

U.S. COMMISSION ON CIVIL RIGHTS

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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

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FRIDAY, MAY 14, 2010

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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

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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

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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

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1 show that these two members standing athwart the
2 entrance of the polling place dressed in paramilitary
3 uniforms with black combat boots.

4 One of them brandished a nightstick. They
5 hurled racial epithets at whites and blacks alike,
6 taunting poll watchers and poll observers, who were
7 there to aid voters and, according to evidence adduced
8 during our hearing last month, caused some voters who
9 sought to cast their votes that day to turn and leave
10 the polling place, rather than have to contend with
11 them.

12 A black poll worker who happened to be
13 working for the Republican Party was called a race
14 traitor and promised that there would be hell to pay
15 if he emerged from the polling place, according to
16 eyewitness statements. He was so alarmed by the
17 Panthers' presence that he would not leave the polling
18 place until they left.

19 Initially this assault upon the sanctity
20 of the polling place was aggressively pursued by the
21 Justice Department in 2008 under Section 11(b) of the
22 Voting Rights Act, which prohibits any person, whether
23 or not acting under color of state law from
24 intimidating, threatening, coercing, or attempting to
25 intimidate, threaten, or coerce any person from voting

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1 or attempting to vote or from aiding a voter.

2 The Department's lawsuit sought to
3 permanently enjoin any similar future conduct by four
4 defendants: Minister King Samir Shabazz; Jerry
5 Jackson; -- these are the two gentlemen who were at
6 the polling place on the day in question -- and the
7 New Black Panther Party Chairman, Malik Zulu Shabazz;
8 and the organization itself.

9 None of the defendants contested the
10 charges. And all that remained for the Department to
11 do was to seek an entry of default judgment and an
12 injunction to stop future acts of intimidation.

13 But on the eve of the date which the court
14 set for the Department's request for default judgment,
15 the trial attorneys that had vigorously pursued the
16 case were instructed, instead, to request a
17 continuance by then Acting Assistant Attorney General
18 for Civil Rights Loretta King.

19 In the days that followed and despite the
20 robust justification memo it had prepared at the
21 inception of the case to support its request to file
22 suit, it appears the experienced line career attorneys
23 responsible for the case were put under intense
24 pressure to justify the lawsuit against the Panthers
25 and required to prepare a defense of its proposed

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1 injunction, as press reports and evidence submitted
2 into the record by Representative Wolf during last
3 month's hearing demonstrate.

4 Ms. King then sought a review of the
5 matter by the Division's Appellate Section, which was
6 also entered into evidence by Representative Wolf.
7 That review states that the Department can make a
8 reasonable argument in favor of default relief against
9 all defendants and probably should, given the unusual
10 procedural situation. It was a view shared by a total
11 of at least six career attorneys intimately familiar
12 with the details of the case, including two who opined
13 from the Appellate Section. One of the appellate
14 attorneys went so far as to characterize the
15 injunctive relief against King Samir Shabazz and Jerry
16 Jackson as very limited and acknowledged that such a
17 limited injunction would not accomplish very much.

18 Nevertheless, the Department dropped its
19 claims against three of the defendants: the
20 organization, the New Black Panther Party; its
21 Chairman, Malik Shabazz; and also, curiously enough,
22 Jerry Jackson, who was one of the individuals from the
23 organization who was at the polling place acting in
24 concert with the gentleman who wielded the nightstick.

25 As to King Samir Shabazz, the Department

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1 reduced the injunctive relief it sought against him.
2 Whereas, the original complaint sought an unlimited
3 injunction prohibiting acts of intimidation anywhere
4 in the United States, the final relief sought by the
5 Department was limited solely to the City of
6 Philadelphia and was only to last through November of
7 2012.

8 Careful analysis of the Department's
9 action in this case falls squarely within this
10 Commission's special statutory mandate to assess the
11 enforcement of the Voting Rights Act. That Act
12 resulted in large part from the Commission's earliest
13 work in the '50s.

14 This assessment comes at a time when both
15 the President and senior DOJ officials have announced
16 the Department is prosecuting civil rights violations
17 again and that it is back open for business.

18 Mr. Perez has stated that it is the job of
19 the Civil Rights Division to enforce all civil rights
20 laws and has noted, "Civil rights enforcement is not
21 like the buffet line at the cafeteria. You can't pick
22 and choose which laws you like and which ones you
23 don't."

24 He has pledged to enforce those laws in a
25 fair and independent fashion using all the tools at

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1 the Department's disposal. "We are not simply open
2 for business," Mr. Perez has said. "We are doing
3 business in a new, different, and better way."

4 In testimony before the House Judiciary
5 Subcommittee on the Constitution in December of 2009,
6 Mr. Perez identified the voting rights of all
7 Americans as being at the core of equal opportunity
8 and equal justice. Robust enforcement of civil rights
9 laws of the dispensation of equal justice, regardless
10 of the color of the victim or offender, are at the
11 heart of the New Black Panther Party case.

12 A dismissal of this case is critical
13 because of the broader message it conveys. The
14 American people expect the Department of Justice to
15 vigorously enforce the nation's civil rights laws.
16 Doing so requires it to exercise its discretion to
17 send a strong message to hate groups across America
18 that the kind of behavior that occurred at the polling
19 place in Philadelphia on Election Day will not be
20 tolerated.

21 Rather than exercise its discretion to
22 deter this behavior in the future, it declined to
23 follow the collective wisdom of career attorneys from
24 several components of the Department, weakened the
25 remedy it sought, and reduced the number of defendants

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1 it sought a remedy against just to one individual,
2 despite evidence that, at a minimum, he acted in close
3 coordination with his colleague Mr. Jackson.

4 A policy of non-prosecution when the facts
5 are so clear is likely to lead to disrespect for the
6 law and the department that is charged with enforcing
7 it.

8 Mr. Perez has said that the nation needs a
9 civil rights division because it is the moral compass
10 of our nation, it serves a guiding light as we
11 navigate new paths on the road to equal justice.

12 Well, if the civil rights division is the
13 nation's moral compass, the Commission on Civil Rights
14 is its conscience. And it is our duty to ensure that
15 the moral compass is pointing due north.

16 Before we hear testimony from Mr. Perez,
17 each Commissioner has been given a minute in which to
18 make an opening statement if he or she wishes. If a
19 Commissioner would prefer to reserve his or her time
20 for a closing statement, they are free to do so. We
21 will adhere firmly to this time limit.

22 Vice Chair Thernstrom, please proceed.

23 COMMISSIONER YAKI: Point of information
24 on the voting rights.

25 CHAIRPERSON REYNOLDS: Yes?

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1 COMMISSIONER YAKI: I just have a question
2 about a statement made in the Chairman's opening
3 remarks. You talked about the --

4 CHAIRPERSON REYNOLDS: Commissioner Yaki,
5 we are under tight time constraints.

6 COMMISSIONER YAKI: I know. I understand.
7 But I think this is important because --

8 CHAIRPERSON REYNOLDS: It may be important
9 --

10 COMMISSIONER YAKI: -- it goes to the
11 rules of the game here, which is you talked about the
12 so-called terrified poll worker at the facility --

13 CHAIRPERSON REYNOLDS: Mr. Yaki?
14 Commissioner Yaki?

15 COMMISSIONER YAKI: -- when there has been
16 direct evidence --

17 CHAIRPERSON REYNOLDS: Commissioner Yaki,
18 we will not be doing this now. Vice Chair Thernstrom,
19 please continue.

20 COMMISSIONER YAKI: I am asking for
21 clarification, Mr. Chair. You made a statement.

22 CHAIRPERSON REYNOLDS: Vice Chair
23 Thernstrom?

24 COMMISSIONER YAKI: It was not based on
25 any direct evidence --

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1 CHAIRPERSON REYNOLDS: Please proceed.

2 COMMISSIONER YAKI: -- by anyone here. It
3 is hearsay testimony. The only thing --

4 CHAIRPERSON REYNOLDS: Commissioner Yaki,
5 now is not the time to try to run out the clock.

6 COMMISSIONER YAKI: I am not trying to run
7 out the clock. I am simply saying that there has been
8 no direct testimony --

9 CHAIRPERSON REYNOLDS: Commissioner Yaki?
10 Commissioner Yaki, you are wasting valuable time. And
11 you know it.

12 COMMISSIONER YAKI: And I think that your
13 ten-minute statement when we only get one minute is a
14 way to put facts into evidence which do not exist.

15 CHAIRPERSON REYNOLDS: Commissioner Yaki?

16 COMMISSIONER YAKI: I just want to make
17 that point.

18 CHAIRPERSON REYNOLDS: Commissioner Yaki?

19 COMMISSIONER YAKI: That's all I have to
20 say.

21 CHAIRPERSON REYNOLDS: Commissioner Yaki,
22 if this happens again, it will come out of your time.

23 COMMISSIONER YAKI: Oh, you can do
24 whatever you want, Mr. Chair.

25 CHAIRPERSON REYNOLDS: Vice Chair

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1 Thernstrom, please?

2 COMMISSIONER YAKI: You seem to be doing
3 it quite --

4 VICE CHAIR THERNSTROM: I was interested
5 in this. I'm just going to reserve my time for later.

6 CHAIRPERSON REYNOLDS: Okay. Next up,
7 Commissioner Gaziano?

8 COMMISSIONER GAZIANO: Actually, I think
9 wouldn't it be Commissioner Kirsanow?

10 CHAIRPERSON REYNOLDS: We are reversing
11 the order.

12 COMMISSIONER GAZIANO: I will reserve my
13 time as well.

14 CHAIRPERSON REYNOLDS: Okay. Commissioner
15 Yaki?

16 COMMISSIONER YAKI: I reserve my time.

17 CHAIRPERSON REYNOLDS: Commissioner
18 Melendez, are you on the phone?

19 COMMISSIONER MELENDEZ: Yes. I just
20 wanted to thank Mr. Perez for being here, and that is
21 about it.

22 CHAIRPERSON REYNOLDS: Okay. Commissioner
23 Heriot?

24 COMMISSIONER HERIOT: I'll reserve my time
25 for afterwards.

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1 CHAIRPERSON REYNOLDS: Okay. I will do
2 the same. At this time we would like to welcome --
3 oh, I'm sorry.

4 COMMISSIONER KIRSANOW: I reserve my time
5 also.

6 CHAIRPERSON REYNOLDS: Okay. We would
7 like to welcome the Assistant Attorney General for the
8 Civil Rights Division, Mr. Thomas Perez. After I
9 introduce Mr. Perez, the General Counsel will begin
10 questioning the witness. And then the floor will be
11 open to Commissioners for questions.

12 Commissioners will have five minutes to
13 ask each of their questions of the witness. And we
14 will again proceed in order of seniority, the only
15 difference being that we have swapped out Commissioner
16 Gaziano for Commissioner Kirsanow. At that point we
17 will engage in another five rounds of questioning if
18 time permits.

19 Mr. Perez, please raise your right hand.
20 Do you swear and affirm that the information you are
21 about to provide is true and accurate, to the best of
22 your knowledge and belief?

23 ASST. ATTY. GEN. PEREZ: Yes, I do.

24 CHAIRPERSON REYNOLDS: Thank you, sir.
25 Given the limited time here today, we ask that you

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1 adhere strictly to the five-minute time limit for your
2 testimony.

3 II. TESTIMONY OF ASSISTANT ATTORNEY GENERAL

4 THOMAS PEREZ, U.S. DEPARTMENT OF JUSTICE,

5 CIVIL RIGHTS DIVISION

6 ASST. ATTY. GEN. PEREZ: Okay. Good
7 morning, Chairman Reynolds and members of the
8 Commission. Thank you for the opportunity to testify
9 here today.

10 The Civil Rights Division remains
11 committed to upholding the civil and constitutional
12 rights of all individuals, particularly those who are
13 the most vulnerable members of our society.

14 I am pleased to be here today to discuss
15 one of the cornerstones of the Division's work: our
16 enforcement of federal laws to protect voting rights.
17 Protection of the right to vote is one of the
18 Department's top priorities, and we want to be as
19 responsive as possible to the Commission's request for
20 information about our law enforcement activities in
21 this area.

22 To that end, the Department has responded
23 to interrogatories and document requests it has
24 received and has provided more than 4,000 pages of
25 documents relating to our enforcement of Section 11(b)

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1 of the Voting Rights Act and specifically with respect
2 to the Department's litigation in the New Black
3 Panther Party matter.

4 Those documents include declarations
5 received by the Department from witnesses in the
6 litigation as well as detailed information collected
7 by the FBI regarding the events that gave rise to that
8 case.

9 As noted in the written responses to the
10 Commission's inquiry, we have endeavored to be
11 responsive to the Commission's request while at the
12 same time protecting against disclosures which would
13 undermine well-established and longstanding
14 confidentiality interests that are integral to the
15 discharge of our law enforcement responsibilities,
16 particularly those relating to litigation decisions.

17 At the outset, let me emphasize with
18 respect to Section 11(b) decisions that these are hard
19 cases. Very few such cases have been brought. In
20 fact, we can find records of only three cases filed by
21 the government under Section 11(b) since its
22 inception.

23 The standards for proof are high. And, as
24 in every case, the question to be addressed is whether
25 the evidence is sufficient to sustain the burden of

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1 proof. And on that question, reasonable minds can
2 differ and can look at the same set of facts but draw
3 different conclusions regarding whether the burden of
4 proof has been met. Let me give you a few examples to
5 illustrate that point.

6 In the most recent case under 11(b) to go
7 to trial, United States versus Brown, the court found
8 that the publication in the newspaper by a county
9 political party chairman of a list of voters to be
10 challenged if they attempted to vote in the party
11 primary did not amount to intimidation, threat, or
12 coercion under 11(b).

13 In another case, in Arizona, the complaint
14 was received by a national civil rights organization
15 regarding events in Pima, Arizona in the 2006 election
16 when three well-known anti-immigrant advocates
17 affiliated with the Minutemen, one of whom was
18 carrying a gun, allegedly intimidated Latino voters at
19 a polling place by approaching several persons,
20 filming them, and advocating and printing voting
21 materials in Spanish.

22 In that instance, the Department declined
23 to bring any action for alleged voter intimidation,
24 notwithstanding the requests of the complaining
25 parties.

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1 In 2005, the Division received allegations
2 that armed Mississippi State investigators intimidated
3 elderly minority voters during an investigation of
4 possible voter fraud in municipal elections by
5 visiting them in their home, asking them who they
6 voted for, in spite of state law protections that
7 explicitly forbid such inquiries.

8 Here again, the Division front office
9 leadership declined to bring a voter intimidation case
10 in this matter. This is the matter referenced in a
11 recent GAO report that examined a number of cases
12 brought by certain sections of the Civil Rights
13 Division during the Bush administration.

14 Moving to the matter at hand, the events
15 occurred on November 4th, 2008. The Department became
16 aware of these events on Election Day and decided to
17 conduct further inquiry.

18 After reviewing the matter, the Civil
19 Rights Division determined that the facts did not
20 constitute a prosecutable violation of the criminal
21 statutes. The Department did, however, file a civil
22 action on January 7th, 2009, seeking injunctive and
23 declaratory relief under 11(b) against four
24 defendants.

25 The complaint alleged that the defendants

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1 violated Section 11(b) because they attempted to
2 engage in and engaged in both voter intimidation and
3 intimidation of individuals aiding voters.

4 Although none of the defendants responded
5 to the complaint, the Department had a continuing
6 legal and ethical obligation to ensure that any relief
7 sought was consistent with the law and supported by
8 the evidence.

9 Based on the careful review of the
10 evidence, the Department concluded that the evidence
11 collected supported the allegations in the complaint
12 against Minister King Samir Shabazz. The Department,
13 therefore, obtained an injunction against defendant
14 King Samir Shabazz, prohibiting him from displaying a
15 weapon within 100 feet of an open polling place on any
16 Election Day in the City of Philadelphia or from
17 otherwise violating Section 11(b).

18 The Department considers this injunction
19 to be tailored appropriately to the scope of the
20 violation and the constitutional requirements and will
21 fully enforce the injunction's terms.

22 Section 11(b) does not authorize any other
23 kinds of relief, such as criminal penalties, monetary
24 damages, or civil penalties.

25 The Department concluded that the

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1 allegations in the complaint against Jerry Jackson,
2 the other defendant present at the polling place, as
3 well as the allegations against the national New Black
4 Panther Party and its leader, Malik Zulu Shabazz, did
5 not have sufficient evidentiary support.

6 The Department reviewed the totality of
7 the evidence in the applicable law in reaching these
8 decisions.

9 CHAIRPERSON REYNOLDS: Thank you, Mr.
10 Perez.

11 At this time, we will hear from the
12 General Counsel. Mr. Blackwood?

13 MR. BLACKWOOD: Thank you. Thank you for
14 coming, Mr. Perez.

15 If I could, if you could put up slide
16 number 2? As I understand your testimony today, the
17 main reason that the course of the litigation changed
18 is that there was another review of evidence. There
19 was, of course, a review of evidence beforehand in
20 determining to file the lawsuit, correct?

21 ASST. ATTY. GEN. PEREZ: Yes, there was a
22 review between November 4th and January 7th.

23 MR. BLACKWOOD: Okay. And at the time
24 that the suit got filed, the J memo shows that four
25 attorneys had signed off: Spencer Fisher, Christian

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1 Adams, Robert Popper, Christopher Coates, four line
2 attorneys. There were four attorneys, two of them,
3 one the Chief, the other the Deputy Chief of the
4 Voting Section.

5 Were there new facts learned between the
6 time of January 7th and May 1st?

7 ASST. ATTY. GEN. PEREZ: The Department
8 has a continuing obligation in any litigation to
9 ensure that the facts that are put forth to support,
10 in this case a default judgment are, in fact, the
11 facts that can support that judgment.

12 MR. BLACKWOOD: Sure.

13 ASST. ATTY. GEN. PEREZ: And so that duty
14 falls with not simply the line attorneys in the
15 section but people up the chain. And in this case,
16 that part is no different than any other case, where
17 you have that continuing legal and ethical obligation
18 to review the facts and apply the facts to the law as
19 you have them.

20 MR. BLACKWOOD: Right. No question.
21 Every attorney has that ongoing obligation.

22 ASST. ATTY. GEN. PEREZ: And every
23 supervisor has the obligation to review the work of
24 the front-line people who are doing it.

25 MR. BLACKWOOD: Right. But --

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1 ASST. ATTY. GEN. PEREZ: That is standard
2 procedure in the Department.

3 MR. BLACKWOOD: No question. But the
4 question I do have is the one I posed to you, which
5 is, was any new evidence learned from the time that
6 the suit was filed on January 7th and the time that a
7 continuance was asked on May 1st?

8 ASST. ATTY. GEN. PEREZ: There was a
9 continuing review of the evidence by people in the
10 front office.

11 MR. BLACKWOOD: But no new evidence?

12 ASST. ATTY. GEN. PEREZ: Well, there was a
13 continuing review of the evidence.

14 MR. BLACKWOOD: Okay. Among that, though,
15 was also a review by the Appellate Section, which
16 occurred on -- what was it? -- May 12th and May 13th
17 by Diana Flynn and Marie McElderry. That review and
18 the memorandum resulting indicated no concern of the
19 kind that you mentioned.

20 If I can see slide 4, please? Ms. Flynn
21 in the memo that she prepared -- and this was just
22 before May 15th, which is the day the default was due
23 or the decision had to be made -- she indicated, "We
24 can make a reasonable argument in favor of default
25 relief against all defendants and probably should

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1 given the unusual procedural situation."

2 Who overruled Ms. Flynn's opinion?

3 ASST. ATTY. GEN. PEREZ: The judgment in
4 this case to proceed in the way that was chosen was
5 made by Steve Rosenbaum and ultimately by Loretta King
6 based on a review of the totality of the
7 circumstances.

8 As it related to the national party, the
9 determination was made -- as you know, there is no
10 vicarious liability when incidents occur. The New
11 Black Panther Party stated that they were going to
12 have 300 poll watchers across America. We are unaware
13 of any incident that occurred anywhere besides
14 Philadelphia.

15 So the evidence in that particular context
16 demonstrated or suggested that if there was indeed a
17 national conspiracy to intimidate voters, that there
18 would have been, it stands to reason, activity
19 elsewhere.

20 So as it related to the national party and
21 the national president -- and, again, the evidence
22 showed that shortly after the election, the national
23 party disavowed the activities and actions of the two
24 people acting locally. And so that judgment was made
25 not to seek that -- the evidence did not support the

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1 actions against the national party and the national
2 chairman.

3 MR. BLACKWOOD: Right. But I'm asking --

4 ASST. ATTY. GEN. PEREZ: And then once you
5 have that happening, you are in a situation where you
6 can no longer because of the narrow tailoring
7 requirements for the injunctive relief --

8 MR. BLACKWOOD: But you are not answering
9 my question.

10 ASST. ATTY. GEN. PEREZ: -- you have -- I
11 actually am, sir, because you are asking the question
12 of why did we make the decision that we made?

13 MR. BLACKWOOD: No, no, no. That's not
14 what I asked. I said, who or why did someone overrule
15 or --

16 ASST. ATTY. GEN. PEREZ: And I'm
17 explaining.

18 MR. BLACKWOOD: -- Ms. Flynn's
19 determination?

20 ASST. ATTY. GEN. PEREZ: Because they took
21 a look at the evidence and --

22 MR. BLACKWOOD: And didn't Ms. Flynn also
23 take a look at the evidence?

24 ASST. ATTY. GEN. PEREZ: And that's --
25 and, Mr. Blackwood, I have worked at the Department

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1 under Republican and Democratic leadership. And I
2 have been involved in many, many cases where you look
3 at evidence. And reasonable people of good faith can
4 take a look at evidence and draw different conclusions
5 from the evidence. This is a case about career people
6 disagreeing with career people. That happens very
7 often.

8 I have had many cases when I was a
9 prosecutor where I looked at a set of facts, and I
10 concluded that we should go in one direction. My
11 supervisors reviewed it. And they had much more
12 experience than I did. And they concluded that we
13 should go in a different direction.

14 That kind of robust interaction is part of
15 the daily fabric of the Department of Justice. And
16 that's precisely what happened in this case.

17 MR. BLACKWOOD: Well, just so we're all
18 clear, though, when you say "career people overruled
19 career people," in this particular case, if we could
20 see slide 3? There was a total of six career
21 attorneys that said the matter should proceed.

22 Now, that's fine. Mr. Rosenbaum and Ms.
23 King came to a different conclusion. But it is, I
24 would think you would agree, slightly unusual that in
25 a case where it's in a default posture, literally the

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1 other side has conceded liability. And the only
2 question is, what is the relief or the remedy?

3 In that circumstance, the six career
4 attorneys were overruled by two others.

5 ASST. ATTY. GEN. PEREZ: We have a
6 continuing duty, whether it's in a default posture,
7 whether it's a pro se defendant, whether it's the
8 biggest white shoe law firm in town representing the
9 defendant, our obligation stays the same, which is
10 that we continue to have a legal and ethical
11 obligation to ensure that we can present evidence that
12 there is sufficient evidence to sustain the elements
13 of the particular charge.

14 In this case, the conclusion was made
15 that, as to the defendant who had the nightstick, that
16 there was indeed sufficient evidence to sustain the
17 charge. And so the default judgment was sought and
18 obtained as it related to him.

19 MR. BLACKWOOD: Okay. If I could --

20 ASST. ATTY. GEN. PEREZ: And as it related
21 to the other defendants in the case, Ms. King and Mr.
22 Rosenbaum concluded that the evidence did not support
23 that. And that was the decision that they made.

24 MR. BLACKWOOD: Okay. This goes back to
25 my original question, though. Of the eight career

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1 attorneys looking at it, the six I mentioned and then
2 Ms. King and Mr. Rosenbaum, they're all looking at the
3 same evidence, correct? I mean, there's no new
4 additional evidence that was collected after January
5 7?

6 ASST. ATTY. GEN. PEREZ: Correct. People
7 can look at the same set of facts, --

8 MR. BLACKWOOD: Of course.

9 ASST. ATTY. GEN. PEREZ: -- just as in the
10 other cases I've provided. People can look at, you
11 know, Minutemen brandishing a weapon at a polling
12 place in Arizona during an election and conclude that
13 that sounds intimidating.

14 MR. BLACKWOOD: Okay.

15 ASST. ATTY. GEN. PEREZ: The Division
16 concluded that it didn't meet the high bar of Section
17 11(b).

18 MR. BLACKWOOD: Okay.

19 ASST. ATTY. GEN. PEREZ: And so that is --
20 again, you know, reasonable people can look at the
21 same set of facts and reach different conclusions.
22 Career people can disagree with career people. And
23 that's precisely what happened in this case.

24 CHAIRPERSON REYNOLDS: Okay. Vice Chair
25 Thernstrom?

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1 VICE CHAIR THERNSTROM: Thank you very
2 much for appearing.

3 ASST. ATTY. GEN. PEREZ: Good morning.

4 VICE CHAIR THERNSTROM: I am interested in
5 three things you have talked about. One, I didn't
6 know that there had been -- and I am extremely
7 interested. You had first thought that there was a
8 threat of a national conspiracy, as it were, 300
9 incidents, 300 poll workers, whatever the description
10 was.

11 It's one of the arguments I have been
12 making from the beginning here at the Commission, that
13 this was a one-off. And, therefore, I would have been
14 very interested in having a briefing, but I didn't
15 think it merited a statutory report.

16 And I just wanted to say that to me, that
17 is an extremely important fact, that you had expected,
18 you know, something on a much larger scale and it
19 didn't occur.

20 I am interested in answers to two
21 questions. One, you have talked about the
22 confidentiality interests of the Department. And I
23 wondered if you would spell those out. I am concerned
24 about those, whether it's a Republican administration
25 or a Democratic administration.

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1 And, two, I wondered if you would spell
2 out -- you had said the standard for the burden of
3 proof in 11(b) cases is very high. And I would like
4 you to spell out what that standard is.

5 I might mention that I am the only person
6 on this Commission who is not an attorney but a
7 political scientist. But I have written two --

8 ASST. ATTY. GEN. PEREZ: You play one on
9 TV, though.

10 VICE CHAIR THERNSTROM: I have written two
11 books on the Voting Rights Act. In neither one did I
12 talk about 11(b) because it has been such a minor
13 provision.

14 ASST. ATTY. GEN. PEREZ: Sure. You ask
15 some very good questions, and let me attempt to
16 address them. The confidentiality interests in not
17 disclosing internal deliberations have been a
18 time-honored interest throughout Republican and
19 Democratic administrations.

20 We have many cases in many different areas
21 that we investigate in the Department of Justice. And
22 the goal that I have, whether it's voting, whether
23 it's criminal, whether it's education, is to foster a
24 robust dialogue.

25 And one way that is a critical way to

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1 foster that robust dialogue is for people on the front
2 lines to appreciate that they can offer me or
3 whomever, Republican or Democrat, is the Assistant
4 Attorney General, that honest and candid advice, not
5 having to constantly wonder whether, if I express this
6 opinion today, will it show up in a PowerPoint
7 presentation tomorrow.

8 And this has been a tradition that has
9 been throughout Republican and Democratic
10 administrations. I recall vividly when I was a career
11 attorney under John Dunne. The Republicans --

12 VICE CHAIR THERNSTROM: I know him well.

13 ASST. ATTY. GEN. PEREZ: And he's a man of
14 great integrity, --

15 VICE CHAIR THERNSTROM: Right.

16 ASST. ATTY. GEN. PEREZ: -- for whom I
17 have great respect. This is an interest that has been
18 expressed and put in practice.

19 We also have great respect for the role of
20 Congress, the role of this Commission. I'm here today
21 because I have great respect for the institution of
22 the Civil Rights Commission and the role that it has
23 played in a host of issues. And that is why we
24 provided over 4,000 pages of documents, including
25 interviews, et cetera.

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1 And when we have this back and forth with
2 Congress, we do very similar things. And our
3 interest, again, is ensuring that those
4 confidentiality interests in our internal
5 deliberations are indeed protected while
6 simultaneously balancing the work that you
7 appropriately have and Congress appropriately has.
8 And we, I think, have historically been able to work
9 those out. And that is why as the head of the
10 Division, I come here today to talk about the matter.

11 11(b), you're correct. If you look at a
12 pie chart under Republican or Democratic
13 administrations, it's been an infinitesimally small
14 part of the enforcement since 1965.

15 We could only find three cases that the
16 Department brought. One was the Harvey Gantt or Jesse
17 Helms case, which resulted in a settlement. And the
18 other two contested cases were not sustained at trial.
19 One was long ago, and one was more recent.

20 And I outlined those other cases, where
21 there are facts that, arguably, demonstrate
22 intimidation, where again the case wasn't even pursued
23 to begin with.

24 And so the courts have set a high bar.
25 That is the hand we're dealt. And I think that is a

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1 big part of the reason why we proceed as such.

2 CHAIRPERSON REYNOLDS: Thank you, Mr.
3 Perez.

4 Commissioner Gaziano?

5 COMMISSIONER GAZIANO: And I have seven
6 minutes, yielded time from -- two from you and --

7 CHAIRPERSON REYNOLDS: Yes. I'm yielding
8 two of my precious minutes to Commissioner Gaziano.

9 COMMISSIONER YAKI: We are going out of
10 seniority? That's basically what is going on now?

11 CHAIRPERSON REYNOLDS: Yes. I announced
12 at the beginning that --

13 COMMISSIONER GAZIANO: Pete is yielding to
14 me, and I will yield to Pete.

15 COMMISSIONER YAKI: Okay.

16 COMMISSIONER GAZIANO: Good morning.

17 ASST. ATTY. GEN. PEREZ: Good morning,
18 sir.

19 COMMISSIONER GAZIANO: I want to begin
20 with a few very simple and general propositions. I
21 don't know if I'll ever drill down apart from these
22 hypotheticals, but please just help me with these
23 propositions.

24 Do you agree that the voting rights laws
25 should always be enforced in a race-neutral manner?

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1 ASST. ATTY. GEN. PEREZ: Yes, sir.

2 COMMISSIONER GAZIANO: I certainly hope
3 so. And I am glad to hear that that is the
4 Department's position.

5 So let me imagine a different
6 administration. It would be a problem for the Civil
7 Rights Division if any political appointee or
8 supervising attorney expressed the view that the
9 voting rights laws should never be enforced against
10 blacks or other racial minorities?

11 ASST. ATTY. GEN. PEREZ: I don't agree
12 with that viewpoint.

13 COMMISSIONER GAZIANO: It would be a
14 problem for the Division, too, wouldn't it? I'm glad
15 you don't agree with it, but it would be a problem for
16 the --

17 ASST. ATTY. GEN. PEREZ: That is not our
18 practice. We look at facts and the law.

19 COMMISSIONER GAZIANO: Hypothetical,
20 another administration. Would you agree it would be a
21 problem if a senior supervising attorney or other
22 political appointee expressed that view in the
23 Division?

24 ASST. ATTY. GEN. PEREZ: Yes, sir.

25 COMMISSIONER GAZIANO: Okay. If that

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1 person who held that view that we both disagree with
2 was in a position to decide which cases to bring or
3 maintain or continue, wouldn't it potentially taint
4 their decision with regard to cases where blacks or
5 other racial minorities were the defendants?

6 ASST. ATTY. GEN. PEREZ: Fortunately, sir,
7 we can continue to have hypothetical conversations.
8 The good news is that in the Division that we work in
9 is the division --

10 COMMISSIONER GAZIANO: Hold on.

11 ASST. ATTY. GEN. PEREZ: If I could
12 finish, sir?

13 COMMISSIONER GAZIANO: I really -- since
14 your time is so limited with us, since you have
15 expressed your limited time -- you know, these are
16 just hypotheticals. This is another administration.
17 I just want to know what the official policy would be.

18 ASST. ATTY. GEN. PEREZ: I would prefer to
19 speak with -- I can speak to the policies and
20 practices of the Obama administration under the
21 leadership of Eric Holder. The Obama administration
22 under the leadership of Eric Holder will enforce the
23 laws, applying the facts to the laws, and we will
24 follow the facts where the facts take us.

25 COMMISSIONER GAZIANO: So what is the --

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1 ASST. ATTY. GEN. PEREZ: The leadership
2 will so reflect.

3 COMMISSIONER GAZIANO: -- answer to my
4 question, which is, would it taint their decisions
5 about whether to bring or maintain a lawsuit against
6 black defendants if they believe the civil rights laws
7 should never --

8 ASST. ATTY. GEN. PEREZ: We don't have
9 people that are of that ilk, sir. So I guess it's a
10 --

11 COMMISSIONER GAZIANO: I hope not.

12 ASST. ATTY. GEN. PEREZ: -- moot question.
13 And the people who have been involved since January
14 20th in decision-making roles in the Civil Rights
15 Division have been people for whom I have great
16 respect.

17 So we can have hypothetical conversations
18 about other administrations, but I thought the focus
19 here of this hearing today was to talk about the
20 decision in the New Black Panther Party case. I'm
21 prepared to talk about the decision in the New Black
22 Panther Party case.

23 COMMISSIONER GAZIANO: Would you be
24 surprised? Would you be surprised, then, if one of
25 your senior political appointees or a supervising

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1 attorney expressed such a view?

2 ASST. ATTY. GEN. PEREZ: I'm quite
3 confident, because I know the folks that work with me
4 quite well, that they have been people who have
5 applied the law, have called balls and strikes as they
6 have seen them, and have done so to the best of their
7 abilities.

8 COMMISSIONER GAZIANO: That isn't an
9 answer to my question. Would it surprise you if
10 someone who was a supervising attorney or another
11 political appointee in your Division expressed such a
12 view?

13 ASST. ATTY. GEN. PEREZ: That's --

14 COMMISSIONER GAZIANO: So it's not your
15 policy. I mean, it would surprise me.

16 ASST. ATTY. GEN. PEREZ: Well, sir, I'm
17 here to answer questions about the New Black Panther
18 Party case. We can continue to have a dialogue about
19 hypothetical people who are not in positions of
20 leadership in the Obama Civil Rights Division if that
21 is the back and forth that you would like to have.

22 I thought I was here to talk about the New
23 Black Panther Party case.

24 COMMISSIONER GAZIANO: I think we are.

25 ASST. ATTY. GEN. PEREZ: Okay. So I'm

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1 happy to answer --

2 COMMISSIONER GAZIANO: Let me ask you.

3 ASST. ATTY. GEN. PEREZ: -- questions
4 about the New Black Panther Party case.

5 COMMISSIONER GAZIANO: If someone came to
6 you and said that someone -- someone in your Division,
7 I should say, came to you and said, "A supervising
8 attorney" or "a political appointee" made the
9 statement that the voting rights laws should never be
10 enforced against blacks or other racial minorities,
11 you would investigate that report, wouldn't you?

12 ASST. ATTY. GEN. PEREZ: I would take a
13 look at the person who made the statement. I would
14 take a look at the statement. And we would have a
15 conversation about it.

16 COMMISSIONER GAZIANO: You would want to
17 interview the people who were supposedly present when
18 that statement was made, wouldn't you?

19 ASST. ATTY. GEN. PEREZ: Yes, sir.

20 COMMISSIONER GAZIANO: And if you believed
21 that statement was made, if you heard it, let's say,
22 you would refute it, wouldn't you?

23 ASST. ATTY. GEN. PEREZ: I would talk to
24 all the people involved and figure out what the
25 context of the statement is. And we would move

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1 forward from there.

2 COMMISSIONER GAZIANO: But wouldn't you
3 want to clarify to all of the people who may have
4 heard it that that is not the policy of the Department
5 and that you would not tolerate that kind of a policy?

6 ASST. ATTY. GEN. PEREZ: Yes, sir.

7 COMMISSIONER GAZIANO: Okay. You helped
8 the Obama transition team for your Division, didn't
9 you?

10 ASST. ATTY. GEN. PEREZ: Yes, I did, not
11 just the Division, the Department.

12 COMMISSIONER GAZIANO: Right, but
13 especially for -- you probably had special interest in
14 -- I don't know how long the clearance process is, but
15 about the same month your nomination was put forward
16 to head the Division, there was a press report with
17 specific instances, examples of people in your
18 Division, not all of whom are still there, who held
19 the view that the voting rights laws should never be
20 enforced against blacks and other racial minorities.

21 Did you take a --

22 ASST. ATTY. GEN. PEREZ: Sir, if you have
23 questions about people who work in the Division, I am
24 happy to have those questions submitted to the
25 Division. And we will take a look at any questions

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1 that you might have.

2 I thought that the subject matter of this
3 hearing was what we did in the New Black Panther Party
4 case. I'm having difficulty understanding --

5 COMMISSIONER GAZIANO: The problem --

6 ASST. ATTY. GEN. PEREZ: -- the nexus.
7 And if --

8 COMMISSIONER GAZIANO: The problem is you
9 are not allowing us to talk to the people we have
10 subpoenaed, the people who might have such evidence.

11 ASST. ATTY. GEN. PEREZ: Well, sir, again
12 --

13 COMMISSIONER GAZIANO: This is very
14 helpful to me, though. You're clarifying for your
15 Division. You're, I hope, correcting the perception
16 that the press reports indicate that the civil rights
17 laws should not be applied to race. So to me this is
18 very valuable testimony.

19 ASST. ATTY. GEN. PEREZ: Well, I'm glad
20 that you think it is valuable.

21 COMMISSIONER GAZIANO: I hope that
22 everyone in your Division is made aware of that.

23 And I will yield my time at this time for
24 the next round.

25 CHAIRPERSON REYNOLDS: Commissioner Yaki?

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1 COMMISSIONER YAKI: Thank you very much,
2 Assistant Attorney General, for being here today. I
3 just want to follow up on some lines that my prior
4 commissioner was talking about. That has to do with
5 the deliberate process privilege and how important
6 that is.

7 Would you agree that, in terms of the
8 prosecutorial decision-making process, especially that
9 the deliberate process privilege -- there is a
10 long-term interest in maintaining the integrity of the
11 prosecutorial decision-making process and that's part
12 of why the deliberate process privilege exists?

13 ASST. ATTY. GEN. PEREZ: Again I want to
14 be very precise about what I have said --

15 COMMISSIONER YAKI: Sure.

16 ASST. ATTY. GEN. PEREZ: -- because I have
17 said that there has been a longstanding -- again, by
18 "longstanding," I am referring to it has been a
19 longstanding interest asserted in Republican and
20 Democratic administrations -- a longstanding
21 confidentiality interest in not disclosing internal
22 deliberations. And it is precisely grounded out of
23 the fact that when you are prosecuting cases, you need
24 to have -- and when I refer to "prosecuting," I am
25 referring to civil and criminal cases.

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1 If you're that front-line attorney -- and
2 I was that front-line attorney because I started in
3 the Division as a summer clerk. Then I was an honors
4 hire. Then I was a first-line supervisor. And then I
5 was the Deputy AAG. And now I have the privilege of
6 being the AAG.

7 And, regardless of where I was in that
8 decision-making process, the currency of good
9 decision-making is having the capacity to investigate
10 the facts, have conversations with your supervisors,
11 disagree, agree, sometimes disagree vociferously, but
12 then come to a conclusion, recognizing that we have a
13 chain of command, we have career people who call balls
14 and strikes.

15 And that confidentiality interest has been
16 an interest that has been well-established, --

17 COMMISSIONER YAKI: Sure.

18 ASST. ATTY. GEN. PEREZ: --
19 well-respected. And that's why we turned over over
20 4,000 pages of documents. We continue to resist, not
21 only here but elsewhere, when people want to talk to
22 line attorneys and ask them, "Why did you do this?
23 Why did you do that? Show me this about your memo."

24 That is an interest I have seen Republican
25 administrations assert with the same vigor as

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1 Democratic administrations. And I think it is a good
2 confidentiality --

3 COMMISSIONER YAKI: So you would agree
4 with this one Attorney General who said, "Employees of
5 the Department of Justice would likely be reluctant to
6 express candidly their views and recommendations on
7 controversial and sensitive matters if those views
8 could be exposed to public scrutiny"?

9 ASST. ATTY. GEN. PEREZ: I think that is a
10 fair statement.

11 COMMISSIONER YAKI: Well, I would tend to
12 agree. And it is ironic that that came from Edwin
13 Meese.

14 I would just like to say that I have one
15 follow-up on the two instances that you did note that
16 were declined by the Department of Justice. But I
17 think that the Pima, Arizona case, where I think the
18 facts as alleged were that people who were noted
19 anti-immigrant activists were openly carrying weapons
20 -- I think they had maybe even hand-made badges or
21 something like that and were videotaping and following
22 Latino voters in Tucson, Arizona. That was one in
23 2006.

24 And then you talked about the Mississippi
25 investigation, where I think people were visiting

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1 elderly people in their homes and people who said they
2 were officials of the government.

3 And one of the points that I have made in
4 this investigation is that this is not really an
5 investigation. This is really just someone's decision
6 to retry the New Black Panther Party case because we
7 have not, despite my many attempts to bring up Pima,
8 Arizona, Mississippi, Philadelphia 2003 mayor's race,
9 the misleading voter rights thing in Orange County in
10 2004, and other instances during the previous
11 administration, we have not really seen any attempt to
12 understand what goes into this, what goes into an
13 11(b) decision to prosecute or not to prosecute.

14 Was there anything in the records with
15 regard to why in 2006 and 2007 those two specific
16 incidents, which somehow did make it up to the Justice
17 Department versus these other ones, which apparently
18 maybe died at the U.S. Attorney level, as to why those
19 were not prosecuted?

20 ASST. ATTY. GEN. PEREZ: I think the
21 political leadership of the prior administration's
22 Civil Rights Division would be in the best position to
23 explain why they chose to decline prosecution --

24 COMMISSIONER YAKI: There were no notes.
25 There were no records.

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1 ASST. ATTY. GEN. PEREZ: -- in the Pima
2 case and in the Mississippi case. And, again, I
3 illustrate these to simply make the point that you can
4 look at a set of facts. And people of good faith can
5 draw different conclusions --

6 CHAIRPERSON REYNOLDS: Thank you.

7 ASST. ATTY. GEN. PEREZ: -- from sets of
8 facts.

9 COMMISSIONER YAKI: Okay. Thank you.

10 CHAIRPERSON REYNOLDS: Commissioner
11 Melendez?

12 COMMISSIONER MELENDEZ: I'll yield my time
13 to Mr. Yaki.

14 COMMISSIONER YAKI: I'll carry it over.
15 I'll take it over to the next round.

16 CHAIRPERSON REYNOLDS: Okay. Commissioner
17 Heriot?

18 COMMISSIONER HERIOT: Thank you.

19 ASST. ATTY. GEN. PEREZ: Good morning.

20 COMMISSIONER HERIOT: Thank you for being
21 here. Good morning.

22 ASST. ATTY. GEN. PEREZ: My pleasure.

23 COMMISSIONER HERIOT: I have got just a
24 few questions. And they mainly focus on a statement
25 that you made before the House Subcommittee.

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1 Just preliminary to this, let me ask you
2 some questions about 11(b), like under 11(b), how many
3 persons must be intimidated or threatened or coerced,
4 since all three of those are in the statute, in order
5 to state a cause of action?

6 ASST. ATTY. GEN. PEREZ: There's no number
7 specified.

8 COMMISSIONER HERIOT: And nobody actually
9 has to be intimated at all. It just has to be an
10 attempt, right?

11 ASST. ATTY. GEN. PEREZ: There is an
12 attempt provision in the statute. That is correct.

13 COMMISSIONER HERIOT: And it covers not
14 just intimidating or threatening or coercing voters
15 but persons who are aiding and assisting voters?

16 ASST. ATTY. GEN. PEREZ: That's correct.

17 COMMISSIONER HERIOT: And that would
18 include election judges?

19 ASST. ATTY. GEN. PEREZ: That would
20 include election observers, anybody in the process who
21 is aiding voters?

22 COMMISSIONER HERIOT: For instance,
23 like Bartle Bull?

24 ASST. ATTY. GEN. PEREZ: In theory.

25 COMMISSIONER HERIOT: Yes, in theory.

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1 Okay. And no weapon is required?

2 ASST. ATTY. GEN. PEREZ: That's correct,
3 although, again, there are cases that have been
4 declined where weapons were there. There are cases,
5 such as this, where we sought an injunction against
6 the person.

7 COMMISSIONER HERIOT: Okay. On your
8 testimony -- this is the testimony before the House
9 Subcommittee on the Constitution, Civil Rights, and
10 Civil Liberties --

11 ASST. ATTY. GEN. PEREZ: Yes.

12 COMMISSIONER HERIOT: -- December 3rd.
13 I'm sure you remember it. And you got some questions
14 about the New Black Panther Party case. And I was
15 particularly interested in your statement about rule
16 11. Let me just quote you here.

17 You said, "In the Third Circuit, the law
18 is that if you're going to seek a default judgment,
19 you need to be able to represent to the court there is
20 a rule, rule 11, that requires you to be able to
21 represent to the court that the charges you are
22 putting forth are charges that are supported by the
23 facts and evidence."

24 I take it you're referring to rule 11 of
25 the Federal Rules of Civil Procedure?

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1 ASST. ATTY. GEN. PEREZ: It's actually
2 local rules in the District Court of Philadelphia, as
3 I understand, or Pennsylvania, as well as the law of
4 the circuit, which says that, even in a default
5 judgment context, the -- in order to establish
6 liability and, therefore, get the judgment, you have
7 to demonstrate that you can establish all of the
8 elements of the offense. So rule 11 is part of it but
9 not all of it.

10 COMMISSIONER HERIOT: So you are talking
11 about rule 11 of the Federal Rules of Civil Procedure?

12 ASST. ATTY. GEN. PEREZ: But one of many.
13 Again, as I understand it, there is a local rule in
14 Pennsylvania pertaining to default judgments and then
15 the law of the Third Circuit, as I understand it. So
16 that it's not simply rule 11 that is what guides this.

17 There is a number of principles which
18 stand for the proposition that, even when you're
19 seeking a default judgment, you need to establish --

20 COMMISSIONER HERIOT: Let's get to rule 11
21 first here. And we'll go on to the rest.

22 ASST. ATTY. GEN. PEREZ: Well, I'm happy
23 to stick to rule 11, but I can tell you the analysis
24 that was made by the Division --

25 COMMISSIONER HERIOT: Yes. Let's take it

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1 --

2 ASST. ATTY. GEN. PEREZ: -- was -- well,
3 again --

4 COMMISSIONER HERIOT: -- one at a time.
5 Start with rule 11.

6 ASST. ATTY. GEN. PEREZ: The analysis that
7 the decision --

8 COMMISSIONER HERIOT: And we're talking
9 about a rule --

10 ASST. ATTY. GEN. PEREZ: -- conducted was
11 guided --

12 COMMISSIONER HERIOT: Come on. No.

13 ASST. ATTY. GEN. PEREZ: If I could
14 finish?

15 COMMISSIONER HERIOT: No, no.

16 ASST. ATTY. GEN. PEREZ: The analysis --

17 COMMISSIONER HERIOT: I'm asking the
18 questions.

19 ASST. ATTY. GEN. PEREZ: Okay. Well, if I
20 could finish answering? You have asked a question on
21 rule 11.

22 COMMISSIONER HERIOT: No. What I asked
23 you is, are you talking about Federal Rules of Civil
24 Procedure rule 11?

25 ASST. ATTY. GEN. PEREZ: And my answer was

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1 --

2 COMMISSIONER HERIOT: You were talking
3 about more than one. And I want to talk about rule 11
4 first.

5 ASST. ATTY. GEN. PEREZ: You would like to
6 talk about rule 11. I am happy to talk about rule 11.

7 COMMISSIONER HERIOT: Okay. Are you
8 making the point that this case was frivolous in its
9 filing?

10 ASST. ATTY. GEN. PEREZ: No, I'm not.

11 COMMISSIONER HERIOT: Are you making the
12 case that it's frivolous in any way?

13 ASST. ATTY. GEN. PEREZ: No.

14 COMMISSIONER HERIOT: Okay. So you're
15 making the point simply that the accusations must be
16 backed with evidence?

17 ASST. ATTY. GEN. PEREZ: Must be able --
18 whether the defendant is pro se, whether the defendant
19 doesn't show up, or whether the defendant is
20 represented by the biggest firm in town, we have to be
21 able to demonstrate to the court in order to obtain a
22 judgment that we have established the elements of the
23 offense and in this case, 11(b) with the high bar that
24 I have articulated and the courts have articulated, we
25 must prove that in this case. That's what we had to

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1 show.

2 COMMISSIONER HERIOT: Well, of course,
3 that's true. Any lawyer would know that's true.
4 That's always true in any case.

5 ASST. ATTY. GEN. PEREZ: Well, no.

6 COMMISSIONER HERIOT: What's special about
7 this one?

8 ASST. ATTY. GEN. PEREZ: Well, actually,
9 there have been a number of people who have made the
10 claim that this is -- nobody showed up. You can just
11 go into the court and get whatever you want. And the
12 point --

13 COMMISSIONER HERIOT: Wait a minute.
14 Nobody is --

15 ASST. ATTY. GEN. PEREZ: Well, with all
16 due respect, I --

17 COMMISSIONER HERIOT: I am a remedies
18 teacher. This is what I do for a living. I teach
19 remedies. If a student came to me and wrote on an
20 exam that, because there was a default here, that
21 there was some problem or some difficulty in getting
22 the judgment, I would flunk them.

23 This is not a tough case here. Of course,
24 the Third Circuit wants more than simply attorneys who
25 have won by default to do more than just waltz into

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1 court and say, "We were assigned this."

2 CHAIRPERSON REYNOLDS: Commissioner
3 Heriot?

4 COMMISSIONER HERIOT: Yes?

5 CHAIRPERSON REYNOLDS: We are going to
6 have to follow up with your line of questioning on the
7 second round.

8 Commissioner Kirsanow?

9 COMMISSIONER KIRSANOW: Good morning, Mr.
10 Perez.

11 ASST. ATTY. GEN. PEREZ: Good morning,
12 sir.

13 COMMISSIONER KIRSANOW: Thank you for
14 coming, sir. Do you agree with Commissioner Vice
15 Chair Thernstrom that 11(b) is a minor provision?

16 ASST. ATTY. GEN. PEREZ: Well, I don't
17 think there is any minor provision of the Voting
18 Rights Act, but I think that what was implicit in her
19 statement was not that it was minor but that, when you
20 look at the panoply of provisions under the Voting
21 Rights Act that have been enforced over the course of
22 years, there is a relative paucity of cases under
23 section 11(b).

24 COMMISSIONER KIRSANOW: Right.

25 VICE CHAIR THERNSTROM: Precisely. Thank

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1 you.

2 COMMISSIONER KIRSANOW: Voter intimidation
3 is not unimportant, in other words?

4 ASST. ATTY. GEN. PEREZ: I completely
5 agree. And we prosecuted a case from election night
6 in New York City where people violently assaulted
7 folks outside of New York City because they had --
8 because President Obama had been elected.

9 COMMISSIONER KIRSANOW: April 28th of
10 2009, the Department informed the defendants of the
11 case that it was prepared to file for default judgment
12 by May 1. However, on May 1, the Department filed for
13 an extension of 15 days, instead of going forward.

14 What happened between April 28th and May 1
15 to cause the Department to reconsider its position in
16 this matter?

17 ASST. ATTY. GEN. PEREZ: That we
18 frequently have done so in a number of cases in the
19 last few weeks. You are analyzing the evidence and
20 figuring out if the evidence supports the charges.

21 And the Assistant, Acting Assistant
22 Attorney General concluded that she needed more time
23 to make that judgment. So she asked for two more
24 weeks and got it from the court.

25 COMMISSIONER KIRSANOW: What, to your

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1 knowledge, triggered that? Was there any intervening
2 circumstance, fact, or piece of evidence that was
3 adduced that would cause the Department after this
4 case had been postured in a fashion so that it was
5 poised for default judgment to reverse its position or
6 at least reconsider its position? What
7 instrumentality, what intervening circumstance,
8 occurred?

9 ASST. ATTY. GEN. PEREZ: The Acting
10 Assistant Attorney General wanted to make sure that
11 she had a complete understanding of the facts and
12 circumstances of the case.

13 And I'll note parenthetically this wasn't
14 the only case she was working on. She was running a
15 fairly robust division. And so she concluded that she
16 needed an extra two weeks in order to make a judgment
17 that would be a judgment on the merits wherein she had
18 considered all of the evidence in the record.

19 COMMISSIONER KIRSANOW: Wasn't the
20 evidence considered beforehand?

21 ASST. ATTY. GEN. PEREZ: The evidence was
22 always being considered throughout but, as of May 1st,
23 the judgment was made that I still need some time to
24 weigh the evidence and make an appropriate judgment.

25 COMMISSIONER KIRSANOW: And I suppose she

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1 then solicited the opinion of the six line attorneys,
2 career attorneys, who were heavily involved in the
3 case, correct?

4 ASST. ATTY. GEN. PEREZ: There was a
5 robust internal debate during the course of this and
6 throughout.

7 COMMISSIONER KIRSANOW: Okay. So I take
8 that to be a yes?

9 ASST. ATTY. GEN. PEREZ: Again, whenever
10 you have decision-making in any case, you have
11 interaction between the front office and the people
12 who were involved.

13 COMMISSIONER KIRSANOW: So you have six
14 career attorneys heavily invested in the case, all of
15 whom were sought out? And, in fact, my understanding
16 is their opinion was sought out not once but twice.
17 They provided memos indicating that their position
18 remained firm that default judgment should be pursued.
19 And, yet, something happened.

20 That's what I think we are trying to
21 figure out. What intervening circumstance? Given the
22 fact that the momentum throughout had been to go
23 forward with this case, what was the trigger?

24 ASST. ATTY. GEN. PEREZ: Well, I have
25 great respect for all of the attorneys who were

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1 involved in this case. And I have certainly had cases
2 where I, as the front-line attorney in the case,
3 wanted to go one way and, at the end of the
4 investigation, the people above me in the career ranks
5 of the chain concluded that, based on their
6 experience, they wanted to go another way.

7 As I have said a number of times, people
8 of good faith can look at the same set of facts and
9 draw different conclusions, whether it's Pima County,
10 whether it's Mississippi, whether it's the New Black
11 Panther Party case.

12 COMMISSIONER KIRSANOW: Yes.

13 ASST. ATTY. GEN. PEREZ: And, again, two
14 people with 60 years of experience, both of whom had
15 worked in the Voting Section -- so they weren't new to
16 voting rights issues. They were working -- they knew
17 -- they were conversant with the issues, conversant
18 with the case.

19 And they made the judgment on the merits
20 that we should proceed with the default judgment
21 against the gentleman who was -- who had the stick and
22 that the evidence didn't sustain the case against the
23 national party or the head of the national party for
24 the reasons that we have discussed.

25 COMMISSIONER KIRSANOW: If the evidence

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1 was such that it was even not nearly an equipoise but
2 it was a close case -- in fact, you've got six line
3 attorneys who were fairly adamant that there was
4 enough to pursue here. If there was concern that
5 default was not the appropriate --

6 CHAIRPERSON REYNOLDS: I'm sorry.
7 Commissioner Kirsanow, we will have to follow --

8 COMMISSIONER KIRSANOW: Thank you, Mr.
9 Chairman.

10 CHAIRPERSON REYNOLDS: -- up next round.
11 Vice Chair Thernstrom?

12 VICE CHAIR THERNSTROM: Thank you very
13 much, Mr. Chairman.

14 First let me make a statement to clarify
15 something. I have not asserted that this incident was
16 frivolous, but it would have made a difference to me
17 in terms of making it our statutory report if there
18 was a national conspiracy, if New Black Panther Party
19 members were showing up all over the place, if there
20 was anything remotely equivalent to racist whites in
21 the Jim Crow south stopping voters from being able to
22 cast their ballots. And that analogy has been made by
23 some members of this Commission. And I simply object
24 to it. So I never have called it "frivolous," but.

25 Now, do you think that there has been a

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1 difference between Republican and Democratic
2 administrations in the concern about the
3 confidentiality of attorney work product? That's
4 question number one.

5 And, two, with respect to 11(b), are there
6 guidelines upon which the Department relies in
7 enforcing that provision?

8 ASST. ATTY. GEN. PEREZ: As it relates to
9 your first question, this confidentiality interest in
10 not disclosing internal deliberations has been an
11 interest that has been put forth and put into play in
12 Republican and Democratic administrations alike with
13 an equal amount of vigor because there is a
14 recognition of the institutional interest at the
15 Department of Justice in assuring that we have a
16 robust internal decision-making process.

17 And so I saw it because I was a career
18 person. I was hired by the elder Bush administration.
19 And I saw the assertion of that interest then. I saw
20 the assertion of that interest under President
21 Clinton. I see the assertion of that interest now.

22 I think it is a good interest. I think it
23 is a critical part of what enables us to do our job.
24 And I respect the job that you have here. And I
25 respect the job that people in Congress have. And

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1 that is why I am here today. And that is why we have
2 taken so much time to do that.

3 In response to your second question
4 regarding 11(b), there is a paucity of case law and a
5 paucity of cases that have been brought under this.
6 And intimidation has been -- there are jury
7 instructions that define intimidation in other
8 contexts. And those contexts have been instructive to
9 the work that we do here.

10 And what those jury instructions in other
11 contexts highlight is that it is indeed a high bar.
12 And also it's very fact-intensive. And that is why it
13 is difficult to -- it's fact-intensive. And it is
14 simply difficult to prove.

15 VICE CHAIR THERNSTROM: Well, there are no
16 internal guidelines, but there are cases --

17 ASST. ATTY. GEN. PEREZ: We have cases.

18 VICE CHAIR THERNSTROM: -- is the bottom
19 line?

20 ASST. ATTY. GEN. PEREZ: We also have,
21 again -- you know, we have guidance that is informed
22 by our enforcement of similar statutes that --

23 VICE CHAIR THERNSTROM: Right. Okay.

24 ASST. ATTY. GEN. PEREZ: -- proscribe
25 coercion, intimidation, --

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1 VICE CHAIR THERNSTROM: Right.

2 ASST. ATTY. GEN. PEREZ: -- and attempts
3 at those issues.

4 VICE CHAIR THERNSTROM: Mr. Chairman?

5 CHAIRPERSON REYNOLDS: Okay. Commissioner
6 Gaziano?

7 COMMISSIONER GAZIANO: How am I for time?

8 CHAIRPERSON REYNOLDS: The full five
9 minutes.

10 COMMISSIONER GAZIANO: Earlier, in January
11 of this year when the outgoing, then outgoing, Voting
12 Chief, Chris Coates, was leaving, there was a farewell
13 party, farewell reception, in your Division.

14 I know you attended early. And you, as I
15 understand, may have left before he gave some very
16 well-publicized farewell remarks. A summary of those
17 remarks was published by, written up and published by
18 -- of the remarks.

19 And he implies that he believes the New
20 Black Panther case was dismissed because there are
21 some in the Department who don't think the Voting
22 Rights Act should apply evenhandedly across races. I
23 am glad that you have said that you disagree with
24 that.

25 I haven't talked to Chris Coates because

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1 you won't let me. The Department won't let me. So I
2 don't know what the basis of his belief is in that
3 regard.

4 But what did you do, if anything, to
5 investigate whether there was any basis for his view?

6 ASST. ATTY. GEN. PEREZ: Again, I reviewed
7 the facts and circumstances of this case. I have --

8 COMMISSIONER GAZIANO: Let me -- I didn't
9 ask my question --

10 ASST. ATTY. GEN. PEREZ: Well, no because
11 --

12 COMMISSIONER GAZIANO: No. I didn't ask
13 my question very well. Did you do anything
14 specifically after Chris Coates' statement in January
15 to see if his impression that the decision was
16 motivated, in part or at least in part, by a
17 race-based view of civil rights enforcement -- did you
18 do anything to investigate whether there was a basis
19 for his claims?

20 ASST. ATTY. GEN. PEREZ: I have reviewed
21 the totality of the evidence in this matter because I
22 wanted to make the --

23 COMMISSIONER GAZIANO: So you did nothing
24 other than that?

25 ASST. ATTY. GEN. PEREZ: Sir, I did not

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1 finish.

2 COMMISSIONER GAZIANO: You did nothing --
3 you are not answering my questions.

4 ASST. ATTY. GEN. PEREZ: You are not
5 giving me a chance to answer your questions, sir.

6 COMMISSIONER GAZIANO: Okay.

7 ASST. ATTY. GEN. PEREZ: And if you want
8 to keep interrupting, that is obviously your
9 prerogative.

10 COMMISSIONER GAZIANO: Because you have
11 said you have such a limited time with us today, I
12 really would ask you -- well, let me move on since you
13 won't answer that question.

14 When the Department won, the appeal was
15 affirmed for its victory in the Noxubee case, that was
16 in this administration, early in this -- between your
17 work on the transition and your nomination. And there
18 was a press report at that time that described how
19 difficult a victory it was for the Division, even
20 though the Fifth Circuit had great praise for the
21 attorney.

22 And that press report said that the then
23 Acting Chief of the Voting Section, Joe Rich, Kristen
24 Clark, whom we have deposed and has refused to answer
25 questions that she should refuse, and others in the

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1 Division opposed the filing of the Noxubee suit in
2 significant part because the defendants were black.

3 Did you do anything to investigate whether
4 that kind of culture existed in your Division?

5 ASST. ATTY. GEN. PEREZ: I am completely
6 comfortable with the decision that was made by the
7 Acting Assistant Attorney General, Loretta King, and
8 by Steve Rosenbaum. I am absolutely --

9 COMMISSIONER GAZIANO: That is not my
10 question.

11 ASST. ATTY. GEN. PEREZ: But, sir, if you
12 --

13 COMMISSIONER GAZIANO: Did you do anything
14 --

15 ASST. ATTY. GEN. PEREZ: Actually,
16 implicit in your question is the assertion that
17 somehow Loretta King and/or Steve Rosenbaum, who were
18 the decision-makers in this case, acted out of some
19 sort of animus and --

20 COMMISSIONER GAZIANO: One final question.

21 ASST. ATTY. GEN. PEREZ: I'm simply here
22 to say categorically that they made a decision on the
23 merits. Reasonable people can differ. People can
24 differ vociferously.

25 COMMISSIONER GAZIANO: This is --

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1 ASST. ATTY. GEN. PEREZ: And that is not
2 the first --

3 COMMISSIONER GAZIANO: There is one
4 strange --

5 ASST. ATTY. GEN. PEREZ: -- or the last
6 time that that will be the case here.

7 COMMISSIONER GAZIANO: There is one
8 strange --

9 ASST. ATTY. GEN. PEREZ: I want to make
10 sure that the record is clear that --

11 COMMISSIONER GAZIANO: Well, let me
12 reclaim my time. There is one strange fact about the
13 Noxubee victory. The career people who were in
14 charge, which was Loretta King and Rosenbaum, did
15 nothing to see that a press release that normally
16 accompanies that victory was put on your website.
17 Now, there could be other reasons.

18 Let me ask my final question. If we
19 uncovered strong evidence that a current supervising
20 attorney or political appointee senior in your
21 Division made statements that this administration will
22 never bring a voting rights case or, to this effect,
23 will never bring a voting rights case against blacks
24 or other minorities, I hope that you will seriously
25 investigate. And I hope you agree that it would be

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1 highly relevant to this investigation and that we
2 should have access to the witnesses to such a
3 statement.

4 ASST. ATTY. GEN. PEREZ: If you have such
5 a statement, bring such a statement to our attention.

6 COMMISSIONER GAZIANO: I hope to uncover,
7 bring such a statement.

8 CHAIRPERSON REYNOLDS: Commissioner
9 Gaziano, do you yield my five minutes back to me?

10 COMMISSIONER GAZIANO: Yes.

11 CHAIRPERSON REYNOLDS: Okay. Commissioner
12 Yaki?

13 COMMISSIONER YAKI: Yes.

14 CHAIRPERSON REYNOLDS: And, Commissioner
15 Yaki, you have ten minutes.

16 COMMISSIONER YAKI: I'm probably going to
17 use a little bit and carry it over to my next round --

18 CHAIRPERSON REYNOLDS: Okay.

19 COMMISSIONER YAKI: -- or however long it
20 takes for you to answer it.

21 I am a little bit confused by Commissioner
22 Gaziano's last remark because it seems to imply that
23 if any senior official, political or whatever, goes
24 off on a toot, that somehow it constitutes whatever
25 hearsay, however, whatever context it is, it somehow

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1 constitutes probative evidence of something going on.
2 And that to me is very interesting.

3 I want to focus more, really, on what the
4 Department is doing. 11(b) is voter intimidation, but
5 that is really a subset in some ways of the broader
6 issue of voter disenfranchisement, wouldn't you say?

7 ASST. ATTY. GEN. PEREZ: Yes.

8 COMMISSIONER YAKI: I am curious. And
9 since we have you here, I am going to use my
10 prerogative of this time to ask you to talk about the
11 Department's other efforts with regard to voter
12 disenfranchisement at this current time because,
13 again, there seems to be some sort of imputation,
14 however implicit or explicit, that somehow you guys
15 are falling down on the job, despite the public
16 standings.

17 And I would like to see what you have to
18 say with regard to the greater issue of voter
19 disenfranchisement and what the DOJ is doing right
20 now.

21 ASST. ATTY. GEN. PEREZ: Well, voter
22 intimidation and voter disenfranchisement, there are a
23 number of laws on the books that deal with that. And
24 our efforts as a Department to address those issues
25 are a joint venture between the Civil Rights Division

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1 and the Criminal Division.

2 And there are a host of laws on the books.
3 And we have remarkable interaction with the Criminal
4 Division so that we ensure that we are communicating
5 and putting the full force and weight behind us.

6 Also, there are a number of laws that we
7 have been very involved with recently involving
8 ensuring the right to vote for people in the military.
9 That has been a very important focus of Congress. And
10 we have been working hard to investigate that.

11 I mentioned the incident that occurred on
12 election night 2008 where a group of people who --
13 racists who took issue with the fact that we had just
14 elected an African-American President and proceeded to
15 assault, brutally assault, the victims. That's U.S.
16 versus Nicoletti, a case that we brought under 18 U.S.
17 Code section 245, which addresses force or threats of
18 force that interfere or attempt to interfere with a
19 person's exercise of a federally protected right. We
20 brought that case as well. And that was I think, you
21 know, a very good and appropriate prosecution in that
22 case.

23 Obviously we have a broad-ranging program
24 under the motor voter law to ensure access to the
25 ballot. And we have vigorous enforcement in that

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1 area. Section 12, by the way, of MVRA also is an
2 intimidation provision.

3 So, in short, there are a host of laws on
4 the books that we work in collaboration with the
5 Criminal Division on to ensure that there is fair and
6 equal access to the ballot.

7 COMMISSIONER YAKI: How about voter
8 purges? What is the Department doing with regard to
9 that issue? I know that was a big issue in the 2008
10 election with regard to various states. Is there any
11 ongoing --

12 ASST. ATTY. GEN. PEREZ: We're actually in
13 the process right now, and we hope to have it in the
14 very near future. We're preparing guidance on all of
15 the sections of motor voter because, in my outreach to
16 Secretaries of State and other state election
17 officials, I have been learning that it would be
18 useful for us to prepare guidance so that there are
19 understandings of Section 4; Section 6; Section 7;
20 Section 8, which is the purging provision that you are
21 referring to.

22 We want to have guidance across the board
23 so that people, that entities understand what the
24 statute sets out and what the road map for compliance
25 is because there is -- there are right ways and wrong

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1 ways to enforce Section 4, to implement Section 7, to
2 implement Section 8. And we want to make sure that
3 everybody has the proper road map so that we can
4 ensure access to the ballot and we can ensure that we
5 prevent fraud.

6 Sometimes there's this tendency to say
7 that you can only do one or the other. I think we can
8 and should and must do both.

9 COMMISSIONER YAKI: And what is the
10 Department doing with regard to -- one of the problems
11 in the 2008 election was that differing, or sporadic
12 or, how should I say, inconsistent enforcement or
13 interpretation of voter ID laws in various states? Is
14 the Justice Department doing anything to try and
15 create some sort of guidance for those states that
16 haven't prevented it and how they should do it without
17 violating the law, et cetera?

18 ASST. ATTY. GEN. PEREZ: Well, a number of
19 those voter ID issues have been dealt with in
20 connection with section 5 submissions.

21 COMMISSIONER YAKI: Okay.

22 ASST. ATTY. GEN. PEREZ: And so we will
23 continue to address that. There was a submission, for
24 instance, from Arizona that was pre-cleared a couple
25 of years ago.

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1 And so as those issues come up and as
2 covered entities enact laws in that area, again, that
3 is their prerogative to do so as long as it doesn't
4 violate the retrogression provisions of the -- of
5 Section 5 of the Voting Rights Act.

6 So we continue to deal with that in
7 connection primarily but not exclusively with our
8 Section 5 work.

9 COMMISSIONER YAKI: Okay. Thank you.

10 I reserve the balance of my time.

11 CHAIRPERSON REYNOLDS: Which is four
12 minutes.

13 Commissioner Heriot?

14 COMMISSIONER HERIOT: Let's get back to
15 default judgments and rule 11. I take it that you
16 would agree that it is a violation of an attorney's
17 professional responsibility to file a cause of action
18 against a defendant without grounds, right?

19 ASST. ATTY. GEN. PEREZ: Correct.

20 COMMISSIONER HERIOT: Tell me what was
21 missing from the Department's evidence against Jerry
22 Jackson.

23 ASST. ATTY. GEN. PEREZ: Well, again,
24 looking at the totality of the evidence, including the
25 actions and responses of the police officer who

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1 responded to the scene. He was the first responder.
2 He interviewed Mr. Jackson, determined that he was
3 indeed a poll watcher who was authorized to do that
4 work --

5 COMMISSIONER HERIOT: You're not saying a
6 poll watcher is exempt from --

7 ASST. ATTY. GEN. PEREZ: No. The fact
8 that --

9 COMMISSIONER HERIOT: -- Section 11(b),
10 are you?

11 ASST. ATTY. GEN. PEREZ: If I could
12 finish?

13 COMMISSIONER HERIOT: You're not saying
14 that, are you?

15 ASST. ATTY. GEN. PEREZ: No, I'm not
16 saying that, ma'am.

17 COMMISSIONER HERIOT: Okay.

18 ASST. ATTY. GEN. PEREZ: But what he did
19 determine, based on talking to a number of witnesses,
20 including Mr. Jackson, including Mr. Shabazz, he
21 instructed Mr. Shabazz to leave. He talked to other
22 people at the scene. And he made a judgment that --
23 and in his judgment -- and he was the first responder
24 at the scene -- that Mr. Jackson was entitled to stay.

25 And there was no local action taken. They

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1 concluded that the activities did not rise to the
2 level of intimidation. And that was certainly a fact
3 that was a fact of relevance that Ms. King and --

4 COMMISSIONER HERIOT: But all of that, of
5 course, would have been taken into consideration at
6 the time a lawsuit was filed. So the Department did
7 make the decision to file the lawsuit. You're not
8 talking about new evidence there.

9 So are you saying that the attorneys that
10 decided that the other witnesses were more credible,
11 for instance, the witnesses who testified before the
12 Commission, who said that Mr. Jackson was acting in
13 concert with Mr. Shabazz, that he was moving to
14 prevent members, to prevent people from entering the
15 polls, who were entitled to do that?

16 That was all decided. What is new about
17 it? Well, the police officer was not charged with
18 enforcing civil rights laws, federal civil rights
19 laws. What is new there?

20 ASST. ATTY. GEN. PEREZ: As I said,
21 Commissioner, people of good faith and great
22 experience can look at the same set of facts and draw
23 different conclusions about the weight of the evidence
24 that, again, I talked about --

25 COMMISSIONER HERIOT: But you're at the

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1 default stage at this point.

2 ASST. ATTY. GEN. PEREZ: Well, again, as
3 you and I, I think, agreed before, if you were in a
4 default stage, that does not mean that you no longer
5 have an obligation, legal and ethical, to demonstrate
6 to the court that the weight of the evidence -- you
7 can establish the violation.

8 COMMISSIONER HERIOT: Of course not.
9 That's routine.

10 ASST. ATTY. GEN. PEREZ: Yes.

11 COMMISSIONER HERIOT: You had all sorts of
12 evidence here. You had the affidavits. This was on
13 video. This was not a tough one. The police officer
14 didn't see what was on the video. He hadn't spoken to
15 the same witnesses. At this point the case was worked
16 up. There was plenty of evidence. It was going to be
17 a slam dunk.

18 I guess Mr. Jackson -- I just don't see
19 what the possible reason would be.

20 ASST. ATTY. GEN. PEREZ: Well, again,
21 people can look at factual circumstances and draw
22 different conclusions. And that is precisely what
23 happened in this case. That is apparently what
24 happened in some of the other cases I have described.

25 This happens all of the time in the course

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1 of looking at factual circumstances, understanding
2 11(b) and the high bar that exists in that case.

3 And that was the judgment that two career
4 professionals at the leadership levels of the Civil
5 Rights Division made in connection with Mr. Jackson.

6 COMMISSIONER HERIOT: There were no
7 factual changes. I mean, everything you're saying
8 about Mr. Jackson was already known at the time the
9 lawsuit was filed. What changed was simply a
10 different administration.

11 ASST. ATTY. GEN. PEREZ: Two people,
12 Loretta King and Steve Rosenbaum, have been in the
13 Division for 30 years. They worked in the
14 administration of George W. Bush, George H. W. Bush,
15 and many other Presidents.

16 COMMISSIONER HERIOT: Different
17 capacities.

18 ASST. ATTY. GEN. PEREZ: That is correct.
19 But my point is simply the career professionals with
20 60 years of experience made the judgment. You
21 disagree with their judgment. I respect the fact that
22 you disagree with their judgment.

23 They made a judgment on the merits. These
24 are the sort of good faith robust deliberations that
25 occur time and time again.

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1 I have had any number of cases when I was
2 a front-line prosecutor where I felt strongly that the
3 facts suggested A and my supervisors took a look at it
4 and decided that --

5 COMMISSIONER HERIOT: At the default
6 stage?

7 ASST. ATTY. GEN. PEREZ: -- we were going
8 a different direction.

9 CHAIRPERSON REYNOLDS: I think that --

10 COMMISSIONER HERIOT: At the default
11 stage?

12 CHAIRPERSON REYNOLDS: Thank you.

13 Commissioner Kirsanow?

14 COMMISSIONER KIRSANOW: Thank you.

15 Mr. Perez, to your knowledge, did Mr.
16 Rosenbaum and Ms. King, for the first time, assess
17 this case in May of 2009?

18 ASST. ATTY. GEN. PEREZ: Well, I don't
19 know precisely. I mean, they were looking at it
20 throughout. But they also had a number of other
21 things going on because they were -- well, Loretta was
22 the Acting Assistant Attorney General. And Mr.
23 Rosenbaum was overseeing the work of a number of
24 sections.

25 And also I think one thing to note is when

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1 the complaint was filed, there's whatever, 30 days to
2 file an answer, whatever the time period is -- I don't
3 know precisely how or what the time frame is.

4 So this wasn't January 21st, a case that
5 would have been necessarily on anyone's immediate
6 radar screen because if it was filed the 7th or 8th or
7 9th of January, you still would have been waiting for
8 those responses.

9 COMMISSIONER KIRSANOW: How frequently is
10 either the Voting Rights Section or the Civil Rights
11 Division faced with a case that is prime for default
12 judgment?

13 ASST. ATTY. GEN. PEREZ: Default
14 judgments?

15 COMMISSIONER KIRSANOW: Yes.

16 ASST. ATTY. GEN. PEREZ: Not very
17 frequently.

18 COMMISSIONER KIRSANOW: Because it seems
19 to me that it's a little late in the game to be
20 reviewing and second-guessing the attorneys when it's
21 already in a position where you're in a position where
22 you're going to file for default judgment.

23 ASST. ATTY. GEN. PEREZ: I would actually
24 respectfully disagree with that because of the reasons
25 that we have been discussing. The Department has a

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1 continuing obligation, whether or not they don't
2 answer, whether or not they're pro se, whether or not
3 they're represented by the biggest firm in town, to
4 continue to conduct the analysis to determine whether
5 there's a sufficient evidentiary base to support the
6 charges. So I don't think it's ever late in the game
7 or too late in the game to make those judgments.

8 And I know in my work as a career
9 prosecutor, we frequently, for a host of reasons,
10 would make varying judgments at varying points in
11 cases. And that does happen.

12 COMMISSIONER KIRSANOW: Given, as you
13 indicated, that voter intimidation is not unimportant
14 and also given that you have a continuing obligation
15 to assess the case, the merits of the case, and you
16 have come to the conclusion that default was not
17 appropriate here --

18 ASST. ATTY. GEN. PEREZ: Well, could I --
19 default --

20 COMMISSIONER KIRSANOW: Seeking a default
21 judgment would not have been appropriate here. Is
22 that correct?

23 ASST. ATTY. GEN. PEREZ: Well, then, one,
24 I just want to be clear. Mr. Shabazz, the person at
25 the scene with the stick, we sought the judgment and

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1 obtained the judgment because we made the conclusion
2 that --

3 COMMISSIONER KIRSANOW: You obtained a
4 certain injunctive relief?

5 ASST. ATTY. GEN. PEREZ: Correct. I've
6 heard it referenced, including in the Chair's opening
7 statements, that we dismissed the case. And I just
8 want to make sure the record is clear about what
9 occurred in the case.

10 COMMISSIONER KIRSANOW: If there was a
11 concern about pursuing default against anyone else,
12 broader injunctive relief against one of the
13 defendants, was there any consideration given to
14 simply making a proffer, simply pursuing the case, as
15 opposed to going for default?

16 ASST. ATTY. GEN. PEREZ: They had not
17 showed up.

18 COMMISSIONER KIRSANOW: I understood that
19 they had not showed up. But you're in a position
20 where you could obtain judgment. And if you had a
21 concern about default, why not simply move forward
22 with the case, instead of simply going with default?
23 It seems to me that there's two avenues you could have
24 pursued here.

25 ASST. ATTY. GEN. PEREZ: Well, the

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1 evidence that was chosen had both -- the evidence that
2 was chosen in this case is I think a very reasonable
3 avenue, which was the avenue of choosing a default
4 judgment against Mr. Shabazz but --

5 COMMISSIONER KIRSANOW: In Pima and
6 Mississippi, did Ms. King and Mr. Rosenbaum, if you
7 know, make the decision to decline pursuing those
8 cases?

9 ASST. ATTY. GEN. PEREZ: Those cases were
10 in the prior administration. And the person that you
11 have to ask about why those cases were not pursued
12 would be the prior Assistant Attorney General for
13 Civil Rights.

14 COMMISSIONER KIRSANOW: Okay. You don't
15 know who made that decision?

16 ASST. ATTY. GEN. PEREZ: Not off the top
17 of -- I know the decisions not to proceed were
18 decisions that were, as I understand it, made by the
19 political leadership in the prior Civil Rights
20 Division.

21 COMMISSIONER KIRSANOW: Okay.

22 ASST. ATTY. GEN. PEREZ: I don't -- again,
23 I don't know who was in charge when because there was
24 a fair amount of movement.

25 COMMISSIONER KIRSANOW: Was there any

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1 political leadership involved in the decision not to
2 pursue this particular case any further than it was?

3 ASST. ATTY. GEN. PEREZ: No. The
4 decisions were made by Loretta King in consultation
5 with Steve Rosenbaum, who is the Acting Deputy
6 Assistant Attorney General.

7 COMMISSIONER KIRSANOW: In Pima and
8 Jackson, as I understand it, the facts, at least as
9 adduced by Senate investigation, were that someone had
10 firearms, were intimidating, apparently, in my
11 estimation, at least in a colloquial sense.

12 CHAIRPERSON REYNOLDS: Commissioner
13 Kirsanow, I will --

14 COMMISSIONER KIRSANOW: Thank you, Mr.
15 Chair. I will yield.

16 CHAIRPERSON REYNOLDS: Okay. I have a few
17 questions for you. I have heard you say on a number
18 of occasions that the decision was made by two senior
19 career civil servants.

20 It is curious because, to my mind,
21 ultimate decisions are made by the politicals. It is
22 the politicals who were working in the administration
23 that were elected, important decisions regarding
24 policies ordinarily made by the politicals.

25 But are you saying that, in the Obama

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1 administration, decisions within the Department of
2 Justice, or at least some decisions, can be made by
3 career civil servants?

4 It's almost as if they are separate and
5 apart from the political leadership in the Department
6 of Justice.

7 ASST. ATTY. GEN. PEREZ: There are
8 literally thousands of decisions made by the
9 Department of Justice given the breadth and depth of
10 our jurisdiction. So the notion that every decision
11 would have to come up to an Attorney General would
12 result in gridlock, among other things, but in this
13 case --

14 CHAIRPERSON REYNOLDS: Who owns the
15 decisions? Who is responsible for the decision? I
16 understand you are completely right. The career civil
17 servants -- I have worked with some great lawyers at
18 DOJ.

19 The politicals can't make every decision.
20 But in my experience, important decisions go to the
21 top. And even those that don't go to the top --

22 ASST. ATTY. GEN. PEREZ: Sure.

23 CHAIRPERSON REYNOLDS: -- the
24 responsibility and the ownership for those decisions,
25 whether they are right or wrong, rests with the

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1 politicals. Is that the same approach taken by the
2 Obama administration?

3 ASST. ATTY. GEN. PEREZ: Let me give you
4 how our lines of communication work because I think
5 this is responsive to your question. We meet
6 regularly with -- my direct supervisor in the Civil
7 Rights Division is the Associate Attorney General.

8 We meet on a weekly basis to communicate
9 with him what is happening in the Division. There are
10 representatives of the Deputy Attorney General and the
11 Attorney General's office in those meetings.

12 And there are coordination meetings here,
13 "Here are the significant things that are happening.
14 Here are the significant things that are going on in
15 the weeks ahead."

16 Whenever there is a decision involving a
17 case that has attracted attention, we -- when the
18 decision is made, we obviously communicate that up the
19 chain. And clearly I understand the chain of command.

20 If indeed they have an objection or a
21 concern about a decision that we are about to make, it
22 is obviously their prerogative to weigh in and to say
23 no, I don't want -- I would like to go in a different
24 direction.

25 So that happens. That happened when I was

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1 in Bush I. And that happens now. I think that's kind
2 of been the standard operating procedure in the --

3 CHAIRPERSON REYNOLDS: Do we agree that
4 the ultimate responsibility for decisions made at the
5 Department of Justice rests with the representatives
6 of the Obama administration?

7 ASST. ATTY. GEN. PEREZ: That is why I am
8 here today.

9 CHAIRPERSON REYNOLDS: Okay. Thank you.

10 COMMISSIONER GAZIANO: Mr. Chair, you
11 yielded to me earlier. Could I have my second round?

12 CHAIRPERSON REYNOLDS: Yes, but hold on.
13 Next up -- okay. You can have the remainder of my
14 time, which was approximately two minutes.

15 COMMISSIONER GAZIANO: Okay. I'm -- since
16 I have served in the Department in three
17 administrations, I am delighted that you have
18 clarified that the -- if we do nothing else, what the
19 official position is.

20 But here is my simple question. It would
21 have been much more effective if you had communicated
22 that directly to everyone in the Division. I
23 understand that there was a request that your
24 confirmation be upheld by members of the House to the
25 Senate because they weren't getting information on

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1 this case.

2 Whether that is true or not, I strongly
3 suspect you followed the press accounts of this case.
4 There were many press accounts suggesting that the New
5 Black Panther suit was dismissed because there was a
6 view that the Voting Rights Act should not be enforced
7 against black defendants.

8 Then we had -- you came into the Division.
9 You had Chris Coates in his farewell address. The
10 Chief of the Voting Section suggests that.

11 Why didn't you issue a statement to your
12 Department, "These press reports are wrong. And to
13 the extent that anyone thinks otherwise, it is not the
14 policy and it shall not be the policy of my Division
15 to not enforce the Voting Rights Act against people of
16 certain races"? Did you do that?

17 ASST. ATTY. GEN. PEREZ: I have many
18 friends in the press, Commissioner. If I have to
19 issue a press release --

20 COMMISSIONER GAZIANO: No, not the press
21 release.

22 ASST. ATTY. GEN. PEREZ: -- every time I
23 have to correct the record --

24 COMMISSIONER GAZIANO: Did you --

25 ASST. ATTY. GEN. PEREZ: -- of something

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1 in the press --

2 COMMISSIONER GAZIANO: Why didn't you
3 issue the statement --

4 ASST. ATTY. GEN. PEREZ: -- I would be
5 issuing a lot of press releases.

6 COMMISSIONER GAZIANO: -- to your
7 Department? With all of these stories, with Chris,
8 why didn't you issue a statement to your staff orally,
9 in writing, whatever form you chose? Why didn't you
10 tell your staff, "These stories are wrong. If anyone
11 has these views, I reject it. You had better not have
12 these views"? Why didn't you do that?

13 ASST. ATTY. GEN. PEREZ: Sir, I have
14 communicated from day one. My first or second day on
15 the job, I met with everybody in the Great Hall. And
16 I said, "Our job is to enforce the law, all the laws,
17 and to do so evenhandedly."

18 I then went to each and every section
19 within the first week of my job. And I reiterated
20 that our job is to enforce the laws, all of the laws,
21 and to do so evenhandedly. And I have done that.

22 CHAIRPERSON REYNOLDS: Okay. Mr. Perez,
23 my two minutes has expired. Next is Vice Chair
24 Thernstrom.

25 VICE CHAIR THERNSTROM: I would like to

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1 actually yield the amount of my time to Commissioner
2 Yaki and if there is time left over to please come
3 back to me.

4 CHAIRPERSON REYNOLDS: Yes?

5 COMMISSIONER YAKI: Thank you.

6 Mr. Assistant Attorney General, this
7 hearing is part of an evidentiary process for our
8 annual report. And our statute states that "The
9 Commission shall submit to the President and Congress
10 at least one report annually that monitors federal
11 civil rights enforcement efforts in the United
12 States." I say that because it does talk about
13 federal civil rights enforcement efforts in the United
14 States.

15 I am going to pose not a hypothetical but
16 a likely scenario to you. And I would like to get
17 your responses to it. We have here, through what you
18 have seen here today and in other hearings, evidence
19 that two individuals at a single precinct in
20 Philadelphia, a predominantly African-American
21 precinct, engaged in, at a minimum, very bad behavior
22 and, at worst, voter intimidation.

23 Certainly, in the case of Mr. Shabazz, I
24 think we all agree that carrying a nightstick and
25 acting in a threatening manner, to me, and apparently

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1 to you or to the Division as well, constituted an
2 11(b) violation.

3 Of course, what is interesting and what
4 doesn't get brought up is the fact that that was, that
5 judgment was, enforced. That judgment was taken
6 through to completion.

7 The second thing that isn't often brought
8 up is that Mr. Shabazz was gone by about 10:00 o'clock
9 in the morning. Only Mr. Jackson stayed. Shabazz was
10 asked to leave by the Philadelphia police. And that,
11 indeed, did happen.

12 Since that time -- and perhaps this goes,
13 this may have gone, into your decision-making. I
14 don't know. But there were no complaints filed by any
15 voters. There were no allegations made by the
16 so-called terrified poll worker that I referenced
17 earlier.

18 There is no direct evidence linking the
19 statement made by a witness here saying, "There is a
20 terrified poll worker," which was essentially hearsay
21 evidence, to any direct evidence by a poll worker
22 saying that they were terrified by Mr. Shabazz.

23 There has been no evidence produced that
24 this precinct had any -- there was some evidence
25 produced that maybe two or three people may have

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1 turned away from voting at that particular time but,
2 as I said, Mr. Shabazz was gone by 9:30.

3 No one knows exactly how long Mr. Jackson
4 stayed. No one knows whether those people came back
5 and voted eventually. No one has produced evidence
6 that this had any impact on the precinct vote. And,
7 in fact, I would probably surmise that the precinct
8 vote was probably substantially higher than it was in
9 previous years.

10 No one has really brought up the fact,
11 except you have here today, about how the decision --
12 about how other cases, I think more egregious
13 decisions, have been -- egregious cases of potential
14 11(b) violations have come forward and been declined
15 by the Department of Justice on at least two
16 occasions. And I know of at least three or four
17 others that were brought at least to the U.S. Attorney
18 level and never apparently saw the light of day of
19 Justice during the previous administration as well.

20 What I am trying to get at, Mr. Assistant
21 Attorney General, is that, despite your efforts here
22 today and despite the evidence that the Panthers, this
23 particular New Black Panther Party's attempts to spark
24 a 300-precinct revolt failed miserably in the hands of
25 two overly aggressive and misguided individuals and

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1 despite the fact that there have been no other
2 allegations against the Department that they have
3 failed to prosecute 11(b) violations anywhere else in
4 this country, nevertheless, the likelihood is very
5 high.

6 And I just wanted to be very frank with
7 you that this Commission -- I will not join the vote,
8 by the way, as you could probably tell -- may come out
9 with a report stating that your Department has somehow
10 failed in enforcing the civil rights laws of this
11 country with regard to voter intimidation.

12 And I would like to know, for the record,
13 what would your response be to that kind of report
14 coming forward based on this single incident at this
15 single precinct, the single charging and prosecutorial
16 decision that was made by your Department? How would
17 you feel if the U.S. Commission on Civil Rights came
18 out with a report somehow condemning the entire
19 Justice Department for its failure to enforce 11(b)?

20 ASST. ATTY. GEN. PEREZ: Well, I'm simply
21 hopeful that the Commission's reports -- and I think
22 your national annual reports are important vehicles --

23 CHAIRPERSON REYNOLDS: I apologize, Mr.
24 Perez, but it was --

25 ASST. ATTY. GEN. PEREZ: -- would be

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1 complete.

2 CHAIRPERSON REYNOLDS: Thank you. It was
3 a very long question.

4 ASST. ATTY. GEN. PEREZ: No problem.

5 COMMISSIONER YAKI: You can answer it when
6 my turn comes up next.

7 CHAIRPERSON REYNOLDS: Commissioner
8 Gaziano?

9 COMMISSIONER GAZIANO: You're yielding?

10 CHAIRPERSON REYNOLDS: No. You have five
11 minutes.

12 COMMISSIONER GAZIANO: Okay. We received
13 a letter last night from a Mr. Hunt responsive to the
14 Chairman's letter to Attorney General Holder raising
15 several questions. And one of them, you know, since I
16 was a defender of the President's executive privilege,
17 no one believes more strongly that when the President
18 and Attorney General invoke it, that it needs to be
19 respected. It doesn't mean that it is absolute, of
20 course.

21 But, as you know, as the Chairman's letter
22 to Holder indicated, the Supreme Court has been very
23 clear that the case of United States versus Reynolds,
24 executive privilege "is not to be lightly invoked."
25 There must be a formal claim of privilege lodged by

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1 the head of the Department, which has control over the
2 matter after actual personal consideration by that
3 officer. That means personal consideration by the
4 Department head or attorney.

5 Now, in that letter, the Department,
6 without any authority -- and I know the authorities in
7 this area -- without any authority because none
8 exists, said that the Department's non-executive
9 privilege confidentiality interests override the
10 statutory command Congress has instructed you to
11 comply fully with our requests.

12 And then the final sentence of that letter
13 is that, since you think you're right, the Department,
14 since the Department thinks it's right, that our
15 statute, our subpoenas are inferior to whatever
16 interests the Department has, therefore, it is
17 inappropriate to appoint the special counsel that we
18 have requested to allow a judge to determine this.

19 In what other situations does the entity,
20 in this case the Department, that has the conflict of
21 interest get to decide how that conflict is resolved?

22 ASST. ATTY. GEN. PEREZ: Sir,
23 Commissioner, one of the things that I think has to be
24 clear in the record, because I think your question
25 leaves it unclear, is that we have not invoked

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1 executive privilege.

2 COMMISSIONER GAZIANO: No. I'm glad --

3 ASST. ATTY. GEN. PEREZ: And your question
4 -- I'm sure you didn't intend to, but your question a
5 reasonable person could interpret as having implied
6 that --

7 COMMISSIONER GAZIANO: I have denied you
8 --

9 ASST. ATTY. GEN. PEREZ: -- we have
10 invoked an executive privilege.

11 COMMISSIONER GAZIANO: That's partly the
12 letter --

13 ASST. ATTY. GEN. PEREZ: We have not.

14 COMMISSIONER GAZIANO: -- and part of it
15 is curious because, in the absence of the President,
16 all the President and Attorney General need to say is
17 "I hereby invoke executive privilege after careful
18 personal review."

19 Again, the Supreme Court says it is not to
20 be lightly invoked. And then we might have a few
21 questions about whether you are willing to waive it or
22 this, that, or the other.

23 But, in the absence of the Attorney
24 General or the principal or the President invoking
25 executive privilege to deny us material, you have

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1 asserted that you are confident -- that is not the
2 exact words -- but you think your other interests,
3 other interests, confidentiality interests, override
4 our statute, override our subpoena. Okay. We have a
5 dispute about that, a legal dispute about that.

6 May I ask you, since you are the
7 Department that is supposed to enforce our subpoenas
8 in court, we have pointed out this very embarrassing
9 conflict of interest the Department has. And we have
10 asked for a special counsel who would help us go to
11 court to get a judge to determine who is right, who is
12 right.

13 Do our statutes that require you to
14 cooperate fully override your other non-executive
15 privilege or not? What other situations is the
16 Department with the conflict or the entity with the
17 conflict gets to decide the outcome of that conflict?

18 ASST. ATTY. GEN. PEREZ: The
19 confidentiality interests again, this back and forth
20 that we have had in terms of providing the 4,000 pages
21 of documents, and including FBI statements, including
22 other materials, is exactly the back and forth that we
23 do when we have the House Judiciary Committee or other
24 committees that ask us for information and ask us to
25 produce the front-line attorneys. So there's --

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1 COMMISSIONER GAZIANO: There's a
2 difference. There's a difference. They can hold you
3 in contempt. And they can go to court. Our statute
4 says that you are to enforce our subpoenas, the
5 Department is to enforce the subpoenas. That is the
6 conflict. And so we have asked for a special counsel.

7 The question is, if you are so sure about
8 your legal position, why not allow a judge to decide
9 that?

10 ASST. ATTY. GEN. PEREZ: The congressional
11 statutes do not --

12 CHAIRPERSON REYNOLDS: Okay. Okay. Long
13 question. Same deal.

14 Commissioner Yaki?

15 COMMISSIONER YAKI: I believe I had four
16 minutes reserved from --

17 CHAIRPERSON REYNOLDS: That is correct.

18 COMMISSIONER YAKI: -- as well as my five
19 minutes?

20 CHAIRPERSON REYNOLDS: That is correct.

21 COMMISSIONER YAKI: Thank you. I am going
22 to use it all right now perhaps.

23 Just to go back to the question that I had
24 raised before, getting aside from the fact that we
25 seem to be devolving into Whitewater territory all

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1 over again, if the Commission were to, based on its
2 re-prosecution of the evidence in the Black Panther
3 case, come to a conclusion that the Department of
4 Justice has been failing in its efforts to deal with
5 voter intimidation in this country, how would you
6 respond?

7 ASST. ATTY. GEN. PEREZ: Well, we have an
8 aggressive program of voter -- of law enforcement to
9 address issues of voter intimidation I described in
10 the case that we just prosecuted. I have described
11 both the guidance that we are in the process of
12 putting out to address a wide range of voter access
13 and purging and other issues. And we are working very
14 vigilantly in those areas.

15 And you have a job to do. You are going
16 to put out a report. We will look forward to
17 receiving that report. And we have had -- there are
18 times when we disagree.

19 We have a different point of view. We --
20 there's remarkable ideological diversity around this
21 table today. And that is not a news item. That is a
22 fact. And that's what makes our country great is we
23 have ideological diversity around a host of issues.

24 So I know that you have your job to do.
25 And we have our job to do. Our job is law

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1 enforcement, to apply the facts to the law to make
2 sure that we are fully and effectively enforcing those
3 laws to the best of our ability. And that is what we
4 will continue to do.

5 COMMISSIONER YAKI: But if someone were to
6 say to you the U.S. Commission on Civil Rights is
7 accusing you, accusing the Department, of dropping the
8 ball on voter intimidation, I take it you would
9 probably disagree strongly with that?

10 ASST. ATTY. GEN. PEREZ: I would disagree.

11 COMMISSIONER YAKI: It's nicely,
12 diplomatically put. I might put it a little bit
13 differently, even more strongly than that.

14 I have a very quick question. There has
15 been a lot of talk -- I am going to reserve the
16 balance of my time.

17 CHAIRPERSON REYNOLDS: Commissioner
18 Melendez?

19 COMMISSIONER MELENDEZ: I'll yield my time
20 to Commissioner Yaki if he needs it.

21 COMMISSIONER YAKI: I'll carry it over.

22 CHAIRPERSON REYNOLDS: Okay. Commissioner
23 Heriot?

24 COMMISSIONER HERIOT: I wanted to ask a
25 question about the injunction that did issue. Why was

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1 the decision made to limit it to the City of
2 Philadelphia? Why not the suburbs? It's easy enough
3 for someone like Mr. Shabazz, if he's told he can't
4 repeat this activity in the City of Philadelphia, to
5 just hop on a bus. Why just the city? Why not --

6 ASST. ATTY. GEN. PEREZ: Well, again, the
7 legal principle is the principle of no tailoring the
8 -- when you're seeking injunctive relief, the
9 injunction needs to be narrowly tailored to the -- to
10 address the underlying offense.

11 Once the national party was dismissed
12 based on insufficiency of the evidence, then the
13 national injunction was no longer in play. And so the
14 judgment was made by --

15 COMMISSIONER HERIOT: But there's narrow
16 tailoring, and then there's narrow tailoring. I mean,
17 sure, there are cases like Marshall versus Goodyear
18 that talk in the abstract about narrow tailoring. And
19 the Goodyear case, I think, is decided correctly, but
20 we are talking about such a narrow tailoring that the
21 injunction is practically naked. It's really not
22 useful to have an injunction that only applies to the
23 City of Philadelphia.

24 If someone like Mr. Shabazz is a wrongdoer
25 -- and I think you agree he is a wrongdoer -- he is

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1 not so stupid that he doesn't know how to get on a
2 bus. And at that point, he could repeat the same
3 activity and not be subject to contempt of court --

4 ASST. ATTY. GEN. PEREZ: Well, if you --

5 COMMISSIONER HERIOT: -- to the confines
6 of an injunction like this to be able to say if he
7 does it again, well, this time, you know, we can get
8 him for contempt and, you know, inflict some
9 punishment there. But narrow tailoring wouldn't say
10 you can't apply the injunction to suburban
11 Philadelphia.

12 I think, in fact, we could go much, much
13 further than that. I think if you look at the cases,
14 you will find that we are way beyond narrow tailoring.
15 You know, we are down to a naked injunction.

16 ASST. ATTY. GEN. PEREZ: I think what is
17 illustrated from our back and forth, Commissioner, is
18 that you and I and the decision-makers have some
19 profound differences of opinion on --

20 COMMISSIONER HERIOT: We disagree that it
21 would be easy for him to get on a bus and go to the
22 suburbs?

23 ASST. ATTY. GEN. PEREZ: Well, he could go
24 to New Jersey, I guess. Should we expand it to New
25 Jersey? The evidence presented was that the New Black

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1 Panther Party --

2 COMMISSIONER HERIOT: Yes. You know,
3 should --

4 ASST. ATTY. GEN. PEREZ: The evidence --

5 COMMISSIONER HERIOT: I mean, New Jersey
6 is very close to Philadelphia.

7 ASST. ATTY. GEN. PEREZ: The evidence
8 presented was that the New Black Panther Party and, in
9 particular, these two people, were involved in the
10 City of Philadelphia. That was the evidence that was
11 presented, as I understand it, to the decision-makers
12 at the time.

13 COMMISSIONER HERIOT: Well, if that had
14 happened --

15 ASST. ATTY. GEN. PEREZ: And so under the
16 principles of --

17 COMMISSIONER HERIOT: -- in 2008 and, you
18 know, it wasn't raining that day, does that mean that
19 it only should occur in, an injunction should only
20 apply, if it's not raining and it's 2008?

21 I mean, you have to do these on a
22 reasonable basis. If this conduct is repeated, under
23 what circumstances would that likely be done? Why
24 confine it in a way that becomes almost comical?

25 ASST. ATTY. GEN. PEREZ: The City of

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1 Philadelphia is pretty big. The --

2 COMMISSIONER HERIOT: Not that big. I
3 take it you have agreed he is capable of getting on a
4 bus.

5 ASST. ATTY. GEN. PEREZ: He is capable of
6 getting on a bus, but we have to be --

7 COMMISSIONER HERIOT: And it wouldn't be
8 very hard, right?

9 ASST. ATTY. GEN. PEREZ: We have to be
10 narrowly tailored in the way we enforce things. So --

11 COMMISSIONER HERIOT: Well, then, what is
12 reasonable? If you take a look at the case law on
13 narrow tailoring of injunctions, you have really gone
14 quite overboard here.

15 ASST. ATTY. GEN. PEREZ: Well, I would
16 respectfully disagree. And, once again, you know, we
17 have --

18 COMMISSIONER HERIOT: What about the
19 Nicoletti case?

20 ASST. ATTY. GEN. PEREZ: -- a difference
21 of opinion.

22 COMMISSIONER HERIOT: What injunction are
23 you requesting there?

24 ASST. ATTY. GEN. PEREZ: They're going to
25 jail. The --

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1 COMMISSIONER HERIOT: Did you bring an
2 11(b)?

3 ASST. ATTY. GEN. PEREZ: We did not
4 because we brought a criminal prosecution in that
5 case. And they are serving jail time.

6 COMMISSIONER HERIOT: Was a criminal case
7 considered in the New Black Panther Party?

8 ASST. ATTY. GEN. PEREZ: The criminal case
9 was considered by the local and the federal
10 authorities. And prosecution was declined.

11 COMMISSIONER HERIOT: Other cases under
12 11(b)? Do you have the injunctions that have been
13 stopped in those cases?

14 ASST. ATTY. GEN. PEREZ: Well, again,
15 there are only three cases that we are aware of that
16 the government has brought. Two of them were lost at
17 trial and --

18 COMMISSIONER HERIOT: Yes. But even if
19 they were lost, presumably you requested something.

20 ASST. ATTY. GEN. PEREZ: Presumably
21 something was requested, but you have to get liability
22 before you can get the injunctive relief.

23 COMMISSIONER HERIOT: Yes, but I am
24 interested in --

25 ASST. ATTY. GEN. PEREZ: And there was no

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1 liability --

2 COMMISSIONER HERIOT: -- evidently someone
3 at the Department of Justice believed these were
4 justified cases. What injunction did they request
5 there? Did they request something that applied only
6 to a particular city or did they request something
7 further, like in the Noxubee case? The 11(b) case
8 wasn't successful, but presumably there was something
9 ready to do, something to what the --

10 ASST. ATTY. GEN. PEREZ: Well, again, if
11 the --

12 COMMISSIONER HERIOT: -- injunction should
13 look like with litigation?

14 ASST. ATTY. GEN. PEREZ: Each set of facts
15 is different. In the case that was the most recent
16 case, that was a case involving an individual who put
17 an ad in a newspaper saying --

18 CHAIRPERSON REYNOLDS: Thank you. Thank
19 you, Mr. --

20 ASST. ATTY. GEN. PEREZ: -- that if the
21 following 20 people vote --

22 COMMISSIONER HERIOT: I assume you --

23 CHAIRPERSON REYNOLDS: Thank you, Mr.
24 Perez.

25 COMMISSIONER HERIOT: -- did that in one

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1 spot.

2 CHAIRPERSON REYNOLDS: Okay. Thank you,
3 Mr. Perez.

4 Commissioner Kirsanow?

5 COMMISSIONER KIRSANOW: Yes. Thank you.

6 Mr. Perez --

7 ASST. ATTY. GEN. PEREZ: Mr. Chairman, I
8 just want to make sure -- I have a commitment at
9 11:30. So I thought it was supposed to be over at
10 11:00. So I just want to make sure that the
11 Commission is aware that I need to leave in about five
12 minutes.

13 CHAIRPERSON REYNOLDS: Thank you.

14 COMMISSIONER KIRSANOW: Okay. Mr. Perez,
15 again, thank you for being here. Thank you for your
16 time.

17 The remedial memo of, I think it was, May
18 6th -- maybe it was May 9th of 2009 -- asked that the
19 preparers determine whether or not there were any
20 First Amendment implications to the conduct in which
21 Shabazz and Jackson were engaged.

22 Did the Department come to a position as
23 to whether or not their activity on Election Day of
24 2008 constitutes protected activity under the First
25 Amendment?

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1 ASST. ATTY. GEN. PEREZ: Well, again, as
2 it relates to Mr. Shabazz, the determination was made
3 that his activities constituted -- I should say Mr.
4 Shabazz, who was at the polling place because there
5 are --

6 COMMISSIONER KIRSANOW: Right.

7 ASST. ATTY. GEN. PEREZ: -- two Mr.
8 Shabazzes in this case -- that his actions constituted
9 unlawful intimidation. The judgment was made that, as
10 to Mr. Jackson, that his actions did not reach the
11 evidentiary threshold necessary to establish that
12 violation.

13 As it relates to the national party,
14 again, there is no vicarious liability so that -- and
15 the post-election statements from the national party
16 that they didn't condone the activities. Statements
17 of that nature were very relevant in the determination
18 that we could not sustain the evidentiary burden
19 against the national party.

20 COMMISSIONER KIRSANOW: Specifically with
21 respect to the First Amendment, was any of the conduct
22 that we observed on the videotape of November 4th of
23 2008 protected under the First Amendment?

24 ASST. ATTY. GEN. PEREZ: Well, again, as
25 it relates to Mr. Shabazz, the determination was made

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1 that his activities constituted --

2 COMMISSIONER KIRSANOW: Understood. Were
3 any of the activities that we observed protected?

4 ASST. ATTY. GEN. PEREZ: Is any of the --
5 well, standing at a -- if you're standing at a polling
6 place, absent other indicia of intimidation, that is
7 certainly a protected activity.

8 COMMISSIONER KIRSANOW: There were
9 allegations that there were racial slurs invoked, that
10 someone was called a race traitor, and they were
11 wearing paramilitary gear. Given the context, was any
12 of that protected under the First Amendment?

13 ASST. ATTY. GEN. PEREZ: Well, again, the
14 determination was made based on the totality of the
15 review that there was insufficient evidence as it
16 related to Mr. Jackson. As it related to the national
17 party, when they made a statement that, "We're going
18 out to 300 -- we're deploying 300 people to various
19 polling sites," that is undeniably in our judgment
20 protected speech absent another statement that says
21 something more than that.

22 COMMISSIONER KIRSANOW: Some of the
23 discrete facts that we have here are, we have two
24 individuals who belong to what has been described as a
25 hate group, in military garb, with one of them having

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1 a baton. Racial slurs were invoked.

2 There is evidence that at least three
3 people, although it's unclear whether or not it was a
4 result of Mr. Shabazz's and Mr. Jackson's conduct,
5 were deterred from voting, at least turned away from
6 voting. And we have a circumstance in which the case
7 was poised for default. And we see it on the
8 videotape.

9 If the public views this and then sees
10 that there is no movement going forward on at least
11 two of the defendants and a limited, very limited,
12 injunction -- and, you know, we can debate that, but I
13 tend to agree with my colleague that it seemed to be a
14 fairly narrow injunction for one of them.

15 To what extent do those facts go into
16 deliberation among persons within the Section,
17 Division, or Department that this may cause others to
18 think that there is some concern about or that the
19 Department has a certain view as to how to proceed on
20 these particular cases?

21 ASST. ATTY. GEN. PEREZ: We apply the
22 facts to the law in every single case that we do. And
23 we make our best judgments as to whether the facts
24 sustain the evidentiary burden, an admittedly high
25 evidentiary burden that we had under Section 11(b).

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1 We do that analysis in every case that we
2 bring. In every statutory context in which we bring a
3 case, we apply the facts to the law and make our best
4 judgment possible. And that is what happened in this
5 case.

6 Again, this is not the first and, nor I
7 will predict with great confidence, will it be the
8 last case where, as you move up the chain, you have
9 robust debate and differences of opinion about how to
10 apply a set of facts that we have before us to the law
11 that we must apply --

12 COMMISSIONER KIRSANOW: And one last
13 question. If, in fact, you determine that default was
14 not appropriate for at least two of the defendants and
15 only a narrow injunction for one of them, why not make
16 that determination or yield that determination to the
17 trier of fact?

18 CHAIRPERSON REYNOLDS: I yield two minutes
19 of my time so you can finish the question.

20 ASST. ATTY. GEN. PEREZ: This was the
21 judgment that was made by the two people with 60 years
22 of experience. And they looked at the entire totality
23 of the circumstances. They reviewed all the evidence
24 that they had before them. And they made their best
25 judgment on the merits.

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1 And, again, this is a -- we will continue
2 to have cases in the Department of Justice where we
3 move up the chain and we have robust dialogue and
4 debate.

5 We can always after the fact say, "Could
6 you do this? Could you do that?" They made a
7 decision on the merits based on the evidence that was
8 presented before them at the time. And it was a
9 decision that was made by the Acting Assistant
10 Attorney General. And it was the product of, I think,
11 very careful consideration.

12 Are there people who might disagree with
13 it? Undeniably, or we wouldn't be here today. But we
14 will frequently have decisions that we make that
15 people will disagree with. And that's the beauty of
16 representative democracy, is that people can indeed
17 disagree.

18 COMMISSIONER KIRSANOW: Thank you, Mr.
19 Perez. Thank you, Mr. Chairman.

20 CHAIRPERSON REYNOLDS: All right. Well,
21 Assistant Attorney General Perez, thank you for your
22 time.

23 ASST. ATTY. GEN. PEREZ: Thank you.

24 III. CLOSING REMARKS BY CHAIR

25 CHAIRPERSON REYNOLDS: I suspect that you

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1 will be hearing from us again. We would appreciate
2 the opportunity to seek out ways that we can get
3 information that will help us to form our final
4 product, our report, but get it in a way that we don't
5 undermine the work that you do.

6 I think that if we have good faith
7 discussions and negotiations over some of the
8 remaining discovery disputes, I suspect that we could
9 reduce the size of the dispute.

10 But, in any event, I thank you for
11 providing us with the time you did. And this is an
12 interesting case.

13 ASST. ATTY. GEN. PEREZ: Thank you. And
14 we will continue to keep the lines of communication
15 open.

16 VICE CHAIR THERNSTROM: Thanks from all of
17 us at the Commission.

18 ASST. ATTY. GEN. PEREZ: Thank you. Have
19 a nice day.

20 CHAIRPERSON REYNOLDS: Okay. Folks, at
21 this time, closing statements for the Commissioners
22 who wish to make them? Vice Chair Thernstrom, we will
23 start with you.

24 VICE CHAIR THERNSTROM: Well, I had a
25 closing question for him, but I am not sure I have a

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1 closing statement. I guess I will say two things.
2 One, I very much appreciate Mr. Perez coming today. I
3 thought he answered the questions in a forthright way
4 and with integrity.

5 I cannot say too strongly that I agree
6 with Attorney General Meese that an administration
7 cannot function if its internal deliberations are
8 always vulnerable to ending up in the public sphere.

9 And, lastly, as I understand it, there is
10 no evidence that the New Black Panther Party, which is
11 a lunatic fringe group and dysfunctional lunatic
12 fringe group, largely dysfunctional, was sufficiently
13 well-organized to show up at any other polling place
14 and to be likely to show up in a suburban setting or
15 other urban setting. And I appreciated his stress on
16 the fact that, look, different attorneys can look at
17 the same facts and come to different conclusions.

18 This is a legitimate argument between
19 people of integrity, both on this Commission and in
20 the Justice Department. And I think we need to
21 respect both sides of this dispute.

22 That's it.

23 CHAIRPERSON REYNOLDS: Commissioner
24 Gaziano?

25 COMMISSIONER GAZIANO: I think that there

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1 are two -- what comes to mind about the conflicts that
2 we have with the Department's refusal to cooperate
3 comes down to this.

4 Greg Katsas has testified very clearly and
5 very explicitly that a decision to dismiss a lawsuit
6 could not have been made at the Division level alone.
7 And we have some interrogatory answers from the
8 Department that suggest Perelli was consulted.

9 I think we need more clarity on exactly
10 what the role of Perelli, Holder, and others was,
11 because we heard time and time again from the
12 Assistant Attorney General that the real decision was
13 made at the Division level. We have a former
14 Associate Attorney General who said that is
15 impossible.

16 Secondly, notwithstanding the 4,000 pages
17 of largely peripheral redacted documents the
18 Department has given us, we all know the elephant in
19 the room. They won't give us the most important and
20 helpful material that would help us in our
21 investigation. And that is interviewing four to six
22 people who would help us understand whether an
23 impermissible racial motive or other impermissible
24 motive was at play.

25 Those individuals include Perelli, King,

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1 Rosenbaum, and some of the trial team. There might be
2 one or two others if we were allowed to do our job
3 back in October and begin where we are.

4 But the central question is, why did they
5 continue to stonewall allowing us to do our job and
6 interview, depose, or hear testimony from those
7 critical witnesses? And why won't they even appoint a
8 special counsel to allow us to take that legal issue
9 to court?

10 CHAIRPERSON REYNOLDS: Commissioner Yaki?

11 COMMISSIONER YAKI: Thank you very much,
12 Mr. Chairman.

13 As I think I have made it very clear, I
14 think that we are spending enormous time and resources
15 on re-litigating an issue, a single-focused issue, and
16 trying to bootstrap within it some Whitewater-esque
17 conspiracy, which I think is going to get us nowhere.
18 It only undermines our credibility as a Commission.

19 We somehow are going to create this
20 atmosphere that the Justice Department will not be
21 pursuing enforcement of voting rights. And I would
22 just like to say this.

23 When you look at what happened during the
24 Bush administration, when you look at the fact that
25 they declined people wearing guns and intimidating

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1 Latino voters, that they declined people interviewing
2 elderly black voters in their homes in Mississippi,
3 interviewing elderly Latino voters in New Mexico,
4 going into Philadelphia in sort of Men in Black-type
5 outfits and this Commission has turned a blind eye to
6 that for years, turned a blind eye to Katrina, turned
7 a blind eye to so many other issues but, somehow in
8 this particular instance, we're going to find fault
9 with the Justice Department is the height, height of
10 hypocrisy.

11 I agree, you know, with Commissioner
12 Thernstrom. We should try and be respectful. But
13 this process has shown no respect for the process, has
14 shown no respect for fairness. And once again, I just
15 think that this is a laughable exercise of the
16 Commission's powers.

17 CHAIRPERSON REYNOLDS: Commissioner
18 Melendez?

19 COMMISSIONER MELENDEZ: I didn't have a
20 statement. Thank you.

21 CHAIRPERSON REYNOLDS: Commissioner
22 Heriot?

23 COMMISSIONER HERIOT: Well, I had thought
24 I wouldn't make a statement, but I guess I am going to
25 go back to my plan to make a statement here. And that

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1 thought was just to make, I think, what is one single
2 point. And that is, in the year running up to the
3 2008 election, there was a lot of very partisan
4 bickering about election procedures.

5 Republicans argued, on the one hand, that
6 there was a lot of voter fraud out there in the world.
7 Democrats argued that there was a lot of voter
8 intimidation out there and that something ought to be
9 done. And, in truth, I have to tell you that I
10 thought that both sides were overstating their case.

11 Although, of course, voter intimidation
12 and voter fraud are both very important issues and
13 they need to be dealt with, it seemed to me there was
14 more hysteria than was appropriate.

15 But because the Bush administration was a
16 Republican administration, naturally the accusation
17 was that the Bush DOJ was not doing enough about voter
18 intimidation.

19 So I thought, perhaps naively, that when
20 the Obama administration came in, that they would
21 naturally want to emphasize voter intimidation, as is
22 their right. I have no objection to that. I believe
23 that each administration has to decide its priorities
24 and that that is appropriate.

25 But, lo and behold, what I regard and what

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1 I think most people regard as an extremely strong case
2 got dropped at a point where the resources necessary
3 to follow through were really very, very small. And
4 so that was surprising to me.

5 Again, each administration can and should
6 set its own priorities unless the motivation has
7 something to do with the fact that, in this particular
8 case, the defendants were black. If the reason for
9 dismissing the case has to do with the race of the
10 parties, then I think that is something that the
11 Commission has a duty to look into. And that is why
12 we are doing this case.

13 If that possibility were not there, I
14 don't think it's very likely that this case would have
15 been chosen as a subject for an enforcement report.
16 It is the fact that there is the possibility that race
17 is infecting these decisions and that that would be,
18 as the Assistant Attorney General said, that that is
19 not what they should be about. That is why we are
20 looking into this.

21 Not all of the evidence is in, but this is
22 something that is perfectly appropriate for this
23 Commission to look at. And, in fact, I think it would
24 be inappropriate for us to neglect this kind of issue.

25 CHAIRPERSON REYNOLDS: Commissioner

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1 Kirsanow?

2 COMMISSIONER KIRSANOW: Mr. Chair, voter
3 intimidation is a matter of some seriousness. And we
4 are specifically charged with investigating those
5 matters.

6 I don't know if we have turned a blind eye
7 to some of the other cases that have been cited:
8 Pima, Mississippi, or some of the others. I will tell
9 you that, frankly, had it been brought to my
10 attention, I would have counseled that we should look
11 into those. I don't recall those ever being raised
12 before the Commission as subjects for our
13 investigation. But, again, had they been, I would
14 have aligned myself with those who would have wanted
15 to take a look at it.

16 I think this particular case was a public
17 case. It was brought to our attention. It merited
18 our review. And I will withhold or at least hold in
19 abeyance the balance of any other statement on this
20 matter until such time as I have had an opportunity to
21 review the depositions, transcript of the hearing, all
22 of the documents that have been produced. And I am
23 hopeful more will be produced at the conclusion of our
24 investigation of this matter.

25 CHAIRPERSON REYNOLDS: Okay. And I would

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1 just like to share some observations. I listened to
2 Mr. Perez. And some of the thoughts that came to mind
3 were, well, I was just surprised at the cramped,
4 narrow approach taken by the Obama administration on
5 this point. It was very technical, very conservative,
6 just giving me the impression that the administration
7 was just uncomfortable with this case.

8 I was also struck by the fact that the
9 characterization as to who was responsible for the
10 decision, the notion that the buck stops with the
11 administration, it's not clear that that is true with
12 this administration.

13 I kept hearing that Loretta King and Mr.
14 Rosenbaum with their 60 years of collective experience
15 were the shot callers in this matter. That struck me
16 as odd. It is the administration that is responsible
17 for decisions. Good, bad or indifferent, the
18 administration owns it.

19 And hiding behind the decisions of career
20 civil servants, it's not what I expect of an
21 administration that accepts responsibilities for its
22 decisions.

23 In any event, at this point, though, I
24 would like to say that this concludes our hearing for
25 today. We are adjourned sine die until a later date.

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1 We will hold the record open for
2 additional evidence pursuant to 45 CFR section 702.8.
3 Individuals who wish to submit items for consideration
4 to be included in the record may send them to the
5 General Counsel at the U.S. Commission on Civil Rights
6 at 624 9th Street, Northwest, Washington, D.C. 20425.
7 Thank you.

8 We will have a business meeting. Let's
9 give ourselves a 15-minute break.

10 (Whereupon, the foregoing matter was
11 concluded sine die at 11:34 a.m.)

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