disposed of on the merits whenever practicable." *Hritz* v. *Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984).

Our proposed Memorandum of Law relies on the three-part test in *Chamberlain* v. *Giampapa*, 210 F.3d 154, 164 (3d Cir. 2000), as governing a district court's determination whether a default judgment is proper. As the Third Circuit more recently acknowledged in an unreported decision, however, *Chamberlain* cites *U.S.* v. *$55,518.05, supra*, as the source of that standard, and *$55,518.05* is a case where a defendant sought to overturn a default judgment. *Hill* v. *Williamsport Police Dept.*, 69 Fed. Appx. 49, 51 (3d Cir. 2003). In *Hill*, the court noted that "both major treatises on federal practice and procedure, as well as the Ninth Circuit, set out additional factors to those listed in *Chamberlain* as appropriate for consideration when ruling on motions to grant default judgments." 69 Fed. Appx. at 51 n.3.[1] Among those factors are "whether material issues of fact or issues of substantial public importance are at issue," "how harsh an effect a default judgment might have," and "the strong policy of the Federal Rules of Civil Procedure." *Ibid.*

Nonetheless, the court in *Hill* determined that it is bound to follow *Chamberlain* in determining whether a district court has abused its discretion in deciding whether to issue a default judgment in the first place. The problem with importation of the three-part test to that context is that step two of the test requires the court to determine "whether the defendant appears to have a litigable defense," and that determination is complicated where, as here, the defendant has totally failed to file a response to the complaint (as opposed to having filed late). Our proposed Memorandum of Law, pg. 4, alludes to that complication by quoting the unreported decision in *Nationwide Mutual Insurance Company* v. *Starlight Ballroom Dance Club, Inc.*, 175 F. Appx. 519, 522 (3d Cir. 2006) ("The second factor is the 'threshold issue in *opening* a default judgment.'"). We then take the position that the presence or absence of a meritorious defense "has no relevance at this stage of the proceedings." Memo. at 4. That is not actually the case, however, since the Court will be following *Chamberlain*.

In any event, I think that we can get over that hurdle by anticipating, as we do in our May 6 internal Remedial Memorandum, possible defenses that might be raised, *i.e.*, First Amendment claims and the post-litigation

denunciation of the conduct of the Philadelphia chapter by the Party (and possibly by Malik Zulu Shabazz). I believe that the district court will anticipate such possible defenses and will want to know how we would address them. Indeed, by the time we file this motion and/or the court sets a hearing, the defendants may file something raising those or other defenses. Given that the court is bound to follow the three-part test, I think that we need to address in the Memorandum in support of the Motion at least those defenses that we have already identified.

I am also not sure that we have made a sufficient showing that we would be prejudiced by denial of a default judgment. When we filed the Complaint, we assumed that we would be engaging in the usual course of litigation, including discovery and filing of legal briefs. The opportunity to receive a judgment without pursuing all of those steps would be a benefit to us, but I am not sure that the court will be persuaded that we would be prejudiced by having to try the case on the merits, which is the preferred method of proceeding under Third Circuit case law. Especially in a case such as this, which is not cut and dried, I think the court will feel that its judgment would be informed by a more deliberate process.

Whether the unchallenged facts constitute a legitimate cause of action against the Party and its national leader. I have some reservations about whether we have a sufficient factual basis to state a claim against the Party and Malik Zulu Shabazz. Paragraph 12 of the Complaint alleges that they "managed, directed, and endorsed the behavior, actions and statements of Defendants Samir Shabazz and Jackson." The May 6 internal memorandum refers to an announcement made in advance of the November 4 election of a "plan to post party members at polling places." But nowhere do I see that we can show that either the Party or Malik Zulu Shabazz suggested, counseled, or endorsed the bringing or brandishing of weapons in advance of what happened in Philadelphia. Assuming that the main behavior we seek to enjoin is bringing weapons to the polls, I am not convinced that we can establish a basis for an injunction against the Party or Malik Shabazz by showing that the Party has violent and racist views against non-blacks and Jews. The additional information discussed on page 8 of the May 6 internal memorandum about

the Party's past actions of bringing weapons to political rallies may, however, be the basis for an argument that both the Party and Malik Shabazz should reasonably have known that the Philadelphia defendants might believe they were authorized to carry weapons to the polls, but I am not sure that would be sufficient to justify the relief we are seeking.

As I read our justification for relief against the Party and Malik Shabazz, it is based largely on Malik Shabazz's statements *after* the events in Philadelphia in which he defended the actions of King Samir Shabazz and Jerry Jackson on national television as based on the alleged presence of members of the Aryan brotherhood or the American Nazi party at that particular polling place. In addition, the Voting Section is relying on admissions made by Malik Shabazz to members of the section. It is unclear how we would present that evidence to the court. That "endorsement," however, is complicated by the statements on the Party's website renouncing the events in Philadelphia and suspending the Philadelphia chapter. It appears that we may have difficulty proving when those statements were added. At least as to the Party, those statements could be an impediment to proving a violation at all, not just an impediment to injunctive relief.

What type of injunctive remedy should be sought. Certainly, we have established a sufficient basis for the very limited injunctive relief that is recited in the proposed order dated April 30 against defendants King Samir Shabazz and Jerry Jackson. But I understand that such a limited injunction will not accomplish very much.

As to those "Philadelphia" defendants, however, the proposed order dated May 6 goes somewhat further. It seeks to enjoin defendants "from deploying or appearing within 200 feet of any polling location on any election day in the United States with weapons." Presumably, both deploying and appearing are meant to be modified by "with weapons." It is not clear what we mean by deploying, especially since the Voting Section indicated in its May 1, 2009, email that, in light of discussions with the Front Office, it does "not seek to enjoin the wearing of the NBPP uniforms at the polls." According to most dictionary definitions, the term "deploy" is used mainly in the context of

troops. I think it suggests that the military-type uniforms used by the Party are an integral part of what we want to enjoin, regardless of our stated intent not to seek to enjoin the wearing of those uniforms.

It appears that, at least as to the Philadelphia defendants, the violation we have alleged encompasses not only bringing the weapon, but also the intimidating atmosphere created by the uniforms, the military-type stance, and the threatening language used. I have not had time to do a comprehensive analysis of the First Amendment implications of attempting to enjoin members of the New Black Panther Party (or any other hate group, such as the American Nazi Party or the Klan) from wearing their uniforms at the polls on election day. The Supreme Court has stated that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas* v. *Johnson*, 491 U.S. 397, 406 (1989) (flag-burning case). It may not, however, "proscribe particular conduct *because* it has expressive elements."

In this case, Party members' wearing of the uniform would likely be viewed as "expressive conduct." It would be relevant, then, to know whether the government has asserted an interest in regulating the wearing of the uniform that is unrelated to the suppression of expression. Here, the government's predominant interest, as expressed in 42 U.S.C. 1973i(b), is preventing intimidation, threats, and coercion (or attempts to do so) against voters or persons urging or aiding persons to vote or attempt to vote. Part of the intimidation in this case is wearing a military-style uniform, which suggests some kind of authority to take action. That aspect of the uniform could theoretically be separated from the particular message that this uniform is intended to convey, *e.g.*, racial hatred. Thus, appearing at the polls in such a uniform with a weapon is more intimidating than appearing in street clothes with a weapon. Interestingly, all three of the Declarations that we propose to present to the court focus on a combination of the uniform and the weapon. None of them mentions the third element of intimidation, *i.e.*, the verbal threats and racial taunts and slurs.

The April 30 Memorandum in support of our Motion addresses the

possible First Amendment claims of the Philadelphia defendants in the context of whether injunctive relief would harm them, *i.e.*, the third part of the traditional test for obtaining an injunction. Memo. at 13-14. As to those defendants, our arguments appear to be sufficient to support the narrow injunction that the Voting Section was seeking as of April 30. It is obviously a closer question whether it would also support either Paragraph V of the May 6 proposed order, either as presently worded using the word "deploy," or a proposed order that explicitly mentions the Party uniform in some way.

As discussed above, my problems with applying Paragraph V to the Party and Malik Shabazz involve whether we have enough evidence to show that they violated the statute. If a decision is made that the evidence is sufficient, I would suggest a separate paragraph in the order for injunctive relief against these defendants that is narrowly tailored to the scope of their violation. That violation is described at various points of the Complaint as "deployment of armed and uniformed personnel at the entrance to [a] polling location," which involves the organization and planning of such activities involving the members of the Party. This portion of the injunction should therefore be geared to enjoining those actions. We might also want to ask the court to order these defendants to undertake some type of procedures or training, such as mentioned on page 8 of the May 6 internal Remedial Memorandum, that would make abundantly clear that the national organization and its leaders do not endorse intimidation, threats or coercion of voters or those who are urging or aiding them to vote.

Marie K. McElderry
Appellate Section
Civil Rights Division

---

1 As the concurring judge in *Hill* pointed out, the Eighth Circuit does not use

the three-part test outside of the context where a party against whom default has been entered has moved to set aside the judgment. 69 Fed. Appx. at 53.

The Washington Times

Close Print

Originally published 04:45 a.m., July 31, 2009, updated 10:57 a.m., July 31, 2009

Lawmakers want answers, seek refiling in Panther case

Jerry Seper (Contact)

Congressional Republicans on Thursday escalated their criticism of the Justice Department for dismissing a controversial voter-intimidation case, demanding that civil charges against the New Black Panther Party be restored. They also renewed their request to interview career attorneys who disagreed with the administration's decision to dismiss the charges.

Rep. Frank R. Wolf of Virginia, a senior Republican on the House Appropriations Committee, obtained an opinion Thursday from the Congressional Research Service (CRS) affirming that charges could legally be refiled without violating the double-jeopardy clause of the U.S. Constitution and said he thought Attorney General Eric H. Holder Jr. was obligated to refile the case.

"In all fairness, he has a duty to protect those seeking to vote and I remain deeply troubled by this questionable dismissal of an important voter-intimidation case in Philadelphia," Mr. Wolf told The Washington Times.

The Times on Thursday reported that Associate Attorney General Thomas J. Perrelli, the department's No. 3 political appointee, approved the decision to drop the case against the NBPP and its members even after the government had won judgments against them for their actions in November at a Philadelphia polling location.

Justice spokeswoman Tracy Schmaler said the department has an "ongoing obligation" to be

sure that claims it makes are supported by the facts and the law and a review of the NBPP complaint by "the top career attorneys in the Civil Rights Division" found that they did not.

She said Justice did obtain an injunction against the defendant who brandished a weapon at the polling place from doing so again and "will fully enforce the terms of that injunction."

Rep. Lamar Smith of Texas, ranking Republican on the House Judiciary Committee, also Thursday renewed his request that Mr. Holder make available the head of the department's Voting Section of the Civil Rights Division for a closed-door briefing on its decision to seek the complaint's dismissal.

Mr. Smith, unsuccessful since May in getting answers to questions on whether political appointees were involved in the complaint's dismissal, wants to know why the department has refused to respond to congressional inquiries requesting specific information on the investigation.

"Time and again, I have sought information from the Justice Department regarding the sudden dismissal of a case against members of the New Black Panther Party," Mr. Smith said. "Time and again, the Justice Department has claimed there was no wrongful political interference in the dismissal of the case.

"Now, according to news reports, it appears the Justice Department's political appointees did in fact play a role in the dismissal of this case," he said.

In January, Justice filed a civil complaint in federal court in Philadelphia against the NBPP and three of its members. Two NBPP members, wearing black berets, black combat boots, black dress shirts and black jackets with military-style markings, were charged with intimidating voters, including brandishing a nightstick and issuing racial threats and racial insults. A third was accused of managing, directing and endorsing their behavior. The incident was captured on videotape.

A Justice memo shows that the front-line lawyers who brought the case decided as early as Dec. 22 to seek a complaint against the NBPP; its chairman, Malik Zulu Shabazz, a lawyer and D.C. resident; Minister King Samir Shabazz, a resident of Philadelphia and head of the Philadelphia NBPP chapter who was accused of wielding the nightstick; and Jerry Jackson, a resident of Philadelphia and a NBPP member.

Witnesses said Mr. Samir Shabazz, armed with the nightstick, and Mr. Jackson used racial slurs and made threats as they stood at the door of the polling place. The department's injunction against Mr. Samir Shabazz prohibits him from displaying a weapon at a polling place until 2012.

Mr. Jackson was an elected member of Philadelphia's 14th Ward Democratic Committee and was credentialed to be at the polling place Nov. 4 as an official Democratic Party polling watcher, according to the Philadelphia city commissioner's office. A check of his MySpace Web page shows similar taunts. It also shows him in numerous poses with a variety of weapons.

Records show Mr. Jackson obtained new credentials as a poll watcher "at any ward/division in Philadelphia" just days after the charges against him were dismissed.

None of the NBPP members responded to the charges or made any appearance in court.

Four months after the complaint was filed, at a time career lawyers who brought the charges were in the final stages of seeking actual sanctions, they were told by their superiors to seek a delay after a meeting between political appointees and career supervisors, according to federal records and interviews.

The delay was ordered by Loretta King, who was acting assistant attorney general, after she discussed concerns about the case with Mr. Perrelli. Ms. King, a career senior executive service official, had been named by President Obama in January to temporarily fill the vacant political position of assistant attorney general for civil rights while a permanent choice could be made.

She and other career supervisors ultimately recommended dropping the case against two of the men and the party and seeking a restraining order against the one man who wielded the nightstick. Mr. Perrelli approved that plan, officials said.

None of the front-line lawyers has been made available for comment, and the department has yet to provide any records sought by The Times under a Freedom of Information Act request filed in May seeking documents detailing the decision process.

In an opinion sought by Mr. Wolf, the CRS said it "appears likely that the Double Jeopardy Clause would not prohibit the Justice Department from bringing a similar suit on the same or similar grounds against at least the Party and the individual members for whom the previous suit was dismissed."

Mr. Smith said if Mr. Perrelli knew about discussions to dismiss the complaint, the Justice Department's responses to Congress "make no mention of his involvement. Instead, he said, the department offered "vague justifications" for the dismissal, none of which included a legitimate explanation.

Ms. King and Steve Rosenbaum, chief of the department's special litigation section, were scheduled to brief Mr. Smith and committee Chairman John Conyers Jr., Michigan Democrat, on

Thursday, but conflicting schedules have forced that meeting into next month.

Ads by Google Seek Criminal Law Process Law Justice Panther Helmet Criminal Resource

The Washington Times

Close Print

Friday, July 31, 2009

EDITORIAL: Hack Panthers

The Justice Department's decision to drop an already-won voter-intimidation case against members of the New Black Panther Party merits multiple, independent investigations.

On Tuesday, Rep. Frank R. Wolf, Virginia Republican, officially asked Attorney General Eric H. Holder Jr. to refile the case. Mr. Holder should comply.

So far, the Justice Department has stonewalled legitimate inquiry. It has yet to provide records sought by this newspaper back in May. It has yet to answer a July 22 letter from Mr. Wolf that asks 35 questions on 17 different subjects relating to the Black Panther case. Justice has claimed, falsely, that the decision to drop the case was made by career attorneys only, not by political appointees. And it has declined to let congressmen interview the career attorneys who originally filed, and won, the case against the Black Panthers

As first reported by The Washington Times, career attorneys at Justice already had won a default judgment against three Black Panthers and the party as a whole for intimidating voters at a Philadelphia polling place while wearing paramilitary-style garb, as one of them brandished a nightstick and made racial threats.

One of the Black Panthers, Jerry Jackson, was an official poll watcher for the Democratic Party and the Obama campaign. Justice Department spokesman Tracy Schmaler refused several times to say whether department lawyers consulted with any outsiders. Yet Kristen Clarke of the NAACP Legal Defense Fund confirmed that she talked about the case with Justice Department lawyers.

Ms. Schmaler said she would not talk about "internal deliberations." But if they consulted with

outside groups, those deliberations by definition are not just internal.

Robert N. Driscoll, former chief of staff of the Civil Rights Division of the Justice Department, told us it would be ethically dubious if political appointees consulted with outside interest groups without telling the career attorneys who filed the case. "I would be hammered if I were to have had such a meeting," he said.

Mr. Wolf's July 22 letter raised numerous discrepancies between Justice Department explanations and readily available facts. In a July 13 letter to the congressman, Assistant Attorney General Ronald Welch wrote that the department dropped the cases against the New Black Panther Party as a whole and its leader, Malik Zulu Shabazz, because "the factual contentions in the complaint did not have sufficient evidentiary support" to prove that they "managed" and "directed" the intimidating behavior of the two Panthers deployed at that polling place.

Mr. Wolf responded that, "the confession on national television by Malik Zulu Shabazz on Nov. 7, 2008, flatly contradicts your assertion. Mr. Shabazz unequivocally claims that his activities in Philadelphia were part of a nationwide effort involving hundreds of party members, and that the use of weapons was a necessary part of the Black Panther deployment."

Mr. Welch claimed one reason the charges against Mr. Jackson were dropped was that "he was a resident of the apartment building where the polling place was located," and thus allowed to be there. Mr. Wolf wrote back that Mr. Jackson "has never resided" at that address, which is a senior living facility called Guild House. At a fit and trim age 53, Mr. Jackson hardly qualifies for a retirement home.

Mr. Jackson's MySpace page still lists one of his main "general interests" as "Killing Crakkkas." Four days after the Justice Department dropped the complaint against Mr. Jackson, he again was named an official election poll watcher for the Democratic primary in Philadelphia's municipal election. How convenient.

Ads by Google Gold Price News News States Panthers Helmet Panthers NHL Tickets Pictures of Panthers

The Washington Times

Originally published 04:45 a.m., July 30, 2009, updated 07:49 p.m., July 30, 2009

EXCLUSIVE: No. 3 at Justice OK'd Panther reversal

Jerry Seper (Contact)

EXCLUSIVE:

Associate Attorney General Thomas J. Perrelli, the No. 3 official in the Obama Justice Department, was consulted and ultimately approved a decision in May to reverse course and drop a civil complaint accusing three members of the New Black Panther Party of intimidating voters in Philadelphia during November's election, according to interviews.

The department's career lawyers in the Voting Section of the Civil Rights Division who pursued the complaint for five months had recommended that Justice seek sanctions against the party and three of its members after the government had already won a default judgment in federal court against the men.

Front-line lawyers were in the final stages of completing that work when they were unexpectedly told by their superiors in late April to seek a delay after a meeting between political appointees and career supervisors, according to federal records and interviews.

The delay was ordered by then-acting Assistant Attorney General Loretta King after she discussed with Mr. Perrelli concerns about the case during one of their regular review meetings, according to the interviews.

Ms. King, a career senior executive service official, had been named by President Obama in

January to temporarily fill the vacant political position of assistant attorney general for civil rights while a permanent choice could be made.

She and other career supervisors ultimately recommended dropping the case against two of the men and the party and seeking a restraining order against the one man who wielded a nightstick at the Philadelphia polling place. Mr. Perrelli approved that plan, officials said.

TWT RELATED STORIES:

- **Senior Republican wants answers on Panther Party case**
- **Career lawyers overruled on voter intimidation case**
- **Justice Dept. shifts from Bush era on voting, deportation**
- **Republicans hit Justice Dept. pursuit of potential torture probe**
- **EDITORIAL: Return of the Black Panther**
- **EDITORIAL: Flack Panthers**

Questions about how high inside the department the decision to drop the case went have persisted in Congress and in the media for weeks.

Justice Department spokeswoman Tracy Schmaler told The Washington Times that the department has an "ongoing obligation" to be sure the claims it makes are supported by the facts and the law. She said that after a "thorough review" of the complaint, top career attorneys in the Civil Rights Division determined the "facts and the law did not support pursuing the claims against three of the defendants."

"As a result, the department dismissed those claims," she said. "We are committed to vigorous enforcement of the laws protecting anyone exercising his or her right to vote."

While the Obama administration has vowed a new era of openness, department officials have refused to answer questions from Republican members of Congress on why the case was dismissed, claiming the information was "privileged," according to congressional correspondence with the department.

Rep. Frank R. Wolf, Virginia Republican and a senior member of the House Appropriations Committee who has raised questions about the case, said he also was prevented from interviewing the front-line lawyers who brought the charges.

"Why am I being prevented from meeting with the trial team on this case?" Mr. Wolf asked. "There are many questions that need to be answered. This whole thing just stinks to high heaven."

Ms. Schmaler said the department has tried to cooperate with Congress. "The Department

responded to an earlier letter from Congressman Wolf in an effort to address his questions. Following that letter, the Department agreed to a meeting with Congressman Wolf and career attorneys, in which they made a good-faith effort to respond to his inquiries about this case. We will continue to try to clear up any confusion Congressman Wolf has about this case."

Ms. King and a deputy are expected to travel to Capitol Hill on Thursday to meet behind closed doors with House Judiciary Committee Chairman John Conyers Jr., Michigan Democrat, and Rep. Lamar Smith of Texas, the top Republican on the panel, to discuss continuing concerns about the case.

The department also has yet to provide any records sought by The Times under a Freedom of Information Act request filed in May seeking documents detailing the decision process. Department officials also declined to answer whether any outside groups had raised concerns about the case or pressured the department to drop it.

Kristen Clarke, director of political participation at the NAACP Legal Defense Fund in Washington, however, 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."

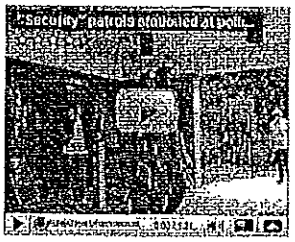
She said the National Association for the Advancement of Colored People has consistently argued that the department should bring more voter intimidation cases, adding that it was "disconcerting" that it did not do so.

Mr. Perrelli, a prominent private practice attorney, served previously as a counsel to Attorney General Janet Reno in the Clinton administration and was an Obama supporter who raised more than $500,000 for the Democrat candidate in the 2008 elections. He authorized a delay to give department officials more time to decide what to do, said officials familiar with the case but not authorized to discuss it publicly. He eventually approved the decision to drop charges against three of the four defendants, they said.

At issue was what, if any, punishment to seek against the New Black Panther Party for Self-Defense (NBPP) and three of its members accused in a Jan. 7 civil complaint filed in U.S. District Court in Philadelphia.

Two NBPP members, wearing black berets, black combat boots, black dress shirts and black jackets with military-style markings, were charged in a civil complaint with intimidating voters at a Philadelphia polling place, including brandishing a 2-foot-long nightstick and issuing racial threats and racial insults. Authorities said a third NBPP member "managed, directed and endorsed the behavior."

The election-day incident gained national attention when it was captured by a voter-fraud citizen activist group on videotape and distributed on YouTube (below).



None of the NBPP members responded to the charges or made any appearance in court.

"Intimidation outside of a polling place is contrary to the democratic process," said Grace Chung Becker, a Bush administration political appointee who was the acting assistant attorney general for civil rights at the time the case was filed. "The Voting Rights Act of 1965 was passed to protect the fundamental right to vote and the department takes allegations of voter intimidation seriously."

Mrs. Becker, now on a leave of absence from government work, said she personally reviewed the NBPP complaint and approved its filing in federal court. She said the complaint had been the subject of numerous reviews and discussions with the career lawyers.

Mrs. Becker said Ms. King was overseeing other cases at the time and was not involved in the decision to file the original complaint.

A Justice Department memo shows that career lawyers in the case decided as early as Dec. 22 to seek a complaint against the NBPP; its chairman, Malik Zulu Shabazz, a lawyer and D.C. resident; Minister King Samir Shabazz, a resident of Philadelphia and head of the Philadelphia NBPP chapter who was accused of wielding the nightstick; and Jerry Jackson, a resident of Philadelphia and a NBPP member.

"We believe the deployment of uniformed members of a well-known group with an extremely hostile racial agenda, combined with the brandishing of a weapon at the entrance to a polling place, constitutes a violation of Section 11(b) of the Voting Rights Act which prohibits types of intimidation, threats and coercion," the memo said.

The memo, sent to Mrs. Becker, was signed by Christopher Coates, chief of the Voting Section; Robert Popper, deputy chief of the section; J. Christian Adams, trial attorney and lead lawyer in the case; and Spencer R. Fisher, law clerk. None of the four has made themselves available for comment.

Members of Congress continue to ask questions about the case.

"If showing a weapon, making threatening statements and wearing paramilitary uniforms in front of polling station doors does not constitute voter intimidation, at what threshold of activity would these laws be enforceable?" Mr. Wolf asked.

Mr. Smith also complained that a July 13 response by Assistant Attorney General Ronald Weich to concerns the congressman had about the Philadelphia incident did not alleviate his concerns.

"The administration still has failed to explain why it did not pursue an obvious case of voter intimidation. Refusal to address these concerns only confirms politicization of the issue and does not reflect well on the Justice Department," Mr. Smith said.

Mr. Smith asked the department's Office on Inspector General to investigate the matter, and the request was referred to the department's Office of Professional Responsibility.

Lawmakers aren't alone in the concerns.

The U.S. Commission on Civil Rights said in a June 16 letter to Justice that the decision to drop the case caused it "great confusion," since the NBPP members were "caught on video blocking access to the polls, and physically threatening and verbally harassing voters during the Nov. 4, 2008, general election."

"Though it had basically won the case, the [Civil Rights Division] took the unusual move of voluntarily dismissing the charges , " the letter said. "The division's public rationale would send the wrong message entirely — that attempts at voter suppression will be tolerated and will not be vigorously prosecuted so long as the groups or individuals who engage in them fail to respond to the charges leveled against them."

The dispute over the case and the reversal of career line attorneys highlights sensitivities that have remained inside the department since Bush administration political appointees ignored or reversed their career counterparts on some issues and some U.S. attorneys were fired for what Congress concluded were political reasons.

Mr. Weich, in his letter to the congressman, sought to dispel any notion that politics was

involved. He argued that the department dropped charges against three of the four defendants "because the facts and the law did not support pursuing" them. He said the decision was made after a "careful and through review of the matter " by Ms. King. He said:

• While the NBPP made statements and posted notice that more than 300 of its members would be deployed at polling places throughout the United States during the Nov. 4 elections, the statement and posting did not say any of them would display a weapon or otherwise break the law.

• While the complaint charged that the NBPP and Mr. Zulu Shabazz endorsed the activities at the polling places, the evidence was "equivocal" since both later disavowed what happened in Philadelphia and suspended that city's chapter after the incident.

• The charges against Mr. Jackson were dropped because police who responded to the polling place ordered Mr. Samir Shabazz to leave but allowed Mr. Jackson to stay. He also noted that the department approved "appropriately tailored injunctive relief" against Mr. Samir Shabazz for his use of the nightstick.

The injunction prohibits Mr. Samir Shabazz from brandishing a weapon outside a polling place through Nov. 15, 2012, and Ms. Schmaler said the department "will fully enforce the terms of that injunction."

On its Web page, the NBPP said the Philadelphia chapter was suspended from operations and would not be recognized until further notice. It said the organization did not condone or promote the carrying of nightsticks or any kind of weapon at any polling place.

"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," it said.

TWT RELATED STORIES:

- **Senior Republican wants answers on Panther Party case**
- **Career lawyers overruled on voter intimidation case**
- **Justice Dept. shifts from Bush era on voting, deportation**
- **Republicans hit Justice Dept. pursuit of potential torture probe**
- **EDITORIAL: Return of the Black Panther**
- **EDITORIAL: Flack Panthers**

Witnesses who supported the Justice Department case said they were surprised by the reversal.

Stephen R. Morse, a blogger hired by Republicans to be at the polls and who videotaped the confrontation, said the NBPP members blatantly used racial insults on would-be voters and

other poll watchers, telling one man, "Cracker, you about to be ruled by a black man."

Mr. Morse, a University of Pennsylvania alumnus, said he was "outraged" that the complaint was dismissed, saying he hoped Democrats would join Mr. Smith and Mr. Wolf in attempting to ensure that the incident "doesn't become a partisan issue, but rather an issue of right vs. wrong."

Chris Hill, national director of operations for a Gathering of Eagles, an organization dedicated to the support of U.S. troops, said the NBPP members visibly intimidated voters with racial slurs as they tried to enter the building.

Mr. Hill, a U.S. Army veteran who also served as a Philadelphia poll watcher for Republicans, said several voters at the location said they were afraid. He said the NBPP members tried to deny him access to the poll although he was a certified poll watcher, telling him, "White power don't rule here."

A Justice Department memo also says that a black couple, Larry and Angela Counts, both Republican poll watchers, told authorities they were scared, worried about their safety and concerned about leaving the polling place at the end of the day because of the actions of the NBPP members. Mrs. Counts said she wondered whether someone might "bomb the place" and Mr. Counts said the NBPP members called him a "race traitor," the memo said.

U.S. District Judge Stewart Dalzell in Philadelphia entered default judgments against the NBPP members April 2 after ordering them to plead or otherwise defend themselves. They refused to appear in court or file motions in answer to the government's complaint. Two weeks later, the judge ordered the Justice Department to file its motions for default judgments by May 1 — a ruling that showed the government had won its case.

The men also have not returned calls from The Times seeking comment.

On May 1, Justice sought an extension of time and during the tumultuous two weeks that followed the career front-line lawyers tried to persuade their bosses to proceed with the case.

The matter was even referred to the Appellate Division for a second opinion, an unusual event for a case that hadn't even reached the appeals process.

Appellate Chief Diana K. Flynn said in a May 13 memo obtained by The Times that the appropriate action was to pursue the default judgment unless the department had evidence the court ruling was based on unethical conduct by the government.

She said the complaint was aimed at preventing the "paramilitary style intimidation of voters" at polling places elsewhere and Justice could make a "reasonable argument in favor of default relief

against all defendants and probably should." She noted that the complaint's purpose was to "prevent the paramilitary style intimidation of voters" while leaving open "ample opportunity for political expression."

An accompanying memo by Appellate Section lawyer Marie K. McElderry said the charges not only included bringing the weapon to the polling place, but creating an intimidating atmosphere by the uniforms, the military-type stance and the threatening language used. She said the complaint appeared to be "sufficient to support" the injunctions sought by the career lawyers.

"The government's predominant interest ... is preventing intimidation, threats and coercion against voters or persons urging or aiding persons to vote or attempt to vote," she said.

The front-line lawyers, however, lost the argument and were ordered to drop the case.

Bartle Bull, a civil rights activist who also was a poll watcher in Philadelphia, said after the complaint was dropped, he called Mr. Adams to find out why. He said he was told the decision "came as a surprise to all of us" and that the career lawyers working on the case feared that the failure to enforce the Voting Rights Act "would embolden other abuses in the future."

Ads by Google Black Panther Photo Free Tubal Reversal In Criminal Justice DOJ Canis Panther

U.S. Department of Justice
Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266
Washington, DC 20530

AUG 28 2009 SEP 9 2009

The Honorable Frank Wolf
Ranking Member
Commerce, Justice, Science Subcommittee
House Appropriations Committee
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Wolf:

Your July 9, 2009 letter to Department of Justice Inspector General Glenn Fine regarding the government's voluntary dismissals in *United States v. New Black Panther Party for Self-Defense, et al.*, Case No. 2:09-cv-0065 (E.D. Pa.), was referred to this Office for review. We also have seen and reviewed your June 8, 2009 letter to Attorney General Eric Holder regarding this matter. Please be advised that we have initiated an inquiry into the matter. We will contact you with the results of our inquiry once it is complete.

Thank you for bringing this matter to the attention of the Department. If you have any questions, please do not hesitate to call me or Assistant Counsel Mary Aubry on 202-514-3365.

Very truly yours,

Mary Patrice Brown
Acting Counsel

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 16, 2009

The Honorable Frank Wolf
Ranking Minority Member
Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Wolf:

This is in response to your letter of November 10, 2009, which inquired about the status of the Office of Professional Responsibility (OPR) inquiry regarding the government's voluntary dismissals in *United States v. New Black Panther Party for Self-Defense, et al.*, and your letter of November 16, 2009, which requested copies of certain materials you describe as having been prepared for OPR in connection with that inquiry. A separate letter has been sent to Representative Smith, who joined your November 10 letter to us.

Your letters have been referred to the Office of Professional Responsibility for reply. To ensure the independence of the OPR inquiry, we do not believe it would be appropriate for other Department officials to attempt to set arbitrary deadlines on OPR's work, or to provide copies of any materials that may have been prepared in connection with its inquiry. We are therefore unable to provide the information or documents you have requested, and we will continue to await the outcome of the OPR process before providing a further response to your requests for information regarding this matter.

Please be assured that the Department is committed to vigorous enforcement of the Voting Rights Act.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Alan B. Mollohan, Jr.
Chairman

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

RANKING MEMBER—COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD

CO-CHAIR—TOM LANTOS HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

November 16, 2009

241 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-4610
(202) 225-5136

13873 PARK CENTER ROAD
SUITE 130
HERNDON, VA 20171
(703) 709-5800
(800) 945-9653 (IN STATE)

110 NORTH CAMERON STREET
WINCHESTER, VA 22601
(540) 667-0990
(800) 850-3463 (IN STATE)

wolf.house.gov

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave NW Rm 5111
Washington DC 20530

Dear Attorney General Holder:

On November 9, House Judiciary Committee Ranking Member Lamar Smith and I wrote to you to request an update on the Department of Justice's (DOJ) Office of Professional Responsibility (OPR) investigation into the inexplicable dismissal of the serious voter intimidation case, *U.S. v. New Black Panther Party*. This investigation has now been open for more than two months.

In addition to our request for an update on the investigation by November 20, 2009, I also request copies of the reports prepared for OPR by the career DOJ attorneys responsible for this case -- Mr. Christopher Coates, Mr. Robert Popper, Mr. J. Christian Adams, and Mr. Spencer Fisher. The American people deserve a full accounting of the facts surrounding the incomprehensible dismissal of this case, including the statements provided by the trial attorneys to OPR.

Sincerely,

Frank R. Wolf
Member of Congress

THIS STATIONERY PRINTED ON PAPER MADE OF RECYCLED FIBERS

U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530

November 24, 2009

The Honorable Frank Wolf
Ranking Minority Member
Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Wolf:

I am writing in response to your November 10, 2009 letter, submitted jointly with Congressman Lamar Smith, as well as your separate November 16, 2009 letter, to Attorney General Eric H. Holder regarding the Office of Professional Responsibility's (OPR) investigation into the dismissal of certain charges relating to the New Black Panther Party and two individuals associated with the organization. Your letters were referred to OPR for a response.

OPR initiated an investigation into this matter in July 2009, and the investigation is being conducted consistent with OPR's Policies and Procedures (available at usdoj.gov/opr/polandproc.htm). As described in the Policies and Procedures, "the first step is usually to request a written response from the attorney involved in the allegation." In addition, "[s]upporting documentation and any other relevant material should be included with the response, and other individuals with relevant information should be identified." Attorneys also must provide to OPR "[c]ase files [and] investigative files." As with any investigation, OPR's review of these documents and responses could lead to additional requests for documents and information. After the gathering of evidence is completed, OPR prepares a written report to the Attorney General and the Deputy Attorney General.

I trust the above description of OPR's policies and procedures demonstrates that an appropriately complete investigation takes more time than has lapsed since the investigation was commenced in July 2009. Please be assured that OPR's investigation is proceeding apace. We will inform you of the results of our investigation as soon as we are able to do so.

Sincerely,

Mary Patrice Brown
Acting Counsel

.....

(Original Signature of Member)

111TH CONGRESS
1ST SESSION

H. RES. _____

Directing the Attorney General to transmit to the House of Representatives all information in the Attorney General's possession relating to the decision to dismiss *UnitedStates* v. *New Black Panther Party*.

IN THE HOUSE OF REPRESENTATIVES

Mr. WOLF submitted the following resolution; which was referred to the Committee on _____

RESOLUTION

Directing the Attorney General to transmit to the House of Representatives all information in the Attorney General's possession relating to the decision to dismiss *UnitedStates* v. *New Black Panther Party*.

Resolved, That the Attorney General is directed to transmit to the House of Representatives, not later than 14 days after the date of adoption of this resolution, copies of any document, memo, or correspondence of the Department of Justice with regard to *United States.* v. *New Black Panther Party*, or any portion of any such document, memo, or correspondence that refers or relates to—

(1) any department communications with regard to the case between November 5, 2008 and November 15, 2009;

(2) any communication with the defendants or the defendants' attorneys between November 5, 2008 and November 15, 2009;

(3) any communication with third-party organizations or individuals between November 5, 2008 and November 15, 2009; or

(4) any evidence with regard to the dismissal of the case.

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

RANKING MEMBER—COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD

CO-CHAIR—TOM LANTOS
HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

January 26, 2010

241 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-4610
(202) 225-5136

13873 PARK CENTER ROAD
SUITE 130
HERNDON, VA 20171
(703) 709-5800
(800) 945-9653 (IN STATE)

110 NORTH CAMERON STREET
WINCHESTER, VA 22601
(540) 667-0990
(800) 850-3463 (IN STATE)

wolf.house.gov

Mr. Glenn Fine
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington DC 20530

Dear Mr. Fine:

I have been disappointed by your reluctance to investigate the unfounded dismissal of an important voter intimidation case, *U.S. v. New Black Panther Party.* As you may recall, this case was inexplicably dismissed last year -- over the ardent objections of the career attorneys overseeing the case as well as the division's own appeal office. Despite repeated requests for information by members of Congress, the press, and the U.S. Commission on Civil Rights, the Department of Justice (DOJ) continues to stonewall all efforts to obtain information regarding the case's abrupt dismissal. This obstruction should be of great concern to you and merit an immediate investigation.

According to the Council of the Inspectors General on Integrity and Efficiency (CIGIE), the role of federal inspectors general is to "detect and prevent fraud, waste, abuse, and violations of law and to promote economy, efficiency and effectiveness in the operations of the Federal Government." I firmly believe that in this case, officials at the Department of Justice are engaged in activities that are an abuse of power, a blatant violation of voting rights enforcement, and potentially even defrauding of members of Congress and the U.S. Commission on Civil Rights by obstructing legitimate investigations of this matter.

In response to my letter to you last July, you referred the case to the department's Office of Professional Responsibility (OPR), which reports to the attorney general. Although OPR opened a preliminary investigation into the dismissal, more than seven months later I still have received no additional information. I do not believe that this office 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.

I have been a stalwart supporter of voting rights enforcement. Voting is a sacrosanct and inalienable right of any democracy. I was the only member of the Virginia congressional delegation -- Republican or Democrat -- to vote for the Voting Rights Act in 1982. I was heavily criticized by state newspapers, including the *Richmond Times-Dispatch*, for my vote. I was

THIS STATIONERY PRINTED ON PAPER MADE OF RECYCLED FIBERS

criticized again by editorials in my district when I supported the Voting Rights Act extension in 2006.

Given my longstanding support for voting rights, I have been deeply concerned with the department's mismanagement of this case and its continued obstructive tactics. These concerns rise far above the scope of the OPR preliminary investigation and are more appropriately handled by your office. Specifically, I would like you to consider the following concerns:

1. The attorney general has still not responded to the questions and concerns I shared in my six letters to him since last June 8. I have only received one response from DOJ, from Ron Weich last July, that was vague and, at least in one instance factually inaccurate. Members of Congress should be able to interact with the department and expect a response that attempts to answer questions.

2. The dismissal of this case was wholeheartedly opposed by the four career attorneys managing the case as well as the division's own appellate office, which is also staffed by career DOJ attorneys. In a memo penned by career Appellate Chief Diana K. Flynn, she wrote that DOJ could make a "reasonable argument in favor of default relief against all defendants and probably should." She further noted that the complaint's purpose was "to prevent the paramilitary style intimidation of voters while leaving open ample opportunity for political expression." I fear that only politicization from the department's leadership can explain why the department acted contradictory to the recommendations of its career trial attorneys and appellate office.

3. Ms. King and Mr. Rosenbaum, the two officials identified in recommending this case for dismissal, have a history of questionable judgment. Earlier this month, U.S. Magistrate Judge David Waxse -- former legal counsel for the ACLU in Kansas and western Missouri -- imposed sanctions on King and Rosenbaum for their refusal to provide information in a housing discrimination case. King was also reprimanded and sanctioned $587,000 in attorneys' fees imposed against the department in an earlier case, *Johnson* v. *Miller*.

4. I am deeply concerned about allegations that Associate Attorney General Perrelli consulted with the White House counsel's office in his decision to dismiss this case. *The Washington Times* has reported a series of meetings between Mr. Perrelli and the deputy White House counsel corresponding to key dates in the decision to dismiss this case. Last week, *The Washington Times* further reported that Perrelli visited the White House counsel's office, including visits with former deputy Cassandra Butts and former counsel Greg Craig, on dates corresponding with key actions in the decisions that led to the dismissal of this case. The pace of these visits immediately slowed following the final dismissal of the case. If true, this represents a dangerous breakdown of the "firewall" policy that former Attorney General Mukasey put in place in 2007 to prevent politicization on active cases.

5. The department has thwarted all attempts by the U.S. Commission on Civil Rights to investigate this matter. The commission has repeatedly sought this same information, in fulfillment of its statutory responsibility to ensure the enforcement of civil rights law. After being similarly rebuffed, the commission filed subpoenas with the department for this information as well as to interview the career attorneys that handled the case.

6. DOJ is flagrantly obstructing the U.S. Commission on Civil Rights' statutory authority to provide oversight of the enforcement of civil rights laws. The department has instructed its career attorneys not to comply with subpoenas issued by the commission. This is an inherent conflict of interest with DOJ's statutory responsibility to enforce the commission's investigations and subpoenas.

7. Your office should be deeply troubled by the broad scope of the seven privileges claimed by DOJ in refusing to answer interrogatory questions submitted by the commission. What precedent will these broad claims of dubious privilege have on future congressional oversight of DOJ? DOJ even went as far as to claim that seven pages of a letter that I sent to the attorney general were considered privileged documents.

   According to Michael Carvin, former deputy assistant attorney general for both the Civil Rights Division and the Office of Legal Counsel:

   > "They are relying on privileges that the Office of Legal Counsel says do not exist. There is no privilege, for instance, saying that the Justice Department will not identify personnel working on the case. ... Generally, a number of these privileges [are ones] I've literally never heard of. Normally there is no general attorney-client privilege unless you are dealing with the president. So a claim would have to come under the 'work product' or 'deliberative process' exemption. But 'work product' is very narrow, and the deliberative-process privilege is moot ... once the case closes. This is especially true when the [request for the information] does not involve litigants but instead an agency with statutory responsibilities concerning civil rights."

8. My staff has reviewed all of the documents provided by DOJ to the commission in response to their interrogatory request. The documents provided to the commission have little or no relevance with regard to the decision to dismiss this case. The "document dump" was merely a smokescreen designed to give the allusion of cooperation. In fact, the department failed to even provide all of the scant information that it agreed to share.

9. New Black Panther Party leader Malik Zulu Shabazz has been quoted issuing threatening comments toward Rep. Lamar Smith and me in a recent statement, saying, "These right-wing white, red-faced, red-neck Republicans are attacking the hell out of the New Black Panther Party, and we're organizing now to fight back... We gearing up for a showdown with this cracker... He keep talking – we going to Capitol Hill, we're just gearing up

right now, we'll go to Capitol Hill." When laws aren't enforced, lawless men like Mr. Shabazz feel more emboldened to spread their intimidation.

In light of these new developments surrounding the department's refusal to reply to of congressional inquiries, its undermining of an investigation by the U.S. Commission on Civil Rights, and questionable meetings between Mr. Perrelli and the White House corresponding with keys dates in the dismissal of this case, I believe that you have an imperative to investigate these potential improprieties. Given that neither the Congress nor the commission can obtain critical information from the department, your authority as inspector general is the only way to learn whether the department has engaged in improper conduct with regard to the dismissal of this case and its hostility to the commission's statutory authorities and responsibilities.

In light of information that surfaced since my initial letter to you, I ask that you revisit your decision and immediately open an investigation. I would appreciate a decision on this matter no later than Friday, January 29.

Please do not hesitate to contact me or my staff member, Thomas Culligan, at 202-225-5136 if I can provide additional information on this matter.

Best wishes.

Sincerely,

Frank R. Wolf
Member of Congress

enclosures

U.S. Department of Justice

Office of the Inspector General

February 2, 2010

The Honorable Frank R. Wolf
United States House of Representatives
Washington, DC 20515

Dear Congressman Wolf:

This is in response to your letter to me, dated January 26, 2010, in which you asked the Office of the Inspector General (OIG) to open an investigation of the Department of Justice's (Department or DOJ) handling of the New Black Panther Party case.

We have carefully reviewed your letter and appreciate the importance of the matters that you have raised. As you note, we received the first letter from you and nine other members of Congress in July 2009 requesting that the OIG investigate the Department's handling of the case and whether political considerations influenced the Department's decisions in the case. When we received that letter, we referred the matter to the Department's Office of Professional Responsibility (OPR).

We did so because, by statute, OPR has jurisdiction to investigate allegations of misconduct relating to Department attorneys' handling of litigation or legal decisions. Such matters are expressly excluded by statute from the OIG's jurisdiction. In the 2002 Department of Justice Reauthorization Act (Act), Congress codified into statute the Attorney General Orders which gave this jurisdiction to OPR.

According to the Act, the OIG has jurisdiction to investigate allegations of misconduct against all employees in any DOJ component with one exception: DOJ attorneys acting in their legal capacity (or investigators acting at an attorney's direction). Specifically, Section 308 of the DOJ Reauthorization Act, entitled "Authority of the Department of Justice Inspector General," states that the Inspector General

> shall refer to OPR allegations of misconduct involving attorneys, investigators, or law enforcement personnel, where the allegations relate

to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice. . . ."[1]

The issues that you raised regarding the New Black Panther Party case involved the exercise by Department attorneys of their authority to litigate and make legal decisions, and whether those decisions were based on improper considerations, such as political influence. That is why we referred the matter to OPR for investigation.[2]

In your letter dated January 26, 2010, you again ask us to open an investigation of the Department's handling of the New Black Panther Party matter. Your letter stated that you are disappointed in our "reluctance to investigate the unfounded dismissal of an important voter intimidation case," and you expressed concern about OPR handling the matter. You stated that you do not believe that 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." You also stated that in light of several recent issues, including your inability to obtain information from the Department about the case, the Department's actions in response to the U.S. Civil Rights Commission's requests for information, and allegations of contacts between Associate Attorney General Thomas Perrelli and the White House, the OIG should revisit our decision and immediately open an investigation.

I understand your desire to have the OIG investigate the Department's handling of the New Black Panther Party case because of our independence. I have advocated changing the OIG's jurisdiction to allow us to investigate all matters within the Department, including matters such as this one that involve Department attorneys' exercise of their legal duties. Unfortunately, unlike all other OIGs which have unlimited jurisdiction to investigate all allegations of waste, fraud, or abuse within their agencies, the Department of Justice OIG does not.

For several years I have expressed my position that Congress should change this jurisdiction and give the OIG the authority to investigate all matters within the Department. I have raised various arguments for this

---

[1] See Public Law 107-273, Section 308 (21st Century Department of Justice Appropriations Authorization Act), codified at 5 U.S.C. App. 3 § 8E(b)(3). See also 28 C.F.R. § 0.29c(b).

[2] Over the years, we have received letters from members of Congress, on both sides of the aisle, asking the OIG to handle various allegations related to the Department's handling of litigation or legal decisions. In accord with the Attorney General Orders and the statute, we have referred such matters to OPR for it to handle, often to the disappointment of the members who asked us to conduct the investigation.

change, including, as you note in your letter, the independence issues that arise because OPR reports to the Attorney General.[3]

When Congress most recently considered this issue in its deliberation on the IG Reform Act, which was enacted in 2008, I again advocated for a change in the jurisdiction between OPR and OIG, to allow us to investigate all matters within the Department. However, Congress did not include this change in the IG Reform Act.[4] Therefore, the jurisdiction to investigate Department attorneys' legal and litigation decisions, such as DOJ attorneys' litigation and legal actions related to the handling of the New Black Panther Party, remains with OPR.

However, in response to your recent letter, we asked OPR about the status of its ongoing investigation. It reported to us that it is in the midst of its investigation – which is a full investigation, not a preliminary investigation or inquiry. OPR reported that it has gathered documents and other relevant materials, has interviewed witnesses, and has numerous other witness interviews scheduled. OPR also told us that it intends to share the results of its investigation with Congress.

In addition, OPR informed us that it has included in its investigation the allegations relating to whether any improper political influence affected the Department's handling of the case. It has specifically included as part of its

---

[3] See, e.g., my statement before the Senate Homeland Security and Governmental Affairs Committee, July 11, 2007, available at http://www.justice.gov/oig/testimony (the current limitation on the DOJ OIG's jurisdiction should be changed because it assigns jurisdiction to OPR, which is not statutorily independent and reports directly to the Attorney General and the Deputy Attorney General; this creates a conflict of interest and contravenes the rationale for establishing independent Inspectors General); my testimony before the Senate Judiciary Committee, May 2, 2006 ("[U]nfortunately, in my view, the jurisdiction of the Inspector General in the Department of Justice is limited to some degree because there's a Department of Justice Office of Professional Responsibility that has jurisdiction to review the actions of attorneys in the exercise of their legal authority up to and including the Attorney General . . . It originally arose from an Attorney General order issued by Attorney General Reno and then Attorney General Ashcroft, and then it was codified in the DOJ Reauthorization Act by the Congress. So it would require a congressional action to change it at this point."); my testimony before the Senate Judiciary Committee, July 30, 2008 ("We don't have jurisdiction, unfortunately, over attorneys in the exercise of their legal duty. I have testified about that and I am hopeful, I hope that the Congress will do something about that because I believe that the Inspector General's Office ought to have unlimited jurisdiction in the Department of Justice. We're independent, we're transparent, and there's no conflict of interest. So I think that ought to be changed."); my testimony before House Judiciary Committee, October 3, 2008 (OIG does not have the authority to investigate prosecutive decisions made by DOJ attorneys; Congress would have to amend this carve-out to our jurisdiction, and I have suggested that it be amended).

[4] Although we believed this should be a bipartisan issue, the prior Administration opposed the change, and Congress did not include the change in the final bill.

investigation the issue you raised in your letter regarding any alleged contact between Associate Attorney General Perrelli and the White House, and whether any alleged contact improperly influenced the Department's decisions regarding the case.

Your letter also raises concerns about the appropriateness of the Department's response to requests by Congress and the U.S. Civil Rights Commission for information about this case, including the appropriateness of Department's legal position on the assertion of certain privileges. We have inquired of the Department about its decisions regarding providing information to Congress and the U.S. Civil Rights Commission. The Department has indicated to us that it is still in the process of considering the legal issues about what information it can and should provide to the U.S. Civil Rights Commission, and that searches to identify responsive documents are still underway. Moreover, we believe, based on our inquiry, that the appropriateness of the legal position the Department takes in responding to these requests is also a matter involving attorneys' legal decisions, which would fall within OPR's jurisdiction.

Therefore, while we understand and appreciate the reason for your request that the OIG investigate the Department's handling of the New Black Panther Party case, we do not have jurisdiction to do so. We believe, and have advocated, that Congress should change this jurisdiction, but it has not done so. Therefore, in accord with the law, we referred the matter to OPR, and OPR is in the midst of its investigation.

If you have any questions about this letter or these issues, please feel free to contact us.

Sincerely,

Glenn A. Fine
Inspector General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 2, 2010

The Honorable Frank R. Wolf
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Wolf:

This follows up on your letter, dated January 26, 2010, to Inspector General (IG) Glenn Fine regarding your concerns about the Department's response to your allegations about improper partisan political considerations affecting the Department's decision last year to dismiss claims against some of the defendants in *United States v. New Black Panther Party for Self-Defense, et al.*, Case No. 2:09-cv-0065 (E.D. Pa.) (the NBPP case). While we understand that IG Fine has responded to your letter, we believe it is important for the Department to address your concerns about the Office of Professional Responsibility (OPR), the pending matters before the U.S. Commission on Civil Rights, and our responses to your previous inquiries.

As you know, OPR initiated an investigation into the conduct of Department attorneys in the summer of 2009. Since then, OPR has advised that it has reviewed voluminous documents, conducted numerous interviews and its comprehensive investigative efforts are continuing. Once that phase is completed, OPR will draft its report, which OPR expects will be extensive. If OPR's draft report includes findings of professional misconduct, then the affected Department attorney(s) will have an opportunity to comment on the draft before OPR completes its final report. Thereafter, the Department will follow established practices, which may vary depending on the nature of any OPR findings. We will supplement this response when that process is concluded.

We must respectfully take issue with your questioning of OPR's ability to conduct an "unbiased and independent review" of this matter. We believe that such a charge is groundless. On the contrary, the Department expects that is precisely what OPR will do with all of the energy, dedication, and professionalism that the Office has demonstrated for more than thirty years. It has a long history of investigating allegations that improper political considerations affected the Department's prosecution and litigation decisions. Moreover, OPR is staffed entirely by career Department of Justice employees, most of whom have, prior to joining OPR, distinguished themselves as Assistant United States Attorneys, trial lawyers in the Department's litigating divisions, and/or litigating partners in private law firms. They are particularly well suited by their experience and career status to conduct full and fair investigations into allegations such as those at issue here, and report their independent findings to appropriate decision-makers within the Department. Any suggestion to the contrary is patently false.

Congress of the United States
Washington, DC 20515

March 2, 2010

The Honorable Glenn A. Fine
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Inspector General,

We write regarding your letter of February 2, 2010, in which you declined to investigate the Department of Justice's dismissal of its voter intimidation case against the New Black Panther Party (NBPP) and affiliated individuals. We urge you to reconsider your decision, which we believe to be based on a too narrow reading of both the scope of your investigative jurisdiction and the scope of the NBPP matter.

The Department's actions in May 2009 to dismiss most of the charges in its Voting Rights Act voter intimidation lawsuit against the NBPP and three of the Party's associates, a lawsuit it initiated only four months prior, has raised many issues for Congress's consideration. Chief among them is whether the Voting Rights Act's scope stretches broadly enough to reach such a clear instance of voter intimidation. However, it also raises a host of troubling questions about whether the Department's political appointees abused their power in this case for political purposes.

PRINTED ON RECYCLED PAPER

These include questions of whether White House officials attempted for partisan political purposes to influence either the NBPP case, the broader class of voting rights cases against minority defendants or both; whether senior Department management officials and political appointees actually colluded for these purposes with White House officials to derail the NBPP case or cases against minority defendants in general; whether senior Department management officials or political appointees unduly interfered with the recommendations of the NBPP trial attorneys to move forward with a default judgment when invited to do so by the trial judge upon the NBPP defendants' default; and whether Department management or political appointees, in concert with White House officials or on their own initiative, have acted improperly to impede the U.S. Commission on Civil Rights' investigation of this affair. Concerns raised in the NBPP matter also include, for example, whether White House or Department officials acted contrary to the letter or spirit of recommendations that you made and Attorney General Michael Mukasey adopted in connection with the U.S. Attorneys investigation last reported on by your office in September 2008.

We readily acknowledge that strict issues of prosecutorial misconduct raised by the case may be within the investigative and ethics jurisdiction of the Department's Office of Professional Responsibility (OPR). While OPR reviews the performance of the Department's attorneys to ensure that they meet basic ethical obligations, it is beyond the scope of OPR's duties and expertise to investigate the politically charged questions raised by the Department's management of the NBPP case. As the above recitation makes clear, the full set of issues presented by the NBPP matter extends well beyond strict issues of prosecutorial misconduct, reaches into the area of Department "politicization" by the White House and senior Department management, and may implicate the sufficiency of the recommendations you made in the U.S. Attorneys matter. Moreover, in the U.S. Attorneys matter itself, both you and OPR demonstrated the ability of your offices to conduct coordinated or parallel investigations of matters that raise companion issues within each of your respective jurisdictions.

For these reasons, we believe there is no impediment to your investigating the NBPP matter, regardless of whether you have properly or improperly already referred some issues in the case to OPR. Moreover, the larger issues in this affair, whether for the pursuit of impartial justice, the pursuit of criminal justice for government officials or the credibility of the Department, lie within your jurisdiction, not OPR's. In the U.S. Attorneys matter, you pursued your investigative authority promptly and zealously to its limits and then pressed for the appointment of a special prosecutor to take the investigation further when you could not, due to your lack of subpoena power over White House officials. It is imperative that you likewise quickly commence a thorough and zealous investigation of the NBPP matter and carry that investigation to its conclusion. We fear that further delay could compromise your ability to obtain all of the facts concerning the potential "politicization" of the Department and that your own hesitation could compromise the credibility of the Office of the Inspector General.

To date, we remain confident of your ability and willingness to investigate allegations within your jurisdiction wherever they may lead. It is precisely our high regard for the Office of the Inspector General that drives our request that your office investigate this matter. Given the Department's refusal thus far to provide meaningful answers to Congress or the U.S. Commission on Civil Rights as to what led to the abrupt reversal of its litigation position in the case we look to you to provide the thorough and impartial investigation called for. Knowing that the NBPP matter raises issues squarely within your jurisdiction and consistent with the precedent that you set in the U.S. Attorneys investigation, we are optimistic that, following your receipt of this letter, you will reconsider and reverse your prior decision not to initiate an Office of the Inspector General investigation of the NBPP affair.

Thank you for your attention to this matter. We look forward to receiving your reply no later than March 12, 2010.

Sincerely,

Lamar Smith
Ranking Member
House Judiciary Committee

Frank Wolf
Ranking Member
Commerce-Justice-Science Subcommittee
House Appropriations Committee

cc: The Honorable John Conyers, Jr.

U.S. Department of Justice

Office of the Inspector General

April 19, 2010

The Honorable Lamar Smith
United States House of Representatives
Washington, DC 20515

The Honorable Frank R. Wolf
United States House of Representatives
Washington, DC 20515

Dear Congressmen Smith and Wolf:

This is in response to your letter to me, dated March 2, 2010. In that letter, you urged the Office of the Inspector General (OIG) to reconsider our decision regarding your request that the OIG investigate the Department of Justice's handling of the New Black Panther Party case.

Our original decision, conveyed in our letter dated February 2, 2010, was that by statute jurisdiction to investigate the Department's handling of the New Black Panther Party litigation fell within the Office of Professional Responsibility's (OPR) jurisdiction rather than the OIG's jurisdiction. Your March 2 letter stated that our decision was based on too narrow a reading of our investigative jurisdiction and the scope of the New Black Panther Party matter. Your letter also stated that the Department's actions "raise a host of troubling questions whether the Department's political appointees abuse their power for political purposes," and you listed those questions.

We have carefully considered the issues you raise in your March 2 letter. However, it still appears to us that each of the issues you urge us to investigate relate to the Department's handling of the New Black Panther Party case or other cases. Specifically, the questions you raise concern whether improper political factors or actions affected the handling of the New Black Panther Party case or other related cases. Even though these allegations concern possible "politicization" of Department decisions, the issues to be investigated consist of whether the alleged politicization had an improper impact on the Department's handling of a case or cases. For the reasons laid out in more detail in our February 2 letter, we believe that, by statute, those issues fall within OPR's jurisdiction, not the OIG's jurisdiction.

According to the statute which defines the jurisdiction of the OIG and OPR, OPR's jurisdiction is not limited to "strict issues of prosecutorial

misconduct." Rather, it extends to allegations that "relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice." 5 U.S.C. App. 3 § 8E (b)(3).[1] Moreover, while you stated that "it is beyond the scope of OPR's duties and expertise to investigate the politically charged questions raised by the Department's management of the NBPP case," the statute does not exempt OPR from investigating the matter when it is alleged that politicization has affected an attorney in the exercise of the authority to investigate, litigate or provide legal advice, or give us the jurisdiction to do so.[2]

Your letter also refers to the OIG's role in investigating the firing of the U.S. Attorneys, and it questions why the OIG would have jurisdiction to review that matter but not have jurisdiction to review the Department's dismissal of the New Black Panther Party litigation. The investigation concerning the U.S. Attorneys was initially assigned to OPR by the former Attorney General. Because the matter involved the firing of U.S. Attorneys (as well as allegations involving the hiring of career Department attorneys), we argued, before OPR started its investigation, that these issues did not involve the handling of litigation, and therefore the matter fell within our jurisdiction. OPR disagreed, arguing that the firing of at least some of the U.S. Attorneys was alleged to have occurred in order to influence a particular case, which gave OPR jurisdiction to investigate the matter. Eventually, because of this jurisdictional ambiguity, we agreed to conduct the investigation jointly.

By contrast, there does not appear to us to be a similar jurisdictional ambiguity with regard to the New Black Panther Party matter, because it involves the Department's actions in the handling of a specific case or cases. That is true even though the allegations are that the handling of this case or class of cases was affected by improper political considerations.

It is also important to note that OPR has been actively investigating this matter for several months (including whether political considerations affected the Department's decisions about the case). We recently inquired again about the status of OPR's investigation and were informed that OPR is in the latter stages of its investigation.

Finally, as described in our February 2 letter, we believe that the jurisdiction between OPR and the OIG should be changed and that we should

---

[1] See also 28 C.F.R. § 0.29c(b) (the Inspector General "shall refer to OPR allegations of misconduct involving attorneys, investigators, or law enforcement personnel, where the allegations relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice. . . .")

[2] As discussed in our February 2 letter, we believe it would be a better policy to give an independent Inspector General jurisdiction to investigate all matters within the Department of Justice, including allegations that politicization affected a decision to bring or dismiss a case. However, that is not what the statute currently provides.

have jurisdiction throughout the Department of Justice. Congress did not make such a change in 2008 in connection with its consideration of the Inspector General Reform Act. Recently, however, several members of Congress have expressed support for such a change. In light of the sentiments you express in your letter about the benefit of OIG investigating these types of matters, we hope that you will consider supporting legislation extending the OIG's jurisdiction to include matters now reserved to OPR's jurisdiction.

In sum, while we continue to understand your desire that the OIG investigate the Department's handling of the New Black Panther Party case, our reading of the statute indicates that the matter by law falls within OPR's jurisdiction. However, we would be willing to meet with you to discuss these issues further, and the concerns you raise, in order to understand more fully why you believe that under the jurisdictional statute the matter is within the OIG's jurisdiction.

If you have any questions about this letter, please feel free to contact us.

Sincerely,

Glenn A. Fine
Inspector General

THE UNIVERSITY of MARYLAND
SCHOOL OF LAW

New Black Panther Party Investigation

Hearings

U.S. COMMISSION ON CIVIL RIGHTS

+ + + + +

HEARING ON THE
DEPARTMENT OF JUSTICE'S ACTIONS RELATED TO
THE NEW BLACK PANTHER PARTY LITIGATION
AND ITS ENFORCEMENT OF
SECTION 11(b) OF THE VOTING RIGHTS ACT

+ + + + +

FRIDAY, APRIL 23, 2010

+ + + + +

The Commission convened in Room 540 at 624 Ninth Street, Northwest, Washington, D.C. at 9:30 a.m., Gerald A. Reynolds, Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairman
ABIGAIL THERNSTROM, Vice Chairman
TODD F. GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner
ARLAN D. MELENDEZ, Commissioner
ASHLEY L. TAYLOR, JR., Commissioner
MICHAEL YAKI, Commissioner

MARTIN DANNENFELSER, Staff Director

STAFF PRESENT:

DAVID BLACKWOOD, General Counsel, OGC
TERESA BROOKS
CHRISTOPHER BYRNES, Director, RPCU
DEMITRIA DEAS
LILLIAN DUNLAP
PAMELA A. DUNSTON, Chief, ASCD
HANNAH GEYER, Legal Intern
MAHA JWEIED
TINALOUISE MARTIN, Director, OM
LENORE OSTROWSKY
JOHN RATCLIFFE, Chief, Budget and Finance
KIMBERLY TOLHURST
VANESSA WILLIAMSON
AUDREY WRIGHT

MICHELE YORKMAN-RAMEY

COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTEN
ALEC DEULL
TIM FAY
DOMINIQUE LUDVIGSON
JOHN MARTIN
ALISON SCHMAUCH
KIMBERLY SCHULD

TABLE OF CONTENTS

P-R-O-C-E-E-D-I-N-G-S

(9:35 a.m.)

I. INTRODUCTION BY CHAIR

CHAIRPERSON REYNOLDS: Ladies and gentlemen, this hearing of the United States Commission on Civil Rights will come to order. Our purpose today is to collect facts and information regarding the Department of Justice's actions related to the New Black Panther Party litigation and its enforcement of Section 11(b) of the Voting Rights Act.

The Commission began its investigation of this matter almost a year ago, in June of 2009. This hearing is an outgrowth of that project. Notice regarding the time, place and content of this hearing appeared in the Federal Register on March 18th, 2010, pursuant to the Commission's regulations.

Since its inception, the US Commission on Civil Rights has had a special mandate over issues of voting and voting rights. In fact, one of the Commission's first official projects upon its establishment by the Civil Rights Act of 1957, the same act that created the Civil Rights Division at the Department of Justice, was to convene hearings in Alabama to look for evidence of racial discrimination in voting there.

Witness after witness testified of efforts to interfere with their right to vote, whether by threats, intimidation, coercion, trickery, or the erection of legal or other impediments. The data gathered by the Commission formed the basis for the Voting Rights Act of 1965, which is unequivocal in its command that no person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten or coerce anyone from voting or attempting to vote, or from aiding a voter.

Investigating such claims, and bringing them to the attention of enforcement entities, such as the Department of Justice, remains a -- remains an essential part of the Commission's statutory mission to this day.

Our mandate also includes investigating and reporting to the President and Congress on how well federal agencies are enforcing the nation's civil rights laws. Since 1961, the Commission has adopted 12 statutory enforcement reports, and have -- has produced over 30 publications on the subject of voting and voting rights.

The right to vote freely without interference, discrimination or intimidation is

fundamental and indeed at the heart of our work here at the Commission. In the nation's mind, voting rights are regarded as sacred and, by extension, the area surrounding our polling stations.

We treat these areas with a high level of sensitivity and care befitting the heady process that unfolds there. It is with great concern, then, that we turn to the events of Election Day in 2008 at a polling place in Philadelphia.

On November 4th, 2008, two members of the New Black Panther Party appeared at a polling station in Philadelphia, Pennsylvania. The allegations against these two members include standing in front of the entrance to the polling station, wearing paramilitary style uniforms and black combat boots.

One of these individuals was armed with a nightstick. These members of the New Black Panther Party are alleged to have cursed at various poll watchers, and to have acted in a threatening manner.

Based on the allegations of voter intimidation, the Department of Justice interviewed numerous witnesses and, on January 7th, 2009, filed a civil complaint pursuant to Section 11(b) of the Voting Rights Act of 1965.

The suit named as defendants the party

members at the polling station, King Samir Shabazz and Jerry Jackson, as well as the New Black Panther Party and its head, Malik Zulu Shabazz. The lawsuit sought a permanent injunction against each of these defendants from in part engaging in coercing, threatening or intimidating behavior at polling locations during elections.

The record reveals that each of the defendants was served with a complaint; however, none of them contested the charges, and a default was entered against them. As a matter of law, that meant that none of the factual allegations contained in the complaint were contested by the defendants.

All that remained for the Department of Justice -- all that -- all that remained was for the -- for the Department of Justice to request the entry of a default judgment, and entry of an effective injunction to stop future acts of intimidation. Yet, that did not happen.

The Court had set a deadline of May 1st, 2009, for the Department to request the default judgment. On May 1st, however, the Department instead requested a continuance until May 15th, 2009.

Press reports indicate that, at this stage, the experienced career line attorneys who were

responsible for the case were put under intense pressure to justify the lawsuit against the New Black Panther Party. In addition, press reports indicate that although the lawsuit was uncontested, the Acting Assistant Attorney General of the Civil Rights Division sought a review of the matter by the division's appellate section.

Although the memorandum written by the chief of the appellate section of the Civil Rights Division supported pursuing a default judgment as to each of the four defendants, the Department dropped its claim against three of the defendants: Jerry Jackson, Malik Zulu Shabazz and the New Black Panther Party itself.

As to the final defendant, King Samir Shabazz, the Department greatly reduced the injunctive relief it was seeking. Whereas the original complaint sought an unlimited injunction, prohibiting acts of intimidation anywhere in the United States, the final relief sought by the Department was limited solely to the City of Philadelphia, and was only to last through November of 2012.

If the press reports are to be believed, these dismissals, as well as the reduction of the release -- relief sought against the final defendant,

occurred only after Loretta King, the Acting Head of the Civil Rights Division, acting with the approval of her politically-appointed supervisors, explicitly overread the career-line attorneys handling the case, the Chief and the Deputy Chief of the Voting Rights Section, and the Chief of the Civil Rights Appellate Section, who reviewed the matter.

The Commission began its inquiry under this matter by writing a letter dated June 6th, 2009, to the Department requesting information with regard to the lawsuit; additional letters seeking information about the case was -- were then sent on August 10th and September 30th of 2009. When the Department was unresponsive, the Commission served subpoenas on the Department's officials on November 10th, 2009 in an effort to determine what had occurred.

The Department refused to allow these individuals, these officials, to testify. Due to this refusal, on December 8th, 2009, the Commission directly subpoenaed the Justice Department, serving it with both a set of interrogatories and a request for production of documents.

Up until very recently, the Department provided little information about the New Black Panther Party litigation, other than providing copies

of pleadings and despite -- and this is despite repeated requests. The correspondence between the Commission and the Department is posted on our website.

Perhaps in recognition of its prior lack of cooperation and its pattern of delay, just last Friday, the Department turned over many heavily redacted documents for the first time that relate to the investigation relating to the New Black Panther litigation.

While it is disappointing that this information was not provided eight or nine months ago before this hearing, the Commission thanks the Department for its belated efforts. Because of the Department's lack of cooperation, the scope of today's hearing necessarily is limited.

Nevertheless, we examine the following. First, we will examine video evidence that provides some background on the New Black Panther Party, as well as the events of November 4th, 2008. Second, we will hear from three witnesses who were present at the polling place on Election Day: Mike -- Mike Mauro, Chris Hill and Bartle Bull.

Then, depending on when Chris -- Frank Wolf arrives, we will likely hear testimony next from

Gregory Katsas, who has served in many senior positions in the Department of Justice, including Senior Attorney General for the Civil Division, and Acting Associate Attorney General, regarding the procedures and channels of Department and White House review that would normally apply to the Department's actions in a case like this one.

Finally, we will hear from Congressman Frank Wolf, who has shared the Commission's concerns relating to the New Black Panther Party litigation, as well -- as well as the Department of Justice's failure to provide information to him, the Commission and other members of Congress with oversight responsibility for the Department.

Before we begin the actual presentation of evidence, each of the Commissioners has two minutes in which to make an opening statement if they wish. I would request that each Commissioner adhere to this firm time limit. We will proceed in order of seniority. Thank you, Commissioners. At this point, I turn matters over to our General Counsel, Mr. David Blackwood.

MR. BLACKWOOD: Their statements?

CHAIRPERSON REYNOLDS: Forgive me. Vice Chair Thernstrom.

II. REMARKS BY COMMISSIONERS

VICE CHAIR THERNSTROM: Thank you very much, Mr. Chairman. I hope my mic is working here. Let me switch glasses as well. I am Abigail Thernstrom, and I thank the witnesses for appearing today.

In addition to being the Vice Chair, I'm an adjunct scholar at the American Enterprise Institute. I am the only non-lawyer on the Commission. I hold a Ph.D. from the Department of Government at Harvard University. I am a Republican appointee to this Commission, and I have served on it now for more than nine years.

As the author of two books on the Voting Rights Act, one of which won multiple awards, including one from the American Bar Association, I have a particularly strong interest in the vigorous protection of voting rights. But, as much as I abhor the New Black Panther Party, it is nothing in my view but a lunatic fringe group, a few of whose members showed up at one polling place in a largely black, safe Democratic precinct. The Philadelphia incident was an isolated one off. There is no analogy to racist whites stopping blacks from voting throughout the Jim Crow south.

My colleagues assert that our purpose today is not to prove that voter intimidation did or did not occur. Our aim, they say, is to examine why the Justice Department handled the case as it did, and indeed, I too am interested in the answer to that question.

But we are very unlikely, I am heartened to hear, that we've now got a pile of document dumped, but we -- nevertheless, I remain skeptical that we are likely to get the evidence needed to answer that question. We could have chosen, in my view, a much more fruitful topic of national importance for our annual statutory report, the most important report that we issue in the course of a year.

I do not think that this inquiry has served the interests of the Commission as being a bipartisan watchdog for important civil rights violations, and I do not believe it has served well the party to which I belong. Thank you very much.

CHAIRPERSON REYNOLDS: Thank you, Vice Chair Thernstrom. Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Mr. Chair, I'd waive opening statement, other than to thank the witnesses for being here today.

CHAIRPERSON REYNOLDS: Okay, next up would

be Commissioner Taylor.

COMMISSIONER TAYLOR: Thank you, Mr. Chairman. My name is Ashley Taylor, and I've been on this Commission now about five years, and I am focused on frankly one issue, and that is the rule of law because the rule of law is our nation's cornerstone, and the Declaration and the Constitution created it, and the Civil Rights and Voting Rights affirmed it.

All persons are created equal. They stand equal before the law, and they are entitled to be protected equally by the law. When government treats people differently, it owes an explanation. And when government declines to enforce the law, it is obligated to justify its decision.

The history of Section 11(b) of the Voting Rights Act, and DOJ's longstanding position, are clear: Proof of intent to intimidate or an actual intimidating effect is not necessary to prosecute voter intimidation.

It's enough to show that the conduct would have threatened, intimidated or coerced a reasonable voter. In the past decade, DOJ has prosecuted criminals who jammed phone lines and slashed van tires in an effort to prevent voters from reaching the voting place.

Now, we have before us the case of two men clad in paramilitary uniforms, openly carrying a weapon, literally standing at the doorway of a voting place in Philadelphia, and the case was not aggressively pursued.

Today, we will view the video that will very clearly show the defendants acting in a threatening manner. We will also hear from witnesses and put documents in the record to shed further light on the intimidation felt by the people who were present that very day.

What we don't have, and what we won't get today, is an explanation. In 2008, the head of DOJ's Voting Rights Section told this Commission that one of DOJ's priorities would be to monitor polling places where racial slurs or other insensitive behaviors could be anticipated.

Here we have a record incident of just such behavior, but DOJ's decision to drop charges indicates that its priorities have changed. And we simply ask what accounts for the difference?

I hope that at some point DOJ will answer these questions. In the meantime, the selective enforcement of our laws and the appearance of selective enforcement, more importantly, will erode

the faith and confidence in the impartial administration of justice, and will undermine the rule of law in our society. Thank you, Mr. Chairman.

CHAIRPERSON REYNOLDS: Thank you, Commissioner Taylor. Commissioner Yaki?

COMMISSIONER YAKI: Thank you, very much, Mr. Chair. It is with, as you know, great reluctance that I am here today. I do not believe that this Commission should be involved in essentially relitigating and reprosecuting a decision, a single decision, made by the Department of Justice.

It strikes me as somewhat rather pious and sanctimonious to talk about the rule of law and equality, and how we are here to protect voting rights. Of course we are. But that is not what this proceeding is about. That is not what the proceeding has ever been about.

If that were the case, we would be talking about a legion of cases that have been -- that have been put before the Department of Justice over the last 10 to 15 years, involving clear cases and patterns and practice of voter intimidation. But that has never been and not been the scope of this particular hearing.

No, this hearing alone, comprising the

National Enforcement Report for this Commission, an enormous expenditure of time and resources, is in my -- - is to me just simply one thing. It's about partisan payback. That's all it is. Because we're -- because there is nothing about this inquiry that talks about how this really goes to a broader question for civil rights enforcement.

There's nothing in the scope of this hearing; there's been nothing in the scope of discovery that talks about a broader scope and application to this country. No. Instead we're going to extrapolate from one single incident on one single precinct in one single city, and one single charging decision by the Department of Justice, and from that, create national -- recommend national policy. That is absurd.

Any scientist, any social science, any Congressional committee would laugh that out of the ballpark. But no, we are spending enormous time and effort here doing just that. And I just want to say that that -- this is not a defense of the Black Panthers.

This is not to -- to belittle anything that any of the witnesses saw or heard, but it is about the greater issue of what this Commission is

really all about, and a mission that we have been sorely lacking for the last five years that I have been on the Commission: a mission that we have advocated time and again until suddenly in this one instance, we see the light on voter intimidation, and that to me is hypocrisy in its highest form. Thank you.

CHAIRPERSON REYNOLDS: Thank you, Commissioner Yaki. Commissioner Melendez?

COMMISSIONER MELENDEZ: Good morning, Mr. Chairman, to our audience here this morning. My name is Arlan Melendez. I'm in my fifth year as a Commissioner here with the US Commission on Civil Rights. My other responsibility is I'm a tribal chairman of a federally recognized Indian tribe located in Reno, Nevada: Washoe, Paiute, Shoshone People. I'm glad to be here today and welcome you again.

My remarks are going to be brief because I think far too much of our time has been consumed on this seemingly unnecessary investigation. Citizens should be able to vote without intimidation, and it is our Commission's duty to investigate complaints from citizens that their voting rights have been infringed.

In this case, however, no citizen has even

alleged that he or she was intimidated from voting at the Fairmount Avenue Polling Station in 2008. This absence of voter intimidation was clear to the Justice Department last spring, which is why they took the course of action that they did.

This absence of voter intimidation was clear to the members of this Commission as well, or at least it should've been. Our investigation has been going on now for the better part of a year. We have wasted a good deal of our staff's time, and the taxpayers' money.

In addition to that, we have also consumed a considerable amount of the Justice Department's resources, forcing them to devote attention to a case that they had long ago concluded was meritless.

I hope that we can quickly conclude this hearing, and conclude this investigation. This Commission needs to get back to seriously addressing civil rights issues, and stop chasing conspiracy theories and pursuing partisan fishing expeditions. So, thank you very much.

CHAIRPERSON REYNOLDS: Thank you, Commissioner Melendez. Commissioner Heriot?

COMMISSIONER HERIOT: Thank you, Mr. Chairman. I don't think I will need the full two

minutes. I just want to -- want to state that no one is on trial here. Not the members of the New Black Panther Party, not the witnesses to the incident, not the DOJ lawyers who initially filed this civil lawsuit, and not the DOJ officials who ultimately decided to terminate the lawsuit, except in a very minor -- minor aspect.

The Commission on Civil Rights, nevertheless, has a duty to investigate matters exactly like the one that we are investigating today. We are specifically charged with investigating the enforcement of civil rights laws, and the voting rights in particular, and that's what this hearing is about.

CHAIRPERSON REYNOLDS: Thank you, Commissioner Heriot. Commissioner Gaziano?

COMMISSIONER GAZIANO: Thank you. I won't respond to the false claims that our investigation is unnecessarily narrow, except to say that the record of our scope of investigation is in our concept paper, which is available, which shows that we very much sought every single report of voter intimidation in evidence of how the Department treated those, compared with the current surprising action, and it was those requests for other investigations that were part of

the overall pattern of stonewalling.

So, I hope that Commissioner Yaki will continue to help us get all of that evidence, which he claims that he is really interested in. But with this hearing, I believe we are entering the third phase of our investigation, and I hope that places it in context.

When we began more than ten months ago, we had high hopes that the Department of Justice would admit its error, and reverse course. But that didn't happen. Phase one was the Department's insistence that there was nothing to investigate, and then making matters much worse by asserting, without any credible explanation, that the intimidating events viewed by countless thousands on YouTube did not warrant further action.

This may encourage other hate groups to engage in their own coordinated campaigns of voter intimidation. That's why this particular incident is important. Phase two was the more than 300 days of excuses, stonewalling, forwarding our lawful subpoenas, refusal to give the evidence that Commissioner Yaki and the rest of us want, in the creation of non-existent privileges and aid thereof.

Phase three begins with these hearings,

which will expose the facts and place evidence on the record for the entire world to see. I sincerely hope that phase four will be the Department of Justice's complete cooperation to our -- as our federal statute unambiguously requires the enforcement of our subpoenas to talk to people who we -- who were actually involved in the decision-making, rather than an assistant attorney general who came much later, and the production of all the evidence we have asked for, rather than that which the Department suggests we should be content with.

Phase five will be our issuance of our statutory enforcement report, in which we will make our own findings of fact, conclusions regarding legal authorities, and our recommendations to Congress and the President for further action.

But unless the DOJ changes its posture, our preliminary report due in September should not end our review. No entity should believe it can run out the clock on our examination of serious voting rights enforcement problems.

We rightfully earned the reputation as the conscience of the nation for our refusal to be intimidated when southern officials tried to thwart the Commission's early investigations into voting

rights violations. We should be no less vigilant in our pursuit of the truth today.

CHAIRPERSON REYNOLDS: Thank you.

COMMISSIONER KIRSANOW: Mr. Chair, if I may invoke a privilege to make a brief rebuttal to some of the comments that were made? I initially waived my right to make an opening statement, but I've heard that this Commission is engaged in a waste of time and resources, and that this is an unnecessary endeavor; that this incident is isolated and one offs, and does not merit any kind of consideration.

I would note that it is the specific charter of this Commission to address matters related to voting rights, and deprivation of voting rights. About three years ago, I testified in a Senate Judiciary Committee hearing on a bill called the Voter Intimidation and Deceptive Practices Act.

The Senate has a number of charters, but is not solely devoted to the protection of voting rights. Nonetheless, they wasted, apparently, a significant amount of time and resources. They devoted a considerable amount of attention to a matter pertaining to voting rights. Not a specific incident. Nothing had happened. Nothing had triggered this specifically.

Nonetheless, the entire Senate Judiciary Committee and the entire Senate decided to take this matter up. Apparently, they wasted their resources because scores of staff members were involved in adducing evidence pertaining to that. A number of senators also testified during that hearing. In fact, one of the sponsors of that particular bill testified at that hearing, and indicated that this was a serious problem worthy of national attention.

Much more time and resources were devoted in that hearing than I would argue even comes close to what's going to be devoted in this particular hearing. The senator who sponsored that bill was someone by the name of Barack Obama.

I think that this is a worthy endeavor. I think this falls squarely within our charter, and I look forward to the testimony of the witnesses.

CHAIRPERSON REYNOLDS: Thank you, Commissioner Kirsanow.

VICE CHAIR THERNSTROM: Can I just make -- say one sentence? It's in response to Commissioner Kirsanow.

CHAIRPERSON REYNOLDS: I think that we need to stick with the structure that we planned.

VICE CHAIR THERNSTROM: That's fine. This

is up to you.

CHAIRPERSON REYNOLDS: Okay. All right, at this point, I'd like to turn it over to our General Counsel, Mr. Blackwood.

III. REMARKS BY GENERAL COUNSEL

MR. BLACKWOOD: Thank you, Mr. Chairman. What we're going to show in this next segment are three video clips that the Commission has obtained. The first -- and they will run one right after the other. The first is from the National Geographic Channel's documentary on the New Black Panther Party, which was obtained by subpoena.

The documentary was produced in 2008, before the election. It has background as to the New Black Panther Party. It shows clips of statements from Malik Zulu Shabazz, who is head of the party, and has footage and comments from the New Black Panther Party members who were at the Fairmount Street Polling Place: Minister King Samir Shabazz and Jerry Jackson.

I think it's appropriate at this time to note that both Mr. Jackson and Minister King Samir Shabazz are present today, along with several other members of the New Black Panther Party. The segment that we're going to show is edited rather abruptly, but it's -- the purpose was to keep the video clips as

short as possible. So, it will start mid scene, but it is meant to be edited in such a way that it is focused simply on the party -- New Black Panther Party for Self Defense, and the individuals I mentioned.

Immediately thereafter, the video will go to two video clips from YouTube that many people have already seen. This was video taken at the Fairmount Street polling location. It's disjointed the audio was poor. But nonetheless, it is the only realtime depiction of the scene at the time, showing King Samir Shabazz and Jerry Jackson.

Lastly, there will be a third clip, which contains an interview with Malik Zulu Shabazz that -- the head of the New Black Panther Party, that took place on November 7, 2008. One of the people doing most of the interviewing is Rick Leventhal, a reporter who was also at the scene on Fairmount Street. This was obtained by subpoena.

The whole video segment shall last about 20 minutes. I would ask that it start.

IV: VIDEO EVIDENCE

(Whereupon, a series of videos were played)

MR. BLACKWOOD: Thank you.

CHAIRPERSON REYNOLDS: Okay, please

continue, Mr. Blackwood.

MR. BLACKWOOD: At this point, Mr. Chairman, I'd like to introduce evidence, and have it accepted into the record.

V: SUBMISSION OF EVIDENCE

MR. BLACKWOOD: As you all are aware, the Commission has been conducting a great deal of discovery over the last several months. But this is the first time that we've been able to formally introduce it into the record.

I'd like to introduce the following, all of which materials are here, directly behind you, and all of which have been provided to each of the Commissioners previously. First are the subpoenas, discovery requests and deposition transcripts of the following: First, Jerry Jackson and King Samir Shabazz. These are the New Black Panther Party members who were at Fairmount Street, who are here today, and who, when deposed, asserted their fifth amendment right against self incrimination.

Second, we have several depositions and information from a variety of poll watchers, Ronald Vann, who is a Democratic poll watcher, as well as Larry Counts and Angela Counts, who although are registered Democrats, were working for the Republicans

as poll watchers that day.

Third, we have the deposition of Kristen Clarke. Fourth, we have a subpoena and related discovery request to the head of the New Black Panther Party, Malik Zulu Shabazz. Unfortunately, he did not appear for his deposition. There is now currently pending in the United States District Court for the District of Columbia an action to compel him to appear before the Commission. As I say, that is pending before the court.

Next is the document request and responses from and to the Department of Justice. This includes a subpoena, interrogatories, discovery requests, their written responses from the Department, as well as a large volume of documents. I will refer to them as the -- for purposes of introducing them into the record as three disks of information, dated January 11, 2010, February 26th, 2010 and April 6th, 2010.

Lastly, we have subpoenas -- video information, which has -- was subpoenaed, some of which you just saw, all of which has been provided to you previously; the National Geographic Program in its entirety, the Strategy Room interview in its entirety, a guest segment on the O'Reilly Factor, in which witness Bartle Bull appeared, and finally two video

clips from Rick Leventhal, who reported from the scene at Fairmount Street.

And I would ask at this time, Mr. Chair, that all that evidence be admitted into the record.

CHAIRPERSON REYNOLDS: Thank you, Mr. Blackwood. The aforementioned items have been entered into the record.

MR. BLACKWOOD: I would indicate to -- all right, in abundance of caution, I evidently failed to mention Larry Counts and Angela Counts as Republican poll watchers. Oh, Coates. I'm sorry. Pardon me, I did forget that. We had Notices of Deposition to two employees/officials at the Department of Justice, Christopher Coates and J. Christian Adams. They were -- as has been reported, the Department declined to allow them to testify. I would also add that into the record.

CHAIRPERSON REYNOLDS: Okay, those items are added to the record as well.

MR. BLACKWOOD: For purposes of clarification, since I was asked earlier this morning, Commissioners now may refer to those documents, and the materials within them in their questioning today, or in their statements. At this time, Mr. Chairman, I'd like to proceed with the examination of the three

witnesses that we have here today. The procedure is I'm going to ask questions, one in a row, first Mr. Mauro, then Mr. Hill, then Mr. Bull.

At that point, the testimony and examination will be thrown open to all the Commissioners of all the panelists.

CHAIRPERSON REYNOLDS: Okay.

VI: TESTIMONY OF WITNESSES

MR. BLACKWOOD: I would like to proceed.

CHAIRPERSON REYNOLDS: Please proceed.

MR. BLACKWOOD: Mr. Mauro, would you please state your name, full name, and profession for the record?

MR. MAURO: Michael Mauro.

MR. BLACKWOOD: I'm sorry. We need to swear you in. Mr. Chairman, would you swear them in?

CHAIRPERSON REYNOLDS: Okay, please raise your right hand.

MR. BLACKWOOD: All of them. Yes, please.

CHAIRPERSON REYNOLDS: Do you swear or affirm under penalty of perjury that the testimony you're about to give will be the truth, the whole truth, and nothing but the truth?

MR. MAURO: I do.

MR. BULL: I do.

MR. HILL: I do.

CHAIRPERSON REYNOLDS: Thank you. Mr. Blackwood, the floor is yours.

MR. BLACKWOOD: Thank you. Mr. Mauro, I'm sorry.

MR. MAURO: Sure. My name is Michael Mauro, and I'm an attorney.

MR. BLACKWOOD: Mr. Mauro, did there come a time that you appeared -- that you were in Philadelphia for Election Day 2008?

MR. MAURO: Yes.

MR. BLACKWOOD: And what was the purpose of that?

MR. MAURO: I was a volunteer poll watcher for the Republican Party.

MR. BLACKWOOD: Did you receive any training?

MR. MAURO: Yes, I did.

MR. BLACKWOOD: And what did that training consist of?

MR. MAURO: It was an informational session, where we were told that we were given procedures to follow. When we were at the polls, if someone had complained that they were being denied an ability to vote, to call it in, and then that an

injunction action needed to be instituted then that would -- the process would start.

MR. BLACKWOOD: Were you paid for your work?

MR. MAURO: No, I -- no, I was not.

MR. BLACKWOOD: Did there come a time when you went to the polling place at 1221 Fairmount Street on Election Day?

MR. MAURO: Yes.

MR. BLACKWOOD: Could you tell the Commissioners why you went to that location?

MR. MAURO: Sure. I was a part of a three-person team called a Roving Watching Patrol with Mr. Hill and another individual. We had received a call from what I would characterize as our headquarters in Philadelphia, that there was a report of voter intimidation and harassment at the Fairmount polling facility, and that my car that I was in I suppose was close enough to respond. And at that point, we drove on over to the polling station.

MR. BLACKWOOD: Around what time of the day was that?

MR. MAURO: It was before noon perhaps, maybe 10:00-11:00 in the morning maybe.

MR. BLACKWOOD: When you arrived at the

scene, what did you observe?

MR. MAURO: When we arrived, we actually drove by the -- from what you could see from that -- from that polling station, there was a circular driveway in the front, but we drove past the circular driveway first to see what was going on. When we drove past the circle, we could see the two individuals of the New Black Panther Party standing at the front of the entrance to the building.

MR. BLACKWOOD: How were they positioned?

MR. MAURO: They were standing shoulder to shoulder, or close to shoulder to shoulder.

MR. BLACKWOOD: Can you identify those individuals today?

MR. MAURO: I suppose I could.

MR. BLACKWOOD: Would you look behind you and see if you can identify them?

MR. MAURO: This gentleman right here.

MR. BLACKWOOD: That's in the second row?

MR. MAURO: Yes, the second row, the third in. And I -- I don't know if I'm -- if I see the second one. I'm not really sure if I see him.

MR. BLACKWOOD: How were they dressed?

MR. MAURO: Not unlike they're dressed right now, with a black paramilitary outfit on, with

berets and military-style boots.

MR. BLACKWOOD: Was anybody carrying anything?

MR. MAURO: Yes. One of the individuals was carrying a billy club.

MR. BLACKWOOD: And how was he handling that?

MR. MAURO: I believe it was in his -- perhaps his right hand. It may have been his left hand, and he was -- at times, it was to his side. Other times, it was being put into his hand like a banging fashion. And I -- that's what I recall.

MR. BLACKWOOD: Did he point it an anybody?

MR. MAURO: I don't particularly recall him pointing at anybody with it.

MR. BLACKWOOD: At any time -- approximately how long were you there?

MR. MAURO: I was there for approximately 45 minutes to an hour, maybe a little less than that.

MR. BLACKWOOD: On the first video clip that we watched of the YouTube videos, were you in that scene?

MR. MAURO: Yes, I was.

MR. BLACKWOOD: Can you basically describe

what you were wearing that day?

MR. MAURO: I probably was wearing the same suit. It was a blue suit and a white shirt is what I was wearing.

MR. BLACKWOOD: Okay, so you were off to the left-hand side of the original scene?

MR. MAURO: That's correct, yes.

MR. BLACKWOOD: It was only -- were both panthers carrying night sticks?

MR. MAURO: No, only one was.

MR. BLACKWOOD: Was that the shorter one, or the taller one?

MR. MAURO: I believe it was the shorter one.

MR. BLACKWOOD: At any time that you were there during that 45 minutes, did you move away from the polling place?

MR. MAURO: I purposely stood away from -- from where they were standing, and kind of off to the side. If you can see, I had my hands in my pockets because I -- I wasn't there to confront either of these two men. That's not my purpose in being there. I'm not a law enforcement officer. That was it.

So, I purposely took a non-confrontational pose, and in fact, I didn't even engage them in any

kind of a discussion at all. It was the -- I believe he was a UPenn journalism student who was filming that. He was doing all of the speaking.

MR. BLACKWOOD: Did he come after you had arrived?

MR. MAURO: He did come after, yes.

MR. BLACKWOOD: About how long? Do you recall?

MR. MAURO: Probably within ten of 15 minutes of us being there.

MR. BLACKWOOD: Okay. During the entire time that you were there, did you see the two Panther members ever move apart?

MR. MAURO: No, I did not. I do recall that when Mr. Hill approached the entrance of the polling facility, they actually moved closer to each other. What it appeared to me is almost be more striking a confrontational pose to obstruct Mr. Hill's entrance into the polling facility, which he had an ability to be there, or a right to be there, actually.

MR. BLACKWOOD: Did they ever move away from the entrance to the polling place?

MR. MAURO: No, they did not. Not -- no. Only from what I observed, it was when the police had ordered them to speak with them where their cars were

parked.

MR. BLACKWOOD: Approximately how far away were you from the two Black Panthers during that time?

MR. MAURO: I was probably ten to 12 feet away at the time.

MR. BLACKWOOD: At any time, did you hear the taller Black Panther direct the younger -- or the smaller Black Panther to put away the night stick?

MR. MAURO: No. I did not hear anyone give any instructions to the individual holding the night stick.

MR. BLACKWOOD: Did anyone else come to the smaller gentleman, and say, "You need to put the night stick away?"

MR. MAURO: No, I did not see anything like that.

MR. BLACKWOOD: Did anybody say anything?

MR. MAURO: The -- when the journalism student approached and engaged them in a conversation, that's when I did hear the members -- the New Black Panther Party speak. Mostly, it was -- the shorter of the individuals, he had engaged in -- as you can see from the YouTube video, there was a -- there was a little bit of a back and forth about what constitutes a weapon; whether the billy club was a weapon, whether

the camera that the journalism student was holding was a weapon.

So, at that point, the -- I also heard the -- the gentleman, Mr. Shabazz, I believe. It was something to the effect of, you know, he had a right to be there, and that -- somehow that we didn't have a right to be there, from what I recall him saying.

MR. BLACKWOOD: Did -- at any time, did he make any racial comments?

MR. MAURO: I believe the term, "White devil." He said the term white devil at some point.

MR. BLACKWOOD: Did he say that to you, or to others?

MR. MAURO: He didn't say it to me. He -- that came in the process of his conversation with that -- with the journalism student.

MR. BLACKWOOD: Did you talk to any of the poll workers that day?

MR. MAURO: I didn't speak with the poll workers, no.

MR. BLACKWOOD: Did your credentials allow you inside the polling place?

MR. MAURO: They did not.

MR. BLACKWOOD: Okay. You saw a minute ago comments made by Malik Zulu Shabazz, who is the

head of the Black Panther Party that Skinheads, Aryan Nation members and Nazi Party members were at the site. Did you see any such people?

MR. MAURO: No, I did not.

MR. BLACKWOOD: This is a rather open location, is it not?

MR. MAURO: It is.

MR. BLACKWOOD: There's parking lots on both sides of the driveway?

MR. MAURO: Yes, it is.

MR. BLACKWOOD: So, if there were Aryan -- members of the Aryan Nation, or Nazi Party there, do you think you would've seen them?

MR. MAURO: I would have seen them. I didn't see them. I saw these two individuals standing at the front of that polling facility. I do -- actually, I recall a comment that was made by I believe Mr. Shabazz. He yelled it out to Mr. Hill. He said, "How's it gonna feel to be ruled by a black man?"

And Mr. Hill, who is a veteran, actually said, "So long as he is elected fairly, I'll get up tomorrow and salute." That's what I remember.

MR. BLACKWOOD: Did he -- did Mr. Shabazz say anything in response?

MR. MAURO: He said, "Whatever, cracker."

MR. BLACKWOOD: Did any of the panther members, while you were there, mention anything about Nazis or Skinheads, and that they were there to protect people against them?

MR. MAURO: No. I did not hear that.

MR. BLACKWOOD: And you were there approximately 45 minutes. Did there come a time when the police came?

MR. MAURO: Yes. I was there when the police arrived, and I witnessed the police approach the two individuals, and ask them to remove themselves from where they were standing, and speak with the police officers at their police cars.

MR. BLACKWOOD: Do you know what happened to the night club?

MR. MAURO: They confiscated the night club, from what I understand.

MR. BLACKWOOD: I'm sorry, the billy club I should say.

MR. MAURO: The billy club, right. I believe that was confiscated, and I don't believe any arrests were made that day.

MR. BLACKWOOD: From your observation, how were third parties, other people, reacting to the

presence and the actions of the Black Panthers?

MR. MAURO: While I was standing there, I did notice that when -- what I would -- what would appear to be people coming to vote, when they entered into that circle area, they would stop and they would congregate and speak to each other, and wait a little bit, and then proceed on in to vote.

So, it wasn't like they were coming right in and walking straight in to vote. They actually stopped for a little bit, and then eventually vote. So, that -- that's what I witnessed. Probably I would say at least six to eight people I saw that that had happened. And then as far as other third parties, you can see from that YouTube video, there was a young lady standing behind the two individuals from the Black Panther Party.

From what I understand, and I don't know for a fact whether it makes sense that she was what I would consider what my counterpart would be for I guess the Democratic Party, and she was on the phone calling in a -- an incident of harassment at the voting place, the Fairmount Polling Center, that a couple of white guys in suits were intimidating voters.

Since I was the only white guy in a suit

around there, I assumed she was talking about me, and I was not talking to anybody. So, obviously that disturbed me greatly. And in addition, she said that as she was standing behind the two individuals.

MR. BLACKWOOD: Specifically, with regard to that woman, did you ever hear her talk to the Panther members?

MR. MAURO: I did not, no. As you can see in the YouTube video, you'll see where she's standing, and you actually can hear her a little bit.

MR. BLACKWOOD: The 40-foot -- the whole time that you were there, was she there the whole time as well?

MR. MAURO: Yes, the whole time.

MR. BLACKWOOD: Standing directly behind the Panthers?

MR. MAURO: She wasn't standing directly behind them the entire time, but for a period she was, yes. Otherwise, she was off to the side.

MR. BLACKWOOD: Did the police ask you any questions?

MR. MAURO: They did not.

MR. BLACKWOOD: Did there come a time when you talked to anybody from the Department of Justice?

MR. MAURO: Yes. Sometime within the next

maybe two hours or so, or three hours. I guess DOJ had some roving attorneys out in cars, and we met with two attorneys. They must've had a rental car, and we rendezvoused with them in a parking lot, and --

MR. BLACKWOOD: That was you and Mr. Hill?

MR. MAURO: Yes, and the third individual who was with us, and the three of us got in the back of the car with the DOJ attorneys, and we had given statements that were handwritten by the attorneys. I was not given a copy of the statement.

MR. BLACKWOOD: Were you allowed to look at the statement?

MR. MAURO: No. And I didn't ask, so.

MR. BLACKWOOD: Did you get the name of the DOJ attorneys that you were interviewed by?

MR. MAURO: I did not. I can't recall. It was two young females.

MR. BLACKWOOD: Did there come a time -- did you talk to anybody else from the Department?

MR. MAURO: Yes. I was contacted by I believe Christopher Coates, who is an attorney at the DOJ, and he had wanted to arrange to meet with me to take a statement. They were investigating whether they were going to bring an action in District Court.

I agreed. I met with him, and Jay

Spencer. I can't recall his last name right now.

MR. BLACKWOOD: Fischer?

MR. MAURO: Fischer, yes. And I met with them, and I gave my statement to them. And then probably a few months later, I met them again, and I gave an affidavit, which I -- which I signed, which I believed was going to be used as part of the injunctive relief that was being filed in Federal Court.

MR. BLACKWOOD: Okay. Did you ever -- did you keep a copy of that statement?

MR. MAURO: No. I did not get a copy.

MR. BLACKWOOD: Okay. At this time, I'd like to direct my questions to Mr. Hill. I'm basically going to ask the same questions, but if you could, let's start -- if you could, give your name and profession.

MR. HILL: Chris Hill, Senior Registrar for the Hospital University of Pennsylvania Dermatology.

MR. BLACKWOOD: And you were in Philadelphia for Election Day 2008?

MR. HILL: I was.

MR. BLACKWOOD: And you're a Citizen of Philadelphia?

MR. HILL: I am indeed.

MR. BLACKWOOD: So, you had -- were you credentialed to go into polling places?

MR. HILL: I was.

MR. BLACKWOOD: What was your purpose as serving as an election officer?

MR. HILL: According to my training, they did several nights of training with us because we'd be entering polling places, and we were told that we were there to protect voting rights and provide assistance to voters of either party, as needed.

MR. BLACKWOOD: And did there come a time on Election Day that you went to the Fairmount Street location?

MR. HILL: Yes, we did.

MR. BLACKWOOD: Why? What was the purpose of your going there?

MR. HILL: We were at I guess our third or fourth polling location of the morning, and we received a -- I received a phone call from the head of the Poll Watchers in Philadelphia, and he said that the poll watcher on site had been threatened, and we were initially -- I was initially told there were three Black Panthers there, and he asked if we could swing by and see if that were the case.

MR. BLACKWOOD: About what time did you arrive at the site?

MR. HILL: Morning, some time between 10:00-11:00. Somewhere in that time. We started early in the morning.

MR. BLACKWOOD: Could you tell the Commissioners what you observed when you got there?

MR. HILL: I was driving. I was in my Jeep. And as we came down the street, I passed in front of the circular driveway. I could clearly see two members of the New Black Panther Party out -- outfitted in their paramilitary garb, directly in front of the doors. So, we went down the street to the first available parking spot, jumped out, and walked back over to the polling spot.

MR. BLACKWOOD: Could you describe what they looked like?

MR. HILL: Two African-American males, one taller, one shorter, both dressed in black BDU style paramilitary garb, berets, black combat boots, patches with, "New Black Panther Party."

MR. BLACKWOOD: Can you identify those individuals here today?

MR. HILL: Mr. Shabazz is the third one in on the second row. That's -- Mr. Shabazz I can

recognize --

MR. BLACKWOOD: Okay.

MR. HILL: -- for sure.

MR. BLACKWOOD: Was anybody carrying anything?

MR. HILL: Mr. Shabazz was carrying a night stick.

MR. BLACKWOOD: And how was he carrying it?

MR. HILL: He had a lanyard wrapped around his hand, and as I approached the door, he was slapping it into the palm of his other hand.

MR. BLACKWOOD: Did he say anything to you?

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.

MR. BLACKWOOD: And who -- do you recall the name of that person inside?

MR. HILL: No, I do not. He was -- he was pretty shaken up, and I wasn't really too concerned about finding out what his name was. You know, he was -- he was visibly upset.

MR. BLACKWOOD: What did he tell you?

MR. HILL: He was told he was called a race traitor for being a poll watcher, credentialed poll watcher for the Republican Party as a black man, and that he was threatened if he stepped outside of the building, there would be hell to pay.

MR. BLACKWOOD: And he said he was told that -- or he relayed that he was told that by the two Black Panthers you saw outside?

MR. HILL: He did.

MR. BLACKWOOD: Did that poll watcher, the Republican poll watcher, ask you to do anything?

MR. HILL: He asked me what we were going to do, and I said, "I have two attorneys with us. We've already called back to headquarters. I'm certain by now the police have been called. If they haven't, we will call them as soon as I get back outside."

I asked if he was okay for the moment, and he said as long as he didn't have to go out of the building.

MR. BLACKWOOD: Did you make a call to the police?

MR. HILL: I did.

MR. BLACKWOOD: Did -- were there anymore

comments from the individuals outside, the Panther members?

MR. HILL: Cracker on more than several occasions from Mr. Shabazz. I never heard Mr. Jackson say anything. He did say something to Mr. Shabazz that I didn't catch, but I was called a cracker, white devil. Told that I was going to be ruled by a black man on the next day, and I would have to get used to being under his boot. Similar things to that.

MR. BLACKWOOD: Okay. How long approximately were you both at the polling place?

MR. HILL: Forty-five minutes to an hour sounds accurate to me.

MR. BLACKWOOD: Same question I asked before: Did you ever see the two Panther members separate by more than a few feet?

MR. HILL: Never.

MR. BLACKWOOD: Did they ever --

MR. HILL: They were within arm's length of each other the entire time.

MR. BLACKWOOD: Did they ever move away from the entrance to the polling place?

MR. HILL: Not until the police physically ordered them to.

MR. BLACKWOOD: If someone wanted to enter

the polling place, how close would they have to pass from the Panther members?

MR. HILL: Arm's length on either side. They were directly in front of the doors, no more than five feet in front of the door. And in order to get to that double door, you'd have had to walk right next to them.

MR. BLACKWOOD: Did you ever hear Mr. Jackson, or anyone else, ask Mr. Shabazz to put away the night stick?

MR. HILL: No.

MR. BLACKWOOD: How were third parties reacting to the presence and the actions of the Panther members?

MR. HILL: 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.

MR. BLACKWOOD: You saw the comments made on the video by Malik Zulu Shabazz about Skinheads and people from the Aryan Nation, and Nazis. Did you see any members of those organizations there?

MR. HILL: Absolutely not.

MR. BLACKWOOD: And again, this is an open area, correct?

MR. HILL: Indeed. And we were the first ones on the scene. There was -- there were no one there but them when we got there.

MR. BLACKWOOD: And did any of the Panther members say that they had seen Nazis or Aryans or Skinheads?

MR. HILL: No. I never heard that until I saw that particular clip.

MR. BLACKWOOD: Did you talk to the police, other than calling in the --

MR. HILL: I did not.

MR. BLACKWOOD: Did you talk to anybody from the Department of Justice?

MR. HILL: A couple hours later, two female attorneys met us in a parking lot, as Mike said, and we got in the car with them. They asked us

what happened. They took notes, and then we went on our way because we were responding to polling places all day long. So, you know.

MR. BLACKWOOD: Did you get a copy of the statement?

MR. HILL: No, I did not, but once again, I didn't ask for one either.

MR. BLACKWOOD: Were you ever asked to testify at a hearing or a trial?

MR. HILL: No. I was deposed. I mean Department -- DOJ came to my house. Well, met me at a coffee shop in Philadelphia twice; took a statement. The first time, I gave them a handwritten -- a typed statement. Second time they came back with the statement, asked me to read over it and sign it, that it was as I had relayed it.

MR. BLACKWOOD: Did you keep a copy of either statement?

MR. HILL: I did not.

MR. BLACKWOOD: Both you and Mr. Mauro mentioned that you were accompanied by a third individual. Do you know who that person was?

MR. HILL: He was another attorney from New York. I don't remember his name, though.

MR. BLACKWOOD: With regard to the woman

in the video, standing -- that Mr. Mauro testified about, did you have any interaction with her?

MR. HILL: I did not. She -- when I went through into the polling place itself, she was coming around the side. So, that's when she's making the phone call. And all I heard her say was, "The white guys in suits are trying to stop people from voting." Or something to that effect. I was a little incredulous by that, but I was concerned about our poll watcher inside. So, I didn't bother with it.

MR. BLACKWOOD: Was she there the whole time that you were there?

MR. HILL: She was.

MR. BLACKWOOD: At this time, Mr. Chairman, I'd like to switch to Mr. Bull.

CHAIRPERSON REYNOLDS: Please proceed.

MR. BLACKWOOD: Again, Mr. Bull, roughly the same questions. But if you could, tell us your name and profession, please.

MR. BULL: Thank you. My name is Bartle Bull. I'm a retired lawyer. I'm a former publisher of the Village Voice in New York. I've written for all five New York newspapers, and for many magazines. And I have six books throughout now. So, at the present time, I'm a full time writer, but a former

lawyer.

MR. BLACKWOOD: Could you detail for the Commission your experience in Civil Rights matters and politics?

MR. BULL: Yes, sir. Briefly, I've done it all my life as a Democrat. In 1956, I was a freshman at Harvard College, where I coordinated Students for Adlai Stevenson. Then in -- in 1970 -- 1968, I was Robert Kennedy's New York State Campaign Manager when he ran for president of the country, the following year or two.

In the early `70s, I went down to Mississippi, and worked in the campaign to elect Charles Evers as Governor of Mississippi. I ran security and poll watching in his home county of Fayette, in towns like Red Lick, Mississippi and Midnight, Mississippi, where I saw nooses hung over the branches of trees.

In 1972, I was chairman in New York State, Democrats for Governor Shriver. In 1976, I was Jimmy Carter's New York State campaign manager. In 1980, I was chairman of New York Democrats for Edward Kennedy when he ran for President, and I did the same thing in campaigns for Mario Cuomo, Hugh Carey. I also worked for Ramsey Clark when he ran for the Senate, and I've

worked in campaigns in New Hampshire, Massachusetts, New York, South Carolina, where I worked against Strom Thurmond, also in Florida and in Mississippi.

So, I've done this all my life, always unpaid as a volunteer, and often organizing poll watchers.

MR. BLACKWOOD: Now, you're in Philadelphia on Election Day 2008. Why are you there?

MR. BULL: Well, I had been serving in New York State, my second Republican candidate, as Chairman of Democrats for McCain in New York State. I knew we were going to lose New York. I thought perhaps I could help in Philadelphia. So, I took the train down there at 5:00 in the morning, and spent a day there, troubleshooting on Election Day for the McCain Campaign.

MR. BLACKWOOD: And did there come a time that you went to the Fairmount Street polling place?

MR. BULL: Yes. I was in a car, driven by a young volunteer, with another volunteer from New York. And we were receiving cell phone messages, saying that in many, many polling places, there was intimidation. Not so much of voters, Mr. Melendez, but intimidation of poll watchers. A very important point, sir, if I may say.

And that was what was going on. Our poll watchers were driven out of the polls in five or six places I went to. And while we were examining those situations, we had a call on the radio -- on the cell phone, excuse me, saying that on -- on -- at Fairmount Street, there were two Black Panthers intimidating voters and poll watchers, as you just heard.

So, we drove there, and there indeed we saw the two Black Panthers, blocking the door to a polling place, one of them armed with a weapon. I may say in my many years as a Civil Rights lawyer -- I didn't mention that. You asked me that question, I'm sorry. I also worked for a group called the Lawyer's Committee for Civil Rights Under Law in Mississippi.

In 1966, I took my summer vacation as a lawyer; went down to Hattiesburg and other towns in Mississippi, and worked as a Civil Rights lawyer there. And even there, I never saw armed people blocking the doors to a polling place.

MR. BLACKWOOD: When you arrived at the Fairmount Street location, what did -- what did you actually see?

MR. BULL: Well, these two gentlemen I believe were there already. They were a bit off to one side from the entrance. There were two Black

Panthers, one of them was armed, standing very close to each other, directly blocking the door to the polling places.

One of them was waving a baton like that, slapping against his hand, pointing at people. And several people -- I was more or less at the end of the driveway, and several people began to walk up the driveways, saw these guys, and then went back and didn't go on to vote.

MR. BLACKWOOD: All right. Did the individuals that you saw turn around, those were people that you believed were coming to vote?

MR. BULL: Oh, yes, yes. That's the only reason you walk along that long block on the pavement, and then go in the long driveway. And several walked in, saw this at the door, and walked back out the drive.

MR. BLACKWOOD: Can you identify the individuals, the Black Panthers that were there that day?

MR. BULL: I will try to. Yes, sir. The second row, the third gentleman in, he was the one with the baton, with the weapon, the club in his hand.

MR. BLACKWOOD: Did either of those members make any comments while you were there?

MR. BULL: Yes, sir. After the police arrived, and did not take the club away, by the way, and they asked the gentleman with the club to get away from the polling place. And as he walked by me, I was standing by a car at the end of the driveway with my two companions, he pointed the billy club at me and said, "Now you will see what it means to be ruled by the black man, Cracker." And the reason I recall that very well is because it struck me as ironic that having worked as a Civil Rights lawyer and being threatened in Mississippi, I was now being threatened in this way here, and being called a cracker, frankly.

MR. BLACKWOOD: About how long were you at the polling place?

MR. BULL: About 45 minutes, maybe.

MR. BLACKWOOD: Okay, and the whole time that you were there, did you see either of the Panther members separate from each other?

MR. BULL: No. Only when they left. Only on leaving.

MR. BLACKWOOD: Up to that point in time, they stayed in front of the polling place?

MR. BULL: They were shoulder to shoulder. They were -- they were clearly -- they had this paramilitary presentation.

MR. BLACKWOOD: Other than the -- you mentioned that -- you indicated that you saw some voters turn away. Was that a single incident, or did you see it multiple times?

MR. BULL: No more than two or three times, I would say.

MR. BLACKWOOD: Okay. Did you talk to the Republican poll watchers inside the polling place?

MR. BULL: No, no. I didn't have access to the polling place.

MR. BLACKWOOD: Again, the same question that I've asked the others: did you see any Skinheads or Aryans or Nazi members during the time at the polling place?

MR. BULL: Absolutely not, and no reference to any such thing.

MR. BLACKWOOD: And did you hear any of the Panther members make any reference to Nazis or Aryan Nation folks?

MR. BULL: Absolutely not.

MR. BLACKWOOD: Did you talk to anybody from the Department of Justice?

MR. BULL: Not on -- not on that occasion. Not that day. But some -- some weeks later, I received a call in New York from the Department of

Justice, saying would I be prepared to sign an affidavit to what I have just told you, and I said yes, provided you guys don't drop the lawsuit. And they said, "Well, we should warn you that this is a dangerous group; they injured several New York policemen at a rally in New York." And I said, "I don't care about that. I will do this as long as you continue with the lawsuit."

That's why I was so shocked when it was dropped, frankly.

MR. BLACKWOOD: Mr. Chairman, I am through my examination of the witnesses. I would point out that Congressman Frank Wolf is here, and has some urgency about --

CONGRESSMAN WOLF: I'm okay.

COMMISSIONER YAKI: I think as a personal privilege, we should reserve questioning until Congressman Wolf --

CHAIRPERSON REYNOLDS: Yes. Okay, we are going to change our proceedings a bit. The original plan called for us to question the witnesses at this point. Since Congressman Wolf is here, we will at this point listen to the testimony that Congressman Wolf has to -- has to put in for the record.

So, Gentlemen, please stick around.

Congressman Wolf, would you please move to the table?

VII. TESTIMONY OF CONGRESSMAN FRANK WOLF

CHAIRPERSON REYNOLDS: Okay, we are honored to have with us today Representative Frank Wolf of Virginia. Thank you for carving out time in your busy schedule to join us. Congressman Wolf, please raise your right hand. Do you swear and affirm that the information you're about to provide is true and accurate to the best of your knowledge and belief?

CONGRESSMAN WOLF: I do.

CHAIRPERSON REYNOLDS: Very good. You may proceed, Congressman Wolf.

CONGRESSMAN WOLF: Thank you very much. Mr. Chairman and Members of the Commission, I want to personally thank you for the opportunity to testify today.

I've several documents I'd like to submit for the Commission's record as part of my testimony. As a former chairman and current ranking member on the House Commerce Justice Science Appropriations Subcommittee, with jurisdiction over the US Commission on Civil Rights, I'm very familiar with the Commission's essential role in ensuring the integrity of our nation's civil and voting rights laws.

As you know, the Commission has an

important, special statutory responsibility to investigate voting rights deprivation, and make appraisals of federal policies to enforce federal voting rights laws.

Congress instilled the independent overnight responsibility on the Commission in statute, where it said, "All federal agencies shall fully cooperate with the Commission to the end that it may effectively carry out its functions and duties." And I remind the Attorney General that this includes the Commission's authority to subpoena witnesses.

I appreciate your efforts to investigate this unexplained dismissal of the US versus New Black Panther Party Case, which is serious and dangerous consequences for future voter intimidation enforcement. I am a strong supporter of the Voting Rights Act, which is why I was so deeply troubled by Justice's questionable dismissal of such an important voter intimidation case in Philadelphia, where I grew up and my father was a Philadelphia policeman.

My commitment to voting rights is unquestioned. In 1981, I was the only member, Republican or Democrat, of the Virginia Delegation in the House of Representatives to vote for the Voting Rights Act, and was harshly criticized then by the

editorial page of the Richmond Times Dispatch, the State's leading newspaper.

I was again criticized in a number of editorials in 2006, by another newspaper in my district, when I supported the Act's reauthorization. From beginning, I have asked the question: Why did the Department dismiss this serious case?

Looking at the facts, if this is not a clear case of voter intimidation, I do not know what is. The public can view a video of the incident, as well as other examples of the party's intimidation, and a clip from National Geographic Channel documentary, entitled, "Coming To a Polling Place Near You." Posted on the website at www.ElectionJournal.org.

My concerns have only been compounded over the last year in light of the Department's obstruction of oversight investigations by the Congress and this Commission. The action of the Attorney General to allow the Department's obstruction of this Commission's investigation are puzzling.

I believe he is undermining in some respects the federal oversight of the Justice Department. For nearly a year, I've been urging the Department to release all the documents surrounding

this case, and to make a genuine attempt to answer the questions asked by members of Congress and by this Commission.

The requests have been rebuffed at each turn. Earlier this year, I introduced a resolution of inquiry that would've compelled the Attorney General to release all requested documents to the Congress. It was defeated in a party line vote in the House Judiciary Committee.

I've urged the Department's Inspector General, Glenn Fine, on multiple occasions, to open an investigation into whether improper political influence contributed to dismissal of this case. Unfortunately, Mr. Fine continues to maintain that ignorance, which I believe is an unacceptable abdication of his responsibility because the IG's office is supposed to look at these things in the Justice Department, and we fully fund the IG to give them the resources to do so.

Mr. Fine's lack of action, I believe, deserves the scrutiny of the Council of Inspector Generals on Integrity Efficiency, called the CIGIE, and I'll be requesting that the Council look into its failure with regard to this matter.

What should be a bipartisan support for

robust voting rights enforcement has become I think a bad example of the types of partisan obstruction that undermine our nation's Civil Rights laws. While some are the Washington Times, and it's been somewhat troubling some papers have covered this, and others have just almost ignored it.

The Philadelphia Inquirer, the last remaining paper, major paper, in the City of Philadelphia -- I used to deliver the Philadelphia Bulletin, but in Philadelphia, nearly everyone reads the Inquirer. The Inquirer has almost pretended that this has not even -- even -- even taken -- taken place.

Last summer, the Washington Times reported that the Department's voter intimidation case against the New Black Panther Party was dismissed over the objections of career attorneys. And again, all this has been initiated by career people.

I was a -- used to work for the Department of Interior before I served in Congress, but all of the activity has all been with regard to the decisions on moving ahead have been made by career people. And this was dismissed over the objections of career attorneys on the trial team, as well as the Chief of the Division, Appellant Division.

According to the Appellant Division, memos first disclosed in the Times articles, Appellant Chief, Diana K. Flynn, said, "The appropriate action was to pursue the default judgment." And that justice had made, "A reasonable argument in favor of default related against all defendants."

Flynn's opinion was shared by a second Appellant Division official, Marie K. McElderry, who stated, "The Government's predominant interest in preventing intimidation, threats and coercion against voters or persons urging or aiding persons to vote or to attempt to vote."

Given these troubling disclosures, I have repeatedly called on the Attorney General to refile the civil suit, and to allow a ruling from the judge based on the merits of the case. Not political expediency, but solely on the merits of the case.

The career trial team should be allowed to bring the case again, per the guidance I obtained from the Congressional Research Services, American Law Division, in its July 30 memo, "To allow our nation's justice system to work as it was intended: impartially, and without bias."

Sources within the Department stated that the Associate Attorney General, Thomas Perrelli, a

political appointee, in conjunction with the Acting Assistant Attorney General for Civil Rights, Ms. Loretta King and her deputy, Mr. Steven Rosenbaum, overruled the career attorneys in the voting rights section.

Earlier this week, the Department finally acknowledged that the Attorney General was made aware on multiple occasions of the steps being taken to dismiss this case. Why would the Department's political leadership overrule the unanimous opinion of the career attorneys on the trial team, and the Appellate Division?

Why would the Department's political leadership not seek a default judgment to secure the maximum enforcement of the Voting Rights Act?

The Justice Department is responsible for the vigorous enforcement of Civil Rights statutes. It is my understanding that the career attorneys, who originally brought this case, continued to stand by its -- by its merit.

These are again career people who have dedicated their life and their career, and had been very courageous to be pushing this ahead, and knowing that their careers could be impacted by the political people who run the Department.

The politicization of the Justice Department against career employees is absolutely wrong, and both the Congress and the Commission have to get to the bottom of this.

I want to leave you with one last thought. It is my understanding that the Career Voting Section Chief, Chris Coates, offered a vigorous defense of the New Black Panther Party Case at his going away luncheon earlier this year. According to one report, "At the end of the luncheon in his honor, the attendees were startled when Coates pulled out a binder and began reciting a written defense of his decision to file the New Black Panther case."

Coates reportedly stated, "I did my best to enforce all of our voting statutes for all Americans, and I leave here with my soul rested that I did the right thing to the best of my ability."

Although the Attorney General will not allow the career attorneys to testify before this Commission, I believe this anecdote helps to convey the ardent opposition of the Department's career attorneys to the dismissal of this voting rights case.

I call again on the Attorney General to comply with the Commission's subpoena, and to allow the career attorneys to testify. This Commission and

the American people should be concerned that the Justice Department and the Attorney General would only agree to allow Tom Perez, a political appointee, who really wasn't even employed at the Department at the time of the dismissal to testify.

I believe and I believe the American people would agree that it's imperative that we protect the right of every American to vote a sacrosanct and inalienable right of any democracy.

The career attorneys in the Appellate Division within the Department sought to demonstrate the federal government's commitment to protecting this right by vigorously prosecuting any individual or group who seeks to undermine this right. The American people deserve the kind of impartial leadership at the Justice Department that will allow this case to go forward again, not to counter political leadership that has tilted the scales of justice.

And again, I want to thank you for having the hearing, and thank you for giving me the opportunity to -- to testify.

CHAIRPERSON REYNOLDS: Thank you, Congressman Wolf. Rest assured that the information that you provided today will be entered into the record. At this time, Mr. Blackwood, do you have any

questions?

MR. BLACKWOOD: No, I do not.

CHAIRPERSON REYNOLDS: Okay, Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: And are we now questioning just Congressman Wolf?

CHAIRPERSON REYNOLDS: That is correct.

VICE CHAIR THERNSTROM: Okay, Congressman Wolf, welcome. And I should mention that I am one of your constituents. I live in McLean --

CONGRESSMAN WOLF: Yes, ma'am.

VICE CHAIR THERNSTROM: -- Virginia. A couple of questions. First, you described the DOJ dismissal as possibly having serious and dangerous consequences, and I wondered what specific consequences you had in mind? Do you think that the New Black Panther Party intimidation is a nationwide alarming phenomenon, or doesn't it matter if it's nationwide? Is it sufficient that it was at this one polling place on this specific day?

CONGRESSMAN WOLF: I think it's sufficient that it took place there, but to have bullies like this intimidating people? If these were three white men standing outside a polling booth in Clinton, Mississippi, and I went to school for a year in

Mississippi back in the mid-`50s, and saw the intimidation and the segregation and what went on. And to have three white men standing outside a polling booth to intimidate African-Americans who were coming in would be totally unacceptable.

And Bartle Bull, I think makes the case better than anyone. No one can question his -- his record. And the fact that it took place in my former home town, to see that people could be intimidated by people standing there and do this? No one should live in fear in this nation with regard to be intimidating for anything, but particularly for the right to vote.

Thirdly, we see some of these fringe groups moving around, and allow them to crack down and say they're going to keep people from doing it is a wrong thing. And I just thought it was almost a no-brainer for the Justice Department. And again, I have great respect for career people.

A large number of federal employees, as you know if you live in my district, live in my -- my congressional district. I have been a champion for -- I used to be a federal employee. I still am a federal employee. My wife was a federal employee when she put me through law school.

The -- to see that federal employees can

be intimidated, can sort of be kind of cut off and blocked? I used to work for a cabinet secretary, Roger C. B. Morton, and the political involvement of pushing back on career people I think can be very, very dangerous.

So, I think it's really both, both of the questions that you asked.

VICE CHAIR THERNSTROM: Well, let -- let me just pick up on something you said. I wondered -- in the first place, we're not in Mississippi in the 1950's. I know that history extremely well, and by the way, you weren't here for my opening statement, but I have written two -- two books on the Voting Rights Act, and Section 11(b) is the most minor provision in the entire Act.

It has -- there have been three Civil Rights -- civil lawsuits, as you know, before this one, based on it. But the -- and I fully support robust voting rights enforcement, obviously, and I am a Republican appointee, by the way, to the Commission.

But surely, the jury is out as to whether the DOJ has in fact been delinquent in this respect, since we don't have the inside story. You don't have it. And in fact, Chris Coates did not have the inside story. I know Chris Adams very well, and he doesn't

know why the decision was made, which was the question before -- that we were supposed to be addressing at this Commission.

So, you know, I have no idea what the reasoning of DOJ was, and I don't think that -- I don't think that any of us do, and I don't think we're going to get the answer to that question. And finally, let me say that I'm not wild about the idea of career attorneys being hauled before hearings like this. I do think that -- and I base this on some experience that -- that if you're trying to do your job in an administration as -- as the career attorneys in the Civil Rights Division, of the voting rights section of the Civil Rights Division are trying to do their job, that to have to constantly think, "If I have the following conversation, or make the following decision, or write the following email, it may become public information." I don't think people can do their job properly.

And so, I -- with all due respect, I would not have liked to have seen them forced to appear here. But let's go back to my first question, how do you define voter intimidation under 11(b)? As I said, there have been three cases prior -- prior to this one. Only one before the Bush -- before the Bush

Administration -- two under the Bush Administration.

CONGRESSMAN WOLF: I don't know that I would define it, and I think that -- excuse me. I don't know that I would define it, and I think the career people there have -- had defined it, and I think what I saw, and after talking to people that were there, and after talking to Bartle Bull, I think that that is. But the point is, the case should've gone forward, and it didn't go forward.

VICE CHAIR THERNSTROM: But we don't know that without knowing more.

CONGRESSMAN WOLF: But you don't get any cooperation from the Justice Department to tell you why. You don't know who they met with. You don't know why the decision was --

VICE CHAIR THERNSTROM: That's why we don't know.

CHAIRPERSON REYNOLDS: Okay, at this point, Commissioner Kirsanow, do you have any questions?

COMMISSIONER KIRSANOW: I do. Thank you. Welcome, Congressman Wolf. Thank you for appearing today. Following up on something Commissioner Thernstrom said, she indicated that we don't know the reason why Justice made the decision to dismiss this

case.

Given all the extent evidence that we have; you were not here for the video that we saw. We have adduced evidence through the Justice Department, supplying us with certain documentation, and obviously you've received a lot of documentation. Given what we do know, can you articulate a plausible reason why Justice would dismiss this case under 11(b)?

CONGRESSMAN WOLF: I think that's something you'll have to look at. I have talked to career people over there, and I do have personal views on it, but I think -- I think they could better answer that question.

COMMISSIONER KIRSANOW: Okay. Second, at the Civil Rights Commission, we've got finite resources. But as a member of Congress, do you think -- do you have an opinion as to whether or not we are wasting our resources in investigating the dismissal of this particular matter today?

CONGRESSMAN WOLF: No, I do not. I don't think -- in fact, if you didn't do this, I think you'd be neglecting your -- your responsibility. And I think maybe the whole credibility of the Commission would be gone.

COMMISSIONER KIRSANOW: And would your

answer be --

CONGRESSMAN WOLF: And if you lived in that neighborhood, and you were there, and they were standing in front of you and intimidating you from voting, you would feel the same way.

COMMISSIONER KIRSANOW: Yes. And is your answer any different because this is a single incident, as opposed to there being maybe a couple of incidents or ten incidents?

CONGRESSMAN WOLF: Any incident.

COMMISSIONER KIRSANOW: Okay. How many times have you been in touch with staff or members of the Department of Justice in order to obtain information related to this particular matter?

CONGRESSMAN WOLF: A number of times I've spoken to people. Many times.

COMMISSIONER KIRSANOW: And are you satisfied with the adequacy of the response of DOJ?

CONGRESSMAN WOLF: No.

COMMISSIONER KIRSANOW: What have they done or not done to satisfy your --

CONGRESSMAN WOLF: They almost never answer a letter.

COMMISSIONER KIRSANOW: What would you say to individuals who would say that the Commission's

inquiry here today, or your inquiry, is motivated by partisan reasons?

CONGRESSMAN WOLF: I think that's ridiculous.

COMMISSIONER KIRSANOW: Would your actions related to this particular matter be at all different if in fact this was -- this dismissal was done under a different administration?

CONGRESSMAN WOLF: No, it wouldn't, and I see the line that you're going on. I have been in Congress for 30 years. My best friend in Congress is a Democratic member of Congress, Congressman Tony Hall, who has actually contributed to my campaign.

If you go call Congressman Hoyer and ask him if I'm a partisan person, he'll tell you that I'm not. I was the author of the Iraq study group, which questioned the whole operation of the Iraq War when the Congress had failed to have aggressive oversight.

I have the most bipartisan bill in Congress with regard to dealing with the debt and the deficit, Jim Cooper and I. So, I approach these things based on what I believe is an important issue with regard to is it right or wrong, and I have not been reluctant to speak out and criticize Republican administrations, as well as Democrat administrations.

So, the answer to your question is no.

COMMISSIONER KIRSANOW: Do you believe that the incident that we are reviewing here today, and I think the scope of this inquiry is really into the adequacy of your response, although obviously we've got to get to the underlying predicate. But do you think that the incident that is the reason why we're here today is any less serious because it occurred in a black neighborhood, or that the alleged intimidators are black?

CONGRESSMAN WOLF: I think it's serious no matter what the case may be. For anyone to intimidate people from voting would be serious, no matter what their race were.

COMMISSIONER KIRSANOW: And does that also include party? In other words, would it be less serious --

CONGRESSMAN WOLF: Yes, absolutely.

COMMISSIONER KIRSANOW: -- if this --

CONGRESSMAN WOLF: No, Republican or Democrat.

COMMISSIONER KIRSANOW: Okay. Thank you, Mr. Chairman.

CHAIRPERSON REYNOLDS: Thank you. Commission Taylor?

COMMISSIONER TAYLOR: I'm going to pass for the moment, Mr. Chairman.

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Thank you very much, Mr. Chair. Thank you very much for appearing, Congressman Wolf. On a personal note, I used to be a senior aide to a young congresswoman named Nancy Pelosi, and we had very good relations with your office on appropriations, and you and your staff was always very accommodating. So thank you.

CONGRESSMAN WOLF: And we still do.

COMMISSIONER YAKI: I know you do. And I also -- and I also used to be a constituent of yours when I used to live in Great Falls. In fact, when you were first elected in 1980, I think.

CONGRESSMAN WOLF: Correct, yes.

COMMISSIONER YAKI: So, the -- I wanted to ask a couple questions, and first I wanted to say that I do commend you for the bipartisan work that you have done on issues. One in particular was the -- your role in questioning the interrogation memos that -- regarding now Judge Bybee and John Yoo, and the fact that at that time you initiated a request for the Office of Professional Responsibility in Justice to take a look at that, if I recall correctly.

My question has to do with this. You've talked a lot about some of the different offices within DOJ, but OPR certainly has been -- perhaps I'm characterizing wrong, but perhaps in your opinion it has been a very good fact-finding and independent watchdog within Justice.

Is it -- isn't it -- why -- why is it that you are not satisfied that OPR has opened an investigation into this matter?

CONGRESSMAN WOLF: It's gone on for so long, and -- and other potential political reasons, but it's gone on for so long, and every time we send a letter over there, we almost get no response back. I think the appropriate place to look at this is really the Inspector General.

COMMISSIONER YAKI: In the -- in the case of the torture memos, why would -- why were you satisfied at OPR versus inspector general for its --

CONGRESSMAN WOLF: Well, we've gone on on this thing over and over. We've talked to Bartle Bull. We've also looked at other things. And I've also talked to career people over at the Department. Many times, I've talked to them off the record, and I think this is a fairly open and shut case that ought to be proceeding and moving ahead, and I -- I -- did

you just watch the film?

I don't think anybody here would want to go vote next November and have anyone standing outside of your polling place with that type of intimidation, and the obvious nature of that. We have the right to vote, the right to be able to take a decision, the right to kind of go down.

I mean I've seen as we travel around the world and see the intimidation of people in other areas; I just think it's just inappropriate. And the career people I think have made a pretty compelling case, and the Justice Department is moving ahead. And something happened, and we're not sure what happened for the political people to intercede and change that.

COMMISSIONER YAKI: Let me just get -- I'll get back to career people in just one second, but based on what you had said to Commissioner Kirsanow, I take it that if -- if you had been informed that cases equally egregious on the facts as this had been brought to the Justice Department in 2002 and 2004 and 2006, and had not been referred for 11(b) prosecution, you would be as concerned about that as you were about this case, correct?

CONGRESSMAN WOLF: I would hope so.

COMMISSIONER YAKI: I mean if someone was

-- if someone was standing at a voting booth with an -- with an open weapon, and asking only certain types of voters, "Why are you here? Are you really registered to vote?" That'd be the kind of thing that would probably upset you.

CONGRESSMAN WOLF: Well, I would -- I would hope so. I'm the co-chairman of the Tom Lantos Human Rights Caucus, which the speaker has set up. And whenever we see activity in places that whether it is -- whoever is involved in it, we hope we speak out. So, I would hope so.

COMMISSIONER YAKI: I agree, and that's certainly been your record in Congress. In fact, I also forgot how much work we did together in the China issue during the -- during the early `90s.

The last question I have -- I have for you has to do with the -- I know that you place a lot of faith in career, and I think that as a matter of practice in the federal government, we tend to look at career people as having a little more insulation, or expertise and professionalism in their job.

The question I have to ask though is this concerns a department within the -- within the Justice Department that the Office of Professional Responsibility cited as having extreme politicization

in the hiring and firing of folks. And I just want -- I just would like to, A, put that on the record, and B, ask you whether or not the fact that if any of the individuals involved were part of that, or had been referenced in that report, or in other citations with regard to the politicization, would that change your -- change your opinion about whether or not as career people, qua career people, their opinion is as sound as, say, someone who had been there 20 or 30 years?

CONGRESSMAN WOLF: Well, I think there's a rebuttable presumption, and the career people are -- are -- almost have been removed for whatever case -- case may be. My staff just gave me a note saying that Chris Coates was hired by the Clinton Administration.

COMMISSIONER YAKI: I understand.

CONGRESSMAN WOLF: But --

COMMISSIONER YAKI: But Chris Coates was also --

CONGRESSMAN WOLF: Let me answer your question. Back in I forget what year it was, the Congress brought up a proposal to -- to amend or to drastically change the Hatch Act. Since having been a federal employee, I was the only member that represented a large number of federal employees to vote against that because I remember during the Nixon

Administration there was a politicizing of the career.

At that time, I was working for a cabinet secretary, and I felt that the Hatch Act provided a protection for career people in the following way: that if someone could come by and say, "Well, we're having a political event and you got to donate," or, "We're going to be out flyering cars next week at the shopping centers, and we want you," the fact that the Hatch Act was there provided a protection for the federal employee where he could say, or she could say, "Well, that's against the law. I really can't do that."

So, I have always kind of leaned in with regard to protecting the career -- you see in other governments around the world the politicizing and manipulation. So, I think the career process has been very good, and I have always gone the extra mile, including voting in a way that probably many people thought I should not have of -- of not repealing the change in the Hatch Act as a way to protect --

COMMISSIONER YAKI: And I agree. No one is impugning your integrity. And I would just say --

CHAIRPERSON REYNOLDS: Commissioner Yaki, I just wanted to let you know you've run out of time.

COMMISSIONER YAKI: Just to finish really

quickly, I assume that the OPR report about the conduct of Mr. Schlozman in DOJ must've had some concern to you with regard to politicization of the Civil Rights Division, and I would just simply say that yes, I understand that Mr. Coates has been -- has been there for quite some time. There have been some allegations, whether they're true or not, that he was a subject of a memo by Mr. Schlozman saying that he's now part of our team, but those are the kinds of --

CONGRESSMAN WOLF: I don't know.

COMMISSIONER YAKI: I understand, but those are the kinds of things that -- that do concern me.

CHAIRPERSON REYNOLDS: Thank you, Commissioner Yaki.

CONGRESSMAN WOLF: Where do you live now?

COMMISSIONER YAKI: San Francisco.

CHAIRPERSON REYNOLDS: Mr. Melendez?

COMMISSIONER MELENDEZ: No further questions.

CHAIRPERSON REYNOLDS: Okay, Commissioner Heriot?

COMMISSIONER HERIOT: I have no questions.

CHAIRPERSON REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Thank you, Congressman Wolf. I would like to think, and I feel confident we would've been investigating this matter had it not been for your prior work, but your prior work has certainly been very helpful and drew a lot of attention to this issue. And I have two lines of questioning that I hope won't take very long, but there were some Commissioners in their opening statements, and one in their questions to you, suggested that since this was a single incident, it wasn't worth our examination.

You responded to Commissioner Kirsanow in saying that you certainly felt we would be derelict, and I'll go back to your words that it might undermine the credibility of the Commission if we didn't. Let me -- let me just tell you one other reason for my concern.

Would you agree with me that it sends a stronger signal, good or bad, depending on what the decision is, to dismiss a suit if you're on the verge of winning, than not filing charges?

CONGRESSMAN WOLF: I would because then that would just send a message. I -- I would. Sometimes when you respond -- when a -- when a teacher, when a third grade teacher goes to the

defense of the most defenseless in the class -- as a young boy, I was a stutterer. I still stutter now. When a -- when a teacher would come to the defense of the person having the most difficult time, that sends a message to the whole class. "You're not going to do that."

And I think by doing precisely what you said sends a message, and we're not going to allow voter intimidation anywhere, period.

COMMISSIONER GAZIANO: Right, and of course if you -- does it send a stronger signal to dismiss a claim that has received national attention, and that most reasonable people who've seen this YouTube that was repeated on Fox News, that it would send a wrong -- a larger negative symbol, than another case which perhaps should've been brought where the evidence is less clear?

CONGRESSMAN WOLF: I agree because if the third grade teacher allows the young stutterer to be harassed, and pushed around, and beaten up, then that sends a message to the rest of the class that you can do it to anybody. So, I think it absolutely does.

COMMISSIONER GAZIANO: Yes. And let me tell you one -- one final reason that I tried to articulate in my opening statement why I think this is

utterly -- by the way, we and you I think too, but certainly we in the scope of our investigation requested evidence on every single investigation the Justice Department has done under 11(b) because we want to compare that response.

I might agree with Commissioner Yaki and others that some of those prior responses are questionable. Some of them are inadequate, but I very much want all of that information. And as you know, as I think your experience reflects, we've been stonewalled, delayed, and -- and only last week, we had -- well, let me -- one of the new privileges that doesn't exist, and I used to work in the Department of Justice's Office of Legal Counsel, responding to congressional requests from the president's side.

This is, to me, the most flagrant. They said that they would have to deny us some material last January. "The Department is constrained by the need to protect against disclosures that otherwise would undermine its ability to carry out its mission."

The statute that Congress has conferred upon us requires every federal agency to comply fully with our requests. And so, last Friday, we finally got some dribbling out of documents, which I hope you also have. And among them, I'm going to ask this

panel of witnesses to maybe identify what their statement was. Because prior to last Friday, we got none of the witnesses statements.

For ten months, they deemed that either not relevant, or -- so, let me ask in their words. So, do you think that supplying you and other members of Congress, and supplying the Commission with the witnesses statements prior to last Friday would, "Undermine the ability of the Department to carry out its mission?"

CONGRESSMAN WOLF: No, I don't think it would undermine it.

COMMISSIONER GAZIANO: Okay. So, what we got last Friday, and this is our continuing problem, has redactions that seem to me ridiculous. I'm going to try to ask the witnesses who -- because the names of the witnesses are redacted.

I have declaration of redacted. Now comes defendant, redacted. Do you not think it's maybe relevant to our investigation to know which witness said which statement?

CONGRESSMAN WOLF: Sure. Of course.

COMMISSIONER GAZIANO: Please. I thank you for your effort to get the information for your own benefit, and to help the Commission get the

information so that we can come to these conclusions that Vice Chairman Thernstrom says that we don't have sufficient information.

I think we've got sufficient information to conclude that this case shouldn't have been dropped. We may or may not ever get sufficient information to conclude why, but I think it's incumbent upon the Department to explain why it dropped the suit.

I think we have sufficient evidence to know that it should not have been.

CHAIRPERSON REYNOLDS: Thank you, Commissioner Gaziano. Would you care to respond?

CONGRESSMAN WOLF: Oh, I would just tell the Commission I'm going to stay with this issue until it's resolved.

CHAIRPERSON REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: Congressman Wolf, my name is Ashley Taylor, and I'm actually a resident of the Commonwealth, not in your district. I live in Richmond. But thank you for coming, and I want to thank you for the manner in which you've gone about this process, the respectful tone, my sense of you working hard to ensure that it's not drawn into a

political fight; that you can discuss the issue in a way that actually advances the substantive issues I think that are important here.

I wanted you to know personally I have reserved judgment on this matter. I think it's important to try to keep an open mind, and to try to do nothing more at this point than try to draw out the facts and ask questions. I want you to comment in that regard on two things: one is the message that you mentioned before that either the lack of aggressive prosecution sends, or aggressive prosecution sends in a neighborhood.

I'd like you to comment on that in the context in my view of the longstanding refusal to value incidents in the black community on the same plane that incidents in the white community are valued. Also, I'd like you to comment on the lack of transparency that I sense, which I think causes a lot of people concern and makes it more difficult to trust decisions made by governmental entities when they refuse to answer questions, or hide behind privileges.

So, with that, I want to again thank you and ask you to comment on those two points.

CONGRESSMAN WOLF: Well, I think the transparency and the trust issue is important because

you saw the -- the Pew Foundation study that came out last -- I guess it was earlier this week or last week. Last week, excuse me. Seventy-eight percent of the people in the United States have lost confidence in their government, and I think accountability and transparency.

I'm the author of this bill with Congressman Cooper, a Democrat, to set up a bipartisan commission to deal with the economic situation of where we are, and we -- in our bill, we require that there be public hearings and transparency around the country to develop the confidence by the American people in whatever decision is -- is done. Very tough things are going to have to be done to deal with that.

So, I think the transparency, to build the confidence up, because the Pew Foundation -- and I saw one of the reports saying that the Pew -- the Pew Foundation did that poll four times because the first time they came back, they found the numbers were so startling that they didn't really believe it was possible, and they went back and they validated it three additional times.

Lastly, I think that the enforcement -- justice, justice. You know, I just think there's some things that have to be done, no matter where they take

you and whatever they do. And I think you have to restore the confidence. Obviously, somebody -- that was if you go back and look at the Richmond Times Dispatch editorial that criticized me in 1981.

I remember I was there, and some of my colleagues said, "What are you doing?" And they really took me to task. If you were an African-American that lived in the south during that period of time, and I always tried to put myself in the same position of how I would feel if I were an African-American and were driving down from Philadelphia to Ole Miss, and couldn't stop at a restaurant to have a burger, or stop -- or have young kids who have to go to the bathroom. How would I feel?

And that's why I voted for the Voting Rights Act. And so, I think there ought to be a transparency, and there ought to be an openness, and there ought to be -- fundamentally, everyone should have the confidence to the best of the ability to address their government. And -- and I think to have people standing in front of the polling booth doing that, and -- and it did strike me to come in from Philadelphia, I was born and raised in south Philadelphia.

I went to high school in John Bartram High

School. To see this taking place in the city that I have a warm sort of fuzzy feeling for because I was born there, a lot of my life experiences have been there, I just said, "This is not good." This is -- there's just some things you see, and you know they're not right. And I saw this, and I said, "This is not right."

COMMISSIONER TAYLOR: Thank you.

CHAIRPERSON REYNOLDS: Okay, thank you, Congressman Wolf. At this point, I would like to bring Mr. Hill, Bull and Mauro back to the table.

CONGRESSMAN WOLF: Am I dismissed?

CHAIRPERSON REYNOLDS: Yes. And on behalf of the Commission, thank you very much.

CONGRESSMAN WOLF: Thank you.

MR. BLACKWOOD: If I might, Mr. Commissioner, before we proceed with the questioning of these witnesses, just some formalities. One, I would like to move the documents that Congressman Wolf submitted formally into the record?

CHAIRPERSON REYNOLDS: Sure.

MR. BLACKWOOD: And secondly, before I ended my -- my questioning of Bartle Bull, I forgot to ask one question. Mr. Bull, did you bring with you a copy of your declaration that you gave to the

Department of Justice?

MR. BULL: My affidavit?

MR. BLACKWOOD: Yes.

MR. BULL: Yes, I have an affidavit here.

MR. BLACKWOOD: And I would like to move that into evidence as well.

MR. BULL: Yes. I'll leave it here.

COMMISSIONER GAZIANO: May I ask the general counsel did we receive Mr. Bull's affidavit from the Department?

MR. BLACKWOOD: The only document we received from the Department is heavily redacted. Mr. Bull has his full statement. The other witnesses do not have copies of their statements.

COMMISSIONER GAZIANO: Did we receive even, to your knowledge, a partially redacted --

MR. BLACKWOOD: Yes.

COMMISSIONER GAZIANO: -- version? Was his name blacked out?

MR. BLACKWOOD: Absolutely.

COMMISSIONER GAZIANO: Okay.

MR. BULL: What are they afraid of?

VICE CHAIR THERNSTROM: You.

CHAIRPERSON REYNOLDS: Anything else?

COMMISSIONER GAZIANO: No, I'm through.

Thank you. So, that was admitted into evidence?

VIII: QUESTIONING OF WITNESSES BY COMMISSIONERS

CHAIRPERSON REYNOLDS: Yes. Okay, at this point, we will continue. We were -- before we made our little detour, we were about to question the witnesses. Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: Thank you very much, Mr. Chairman. One opening comment here. I'm having a little trouble distinguishing a line of questioning that seems like an effort to establish the fact that the New Black Panther Party is exactly as they describe themselves, which is -- now, it's not a pretty picture.

Now, distinguishing that from the line of inquiry that informs -- and that line of inquiry informs of simply of what we already know. Distinguishing that from the questions that address the issue of clear intimidation. And neither line of questioning, it seems to me, really get to the matter of the internal DOJ decision to dismiss this lawsuit.

But I wondered on the matter of clear intimidation. I've already asked Congressman Wolf what he thought was the definition of intimidation under 11(b), and in fact there is no settled definition. But did you see -- you saw two women

arriving at the polling place, and saying they'll come back later. They were uncomfortable with what they saw.

But otherwise, did you see anybody at the polling place who obviously intended to vote, and didn't end up voting because of the presence of the New Black Panther Party members?

MR. HILL: It was two women and a gentleman.

VICE CHAIR THERNSTROM: Two women and a gentleman? These were the people in the car that you mentioned?

MR. HILL: No. They stopped at the corner. They came walking down Fairmount.

VICE CHAIR THERNSTROM: Okay, okay. I misunderstood.

MR. HILL: They stopped right at the corner of the driveway, circular drive, where I was standing on the phone, and they said, "What's going on?" Truthfully, I didn't really have a good answer for them.

VICE CHAIR THERNSTROM: And they said they'd come back later, which they may or may not have come?

MR. HILL: They may or may not have, yes.

VICE CHAIR THERNSTROM: Yes, I understand.

MR. HILL: But at that exact moment in time, those people were not going near that doorway, and ma'am, I'm not as well versed are you are in these Civil Rights issues, but they were intimidated.

VICE CHAIR THERNSTROM: They were intimidated, okay. Do we have -- I mean I take seriously when anybody is intimidated, and I'm not dismissing that experience of theirs. But yet, we don't seem to have any evidence other than these three people. Three people are three people, I agree with you, but nevertheless, it seems to me the case of the New Black Panther Party actually blocking people from voting would be stronger if there were more than three people that we're talking about here.

MR. HILL: Indeed that's true, but I proudly wore the uniform of the United States Army Infantry, and it wasn't so that anybody could be stopped. One person is way too many, and 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, but they did stop those three people from voting at that second.

Whether or not they voted later, none of us can tell because I don't have their names. We

can't check the rolls. But at that exact moment when those three people walked up, I was disgusted that those guys were standing there, and they weren't able to access the polling place.

MR. BULL: May I respond too, ma'am?

VICE CHAIR THERNSTROM: Yes, sure.

MR. BULL: Thank you. I don't know if the individuals I saw were the same ones that he mentioned. I was standing by our parked car near the end of the driveway, and I only saw again I would say three people, but it doesn't sound to me it was exactly the same one.

It was an elderly couple who started walking down the drive, and then they just thought -- I don't know what they thought, but they left. And then one individual later. But I want to say most of us are lawyers at this table, and we know almost every single system of justice, from the Magna Carta to Brown versus Board of Education, comes down to one incident, and one individual. Every time.

These aren't mass trials of 100 incidents.

VICE CHAIR THERNSTROM: Well, not --

MR. BULL: If you study the history of justice, it comes down to normally one individual and one case.

VICE CHAIR THERNSTROM: Not really. Well, wait a minute. I mean Brown versus Board, we're talking about --

MR. BULL: No, but there's a point I'm making. The -- the nature of our system lends itself to an individual person being involved in a proceeding.

VICE CHAIR THERNSTROM: Yes, I know, but the whole Voting Rights Act was, for instance, built on years and years --

MR. BULL: Of course.

VICE CHAIR THERNSTROM: -- of experience and testimony and frustration on the part of the Justice Department --

MR. BULL: Absolutely right.

VICE CHAIR THERNSTROM: -- and so forth. And this is really a little different. Look, I mean I guess in part I ask this, because I've got a rather -- okay, let me just finish this sentence. I've got a rather cynical view of elections that elections are messy. They're never – across the country in various iterations. There are voting problems.

We can't make them perfect. We've got three people here who seem to have been intimidated by guys. I don't like the way they were standing around

there. I don't like the way they look, and I don't like their voice, but -- and by the way, I would not have been opposed to a briefing on this subject. My -- my opposition in my opening statement was to having made this a statutory report.

CHAIRPERSON REYNOLDS: Okay. At this point, I'll turn to Commissioner Kirsanow.

COMMISSIONER KIRSANOW: Thank you, Mr. Chairman. This is to each one of you. You each gave statements to the Department of Justice, correct?

MR. MAURO: Yes.

MR. HILL: Yes, sir.

MR. BULL: Yes.

COMMISSIONER KIRSANOW: When did you give those statements to the Department of Justice, if you recall?

MR. MAURO: I can only tell you what it is in relation to the time the complaint was filed. So, it was probably a few months, two to three months, prior to that. I just don't recall when the complaint was filed. I think it's the Eastern District in Philadelphia.

COMMISSIONER KIRSANOW: Okay. Mr. Hill, do you recall?

MR. HILL: Would've been early spring

2009. I gave the formal statement. Then they brought it back to me and had me sign it.

COMMISSIONER KIRSANOW: And that was before the complaint was filed, to your knowledge?

MR. HILL: To the best of my knowledge, yes.

COMMISSIONER KIRSANOW: Mr. Bull, do you recall when you --

MR. BULL: I think it was January.

COMMISSIONER KIRSANOW: January of 2009?

MR. BULL: I believe so. Yes, sir.

COMMISSIONER KIRSANOW: Okay. Now, as you're all aware, Department of Justice decided to dismiss this effort, a default having been entered already, and that dismissal was in, Mr. General Counsel, May of 2009?

MR. BLACKWOOD: Yes.

COMMISSIONER KIRSANOW: The dismissal. At any time in or about May of 2009, did you give any further statements to the Department of Justice?

MR. MAURO: I did not, no.

MR. BULL: No, sir.

COMMISSIONER KIRSANOW: Did Department of Justice follow up with you in any regard prior to the dismissal of this particular lawsuit?

MR. MAURO: I have no contacts.

MR. HILL: They called me on a couple of different occasions to clarify comments in my -- my statement, and also because there's another clip that we didn't see, where I was actually interviewed onsite, and they wanted to clarify something.

COMMISSIONER KIRSANOW: Do you recall approximately when that was?

MR. HILL: I was in short sleeves outside. I met them at a coffee shop. So, it wasn't cold. So, it would've had to have been late March, early April, I guess.

COMMISSIONER KIRSANOW: Mr. Bull, do you know?

MR. BULL: I don't think I talked to them again after I signed my affidavit. I don't think so.

COMMISSIONER KIRSANOW: Were any of you advised by the Department of Justice of their intent to dismiss this lawsuit?

MR. BULL: No. Oh, no.

MR. MAURO: No.

MR. HILL: Absolutely not.

COMMISSIONER KIRSANOW: All right. I think Mr. Mauro -- strike that. Mr. Bull, you testified, I believe, that on this -- on that Election

Day in 2008, you'd had a report of several poll watchers being driven from the polls?

MR. BULL: Yes, I could give you the addresses of polling places. I took notes on filing cards at each polling place. One was in West Philadelphia, 5501 Market Street, Community Center. We had trouble here earlier. Our poll watcher left intimidated. I wrote that down in quotes. Another one in West Philadelphia, 56th and Christian Street, a woman left hysterically after being intimidated.

We had these going on all over these neighborhoods.

COMMISSIONER KIRSANOW: Do you have any more detail to that? I mean how were they intimidated and by whom?

MR. BULL: I don't know because I wasn't there at the time. We would get a call, saying, "There's trouble here. Will you go there?" I'd go there and try to collect the evidence, see if we could help, and they'd say that the poll watcher left already. You know, they'd been driven out. And so, I couldn't get their statement.

COMMISSIONER KIRSANOW: Okay, Mr. Bull, did you get involved in poll watching because you thought it was permissible to allow one or two people

to be intimidated, but only if there were more than one or two was it time for Justice Department to step in and --

MR. BULL: Well, I didn't get involved for either A or B on your question. I got involved in this, as I have been, in perhaps 20 Democratic campaigns because I think that we should make this as civil and Democratic society as possible. I'm not getting involved in anticipation of the Department of Justice doing something.

COMMISSIONER KIRSANOW: Mr. Hill, you were about to say something.

MR. HILL: I'd like to reiterate Mr. Bull's comment. We went to at least half a dozen polling places where poll watchers had been expelled from the building.

MR. BULL: Yes.

MR. HILL: And I personally got both the Obama and the McCain poll watchers back into three polling places by just not refusing to leave. I had the two attorneys with me, who gave me legal background on things, and then my Irish stubbornness just kept me there until I got those guys back in the building.

This is more to me than just, you know,

two guys standing outside a polling place. This is the fundamental right of the United States, and as I said in my statement about serving in the Army, everybody should get to participate. And it just drives me nuts that Department of Justice doesn't take this as seriously as I think they should.

MR. BULL: Absolutely.

COMMISSIONER KIRSANOW: And this is to maybe Mr. Mauro, could you please -- just a specific technical question. Could you please describe the duties of an elections observer poll watcher? Is it -- more specifically, in your experience, do poll watchers, regardless of for which party they're working, do they stand outside of an election or a polling place and simply stand there? Or, how do they normally comport themselves?

MR. MAURO: The role is to be, as my role was, to be an observer, which is to observe. What is going on? What am I seeing? What am I hearing? Is anyone -- I can also receive a complaint that someone has been denied access to voting or have a question about where they should vote.

That's what the role is, and if there is some kind of impropriety, or some kind of inappropriate conduct, some kind of electioneering

that's going on that violates some federal statute, it's my obligation as an observer to call it into what I characterized earlier as headquarters, and say, "Hey, there's an issue here. There's a problem. We may need to take action here."

And action meaning do we need to have further investigation, do we need to start the process of moving for an injunction? That is what the process is. It's really on those legal procedures.

COMMISSIONER KIRSANOW: Thank you, Mr. Chairman.

CHAIRPERSON REYNOLDS: Thank you. Commissioner Taylor?

COMMISSIONER TAYLOR: Mr. Hill, you mentioned the possible intimidation of a poll watcher.

MR. HILL: It wasn't possible intimidation, Mr. Commissioner.

COMMISSIONER TAYLOR: Well, that's what I'd like you to expand upon because I have -- I have served as counsel in a number of statewide elections, and I appreciate the importance of having poll watchers from both parties at every poll.

MR. HILL: Right.

COMMISSIONER TAYLOR: To ensure a level and balanced playing field.

MR. HILL: Right on.

COMMISSIONER TAYLOR: Two advocates aggressively arguing their point; you tend to get the right result.

MR. HILL: Right.

COMMISSIONER TAYLOR: So, I want to hear more about the poll watcher in particular at this precinct that you observed, what you observed, and what you reported about that aspect of this incident to the Department of Justice.

MR. HILL: Initially, they said that the Black Panthers -- I was told on the phone that the Black Panthers had threatened him personally. They said they were standing outside. They didn't mention at the initial phone call any voter intimidation. It was just that they had threatened the poll watcher.

So, I had -- that's why I headed straight into the building, and didn't waste any time in the parking lot with him. When I found him, he wasn't quite cowering, but he was definitely shook up.

COMMISSIONER TAYLOR: How old was this poll watcher?

MR. HILL: I would say mid-`50s.

COMMISSIONER TAYLOR: Was he African-American?

MR. HILL: He was.

COMMISSIONER TAYLOR: He was the Republican poll watcher?

MR. HILL: He was. And he told me that he was called a race traitor by Mr. Shabazz, and was told he better not walk outside into the parking lot while they were there. And I said, "Well, I'm going back out into the parking lot." I mean that got my Irish up -- you know, like I said, that's not what this is supposed to be about.

And he said, "Are you going to call the police?" I said, "Yes." When I got outside, I called the police. I dialed 911. They said, "We've already received three phone calls. The police are on the way."

COMMISSIONER TAYLOR: Did you report this to the Department of Justice?

MR. HILL: I did. I did.

COMMISSIONER TAYLOR: Was this part of the affidavit you submitted?

MR. HILL: I don't --

COMMISSIONER TAYLOR: This aspect of the incident, specifically with respect to the poll watcher?

MR. HILL: I -- I thought that I mentioned

that, but with the redacted part in there, I'm not certain that it's actually in that statement.

COMMISSIONER TAYLOR: Okay. As part of your organizing efforts, did you all assign poll watchers? In a lot of these statewide elections, you'll have a master list, and you'll say, "Poll watcher X, you go here."

MR. HILL: Right.

COMMISSIONER TAYLOR: Did you all keep a list of that nature so we could perhaps find this poll watcher?

MR. HILL: I do not have a copy of that, but I know who does.

COMMISSIONER TAYLOR: Okay, all right. Thank you.

CHAIRPERSON REYNOLDS: Commissioner Yaki.

COMMISSIONER TAYLOR: Who has that list? I'm sorry.

MR. HILL: His name is Joseph J. DeFelice.

MR. BLACKWOOD: We already have that information.

COMMISSIONER TAYLOR: Okay, that's what I was going to ask. Wanted to make sure you had all that information. Great.

CHAIRPERSON REYNOLDS: Okay, great.

Commissioner Yaki?

COMMISSIONER YAKI: Yes, thank you very much all of you for -- for being here today. I'm opening up to each one. I'm just going to go down each line because I have questions. Mr. Hill, did you -- did you witness the defendants -- well, forget that. 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.

MR. BULL: There was.

COMMISSIONER YAKI: There was intimidation. And in fact, what sort of bothers me about this entire proceeding has been the fact we keep on saying that Justice dropped the charges, when in fact for Mr. Shabazz, the one with the -- one with the billy club, the charges were not dropped, and that a judgment was entered against him.

And he is enjoined from being within 100 feet of any polling location in any election, in any place in the City of Philadelphia, through the -- through the presidential election of 2012.

So, for the record, it is important to note that that person who you've identified in this

room today does have a civil injunction against him, keeping him from engaging in voter intimidation, and it's thanks to your affidavits that did it.

So, I don't want -- I don't want to get into that. But what I do want to get into is just a little bit about sort of what was going -- some of the other stuff that was going on. Because the greater allegation that seems to be being made is that there was some sort of concerted nationwide attempt, or whatever, by this -- by -- as Commissioner Thernstrom described it, a fringe group.

So, with regard to you, Mr. Hill, and the other locations that you went to in which there were allegations that poll watchers were intimidated or thrown out, was there any indication from anyone that you spoke to at any of those other locations that it was a result of any action by people associated with the New Black Panther Party?

MR. HILL: At the other locations? No.

COMMISSIONER YAKI: Mr. Bull, same question.

MR. BULL: Not to my knowledge, no, sir.

COMMISSIONER YAKI: And Mr. Mauro?

MR. MAURO: Correct. The answer is no.

COMMISSIONER YAKI: Hypothetically

speaking -- hypothetically speaking, I would just note for the record that what you've told us here today differs slightly from the affidavits that we've seen here, just in one critical area, and that is the -- the notion that -- the fact -- the facts as you saw them, and I have no reason to doubt them, that people -- as you say, one person is enough were turned away.

I would just note that for whatever reason, they're not in the affidavits and they probably should've been. But the -- the question that I have goes to -- so, you were -- you were -- you're volunteering for the Republican Party. You're volunteering for -- I'm sorry, Mr. Hill, you were -- Mr. Mauro, you were a volunteer for the Republican Party?

MR. MAURO: Correct.

COMMISSIONER YAKI: Where do you live?

MR. MAURO: I live in New York -- Connecticut.

COMMISSIONER YAKI: So, you drove down, drove up. My geography is so bad. To volunteer in the --

MR. MAURO: Right.

COMMISSIONER YAKI: Mr. Hill, you actually live in the Philadelphia -- well, in the Pennsylvania

area?

MR. HILL: Nine blocks from that polling station.

COMMISSIONER YAKI: Okay, Mr. Bull, you --

MR. BULL: I live in Amenia, New York, which is mid-state New York, about an hour from the City.

COMMISSIONER YAKI: Now, were you there for the McCain Campaign or the Republican campaign?

MR. BULL: As I said in my statement, I was there -- I'm a democrat, but I was chairman of Democrats for McCain in New York State. Almost every state has one of those for the other party.

COMMISSIONER YAKI: Right, sure.

MR. BULL: But this was the first time in a presidential campaign I'd ever worked for a Republican. And I thought we were going to lose New York, so --

COMMISSIONER YAKI: Hopefully it'll be the last.

MR. BULL: Well, we'll see. It depends on this kind of matter. But no, I'm -- when the Department of Justice enforces a law, and the president is sworn in, he says, "I will enforce the laws of the United States." The Voting Rights Act

says people should not be intimidated. So, let's have it enforced.

COMMISSIONER YAKI: So, were you --

MR. BULL: That's why I'm doing it.

COMMISSIONER YAKI: So, were you there for the McCain Campaign, or the Republican Party?

MR. BULL: McCain party. I don't care much about the Republican Party in that sense.

COMMISSIONER YAKI: So, knowing that -- so the question I have for you is the person who was the most, I believe, culpable in terms of certainly when you identified has an injunction and for -- in place against correct. So, then what -- what then --

MR. BULL: For one election, or just the next election?

COMMISSIONER YAKI: No, it's through all elections up through the presidential of 2012.

MR. BULL: Which essentially means two days?

COMMISSIONER YAKI: No, not at all. There's city elections. There are district elections.

MR. BULL: Okay.

COMMISSIONER YAKI: There's state elections. There's a number of elections. One might argue, and -- and -- and this is not the time or place

to do it. How long? Should it be forever? Whatever. We might -- we might want to -- but the one question -- one statement that kind of startled me about what you said is you said this is the worst kind of voter intimidation you've ever seen.

MR. BULL: Yes. I've never seen -- I've never seen the entrance of a polling place blocked by uniformed men with a weapon, and there is -- but may I answer the question? It really is, because even when I was in Mississippi, particularly in a little town called Midnight, Mississippi, and there were truly nooses across the tree, and I thought this really is the end. And I stopped the voting there until they took them down.

But -- but even then, you -- you could go in and cast your vote. Here you had to go, as he said, within arm's length of -- of an armed man. And I think that's really egregious. And my own point of view, just to put it in a sentence, is that Martin Luther King and Robert Kennedy did not die to have armed thugs in uniforms block the door to a polling place.

COMMISSIONER YAKI: I understand, but let me ask this.

MR. BULL: That's an important point.

COMMISSIONER YAKI: That is an important point, but let me ask you this. I'm sorry.

CHAIRPERSON REYNOLDS: Commission Yaki, you've run out of time.

COMMISSIONER YAKI: Well, I was in the middle of asking a question, and he wanted to --

CHAIRPERSON REYNOLDS: You ran out of time during your last --

COMMISSIONER YAKI: So, the question I have, though, is -- yes, I -- I really appreciate what it is you're saying, but certainly you can't mean that this is the worst form of voter intimidation. Certainly, Selma, certainly the three --

MR. BULL: I have never seen what -- you're giving me an answer. You're telling me that I certainly can't mean what I mean? Is that what you're saying?

COMMISSIONER YAKI: No, I'm saying --

MR. BULL: You just said, "You certainly cannot mean what you mean." Is that a question?

COMMISSIONER YAKI: You know what? You certainly -- I'm going to ask you that. Do you really mean it's the worst example ever?

MR. BULL: No. I didn't say ever. I said, "I've seen." I have never in my lifetime, and

I've worked in seven states in elections, seen an armed person blocking a door to a polling place.

COMMISSIONER YAKI: And the people --

CHAIRPERSON REYNOLDS: Okay, Commissioner.

COMMISSIONER YAKI: Did you still see people going in there and voting?

CHAIRPERSON REYNOLDS: Commissioner Yaki, you -- Mr. Yaki, you have run out of time.

COMMISSIONER YAKI: Okay.

CHAIRPERSON REYNOLDS: Commissioner Melendez.

COMMISSIONER YAKI: I'm sorry. As a point of order, I was watching the red dot for some of the other Commissioners continue on for quite some time. I actually have my watch going right here, and I have not come anywhere close to where some of those red dots were at the point that it was over.

CHAIRPERSON REYNOLDS: Commissioner Yaki, I have been lenient. Commissioner Yaki --

COMMISSIONER YAKI: What I would do -- we are -- we are allowed for the second round, and I reserve for the second round.

CHAIRPERSON REYNOLDS: Okay, very good. Commissioner Melendez.

COMMISSIONER MELENDEZ: You're telling --

this is for all three of you. You've said that the -- that you saw people approach the polling place and that they were turned away. Did you actually tell that to the Department of Justice?

MR. HILL: Yes, I did.

MR. BULL: I didn't say they were turned away. You said that; not me. I said they walked up the drive and turned around. I didn't say they were turned away.

COMMISSIONER MELENDEZ: Okay.

MR. BULL: You changed the language, sir.

COMMISSIONER MELENDEZ: Yes, I didn't say that. Okay, thank you. That's the only question I have.

VICE CHAIR THERNSTROM: Why don't you yield the rest of your time to Commissioner Yaki so he can finish.

COMMISSIONER YAKI: Yeah, could you?

COMMISSIONER MELENDEZ: Okay.

CHAIRPERSON REYNOLDS: That's fine.

COMMISSIONER YAKI: Very quickly, part of this case deals with the fact that, as I said before, there was a concerted effort elsewhere to deal with this, but it's clear that you're testifying only -- only is concerned with this one precinct in this one

city of Philadelphia.

So, again, I ask you, in any other -- in your voter poll watching protection roles that you had, aside from this one precinct, did you hear of any other incidents involving the New Black Panther Party intimidating poll watchers, or voters?

MR. MAURO: I did not.

MR. HILL: No, I did not.

MR. BULL: No, I did not.

COMMISSIONER YAKI: Thank you.

CHAIRPERSON REYNOLDS: Okay, Commissioner Heriot?

COMMISSIONER HERIOT: I just have -- have one question, I think, and that is with regard to the other precincts where -- where poll watchers may have been intimidated. Have the harassing parties, or were the harassing parties in those situations ever identified to your knowledge?

MR. HILL: Not to my knowledge. I want to make it clear that it wasn't always malfeasance at those polling places. It was on a few occasions. Some of it was just poor information. The Citywide Accreditation --

COMMISSIONER HERIOT: What do you mean? What do you mean on that?

MR. HILL: The Citywide Accreditation allowed certified poll watchers to go into any poll anywhere in the city, whether they were Democrat or Republican. At some of the polling places, whomever was in charge would make the argument that only if the -- your documentation said their physical address could you get into their polling place.

So, it wasn't always intimidation. I don't want to make it sound like it was bigger than it was, because it wasn't. And I had Mike with me for the legal background, and we were able to get the statute and get guys back into those places fairly quickly.

In the places where there were intimidation, which would've been two or three more places, we just explained that we're not going anywhere until these people get back into the building.

COMMISSIONER HERIOT: Who was doing the intimidating?

MR. HILL: Committeemen for the most part, or self identified committeemen. I don't know if they were necessarily committeemen. In a couple of cases, the poll watchers were 20-21 years old, and weren't really sure of themselves. And the one in particular,

who we actually eventually developed a pretty decent rapport with, was a large guy, and he was bodying up on them, and attempting to be intimidating to keep them out of the building.

And then once Mike explained the statute, and I said, "Well, I'm not going anywhere until they get inside," eventually, it was just easier to agree with us and get rid of us, and let them in the building than to have us stay around all day.

COMMISSIONER HERIOT: Did you hear about any other cases?

MR. HILL: Oh, dozens during the course of the day. They were related back and forth. Because of our particular situation, we were sent to some of the rougher neighborhoods, and that was part of the deal.

They told me at the beginning. They said, "6:30 in the morning." They said, "Be expected you're going to go to bad neighborhoods, and it's going to be tough all day long." Okay, cool.

MR. BULL: That's right.

MR. HILL: So, there were at least -- I'd say at least a dozen came back to us while we were driving around at those sorts of things, and then anecdotally, later when we got back to -- to the

headquarters to turn in the paperwork and all that, there were several dozen, I would say.

COMMISSIONER HERIOT: Any name-calling?

MR. HILL: Yes, there was name-calling. There was name-calling. It seemed to go both ways, apparently. It was a pretty contentious election. And so, it did seem to go both ways. Nobody held complete sway on being the bad guy. So, there seemed to be a lot of bad actors acting out I guess is the best word.

COMMISSIONER HERIOT: Okay.

MR. BULL: One of the background reasons for this, we were told, is that there had been a lot of press before the election; that there was an enormous number of illegally registered voters, perhaps the largest in history.

The New York Times, on October 27th, eight days before the election, said that there were 1,300,000 voters registered nationally by ACORN, of which it said 30 percent were fraudulent. That meant there were 400,000 illegal voters just from that source alone. And of course, that organization was active in Chicago and Philadelphia.

So, there was a huge effort to protect voters who might be challenged, and a big effort to

identify the voters who should be challenged, and that made these incidents more contentious. You could see a pattern. That's why it's more than one place. Do you see what I mean?

COMMISSIONER HERIOT: Yes.

MR. HILL: There was also a lot of question with absentee ballots that day. We ran across that on a number of occasions. Just literally boxes full of absentee ballots when the voting machines were working, and they said, "Well, they weren't working an hour ago. They're working now, though."

So, it was -- there was a lot going on in Philadelphia that day. And I grew up in New Orleans, so I'm used to a little skullduggery on Election Day. But there was a lot going on on Election Day in Philadelphia.

COMMISSIONER HERIOT: Thank you.

CHAIRPERSON REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: Wish I didn't have to take up my question time with this, but I observed the defendant, King Samir Shabazz, taking a picture of you all. And from someone who -- who has said that black people should kill white people, I want to know

that I have -- I have some concern about that, and I -- I -- there are perfectly legitimate reasons to take pictures, but I wondered if any of you saw that?

MR. BULL: You mean just now here?

COMMISSIONER GAZIANO: Just --

MR. BULL: I wasn't aware of that, no.

COMMISSIONER HERIOT: He's doing it right now.

MR. HILL: Yes, I did notice it.

COMMISSIONER GAZIANO: You did notice it? It seems to me he stood here with a purpose so that you could see that he was taking your picture. Well, let me move on. We can -- we can think about that later.

VICE CHAIR THERNSTROM: Not taking the pictures of the rest of us?

MR. BULL: You're not witnesses.

COMMISSIONER GAZIANO: I may ask a different version of this --

CHAIRPERSON REYNOLDS: Folks, folks -- Commissioner Gaziano, please continue.

COMMISSIONER GAZIANO: Please give me an extra 30 seconds for that. I may ask a different version of this question to the former Justice Department official, but I want to ask particularly

the writer and publisher of this. Certainly, there was large concern about the wrongs of the Jim Crow era, but many writers have said that one of the turning points was the national TV pictures of Bull Connor turning dogs and hoses on -- on the Civil Rights marchers. And that properly led to some of the -- the great Civil Rights reform.

MR. BULL: Yes. It educated the public about the evils of the problems.

COMMISSIONER GAZIANO: Yes. After that national viewing, though, Americans who wanted to believe it wasn't as bad as it was, could no longer deny it. But if there had not been action after that, do you think that the heartache and the despair would have been worse for those who wanted Civil Rights?

MR. BULL: The problem would've gone on longer, and it would've been worse. It's essential to educate the public about these evils. That's part of our job.

COMMISSIONER GAZIANO: So, the fact that the YouTube was viewed by tens of thousands, and on -- then broadcast on national TV, raised the awareness of this issue. So, that -- would you agree with me that the dismissal is a bigger problem than non-filing where the evidence is ambiguous?

MR. BULL: Of course, because the message is that you are allowed to intimidate people as long as it's only caught in one place at a time.

COMMISSIONER GAZIANO: Okay, I'd like to follow up with one other comment you made earlier. 11(b) of the Voting Rights Act prohibits intimidating either voters or poll watchers.

MR. BULL: Yes.

COMMISSIONER GAZIANO: You seem to imply that that was important. Can you tell me why you think that's important?

MR. BULL: Well, it depends on the setting. But if you are in a district like the district we were in, it's not so much the voters that one side is worried about as the poll watchers who were challenging their fraudulent voters. And as I said, it was even in The New York Times that there were 400,000 from just one organization.

So, of course it's more important. The poll watcher is the central point of democratic efficiency at the election place.

COMMISSIONER GAZIANO: And they're there also to make the voters feel comfortable?

MR. BULL: Yes.

COMMISSIONER GAZIANO: Prevent future

possible intimidation?

MR. BULL: Yes, but also to challenge dishonest voting.

COMMISSIONER GAZIANO: There's been a lot of back and forth about this -- this -- this injunction against one of the defendants that seems to me to have been extremely awkwardly written to -- to just cover City of Philadelphia. Is there any reason in your mind to -- by the way, the injunction as I read it doesn't prevent him from standing with ten of his friends in uniform with his arms out like this. Do -- do you think --

MR. BULL: Or the organization they claim in the six cities they claim.

COMMISSIONER GAZIANO: Yes. As a -- as a lawyer, does this seem like a broad injunction, or a rather narrow injunction?

MR. BULL: It's what we would call minimalist.

COMMISSIONER GAZIANO: And is there any reason in any of your minds that the case should've been dropped against the person who seemed to be acting in concert with the man with the billy club?

MR. BULL: Gentlemen?

MR. HILL: No.

COMMISSIONER GAZIANO: To you, did the fact that they were together add to the intimidation?

MR. HILL: They were a team. They were acting in concert. They moved together.

MR. BULL: They were uniformed.

MR. HILL: 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.

COMMISSIONER GAZIANO: Okay. And do you know if some of these problems with poll watchers being intimidated, do you know whether that may or may not have involved -- oh, let me go back to correcting, clarifying one other part of the record. The complaint was filed on January 7th, I believe. So, I know you all seem to have given statements before it to the -- sounds like female employees of the Department.

If you gave statements after January 7th, is it possible that it would be in furtherance of the case that was already filed?

MR. HILL: Yes. I would say yes.

COMMISSIONER GAZIANO: I just wanted to see if that clarified your record. I'll yield.

CHAIRPERSON REYNOLDS: Okay. Gentlemen, thank you. Second round, okay. Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: I'll save my time to Commissioner Yaki. He's got something on his mind.

CHAIRPERSON REYNOLDS: Well, no. He will -- he will have any opportunity to ask questions. You could give him ten minutes if you'd like.

VICE CHAIR THERNSTROM: All right. Actually, I disagree with something that Commissioner Yaki said, that this is a clear instance of intimidation, because I don't have a clear definition of what voter intimidation, specifically under 11(b) is. I mean not simply by my own common sense, but there's a legal question here, and it seems to me because 11(b) has been so seldom used, once before the Bush Administration, twice during the years of the Bush Administration, we are left without a legally clear definition of what voter intimidation amounts to.

But I'm going to go back for a second. I'm really not going to take substantial time here. I don't like the New Black Panther Party. Huey Newton didn't like the New Black Panther Party. You know, all sorts of stalwart Civil Rights spokespersons don't

like the New Black Panther Party.

But we cannot pretend that elections are clean of racial and ethnic tension across the country. There's not only black-white tension, there is tension involving Asians, involving Hispanics. There is group friction wherever we look in America, and it affects elections.

And had we turned -- had we had a statutory report, that subject I would have been all for it. But it does remain a problem for me that we have so narrowly focused on this one incident, and I have also, and this is going to be my last statement, I also have a real problem with making any analogy to the Jim Crow South. I know that history very, very well.

I am old enough to feel it was just yesterday. If my daughter had not been born in the summer of 1964, I would've been in Mississippi, and it's -- I think it does a disservice to -- to the -- to -- to this country to suggest in any way that we have not made the most enormous progress in terms of race relations.

MR. BULL: None of us suggested that.

VICE CHAIR THERNSTROM: Right, but the analogies to the Jim Crow South are, for that reason,

troubling to me. I'll just leave it there.

CHAIRPERSON REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: No questions.

CHAIRPERSON REYNOLDS: Okay, going down the list. Commissioner Taylor?

COMMISSIONER TAYLOR: None.

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Yes, thank you very much. One more quick question to clean up the record. Aside from what you -- what you witnessed in this precinct in Philadelphia, do any of you have any personal knowledge that the New Black Panther Party engaged in any similar tactics in any other cities?

MR. MAURO: I do not.

MR. HILL: Mr. Shabazz -- Mr. Shabazz said they were, but I didn't see any. No. But if it had happened in Rittenhouse Square, I bet you we'd have a different result right now.

MR. BULL: Only that the Department of Justice lawyer warned me that they had injured New York policemen.

COMMISSIONER YAKI: Do you know when? Did they say when?

MR. BULL: No, no.

COMMISSIONER YAKI: Any time frame?

MR. BULL: As I recall, it was two or three years before when he talked to me.

COMMISSIONER YAKI: But not -- but not with regard to this particular --

MR. BULL: Oh, no, sir. Absolutely not.

COMMISSIONER YAKI: One other thing that -- that I just wanted to follow up on something that you said, and it follows up on something that Commissioner Gaziano said, when you talked about the limited nature of the injunction against Mr. Shabazz.

Are you -- if -- if Mr. Shabazz and Mr. Jackson did not have a night stick with them, they'd merely been standing there at the polls, would that have made a difference in how -- in how you viewed whether they were intimidating or not?

MR. BULL: Well, obviously, carrying a weapon makes you more intimidating than if you're not carrying a weapon. Is that what you mean?

COMMISSIONER YAKI: Well, I'm just saying. Would -- absent the weapon, would you consider them to be intimidating?

MR. BULL: In uniform and calling people crackers and so on? Yes. But not as intimidating. Obviously a weapon, carrying a club, is more

intimidating.

COMMISSIONER YAKI: What about the uniform was it that made them intimidating?

MR. BULL: Well, it has a history. For example, this is the way paramilitaries dressed in fascist Italy and Nazi Germany, did they not, before those governments took over. They wore jackboots like these gentlemen. They wore caps like these gentlemen. They wore uniforms with their own regalia like these gentlemen.

So, this is a pattern and culture that they're very aware of.

COMMISSIONER YAKI: Okay, Mr. Hill?

MR. HILL: Yes, without a doubt. I mean --

COMMISSIONER YAKI: Without a doubt?

MR. HILL: Without a doubt it's intimidating. You know, like I said, to me? No. But if I'm an older lady or an older gentleman walking up to the door? Yes. I mean --

COMMISSIONER YAKI: Sure. Let me ask the question --

MR. BULL: They were called Black Shirts in former times.

COMMISSIONER YAKI: Let me -- let me flip

the question around. Let's say you went to some place in mainline Philadelphia. Say it's like 90 some percent white suburb. What -- what if -- scratch that. That's the wrong example.

Let's go, for example, to Phoenix, Arizona. Okay, and you have a precinct out in Western Phoenix, which is 80 percent Latino. If you saw -- if you were there as a poll watcher, and there were two guys, dark suits, dark glasses, with a video camera and a clipboard, taping and -- taping every single Latino voter who was going to the polls, would you call that intimidation or not?

MR. HILL: Yes.

COMMISSIONER YAKI: Mr. Bull?

MR. BULL: I'd have to know more about the circumstances. I mean are suits you're suggesting intimidating, such as your dark suit?

COMMISSIONER YAKI: I'm just saying dark suits, dark glasses.

MR. BULL: Dark suits and dark glasses?

COMMISSIONER YAKI: Dark suits and dark glasses, holding video cameras, and clipboards, and taping people who were only Latino voters, walking by them?

MR. BULL: I'm really not sure. I'd have

to see that. I think it could be seen as intimidating, but wearing sunglasses in Arizona is not an unusual manner, and wearing dark suits is not an unusual manner, and actually --

COMMISSIONER YAKI: Actually, dark suit in the mid day of Arizona would be unusual.

MR. BULL: Yes, but dark suits essentially could come out -- they could be lawyers or whatever. Who knows?

COMMISSIONER YAKI: Now, do you -- do you -- let me take a third example. And this actually happened in Philadelphia. Dark suits, dark glasses, dark van, blacked out vans, patrolling black neighborhoods. The people were Caucasian. They would be aggressively questioning people whether they were registered to vote, or the circumstances of their voting, intimidated or not? And they had no identifying, other than --

MR. BULL: I don't understand the nature of these hypotheticals.

COMMISSIONER YAKI: It's not a hypothetical. It actually happened in Philadelphia.

MR. BULL: Yes, but in this room it's a hypothetical.

COMMISSIONER YAKI: No.

MR. BULL: You're saying if. What is if but a hypothetical? I mean it's hypothetical. That's the point of the word.

COMMISSIONER YAKI: Well, but you just answered with a hypothetical yourself. You said --

MR. BULL: I'm trying to be courteous, but you're pursuing an artificial line of questioning.

COMMISSIONER YAKI: No, because you said, Mr. Bull, with all due respect, you said if there were ten members of the Black Panther Party locked arm in arm, you would consider that --

MR. BULL: No. That was him. I did not say that. I never used -- the ten was not directed to me.

COMMISSIONER YAKI: Well, then you --

MR. BULL: You're confusing your witnesses.

COMMISSIONER YAKI: But you did say that two would?

MR. BULL: I did say what?

COMMISSIONER YAKI: If they -- if they were there without a night stick, you said they would still be intimidating?

MR. BULL: Yes, but much less so, I would say. Wouldn't you agree?

COMMISSIONER YAKI: I don't know.

MR. MAURO: Commissioner Yaki, I would only add this, only because I have a little bit of familiarity with I think an analogist statute here, the National Labor Relations Act.

COMMISSIONER YAKI: Yes?

MR. MAURO: Under the Act, there are so many instances of conduct that can be -- that is construed as intimidation during the voting process when the people vote, and whether they want a union or not.

COMMISSIONER YAKI: Sure.

MR. MAURO: Many of the items that you've been -- you've been providing by way of illustration would be considered violating Section 8(a)(1) of the National Labor Relations Act.

COMMISSIONER YAKI: Sure.

MR. MAURO: And this also goes to Commissioner Thernstrom's concerns about what is intimidation under 11(b). Well, I think what is illuminative is looking at what intimidation is under the National Labor Relations Act, and it's fair to say that you can draw an analogy because you're talking about the right to vote, and whether it's to be part of a union, or not to be part of a union, or to vote

for whatever candidate is on the ballot.

COMMISSIONER YAKI: Sure. No, I appreciate that. I was just -- it wasn't mean to -- I just was asking.

CHAIRPERSON REYNOLDS: Commissioner Yaki, thank you very much. Okay, Commissioner Melendez.

COMMISSIONER MELENDEZ: Yes. Thank you, Mr. Chairman. Just one comment or anybody can add to this. I know that the comment that we weren't really talking about intimidation of a voter because we're not really specific. We don't have a witness here of a voter that's saying he was intimidated against. But then even going to the poll watcher, of which Mr. Bull talked about, we don't even have that person here, who would speak for himself.

I've heard other people speak on his behalf that he was shaking in his boots or whatever, but it would be -- it would've been great if we would've had that person here testifying on his own behalf, since he was the person that was intimidated against.

MR. HILL: My understanding is he lives in that district.

COMMISSIONER MELENDEZ: Right.

MR. HILL: And testifying in front of this

Commission when he lives in that district just didn't seem to be in his best interests. Now, I don't know if that's necessarily the case, but that's how it was conveyed to me.

COMMISSIONER MELENDEZ: Unfortunately, in courts, whether or not you are there to testify really has a lot to do with whether or not --

MR. HILL: Sure.

COMMISSIONER MELENDEZ: With this whole case. So, I just wanted to close with that. Thank you.

CHAIRPERSON REYNOLDS: Okay, Commissioner Heriot?

COMMISSIONER HERIOT: Mr. Hill, I just wanted to clarify with regard to the Phoenix hypothetical that Commissioner Yaki used.

MR. HILL: Right.

COMMISSIONER HERIOT: Do you regard it as being equally intimidating to be in a suit with a camera, as with in a paramilitary outfit with a --

MR. HILL: No. And that's what's --

COMMISSIONER HERIOT: Expand on that a little.

MR. HILL: Well, yes, obviously I'm sitting in a suit right now.

VICE CHAIR THERNSTROM: And you look intimidating to me.

MR. HILL: Yes, right.

COMMISSIONER HERIOT: But not to me.

MR. HILL: Army Infantry, ma'am. So, absolutely not. The way the hypothetical was set up though, I could see someone being intimidated, and agree that yes, that could potentially be intimidating.

COMMISSIONER HERIOT: So, there may be circumstances.

MR. HILL: Right. Could be. What was not a hypothetical is the fact that two men, standing outside of a polling place in Philadelphia, wearing paramilitary garb, one of them armed with a weapon directly in front of a door that people have to pass by to get into is intimidating to a lot of people. And I mean we witnessed it personally.

COMMISSIONER HERIOT: Thank you.

CHAIRPERSON REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: I want to thank the witnesses again for your patience in testifying and coming down today. And I will state for the record that both Commissioner Yaki and I are also in dark

suits, and we sometimes say things to each other that aren't the most friendly. But I hope I don't intimidate him. And whether he tries or not, he doesn't intimidate me.

COMMISSIONER YAKI: You have never intimidated me, Mr. Gaziano.

COMMISSIONER GAZIANO: Okay, thank you. Now, may I ask for a point of personal privilege if we could take a five minute break before the next witness?

CHAIRPERSON REYNOLDS: Yes. That's the -- you've concluded your questions? Okay, gentlemen, thank you very much. Your testimony is quite important. We'll take a five-minute break.

(Whereupon, the above-entitled matter went off the record at 12:25 p.m., and resumed at 12:39 p.m.)

IX: TESTIMONY OF MR. KATSAS

CHAIRPERSON REYNOLDS: Okay, we're back from the break. We are pleased to have with us today Gregory Katsas, who is the former Assistant Attorney General at the Department of Justice. Mr. Katsas, please raise your right hand. Do you swear and affirm that the information you're about to provide is true, and accurate to the best of your knowledge and belief?

MR. KATSAS: I do.

CHAIRPERSON REYNOLDS: Very good. You may proceed.

MR. KATSAS: Thank you, Mr. Chairman. My name is Gregory Katsas. I'm a partner at the law firm Jones Day. I served in the Justice Department between 2001 and 2009. As relevant to this proceeding, I think my most relevant experience was at serving as Principal Deputy Associate Attorney General, the top advisor to the Associate Attorney General, for about 20 months, and for about eight months, I was the Acting Associate Attorney General of the United States.

I was not in the Associate's office during any of the deliberations about this case. So, my testimony doesn't implicate any privilege issues that some of my successors might have. I've submitted written testimony to you. I won't belabor that.

Just to summarize my conclusions, I was asked by Chairman Reynolds to opine on the decision making processes within DOJ, and the level within DOJ that decisions to file or change course in this case would've been made.

My conclusion was that the decision to file the case and to change course could not have been

made below the rank of Assistant Attorney General for the Civil Rights Division, and would have been made with at least consultation by one of the Department leadership officers, most likely the Associate Attorney General, if not someone higher up the chain than that.

With respect to the merits of the case, I was asked to evaluate the complaint and give an opinion on the strength of the case, both in terms of the decision to file at the outset, and in terms of the decision to abandon most of the government's claims in the case and narrow the requested injunction, notwithstanding the default.

I did not have any independent knowledge of facts of the case in the written testimony that I gave you. I was asked to assume the truth of the allegations in the complaint, which I did, and my conclusions were that the complaint stated a strong case of voter intimidation against all the defendants, and that the decision to file was fully justified, and that the decision to abandon most of the claims in the case and narrow the requested injunction was not justified.

I have -- I was asked to attend the entire hearing and watch the evidentiary presentation that

you all had heard. Based on that submission, my opinions remain the same. Indeed, they are reinforced. I think the evidence that you've adduced today tends to confirm both the intimidating nature of the conduct that took place in Philadelphia, and the connection between the Philadelphia conduct and the national party, and I'm happy to answer any questions.

CHAIRPERSON REYNOLDS: Thank you. Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: I'd like to pass for the moment, but reserve the right to come back.

CHAIRPERSON REYNOLDS: Very well. Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Thank you, Mr. Chairman. Mr. Katsas, is there a de minimis level of voter intimidation or a number of intimidated voters below which intimidation becomes acceptable under 11(b)?

MR. KATSAS: No.

COMMISSIONER KIRSANOW: Is there any difference, in your mind, in terms of whether or not there may be an actionable case of voter intimidation under 11(b) if a defendant brandishes a weapon? In other words, is a -- is a predicate to 11(b) violation

a brandishing of a weapon?

MR. KATSAS: I think brandishing a weapon would be certainly sufficient to establish intimidation, but not necessary.

COMMISSIONER KIRSANOW: Okay. Is there a heightened standard at all? There may not be any case law with respect to this, but in terms of the manner in which Justice would assess bringing a complaint under 11(b) differ if one of the alleged defendants was a credentialed poll watcher? Is he held to a heightened standard?

MR. KATSAS: I -- my instinct is that if -- I don't think that makes any difference on the law in terms of Justice assessing the seriousness of the violation. If it makes any difference at all, my instinct is it would make it worse. Because here's -- on your question, here is someone charged with furthering the integrity of the process who is betraying that charge.

COMMISSIONER KIRSANOW: In this particular case, DOJ decided not to pursue the case any further and indeed dismissed the charges after there was a default entered. If there is a default entered, is there anything to preclude DOJ from nonetheless proceeding forward in discovery, and maybe then filing

under Rule 56, or for going for a full blown trial?

MR. KATSAS: I don't think so, but I think the ordinary course would be to do exactly what the Department did with respect to Minister Shabazz, which is seek a default judgment on the ground that there's a facially valid complaint, and the defendants have chosen not to contest it. But I think as a lesser alternative to that, I think they could pursue the other options that you mentioned.

COMMISSIONER KIRSANOW: And just as a final matter, this should not be held against Mr. Katsas, but for Mr. Katsas' argument at the DC Circuit, I probably would not be sitting here today.

MR. KATSAS: Brings back some fond memories.

CHAIRPERSON REYNOLDS: Mr. Taylor?

COMMISSIONER TAYLOR: Mr. Katsas, my questions relate to your view of the Commission and the types of questions we have asked of this process. As a former prosecutor, you have an appreciation of the fact that the public will often ask questions about prosecutorial discretion, internal process, et cetera.

We have a unique roll to play, obviously, but I'd like you to comment, if you could, on the

types of questions we have asked. Putting yourself back inside the Department for a moment, and try to shed some light on both the process and our role in it if you would.

MR. KATSAS: I guess I'm not frankly an expert on the charge and role of this Commission, but let me -- if it's responsive, let me --

COMMISSIONER TAYLOR: Or generally would be fine.

MR. KATSAS: Let me try to sort of address how I think the questions would have played out within the Department for people who were charged with enforcing this statute.

Okay, so the first question obviously is is this a meritorious case or not? And it seems to me the answer to that question, either based on the allegations in the complaint or based on the evidence that you saw today, would be yes. And then the question would be, well, is there some discretionary reason not to bring this case?

I would think the answer to that question would be no. This seems like a particularly -- it seems like a fairly clear case of intimidation. It seems like a case that is plausibly linked up to the broader agenda of a national entity.

I don't know of any other cases that the Civil Rights Division would have had to forego in order to bring this case. So, there doesn't seem to be an issue of scarce resources. The complaint -- the investment of resources was pretty limited. It's a nine-page complaint. It seems like it would have been a fairly easy case to prosecute.

So, for all of those reasons, I think the decision to go forward at the outset was perfectly justified. Now, let's talk about what I view as the very different decision whether to abandon the case, or large parts of the case, mid-course.

I think there is a strong tradition within the Justice Department recognized by career employees and responsible political appointees of both sides, both parties, that there is a sort of tradition of stare decisis within the Department as it were, of not changing course in the middle of a case.

The decision to abandon a case that was filed should be a harder one than the decision to bring the case in the first instance. I can't think of anything that would have made the case weaker and indeed this was a default. So, it's not a situation where the government brings a claim in good faith, and then the litigation goes badly, and the position

erodes, and they abandon a claim for that reason.

I would think the case for the government was no weaker when they abandoned it, where the only intervening event was a default of the defendants, than it was at the outset of the case.

So, there is no good reason apparent to me for why the case would've been abandoned.

COMMISSIONER KIRSANOW: Did you -- one final question. Could --

MR. KATSAS: Abandoned in substantial part.

COMMISSIONER TAYLOR: Could you shed some light on the lack of cases brought under 11(b)? We've heard the fact that there are only a couple of cases brought under that section. Could you shed some light on that?

MR. KATSAS: I really think the short answer is no. I was struck in just doing some very quick research in preparing for my testimony at how few cases there are.

I would think that the absence of a lot of prior enforcement, if it affected this decision one way or the other, would have cut in favor of enforcing because the voter intimidation is presumably a serious concern of the Department, and here was a pretty clear

case of it that's caught on videotape.

I would think that this is a pretty good case where you would want to ramp up enforcement.

COMMISSIONER TAYLOR: Thank you.

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Thank you. I'm getting the hang of this round-by-round thing. I'm only asking one question, and then I'll just keep on going through the rounds. You said that this would -- just based on your thinking of this, this would not have been an issue of scarce resources. This was relatively easy to deal with.

MR. KATSAS: Right.

COMMISSIONER YAKI: Why would you ever abandon course? You were at the Justice Department for a long time, eight years.

MR. KATSAS: Yes.

COMMISSIONER YAKI: Approximately, correct?

MR. KATSAS: Yes.

COMMISSIONER YAKI: Can you give -- can you tell me were there not instances during that time period where Justice Department abandoned litigation in major civil cases during that period of time?

MR. KATSAS: I can't think of a single

case where we did. Now, let me -- let me be clear about something. My initial five or six years were on the appellate staff of the Civil Division. So, until 2006, I would have had scant knowledge of anything outside that --

COMMISSIONER YAKI: Okay.

MR. KATSAS: Within that universe, I can tell you that -- and I would've been the official responsible for defining the government position. I can tell you with confidence that at the beginning of the Bush Administration, I never once reversed a position in a pending case taken by the prior administration.

COMMISSIONER YAKI: Sure. But you were in the appellate division, correct?

MR. KATSAS: Correct.

COMMISSIONER YAKI: The reason I ask is that -- is that I seem to recall on more than one occasion that there were pending investigations, pending -- many sort of ongoing proceedings in which the Bush Administration did reverse course from the Clinton Administration. Not at the appellate level, but everything is kind of cooked. I would agree at that point.

But in -- but in the ground war litigation

phase, I do seem to recall that, and that's actually more applicable, wouldn't you say, than what you're talking about at the appellate level?

MR. KATSAS: Now, when I say change in a pending case, with respect in my experience at civil appellant, what I mean is there's an appeal pending the day I come in the door.

COMMISSIONER YAKI: Sure.

MR. KATSAS: I reach a judgment that, gee, this isn't the position I would've taken, and I go to the appellate court and say basically, "Never mind."

COMMISSIONER YAKI: Right.

MR. KATSAS: That seems to me analogous to what we have here. It's different from the case where a prior administration takes a position in a trial court, loses and then the new administration has to make a decision whether or not to take an appeal. I think a new administration --

COMMISSIONER YAKI: On the other hand, wouldn't you also say that in a default judgment, there is no -- at that point, there really is no investigation, no discovery, no reexamination of facts that might've gone at that point? And wouldn't you say that that's a slightly different situation than a fully litigated and cooked appeal that you're talking

about?

MR. KATSAS: Sure. But to me, the default nature of this case cuts even more strongly against changing course because the government, I assume, did what every ethical lawyer plaintiff side has to do, which is establish a factual basis for the allegations made in the complaint when they made them, and nothing would have happened. There's no action-forcing event like adversary litigation to have the government reassess that position.

COMMISSIONER YAKI: And you find that more egregious than, say, an expenditure of millions of dollars of government discovery and time on a case, and then abruptly dropping it?

MR. KATSAS: Not saying it's -- I'm saying it's unusual. More egregious? They're different situations.

COMMISSIONER YAKI: Sure.

MR. KATSAS: In -- in your hypothetical case, the concern would be on the one hand it might be a worse case because the government has invested a lot more resources. On the other hand, it might be a less bad case because in the course of adversary testing, the government's initial position might have been eroded with further factual developments.

So, it just strikes me that there are different considerations in the two kinds of cases.

COMMISSIONER YAKI: Well, I'm going to let go, but we'll follow up on that.

MR. KATSAS: Okay.

CHAIRPERSON REYNOLDS: Okay, Commissioner Melendez?

COMMISSIONER MELENDEZ: Thank you, Mr. Katsas. Just one question. What's your opinion as far as the -- there were four parts to this that --

MR. KATSAS: Four defendants?

COMMISSIONER MELENDEZ: Four defendants, and only one was basically upheld.

MR. KATSAS: One was pursued.

COMMISSIONER MELENDEZ: Is that because in your opinion it's because there was a weapon used? The night stick.

MR. KATSAS: I don't know what the reasoning of DOJ was. That's the most plausible explanation. To me, it is not -- it is not a very convincing ground for distinguishing between the two defendants who were on the scene.

COMMISSIONER MELENDEZ: So, but if there was not a weapon used, then it would -- it would seem that all four would've been the same situation, since

there were two basically that were -- two people that were at the polling place. So, I can't differentiate between those two people as far as one having the weapon, the night stick, and the other not, it just seemed to most ordinary people that if it wasn't for the night stick, everybody would've been basically dismissed.

MR. KATSAS: That's probably right if you're asking me for --

COMMISSIONER MELENDEZ: Just your opinion.

MR. KATSAS: -- DOJ -- I mean my opinion is that the night stick shouldn't make a difference in the treatment of the defendants for two reasons. One, the sum total of the acts of the two defendants, minus the night stick, still would have amounted to an actionable case of intimidation. That's my first point.

My second point is that the two defendants at the scene were acting in concert together, so, it is perfectly fair to attribute the acts of the one to the other.

COMMISSIONER MELENDEZ: Okay, thank you.

CHAIRPERSON REYNOLDS: Vice Chair Thernstrom?

COMMISSIONER GAZIANO: No, no.

VICE CHAIR THERNSTROM: I pass.

CHAIRPERSON REYNOLDS: I told Vice Chair Thernstrom that she would go after Commissioner Melendez. There is no harm.

COMMISSIONER GAZIANO: There is, but I'll yield.

CHAIRPERSON REYNOLDS: Thank you very much, Vice Chair Thernstrom.

VICE CHAIR THERNSTROM: And I thank you also. By the way, a good pal of mine, who I've worked with closely on voting rights issues, is at Jones Day, and somebody I'm recently very much in touch with over the Kinston case, Mike Carvin.

MR. KATSAS: Pal of mine, too.

VICE CHAIR THERNSTROM: Yes, I'm sure. Look, two things. One, I've focused here. I don't know, have you been here all morning?

MR. KATSAS: Yes.

VICE CHAIR THERNSTROM: Okay, I've focused here somewhat on the question of the legal definition of 11(b), in part because I arrived at the Commission just in time for the 2001 hearings in Florida. The question of black disfranchisement in Florida in the 2000 elections.

And there were many charges of voter

intimidation that were floated at the time that were contested. I mean there were differing views on whether it amounted to what happened that police cars had parked at certain spots not far from a polling place, and so forth, whether amounted to voter intimidation. And there's nothing unique about Florida. I mean this conversation occurs repeatedly across the country because there's this huge spectrum of events that one can label voter intimidation or not.

And so, I am a bit troubled by -- by the absence of a typed definition, legal definition, rather than a common sense one here, and I wondered if you had any thoughts. And the other question I have: again, do you have any thoughts? This sparse record of the enforcement of -- of 11(b) has meant it is a most minor provision of the Voting Rights Act. I mean I've written two books on this statute, and I haven't mentioned 11(b) in either one of them because it's played such a small role under Democratic and Republican administrations.

I mean one case before the Bush Administration, two during the Bush years. Got any thoughts on that? So, two questions. Got any thoughts on?

MR. KATSAS: I'll try my best. On the question of standards, the case law is sparse, but it is not entirely without guidance. There are cases that say the provision should be construed broadly rather than narrowly. There are cases that say you don't need a subjective intent on the part of the perpetrator.

There are cases that say consistent with that, you measure intimidation by the response of a reasonable voter or poll watcher. And there is a general legal principle that if you have -- you have a somewhat open ended standard, you don't necessarily need a precedent on all fours with the facts of your case in order to figure out whether the standard applies.

Now, I have no doubt that there are many debatable cases, whether something would or would not constitute voter intimidation, and I have no doubt that in a close and debatable case, there could be a proper exercise of enforcement discretion to say, "It's a close case. We haven't enforced this statute very much. There's kind of a rule of lenity principle, even in a civil injunction context."

That would be a responsible decision. This, I have to say, does not strike me as a close

case for all of the reasons that -- that you heard before.

On the question -- on your second question about the relationship of Section 11(b) to the Voting Rights Act more broadly, and DOJ's enforcement history, I'm not sure I can shed much light on that. I haven't looked at that in preparation for being here. Just for what it's worth, I will give my gut reaction that Section 11(b), whatever its enforcement history in the past, seems to be directed at a fairly serious problem, which is voter intimidation.

I don't think anyone would deny that that's a minor problem, and that is the evil against which this statute is directed.

CHAIRPERSON REYNOLDS: Okay, Commissioner Heriot?

COMMISSIONER HERIOT: I think I pass.

CHAIRPERSON REYNOLDS: Commissioner Gaziano.

COMMISSIONER GAZIANO: I may -- if it's all right with you -- first of all, thank you for your written and oral testimony. Your written testimony is very well done, and I think very helpful to the Commission. I hope you can remain with us for a round or two because I have a few -- I don't know where to

begin exactly.

I don't know if you're aware, so tell me if you are aware, that there is a criminal provision, 18 USC Section 245(b), that makes it a crime to, "Interfere or intimidate or interfere." And that's -- I'll paraphrase. A voter or a poll watcher. Are you aware of that criminal provision?

MR. KATSAS: I'm aware that there are parallel criminal provisions. I'm not aware with the specific cites and exact statutes.

COMMISSIONER GAZIANO: You may or may not. You don't have to trust me on my quote. But entered into evidence today were the depositions or attempted depositions of Mr. King Samir Shabazz and Jerry Jackson, in which they pled the Fifth Amendment to -- to refuse to answer our questions.

Given your knowledge of the Fifth Amendment right, can you assert the Fifth Amendment right merely to avoid answering questions of a federal agency in a civil matter? Can you invoke the Fifth in a civil action?

MR. KATSAS: You can invoke the Fifth in a civil action, but only --

COMMISSIONER GAZIANO: But only out of fear?

MR. KATSAS: But only out of fear of criminal exposure.

COMMISSIONER GAZIANO: So, rightfully invoke the Fifth? These defendants, and maybe they didn't understand this, but to rightfully invoke the Fifth, they believe that their answers in our investigation or that the facts that we're investigating might give rise to criminal liability.

MR. KATSAS: I think that's right.

COMMISSIONER GAZIANO: Okay, separate, same line. Viewing the YouTube and the other facts, do you think that there was at least possible grounds on the facts of this case for the Department to have at least considered a criminal investigation?

MR. KATSAS: Can you read the statute back to me?

COMMISSIONER GAZIANO: It is a crime to -- and I only have a portion of it. I don't have it with me. Quote, "Intimidate or interfere with." End quote, and that's the only portion I have. "A person attempting to vote or a poll watcher."

MR. KATSAS: I would think that -- I would think that they faced the possibility of criminal exposure.

COMMISSIONER GAZIANO: Yes. So, that's

why I seem to agree with you. I don't know what all this talk is of -- of 11(b) not being often invoked. This was a rather outrageous factual pattern, wouldn't you agree?

MR. KATSAS: Yes.

COMMISSIONER GAZIANO: Okay, now, with --

VICE CHAIR THERNSTROM: But the Justice Department --

COMMISSIONER GAZIANO: I'm in my first round. I'd like to concentrate on some of the points in your written statement regarding the dismissal. You said Office of Associate Attorney General would have definitely had to play a bigger role. Here's one quote. Speaking of the dismissal, you said, "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 position may be influenced by political considerations."

That kind of speaks for itself, but do you have any elaboration on whether that factor was an additional reason not to dismiss the suit from the

Department's Institutional standpoint?

MR. KATSAS: At a minimum, I think those considerations would counsel the Department to be very careful before it dismissed the suit. And if it were going to dismiss the suit, to have a pretty plausible non-political explanation that it was willing and able to publicly articulate and stand behind.

COMMISSIONER GAZIANO: And if they didn't articulate a plausible and credible explanation, do you think reasonable people would draw the negative inference that -- that you're saying is at risk?

MR. KATSAS: I think many people would. I'm not prepared to reach that conclusion myself. But when you serve in a leadership office like the Associate Attorney General's, part of your job is to avoid political messes for your department and your administration.

I would think that they should've been pretty careful with this one.

COMMISSIONER GAZIANO: Right. You also point out in your written testimony, "Moreover," I'm quoting you now. "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." Why is that relevant?

CHAIRPERSON REYNOLDS: Last question.

COMMISSIONER GAZIANO: Okay. Why is that relevant?

MR. KATSAS: From a Department -- from the Department's perspective, it's relevant because it would have been quite foreseeable to them, given everything that happened, and given the politics that if they changed course, there would be the kind of controversy that followed. And when you're in a situation like that, you want to be very careful to make sure that all of your decisions are fully justified on fair, neutral grounds.

COMMISSIONER GAZIANO: Thank you.

CHAIRPERSON REYNOLDS: Okay. Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: Commissioner Gaziano, just -- I'm slightly puzzled by your -- you said, well, you're puzzled why it has been repeatedly noted, especially by me, that 11(b) has so far involved only three cases, and not four decades of -- since the passage of the Voting Rights Act.

But there was a criminal potential basis for bringing criminal charges, but the Justice Department did not bring criminal charges, so that

issue is not before us, it seems to me. For whatever reasons, that criminal statute, that criminal provision, was not -- was not used. And that's another question we'll never get the answer to, you know, the why question, but I think it's irrelevant to our inquiry.

CHAIRPERSON REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: If the facts of the case would give rise to a former official like this, and to -- to us; potential criminal violations it seems to me, potentially more important to maintain the lesser suit than an ambiguous close case under 11(b) alone.

VICE CHAIR THERNSTROM: Well, but this is the Obama Justice Department, and it didn't bring a criminal -- it didn't bring criminal charges.

COMMISSIONER GAZIANO: I understand, but I think it's -- the egregiousness of the conduct should certainly affect the decision to maintain the civil action. And if -- and if the Department has two slings in its quiver, or two arrows in its quiver, and it -- and it said that, you know, "Trust us. We could use both, but we're going to use one." It's more -- it undermines respect for the rule of law even more

that it doesn't use either of those arrows.

VICE CHAIR THERNSTROM: I don't see the logic, but that's all right.

CHAIRPERSON REYNOLDS: Commission Kirsanow?

COMMISSIONER KIRSANOW: One question. You may have seen, if you were here, in the video, that police had arrived on the scene. Apparently they declined to either remove the individuals from the polling place, or to arrest them. Is that in any respect relevant to the decision to DOJ not to file -- or not to pursue default judgment in a civil action of 11(b)?

MR. KATSAS: I don't think so because the police -- the local police would not have been charged with enforcing this federal statute, and whatever state and local laws they were enforcing would've raised separate issues.

COMMISSIONER KIRSANOW: Thank you. No further questions, Mr. Chairman.

CHAIRPERSON REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: None.

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Yes. Next question,

round two. You were, again, at the Justice Department a very long time. I'm wondering if you're at liberty to comment on -- on Attorney General Mukasey's referral to OPR of the US Attorney and Civil Rights Division politicization issues?

MR. KATSAS: I'm just not familiar with those issues. I didn't work on them in the Department. So, I don't --

COMMISSIONER YAKI: You're unfamiliar with the findings of -- of the report?

MR. KATSAS: I'm generally familiar. I had no official-capacity involvement.

COMMISSIONER YAKI: Would it -- would it have -- well, let me ask you this question. Given the findings regarding the report that there was substantial politicization in the hiring and assignment of attorneys within the Civil Rights Division of the Justice Department during the certain portion of the -- of the Bush Administration, does that not give you some pause as to whether or not the incoming administration had a right to review decisions made by that previous Civil Rights Division?

MR. KATSAS: Well, they had a right. I guess -- I mean I start with -- I start with the case, and I see what seems on the face of it a strong

complaint. We've heard here evidence that tends to corroborate the allegations in the complaint. I would think that the Justice Department had at least some of that evidence in its files.

COMMISSIONER YAKI: But let me ask you this. To me, the evidence that has been presented today, such as it is, and someone said we weren't relitigating this, and I tend to disagree because that's exactly what we've been doing all day today, goes I think very strongly against Mr. Shabazz.

Mr. Jackson, I'm not prepared to make a comment one way or the other, but clearly in terms of some of the conduct and statements, Mr. Shabazz was -- was out there. But this -- this case was not simply about Mr. Shabazz and Mr. Jackson. It was also about a national organization by a -- by a national defendant based in another city.

So, my question -- my question really -- I mean are you telling me that -- that if you were -- if you went into a department that you -- that a neutral body, OPR, had said was rife with politicization that hires and assignments had been made based on political loyalty, your -- your willingness to be on their team or not with regard to your political and ideological viewpoints, that you -- it would not cross your mind

perhaps to take a look at some of the petitions that they had made if you were incoming?

Forget if it's left or right. Just say you're the new guy coming in, Assistant Attorney General Katsas, into a situation where you know this department has had an OPR review that goes, "Things were not going on very well in this department. Decisions were being made that had nothing to do with merit; had nothing to do with the integrity of the division." Are you saying to me it would still be hands off entirely on -- on this case or any other case?

MR. KATSAS: No. I mean look, it's never hands off entirely. In terms of the significance of the OPR report, with respect to this case, I would think there -- there may be -- now he's after me.

Look, if OPR reached an adverse conclusion about the competence or integrity of the specific lawyers on that case, maybe it would have relevance and counsel the kind of fresh look you're suggesting. To my knowledge, OPR did not make such findings.

So, if you're suggesting that based on either generalized concerns about politicization, or findings about other employees in the Department, would that strongly support a de novo consideration of

this issue? I think the answer to that question is no.

COMMISSIONER YAKI: Okay, I'll follow up. My time is up.

CHAIRPERSON REYNOLDS: Okay, Commissioner Melendez?

COMMISSIONER MELENDEZ: I didn't have anything.

CHAIRPERSON REYNOLDS: All right. That was our second round?

COMMISSIONER YAKI: No. Commissioner Heriot.

CHAIRPERSON REYNOLDS: Please don't take it personally. I apologize. Commissioner Heriot?

COMMISSIONER HERIOT: It's okay because I am going to pass anyway. I do, however, just want to clarify the record. There are going to be stray statements about some creature. There's a housefly that is overly friendly. So, anyone reading this transcript in the future will understand that.

COMMISSIONER YAKI: May I correct? It is a large housefly. It's the 747 of houseflies flying around.

CHAIRPERSON REYNOLDS: Thank you for that clarification. Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes. This may help pick up the line of questioning I was on. It seems to me American people, or citizens of any nations respect for the rule of law has to be cultivated by a long train of proper enforcement of -- of the law by public officials. But would you agree with me that it could be undermined more rapidly by perhaps even a single, wrongful but notorious action?

MR. KATSAS: Sure.

COMMISSIONER GAZIANO: So, it's -- so, individual actions that are -- that are open notorious well known have a greater impact. The implications of them are -- are broader than even a train of rightful conduct.

MR. KATSAS: Other things equal, yes.

COMMISSIONER GAZIANO: Okay. So, is it worse -- if -- if you think the suit should not have been dismissed, and that's been your written and oral testimony, is it worse for the government to have said, "Well, these were 11(b) violations by all four defendants. But we just don't want to spend any more money on them, and it's cheaper if we just get a judgment against the most flagrant of them."

Or, is it worse for them to maintain to the public and to the Commission and to members of

Congress that, "No, those three other defendants did not violate 11(b). We could not -- it was improper to maintain a case against them."

MR. KATSAS: I think the latter position is untenable.

COMMISSIONER GAZIANO: And why is that?

MR. KATSAS: Well, for the reasons I've said. I mean you saw -- you saw the video tapes. The two defendants at the scene in Philadelphia were acting in concert, wearing military uniforms, stationed right in front of the entrance, within arm's length of people who had to enter, hurling racial insults at people, and one of the two had a weapon. That seems like a pretty clear case.

COMMISSIONER GAZIANO: So, it's --

MR. KATSAS: And as to the -- as to the national party, some of the videotape evidence that you presented suggests that these defendants were acting pursuant to the national party and consistent with its broader agenda of racial antagonism.

COMMISSIONER GAZIANO: So -- and I'll get to that. I'm glad you mentioned it. But I just want to talk about this one point. So, it's bad enough for the Department to take a wrongful dismissal with all these political overtones that you've mentioned, and

give no reason, or to give a reason that it didn't want to spend any more money, but that it's more harmful to the public's respect for the rule of law if it maintains wrongfully that the law cannot reach those individuals?

MR. KATSAS: I suppose. I think none of those are ideal.

COMMISSIONER GAZIANO: Certainly. Let me ask you about the First Amendment defense that seems to be raised in some of the responses from the Department of Justice. You -- in your written testimony, you said that a First Amendment defense would not have been able to be invoked on behalf -- can you explain that?

MR. KATSAS: Sure. I have two basic reasons for that conclusion. One is that there's no First Amendment right to intimidate people anywhere at any time. And two, particularly with respect to polling places on Election Day, the government interests in ensuring easy access to the polls and preventing voter intimidation are so strong that the Supreme Court upheld a statute prohibiting all election related speech within a 100-foot area of a -- of a polling place.

So, here, you have both conduct that is

intimidating and the particularly sensitive time and place of the entrance to the polling place on Election Day. To say that there's a First Amendment right to intimidate voters at that time and place seems to me -

-

COMMISSIONER GAZIANO: Well, let me just ask a quick question. My -- so, for these individuals, if you -- who wore the paramilitary uniform and engaged in racial slurs, and one of them had a billy club, the original injunction that was dropped that included a prohibition that they not appear at the polls, at least these individuals who violated the Voting Rights Act, not appear at the polls wearing the paramilitary uniform.

Do you think that that part of the original injunction would've or could've been sustained?

CHAIRPERSON REYNOLDS: Last question.

COMMISSIONER GAZIANO: Yes.

MR. KATSAS: I think it could've been sustained because the original injunction spoke of wearing uniforms, but in the course of a deployment.

COMMISSIONER GAZIANO: Sure.

MR. KATSAS: And I think the word deployment sort of captures the idea of going to the

polling station, and in concert standing guard as if in military display. That seems to be -- that seems to be clearly defensible and quite different from an injunction that would've just -- just prohibited nothing more than wearing particular clothes.

COMMISSIONER GAZIANO: Thank you.

CHAIRPERSON REYNOLDS: Thank you. Commissioners, do we need another round?

COMMISSIONER KIRSANOW: Yes.

CHAIRPERSON REYNOLDS: Okay, Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: No, I'm taking a pass.

CHAIRPERSON REYNOLDS: A pass, okay. Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes, Mr. Katsas, there is ongoing an OPR investigation related to the disposition of this matter. At the outset of the Commission's investigation of this matter, and also that of Congressman Wolf, DOJ responded to inquiries by indicating that there was an ongoing OPR investigation.

At the conclusion of such investigation, are you aware of any privileges that would attach to any of the evidence that was considered or adduced

during the course of such investigation, and if so, that would preclude the release of any information related to the investigation? And if so, what are those privileges, and who has the privilege?

MR. KATSAS: All right, the evidence submitted to OPR?

COMMISSIONER KIRSANOW: Yes, the evidence and the -- the deliberative process that OPR engages in.

MR. KATSAS: Yes. I don't think that the mere fact of submission to OPR would itself create a privilege that would extend past the life of the OPR investigation. I do think that much of the evidence likely to have been submitted to OPR would have involved internal deliberations within the Department, and that evidence probably would be subject to some form of DOJ's deliberative process privilege.

I assume -- correct me if I'm wrong, I assume that you all stand on the same footing vis a vis the Department as Congress. And if that's true, then there would presumably have to be some process of negotiation to work out the competing claims of deliberative process on the one hand. And I agree with what Commissioner Thernstrom said earlier: that those are important, but to balance those deliberative

process claims on the one hand with your statutory authority to investigate on the other hand.

COMMISSIONER KIRSANOW: Who within DOJ, or is it the client, the President of the United States, or who would invoke the privilege?

MR. KATSAS: Probably not the President because there's a distinction in the law between the presidential communications privilege for the President and his immediate advisors and deliberative process, which is typically the less absolute privilege that governs those of us who served in agencies in lower ranking positions.

On the question of who invokes it, I don't know. Probably officially the attorney general, but my instinct is that the authority to invoke it would be delegable, and probably has been delegated.

COMMISSIONER KIRSANOW: Aside from the deliberative process privilege, would then any other privilege be the executive privilege?

MR. KATSAS: Deliberative process is a subspecies of executive privilege.

COMMISSIONER KIRSANOW: Is there an over-arching executive privilege that could be invoked at the conclusion of this, outside of the deliberative process?

MR. KATSAS: If there is -- executive privilege has two components. Deliberative process privilege, which would cover internal deliberations within DOJ and a presidential communications privilege, which would cover any possible communications about this matter involving either the President or the President's immediate advisors soliciting information on his behalf.

COMMISSIONER KIRSANOW: Thank you. No further questions.

CHAIRPERSON REYNOLDS: Okay, Commissioner Taylor?

COMMISSIONER TAYLOR: I have no further questions?

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Ding round three. Mr. Katsas, would it be fair to say that your knowledge of the Civil Rights Division during your tenure at Justice is pretty thin?

MR. KATSAS: It would be fair to say that my knowledge of the Civil Rights Division was acquired primarily during my year-and-a-half plus in the Associate Attorney General's office, and the -- and that the degree of intensiveness of review that one can conduct from the associate's office about what a

litigating division is doing is limited.

COMMISSIONER YAKI: So, it's pretty thin?

MR. KATSAS: That has a pejorative connotation that I -- I might want to resist.

COMMISSIONER YAKI: Well, the reason I'm asking --

MR. KATSAS: It's less extensive than, say, an Assistant Attorney General for the Civil Division -- for the Civil Rights Division.

COMMISSIONER YAKI: But for example, you would not -- you would not know for example whether or why Civil Rights Division decided to turn down potential 11(b) cases, and you would never -- it would never cross your desk?

MR. KATSAS: It may have. In theory, it could've come up to the associate's office while I was in the associate's office. But in fact, it didn't.

COMMISSIONER YAKI: But only during that time period?

MR. KATSAS: Yes.

COMMISSIONER YAKI: And what time period was that again?

MR. KATSAS: Let's see. August of 2006 until April of 2008, plus or minus a month.

COMMISSIONER YAKI: The reason I ask you

that is the statement by one of the Commissioners was kind of startling in terms of talking about how a single instance can -- can be in an of itself galvanizing. Although, I think to myself that this is hardly -- hardly rise to the level of an Adam Walsh or and Amber Hagerman in terms of its importance.

But nevertheless, that being -- that being the case, I know of at least three different -- three different incidents that were -- four that were brought up to the -- to the -- to the Justice Department and for which we have yet to hear anything with regard to why or what their disposition was.

One involved two instances during the 2006 national election cycle, where one congressional candidate in Orange County sent out a letter to 14,000 registered Latino voters. Perhaps you're familiar with that case?

MR. KATSAS: Only in very general terms. I'm familiar with the allegations.

COMMISSIONER YAKI: And -- and then there was the -- then during also that election, there were allegations in Tucson, Arizona, involving people who wore dark clothing, their own hand made badges, not unlike other people who may wear handmade -- or design their emblem with an open handgun in a holster, asking

only Latino voters personal information and videotaping them.

You don't recall that coming up to you for -- for decision or review, do you?

MR. KATSAS: No.

COMMISSIONER YAKI: All right. In 2008, do you recall whether or not it was referred to you that a private investigator in New Mexico was visiting the homes of newly registered Latino voters, telling them that they could not vote; that they were here illegally and he would report them to the INS. Did that ever come up to your attention?

MR. KATSAS: Not that I recall.

COMMISSIONER YAKI: And certainly when you were in the appellate division, you wouldn't have been aware of -- during the mayoral election in Philadelphia in 2003, that there was many reports about folks in dark suits and dark vans and clipboards, driving around in predominantly African-American neighborhoods, telling people that they had to have all sorts of ID with which to vote, and if they didn't, they would go to jail.

MR. KATSAS: That would've been outside the purview of the Civil -- I mean, look, you're describing cases that --

COMMISSIONER YAKI: I'm describing cases that Justice never took, and some of them are -- to me, are more egregious in that it involved serious intimidation with threats of jail time and other sorts of things, but apparently that is not enough for some Commissioners in which to say it is a national issue, but --

MR. KATSAS: I mean I can't speak to cases that I haven't looked at.

COMMISSIONER YAKI: I understand. So, that ends my next round. I have one more round left to go.

CHAIRPERSON REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: I'll pass.

CHAIRPERSON REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: I'll pass.

COMMISSIONER GAZIANO: I may run out before Commissioner Yaki, but in one of -- in your written statement, you -- regarding the kind of communications that were allowed under the then Mukasey Memo, which we understand Attorney General Holder has said he's keeping in place, but I'm asking under the -- under your experience, you say, "Under

these rules, I think it is unlikely that DOJ would have consulted the White House regarding whether to reverse course in the New Black Panther Litigation."

Your answer, first of all, is regarding the kind of officials and the policy as you think it should be implemented. Is that correct?

MR. KATSAS: It's based on my understanding of the guidelines in the Mukasey memo.

COMMISSIONER GAZIANO: Sure. So, you don't know one way or the other whether either Bush Administration officials or Obama Administration officials in the Department of Justice did in fact communicate at either the filing stage or the dismissal stage?

MR. KATSAS: With respect to Bush Administration officials, I have a vague recollection in some of the papers that I reviewed that there was a communication telling I think it was the press office of the White House that the complaint had been filed.

COMMISSIONER GAZIANO: Okay, then that gets me to my next question. Do you think it would have been likely appropriate or either for the Obama Administration to have alerted the White House that they were going to dismiss the case?

MR. KATSAS: I think under the Mukasey

guidelines, it would have been quite appropriate and indeed I think affirmatively good for the Department to alert the White House that, "This is a decision we have made. It's high profile. It's controversial. You might be hearing about it. This is what we did."

COMMISSIONER GAZIANO: Okay.

MR. KATSAS: But that sort of informing them of a decision already made, which seems to me entirely appropriate and unproblematic is very different from what the Mukasey memo is designed to get at, which is the prior -- the deliberations about what the decision should be.

COMMISSIONER GAZIANO: I understand. And you think -- based on your testimony, I'm inferring you think it's more likely, more appropriate that the White House -- if the White House was alerted when the case was filed, it's even more likely that the White House should've been alerted when they were considering dismissing it?

MR. KATSAS: Let me -- let me answer it this way. If I were Acting Associate or Associate Attorney General during the time of the dismissal deliberations, I would not have contacted the White House while the decision was ongoing, and that's partly to protect the perception of impartiality, and

it's also frankly partly to protect the White House from any perception or misperception of political interference.

COMMISSIONER GAZIANO: Okay. But you --

MR. KATSAS: But I would have -- after the decision was made, I think I would have made a call, saying, "This is what we've done. You may hear about it."

COMMISSIONER GAZIANO: After the dismissal, right before the dismissal?

MR. KATSAS: At a point in the process where no one could misunderstand the communication to be seeking advice with a nod and a wink.

COMMISSIONER GAZIANO: Okay, that's very helpful just for our record of what you think the proper procedure should've been. We may or may not ever find out what happened in this case. But now, I want to contrast that with communications to the Attorney General.

Obviously, the Civil Rights Division was supposed to raise significant matters with the associate's office, you said generally once a week.

MR. KATSAS: Right.

COMMISSIONER GAZIANO: And obviously, you were not a potted plant. So, anything that you were

interested in, you could've inquired about further, right?

MR. KATSAS: As the associate?

COMMISSIONER GAZIANO: Yes.

MR. KATSAS: Sure.

COMMISSIONER GAZIANO: And we have now supplemental interrogatory answers just received last week that we should've received ten months ago saying, "The Attorney General was made generally aware." I think it's not an exact quote, but pretty close, of the dismissal -- Attorney General Holder was made generally aware of -- of the consideration of dismissal.

He could have made inquiries if he thought that that raised concerns. Is that correct? He's not a potted plant in other words.

MR. KATSAS: No, no.

COMMISSIONER GAZIANO: He has authority to overrule.

MR. KATSAS: He has authority. He has every prerogative to do that. The question for him would be whether he wants to use his very limited time to drill down into a case like that.

COMMISSIONER GAZIANO: Correct, but you would not --

CHAIRPERSON REYNOLDS: Next round. Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: No, but if -- I'm happy to -- I'll just say no.

CHAIRPERSON REYNOLDS: Okay, Commissioner Kirsanow.

COMMISSIONER KIRSANOW: No questions.

CHAIRPERSON REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: No questions.

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Yes. I was -- I was curious about a statement that you made in your statement, in which you say New Black Panther Party endorsed President Obama for President. Where did you get that information from?

MR. KATSAS: I don't recall the source. I did some general quick and dirty -- quick and dirty internet research in the course of preparing.

COMMISSIONER YAKI: Could you provide that source? Because I'm not familiar with that?

MR. KATSAS: I'll look through my notes.

COMMISSIONER YAKI: And secondly, this -- there's some -- there's some -- there's a tautology here, which I'm not quite getting. And maybe it's

simply if you say it enough, it'll become true. Why would you consider this particular case, which at most involved two, maybe three individuals, of a pretty small organization, that apparently only manifested itself in one precinct in Philadelphia, despite declarations, "I was going to try and do this a lot of other places?"

Why would you consider this high-profile?

MR. KATSAS: High-profile because the conduct was recorded on the videotapes that you saw, and played in the national media immediately --

COMMISSIONER YAKI: So, absent YouTube, you're saying this -- yes, that's okay. It would not have been high-profile? I mean is that the definition of high-profile? It's not how many people were involved? It's not how many voters -- voters were affected? It's not how many -- how many voters may have been impacted? It's simply because it was on YouTube? That's what makes it high-profile?

MR. KATSAS: All of those considerations are relevant to the question whether or not you bring the case.

COMMISSIONER YAKI: Well, let's leave aside YouTube. You've heard the testimony today of these two individuals behaving badly. I think -- I

think engaging in 11(b) type behavior. Witnesses who were there saw only two or three people actually turn away. Testimony from inside -- deposition witnesses -- deponents who were inside said people were kind of chatting about it and joking about it in some ways, but no one seemed to be overly concerned about it.

So, absent -- absent YouTube, how -- how high-profile is this? Two people, one precinct, three people maybe turned away.

MR. KATSAS: Look, I --

COMMISSIONER YAKI: We have no evidence saying that turnout was affected one way or another; if it was down or if it was up. Yes, it's an 11(b) as to those individuals, but how does it become high-profile other than the fact that someone was there with a camcorder?

MR. KATSAS: The question -- maybe we're quibbling about the term high-profile. To me, the term high-profile means was there widespread general knowledge about this incident, and that question does turn on do the -- is it known on a nationwide basis, or just in terms of the people who were there?

I don't think that's the same -- I don't think that it is or should be a driver in the decision whether or not to bring the case.

COMMISSIONER YAKI: Well, I would hope not. I would hope not. I would -- I would hope that parts -- that to bring the case would depend on the severity of the incident.

MR. KATSAS: Yes, absolutely.

COMMISSIONER YAKI: Certainly the number of people who were affected.

MR. KATSAS: No question -- no question about that. But I was asked which -- which way the high-profile nature of the incident cuts.

COMMISSIONER YAKI: No, I understand.

MR. KATSAS: Okay.

COMMISSIONER YAKI: Yes, you can have I don't know how many hits on YouTube, but if it's in the paper with a circulation of 400,000-500,000, is that high profile? I don't know.

MR. KATSAS: The other -- let me just make one related point on the video. It seems to me it may be relevant for the reasons Commissioner Gaziano suggested. Not a driver but a consideration. It's also relevant for another reason, which is it seems to me in terms of the decision whether or not to pursue the case, one obvious consideration the Department would -- would always consider is is this going to be an easy case or a hard case to prove. And that video,

in my judgment makes it frankly an open and shut case to prove, with no investment of Department resources.

So, I think it's relevant for that reason as well.

COMMISSIONER YAKI: But then we could argue that that's the easy way out --

CHAIRPERSON REYNOLDS: Last question.

COMMISSIONER YAKI: -- in determining whether there's 11(b) violation because the fact of the matter is there are a number of -- of cases that were not brought under 11(b) that probably should've by the Justice Department during this period of time that had a much more egregious effect on many more thousands -- hundreds and thousands of people than these particular idiots with their baton.

MR. KATSAS: I can't speak to other cases that I haven't looked at. All I can tell you is that this case strikes me as a clear -- the clear violation of law, linked up to the agenda of the national party, and widely --

COMMISSIONER YAKI: So, this is policy by --

CHAIRPERSON REYNOLDS: Commissioner, Commissioner Yaki --

MR. KATSAS: No.

COMMISSIONER YAKI: Sounds like it. Sounds like what you're saying.

CHAIRPERSON REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: I didn't have anything.

CHAIRPERSON REYNOLDS: All right, Commissioner Heriot?

COMMISSIONER HERIOT: Mr. Katsas, I assume that you would agree that -- that one of the reasons for laws like this, and one of the reasons that the Department of Justice might undertake such an action is to general deterrence: sending the message out to people generally that intimidating voters is a bad thing.

MR. KATSAS: Sure.

COMMISSIONER HERIOT: Am I also right that the issue of general deterrence is linked up with is it a high profile issue. And by that, I mean I think what you mean as well.

MR. KATSAS: Yes.

COMMISSIONER HERIOT: You know, that a lot of people know about it.

MR. KATSAS: And that's why I think that is a fair and relevant consideration. I think in the

last round of questioning, I was just resisting a suggestion that you bring a prosecution for no other reason than --

COMMISSIONER HERIOT: No other reason. But it's --

MR. KATSAS: -- there's a video.

COMMISSIONER HERIOT: -- perfectly appropriate to consider it in the bringing of the case?

MR. KATSAS: Of course.

COMMISSIONER HERIOT: Okay.

CHAIRPERSON REYNOLDS: Let's finish up the order. Commissioner Gaziano?

COMMISSIONER GAZIANO: Yes. This -- this actually helps as a prelude to my final question to you. Since the Justice Department in their supplemental interrogatory answers, which we should've gotten ten months ago, has admitted the Attorney General was made generally aware of the -- the dismissal notions, did you raise things to the Attorney General level, or suggest things be raised to the Attorney General level that were insignificant or low profile?

MR. KATSAS: No.

COMMISSIONER GAZIANO: Okay, so what does

it tell you about the Obama-Holder Justice Department that this was raised to the Attorney General's level?

MR. KATSAS: I think it tends to confirm what I said in my written testimony, which was that my sense is that the decision to abandon most of this litigation, given everything that we knew about it, would have been a pretty sensitive one within DOJ.

COMMISSIONER GAZIANO: Certainly. Okay, since you were very helpful on explaining some of the permutations of executive privilege, I -- I can't spend a lot of time, but you heard this morning that we just got the witness statements that we've been asking for for ten months.

And even now, they're redacted as to their name. But I think the witnesses are going to volunteer to tell us whose was whose. Is there -- does it raise any clear, deliberative process issue to -- to have the witness statements that were on file?

MR. KATSAS: I wouldn't think so. Just let me make sure I understand. These are statements that DOJ took in the course of working up the case?

COMMISSIONER GAZIANO: Correct. Now, they may implicate work product, which doesn't apply. Which doesn't apply. So, does this --

MR. KATSAS: They wouldn't have been

deliberative process by definition because they involved a communication with someone outside the Department. They may have -- they may have involved something akin to a law enforcement-like privilege while the case was pending, but I would think that wouldn't apply after the case was over.

COMMISSIONER GAZIANO: We began our investigation after the dismissal.

MR. KATSAS: Yes.

COMMISSIONER GAZIANO: And do you think even to this day there's any justification for the White House to have -- or the administration to have redacted -- tried to keep from us the names of which witnesses made which statements?

MR. KATSAS: I can't think of one.

COMMISSIONER GAZIANO: Thank you.

CHAIRPERSON REYNOLDS: I want to yield half of my time to Vice Chair Thernstrom.

VICE CHAIR THERNSTROM: I just want to push you a minute on this high-profile definition. I mean there was hope on this Commission that this would become a high-profile issue, but it seems to me indisputably it has not become one. That is, yes, the Washington Times, which is a paper nobody reads, is -- has been carrying stories on it, and Fox News did pick

up from the Washington Times at one point. But in terms of mainstream media?

COMMISSIONER GAZIANO: The Washington Post is Twittering this very hearing.

VICE CHAIR THERNSTROM: Okay, today. But up to now, this has not been -- maybe it will be as a consequence of today, but up to now, it has not been a high-profile issue. I just -- I mean I think that's important to establish.

MR. KATSAS: Those are fair observations. It has not been as high-profile as it might. But in the context of a strong meritorious case, it does seem to me fair for the reasons that we just discussed about general deterrence for the Department to take into consideration the dissemination of that information.

I don't think that should be a driver, but --

VICE CHAIR THERNSTROM: Look, I don't think the Department should shrug its shoulders, but I think given how low-profile it has been, what I would expect is for the Department to say, "Ah, who's paying attention?"

MR. KATSAS: I don't know. I would think that most incidents like this are not captured on a

video, put on the internet, and made the subject of discussion on a national network.

VICE CHAIR THERNSTROM: And by the way, I've talked to the Chairman about this, my last sentence. The members of the New Black Panther Party who were here before asked me if the Commission, at some other time obviously, could see the section of that YouTube video, which preceded what we do see. And I think --

MR. BLACKWOOD: If I might, we saw the complete YouTube video.

VICE CHAIR THERNSTROM: They think there is something that --

MR. BLACKWOOD: I had that conversation out in the hallway. I can tell you that's the complete YouTube video we have seen.

CHAIRPERSON REYNOLDS: Okay, so to the extent there's additional, we don't have it?

MR. BLACKWOOD: We do not have it.

COMMISSIONER GAZIANO: If they want to supply it to us, I would like to see it.

VICE CHAIR THERNSTROM: Well, exactly. If there is more, I'd like to see it.

CHAIRPERSON REYNOLDS: Okay. Any other questions? Okay, hold on a moment. Other than

Commissioner Yaki, do we have additional questions?

COMMISSIONER HERIOT: I have just one question.

CHAIRPERSON REYNOLDS: Okay, Commissioner Yaki?

COMMISSIONER YAKI: I'm just going to make one little follow up on the high-profile issue. Would it -- would it have been proper course to advise the Attorney General, regardless of whether you thought it was high-profile or not? But if you were reversing a decision of a prior administration, would that be something that you would advise the Attorney General's office that is was action you were taking?

MR. KATSAS: Yes, probably.

COMMISSIONER YAKI: That's all. Thank you.

MR. KATSAS: Because of the sensitivity of that kind of decision.

COMMISSIONER YAKI: Exactly, yes.

MR. KATSAS: Yes.

CHAIRPERSON REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: I just want to establish that we understand that high-profile is a matter of degree. Do you know of any other incident

at a precinct during that election that was any higher profile than this one?

MR. KATSAS: I'm not an expert, but no.

COMMISSIONER YAKI: I do.

CHAIRPERSON REYNOLDS: Okay.

COMMISSIONER YAKI: It depends on how you define high-profile. It depends on the number of people who were --

CHAIRPERSON REYNOLDS: Okay, we're going to direct our questions to the witnesses. Folks, this concludes our hearing for today. We will adjourn until May 14th, 2010, at which time we will hear testimony in the New Black Panther Party litigation matter from Assistant Attorney General Thomas Perez, and possibly a few other witnesses.

We will hold the record open for additional evidence pursuant to 45 CFR Section 702.8. Individuals who wish to submit items for consideration to be included in the record may do so by sending them to the General Counsel, David Blackwood, at the US Commission on Civil Rights, at 624 9th Street Northwest, Washington, D.C. 20425. Mr. Katsas, thank you very much.

MR. KATSAS: Thank you.

(Whereupon, the above-entitled matter went

off the record at 1:56 p.m.)

U.S. COMMISSION ON CIVIL RIGHTS

+ + + + +

HEARING ON
THE DEPARTMENT OF JUSTICE'S ACTIONS
RELATED TO THE NEW BLACK PANTHER PARTY
LITIGATION AND ITS ENFORCEMENT OF SECTION 11(b)
OF THE VOTING RIGHTS ACT

+ + + + +

FRIDAY, MAY 14, 2010

+ + + + +

The Commission convened in Room 540 at 624 Ninth Street, Northwest, Washington, D.C. at 9:30 a.m., GERALD A. REYNOLDS, Chairman, presiding.
PRESENT:

GERALD A. REYNOLDS, Chairman
ABIGAIL THERNSTROM, Vice Chairman
TODD F. GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner
ARLAN D. MELENDEZ, Commissioner (via telephone)
MICHAEL YAKI, Commissioner

MARTIN DANNENFELSER, Staff Director

WITNESS:

THOMAS PEREZ, Assistant Attorney General,
U.S. Department of Justice,
Civil Rights Division

STAFF PRESENT:

DAVID BLACKWOOD, General Counsel, OGC
TERESA BROOKS
MARGARET BUTLER
CHRISTOPHER BYRNES, Director, RPCU
DEMITRIA DEAS
LILLIAN DUNLAP
PAMELA A. DUNSTON, Chief, ASCD
LATRICE FOSHEE
HANNAH GEYER, Legal Intern
ALFREDA GREENE
TINALOUISE MARTIN, Director, OM
EMMA MONROIG, Solicitor
LENORE OSTROWSKY
EILEEN RUDERT
VANESSA WILLIAMSON
AUDREY WRIGHT

TABLE OF CONTENTS

P-R-O-C-E-E-D-I-N-G-S

(9:33 a.m.)

I. INTRODUCTION BY CHAIR

CHAIRPERSON REYNOLDS: This hearing of the U.S. Commission on Civil Rights will come to order. Our purpose today is to collect facts and information regarding the Department of Justice's actions related to the New Black Panther Party litigation and its enforcement of Section 11(b) of the Voting Rights Act.

The Commission began its investigation of this matter almost a year ago, in June of 2009, and held the first hearing on this matter on April 23rd, 2010. During this hearing, the Commission heard testimony from various fact witnesses, who testified, who witnessed the Election Day incident as well as Representative Frank Wolf and former DOJ official Gregory Katsas.

Today's testimony by Assistant Attorney General for the Civil Rights Division, Thomas Perez, is a continuation of that hearing.

By now, the facts of this case should be well-known. On November 4th, 2008, two members of the New Black Panther Party appeared at a polling station in Philadelphia.

Video evidence and eyewitness testimony

show that these two members standing athwart the entrance of the polling place dressed in paramilitary uniforms with black combat boots.

One of them brandished a nightstick. They hurled racial epithets at whites and blacks alike, taunting poll watchers and poll observers, who were there to aid voters and, according to evidence adduced during our hearing last month, caused some voters who sought to cast their votes that day to turn and leave the polling place, rather than have to contend with them.

A black poll worker who happened to be working for the Republican Party was called a race traitor and promised that there would be hell to pay if he emerged from the polling place, according to eyewitness statements. He was so alarmed by the Panthers' presence that he would not leave the polling place until they left.

Initially this assault upon the sanctity of the polling place was aggressively pursued by the Justice Department in 2008 under Section 11(b) of the Voting Rights Act, which prohibits any person, whether or not acting under color of state law from intimidating, threatening, coercing, or attempting to intimidate, threaten, or coerce any person from voting

or attempting to vote or from aiding a voter.

The Department's lawsuit sought to permanently enjoin any similar future conduct by four defendants: Minister King Samir Shabazz; Jerry Jackson; -- these are the two gentlemen who were at the polling place on the day in question -- and the New Black Panther Party Chairman, Malik Zulu Shabazz; and the organization itself.

None of the defendants contested the charges. And all that remained for the Department to do was to seek an entry of default judgment and an injunction to stop future acts of intimidation.

But on the eve of the date which the court set for the Department's request for default judgment, the trial attorneys that had vigorously pursued the case were instructed, instead, to request a continuance by then Acting Assistant Attorney General for Civil Rights Loretta King.

In the days that followed and despite the robust justification memo it had prepared at the inception of the case to support its request to file suit, it appears the experienced line career attorneys responsible for the case were put under intense pressure to justify the lawsuit against the Panthers and required to prepare a defense of its proposed

injunction, as press reports and evidence submitted into the record by Representative Wolf during last month's hearing demonstrate.

Ms. King then sought a review of the matter by the Division's Appellate Section, which was also entered into evidence by Representative Wolf. That review states that the Department can make a reasonable argument in favor of default relief against all defendants and probably should, given the unusual procedural situation. It was a view shared by a total of at least six career attorneys intimately familiar with the details of the case, including two who opined from the Appellate Section. One of the appellate attorneys went so far as to characterize the injunctive relief against King Samir Shabazz and Jerry Jackson as very limited and acknowledged that such a limited injunction would not accomplish very much.

Nevertheless, the Department dropped its claims against three of the defendants: the organization, the New Black Panther Party; its Chairman, Malik Shabazz; and also, curiously enough, Jerry Jackson, who was one of the individuals from the organization who was at the polling place acting in concert with the gentleman who wielded the nightstick.

As to King Samir Shabazz, the Department

reduced the injunctive relief it sought against him. Whereas, the original complaint sought an unlimited injunction prohibiting acts of intimidation anywhere in the United States, the final relief sought by the Department was limited solely to the City of Philadelphia and was only to last through November of 2012.

Careful analysis of the Department's action in this case falls squarely within this Commission's special statutory mandate to assess the enforcement of the Voting Rights Act. That Act resulted in large part from the Commission's earliest work in the '50s.

This assessment comes at a time when both the President and senior DOJ officials have announced the Department is prosecuting civil rights violations again and that it is back open for business.

Mr. Perez has stated that it is the job of the Civil Rights Division to enforce all civil rights laws and has noted, "Civil rights enforcement is not like the buffet line at the cafeteria. You can't pick and choose which laws you like and which ones you don't."

He has pledged to enforce those laws in a fair and independent fashion using all the tools at

the Department's disposal. "We are not simply open for business," Mr. Perez has said. "We are doing business in a new, different, and better way."

In testimony before the House Judiciary Subcommittee on the Constitution in December of 2009, Mr. Perez identified the voting rights of all Americans as being at the core of equal opportunity and equal justice. Robust enforcement of civil rights laws of the dispensation of equal justice, regardless of the color of the victim or offender, are at the heart of the New Black Panther Party case.

A dismissal of this case is critical because of the broader message it conveys. The American people expect the Department of Justice to vigorously enforce the nation's civil rights laws. Doing so requires it to exercise its discretion to send a strong message to hate groups across America that the kind of behavior that occurred at the polling place in Philadelphia on Election Day will not be tolerated.

Rather than exercise its discretion to deter this behavior in the future, it declined to follow the collective wisdom of career attorneys from several components of the Department, weakened the remedy it sought, and reduced the number of defendants

it sought a remedy against just to one individual, despite evidence that, at a minimum, he acted in close coordination with his colleague Mr. Jackson.

A policy of non-prosecution when the facts are so clear is likely to lead to disrespect for the law and the department that is charged with enforcing it.

Mr. Perez has said that the nation needs a civil rights division because it is the moral compass of our nation, it serves a guiding light as we navigate new paths on the road to equal justice.

Well, if the civil rights division is the nation's moral compass, the Commission on Civil Rights is its conscience. And it is our duty to ensure that the moral compass is pointing due north.

Before we hear testimony from Mr. Perez, each Commissioner has been given a minute in which to make an opening statement if he or she wishes. If a Commissioner would prefer to reserve his or her time for a closing statement, they are free to do so. We will adhere firmly to this time limit.

Vice Chair Thernstrom, please proceed.

COMMISSIONER YAKI: Point of information on the voting rights.

CHAIRPERSON REYNOLDS: Yes?

COMMISSIONER YAKI: I just have a question about a statement made in the Chairman's opening remarks. You talked about the --

CHAIRPERSON REYNOLDS: Commissioner Yaki, we are under tight time constraints.

COMMISSIONER YAKI: I know. I understand. But I think this is important because --

CHAIRPERSON REYNOLDS: It may be important --

COMMISSIONER YAKI: -- it goes to the rules of the game here, which is you talked about the so-called terrified poll worker at the facility --

CHAIRPERSON REYNOLDS: Mr. Yaki? Commissioner Yaki?

COMMISSIONER YAKI: -- when there has been direct evidence --

CHAIRPERSON REYNOLDS: Commissioner Yaki, we will not be doing this now. Vice Chair Thernstrom, please continue.

COMMISSIONER YAKI: I am asking for clarification, Mr. Chair. You made a statement.

CHAIRPERSON REYNOLDS: Vice Chair Thernstrom?

COMMISSIONER YAKI: It was not based on any direct evidence --

CHAIRPERSON REYNOLDS: Please proceed.

COMMISSIONER YAKI: -- by anyone here. It is hearsay testimony. The only thing --

CHAIRPERSON REYNOLDS: Commissioner Yaki, now is not the time to try to run out the clock.

COMMISSIONER YAKI: I am not trying to run out the clock. I am simply saying that there has been no direct testimony --

CHAIRPERSON REYNOLDS: Commissioner Yaki? Commissioner Yaki, you are wasting valuable time. And you know it.

COMMISSIONER YAKI: And I think that your ten-minute statement when we only get one minute is a way to put facts into evidence which do not exist.

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: I just want to make that point.

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: That's all I have to say.

CHAIRPERSON REYNOLDS: Commissioner Yaki, if this happens again, it will come out of your time.

COMMISSIONER YAKI: Oh, you can do whatever you want, Mr. Chair.

CHAIRPERSON REYNOLDS: Vice Chair

Thernstrom, please?

COMMISSIONER YAKI: You seem to be doing it quite --

VICE CHAIR THERNSTROM: I was interested in this. I'm just going to reserve my time for later.

CHAIRPERSON REYNOLDS: Okay. Next up, Commissioner Gaziano?

COMMISSIONER GAZIANO: Actually, I think wouldn't it be Commissioner Kirsanow?

CHAIRPERSON REYNOLDS: We are reversing the order.

COMMISSIONER GAZIANO: I will reserve my time as well.

CHAIRPERSON REYNOLDS: Okay. Commissioner Yaki?

COMMISSIONER YAKI: I reserve my time.

CHAIRPERSON REYNOLDS: Commissioner Melendez, are you on the phone?

COMMISSIONER MELENDEZ: Yes. I just wanted to thank Mr. Perez for being here, and that is about it.

CHAIRPERSON REYNOLDS: Okay. Commissioner Heriot?

COMMISSIONER HERIOT: I'll reserve my time for afterwards.

CHAIRPERSON REYNOLDS: Okay. I will do the same. At this time we would like to welcome -- oh, I'm sorry.

COMMISSIONER KIRSANOW: I reserve my time also.

CHAIRPERSON REYNOLDS: Okay. We would like to welcome the Assistant Attorney General for the Civil Rights Division, Mr. Thomas Perez. After I introduce Mr. Perez, the General Counsel will begin questioning the witness. And then the floor will be open to Commissioners for questions.

Commissioners will have five minutes to ask each of their questions of the witness. And we will again proceed in order of seniority, the only difference being that we have swapped out Commissioner Gaziano for Commissioner Kirsanow. At that point we will engage in another five rounds of questioning if time permits.

Mr. Perez, please raise your right hand. Do you swear and affirm that the information you are about to provide is true and accurate, to the best of your knowledge and belief?

ASST. ATTY. GEN. PEREZ: Yes, I do.

CHAIRPERSON REYNOLDS: Thank you, sir. Given the limited time here today, we ask that you

adhere strictly to the five-minute time limit for your testimony.

II. TESTIMONY OF ASSISTANT ATTORNEY GENERAL THOMAS PEREZ, U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION

ASST. ATTY. GEN. PEREZ: Okay. Good morning, Chairman Reynolds and members of the Commission. Thank you for the opportunity to testify here today.

The Civil Rights Division remains committed to upholding the civil and constitutional rights of all individuals, particularly those who are the most vulnerable members of our society.

I am pleased to be here today to discuss one of the cornerstones of the Division's work: our enforcement of federal laws to protect voting rights. Protection of the right to vote is one of the Department's top priorities, and we want to be as responsive as possible to the Commission's request for information about our law enforcement activities in this area.

To that end, the Department has responded to interrogatories and document requests it has received and has provided more than 4,000 pages of documents relating to our enforcement of Section 11(b)

of the Voting Rights Act and specifically with respect to the Department's litigation in the New Black Panther Party matter.

Those documents include declarations received by the Department from witnesses in the litigation as well as detailed information collected by the FBI regarding the events that gave rise to that case.

As noted in the written responses to the Commission's inquiry, we have endeavored to be responsive to the Commission's request while at the same time protecting against disclosures which would undermine well-established and longstanding confidentiality interests that are integral to the discharge of our law enforcement responsibilities, particularly those relating to litigation decisions.

At the outset, let me emphasize with respect to Section 11(b) decisions that these are hard cases. Very few such cases have been brought. In fact, we can find records of only three cases filed by the government under Section 11(b) since its inception.

The standards for proof are high. And, as in every case, the question to be addressed is whether the evidence is sufficient to sustain the burden of

proof. And on that question, reasonable minds can differ and can look at the same set of facts but draw different conclusions regarding whether the burden of proof has been met. Let me give you a few examples to illustrate that point.

In the most recent case under 11(b) to go to trial, United States versus Brown, the court found that the publication in the newspaper by a county political party chairman of a list of voters to be challenged if they attempted to vote in the party primary did not amount to intimidation, threat, or coercion under 11(b).

In another case, in Arizona, the complaint was received by a national civil rights organization regarding events in Pima, Arizona in the 2006 election when three well-known anti-immigrant advocates affiliated with the Minutemen, one of whom was carrying a gun, allegedly intimidated Latino voters at a polling place by approaching several persons, filming them, and advocating and printing voting materials in Spanish.

In that instance, the Department declined to bring any action for alleged voter intimidation, notwithstanding the requests of the complaining parties.

In 2005, the Division received allegations that armed Mississippi State investigators intimidated elderly minority voters during an investigation of possible voter fraud in municipal elections by visiting them in their home, asking them who they voted for, in spite of state law protections that explicitly forbid such inquiries.

Here again, the Division front office leadership declined to bring a voter intimidation case in this matter. This is the matter referenced in a recent GAO report that examined a number of cases brought by certain sections of the Civil Rights Division during the Bush administration.

Moving to the matter at hand, the events occurred on November 4th, 2008. The Department became aware of these events on Election Day and decided to conduct further inquiry.

After reviewing the matter, the Civil Rights Division determined that the facts did not constitute a prosecutable violation of the criminal statutes. The Department did, however, file a civil action on January 7th, 2009, seeking injunctive and declaratory relief under 11(b) against four defendants.

The complaint alleged that the defendants

violated Section 11(b) because they attempted to engage in and engaged in both voter intimidation and intimidation of individuals aiding voters.

Although none of the defendants responded to the complaint, the Department had a continuing legal and ethical obligation to ensure that any relief sought was consistent with the law and supported by the evidence.

Based on the careful review of the evidence, the Department concluded that the evidence collected supported the allegations in the complaint against Minister King Samir Shabazz. The Department, therefore, obtained an injunction against defendant King Samir Shabazz, prohibiting him from displaying a weapon within 100 feet of an open polling place on any Election Day in the City of Philadelphia or from otherwise violating Section 11(b).

The Department considers this injunction to be tailored appropriately to the scope of the violation and the constitutional requirements and will fully enforce the injunction's terms.

Section 11(b) does not authorize any other kinds of relief, such as criminal penalties, monetary damages, or civil penalties.

The Department concluded that the

allegations in the complaint against Jerry Jackson, the other defendant present at the polling place, as well as the allegations against the national New Black Panther Party and its leader, Malik Zulu Shabazz, did not have sufficient evidentiary support.

The Department reviewed the totality of the evidence in the applicable law in reaching these decisions.

CHAIRPERSON REYNOLDS: Thank you, Mr. Perez.

At this time, we will hear from the General Counsel. Mr. Blackwood?

MR. BLACKWOOD: Thank you. Thank you for coming, Mr. Perez.

If I could, if you could put up slide number 2? As I understand your testimony today, the main reason that the course of the litigation changed is that there was another review of evidence. There was, of course, a review of evidence beforehand in determining to file the lawsuit, correct?

ASST. ATTY. GEN. PEREZ: Yes, there was a review between November 4th and January 7th.

MR. BLACKWOOD: Okay. And at the time that the suit got filed, the J memo shows that four attorneys had signed off: Spencer Fisher, Christian

Adams, Robert Popper, Christopher Coates, four line attorneys. There were four attorneys, two of them, one the Chief, the other the Deputy Chief of the Voting Section.

Were there new facts learned between the time of January 7th and May 1st?

ASST. ATTY. GEN. PEREZ: The Department has a continuing obligation in any litigation to ensure that the facts that are put forth to support, in this case a default judgment are, in fact, the facts that can support that judgment.

MR. BLACKWOOD: Sure.

ASST. ATTY. GEN. PEREZ: And so that duty falls with not simply the line attorneys in the section but people up the chain. And in this case, that part is no different than any other case, where you have that continuing legal and ethical obligation to review the facts and apply the facts to the law as you have them.

MR. BLACKWOOD: Right. No question. Every attorney has that ongoing obligation.

ASST. ATTY. GEN. PEREZ: And every supervisor has the obligation to review the work of the front-line people who are doing it.

MR. BLACKWOOD: Right. But --

ASST. ATTY. GEN. PEREZ: That is standard procedure in the Department.

MR. BLACKWOOD: No question. But the question I do have is the one I posed to you, which is, was any new evidence learned from the time that the suit was filed on January 7th and the time that a continuance was asked on May 1st?

ASST. ATTY. GEN. PEREZ: There was a continuing review of the evidence by people in the front office.

MR. BLACKWOOD: But no new evidence?

ASST. ATTY. GEN. PEREZ: Well, there was a continuing review of the evidence.

MR. BLACKWOOD: Okay. Among that, though, was also a review by the Appellate Section, which occurred on -- what was it? -- May 12th and May 13th by Diana Flynn and Marie McElderry. That review and the memorandum resulting indicated no concern of the kind that you mentioned.

If I can see slide 4, please? Ms. Flynn in the memo that she prepared -- and this was just before May 15th, which is the day the default was due or the decision had to be made -- she indicated, "We can make a reasonable argument in favor of default relief against all defendants and probably should

given the unusual procedural situation."

Who overruled Ms. Flynn's opinion?

ASST. ATTY. GEN. PEREZ: 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.

As it related to the national party, the determination was made -- as you know, there is no vicarious liability when incidents occur. The New Black Panther Party stated that they were going to have 300 poll watchers across America. We are unaware of any incident that occurred anywhere besides Philadelphia.

So the evidence in that particular context demonstrated or suggested that if there was indeed a national conspiracy to intimidate voters, that there would have been, it stands to reason, activity elsewhere.

So as it related to the national party and the national president -- and, again, the evidence showed that shortly after the election, the national party disavowed the activities and actions of the two people acting locally. And so that judgment was made not to seek that -- the evidence did not support the

actions against the national party and the national chairman.

MR. BLACKWOOD: Right. But I'm asking --

ASST. ATTY. GEN. PEREZ: And then once you have that happening, you are in a situation where you can no longer because of the narrow tailoring requirements for the injunctive relief --

MR. BLACKWOOD: But you are not answering my question.

ASST. ATTY. GEN. PEREZ: -- you have -- I actually am, sir, because you are asking the question of why did we make the decision that we made?

MR. BLACKWOOD: No, no, no. That's not what I asked. I said, who or why did someone overrule or --

ASST. ATTY. GEN. PEREZ: And I'm explaining.

MR. BLACKWOOD: -- Ms. Flynn's determination?

ASST. ATTY. GEN. PEREZ: Because they took a look at the evidence and --

MR. BLACKWOOD: And didn't Ms. Flynn also take a look at the evidence?

ASST. ATTY. GEN. PEREZ: And that's -- and, Mr. Blackwood, I have worked at the Department

under Republican and Democratic leadership. And I have been involved in many, many cases where you look at evidence. And reasonable people of good faith can take a look at evidence and draw different conclusions from the evidence. This is a case about career people disagreeing with career people. That happens very often.

I have had many cases when I was a prosecutor where I looked at a set of facts, and I concluded that we should go in one direction. My supervisors reviewed it. And they had much more experience than I did. And they concluded that we should go in a different direction.

That kind of robust interaction is part of the daily fabric of the Department of Justice. And that's precisely what happened in this case.

MR. BLACKWOOD: Well, just so we're all clear, though, when you say "career people overruled career people," in this particular case, if we could see slide 3? There was a total of six career attorneys that said the matter should proceed.

Now, that's fine. Mr. Rosenbaum and Ms. King came to a different conclusion. But it is, I would think you would agree, slightly unusual that in a case where it's in a default posture, literally the

other side has conceded liability. And the only question is, what is the relief or the remedy?

In that circumstance, the six career attorneys were overruled by two others.

ASST. ATTY. GEN. PEREZ: We have a continuing duty, whether it's in a default posture, whether it's a pro se defendant, whether it's the biggest white shoe law firm in town representing the defendant, our obligation stays the same, which is that we continue to have a legal and ethical obligation to ensure that we can present evidence that there is sufficient evidence to sustain the elements of the particular charge.

In this case, the conclusion was made that, as to the defendant who had the nightstick, that there was indeed sufficient evidence to sustain the charge. And so the default judgment was sought and obtained as it related to him.

MR. BLACKWOOD: Okay. If I could --

ASST. ATTY. GEN. PEREZ: And as it related to the other defendants in the case, Ms. King and Mr. Rosenbaum concluded that the evidence did not support that. And that was the decision that they made.

MR. BLACKWOOD: Okay. This goes back to my original question, though. Of the eight career

attorneys looking at it, the six I mentioned and then Ms. King and Mr. Rosenbaum, they're all looking at the same evidence, correct? I mean, there's no new additional evidence that was collected after January 7?

ASST. ATTY. GEN. PEREZ: Correct. People can look at the same set of facts, --

MR. BLACKWOOD: Of course.

ASST. ATTY. GEN. PEREZ: -- just as in the other cases I've provided. People can look at, you know, Minutemen brandishing a weapon at a polling place in Arizona during an election and conclude that that sounds intimidating.

MR. BLACKWOOD: Okay.

ASST. ATTY. GEN. PEREZ: The Division concluded that it didn't meet the high bar of Section 11(b).

MR. BLACKWOOD: Okay.

ASST. ATTY. GEN. PEREZ: And so that is -- again, you know, reasonable 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.

CHAIRPERSON REYNOLDS: Okay. Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: Thank you very much for appearing.

ASST. ATTY. GEN. PEREZ: Good morning.

VICE CHAIR THERNSTROM: I am interested in three things you have talked about. One, I didn't know that there had been -- and I am extremely interested. You had first thought that there was a threat of a national conspiracy, as it were, 300 incidents, 300 poll workers, whatever the description was.

It's one of the arguments I have been making from the beginning here at the Commission, that this was a one-off. And, therefore, I would have been very interested in having a briefing, but I didn't think it merited a statutory report.

And I just wanted to say that to me, that is an extremely important fact, that you had expected, you know, something on a much larger scale and it didn't occur.

I am interested in answers to two questions. One, you have talked about the confidentiality interests of the Department. And I wondered if you would spell those out. I am concerned about those, whether it's a Republican administration or a Democratic administration.

And, two, I wondered if you would spell out -- you had said the standard for the burden of proof in 11(b) cases is very high. And I would like you to spell out what that standard is.

I might mention that I am the only person on this Commission who is not an attorney but a political scientist. But I have written two --

ASST. ATTY. GEN. PEREZ: You play one on TV, though.

VICE CHAIR THERNSTROM: I have written two books on the Voting Rights Act. In neither one did I talk about 11(b) because it has been such a minor provision.

ASST. ATTY. GEN. PEREZ: Sure. You ask some very good questions, and let me attempt to address them. The confidentiality interests in not disclosing internal deliberations have been a time-honored interest throughout Republican and Democratic administrations.

We have many cases in many different areas that we investigate in the Department of Justice. And the goal that I have, whether it's voting, whether it's criminal, whether it's education, is to foster a robust dialogue.

And one way that is a critical way to

foster that robust dialogue is for people on the front lines to appreciate that they can offer me or whomever, Republican or Democrat, is the Assistant Attorney General, that honest and candid advice, not having to constantly wonder whether, if I express this opinion today, will it show up in a PowerPoint presentation tomorrow.

And this has been a tradition that has been throughout Republican and Democratic administrations. I recall vividly when I was a career attorney under John Dunne. The Republicans --

VICE CHAIR THERNSTROM: I know him well.

ASST. ATTY. GEN. PEREZ: And he's a man of great integrity, --

VICE CHAIR THERNSTROM: Right.

ASST. ATTY. GEN. PEREZ: -- for whom I have great respect. This is an interest that has been expressed and put in practice.

We also have great respect for the role of Congress, the role of this Commission. I'm here today because I have great respect for the institution of the Civil Rights Commission and the role that it has played in a host of issues. And that is why we provided over 4,000 pages of documents, including interviews, et cetera.

And when we have this back and forth with Congress, we do very similar things. And our interest, again, is ensuring that those confidentiality interests in our internal deliberations are indeed protected while simultaneously balancing the work that you appropriately have and Congress appropriately has. And we, I think, have historically been able to work those out. And that is why as the head of the Division, I come here today to talk about the matter.

11(b), you're correct. If you look at a pie chart under Republican or Democratic administrations, it's been an infinitesimally small part of the enforcement since 1965.

We could only find three cases that the Department brought. One was the Harvey Gantt or Jesse Helms case, which resulted in a settlement. And the other two contested cases were not sustained at trial. One was long ago, and one was more recent.

And I outlined those other cases, where there are facts that, arguably, demonstrate intimidation, where again the case wasn't even pursued to begin with.

And so the courts have set a high bar. That is the hand we're dealt. And I think that is a

big part of the reason why we proceed as such.

CHAIRPERSON REYNOLDS: Thank you, Mr. Perez.

Commissioner Gaziano?

COMMISSIONER GAZIANO: And I have seven minutes, yielded time from -- two from you and --

CHAIRPERSON REYNOLDS: Yes. I'm yielding two of my precious minutes to Commissioner Gaziano.

COMMISSIONER YAKI: We are going out of seniority? That's basically what is going on now?

CHAIRPERSON REYNOLDS: Yes. I announced at the beginning that --

COMMISSIONER GAZIANO: Pete is yielding to me, and I will yield to Pete.

COMMISSIONER YAKI: Okay.

COMMISSIONER GAZIANO: Good morning.

ASST. ATTY. GEN. PEREZ: Good morning, sir.

COMMISSIONER GAZIANO: I want to begin with a few very simple and general propositions. I don't know if I'll ever drill down apart from these hypotheticals, but please just help me with these propositions.

Do you agree that the voting rights laws should always be enforced in a race-neutral manner?

ASST. ATTY. GEN. PEREZ: Yes, sir.

COMMISSIONER GAZIANO: I certainly hope so. And I am glad to hear that that is the Department's position.

So let me imagine a different administration. It would be a problem for the Civil Rights Division if any political appointee or supervising attorney expressed the view that the voting rights laws should never be enforced against blacks or other racial minorities?

ASST. ATTY. GEN. PEREZ: I don't agree with that viewpoint.

COMMISSIONER GAZIANO: It would be a problem for the Division, too, wouldn't it? I'm glad you don't agree with it, but it would be a problem for the --

ASST. ATTY. GEN. PEREZ: That is not our practice. We look at facts and the law.

COMMISSIONER GAZIANO: Hypothetical, another administration. Would you agree it would be a problem if a senior supervising attorney or other political appointee expressed that view in the Division?

ASST. ATTY. GEN. PEREZ: Yes, sir.

COMMISSIONER GAZIANO: Okay. If that

person who held that view that we both disagree with was in a position to decide which cases to bring or maintain or continue, wouldn't it potentially taint their decision with regard to cases where blacks or other racial minorities were the defendants?

ASST. ATTY. GEN. PEREZ: Fortunately, sir, we can continue to have hypothetical conversations. The good news is that in the Division that we work in is the division --

COMMISSIONER GAZIANO: Hold on.

ASST. ATTY. GEN. PEREZ: If I could finish, sir?

COMMISSIONER GAZIANO: I really -- since your time is so limited with us, since you have expressed your limited time -- you know, these are just hypotheticals. This is another administration. I just want to know what the official policy would be.

ASST. ATTY. GEN. PEREZ: I would prefer to speak with -- I can speak to the policies and practices of the Obama administration under the leadership of Eric Holder. The Obama administration under the leadership of Eric Holder will enforce the laws, applying the facts to the laws, and we will follow the facts where the facts take us.

COMMISSIONER GAZIANO: So what is the --

ASST. ATTY. GEN. PEREZ: The leadership will so reflect.

COMMISSIONER GAZIANO: -- answer to my question, which is, would it taint their decisions about whether to bring or maintain a lawsuit against black defendants if they believe the civil rights laws should never --

ASST. ATTY. GEN. PEREZ: We don't have people that are of that ilk, sir. So I guess it's a --

COMMISSIONER GAZIANO: I hope not.

ASST. ATTY. GEN. PEREZ: -- moot question. And the people who have been involved since January 20th in decision-making roles in the Civil Rights Division have been people for whom I have great respect.

So we can have hypothetical conversations about other administrations, but I thought the focus here of this hearing today was to talk about the decision in the New Black Panther Party case. I'm prepared to talk about the decision in the New Black Panther Party case.

COMMISSIONER GAZIANO: Would you be surprised? Would you be surprised, then, if one of your senior political appointees or a supervising

attorney expressed such a view?

ASST. ATTY. GEN. PEREZ: I'm quite confident, because I know the folks that work with me quite well, that they have been people who have applied the law, have called balls and strikes as they have seen them, and have done so to the best of their abilities.

COMMISSIONER GAZIANO: That isn't an answer to my question. Would it surprise you if someone who was a supervising attorney or another political appointee in your Division expressed such a view?

ASST. ATTY. GEN. PEREZ: That's --

COMMISSIONER GAZIANO: So it's not your policy. I mean, it would surprise me.

ASST. ATTY. GEN. PEREZ: Well, sir, I'm here to answer questions about the New Black Panther Party case. We can continue to have a dialogue about hypothetical people who are not in positions of leadership in the Obama Civil Rights Division if that is the back and forth that you would like to have.

I thought I was here to talk about the New Black Panther Party case.

COMMISSIONER GAZIANO: I think we are.

ASST. ATTY. GEN. PEREZ: Okay. So I'm

happy to answer --

COMMISSIONER GAZIANO: Let me ask you.

ASST. ATTY. GEN. PEREZ: -- questions about the New Black Panther Party case.

COMMISSIONER GAZIANO: If someone came to you and said that someone -- someone in your Division, I should say, came to you and said, "A supervising attorney" or "a political appointee" made the statement that the voting rights laws should never be enforced against blacks or other racial minorities, you would investigate that report, wouldn't you?

ASST. ATTY. GEN. PEREZ: I would take a look at the person who made the statement. I would take a look at the statement. And we would have a conversation about it.

COMMISSIONER GAZIANO: You would want to interview the people who were supposedly present when that statement was made, wouldn't you?

ASST. ATTY. GEN. PEREZ: Yes, sir.

COMMISSIONER GAZIANO: And if you believed that statement was made, if you heard it, let's say, you would refute it, wouldn't you?

ASST. ATTY. GEN. PEREZ: I would talk to all the people involved and figure out what the context of the statement is. And we would move

forward from there.

COMMISSIONER GAZIANO: But wouldn't you want to clarify to all of the people who may have heard it that that is not the policy of the Department and that you would not tolerate that kind of a policy?

ASST. ATTY. GEN. PEREZ: Yes, sir.

COMMISSIONER GAZIANO: Okay. You helped the Obama transition team for your Division, didn't you?

ASST. ATTY. GEN. PEREZ: Yes, I did, not just the Division, the Department.

COMMISSIONER GAZIANO: Right, but especially for -- you probably had special interest in -- I don't know how long the clearance process is, but about the same month your nomination was put forward to head the Division, there was a press report with specific instances, examples of people in your Division, not all of whom are still there, who held the view that the voting rights laws should never be enforced against blacks and other racial minorities.

Did you take a --

ASST. ATTY. GEN. PEREZ: Sir, if you have questions about people who work in the Division, I am happy to have those questions submitted to the Division. And we will take a look at any questions

that you might have.

I thought that the subject matter of this hearing was what we did in the New Black Panther Party case. I'm having difficulty understanding --

COMMISSIONER GAZIANO: The problem --

ASST. ATTY. GEN. PEREZ: -- the nexus. And if --

COMMISSIONER GAZIANO: The problem is you are not allowing us to talk to the people we have subpoenaed, the people who might have such evidence.

ASST. ATTY. GEN. PEREZ: Well, sir, again --

COMMISSIONER GAZIANO: This is very helpful to me, though. You're clarifying for your Division. You're, I hope, correcting the perception that the press reports indicate that the civil rights laws should not be applied to race. So to me this is very valuable testimony.

ASST. ATTY. GEN. PEREZ: Well, I'm glad that you think it is valuable.

COMMISSIONER GAZIANO: I hope that everyone in your Division is made aware of that.

And I will yield my time at this time for the next round.

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Thank you very much, Assistant Attorney General, for being here today. I just want to follow up on some lines that my prior commissioner was talking about. That has to do with the deliberate process privilege and how important that is.

Would you agree that, in terms of the prosecutorial decision-making process, especially that the deliberate process privilege -- there is a long-term interest in maintaining the integrity of the prosecutorial decision-making process and that's part of why the deliberate process privilege exists?

ASST. ATTY. GEN. PEREZ: Again I want to be very precise about what I have said --

COMMISSIONER YAKI: Sure.

ASST. ATTY. GEN. PEREZ: -- because I have said that there has been a longstanding -- again, by "longstanding," I am referring to it has been a longstanding interest asserted in Republican and Democratic administrations -- a longstanding confidentiality interest in not disclosing internal deliberations. And it is precisely grounded out of the fact that when you are prosecuting cases, you need to have -- and when I refer to "prosecuting," I am referring to civil and criminal cases.

If you're that front-line attorney -- and I was that front-line attorney because I started in the Division as a summer clerk. Then I was an honors hire. Then I was a first-line supervisor. And then I was the Deputy AAG. And now I have the privilege of being the AAG.

And, regardless of where I was in that decision-making process, the currency of good decision-making is having the capacity to investigate the facts, have conversations with your supervisors, disagree, agree, sometimes disagree vociferously, but then come to a conclusion, recognizing that we have a chain of command, we have career people who call balls and strikes.

And that confidentiality interest has been an interest that has been well-established, --

COMMISSIONER YAKI: Sure.

ASST. ATTY. GEN. PEREZ: -- well-respected. And that's why we turned over over 4,000 pages of documents. We continue to resist, not only here but elsewhere, when people want to talk to line attorneys and ask them, "Why did you do this? Why did you do that? Show me this about your memo."

That is an interest I have seen Republican administrations assert with the same vigor as

Democratic administrations. And I think it is a good confidentiality --

COMMISSIONER YAKI: So you would agree with this one Attorney General who said, "Employees of the Department of Justice would likely be reluctant to express candidly their views and recommendations on controversial and sensitive matters if those views could be exposed to public scrutiny"?

ASST. ATTY. GEN. PEREZ: I think that is a fair statement.

COMMISSIONER YAKI: Well, I would tend to agree. And it is ironic that that came from Edwin Meese.

I would just like to say that I have one follow-up on the two instances that you did note that were declined by the Department of Justice. But I think that the Pima, Arizona case, where I think the facts as alleged were that people who were noted anti-immigrant activists were openly carrying weapons -- I think they had maybe even hand-made badges or something like that and were videotaping and following Latino voters in Tucson, Arizona. That was one in 2006.

And then you talked about the Mississippi investigation, where I think people were visiting

elderly people in their homes and people who said they were officials of the government.

And one of the points that I have made in this investigation is that this is not really an investigation. This is really just someone's decision to retry the New Black Panther Party case because we have not, despite my many attempts to bring up Pima, Arizona, Mississippi, Philadelphia 2003 mayor's race, the misleading voter rights thing in Orange County in 2004, and other instances during the previous administration, we have not really seen any attempt to understand what goes into this, what goes into an 11(b) decision to prosecute or not to prosecute.

Was there anything in the records with regard to why in 2006 and 2007 those two specific incidents, which somehow did make it up to the Justice Department versus these other ones, which apparently maybe died at the U.S. Attorney level, as to why those were not prosecuted?

ASST. ATTY. GEN. PEREZ: I think the political leadership of the prior administration's Civil Rights Division would be in the best position to explain why they chose to decline prosecution --

COMMISSIONER YAKI: There were no notes. There were no records.

ASST. ATTY. GEN. PEREZ: -- in the Pima case and in the Mississippi case. And, again, I illustrate these to simply make the point that you can look at a set of facts. And people of good faith can draw different conclusions --

CHAIRPERSON REYNOLDS: Thank you.

ASST. ATTY. GEN. PEREZ: -- from sets of facts.

COMMISSIONER YAKI: Okay. Thank you.

CHAIRPERSON REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: I'll yield my time to Mr. Yaki.

COMMISSIONER YAKI: I'll carry it over. I'll take it over to the next round.

CHAIRPERSON REYNOLDS: Okay. Commissioner Heriot?

COMMISSIONER HERIOT: Thank you.

ASST. ATTY. GEN. PEREZ: Good morning.

COMMISSIONER HERIOT: Thank you for being here. Good morning.

ASST. ATTY. GEN. PEREZ: My pleasure.

COMMISSIONER HERIOT: I have got just a few questions. And they mainly focus on a statement that you made before the House Subcommittee.

Just preliminary to this, let me ask you some questions about 11(b), like under 11(b), how many persons must be intimidated or threatened or coerced, since all three of those are in the statute, in order to state a cause of action?

ASST. ATTY. GEN. PEREZ: There's no number specified.

COMMISSIONER HERIOT: And nobody actually has to be intimated at all. It just has to be an attempt, right?

ASST. ATTY. GEN. PEREZ: There is an attempt provision in the statute. That is correct.

COMMISSIONER HERIOT: And it covers not just intimidating or threatening or coercing voters but persons who are aiding and assisting voters?

ASST. ATTY. GEN. PEREZ: That's correct.

COMMISSIONER HERIOT: And that would include election judges?

ASST. ATTY. GEN. PEREZ: That would include election observers, anybody in the process who is aiding voters?

COMMISSIONER HERIOT: For instance, likeBartle Bull?

ASST. ATTY. GEN. PEREZ: In theory.

COMMISSIONER HERIOT: Yes, in theory.

Okay. And no weapon is required?

ASST. ATTY. GEN. PEREZ: That's correct, although, again, there are cases that have been declined where weapons were there. There are cases, such as this, where we sought an injunction against the person.

COMMISSIONER HERIOT: Okay. On your testimony -- this is the testimony before the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties --

ASST. ATTY. GEN. PEREZ: Yes.

COMMISSIONER HERIOT: -- December 3rd. I'm sure you remember it. And you got some questions about the New Black Panther Party case. And I was particularly interested in your statement about rule 11. Let me just quote you here.

You said, "In the Third Circuit, the law is that if you're going to seek a default judgment, you need to be able to represent to the court there is a rule, rule 11, that requires you to be able to represent to the court that the charges you are putting forth are charges that are supported by the facts and evidence."

I take it you're referring to rule 11 of the Federal Rules of Civil Procedure?

ASST. ATTY. GEN. PEREZ: It's actually local rules in the District Court of Philadelphia, as I understand, or Pennsylvania, as well as the law of the circuit, which says that, even in a default judgment context, the -- in order to establish liability and, therefore, get the judgment, you have to demonstrate that you can establish all of the elements of the offense. So rule 11 is part of it but not all of it.

COMMISSIONER HERIOT: So you are talking about rule 11 of the Federal Rules of Civil Procedure?

ASST. ATTY. GEN. PEREZ: But one of many. Again, as I understand it, there is a local rule in Pennsylvania pertaining to default judgments and then the law of the Third Circuit, as I understand it. So that it's not simply rule 11 that is what guides this.

There is a number of principles which stand for the proposition that, even when you're seeking a default judgment, you need to establish --

COMMISSIONER HERIOT: Let's get to rule 11 first here. And we'll go on to the rest.

ASST. ATTY. GEN. PEREZ: Well, I'm happy to stick to rule 11, but I can tell you the analysis that was made by the Division --

COMMISSIONER HERIOT: Yes. Let's take it

--

ASST. ATTY. GEN. PEREZ: -- was -- well, again --

COMMISSIONER HERIOT: -- one at a time. Start with rule 11.

ASST. ATTY. GEN. PEREZ: The analysis that the decision --

COMMISSIONER HERIOT: And we're talking about a rule --

ASST. ATTY. GEN. PEREZ: -- conducted was guided --

COMMISSIONER HERIOT: Come on. No.

ASST. ATTY. GEN. PEREZ: If I could finish?

COMMISSIONER HERIOT: No, no.

ASST. ATTY. GEN. PEREZ: The analysis --

COMMISSIONER HERIOT: I'm asking the questions.

ASST. ATTY. GEN. PEREZ: Okay. Well, if I could finish answering? You have asked a question on rule 11.

COMMISSIONER HERIOT: No. What I asked you is, are you talking about Federal Rules of Civil Procedure rule 11?

ASST. ATTY. GEN. PEREZ: And my answer was

--

COMMISSIONER HERIOT: You were talking about more than one. And I want to talk about rule 11 first.

ASST. ATTY. GEN. PEREZ: You would like to talk about rule 11. I am happy to talk about rule 11.

COMMISSIONER HERIOT: Okay. Are you making the point that this case was frivolous in its filing?

ASST. ATTY. GEN. PEREZ: No, I'm not.

COMMISSIONER HERIOT: Are you making the case that it's frivolous in any way?

ASST. ATTY. GEN. PEREZ: No.

COMMISSIONER HERIOT: Okay. So you're making the point simply that the accusations must be backed with evidence?

ASST. ATTY. GEN. PEREZ: Must be able -- whether the defendant is pro se, whether the defendant doesn't show up, or whether the defendant is represented by the biggest firm in town, we have to be able to demonstrate to the court in order to obtain a judgment that we have established the elements of the offense and in this case, 11(b) with the high bar that I have articulated and the courts have articulated, we must prove that in this case. That's what we had to

show.

COMMISSIONER HERIOT: Well, of course, that's true. Any lawyer would know that's true. That's always true in any case.

ASST. ATTY. GEN. PEREZ: Well, no.

COMMISSIONER HERIOT: What's special about this one?

ASST. ATTY. GEN. PEREZ: Well, actually, there have been a number of people who have made the claim that this is -- nobody showed up. You can just go into the court and get whatever you want. And the point --

COMMISSIONER HERIOT: Wait a minute. Nobody is --

ASST. ATTY. GEN. PEREZ: Well, with all due respect, I --

COMMISSIONER HERIOT: I am a remedies teacher. This is what I do for a living. I teach remedies. If a student came to me and wrote on an exam that, because there was a default here, that there was some problem or some difficulty in getting the judgment, I would flunk them.

This is not a tough case here. Of course, the Third Circuit wants more than simply attorneys who have won by default to do more than just waltz into

court and say, "We were assigned this."

CHAIRPERSON REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes?

CHAIRPERSON REYNOLDS: We are going to have to follow up with your line of questioning on the second round.

Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Good morning, Mr. Perez.

ASST. ATTY. GEN. PEREZ: Good morning, sir.

COMMISSIONER KIRSANOW: Thank you for coming, sir. Do you agree with Commissioner Vice Chair Thernstrom that 11(b) is a minor provision?

ASST. ATTY. GEN. PEREZ: Well, I don't think there is any minor provision of the Voting Rights Act, but I think that what was implicit in her statement was not that it was minor but that, when you look at the panoply of provisions under the Voting Rights Act that have been enforced over the course of years, there is a relative paucity of cases under section 11(b).

COMMISSIONER KIRSANOW: Right.

VICE CHAIR THERNSTROM: Precisely. Thank

you.

COMMISSIONER KIRSANOW: Voter intimidation is not unimportant, in other words?

ASST. ATTY. GEN. PEREZ: I completely agree. And we prosecuted a case from election night in New York City where people violently assaulted folks outside of New York City because they had -- because President Obama had been elected.

COMMISSIONER KIRSANOW: April 28th of 2009, the Department informed the defendants of the case that it was prepared to file for default judgment by May 1. However, on May 1, the Department filed for an extension of 15 days, instead of going forward.

What happened between April 28th and May 1 to cause the Department to reconsider its position in this matter?

ASST. ATTY. GEN. PEREZ: That we frequently have done so in a number of cases in the last few weeks. You are analyzing the evidence and figuring out if the evidence supports the charges.

And the Assistant, Acting Assistant Attorney General concluded that she needed more time to make that judgment. So she asked for two more weeks and got it from the court.

COMMISSIONER KIRSANOW: What, to your

knowledge, triggered that? Was there any intervening circumstance, fact, or piece of evidence that was adduced that would cause the Department after this case had been postured in a fashion so that it was poised for default judgment to reverse its position or at least reconsider its position? What instrumentality, what intervening circumstance, occurred?

ASST. ATTY. GEN. PEREZ: The Acting Assistant Attorney General wanted to make sure that she had a complete understanding of the facts and circumstances of the case.

And I'll note parenthetically this wasn't the only case she was working on. She was running a fairly robust division. And so she concluded that she needed an extra two weeks in order to make a judgment that would be a judgment on the merits wherein she had considered all of the evidence in the record.

COMMISSIONER KIRSANOW: Wasn't the evidence considered beforehand?

ASST. ATTY. GEN. PEREZ: The evidence was always being considered throughout but, as of May 1st, the judgment was made that I still need some time to weigh the evidence and make an appropriate judgment.

COMMISSIONER KIRSANOW: And I suppose she

then solicited the opinion of the six line attorneys, career attorneys, who were heavily involved in the case, correct?

ASST. ATTY. GEN. PEREZ: There was a robust internal debate during the course of this and throughout.

COMMISSIONER KIRSANOW: Okay. So I take that to be a yes?

ASST. ATTY. GEN. PEREZ: Again, whenever you have decision-making in any case, you have interaction between the front office and the people who were involved.

COMMISSIONER KIRSANOW: So you have six career attorneys heavily invested in the case, all of whom were sought out? And, in fact, my understanding is their opinion was sought out not once but twice. They provided memos indicating that their position remained firm that default judgment should be pursued. And, yet, something happened.

That's what I think we are trying to figure out. What intervening circumstance? Given the fact that the momentum throughout had been to go forward with this case, what was the trigger?

ASST. ATTY. GEN. PEREZ: Well, I have great respect for all of the attorneys who were

involved in this case. And I have certainly had cases where I, as the front-line attorney in the case, wanted to go one way and, at the end of the investigation, the people above me in the career ranks of the chain concluded that, based on their experience, they wanted to go another way.

As I have said a number of times, people of good faith can look at the same set of facts and draw different conclusions, whether it's Pima County, whether it's Mississippi, whether it's the New Black Panther Party case.

COMMISSIONER KIRSANOW: Yes.

ASST. ATTY. GEN. PEREZ: And, again, two people with 60 years of experience, both of whom had worked in the Voting Section -- so they weren't new to voting rights issues. They were working -- they knew -- they were conversant with the issues, conversant with the case.

And they made the judgment on the merits that we should proceed with the default judgment against the gentleman who was -- who had the stick and that the evidence didn't sustain the case against the national party or the head of the national party for the reasons that we have discussed.

COMMISSIONER KIRSANOW: If the evidence

was such that it was even not nearly an equipoise but it was a close case -- in fact, you've got six line attorneys who were fairly adamant that there was enough to pursue here. If there was concern that default was not the appropriate --

CHAIRPERSON REYNOLDS: I'm sorry. Commissioner Kirsanow, we will have to follow --

COMMISSIONER KIRSANOW: Thank you, Mr. Chairman.

CHAIRPERSON REYNOLDS: -- up next round.

Vice Chair Thernstrom?

VICE CHAIR THERNSTROM: Thank you very much, Mr. Chairman.

First let me make a statement to clarify something. I have not asserted that this incident was frivolous, but it would have made a difference to me in terms of making it our statutory report if there was a national conspiracy, if New Black Panther Party members were showing up all over the place, if there was anything remotely equivalent to racist whites in the Jim Crow south stopping voters from being able to cast their ballots. And that analogy has been made by some members of this Commission. And I simply object to it. So I never have called it "frivolous," but.

Now, do you think that there has been a

difference between Republican and Democratic administrations in the concern about the confidentiality of attorney work product? That's question number one.

And, two, with respect to 11(b), are there guidelines upon which the Department relies in enforcing that provision?

ASST. ATTY. GEN. PEREZ: As it relates to your first question, this confidentiality interest in not disclosing internal deliberations has been an interest that has been put forth and put into play in Republican and Democratic administrations alike with an equal amount of vigor because there is a recognition of the institutional interest at the Department of Justice in assuring that we have a robust internal decision-making process.

And so I saw it because I was a career person. I was hired by the elder Bush administration. And I saw the assertion of that interest then. I saw the assertion of that interest under President Clinton. I see the assertion of that interest now.

I think it is a good interest. I think it is a critical part of what enables us to do our job. And I respect the job that you have here. And I respect the job that people in Congress have. And

that is why I am here today. And that is why we have taken so much time to do that.

In response to your second question regarding 11(b), there is a paucity of case law and a paucity of cases that have been brought under this. And intimidation has been -- there are jury instructions that define intimidation in other contexts. And those contexts have been instructive to the work that we do here.

And what those jury instructions in other contexts highlight is that it is indeed a high bar. And also it's very fact-intensive. And that is why it is difficult to -- it's fact-intensive. And it is simply difficult to prove.

VICE CHAIR THERNSTROM: Well, there are no internal guidelines, but there are cases --

ASST. ATTY. GEN. PEREZ: We have cases.

VICE CHAIR THERNSTROM: -- is the bottom line?

ASST. ATTY. GEN. PEREZ: We also have, again -- you know, we have guidance that is informed by our enforcement of similar statutes that --

VICE CHAIR THERNSTROM: Right. Okay.

ASST. ATTY. GEN. PEREZ: -- proscribe coercion, intimidation, --

VICE CHAIR THERNSTROM: Right.

ASST. ATTY. GEN. PEREZ: -- and attempts at those issues.

VICE CHAIR THERNSTROM: Mr. Chairman?

CHAIRPERSON REYNOLDS: Okay. Commissioner Gaziano?

COMMISSIONER GAZIANO: How am I for time?

CHAIRPERSON REYNOLDS: The full five minutes.

COMMISSIONER GAZIANO: Earlier, in January of this year when the outgoing, then outgoing, Voting Chief, Chris Coates, was leaving, there was a farewell party, farewell reception, in your Division.

I know you attended early. And you, as I understand, may have left before he gave some very well-publicized farewell remarks. A summary of those remarks was published by, written up and published by -- of the remarks.

And he implies that he believes the New Black Panther case was dismissed because there are some in the Department who don't think the Voting Rights Act should apply evenhandedly across races. I am glad that you have said that you disagree with that.

I haven't talked to Chris Coates because

you won't let me. The Department won't let me. So I don't know what the basis of his belief is in that regard.

But what did you do, if anything, to investigate whether there was any basis for his view?

ASST. ATTY. GEN. PEREZ: Again, I reviewed the facts and circumstances of this case. I have --

COMMISSIONER GAZIANO: Let me -- I didn't ask my question --

ASST. ATTY. GEN. PEREZ: Well, no because --

COMMISSIONER GAZIANO: No. I didn't ask my question very well. Did you do anything specifically after Chris Coates' statement in January to see if his impression that the decision was motivated, in part or at least in part, by a race-based view of civil rights enforcement -- did you do anything to investigate whether there was a basis for his claims?

ASST. ATTY. GEN. PEREZ: I have reviewed the totality of the evidence in this matter because I wanted to make the --

COMMISSIONER GAZIANO: So you did nothing other than that?

ASST. ATTY. GEN. PEREZ: Sir, I did not

finish.

COMMISSIONER GAZIANO: You did nothing -- you are not answering my questions.

ASST. ATTY. GEN. PEREZ: You are not giving me a chance to answer your questions, sir.

COMMISSIONER GAZIANO: Okay.

ASST. ATTY. GEN. PEREZ: And if you want to keep interrupting, that is obviously your prerogative.

COMMISSIONER GAZIANO: Because you have said you have such a limited time with us today, I really would ask you -- well, let me move on since you won't answer that question.

When the Department won, the appeal was affirmed for its victory in the Noxubee case, that was in this administration, early in this -- between your work on the transition and your nomination. And there was a press report at that time that described how difficult a victory it was for the Division, even though the Fifth Circuit had great praise for the attorney.

And that press report said that the then Acting Chief of the Voting Section, Joe Rich, Kristen Clark, whom we have deposed and has refused to answer questions that she should refuse, and others in the

Division opposed the filing of the Noxubee suit in significant part because the defendants were black.

Did you do anything to investigate whether that kind of culture existed in your Division?

ASST. ATTY. GEN. PEREZ: I am completely comfortable with the decision that was made by the Acting Assistant Attorney General, Loretta King, and by Steve Rosenbaum. I am absolutely --

COMMISSIONER GAZIANO: That is not my question.

ASST. ATTY. GEN. PEREZ: But, sir, if you --

COMMISSIONER GAZIANO: Did you do anything --

ASST. ATTY. GEN. PEREZ: Actually, implicit in your question is the assertion that somehow Loretta King and/or Steve Rosenbaum, who were the decision-makers in this case, acted out of some sort of animus and --

COMMISSIONER GAZIANO: One final question.

ASST. ATTY. GEN. PEREZ: I'm simply here to say categorically that they made a decision on the merits. Reasonable people can differ. People can differ vociferously.

COMMISSIONER GAZIANO: This is --

ASST. ATTY. GEN. PEREZ: And that is not the first --

COMMISSIONER GAZIANO: There is one strange --

ASST. ATTY. GEN. PEREZ: -- or the last time that that will be the case here.

COMMISSIONER GAZIANO: There is one strange --

ASST. ATTY. GEN. PEREZ: I want to make sure that the record is clear that --

COMMISSIONER GAZIANO: Well, let me reclaim my time. There is one strange fact about the Noxubee victory. The career people who were in charge, which was Loretta King and Rosenbaum, did nothing to see that a press release that normally accompanies that victory was put on your website. Now, there could be other reasons.

Let me ask my final question. If we uncovered strong evidence that a current supervising attorney or political appointee senior in your Division made statements that this administration will never bring a voting rights case or, to this effect, will never bring a voting rights case against blacks or other minorities, I hope that you will seriously investigate. And I hope you agree that it would be

highly relevant to this investigation and that we should have access to the witnesses to such a statement.

ASST. ATTY. GEN. PEREZ: If you have such a statement, bring such a statement to our attention.

COMMISSIONER GAZIANO: I hope to uncover, bring such a statement.

CHAIRPERSON REYNOLDS: Commissioner Gaziano, do you yield my five minutes back to me?

COMMISSIONER GAZIANO: Yes.

CHAIRPERSON REYNOLDS: Okay. Commissioner Yaki?

COMMISSIONER YAKI: Yes.

CHAIRPERSON REYNOLDS: And, Commissioner Yaki, you have ten minutes.

COMMISSIONER YAKI: I'm probably going to use a little bit and carry it over to my next round --

CHAIRPERSON REYNOLDS: Okay.

COMMISSIONER YAKI: -- or however long it takes for you to answer it.

I am a little bit confused by Commissioner Gaziano's last remark because it seems to imply that if any senior official, political or whatever, goes off on a toot, that somehow it constitutes whatever hearsay, however, whatever context it is, it somehow

constitutes probative evidence of something going on. And that to me is very interesting.

I want to focus more, really, on what the Department is doing. 11(b) is voter intimidation, but that is really a subset in some ways of the broader issue of voter disenfranchisement, wouldn't you say?

ASST. ATTY. GEN. PEREZ: Yes.

COMMISSIONER YAKI: I am curious. And since we have you here, I am going to use my prerogative of this time to ask you to talk about the Department's other efforts with regard to voter disenfranchisement at this current time because, again, there seems to be some sort of imputation, however implicit or explicit, that somehow you guys are falling down on the job, despite the public standings.

And I would like to see what you have to say with regard to the greater issue of voter disenfranchisement and what the DOJ is doing right now.

ASST. ATTY. GEN. PEREZ: Well, voter intimidation and voter disenfranchisement, there are a number of laws on the books that deal with that. And our efforts as a Department to address those issues are a joint venture between the Civil Rights Division

and the Criminal Division.

And there are a host of laws on the books. And we have remarkable interaction with the Criminal Division so that we ensure that we are communicating and putting the full force and weight behind us.

Also, there are a number of laws that we have been very involved with recently involving ensuring the right to vote for people in the military. That has been a very important focus of Congress. And we have been working hard to investigate that.

I mentioned the incident that occurred on election night 2008 where a group of people who -- racists who took issue with the fact that we had just elected an African-American President and proceeded to assault, brutally assault, the victims. That's U.S. versus Nicoletti, a case that we brought under 18 U.S. Code section 245, which addresses force or threats of force that interfere or attempt to interfere with a person's exercise of a federally protected right. We brought that case as well. And that was I think, you know, a very good and appropriate prosecution in that case.

Obviously we have a broad-ranging program under the motor voter law to ensure access to the ballot. And we have vigorous enforcement in that

area. Section 12, by the way, of MVRA also is an intimidation provision.

So, in short, there are a host of laws on the books that we work in collaboration with the Criminal Division on to ensure that there is fair and equal access to the ballot.

COMMISSIONER YAKI: How about voter purges? What is the Department doing with regard to that issue? I know that was a big issue in the 2008 election with regard to various states. Is there any ongoing --

ASST. ATTY. GEN. PEREZ: We're actually in the process right now, and we hope to have it in the very near future. We're preparing guidance on all of the sections of motor voter because, in my outreach to Secretaries of State and other state election officials, I have been learning that it would be useful for us to prepare guidance so that there are understandings of Section 4; Section 6; Section 7; Section 8, which is the purging provision that you are referring to.

We want to have guidance across the board so that people, that entities understand what the statute sets out and what the road map for compliance is because there is -- there are right ways and wrong

ways to enforce Section 4, to implement Section 7, to implement Section 8. And we want to make sure that everybody has the proper road map so that we can ensure access to the ballot and we can ensure that we prevent fraud.

Sometimes there's this tendency to say that you can only do one or the other. I think we can and should and must do both.

COMMISSIONER YAKI: And what is the Department doing with regard to -- one of the problems in the 2008 election was that differing, or sporadic or, how should I say, inconsistent enforcement or interpretation of voter ID laws in various states? Is the Justice Department doing anything to try and create some sort of guidance for those states that haven't prevented it and how they should do it without violating the law, et cetera?

ASST. ATTY. GEN. PEREZ: Well, a number of those voter ID issues have been dealt with in connection with section 5 submissions.

COMMISSIONER YAKI: Okay.

ASST. ATTY. GEN. PEREZ: And so we will continue to address that. There was a submission, for instance, from Arizona that was pre-cleared a couple of years ago.

And so as those issues come up and as covered entities enact laws in that area, again, that is their prerogative to do so as long as it doesn't violate the retrogression provisions of the -- of Section 5 of the Voting Rights Act.

So we continue to deal with that in connection primarily but not exclusively with our Section 5 work.

COMMISSIONER YAKI: Okay. Thank you.

I reserve the balance of my time.

CHAIRPERSON REYNOLDS: Which is four minutes.

Commissioner Heriot?

COMMISSIONER HERIOT: Let's get back to default judgments and rule 11. I take it that you would agree that it is a violation of an attorney's professional responsibility to file a cause of action against a defendant without grounds, right?

ASST. ATTY. GEN. PEREZ: Correct.

COMMISSIONER HERIOT: Tell me what was missing from the Department's evidence against Jerry Jackson.

ASST. ATTY. GEN. PEREZ: Well, again, looking at the totality of the evidence, including the actions and responses of the police officer who

responded to the scene. He was the first responder. He interviewed Mr. Jackson, determined that he was indeed a poll watcher who was authorized to do that work --

COMMISSIONER HERIOT: You're not saying a poll watcher is exempt from --

ASST. ATTY. GEN. PEREZ: No. The fact that --

COMMISSIONER HERIOT: -- Section 11(b), are you?

ASST. ATTY. GEN. PEREZ: If I could finish?

COMMISSIONER HERIOT: You're not saying that, are you?

ASST. ATTY. GEN. PEREZ: No, I'm not saying that, ma'am.

COMMISSIONER HERIOT: Okay.

ASST. ATTY. GEN. PEREZ: But what he did determine, based on talking to a number of witnesses, including Mr. Jackson, including Mr. Shabazz, he instructed Mr. Shabazz to leave. He talked to other people at the scene. And he made a judgment that -- and in his judgment -- and he was the first responder at the scene -- that Mr. Jackson was entitled to stay.

And there was no local action taken. They

concluded that the activities did not rise to the level of intimidation. And that was certainly a fact that was a fact of relevance that Ms. King and --

COMMISSIONER HERIOT: But all of that, of course, would have been taken into consideration at the time a lawsuit was filed. So the Department did make the decision to file the lawsuit. You're not talking about new evidence there.

So are you saying that the attorneys that decided that the other witnesses were more credible, for instance, the witnesses who testified before the Commission, who said that Mr. Jackson was acting in concert with Mr. Shabazz, that he was moving to prevent members, to prevent people from entering the polls, who were entitled to do that?

That was all decided. What is new about it? Well, the police officer was not charged with enforcing civil rights laws, federal civil rights laws. What is new there?

ASST. ATTY. GEN. PEREZ: As I said, Commissioner, people of good faith and great experience can look at the same set of facts and draw different conclusions about the weight of the evidence that, again, I talked about --

COMMISSIONER HERIOT: But you're at the

default stage at this point.

ASST. ATTY. GEN. PEREZ: Well, again, as you and I, I think, agreed before, if you were in a default stage, that does not mean that you no longer have an obligation, legal and ethical, to demonstrate to the court that the weight of the evidence -- you can establish the violation.

COMMISSIONER HERIOT: Of course not. That's routine.

ASST. ATTY. GEN. PEREZ: Yes.

COMMISSIONER HERIOT: You had all sorts of evidence here. You had the affidavits. This was on video. This was not a tough one. The police officer didn't see what was on the video. He hadn't spoken to the same witnesses. At this point the case was worked up. There was plenty of evidence. It was going to be a slam dunk.

I guess Mr. Jackson -- I just don't see what the possible reason would be.

ASST. ATTY. GEN. PEREZ: Well, again, people can look at factual circumstances and draw different conclusions. And that is precisely what happened in this case. That is apparently what happened in some of the other cases I have described.

This happens all of the time in the course

of looking at factual circumstances, understanding 11(b) and the high bar that exists in that case.

And that was the judgment that two career professionals at the leadership levels of the Civil Rights Division made in connection with Mr. Jackson.

COMMISSIONER HERIOT: There were no factual changes. I mean, everything you're saying about Mr. Jackson was already known at the time the lawsuit was filed. What changed was simply a different administration.

ASST. ATTY. GEN. PEREZ: Two people, Loretta King and Steve Rosenbaum, have been in the Division for 30 years. They worked in the administration of George W. Bush, George H. W. Bush, and many other Presidents.

COMMISSIONER HERIOT: Different capacities.

ASST. ATTY. GEN. PEREZ: That is correct. But my point is simply the career professionals with 60 years of experience made the judgment. You disagree with their judgment. I respect the fact that you disagree with their judgment.

They made a judgment on the merits. These are the sort of good faith robust deliberations that occur time and time again.

I have had any number of cases when I was a front-line prosecutor where I felt strongly that the facts suggested A and my supervisors took a look at it and decided that --

COMMISSIONER HERIOT: At the default stage?

ASST. ATTY. GEN. PEREZ: -- we were going a different direction.

CHAIRPERSON REYNOLDS: I think that --

COMMISSIONER HERIOT: At the default stage?

CHAIRPERSON REYNOLDS: Thank you.

Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Thank you.

Mr. Perez, to your knowledge, did Mr. Rosenbaum and Ms. King, for the first time, assess this case in May of 2009?

ASST. ATTY. GEN. PEREZ: Well, I don't know precisely. I mean, they were looking at it throughout. But they also had a number of other things going on because they were -- well, Loretta was the Acting Assistant Attorney General. And Mr. Rosenbaum was overseeing the work of a number of sections.

And also I think one thing to note is when

the complaint was filed, there's whatever, 30 days to file an answer, whatever the time period is -- I don't know precisely how or what the time frame is.

So this wasn't January 21st, a case that would have been necessarily on anyone's immediate radar screen because if it was filed the 7th or 8th or 9th of January, you still would have been waiting for those responses.

COMMISSIONER KIRSANOW: How frequently is either the Voting Rights Section or the Civil Rights Division faced with a case that is prime for default judgment?

ASST. ATTY. GEN. PEREZ: Default judgments?

COMMISSIONER KIRSANOW: Yes.

ASST. ATTY. GEN. PEREZ: Not very frequently.

COMMISSIONER KIRSANOW: Because it seems to me that it's a little late in the game to be reviewing and second-guessing the attorneys when it's already in a position where you're in a position where you're going to file for default judgment.

ASST. ATTY. GEN. PEREZ: I would actually respectfully disagree with that because of the reasons that we have been discussing. The Department has a

continuing obligation, whether or not they don't answer, whether or not they're pro se, whether or not they're represented by the biggest firm in town, to continue to conduct the analysis to determine whether there's a sufficient evidentiary base to support the charges. So I don't think it's ever late in the game or too late in the game to make those judgments.

And I know in my work as a career prosecutor, we frequently, for a host of reasons, would make varying judgments at varying points in cases. And that does happen.

COMMISSIONER KIRSANOW: Given, as you indicated, that voter intimidation is not unimportant and also given that you have a continuing obligation to assess the case, the merits of the case, and you have come to the conclusion that default was not appropriate here --

ASST. ATTY. GEN. PEREZ: Well, could I -- default --

COMMISSIONER KIRSANOW: Seeking a default judgment would not have been appropriate here. Is that correct?

ASST. ATTY. GEN. PEREZ: Well, then, one, I just want to be clear. Mr. Shabazz, the person at the scene with the stick, we sought the judgment and

obtained the judgment because we made the conclusion that --

COMMISSIONER KIRSANOW: You obtained a certain injunctive relief?

ASST. ATTY. GEN. PEREZ: Correct. I've heard it referenced, including in the Chair's opening statements, that we dismissed the case. And I just want to make sure the record is clear about what occurred in the case.

COMMISSIONER KIRSANOW: If there was a concern about pursuing default against anyone else, broader injunctive relief against one of the defendants, was there any consideration given to simply making a proffer, simply pursuing the case, as opposed to going for default?

ASST. ATTY. GEN. PEREZ: They had not showed up.

COMMISSIONER KIRSANOW: I understood that they had not showed up. But you're in a position where you could obtain judgment. And if you had a concern about default, why not simply move forward with the case, instead of simply going with default? It seems to me that there's two avenues you could have pursued here.

ASST. ATTY. GEN. PEREZ: Well, the

evidence that was chosen had both -- the evidence that was chosen in this case is I think a very reasonable avenue, which was the avenue of choosing a default judgment against Mr. Shabazz but --

COMMISSIONER KIRSANOW: In Pima and Mississippi, did Ms. King and Mr. Rosenbaum, if you know, make the decision to decline pursuing those cases?

ASST. ATTY. GEN. PEREZ: Those cases were in the prior administration. And the person that you have to ask about why those cases were not pursued would be the prior Assistant Attorney General for Civil Rights.

COMMISSIONER KIRSANOW: Okay. You don't know who made that decision?

ASST. ATTY. GEN. PEREZ: Not off the top of -- I know the decisions not to proceed were decisions that were, as I understand it, made by the political leadership in the prior Civil Rights Division.

COMMISSIONER KIRSANOW: Okay.

ASST. ATTY. GEN. PEREZ: I don't -- again, I don't know who was in charge when because there was a fair amount of movement.

COMMISSIONER KIRSANOW: Was there any

political leadership involved in the decision not to pursue this particular case any further than it was?

ASST. ATTY. GEN. PEREZ: No. The decisions were made by Loretta King in consultation with Steve Rosenbaum, who is the Acting Deputy Assistant Attorney General.

COMMISSIONER KIRSANOW: In Pima and Jackson, as I understand it, the facts, at least as adduced by Senate investigation, were that someone had firearms, were intimidating, apparently, in my estimation, at least in a colloquial sense.

CHAIRPERSON REYNOLDS: Commissioner Kirsanow, I will --

COMMISSIONER KIRSANOW: Thank you, Mr. Chair. I will yield.

CHAIRPERSON REYNOLDS: Okay. I have a few questions for you. I have heard you say on a number of occasions that the decision was made by two senior career civil servants.

It is curious because, to my mind, ultimate decisions are made by the politicals. It is the politicals who were working in the administration that were elected, important decisions regarding policies ordinarily made by the politicals.

But are you saying that, in the Obama

administration, decisions within the Department of Justice, or at least some decisions, can be made by career civil servants?

It's almost as if they are separate and apart from the political leadership in the Department of Justice.

ASST. ATTY. GEN. PEREZ: There are literally thousands of decisions made by the Department of Justice given the breadth and depth of our jurisdiction. So the notion that every decision would have to come up to an Attorney General would result in gridlock, among other things, but in this case --

CHAIRPERSON REYNOLDS: Who owns the decisions? Who is responsible for the decision? I understand you are completely right. The career civil servants -- I have worked with some great lawyers at DOJ.

The politicals can't make every decision. But in my experience, important decisions go to the top. And even those that don't go to the top --

ASST. ATTY. GEN. PEREZ: Sure.

CHAIRPERSON REYNOLDS: -- the responsibility and the ownership for those decisions, whether they are right or wrong, rests with the

politicals. Is that the same approach taken by the Obama administration?

ASST. ATTY. GEN. PEREZ: Let me give you how our lines of communication work because I think this is responsive to your question. We meet regularly with -- my direct supervisor in the Civil Rights Division is the Associate Attorney General.

We meet on a weekly basis to communicate with him what is happening in the Division. There are representatives of the Deputy Attorney General and the Attorney General's office in those meetings.

And there are coordination meetings here, "Here are the significant things that are happening. Here are the significant things that are going on in the weeks ahead."

Whenever there is a decision involving a case that has attracted attention, we -- when the decision is made, we obviously communicate that up the chain. And clearly I understand the chain of command.

If indeed they have an objection or a concern about a decision that we are about to make, it is obviously their prerogative to weigh in and to say no, I don't want -- I would like to go in a different direction.

So that happens. That happened when I was

in Bush I. And that happens now. I think that's kind of been the standard operating procedure in the --

CHAIRPERSON REYNOLDS: Do we agree that the ultimate responsibility for decisions made at the Department of Justice rests with the representatives of the Obama administration?

ASST. ATTY. GEN. PEREZ: That is why I am here today.

CHAIRPERSON REYNOLDS: Okay. Thank you.

COMMISSIONER GAZIANO: Mr. Chair, you yielded to me earlier. Could I have my second round?

CHAIRPERSON REYNOLDS: Yes, but hold on. Next up -- okay. You can have the remainder of my time, which was approximately two minutes.

COMMISSIONER GAZIANO: Okay. I'm -- since I have served in the Department in three administrations, I am delighted that you have clarified that the -- if we do nothing else, what the official position is.

But here is my simple question. It would have been much more effective if you had communicated that directly to everyone in the Division. I understand that there was a request that your confirmation be upheld by members of the House to the Senate because they weren't getting information on

this case.

Whether that is true or not, I strongly suspect you followed the press accounts of this case. There were many press accounts suggesting that the New Black Panther suit was dismissed because there was a view that the Voting Rights Act should not be enforced against black defendants.

Then we had -- you came into the Division. You had Chris Coates in his farewell address. The Chief of the Voting Section suggests that.

Why didn't you issue a statement to your Department, "These press reports are wrong. And to the extent that anyone thinks otherwise, it is not the policy and it shall not be the policy of my Division to not enforce the Voting Rights Act against people of certain races"? Did you do that?

ASST. ATTY. GEN. PEREZ: I have many friends in the press, Commissioner. If I have to issue a press release --

COMMISSIONER GAZIANO: No, not the press release.

ASST. ATTY. GEN. PEREZ: -- every time I have to correct the record --

COMMISSIONER GAZIANO: Did you --

ASST. ATTY. GEN. PEREZ: -- of something

in the press --

COMMISSIONER GAZIANO: Why didn't you issue the statement --

ASST. ATTY. GEN. PEREZ: -- I would be issuing a lot of press releases.

COMMISSIONER GAZIANO: -- to your Department? With all of these stories, with Chris, why didn't you issue a statement to your staff orally, in writing, whatever form you chose? Why didn't you tell your staff, "These stories are wrong. If anyone has these views, I reject it. You had better not have these views"? Why didn't you do that?

ASST. ATTY. GEN. PEREZ: Sir, I have communicated from day one. My first or second day on the job, I met with everybody in the Great Hall. And I said, "Our job is to enforce the law, all the laws, and to do so evenhandedly."

I then went to each and every section within the first week of my job. And I reiterated that our job is to enforce the laws, all of the laws, and to do so evenhandedly. And I have done that.

CHAIRPERSON REYNOLDS: Okay. Mr. Perez, my two minutes has expired. Next is Vice Chair Thernstrom.

VICE CHAIR THERNSTROM: I would like to

actually yield the amount of my time to Commissioner Yaki and if there is time left over to please come back to me.

CHAIRPERSON REYNOLDS: Yes?

COMMISSIONER YAKI: Thank you.

Mr. Assistant Attorney General, this hearing is part of an evidentiary process for our annual report. And our statute states that "The Commission shall submit to the President and Congress at least one report annually that monitors federal civil rights enforcement efforts in the United States." I say that because it does talk about federal civil rights enforcement efforts in the United States.

I am going to pose not a hypothetical but a likely scenario to you. And I would like to get your responses to it. We have here, through what you have seen here today and in other hearings, evidence that two individuals at a single precinct in Philadelphia, a predominantly African-American precinct, engaged in, at a minimum, very bad behavior and, at worst, voter intimidation.

Certainly, in the case of Mr. Shabazz, I think we all agree that carrying a nightstick and acting in a threatening manner, to me, and apparently

to you or to the Division as well, constituted an 11(b) violation.

Of course, what is interesting and what doesn't get brought up is the fact that that was, that judgment was, enforced. That judgment was taken through to completion.

The second thing that isn't often brought up is that Mr. Shabazz was gone by about 10:00 o'clock in the morning. Only Mr. Jackson stayed. Shabazz was asked to leave by the Philadelphia police. And that, indeed, did happen.

Since that time -- and perhaps this goes, this may have gone, into your decision-making. I don't know. But there were no complaints filed by any voters. There were no allegations made by the so-called terrified poll worker that I referenced earlier.

There is no direct evidence linking the statement made by a witness here saying, "There is a terrified poll worker," which was essentially hearsay evidence, to any direct evidence by a poll worker saying that they were terrified by Mr. Shabazz.

There has been no evidence produced that this precinct had any -- there was some evidence produced that maybe two or three people may have

turned away from voting at that particular time but, as I said, Mr. Shabazz was gone by 9:30.

No one knows exactly how long Mr. Jackson stayed. No one knows whether those people came back and voted eventually. No one has produced evidence that this had any impact on the precinct vote. And, in fact, I would probably surmise that the precinct vote was probably substantially higher than it was in previous years.

No one has really brought up the fact, except you have here today, about how the decision -- about how other cases, I think more egregious decisions, have been -- egregious cases of potential 11(b) violations have come forward and been declined by the Department of Justice on at least two occasions. And I know of at least three or four others that were brought at least to the U.S. Attorney level and never apparently saw the light of day of Justice during the previous administration as well.

What I am trying to get at, Mr. Assistant Attorney General, is that, despite your efforts here today and despite the evidence that the Panthers, this particular New Black Panther Party's attempts to spark a 300-precinct revolt failed miserably in the hands of two overly aggressive and misguided individuals and

despite the fact that there have been no other allegations against the Department that they have failed to prosecute 11(b) violations anywhere else in this country, nevertheless, the likelihood is very high.

And I just wanted to be very frank with you that this Commission -- I will not join the vote, by the way, as you could probably tell -- may come out with a report stating that your Department has somehow failed in enforcing the civil rights laws of this country with regard to voter intimidation.

And I would like to know, for the record, what would your response be to that kind of report coming forward based on this single incident at this single precinct, the single charging and prosecutorial decision that was made by your Department? How would you feel if the U.S. Commission on Civil Rights came out with a report somehow condemning the entire Justice Department for its failure to enforce 11(b)?

ASST. ATTY. GEN. PEREZ: Well, I'm simply hopeful that the Commission's reports -- and I think your national annual reports are important vehicles --

CHAIRPERSON REYNOLDS: I apologize, Mr. Perez, but it was --

ASST. ATTY. GEN. PEREZ: -- would be

complete.

CHAIRPERSON REYNOLDS: Thank you. It was a very long question.

ASST. ATTY. GEN. PEREZ: No problem.

COMMISSIONER YAKI: You can answer it when my turn comes up next.

CHAIRPERSON REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: You're yielding?

CHAIRPERSON REYNOLDS: No. You have five minutes.

COMMISSIONER GAZIANO: Okay. We received a letter last night from a Mr. Hunt responsive to the Chairman's letter to Attorney General Holder raising several questions. And one of them, you know, since I was a defender of the President's executive privilege, no one believes more strongly that when the President and Attorney General invoke it, that it needs to be respected. It doesn't mean that it is absolute, of course.

But, as you know, as the Chairman's letter to Holder indicated, the Supreme Court has been very clear that the case of United States versus Reynolds, executive privilege “is not to be lightly invoked.” There must be a formal claim of privilege lodged by

the head of the Department, which has control over the matter after actual personal consideration by that officer. That means personal consideration by the Department head or attorney.

Now, in that letter, the Department, without any authority -- and I know the authorities in this area -- without any authority because none exists, said that the Department's non-executive privilege confidentiality interests override the statutory command Congress has instructed you to comply fully with our requests.

And then the final sentence of that letter is that, since you think you're right, the Department, since the Department thinks it's right, that our statute, our subpoenas are inferior to whatever interests the Department has, therefore, it is inappropriate to appoint the special counsel that we have requested to allow a judge to determine this.

In what other situations does the entity, in this case the Department, that has the conflict of interest get to decide how that conflict is resolved?

ASST. ATTY. GEN. PEREZ: Sir, Commissioner, one of the things that I think has to be clear in the record, because I think your question leaves it unclear, is that we have not invoked

executive privilege.

COMMISSIONER GAZIANO: No. I'm glad --

ASST. ATTY. GEN. PEREZ: And your question -- I'm sure you didn't intend to, but your question a reasonable person could interpret as having implied that --

COMMISSIONER GAZIANO: I have denied you --

ASST. ATTY. GEN. PEREZ: -- we have invoked an executive privilege.

COMMISSIONER GAZIANO: That's partly the letter --

ASST. ATTY. GEN. PEREZ: We have not.

COMMISSIONER GAZIANO: -- and part of it is curious because, in the absence of the President, all the President and Attorney General need to say is "I hereby invoke executive privilege after careful personal review."

Again, the Supreme Court says it is not to be lightly invoked. And then we might have a few questions about whether you are willing to waive it or this, that, or the other.

But, in the absence of the Attorney General or the principal or the President invoking executive privilege to deny us material, you have

asserted that you are confident -- that is not the exact words -- but you think your other interests, other interests, confidentiality interests, override our statute, override our subpoena. Okay. We have a dispute about that, a legal dispute about that.

May I ask you, since you are the Department that is supposed to enforce our subpoenas in court, we have pointed out this very embarrassing conflict of interest the Department has. And we have asked for a special counsel who would help us go to court to get a judge to determine who is right, who is right.

Do our statutes that require you to cooperate fully override your other non-executive privilege or not? What other situations is the Department with the conflict or the entity with the conflict gets to decide the outcome of that conflict?

ASST. ATTY. GEN. PEREZ: The confidentiality interests again, this back and forth that we have had in terms of providing the 4,000 pages of documents, and including FBI statements, including other materials, is exactly the back and forth that we do when we have the House Judiciary Committee or other committees that ask us for information and ask us to produce the front-line attorneys. So there's --

COMMISSIONER GAZIANO: There's a difference. There's a difference. They can hold you in contempt. And they can go to court. Our statute says that you are to enforce our subpoenas, the Department is to enforce the subpoenas. That is the conflict. And so we have asked for a special counsel.

The question is, if you are so sure about your legal position, why not allow a judge to decide that?

ASST. ATTY. GEN. PEREZ: The congressional statutes do not --

CHAIRPERSON REYNOLDS: Okay. Okay. Long question. Same deal.

Commissioner Yaki?

COMMISSIONER YAKI: I believe I had four minutes reserved from --

CHAIRPERSON REYNOLDS: That is correct.

COMMISSIONER YAKI: -- as well as my five minutes?

CHAIRPERSON REYNOLDS: That is correct.

COMMISSIONER YAKI: Thank you. I am going to use it all right now perhaps.

Just to go back to the question that I had raised before, getting aside from the fact that we seem to be devolving into Whitewater territory all

over again, if the Commission were to, based on its re-prosecution of the evidence in the Black Panther case, come to a conclusion that the Department of Justice has been failing in its efforts to deal with voter intimidation in this country, how would you respond?

ASST. ATTY. GEN. PEREZ: Well, we have an aggressive program of voter -- of law enforcement to address issues of voter intimidation I described in the case that we just prosecuted. I have described both the guidance that we are in the process of putting out to address a wide range of voter access and purging and other issues. And we are working very vigilantly in those areas.

And you have a job to do. You are going to put out a report. We will look forward to receiving that report. And we have had -- there are times when we disagree.

We have a different point of view. We -- there's remarkable ideological diversity around this table today. And that is not a news item. That is a fact. And that's what makes our country great is we have ideological diversity around a host of issues.

So I know that you have your job to do. And we have our job to do. Our job is law

enforcement, to apply the facts to the law to make sure that we are fully and effectively enforcing those laws to the best of our ability. And that is what we will continue to do.

COMMISSIONER YAKI: But if someone were to say to you the U.S. Commission on Civil Rights is accusing you, accusing the Department, of dropping the ball on voter intimidation, I take it you would probably disagree strongly with that?

ASST. ATTY. GEN. PEREZ: I would disagree.

COMMISSIONER YAKI: It's nicely, diplomatically put. I might put it a little bit differently, even more strongly than that.

I have a very quick question. There has been a lot of talk -- I am going to reserve the balance of my time.

CHAIRPERSON REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: I'll yield my time to Commissioner Yaki if he needs it.

COMMISSIONER YAKI: I'll carry it over.

CHAIRPERSON REYNOLDS: Okay. Commissioner Heriot?

COMMISSIONER HERIOT: I wanted to ask a question about the injunction that did issue. Why was

the decision made to limit it to the City of Philadelphia? Why not the suburbs? It's easy enough for someone like Mr. Shabazz, if he's told he can't repeat this activity in the City of Philadelphia, to just hop on a bus. Why just the city? Why not --

ASST. ATTY. GEN. PEREZ: Well, again, the legal principle is the principle of no tailoring the -- when you're seeking injunctive relief, the injunction needs to be narrowly tailored to the -- to address the underlying offense.

Once the national party was dismissed based on insufficiency of the evidence, then the national injunction was no longer in play. And so the judgment was made by --

COMMISSIONER HERIOT: But there's narrow tailoring, and then there's narrow tailoring. I mean, sure, there are cases like Marshall versus Goodyear that talk in the abstract about narrow tailoring. And the Goodyear case, I think, is decided correctly, but we are talking about such a narrow tailoring that the injunction is practically naked. It's really not useful to have an injunction that only applies to the City of Philadelphia.

If someone like Mr. Shabazz is a wrongdoer -- and I think you agree he is a wrongdoer -- he is

not so stupid that he doesn't know how to get on a bus. And at that point, he could repeat the same activity and not be subject to contempt of court --

ASST. ATTY. GEN. PEREZ: Well, if you --

COMMISSIONER HERIOT: -- to the confines of an injunction like this to be able to say if he does it again, well, this time, you know, we can get him for contempt and, you know, inflict some punishment there. But narrow tailoring wouldn't say you can't apply the injunction to suburban Philadelphia.

I think, in fact, we could go much, much further than that. I think if you look at the cases, you will find that we are way beyond narrow tailoring. You know, we are down to a naked injunction.

ASST. ATTY. GEN. PEREZ: I think what is illustrated from our back and forth, Commissioner, is that you and I and the decision-makers have some profound differences of opinion on --

COMMISSIONER HERIOT: We disagree that it would be easy for him to get on a bus and go to the suburbs?

ASST. ATTY. GEN. PEREZ: Well, he could go to New Jersey, I guess. Should we expand it to New Jersey? The evidence presented was that the New Black

Panther Party --

COMMISSIONER HERIOT: Yes. You know, should --

ASST. ATTY. GEN. PEREZ: The evidence --

COMMISSIONER HERIOT: I mean, New Jersey is very close to Philadelphia.

ASST. ATTY. GEN. PEREZ: The evidence presented was that the New Black Panther Party and, in particular, these two people, were involved in the City of Philadelphia. That was the evidence that was presented, as I understand it, to the decision-makers at the time.

COMMISSIONER HERIOT: Well, if that had happened --

ASST. ATTY. GEN. PEREZ: And so under the principles of --

COMMISSIONER HERIOT: -- in 2008 and, you know, it wasn't raining that day, does that mean that it only should occur in, an injunction should only apply, if it's not raining and it's 2008?

I mean, you have to do these on a reasonable basis. If this conduct is repeated, under what circumstances would that likely be done? Why confine it in a way that becomes almost comical?

ASST. ATTY. GEN. PEREZ: The City of

Philadelphia is pretty big. The --

COMMISSIONER HERIOT: Not that big. I take it you have agreed he is capable of getting on a bus.

ASST. ATTY. GEN. PEREZ: He is capable of getting on a bus, but we have to be --

COMMISSIONER HERIOT: And it wouldn't be very hard, right?

ASST. ATTY. GEN. PEREZ: We have to be narrowly tailored in the way we enforce things. So --

COMMISSIONER HERIOT: Well, then, what is reasonable? If you take a look at the case law on narrow tailoring of injunctions, you have really gone quite overboard here.

ASST. ATTY. GEN. PEREZ: Well, I would respectfully disagree. And, once again, you know, we have --

COMMISSIONER HERIOT: What about the Nicoletti case?

ASST. ATTY. GEN. PEREZ: -- a difference of opinion.

COMMISSIONER HERIOT: What injunction are you requesting there?

ASST. ATTY. GEN. PEREZ: They're going to jail. The --

COMMISSIONER HERIOT: Did you bring an 11(b)?

ASST. ATTY. GEN. PEREZ: We did not because we brought a criminal prosecution in that case. And they are serving jail time.

COMMISSIONER HERIOT: Was a criminal case considered in the New Black Panther Party?

ASST. ATTY. GEN. PEREZ: The criminal case was considered by the local and the federal authorities. And prosecution was declined.

COMMISSIONER HERIOT: Other cases under 11(b)? Do you have the injunctions that have been stopped in those cases?

ASST. ATTY. GEN. PEREZ: Well, again, there are only three cases that we are aware of that the government has brought. Two of them were lost at trial and --

COMMISSIONER HERIOT: Yes. But even if they were lost, presumably you requested something.

ASST. ATTY. GEN. PEREZ: Presumably something was requested, but you have to get liability before you can get the injunctive relief.

COMMISSIONER HERIOT: Yes, but I am interested in --

ASST. ATTY. GEN. PEREZ: And there was no

liability --

COMMISSIONER HERIOT: -- evidently someone at the Department of Justice believed these were justified cases. What injunction did they request there? Did they request something that applied only to a particular city or did they request something further, like in the Noxubee case? The 11(b) case wasn't successful, but presumably there was something ready to do, something to what the --

ASST. ATTY. GEN. PEREZ: Well, again, if the --

COMMISSIONER HERIOT: -- injunction should look like with litigation?

ASST. ATTY. GEN. PEREZ: Each set of facts is different. In the case that was the most recent case, that was a case involving an individual who put an ad in a newspaper saying --

CHAIRPERSON REYNOLDS: Thank you. Thank you, Mr. --

ASST. ATTY. GEN. PEREZ: -- that if the following 20 people vote --

COMMISSIONER HERIOT: I assume you --

CHAIRPERSON REYNOLDS: Thank you, Mr. Perez.

COMMISSIONER HERIOT: -- did that in one

spot.

CHAIRPERSON REYNOLDS: Okay. Thank you, Mr. Perez.

Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes. Thank you.

Mr. Perez --

ASST. ATTY. GEN. PEREZ: Mr. Chairman, I just want to make sure -- I have a commitment at 11:30. So I thought it was supposed to be over at 11:00. So I just want to make sure that the Commission is aware that I need to leave in about five minutes.

CHAIRPERSON REYNOLDS: Thank you.

COMMISSIONER KIRSANOW: Okay. Mr. Perez, again, thank you for being here. Thank you for your time.

The remedial memo of, I think it was, May 6th -- maybe it was May 9th of 2009 -- asked that the preparers determine whether or not there were any First Amendment implications to the conduct in which Shabazz and Jackson were engaged.

Did the Department come to a position as to whether or not their activity on Election Day of 2008 constitutes protected activity under the First Amendment?

ASST. ATTY. GEN. PEREZ: Well, again, as it relates to Mr. Shabazz, the determination was made that his activities constituted -- I should say Mr. Shabazz, who was at the polling place because there are --

COMMISSIONER KIRSANOW: Right.

ASST. ATTY. GEN. PEREZ: -- two Mr. Shabazzes in this case -- that his actions constituted unlawful intimidation. The judgment was made that, as to Mr. Jackson, that his actions did not reach the evidentiary threshold necessary to establish that violation.

As it relates to the national party, again, 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.

COMMISSIONER KIRSANOW: Specifically with respect to the First Amendment, was any of the conduct that we observed on the videotape of November 4th of 2008 protected under the First Amendment?

ASST. ATTY. GEN. PEREZ: Well, again, as it relates to Mr. Shabazz, the determination was made

that his activities constituted --

COMMISSIONER KIRSANOW: Understood. Were any of the activities that we observed protected?

ASST. ATTY. GEN. PEREZ: Is any of the -- well, standing at a -- if you're standing at a polling place, absent other indicia of intimidation, that is certainly a protected activity.

COMMISSIONER KIRSANOW: There were allegations that there were racial slurs invoked, that someone was called a race traitor, and they were wearing paramilitary gear. Given the context, was any of that protected under the First Amendment?

ASST. ATTY. GEN. PEREZ: Well, again, the determination was made based on the totality of the review that there was insufficient evidence as it related to Mr. Jackson. As it related to the national party, when they made a statement that, "We're going out to 300 -- we're deploying 300 people to various polling sites," that is undeniably in our judgment protected speech absent another statement that says something more than that.

COMMISSIONER KIRSANOW: Some of the discrete facts that we have here are, we have two individuals who belong to what has been described as a hate group, in military garb, with one of them having

a baton. Racial slurs were invoked.

There is evidence that at least three people, although it's unclear whether or not it was a result of Mr. Shabazz's and Mr. Jackson's conduct, were deterred from voting, at least turned away from voting. And we have a circumstance in which the case was poised for default. And we see it on the videotape.

If the public views this and then sees that there is no movement going forward on at least two of the defendants and a limited, very limited, injunction -- and, you know, we can debate that, but I tend to agree with my colleague that it seemed to be a fairly narrow injunction for one of them.

To what extent do those facts go into deliberation among persons within the Section, Division, or Department that this may cause others to think that there is some concern about or that the Department has a certain view as to how to proceed on these particular cases?

ASST. ATTY. GEN. PEREZ: We apply the facts to the law in every single case that we do. And we make our best judgments as to whether the facts sustain the evidentiary burden, an admittedly high evidentiary burden that we had under Section 11(b).

We do that analysis in every case that we bring. In every statutory context in which we bring a case, we apply the facts to the law and make our best judgment possible. And that is what happened in this case.

Again, this is not the first and, nor I will predict with great confidence, will it be the last case where, as you move up the chain, you have robust debate and differences of opinion about how to apply a set of facts that we have before us to the law that we must apply --

COMMISSIONER KIRSANOW: And one last question. If, in fact, you determine that default was not appropriate for at least two of the defendants and only a narrow injunction for one of them, why not make that determination or yield that determination to the trier of fact?

CHAIRPERSON REYNOLDS: I yield two minutes of my time so you can finish the question.

ASST. ATTY. GEN. PEREZ: This was the judgment that was made by the two people with 60 years of experience. And they looked at the entire totality of the circumstances. They reviewed all the evidence that they had before them. And they made their best judgment on the merits.

And, again, this is a -- we will continue to have cases in the Department of Justice where we move up the chain and we have robust dialogue and debate.

We can always after the fact say, "Could you do this? Could you do that?" They made a decision on the merits based on the evidence that was presented before them at the time. And it was a decision that was made by the Acting Assistant Attorney General. And it was the product of, I think, very careful consideration.

Are there people who might disagree with it? Undeniably, or we wouldn't be here today. But we will frequently have decisions that we make that people will disagree with. And that's the beauty of representative democracy, is that people can indeed disagree.

COMMISSIONER KIRSANOW: Thank you, Mr. Perez. Thank you, Mr. Chairman.

CHAIRPERSON REYNOLDS: All right. Well, Assistant Attorney General Perez, thank you for your time.

ASST. ATTY. GEN. PEREZ: Thank you.

III. CLOSING REMARKS BY CHAIR

CHAIRPERSON REYNOLDS: I suspect that you

will be hearing from us again. We would appreciate the opportunity to seek out ways that we can get information that will help us to form our final product, our report, but get it in a way that we don't undermine the work that you do.

I think that if we have good faith discussions and negotiations over some of the remaining discovery disputes, I suspect that we could reduce the size of the dispute.

But, in any event, I thank you for providing us with the time you did. And this is an interesting case.

ASST. ATTY. GEN. PEREZ: Thank you. And we will continue to keep the lines of communication open.

VICE CHAIR THERNSTROM: Thanks from all of us at the Commission.

ASST. ATTY. GEN. PEREZ: Thank you. Have a nice day.

CHAIRPERSON REYNOLDS: Okay. Folks, at this time, closing statements for the Commissioners who wish to make them? Vice Chair Thernstrom, we will start with you.

VICE CHAIR THERNSTROM: Well, I had a closing question for him, but I am not sure I have a

closing statement. I guess I will say two things. One, I very much appreciate Mr. Perez coming today. I thought he answered the questions in a forthright way and with integrity.

I cannot say too strongly that I agree with Attorney General Meese that an administration cannot function if its internal deliberations are always vulnerable to ending up in the public sphere.

And, lastly, as I understand it, there is no evidence that the New Black Panther Party, which is a lunatic fringe group and dysfunctional lunatic fringe group, largely dysfunctional, was sufficiently well-organized to show up at any other polling place and to be likely to show up in a suburban setting or other urban setting. And I appreciated his stress on the fact that, look, different attorneys can look at the same facts and come to different conclusions.

This is a legitimate argument between people of integrity, both on this Commission and in the Justice Department. And I think we need to respect both sides of this dispute.

That's it.

CHAIRPERSON REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: I think that there

are two -- what comes to mind about the conflicts that we have with the Department's refusal to cooperate comes down to this.

Greg Katsas has testified very clearly and very explicitly that a decision to dismiss a lawsuit could not have been made at the Division level alone. And we have some interrogatory answers from the Department that suggest Perelli was consulted.

I think we need more clarity on exactly what the role of Perelli, Holder, and others was, because we heard time and time again from the Assistant Attorney General that the real decision was made at the Division level. We have a former Associate Attorney General who said that is impossible.

Secondly, notwithstanding the 4,000 pages of largely peripheral redacted documents the Department has given us, we all know the elephant in the room. They won't give us the most important and helpful material that would help us in our investigation. And that is interviewing four to six people who would help us understand whether an impermissible racial motive or other impermissible motive was at play.

Those individuals include Perelli, King,

Rosenbaum, and some of the trial team. There might be one or two others if we were allowed to do our job back in October and begin where we are.

But the central question is, why did they continue to stonewall allowing us to do our job and interview, depose, or hear testimony from those critical witnesses? And why won't they even appoint a special counsel to allow us to take that legal issue to court?

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Thank you very much, Mr. Chairman.

As I think I have made it very clear, I think that we are spending enormous time and resources on re-litigating an issue, a single-focused issue, and trying to bootstrap within it some Whitewater-esque conspiracy, which I think is going to get us nowhere. It only undermines our credibility as a Commission.

We somehow are going to create this atmosphere that the Justice Department will not be pursuing enforcement of voting rights. And I would just like to say this.

When you look at what happened during the Bush administration, when you look at the fact that they declined people wearing guns and intimidating

Latino voters, that they declined people interviewing elderly black voters in their homes in Mississippi, interviewing elderly Latino voters in New Mexico, going into Philadelphia in sort of Men in Black-type outfits and this Commission has turned a blind eye to that for years, turned a blind eye to Katrina, turned a blind eye to so many other issues but, somehow in this particular instance, we're going to find fault with the Justice Department is the height, height of hypocrisy.

I agree, you know, with Commissioner Thernstrom. We should try and be respectful. But this process has shown no respect for the process, has shown no respect for fairness. And once again, I just think that this is a laughable exercise of the Commission's powers.

CHAIRPERSON REYNOLDS: Commissioner Melendez?

COMMISSIONER MELENDEZ: I didn't have a statement. Thank you.

CHAIRPERSON REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Well, I had thought I wouldn't make a statement, but I guess I am going to go back to my plan to make a statement here. And that

thought was just to make, I think, what is one single point. And that is, in the year running up to the 2008 election, there was a lot of very partisan bickering about election procedures.

Republicans argued, on the one hand, that there was a lot of voter fraud out there in the world. Democrats argued that there was a lot of voter intimidation out there and that something ought to be done. And, in truth, I have to tell you that I thought that both sides were overstating their case.

Although, of course, voter intimidation and voter fraud are both very important issues and they need to be dealt with, it seemed to me there was more hysteria than was appropriate.

But because the Bush administration was a Republican administration, naturally the accusation was that the Bush DOJ was not doing enough about voter intimidation.

So I thought, perhaps naively, that when the Obama administration came in, that they would naturally want to emphasize voter intimidation, as is their right. I have no objection to that. I believe that each administration has to decide its priorities and that that is appropriate.

But, lo and behold, what I regard and what

I think most people regard as an extremely strong case got dropped at a point where the resources necessary to follow through were really very, very small. And so that was surprising to me.

Again, each administration can and should set its own priorities unless the motivation has something to do with the fact that, in this particular case, the defendants were black. If the reason for dismissing the case has to do with the race of the parties, then I think that is something that the Commission has a duty to look into. And that is why we are doing this case.

If that possibility were not there, I don't think it's very likely that this case would have been chosen as a subject for an enforcement report. It is the fact that there is the possibility that race is infecting these decisions and that that would be, as the Assistant Attorney General said, that that is not what they should be about. That is why we are looking into this.

Not all of the evidence is in, but this is something that is perfectly appropriate for this Commission to look at. And, in fact, I think it would be inappropriate for us to neglect this kind of issue.

CHAIRPERSON REYNOLDS: Commissioner

Kirsanow?

COMMISSIONER KIRSANOW: Mr. Chair, voter intimidation is a matter of some seriousness. And we are specifically charged with investigating those matters.

I don't know if we have turned a blind eye to some of the other cases that have been cited: Pima, Mississippi, or some of the others. I will tell you that, frankly, had it been brought to my attention, I would have counseled that we should look into those. I don't recall those ever being raised before the Commission as subjects for our investigation. But, again, had they been, I would have aligned myself with those who would have wanted to take a look at it.

I think this particular case was a public case. It was brought to our attention. It merited our review. And I will withhold or at least hold in abeyance the balance of any other statement on this matter until such time as I have had an opportunity to review the depositions, transcript of the hearing, all of the documents that have been produced. And I am hopeful more will be produced at the conclusion of our investigation of this matter.

CHAIRPERSON REYNOLDS: Okay. And I would

just like to share some observations. I listened to Mr. Perez. And some of the thoughts that came to mind were, well, I was just surprised at the cramped, narrow approach taken by the Obama administration on this point. It was very technical, very conservative, just giving me the impression that the administration was just uncomfortable with this case.

I was also struck by the fact that the characterization as to who was responsible for the decision, the notion that the buck stops with the administration, it's not clear that that is true with this administration.

I kept hearing that Loretta King and Mr. Rosenbaum with their 60 years of collective experience were the shot callers in this matter. That struck me as odd. It is the administration that is responsible for decisions. Good, bad or indifferent, the administration owns it.

And hiding behind the decisions of career civil servants, it's not what I expect of an administration that accepts responsibilities for its decisions.

In any event, at this point, though, I would like to say that this concludes our hearing for today. We are adjourned sine die until a later date.

We will hold the record open for additional evidence pursuant to 45 CFR section 702.8. Individuals who wish to submit items for consideration to be included in the record may send them to the General Counsel at the U.S. Commission on Civil Rights at 624 9th Street, Northwest, Washington, D.C. 20425. Thank you.

We will have a business meeting. Let's give ourselves a 15-minute break.

(Whereupon, the foregoing matter was concluded sine die at 11:34 a.m.)