Race Neutral Enforcement of the Law?

DOJ and the New Black Panther Party Litigation

An Interim Report

The following interim report was adopted by the Commission on November 19, 2010.[1] Although this version of the report does not contain Commissioner statements (which will be added at a later date), the substance of the report is complete. It was the decision of the Commission to immediately post this version, given that an earlier draft of the report had been leaked to the press. It is also anticipated that additional links and footnote citations will be added.

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

U.S. Commission on Civil Rights

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- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
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Letter of Transmittal

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

- November 4, 2008

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

- January 7, 2009

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

- April 17, 2009

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

- April 28, 2009

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

- April 29, 2009

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

- April 30, 2009

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

- May 1, 2009

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

- May 6, 2009

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

- May 7, 2009

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

- May 13, 2009

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

- May 15, 2009

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

- November 18, 2009

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

- May 13, 2010

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

- May 14, 2010

  Thomas Perez testifies before the Commission.

- May 14, 2010

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

- July 6, 2010

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

- September 24, 2010

  Coates testifies before the Commission, claiming that he believes Perez's statements to the Commission do not "accurately reflect what occurred in the Panther case and do not reflect the hostile atmosphere that has existed within the Division [Civil Rights Division] for a long time against race-neutral enforcement of the Voting Rights Act."[2]

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

INTRODUCTION

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

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

default was entered, the Department unilaterally dismissed the claims against three of the defendants and reduced the injunctive relief sought against the fourth.

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

In their appearances before the Commission, which the Department attempted to prevent, trial team members Coates and Adams presented testimony that both raises concerns about the current enforcement policies of the Department and provides a possible explanation for the reversal in the course of the NBPP litigation. In sum, they indicated that there is currently

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

Mr. Coates and Mr. Adams testified that this hostility to race-neutral enforcement influenced the decisionmaking process in the NBPP case. The disposition of the Panther case, Mr. Coates testified, was the result of anger on the part of acting political appointees and other attorneys arising from a "deep-seated opposition to the equal enforcement of the Voting Rights Act against racial minorities and for the protection of white voters who had been discriminated against."[3]

These serious accusations deserve to either be proven or exposed as false. While the Department has issued general statements that it enforces the laws without regard to race, these assurances do not confirm, deny, or explain the specific allegations of misconduct raised by Mr. Coates and Mr. Adams.[4] Unfortunately, the Department has thus far refused to

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

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

address many of these specific claims or to provide the type of information that would allow the Commission to properly review the decision making relating to the NBPP lawsuit.

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

What was not anticipated was the extent of the Department's lack of cooperation. At various times the Department alleged it would provide no information because the matter was being reviewed by its Office of Professional Responsibility. At other times, the Department raised a wide variety of legal privileges, many of which seemed to have no relevance to the current investigation. Although the Department eventually began to provide some information, including 4,000 pages of documents, much of the information provided either did not relate to the New Black Panther Party litigation, involved matters that were already public, or involved prior voter intimidation lawsuits. While useful, this information did not address the core of the Commission's inquiry as to why the NBPP lawsuit had been challenged internally.

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

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

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

PART I

PART I Factual Background

A. Election Day 2008

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

The men were dressed in paramilitary uniforms consisting of black pants, black shirts, and black jackets, as well as combat boots and berets. Their clothing bore a NBPP insignia, as well as symbols of rank within the New Black Panther Party. The higher-ranking party member, King Samir Shabazz, carried a nightstick secured by a lanyard wrapped around his hand.[5] Mr. Shabazz was observed occasionally slapping the nightstick in his free hand in a menacing manner and pointing the weapon at people located at the polling site.[6] According to witness testimony, Jackson and Shabazz stood shoulder to shoulder in front of the entrance to the polling place and were positioned in such a way that voters had to pass within arm's

[5] *See* Apr. 23, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 47 (testimony of Chris Hill), *available at* http://www.usccr.gov/NBPH/04-23-2010_NBPPhearing.pdf [hereinafter "Hill Testimony"].
[6] *See id.* at 47; Apr. 23, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 57 (testimony of Bartle Bull), *available at* http://www.usccr.gov/NBPH/04-23-2010_NBPPhearing.pdf [hereinafter "Bull Testimony"].

length of them to gain access.[7] Shabazz and Jackson were observed to be moving in concert and at one point closed ranks to attempt to block a poll watcher from gaining access to the polling entrance.[8] Their presence was caught on video.[9]

During their time at the polling site, a series of racial epithets were directed at those at the polling location. This included statements calling poll watchers "white devils"[10] and "white supremacists and crackers" and general statements such as "fuck you cracker" "how you [sic] white mother [expletive] gonna like being ruled by a black man?;" and "now you will see what it means to be ruled by the black man, cracker."[11]

Video evidence and witness statements indicate that King Samir Shabazz was the only Party member identified as carrying a weapon, i.e., the nightstick. Yet, witnesses indicated that at no point did Jackson attempt to disassociate himself from Mr. Shabazz. Instead, Jackson and Shabazz were observed acting in concert. No witness heard Mr. Jackson request that Mr. Shabazz either put away the nightstick or cease making inflammatory and racially abusive comments.[12] The latter information is important inasmuch as Mr. Jackson was a certified poll watcher serving on behalf of the Democratic Party and presumably had training as to what constitutes improper behavior at a polling site.

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[7] *See* Apr. 23, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 36 (Testimony of Mike Mauro), *available at* http://www.usccr.gov/NBPH/04-23-2010_NBPPhearing.pdf [hereinafter "Mauro Testimony"]; Hill Testimony, *supra* note 5, at 50.

[8] *See* Mauro Testimony, *supra* note 7, at 36; Hill Testimony, *supra* note 5, at 47.

[9] *See* Video: YouTube.com, "Security" Patrols Stationed at Polling Places in Philly (2008), http://www.youtube.com/watch?v=neGbKHyGuHU (last visited Oct. 19, 2010); Video: YouTube.com, Fox News- Black Panthers Guarding Polling Site (2008), http://www.youtube.com/watch?v=JwNDMdrqKcc (last visited Oct. 19, 2010).

[10] *See* Mauro Testimony, *supra* note 7, at 38; Hill Testimony, *supra* note 5, at 49.

[11] *See* Memorandum from Christopher Coates et al. to Grace Chung Becker, at 6 (Dec. 22, 2008), *available at* http://www.usccr.gov/NBPH/DOJmemo_12-22-08_rerecommendedlawsuitagainstNBPP.pdf [hereinafter "J. Memo"]; *see also* Mauro Testimony, *supra* note 7, at 39; Hill Testimony, *supra* note 5, at 58.

[12] *See* Mauro Testimony, *supra* note 7, at 37; Hill Testimony, *supra* note 5, at 50.

The fact that Jackson and Shabazz acted in concert is consistent with other evidence relating to their relationship. As is more fully discussed in the Appendix, Jackson is the chief of staff to King Samir Shabazz. In a documentary produced by National Geographic,[13] they are often observed working together, posing with weapons, and standing within feet of each other as Shabazz makes threats of violence.

Witnesses testified before the Commission that they observed voters turned away from the polling place due to the presence of the NBPP members.[14] For example, Christopher Hill, a Republican poll watcher, testified before the Commission to the following:

> People were put off when – there were a couple of people that walked up, couple of people that drove up, and they would come to a screeching halt because it's not something you expect to see in front of a polling place. As I was standing on the corner, I had two older ladies and an older gentleman stop right next to me, ask what was going on. I said, "Truthfully, we don't really know. All we know is there's two Black Panthers here." And the lady said, "Well, we'll just come back." And so, they just walked away. I didn't see anybody other than them leave but I did see those three leave.[15]

Similar testimony was provided by Bartle Bull, who was serving on that date as part of a roving legal team on behalf of Senator John McCain's presidential campaign. Mr. Bull has

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[13] *Inside the New Black Panthers* (National Geographic television broadcast 2009).

[14] While factually relevant, proof of whether voters, or those aiding voters, were actually intimidated is legally unnecessary for purposes of establishing liability under § 11(b) of the Voting Rights Act. As noted by one legal authority who formerly served in the Civil Rights Division:

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

J. Gerald Hebert, Rattling the Vote Cage – Part I, The Campaign Legal Center Blog, http://www.clcblog.org/blog_item-245.html (Aug. 8, 2008) (emphasis in original) (last visited Oct. 21, 2010).

[15] Hill Testimony, *supra* note 5, at 50-51.

extensive experience in political campaigns and a record of supporting the voting rights of minorities. Among his past activities, Mr. Bull indicated that he had served on the Lawyers' Committee for Civil Rights Under Law in Mississippi in the 1960s; was the publisher of the Village Voice; was the New York campaign manager for Senator Robert Kennedy's presidential campaign in 1968; was a campaign worker on behalf of Charles Evers' campaign for Governor of Mississippi; was the 1976 New York State campaign manager for Jimmy Carter's presidential campaign; was the 1980 chairman for the New York Democrats for Edward Kennedy; was the chairman of New York Democrats for both Mario Cuomo and Hugh Carey; and that he worked for Ramsey Clark's Senate campaign. As to the 2008 election, Mr. Bull indicated that he was chairman of New York Democrats for John McCain.

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

> I watched the two uniformed men confront voters, and attempt to intimidate voters. They were positioned in a location that forced every voter to pass in close proximity to them. The weapon [a nightstick] was openly displayed and brandished in sight of voters.
>
> I watched the two uniformed men attempt to intimidate, and interfere with the work of other poll observers whom the uniformed men apparently believed did not share their preferences politically.
>
> In my opinion, the men created an intimidating presence at the entrance to a poll. In all of my experience in politics, in civil rights litigation, and in my efforts in the 1960's to secure the right to vote in Mississippi through participation with civil rights leaders and the Lawyers Committee for Civil Rights Under Law, I have never

> encountered or heard of another instance in the United States where armed and uniformed men blocked the entrance to a polling location. Their clear purpose and intent was to intimidate voters with whom they did not agree. Their views were, in part, made apparent by the uniform of the organization the two men wore and the racially charged statements they made. For example, I have heard the shorter man make a statement directed toward white poll observers that "you are about to be ruled by the black man, cracker." To me, the presence and behavior of the two uniformed men was an outrageous affront to American democracy and the rights of voters to participate in an election without fear. It would qualify as the most blatant form of voter intimidation I have encountered in my life in political campaigns in many states, even going back to the work I did in Mississippi in the 1960's. I considered their presence to be a racially motivated effort to intimidate both poll watchers aiding voters, as well as voters with whom the men did not agree.[16]

The Department trial team prepared a memorandum dated December 22, 2008 to justify the filing of a possible civil lawsuit. These memoranda are typically called "J Memos" within the Department. The J Memo summarized Department interviews of various witnesses at the polling place. Although the Department has refused to turn over to the Commission the actual witness statements without any plausible justification,[17] the summary provided in the J Memo presumably reflects the contents of witness statements taken by the trial team[18]:

> [Republican poll watcher Mike] Mauro told us that he watched voters arrive at the polling location and exhibit manifest surprise and

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

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

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

> apprehension at the presence of the Black Panthers. Mauro also stated that he saw black voters congregate away from the entrance to the polling location and speak about the presence of the Black Panthers. He recalls them saying words to the effect of "what is going on there?" Mauro also witnessed an elderly black woman approaching the polls and exhibiting apprehension as she approached the scene. Attorney poll watcher Harry Lewis told us he saw voters appear apprehensive about approaching the polling location entrance behind the Black Panthers. We received similar information from [Republican poll watcher Joe] Fischetti. Officer Alexander said that he received a call from dispatch about reports of "voter intimidation" at the polling place. He said he saw individuals gathered within sight of the polling entrance, but they did not attempt to enter. Officer Alexander did not interview any voters while he was at the polling location.[19]

In addition to the threats and actions directed toward Republican poll watchers outside the building, the New Black Panther Party members also made threats to those serving as Republican poll watchers inside the polling site.[20] Although registered as Democrats,[21] Larry and Angela Counts, husband and wife, served as paid Republican poll watchers at the Fairmount Street location. They had performed similar services in prior elections.[22] Statements made by Republican poll workers and Department of Justice records both reflect that the Counts indicated that the NBPP members had called them "race traitors" and threatened that "if [they] stepped outside of the building, there would be hell to pay."[23] The Republican Party representatives also indicated that the Counts had told them that they took

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[19] J. Memo, *supra* note 11, at 6.
[20] Under § 11(b) of the Voting Rights Act, it is illegal to threaten poll watchers. *See* 42 U.S.C. § 1973i(b).
[21] *See* Deposition of Larry Counts at 5, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 12, 2010, *available at* http://www.usccr.gov/NBPH/LarryCountsDepositionTranscript.pdf [hereinafter "L. Counts Deposition"]; Deposition of Angela Counts at 4, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 12, 2010, *available at* http://www.usccr.gov/NBPH/AngelaCountsDepositionTranscript.pdf [hereinafter A. Counts Deposition].
[22] *See* L. Counts Deposition, *supra* note 21, at 5; A. Counts Deposition, *supra* note 21, at 4.
[23] *See* Hill Testimony, *supra* note 5, at 47-48; *see also* J. Memo, *supra* note 11, at 5-6.

these threats seriously, and that they would not leave the building until the NBPP members had left.[24]

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

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

[24] *See* Hill Testimony, *supra* note 5, at 48.

> Black Panthers had departed. This is consistent with the behavior of Counts as described to us by Fischetti. Angela Counts said she kept looking out the window at the Black Panthers with concern. She said she wondered what might occur next and if someone might "bomb the place." Lunch was brought to them, instead of them leaving to get it themselves. Larry and Angela Counts told us that when they finally departed the polling place, they first checked to see if the Black Panthers were still deployed outside. They told us that they left only because the Black Panthers had departed.[25]

The Commission took the depositions of Larry and Angela Counts on January 12, 2010, long after the claim against three NBPP defendants had been dismissed and the scope of the injunction sought against the fourth had been reduced. Their testimony to the Commission varied greatly from what was represented in the J Memo, as well as from the statements made by other Republican poll watchers. In their sworn depositions, Mr. and Mrs. Counts stated that they had not seen members of the New Black Panther Party at the polling site.[26] In addition, both denied speaking with anyone from the Republican Party about the Panthers.[27] Further, Mr. Counts even contended that he had never been interviewed by the Justice Department.[28] His testimony on this latter point was contradicted by his wife, however, who indicated that they each had been interviewed by a team from the Federal Bureau of Investigation (FBI) and the Department of Justice several months after the election.[29]

Other than the simple passage of time, the only known change in circumstance that might have affected the testimony of Mr. and Mrs. Counts was the dismissal of the suit as to three of the defendants. The Counts live less than four miles from the Fairmont Street polling

[25] J. Memo, *supra* note 11, at 5-6.
[26] *See* L. Counts Deposition, *supra* note 21, at 11-12, 15; A. Counts Deposition, *supra* note 21, at 18, 25-26.
[27] *See* L. Counts Deposition, *supra* note 21, at 14, 17-18; A. Counts Deposition, *supra* note 21, at 11, 19.
[28] *See* L. Counts Deposition, *supra* note 21, at 19.
[29] *See* A. Counts Deposition, *supra* note 21, at 23-24.

location and would likely be aware of the New Black Panther Party members' activities in Philadelphia in recent years. If the J Memo and statements by Republican poll watchers are to be believed, the Counts were threatened by, and afraid of, the New Black Panther Party members. If the Counts' subsequent testimony before the Commission is to be believed, they never saw the Black Panther Party members (who were just outside the entrance of the building), never spoke to any Republican Party representatives (who made contemporaneous reports of such conversations) and, if Mr. Counts is to be believed, never even spoke to anyone from the Department of Justice (although both the J Memo and his wife indicate that such an interview occurred).[30] These claims of ignorance contrast with the documented statements the Counts appear to have given to the Department. The extent of the newly claimed ignorance is captured in the following colloquy with Mr. Counts during his deposition:

> QUESTION: When did you become aware that [the Party] members had arrived?
>
> COUNTS: I wasn't aware. All I know when I was inside, all I saw was the news people outside, and I didn't see anybody. I didn't see anybody outside. Nobody said nothing to me about anything. I didn't go outside. All I just saw the news people outside. I don't know whether they were just there for the election, talking to the election people outside, or whatever. But as far as telling me, I didn't see nobody come inside or outside.[31]

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

[30] *See* J. Memo, *supra* note 11, at 5-6; A. Counts Deposition, *supra* note 21, at 23-24.
[31] L. Counts Deposition, *supra* note 21, at 8-9.

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

The Commission attempted to interview and take the deposition of as many people as it could locate who were identified as having been at the polling site.[32] Among them was Ronald Vann, who had served as a Democratic poll watcher with Jerry Jackson during prior elections.[33] Mr. Vann indicated that Election Day 2008 was the first time that he had noticed Jerry Jackson wearing his Panther uniform.[34] When questioned as to whether, as a certified poll watcher, he had requested that Jackson ask King Samir Shabazz to put away the nightstick or cease making inflammatory statements, he responded as follows:

> QUESTION: If you were flabbergasted – I want to make sure, and I know you kind of hinted before, if you were flabbergasted, why didn't you go up to Jerry and say, "Why don't you ask your friend to leave?"
>
> VANN: Mr. Black[wood], some things unsaid. If I said something to Jerry, it would be an argument, so I don't even want to go there. My thing is keep my mouth shut, stay out of it, and that's the best method.[35]

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

> QUESTION: Did anybody express concern to you about Jerry and his friend?

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

> VANN: Well, you know, I mean people was talking about all the publicity going on about the police and the news media and stuff like that and the guy with the stick.
>
> But, you know, my thing is I just listen, keep my mouth shut. This way can nobody come back and say, "Mr. Vann said this," or "Mr. Vann said that." Sometimes it's just best to keep your mouth shut.
>
> QUESTION: Did you even talk to Jerry until the ward leader got there?
>
> VANN: Kept my mouth shut.
>
> QUESTION: I'm just asking. You didn't talk to Jerry at all and you didn't call the ward leader or anybody else at the Democratic Party to say, "We have a problem here"?
>
> VANN: No.[36]

Mr. Vann may have been somewhat intimidated himself.

Mr. Vann did confirm, however, that King Samir Shabazz was armed with a nightstick, and that he was observed smacking the stick in his hand.[37] While he indicated that, in his opinion, King Samir Shabazz should not have been present,[38] he also stated that he did not report him to the police.[39] Mr. Vann also indicated that the voting judge at the site did not take any steps to address the situation.[40] Finally, Mr. Vann confirmed that Mr. Jackson remains an election poll watcher for the Democratic Party to this day.[41]

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[36] *Id.* at 21-22.
[37] *See id.* at 12, 16, 22.
[38] *See id.* at 17.
[39] *See id.* at 18.
[40] *See id.* at 24-25.
[41] *See id.* at 10. *See also* Watcher's Certificate of Jerry Jackson, Commonwealth of Pa., County of Phila., *available at* http://www.usccr.gov/NBPH/CongressionalCorrespondencereNBPP.pdf (p. 29)

Eventually the police arrived at the polling site. Their arrival and confrontation with Mr. Shabazz and Mr. Jackson were caught by a Fox News team that had arrived.[42] Mr. Shabazz was ordered to leave the site. It is unclear, however, whether he surrendered his nightstick or kept the weapon in his possession.[43] Mr. Jackson was allowed to remain on the scene. According to the J Memo of December 2008, the police believed that Mr. Jackson had a right to remain at the property due to his status as a poll watcher.[44]

The actions of the New Black Panther Party members quickly achieved notoriety due to the fact that their presence was filmed by a videographer hired by the Republican Party,[45] as well as by a Fox News team that arrived on the scene.[46] These broadcasts became widely available through television rebroadcasts and YouTube video clips on the Internet. At least in part because of this notoriety, a Department of Justice roving legal team met with several of the witnesses who observed the events of Election Day.[47] Despite a subpoena issued by the Commission, the statements taken on that date have not been provided to the Commission by the Department.

In addition to the Election Day interviews, trial team members J. Christian Adams and Spencer Fisher interviewed many of the witnesses who had been at the polling site. Some of these interviews were later summarized in Declarations by such witnesses as Bartle Bull,

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[42] *See* Vann Deposition, *supra* note 33, at 23.
[43] *See* Mauro Testimony, *supra* note 7, at 41; Bull Testimony, *supra* note 5, at 58.
[44] *See* J. Memo, *supra* note 11, at 4.
[45] *See id.* at 3-4.
[46] *See* Video: YouTube.com, "Security" Patrols Stationed at Polling Places in Philly (2008), http://www.youtube.com/watch?v=neGbKHyGuHU (last visited Oct. 19, 2010); Video: YouTube.com, Fox News, Black Panthers Guarding Polling Site (2008), http://www.youtube.com/watch?v=JwNDMdrqKcc (last visited Oct. 19, 2010).
[47] *See* Mauro Testimony, *supra* note 7, at 42-43.

Chris Hill, Wayne Byman and Mike Mauro.[48] Regrettably, the Department has declined to provide the statements taken by the trial team to the Commission.

[48] *See* [LINKS to the Declarations – NEED to add citations to declarations]

PART II

PART II The New Black Panther Party Litigation

A. History of The Lawsuit

Following its investigation of the facts and circumstances surrounding the Election Day incident, the Department of Justice trial team prepared a Justification Memorandum ("J Memo") dated December 22, 2008.[49] The memorandum was directed to the then-Acting Assistant Attorney General, Grace Chung Becker. The memorandum was signed by Christopher Coates, the Chief of the Voting Section,[50] Robert Popper, the Deputy Chief, and attorneys J. Christian Adams and Spencer R. Fisher.[51]

The memorandum summarized the evidence collected by the trial team and discussed theories of liability. It recommended a civil lawsuit pursuant to Section 11(b) of the Voting Rights Act[52] and requested authorization to file a complaint against the New Black Panther Party for Self Defense, its Chairman, Malik Zulu Shabazz, and the two NBPP members

[49] J. Memo, *supra* note 11.
[50] The legal expertise and professionalism of Mr. Coates has been recognized. He has received the Attorney General's Special Achievement and Meritorious Performance Award, the Civil Rights Division's Walter Barnett Memorial Award for Excellence in Advocacy, the Environmental Justice Award from the Georgia Environmental Organization, and the Thurgood Marshall Decade Award from the Georgia NAACP.
[51] In his testimony before the Commission, J. Christian Adams stated that "[i]t's customary practice in the Department that you do not attach your name to a document that you disagree with." July 6, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 17 (Testimony of J. Christian Adams), *available at* http://www.usccr.gov/NBPH/07-06-2010_NBPPhearing.pdf [hereinafter "Adams Testimony"],
[52] 42 U.S.C. § 1973i(b).

present at the Fairmount Street polling site on Election Day, King Samir Shabazz and Jerry Jackson.[53] These recommendations were approved.[54]

The lawsuit itself was filed in the U.S. District Court for the Eastern District of Pennsylvania on January 7, 2009.[55] The Complaint charged each of the four defendants with (i) intimidation of voters (Count I); (ii) attempted intimidation of voters (Count II); (iii) intimidation of individuals aiding voters (Count III); and (iv) attempted intimidation of individuals aiding voters (Count IV).

Each of the defendants was served with the Complaint, but none of the defendants filed an answer. The allegations were uncontested. The failure to file a response is particularly curious given that the Chairman of the NBPP, Malik Zulu Shabazz, is an attorney, and the fact that Jerry Jackson apparently had consulted with Philadelphia attorney Michael Coard.[56] Subsequent papers filed in the case reflect that Mr. Coard was copied on pleadings,[57] but he never formally entered an appearance and he did not file an answer on behalf of either Jerry Jackson or King Samir Shabazz.

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[53] *See* J. Memo, *supra* note 11, at 12-13.

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

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

[56] *See* Adams Testimony, *supra* note 51, at 109; *see also* Supplemental Interrogatory Responses of the Dep't of Justice at 6-7, Apr. 16, 2010 (Supplemental Response to Interrogatory No. 17), *available at* http://www.usccr.gov/NBPH/LetterfromHunttoUSCCRprovidingsupplementalresponses_04-16-10.pdf [hereinafter "Supp. Interrog. Responses"].

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

Under the terms of the Federal Rules of Civil Procedure, the failure to contest allegations contained in a civil complaint has important legal ramifications. Specifically, Federal Rule of Civil Procedure 8(b)(6) provides, in part, that an "allegation – other than one relating to the amount of damages – is admitted if a responsive pleading is required and the allegation is not denied." Accordingly, the failure of the defendants to contest allegations contained in the complaint served to establish liability as to each.[58]

On April 17, 2009, the Court entered an order of default and gave the Justice Department until May 1, 2009 to file a motion for default judgment.[59] The motion for default judgment was necessary for the Department to specify the ultimate remedy it was seeking as to each of the defendants. In the Complaint, the Department indicated that it was seeking a permanent injunction that would prohibit voter intimidation at *any* polling site. As set forth in the Complaint:

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

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

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

> otherwise engaging in coercing, threatening, or intimidating, behavior at polling locations during elections.[60]

On April 28, 2009, the Department provided notice to the defendants of the Department's intent to file for default judgment.[61] It was at this point, after liability had been conceded, and only days before the motion for default judgment was due, that objections to the lawsuit were raised internally within the Justice Department. Specifically, it is alleged that the Acting Assistant Attorney General for Civil Rights, Loretta King, and the Acting Deputy Assistant Attorney General for Civil Rights, Steven Rosenbaum, raised objections and began the process by which three of the defendants were to be dismissed and the remedy sought against the fourth defendant was to be substantially reduced. What follows is an examination of the process whereby the direction of the lawsuit was reversed.

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

In addition to the above, this discussion also includes references to information obtained by a third party, Judicial Watch, pursuant to a lawsuit it filed against the Department pursuant to

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[60] Complaint at 8, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-CV-065-SD (E.D. Pa. Jan. 8, 2009), *available at* http://www.usccr.gov/NBPH/COMPLAINT-USAvNBPP.pdf.
[61] *See* Letter from _____ to _____ (Apr. 28, 2009).

the Freedom of Information Act (FOIA).[62] As of September 20, 2010, Judicial Watch received an index from the Department that describes the number and variety of internal contacts between the trial team, the Civil Rights Division, the office of the Associate Attorney General, and others with regard to the NBPP litigation.[63]

To the extent possible, the source of each item of information is identified. While it has not been possible for the Commission to verify all of the information that will be described below, the allegations presented are of such seriousness that they need to be addressed and presented to the public.

According to *The Weekly Standard*, the trial team first learned of concerns by higher Department officials on April 29 when Acting Deputy Assistant Attorney General for Civil Rights, Steven Rosenbaum, informed the trial team: "I have serious doubts about the merits of the motion for entry of a default judgment and the request for injunctive relief."[64] The article indicated that Mr. Rosenbaum stated: "Most significantly, this case raises serious First Amendment issues, but the papers make no mention of the First Amendment."[65] The article further indicated that the nature of the questions raised by Mr. Rosenbaum seemed to reflect

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

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

[64] Jennifer Rubin, *Friends in High Places*, WEEKLY STANDARD, June 12, 2010, *available at* https://www.weeklystandard.com/articles/friends-high-places (last visited Oct. 21, 2010). The index produced in the *Judicial Watch* litigation reflects a series of e-mails between Mr. Rosenbaum and Mr. Coates between April 28 and April 30, 2009.

[65] *Id.*

that he was "not familiar with the case and had not read the detailed memorandum accompanying the draft order."[66]

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

> The trial team was surprised by the email and answered Rosenbaum point by point in a response sent that same evening. They corrected his misstatements and explained in answer to his First Amendment concerns, "We are not seeking to enjoin the making of those (or any) statements. We plan to introduce them as evidence to show that what happened in Philadelphia on Election Day was planned and announced in advance by the central authority of the NBPP, and was a NBPP initiative." They pointed out that dressing in military garb did not raise First Amendment concerns when "used with the brandishing of a weapon to intimidate people going to the polling station." They concluded: "We strongly believe that this is one of the clearest violations of Section 11(b) [of the Voting Rights Act] the Department has come across. There is never a good reason to bring a billy club to a polling station. If the conduct of these men, which was video recorded and broadcast nationally, does not violate Section 11(b), the statute will have little meaning going forward."[67]

In their testimony before the Commission, both Mr. Coates and Mr. Adams confirmed that such an e-mail was sent,[68] but refused to confirm its contents due to alleged privileges previously raised by the Department.[69] At the same time, the index provided in the *Judicial*

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[66] *Id*.
[67] *Id*.
[68] *See* Adams Testimony, *supra* note 51, at 26. In his testimony before the Commission, Mr. Coates recalled that such memo was written, but also refused to testify as to its substance. *See* Coates Testimony, *supra* note 2, at _____.
[69] Both Mr. Coates and Mr. Adams testified that they were limiting their testimony due to the Department's assertion of a deliberative process privilege as to the NBPP litigation. *See* Coates Testimony, *supra* note 2, at 11; Adams Testimony, *supra* note 51, at 10-11.

Watch litigation shows that e-mails on these subjects were sent in the time frame described in the above article.[70]

The Weekly Standard article alleged that Mr. Coates and Mr. Popper subsequently met with Mr. Rosenbaum and Loretta King, the Acting Assistant Attorney General for Civil Rights. The article describes these meetings as "two days of shouting."[71]

In their appearance before the Commission, Mr. Coates and Mr. Adams were careful to explain that they would not go into the substance of any deliberations because of the Department's assertions of privilege.[72] Yet both witnesses did provide some corroboration for *The Weekly Standard*'s account of events:

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

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

[71] *See* Rubin, *supra* note 64. The index produced in the *Judicial Watch* litigation reflects the following summary of a May 4, 2009 e-mail from Coates to King and Rosenbaum: "Section Chief [Coates] and Deputy Section Chief [Popper] [email] to their AAG [King] and DAAG [Rosenbaum] supervisors with candid statements about an earlier meeting discussing specific factual matters and clarification of issues in a draft memorandum of law for the NBPP litigation." Judicial Watch *Vaughn* Index, *supra* note 70, at 9 (Doc. No. 20(a)) (emphasis added).

[72] *See* Adams Testimony, *supra* note 51, at 10-11.

ADAMS: Correct.[73]

While the substance remains undisclosed, the result of these discussions is clear. The trial team was ordered to seek a continuance from the court requesting that the Department be given until May 15, 2009 for the filing of the motion for default.[74]

On May 6, 2009, after the continuance was granted, the trial team submitted a Remedial Memorandum to Loretta King which addressed questions that had been raised regarding the basis for liability and the remedies being sought.[75] These issues had not been raised by the defendants, who had not contested the lawsuit. Instead, each of the objections had been raised by Department officials after a default had been entered.

According to *The Weekly Standard* article, disputes with the trial team continued after the May 6 Remedial Memorandum was submitted.[76] In his testimony before the Commission, Mr. Coates described the situation as follows:

> QUESTION: In a magazine article about the *New Black Panther* case, it was alleged that there were two days of yelling as arising out of the time that the case got continued. Can you tell us anything about that?
>
> COATES: Well, in terms of the – I won't tell you what the discussions were. I will tell you that I became so frustrated with the process that I did use profanity. It wasn't the first time that I've ever used profanity, but it was not my customary way of speaking to my supervisors at the Division level. And I used the "bs" word that Mr. Adams identified in his testimony. And so, to that extent, that yelling went on.

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[73] *Id.* at 26-27.
[74] *See* Motion for Extension of Time to Comply with This Court's Order of April 20, 2010, United States v. New Black Panther Party for Self-Defense, No. 2:09-cv-065-SD (E.D. Pa. May 1, 2009), *available at* http://www.usccr.gov/NBPH/MotionforExtensionofTimetoComplywithCourtsOrderofApril20,2009.pdf.
[75] *See* Memorandum from Christopher Coates et al. to Loretta King (May 6, 2009), *available at* http://www.usccr.gov/NBPH/DOJremedialmemo_05-06-09_reproposedinjunction.pdf [hereinafter "Remedial Memo"].
[76] *See* Rubin, *supra* note 63.

> QUESTION: Aside from use of profanity or not, did that arise out of the fact that it appeared that Mr. Rosenbaum had not been reading the background materials supplied by the trial team for his review?
>
> COATES: No. It arose because the accusation had been – was made against me and Mr. Popper that wasn't true.
>
> QUESTION: Can you tell us what that accusation was?
>
> COATES: No, I can't.[77]

At this stage of the debate, the four members of the career trial team, Mr. Coates, Mr. Popper, Mr. Adams and Mr. Fisher, remained unanimous in their recommendation that the case should proceed against all four defendants. Faced by this opposition, Ms. King and Mr. Rosenbaum took the extraordinary step of requesting a review by the Appellate Section of a matter that was in default.[78] In their testimony before the Commission, both Mr. Coates and Mr. Adams indicated that they were unaware of any similar review in their tenure at the Department.[79] Other former Department officials have also indicated that they had never heard of an Appellate Section review being conducted in a case in which the defendants had conceded liability.[80]

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[77] Coates Testimony, *supra* note 2, at 55-56. Mr. Coates testified that he would not discuss certain topics, stating: "I will not answer questions which will require me to disclose communications in the Panther case that are protected by the deliberative process privilege." *Id.* at 11.

[78] According to the index in the *Judicial Watch* litigation, Mr. Rosenbaum requested a review by the appellate section on May 7, 2009. A series of e-mails in the index indicates that Mr. Rosenbaum forwarded to Diana Flynn a copy of the draft remedial memorandum, his own analysis and opinion of the development of different approaches under consideration, the trial team's analysis and detailed responses to questions on the merits, as well as draft pleadings, witness statements, and legal research.

[79] *See* Coates Testimony, *supra* note 2, at 52; Adams Testimony, *supra* note 51, at 34.

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

The requested review was undertaken by career Appellate Section attorney Marie McElderry and Appellate Section chief Diana Flynn, also a career official.[81] While the Appellate Section analysis examined the strengths and weaknesses of the lawsuit, and indicated that the trial court might require proceedings in addition to the filing of a motion for a default judgment, the analysis concluded as follows:

> We can make a reasonable argument in favor of default relief against all defendants and probably should, given the unusual procedural situation. The argument may well not succeed at the default stage, and we should expect the district court to schedule further proceedings. But it would be curious not to pray for the relief on default that we would seek following trial. Thus we generally concur in Voting's recommendation to go forward, with some suggested modifications in our argument, as set out below.[82]

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

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[81] E-mail from Diana K. Flynn to Steven Rosenbaum (May 13, 2009), *available at* http://www.usccr.gov/NBPH/DOJcomments_05-13-09_reproposeddefaultjudgment.pdf.
[82] *Id.*
[83] *Cf.* Jerry Markon & Krissah Thompson, *Dispute Over New Black Panthers Case Causes Deep Divisions*, WASH. POST, Oct. 22, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/22/AR2010102203982.html (last visited Nov. 9, 2010) ("Legal experts have called the reversal exceedingly rare, especially because the defendants had not contested the charges.").

Samir Shabazz from displaying a weapon within 100 feet of any polling location in Philadelphia.[84]

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

B. The Department's Explanations

In his testimony before the Commission, Assistant Attorney General for Civil Rights Thomas Perez acknowledged that no new facts had come to light between the time the case had been filed and the time it was dismissed.[85] That is to say, the six career line attorneys, and those who overruled them, were looking at the same set of facts.

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

[85] *See* Perez Testimony, *supra* note 54, at 21-22, 27, 53; *see also* Adams Testimony, *supra* note 51, at 106-07.

In explaining the Department's reversal, Mr. Perez testified that the decision to overrule the position of the six line attorneys was "based on a review of the totality of the circumstances,"[86] and simply represented the "kind of robust interaction [that] is part of the daily fabric of the Department of Justice."[87] He stated: "[R]easonable people can look at the same set of facts and reach different conclusions. Career people can disagree with career people. And that's precisely what happened in this case."[88]

In his testimony before the Commission, Christopher Coates disagreed:

> . . . I have always been flabbergasted that anyone would make such a claim regarding the *New Black Panther* case. People can have differences about a number of things, but we had eyewitness testimony.
>
> We had videotape that there were two people standing in uniform in front of a polling place in violation of the distance required by Pennsylvania law, as I recall, for people to be away from the polling place. One of them had a weapon.
>
> They were hurling racial slurs, including to white voters, "How do you think you're going to feel with a black man ruling over you?" at the voters. They were standing in close proximity to each other to block the ingress into the polling place.
>
> The 11(b) of the Voting Rights Act prohibits attempts to intimidate or coerce or threaten. It doesn't even require that the actual intimidation or coercion or threat occurred. It requires that no number of people be intimidated but just that there was an attempt in intimidation.

[86] Perez Testimony, *supra* note 54, at 23.
[87] *Id*. at 25.
[88] *Id*. at 27.

> And I've never been able to understand how anyone could accuse us of not having a basis in law and fact for bringing a straightforward 11(b) claim in circumstances where the evidence was so compelling.[89]

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

i. First Amendment Concerns

The existing record reflects that Mr. Rosenbaum originally raised First Amendment concerns with the trial team after a default had been entered.[90] These concerns were responded to, at length, in both the Remedial Memo and in the Appellate Section review.[91] In both instances, the career attorneys argued that any First Amendment concerns could be successfully addressed and would not preclude a default judgment.

As to the scope of the initial injunction sought by the Department, the potential relief sought in the Complaint focused on conduct not protected by the First Amendment. The proposed restrictions were directed at the behavior of the NBPP members, with no direct prohibition

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[89] Coates Testimony, *supra* note 2, at 57-58.
[90] *See* Rubin, *supra* note 63; Adams Testimony, *supra* note 51, at 24-25.
[91] This issue may also have been addressed in an e-mail by the trial team prepared in response to the doubts originally expressed by Mr. Rosenbaum on April 29, 2009. The Vaughn index shows a series of e-mails on those dates between Mr. Rosenbaum and Mr. Coates and this was the subject of testimony by Mr. Adams and Mr. Coates that trial team members worked all night to prepare a response. *See* Adams Testimony, *supra* note 51, at 26-27; Coates Testimony, *supra* note 2, at ___.

on speech. Even if the scope of the injunction was a matter of legitimate debate, however, such concerns would not have justified the dismissal of all claims against three of the defendants. Instead, the same limited restrictions approved by the Department as to King Samir Shabazz could have been applied to the other defendants.

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

> The alleged conduct of Minister Shabazz and Mr. Jackson was not constitutionally protected. To begin with, the First Amendment does not protect intimidation in any context, even if carried out through speech or expressive conduct. See *Virginia* v. *Black*, 538 U.S. 343, 360 (2003). Moreover, to prevent against voter intimidation, states may prohibit even pure political speech around entrances to polling places. See *Burson v. Freeman*, 504 U.S. 191, 196-210 (1992) (plurality opinion) (upholding ban on such speech within 100 feet of entrance); *id* at 213 (Scalia, J., concurring in the judgment) ("restrictions on speech around polling places on Election Day are as venerable a part of the American tradition as the secret ballot").
>
> The alleged conduct of Malik Shabazz and the New Black Panther Party, in directing and ratifying the conduct of Minister Shabazz and Mr. Jackson, also was unprotected. Even in cases involving some activity protected by the First Amendment, a supervisor "may be held liable for unlawful conduct that he himself authorized or incited." *NAACP* v. *Claiburne Hardware Co.*, 458 U.S. 886, 920 n.56 (1982). And a political party or advocacy group, "like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority." *Id.* at 930.[92]

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

> Finally, the relief requested would have raised no significant First Amendment problems. In its original complaint, DOJ asked the court for an order that "[p]ermanently enjoins Defendants, their agents and successors in office, and all persons acting in concert with them, from deploying athwart the entrance to polling locations either with weapons or in the uniform of the Defendant New Black Panther Party, or both, and from otherwise engaging in coercing, threatening, or intimidating, behavior at polling locations during elections."[93] The first clause describes the specific unlawful conduct committed or authorized by the defendants, and the second clause describes more generally the conduct of intimidating voters "at polling locations during elections." Neither clause plausibly encompasses constitutionally protected conduct.[94]

During his live testimony before the Commission, Mr. Katsas defended and elaborated on these views.[95]

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

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[93] Complaint at 8, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-CV-065-SD (E.D. Pa. Jan. 8, 2009), *available at* http://www.usccr.gov/NBPH/COMPLAINT-USAvNBPP.pdf.
[94] Katsas Statement, *supra* note 80, at 11-12.
[95] *See* Apr. 23, 2010 Hearing Before the U.S. Comm'n on Civil Rights, at 174-176 (Testimony of Gregory Katsas), *available at* http://www.usccr.gov/NBPH/04-23-2010_NBPPhearing.pdf [hereinafter "Katsas Testimony"].

ii. Jerry Jackson

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

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

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

> The Department concluded that the allegations in the complaint against Jerry Jackson, the other defendant present at the Philadelphia

> polling place, did not have sufficient evidentiary support. The Department's determination was based on the totality of the evidence. In reaching this conclusion, the Department placed significant weight on the response of the law enforcement first responders to the Philadelphia polling place on Election Day. A report of the local police officer who responded to the scene, which is included in the Department's production to the Commission, indicates that the officer interviewed Mr. Jackson, confirmed that he in fact was a certified poll watcher, and concluded that his actions did not warrant his removal from the premises.[96]

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

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

Mr. Coates testified as follows:

> The primary reason cited by the Division for not obtaining injunctive relief against Black Panther Jerry Jackson, who stood at the

[96] Perez Statement, *supra* note 54, at 8; *see also* Perez Testimony, *supra* note 54, at 69-71.

> Philadelphia polling place in uniform with fellow Panther King Samir Shabazz but without a weapon, was that a Philadelphia police officer came to the polling place, made the determination that King Samir Shabazz had to leave the polling place, but that Black Panther Jackson could stay because he was a certified Democratic poll watcher.
>
> During my 13 and a half years in the Voting Section, I cannot remember another situation where a decision not to file a Voting Rights Act case, much less to dismiss pending claims and parties, as happened in the *New Black Panther Party* case, was made, in whole or in part, on a determination of a local police officer.
>
> In my experience, officials in the Voting Section and the Civil Rights Division always reserved for themselves, and correctly so, the determination as to what behavior constitutes a violation of federal law and what does not. One of the reasons for this federal preemption of the determination of what constitutes a Voting Rights Act violation is that local police officers are normally not trained in what constitutes a Voting Rights Act violation.[97]

Mr. Adams added the following:

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

[97] Coates Testimony, *supra* note 2, at 26-27.

> QUESTION: So you don't have to defer to the Philadelphia police.
>
> ADAMS: Of course not.[98]

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

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

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

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

[98] Adams Testimony, *supra* note 51, at 89-90.

> deployment, behavior, and statements of Defendants Samir Shabazz and Jackson at 1221 Fairmount Street in Philadelphia, Pennsylvania.[99]

In his testimony before the Commission, Assistant Attorney General for Civil Rights Thomas Perez stated that these claims "did not have sufficient evidentiary support."[100] He further indicated that the Department had taken into consideration that the Party had specifically disavowed the actions at the polling site in the Department's decision to dismiss claims against both the Party and Malik Zulu Shabazz.[101]

> As it relates to the national party… there is no vicarious liability so that – and the post-election statements from the national party that they didn't condone the activities: Statements of that nature were very relevant in the determination that we could not sustain the evidentiary burden against the national party.[102]

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

The position of Mr. Perez is contrary to those with the most direct knowledge about the case. All four career attorneys of the trial team indicated that there was sufficient evidence to proceed to judgment against both the Party and Malik Zulu Shabazz. This position was also supported by the two career attorneys from the Appellate Section who reviewed the claim. In

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[99] Complaint at 3, United States v. New Black Panther Party for Self-Defense et al., No. 2:09-CV-065-SD (E.D. Pa. Jan. 8, 2009), *available at* http://www.usccr.gov/NBPH/COMPLAINT-USAvNBPP.pdf.
[100] Perez Testimony, *supra* note 54, at 20.
[101] *See id.* at 23-24, 96.
[102] *Id.* at 103; *see also* Perez Statement, *supra* note 54, at 6.

addition, the Commission heard the testimony of Gregory Katsas, who previously held a series of high-level positions in the Department, including that of Acting Associate Attorney General, which supervises the Civil Rights Division. Both in his written statement[103] and in his oral testimony before the Commission,[104] Mr. Katsas said that a judgment could have been obtained against both the Party and its Chairman under general principles of agency law.[105]

In an attempt to establish the extent of the Party's involvement on Election Day 2008, the Commission subpoenaed King Samir Shabazz, Jerry Jackson, and Malik Zulu Shabazz. The first two individuals, who had been present at the polling site in Philadelphia, asserted their rights against self-incrimination under the Fifth Amendment of the U.S. Constitution and refused to testify.[106] As of the date of this report, Malik Zulu Shabazz remains under subpoena, but refuses to testify, contesting the subpoena in the U.S. District Court for the District of Columbia.[107]

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

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[103] *See* Katsas Statement, *supra* note 80, at 7.
[104] *See* Katsas Testimony, *supra* note 95, at 159.
[105] *See* Katsas Statement, *supra* note 80, at 7.
[106] *See* Deposition of King Samir Shabazz at 4-6, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 11, 2010, *available at* http://www.usccr.gov/NBPH/KingSamirShabazzDepositionTranscript_01-11-10.pdf; Deposition of Jerry Jackson at 6-8, U.S. Comm'n on Civil Rights, Phila., Pa., Jan. 11, 2010, *available at* http://www.usccr.gov/NBPH/JerryJacksonDepositionTranscript_01-11-10.pdf.
[107] *See* U.S. Comm'n on Civil Rights v. Shabazz, No. 1:10-mc-00232 (D.D.C.). [link]

the Party over its members relating to such activities? And what activities were sanctioned by the Party and what activities were prohibited?

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

In a statement posted on the New Black Panther Party website, dated November 4, 2008 but possibly posted after that date, the Party indicated that "[it] does not now nor ever has, engaged in any form of voter intimidation."[108] The notice goes on to state that the Party had "over 350 of its members on the ground in 15 cities in order to ensure that people of color particularly our women, youth and elders, are ensured their right to vote and in order to provide security protecting our people in the face of real and confirmed Neo-Nazi, Skinhead, KKK, Aryan Nation and other White Supremacist threats."[109] The statement then directly addresses the incident in Philadelphia:

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

[108] New Black Panther Party, The NBPP Issues Official Statement re: Election 2008 and Voter Intimidation 11/4/08, *available at* [cite].
[109] *Id.*

> The publicly expressed sentiments and actions of purported members do not speak for either the party's leadership or its membership.[110]

The statement then notes that, "The New Black Panther Party does not issue threats of violence to those who we may not agree with."[111]

Only three days after the election, Malik Zulu Shabazz appeared on the Fox News program, "The Strategy Room."[112] In that interview, Mr. Shabazz made statements that contradicted the representations contained in the Party's statement on its website.

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

> RICK LEVENTHAL: …All right. So, first and foremost, because probably most of the people watching have seen some portion of it [videos of King Samir Shabazz and Jerry Jackson on Election Day], what was your reaction to that?
>
> SHABAZZ: After my investigation into that case, I have found that those members were responding to members of the Aryan Nation and

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[110] *Id.*

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

- The statement is dated November 4, 2008, Election Day, but it is unclear if the statement was actually posted on that date. Neither the efforts of the Department, nor of the Commission, were able to establish the actual date of posting.[111]
- The notice makes reference to the actions in Philadelphia being attributed to "purported members." Even as of Election Day, a national broadcast had shown the video images of King Samir Shabazz and Jerry Jackson. These members were well known to Party members and Malik Zulu Shabazz. Was this an attempt at deniability?
- The statement that, "The New Black Panther Party does not issue threats of violence to those we may not agree with," is demonstrably false. King Samir Shabazz has issued blunt threats of violence of which Malik Zulu Shabazz was surely aware. Yet no suspension resulted from these earlier incidents.

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

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

> the Nazi Party who were voting Republican and who were at those polling stations really intimidating black voters.
>
> RICK LEVENTHAL: Whoa, whoa, whoa. You're saying that there were white members of, there were Aryans living in that district who went to vote in that polling place?
>
> SHABAZZ: I don't know if they were voting, but they were there. They were in the parking lot, they had Nazi insignia on their arms, and…
>
> RICK LEVENTHAL: This is absolutely the first I've heard of this.
>
> SHABAZZ: That is the absolute truth. And those men were not wrong, that they were there…
>
> RICK LEVENTHAL: Dr. Shabazz, why wouldn't anyone there tell me that? What they told me was that that gentleman in the Black Panther uniform was a poll watcher who was just there to greet voters. There was never any mention from any one of the people who I spoke with that day at that location who said anything about anyone from an Aryan Nation or any white supremacist being there.
>
> SHABAZZ: I can only tell you what my investigation has uncovered. Yes, one of the members of the Party, he lived there, he was a poll watcher, and there are other elders and grandmothers that we have interviewed that have told of the intimidation that was taking place that day. And so those men were there to try to stop something, not start something.[113]

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

> RICK LEVENTHAL: Dr. Shabazz, do you have any film or pictures of the presence of these Nazis at the Philadelphia polling place? Any evidence whatsoever?
>
> SHABAZZ: You check our website soon, coming out.
>
> RICK LEVENTHAL: Oh, soon. You're gonna have pictures of them?

[113] *Id.*

> SHABAZZ: Well, we're gonna have interviews with the elders. You know, the elderly who were at that polling site were really thanking the New Black Panther Party for being there because they were the only security they had on that day.[114]

Mr. Shabazz also stated, "I can tell you at that polling site that there were neo-Nazis at the polling site, as God is my witness."[115]

The testimony developed by the Commission indicates that the allegations claiming the presence of white supremacists at the polling site are false. Commission witnesses Chris Hill, Mike Mauro, Bartle Bull and Ronald Vann all testified that there was no evidence of white supremacists at the polling site.[116] In addition, despite Mr. Shabazz's representations, no evidence substantiating the presence of white supremacists has ever been posted on the Panthers' website or otherwise made publicly available.

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

> RICK LEVENTHAL: Did you know that there were Black Panthers in Philadelphia, because when we called your office that day we were told that you had Black Panthers at other polling locations around the country but no one in Philadelphia.

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[114] *Id.*
[115] *Id.*
[116] *See* Mauro Testimony, *supra* note 7, at 39; Hill Testimony, *supra* note 5, at 51; Bull Testimony, *supra* note 6, at 59; Vann Deposition, *supra* note 33, at 21; *see also* L. Counts Deposition, *supra* note 21, at 19; Adams Testimony, *supra* note 51, at 21.

> SHABAZZ: Well, once we did our research we figured out that there were members of the Party not only in Pennsylvania but many areas. I mean, obviously we don't condone bringing billy clubs to polling sites. But when we found out that this was an emergency response to some other skinhead and white supremacist activity at that polling site, then there was some explanation for that.[117]

In the J Memo of December 22, 2008, the trial team indicates that Malik Zulu Shabazz was interviewed by the Department about the incident. However, the references in the J Memo do not provide much detail about the interview. The document simply notes that Shabazz stated that "[t]here were members of the party in many areas [on Election Day]" and that he "specifically endorsed the use and display of the weapon at 1221 Fairmount Street by Samir Shabazz . . . ."[118] In his testimony before the Commission, trial team member J. Christian Adams indicated that Malik Zulu Shabazz had "said the weapon was necessary."[119]

Although in the previously-cited Fox News "Strategy Room" interview Malik Zulu Shabazz acknowledges that the actions of King Samir Shabazz at the polling place were improper, there is no evidence that the Party imposed any sanction or discipline at that time. Instead, it appears that the alleged imposition of discipline was delayed until January 7, 2009, over two months after Election Day, the same date the Justice Department filed its lawsuit against King Samir Shabazz, Jerry Jackson, the Party, and Malik Zulu Shabazz.[120]

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[117] *The Stategy Room* (Fox News Internet broadcast Nov. 7, 2009), *available at* http://video.foxnews.com/v/3917372/dr-malik-shabazz (last visited Oct. 21, 2010).
[118] J. Memo, *supra* note 11, at 7.
[119] Adams Testimony, *supra* note 51, at 21-22.
[120] Press Release, U.S. Dep't of Justice, Justice Department Seeks Injunction Against New Black Panther Party (Jan. 7, 2009), *available at* http://www.justice.gov/opa/pr/2009/January/09-crt-014.html (last visited Oct. 21, 2010).

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

> **Public Notice Regarding Philadelphia Chapter Suspension 1/7/09 NBPP Official Statement**
>
> Philadelphia Chapter of the New Black Panther Party is suspended from operations and is not recognized by the New Black Panther Party until further notice.
>
> The New Black Panther Party has never, and never will, condone or promote the carrying of nightsticks or any kind of weapon at any polling place. Such actions that were taken were purely the individual actions of Samir Shabazz and not in any way representative or connected to the New Black Panther Party. On that day November 4th, Samir Shabazz acted purely on his own will and in complete contradiction to the code and conduct of a member of our organization. We don't believe in what he did and did not tell him to do what he did, he moved on his own instructions.
>
> It is true that volunteers in the New Black Panther Party successfully served as poll watchers all over the country and helped get the Black vote out. We were incident free. We are intelligent enough to understand that a polling place is a sensitive site and all actions must be carried out in a civilized and lawful manner.
>
> Certainly no advice from the leadership of the New Black Panther Party was given to Samir Shabazz to do what he did, he acted on his own. This will be the New Black Panther Party's Only Statement on the matter.[121]

[121] New Black Panther Party, Public Notice Regarding Philadelphia Chapter Suspension 1/7/09 NBPP Official Statement, *available at* [cite]. As with the Party's other statements, questions arise out of the notice dated January 7, 2009.

- On its face, it appears that the suspension of the Philadelphia Chapter only occurred after the Department's lawsuit was filed. Yet, the actions of King Samir Shabazz and Jerry Jackson were known to the Party and Malik Zulu Shabazz no later than November 7, 2008, the date of the Fox News "Strategy Room" interview. Why was the suspension not imposed earlier?
- There is no reference to the presence of white supremacists justifying the use of a nightstick. Should this have not raised questions in the Department as to whether the Party's alleged repudiation was credible? Did no one at the Department question the Party's changing positions?

The sincerity of the alleged repudiation and suspension was called into question by a subsequent speech given by Malik Zulu Shabazz on December 30, 2009, at a party conference in Dallas.[122] The Party Chairman appears in his uniform, with four stars on his lapel, and surrounded by Party members in paramilitary garb. During that speech, less than a year after the alleged suspension of King Samir Shabazz and the Philadelphia Chapter, Malik Zulu Shabazz stated:

> And, for the record, for the record, inside the Party, King Samir is welcomed back to the New Black Panther Party. King Samir is welcome. [applause]… And so he served a little suspension, but that suspension is up. And I still charge it to his head and not his heart. He's still our brother. We're not gonna pull our brother away for those damn devils. [applause] No, but we also had to move in a way that gets this beast off our back and to get everything dropped.[123] (emphasis added)

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

- The notice contends that, "The New Black Panther Party has never, and never will, condone or promote the carrying of nightsticks or any kind of weapon at any polling place."[121] Yet the Party's own website and publications, as well as the media interviews with King Samir Shabazz and Malik Zulu Shabazz, all reflect that Party members have arms training, and often appear with weapons. Given the general encouragement of armed status, what specific instructions, if any, were given with regard to Election Day activities?
- The statement contends that King Samir Shabazz acted in "contradiction to the code and conduct of a member of our organization." Yet the rules and principles of the Party posted on its website in no way address electoral matters or polling activities. What code is the statement referring to? Given the past record of King Samir Shabazz making threats of violence (S*ee* Appendix), what steps were taken to prevent their reoccurrence?
- The statement notes that, "volunteers in the New Black Panther Party successfully served as poll watchers all over the country and helped get the Black vote out."[121] If this statement is true, and the Party planned and organized Election Day activities, the instructions, training, and orders given to the Party members should be readily available and logically would have been produced to the Department as part of an argument for dismissal of the lawsuit. No such evidence has been forthcoming and the Party did not challenge the allegations in the suit. Why not?

[122] [link]
[123] [link]

> They only had video evidence on Samir; they didn't have no evidence that I directed the operation. They had no evidence. They said brother Jerry didn't have a baton and he was a poll watcher. The New Black Panther Party moved in a way where they couldn't say that the Party had condoned doing that. And so the Justice Department changed hands into the Obama administration and the Justice Department leadership changed into the hands of a black man by the name of Eric Holder, and they took a look at it and they threw mostly everything out.[124] (emphasis added)

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

> And I've always been of the belief that Bush had vowed that before he left office he would try to trap us or something. And as strong as we were, we were still too wise to run in his traps, to run into his traps. So on the last days of his administration, on the last day, November 4, 2008, he gets what he wants, some little weak charge on the New Black Panther Party of voter intimidation, sayin' that we were in front of a polling place with a baton. Now, what would we look like in front of a polling place with a baton? You know we don't carry batons. It's like [pause] Psyche! I'm just playin'. [laughter][125]

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

> We went out there to help the elders, we went out there to pass out flyers and went out there to pass out some information to our brothers and sisters, that was our orders. And we went out, and for the most part we did that well. It's just that the New Black Panther Party

[124] [link]
[125] [link]

> sometimes, whatever we do, we just tend to do it kind of strong, you know what I mean? [laughter] Sometimes, whatever we do, sometimes we just do it just real strong, and sometimes it can even be too black and too strong. And so what happened was, one of our men, one of our brothers, who's my little brother and I love, King Samir Shabazz, just was a little bit too strong and he was caught out there at the polling place with a nightstick at the polling place, and the John McCain campaign rolled up on him with some cameras and some poll watchers and jumped all over the issue and all over the brother.[126]

The contradictory and seemingly tactical nature of the statements made by Malik Zulu Shabazz raise serious questions that call for additional investigation. On the one hand, he clearly acknowledges that the Party planned Election Day activities at polling sites and that there was some form of instruction or orders relating to conduct. At the same time, serious questions exist as to whether his alleged condemnations and suspension of King Samir Shabazz, made only after the lawsuit was filed, were genuine. By his own words, the alleged acts of discipline appear to have been taken strictly "as a way that gets this beast off our back and to get everything dropped."

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

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[126] [link]

Even if these questions cannot be answered, a fuller explanation should be provided by the Department as to why the opinions of the trial team and the Appellate Section were disregarded. Regardless of the NBPP's post-election comments, the Party's control and discipline over its members, would seem to present a strong case that general principles of agency would bind the Party for the acts of Jerry Jackson and King Samir Shabazz.[127]

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

C. The Response of Christopher Coates

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

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

> To understand the rationale of these articulated reasons for gutting this case, the *Panther* case, one only has to state the facts in the racial reverse. Assume that two members of the Ku Klux Klan, one of which lived in an apartment building that was being used as a polling place, showed up at the entrance in KKK regalia and that one of the Klansmen was carrying a billy stick. Further assume that the two Klansmen were yelling racial slurs at black voters, who were a minority of the people registered to vote at that particular polling place and that the Klansman was blocking ingress to the polling place. Assume further that a local policeman came on the scene and determined that the Klan with the billy club must leave but that the other Klansman could stay because he was a certified poll watcher for a local political party.
>
> In those circumstances, ladies and gentlemen, does anyone seriously believe that the Assistant Attorney General for Civil Rights would contend that, on the basis of the facts and the law, the Civil Rights Division did not have a case under the Voting Rights Act against the hypothetical Klansman that I described because he resided in the apartment building where the polling place was located or because he was allowed to stay at the polling place by a local police officer because he was a poll watcher?[128]

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

D. Decision Making By Political Appointees

The Commission does not question the responsibility of political appointees to review, and in many instances, to overrule the decisions of career lawyers in the Department. But it is the

[128] Coates Testimony, *supra* note 2, at 29-30.

Commission's responsibility in a case like this to investigate, evaluate, and report on whether the Commission believes the ultimate decision was based on impermissible factors. If no plausible explanation is offered for overruling numerous career lawyers, it raises questions as to whether the purported explanation is accurate and/or legitimate.

In the present case, the Department has taken the position that the decisions regarding the ultimate fate of the NBPP litigation were made by career attorneys Loretta King and Steven Rosenbaum.[129] Ms. King and Mr. Rosenbaum are indeed career attorneys at the Department. At the time the decisions were made with regard to the litigation, however, both Ms. King and Mr. Rosenbaum were temporarily serving in political positions. Specifically, Ms. King was serving as the Acting Assistant Attorney General for Civil Rights, and Mr. Rosenbaum was serving as the Acting Deputy Assistant Attorney General for Civil Rights. It has been argued that, under the Vacancies Reform Act,[130] Ms. King and Mr. Rosenbaum were, in fact, political appointees.[131]

The Department does not share this interpretation.[132] In responses to discovery requests to the Commission, the Department contends:

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[129] In his testimony before the Commission, Assistant Attorney General Thomas Perez stated, "The judgment in this case to proceed in the way that was chosen was made by Steve Rosenbaum and ultimately by Loretta King based on a review of the totality of the circumstances." Perez Testimony, *supra* note 54, at 23.
[130] 5 U.S.C. § 3345 et seq.
[131] Under the Vacancies Reform Act, when there is a vacancy in a position that requires Senate approval, such as Assistant Attorney General for Civil Rights, the "President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity." Rubin, *supra* note 64.
[132] *See* Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights (Sept. 24, 2010), *available at* http://www.usccr.gov/NBPH/09-24-10_Blackwood.pdf.

> Career supervising attorneys [Loretta King and Steven Rosenbaum] who have over 60 years of experience at the Department between them decided not to seek relief against three other defendants after a thorough review of the facts and applicable legal precedent. The Department implemented that decision. Political considerations had no role in that decision and reports that political appointees interfered with the advice of career attorneys are false.[133]

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

> Consistent with the Department's practice, the attorney serving as Acting Assistant Attorney General for Civil Rights [Loretta King] informed Department supervisors of the Division's decisions related to the case. The Department supervisors [in the office of Associate Attorney General Thomas Perrelli] did not overrule that attorney.[134]

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

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

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

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

With regard to the original May 1 deadline, the index reflects that the Acting Deputy Assistant Attorney General for Civil Rights, Steve Rosenbaum, exchanged eight e-mails on April 30, 2009 with Sam Hirsch, a political appointee who was serving as a Deputy Associate Attorney General.[135] Mr. Hirsch reports directly to Thomas Perrelli, the Associate Attorney General, and third-highest official within the Department. These communications included Mr. Rosenbaum's "detailed response and analysis of the proposed draft filings"[136] as well as discussions regarding said drafts "and legal strategy and merits of NBPP litigation."[137]

The index also reflects that, on the same date, Mr. Hirsch reported developments in the NBPP case directly to Mr. Perrelli. These communications are described in the index as: "Emails forwarding and discussing draft filings for the pending NBPP litigation. Emails start with a discussion of proposed filings, and of the merits and legal arguments underlying

[135] *See* Judicial Watch *Vaughn* Index, *supra* note 70, at 5-8 (Doc. Nos. 13(a), 14(a), 17(a)-(f)).
[136] *Id.* at 6 (Doc. No. 14(a)).
[137] *Id.* at 7 (Doc. No. 17(a)).

them."[138] In addition, it is reported that Mr. Hirsch provided a "briefing on the current status of litigation and provid[ed] his opinion on the development of different approaches under consideration."[139] The description then indicates that, as to the latter communication: "Email is then forwarded within OASG [the Office of the Associate Attorney General] with comment and noting need to discuss."[140]

As the May 15 deadline approached, the index reflects that Mr. Rosenbaum and Mr. Hirsch were again in contact. Between May 8 and May 14, 2009, there were 10 e-mails between them.[141] These messages seem to indicate that Mr. Hirsch actively sought information and provided direction to Mr. Rosenbaum. The index summarizes a series of e-mails between the parties dated May 12, 2009 as follows: "DAAG [Rosenbaum] provides OASG in charge of CRT [Hirsch] with requested follow-up information and confirmation that additional actions would be conducted by Criminal Section Chief per his request."[142] Thereafter, on the day before the filing deadline, the index reflects that Mr. Rosenbaum provided Mr. Hirsch with "revised proposed draft documents for review and analysis."

These communications continued up to the last minute. As late as May 15, 2009, the day the motion for default judgment was due, the record reflects that Mr. Hirsch was overseeing edits to the pleadings to be filed with the court.[143]

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[138] *Id.* at 53 (Doc. No. 100(a)).
[139] *Id.* (Doc. No. 101(a)).
[140] *Id.*
[141] *See id.* at 21, 25-27, 29-30 (Doc. Nos. 36(a), 44(a), 49(a), 50(a)-(d), 55(b), 55(d) & 57(a)).
[142] *Id.* at 27 (Doc. Nos. 50(a)-(d)). In his testimony before the Commission, Mr. Coates, the Chief of the Voting Section, indicated that he had no knowledge of any participation by the Criminal Section in the decision making process. *See* Coates Testimony, *supra* note 2, at 54.
[143] DOJ Motion for Summary Judgment in Judicial Watch litigation, Document 11-3, p. 55 (Docs. No. 67 and 68).

The index also reflects that Mr. Perrelli was kept informed of the change in course in the litigation. On May 14, 2009, Mr. Perrelli and Mr. Hirsch shared updates on the status of the case. In one of these e-mails, it is suggested that Mr. Perrelli's office had been consulting with the Office of the Deputy Attorney General (ODAG), the second-highest office in the Department, then headed by David Ogden. The index provides the following summary: "Email asking for update on the NBPP litigation between officials in OASG [Office of the Associate Attorney General], and noting ODAG's [Ogden's] current thoughts on the case."[144]

The communications between Mr. Hirsch and Mr. Perrelli continued up through the court deadline of May 15, 2009. On e-mails of that date, Mr. Hirsch provided Mr. Perrelli with "the status of deliberations,"[145] updates "regarding edits to court papers,"[146] as well as "Emails forwarding and presenting legal analysis from CRT Appellate Section attorneys on questions presented from the CRT Front Office…"[147]

While the Department has refused to reveal the content of the various emails between the Civil Rights Division and Mr. Hirsch, and between Mr. Hirsch and Mr. Perrelli, the number, timing, and subject matter of such communications appear to reflect a level of

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[144] *Id.* at 53 (Doc. No. 102). It is unclear from this passage whether the use of the word "current" is meant to indicate that Mr. Ogden may have made prior comments on the case. The index reflects no other references to communications with ODAG.
[145] 104
[146] 106(c)
[147] Judicial Watch *Vaughn* Index, *supra* note 70, at 30 (Doc. No. 57(a)) (Doc. No. 103(a)).

participation by senior political appointees that is at odds with representations by the Department that senior career attorneys made the ultimate decision to override the opinions of the trial team and appellate section attorneys who supported seeking a default judgment as to all four NBPP defendants.

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

> The Attorney General was made generally aware by the then-Acting Assistant Attorney General for Civil Rights [Loretta King] and the Associate's staff that the Civil Rights Division was considering the appropriate actions to take in the *New Black Panther Party* litigation. The Associate Attorney General [Thomas Perrelli] likely provided a brief update to the Attorney General on the timetable for the Civil Rights Division's decision. The Attorney General did not make the decisions regarding any aspect of the *New Black Panther Party* litigation, including which claims to pursue or the scope of relief to seek.[148]

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

> On January 7, 2009, the day that the Civil Rights Division filed its complaint against the four defendants, the Department's press office notified the Executive Office of the President about a press release it issued on the filing of the case … The Department has identified no

[148] Supp. Interrog. Responses, *supra* note 56, at 5 (Apr. 16, 2010) (Supplemental Response to Interrogatory No. 6).

> other communication relating to this litigation with the Executive Office of the President prior to the May 18, 2009 court judgment enjoining Minister King Samir Shabazz and dismissing the three other defendants. The Department is aware of no information that might suggest that the Executive Office of the President had a role in any litigation decision in this case.[149]

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

In an effort to understand the normal decisionmaking process in DOJ, the Commission received testimony from the former Acting Associate Attorney General Gregory Katsas. Mr. Katsas described the normal decisionmaking process within the Department in cases like the NBPP litigation. He testified that he "would expect that OASG [the Office of Associate Attorney General, then held by Thomas Perrelli] was kept routinely apprised of significant

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[149] *Id.* at 5-6 (Supplemental Response to Interrogatory No. 15). *See also* Letter from _____, DOJ to Congressman Lamar Smith (Feb. 25, 2010) [need to locate source]. While there has been some speculation of additional contacts with the White House, these allegations remain unsubstantiated. *See* Editorial, *Panther Politics: White House Interference Derails Justice?*, WASH. TIMES, Jan. 19, 2010, at B01, *available* at http://www.washingtontimes.com/news/2010/jan/19/panther-politics/ (last visited Oct. 20, 2010).

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

developments in the [NBPP] litigation" and, moreover, that he "would expect that OASG played a far more active role in these decisions [to dismiss] than it likely played in its initial decision to file the case."[150] He explained:

> The initial decision – to file a straightforward and seemingly strong voter intimidation lawsuit – would not likely have raised concerns with OASG. In contrast, the decisions at the end of the case would have been anything but straightforward. They amounted to nothing less than a decision by DOJ, following a change in presidential administrations, to reverse legal positions asserted in a pending case. Such reversals are extremely rare – and for good reason: they inevitably undermine DOJ's credibility with the courts, and they inevitably raise suspicion that DOJ's litigating positions may be influenced by political considerations. Accordingly, while a new Administration obviously has wide discretion to change its enforcement priorities and even its litigating positions in new cases, it is extremely rare for DOJ to shift course so dramatically in the course of a pending case.
> Several considerations specific to the *New Black Panther Party* case would have exacerbated these general concerns. For one thing, DOJ did not merely abandon some of its claims in the course of ongoing and contested litigation; instead, it abandoned most of its claims after a default by all of the defendants, and an entry of that default pursuant to Federal Rule of Civil Procedure 55(a). I cannot think of any other instance when that has occurred. Moreover, the New Black Panther Party had endorsed President Obama in the 2008 election, and Mr. Jackson, during the events at issue, apparently was a registered poll watcher for the Democratic Party. Those facts inevitably would raise suspicion that the highly unusual decision to abandon a defaulted case was politically motivated, and that suspicion, in turn, would have heightened the sensitivity of deliberations within DOJ.
>
> For these reasons, I believe that OASG would have been actively involved in deliberations about whether to reverse positions in the *New Black Panther Party* litigation.[151]

[150] Katsas Statement, *supra* note 80, at 8-9.
[151] *Id.* at 9-10.

As of the date of this report, Judicial Watch has announced that it has filed another Freedom of Information Act lawsuit against the Department of Justice to obtain records relating to any meetings between Associate Attorney General Thomas Perrelli and White House officials regarding the NBPP lawsuit.[152]

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

During the course of this investigation, allegations appeared that the NAACP Legal Defense and Educational Fund ("NAACP Legal Defense Fund") had communicated with the Department regarding the course of the NBPP litigation. Such allegations raise concerns, inasmuch as outside influence might, at least in part, explain the abrupt reversal in policy relating to the litigation.[153]

As part of its discovery requests, the Commission sought information with regard to any contacts by the Department with outside third-parties including, specifically, Kristen Clarke of the NAACP Legal Defense Fund.[154] Although the Department has consistently raised assertions of privilege relating to internal decision making, no such privilege exists with regard to third-party contacts. In response to the Commission's interrogatory request, the

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

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

[154] *See* U.S. Comm'n on Civil Rights Discovery Requests to U.S. Dep't of Justice at 10, Dec. 8, 2009 (Interrogatory No. 12), *available at* http://www.usccr.gov/correspd/DISCOVERYREQUESTStoJosephHuntreNBPP.pdf [hereinafter "U.S.C.C.R. Discovery Requests"]. [Note that Clarke formerly worked at DOJ and when she worked there.]

Department indicated that it had "identified no communication, oral or otherwise, with Kristen Clarke of the NAACP Legal Defense Fund relating to this litigation prior to the May 18, 2009 court judgment enjoining Minister King Samir Shabazz and dismissing the three other defendants."[155]

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

> Kristen Clarke, Director of Political Participation at the NAACP Legal Defense Fund in Washington … confirmed to The Times that she talked about the case with lawyers at the Justice Department and shared copies of the complaint with several persons. She said, however, her organization was "not involved in the decision to dismiss the civil complaint."[156]

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

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

[155] Supp. Interrog. Responses, *supra* note 56, at 5 (Supplemental Response to Interrogatory No. 12).
[156] Seper, *supra* note 134.

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

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

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

QUESTION: And how did you learn that?

CLARKE: Through a phone call.

QUESTION: Who called who?

CLARKE: She called me.

* * *

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

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

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

CLARKE: No.

* * *

QUESTION: Can you tell me what Exhibit A is?

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

QUESTION: 2009, correct?

CLARKE: 2009. That's correct.

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

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

> QUESTION: And is it typical for Ms. Reed to send you just news clips of this kind?
>
> CLARKE: No.
>
> QUESTION: Did you talk to Ms. Reed about the content of this email?
>
> CLARKE: No, I did not.[157]
>
> * * *
>
> QUESTION: [B]etween the time of the first email on Exhibit A, January 13, 2009 and then July 31, 2009 [the day after *The Washington Times* article], do you recall having any conversations or any communications of any kind with anybody at DOJ about the New Black Panther litigation?
>
> CLARKE: Now again as I indicated earlier, I learned about the fact of the filing from a Justice Department attorney. I received the email that we just referenced that also make mention of the fact of filing. Beyond that, there were no additional contacts about the litigation itself.[158]

While Ms. Clarke confirmed that she did talk to a reporter for *The Washington Times*,[159] she denied that the reporting set forth in the article was accurate, and claimed that she had written to *The Washington Times* requesting a correction.[160] When asked what she had said to the reporter, however, Ms. Clarke refused to say.[161]

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

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

> She [Kristen Clarke] spoke to a voting section attorney Laura Coates (no relation to Chris Coates) about the case at a Justice Department function. Clarke asked Coates, who she assumed was sympathetic, when the Panther case was going to be dismissed. The comment suggested that the NAACP had been pushing for such an outcome, and Coates reported the conversation to her superiors.[162]

In response to this report, on June 15, 2010 the Commission requested that the Department determine "whether Laura Coates had a conversation with Ms. Clarke, the date thereof, the content of the conversation, and whether, as represented in the… article, the conversation was reported to Ms. Coates' superiors."[163] In a letter dated June 30, 2010, it was represented that "the Department of Justice has re-examined the accuracy of the Supplemental Response to Interrogatory No. 12" but "determined that the prior response remains accurate and therefore requires no amendment." [164]

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

> QUESTION: Okay. I want to make sure or follow up on one of the names I mentioned before. To be clear, did you – are you sure that you did not have a conversation with Laura Coats [sic] of the Justice Department with regard to the litigation?

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[162] Rubin, *supra* note 63.
[163] Letter from David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights, to Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice (June 15, 2010), *available at* http://www.usccr.gov/NBPH/StatEnforce_06-15-10.pdf.
[164] Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice to David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights (June 30, 2010), *available at* http://www.usccr.gov/correspd/6-30-10_Hunt2Blackwood.pdf.

> CLARKE: As I indicated earlier, no. I recall no such conversation with her.[165]

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

> [I]t was reported to me that Ms. Clarke approached an African-American attorney who had been working in the Voting Section for only a short period of time in the Winter of 2009, before the dismissals in the *Panther* case and asked that attorney when the *New Black Panther Party* case was going to be dismissed. The Voting Section attorney to whom I refer was not even involved in the *Panther* case.
>
> This reported incident led me to believe in 2009 that the Legal Defense Fund Political Participation Director, Ms. Clarke, was lobbying for the dismissal of the *New Black Panther Party* case before it was dismissed.[166]

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

> [O]ne of the groups that had opposed the Civil Rights Division's prosecution of the *Ike Brown* case the most adamantly was the NAACP Legal Defense Fund, through its Director of Political Participation, Kristen Clarke. Ms. Clarke has spent a considerable amount of time attacking the Division's decision to file and prosecute the *Ike Brown* case.[167]

Subsequent to Mr. Coates' testimony, the NAACP Legal Defense Fund submitted a letter to the Commission denying that it had either "encouraged or lobbied the Department of Justice .

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[165] Clarke Deposition, *supra* note 158, at 33; *see also id.* at 19.
[166] Coates Testimony, *supra* note 2, at 22-23.
[167] *Id.* at 21.

. . to drop or take some other action with respect to DOJ's New Black Panther Party litigation."[168] The letter further provided:

> Neither LDF nor any of its staff ever urged DOJ to take any action with respect to the New Black Panther Party litigation. LDF played no role in, and conducted no advocacy around, DOJ's New Black Panther Party litigation. Statements that LDF, or any of its staff, sought to influence the manner or to limit the scope of the litigation in any respect are false.[169]

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

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

[169] *Id.*

PART III

PART III The Civil Rights Division and Race-Neutral Enforcement

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

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

The troubling nature of these allegations of misconduct in the Division might explain why some anonymous sources within the Department have attempted to paint Coates as a disgruntled right-wing ideologue.[170] A review of his career, however, speaks for itself and paints a picture at odds with his detractors' characterization.

Before beginning his work at the Department, Mr. Coates served with the Voting Rights Project of the American Civil Liberties Union in Atlanta, Georgia. During his time there, he

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

litigated cases on behalf of African-American clients, particularly those challenging at-large election procedures. In 1993 he argued a case before the United States Supreme Court on behalf of six African-American citizens in the local NAACP chapter in Bleckley County, Georgia.[171] For his service with the ACLU he was awarded the Thurgood Marshall Decade Award by the Georgia Conference of the NAACP, as well as an award from the Georgia Environmental Association for his representation of African-American clients opposing the installation of landfill in their neighborhood.

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

i. The Decision to Testify

In November 2009, the Commission issued subpoenas to two members of the trial team, Christopher Coates, the Chief of the Voting Section, and J. Christian Adams. Despite the statutory mandate requiring federal agencies to cooperate with the Commission,[172] the Department directed Mr. Coates and Mr. Adams not to appear before the Commission. Mr.

[171] *See* Holder v. Hall, 512 U.S. 874 (1994).
[172] *See* 42 U.S.C. § 1975b(4)(e): "All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties."

Adams indicated that the Department told him that there was no need to comply with the Commission's subpoena because the Department had no intention of enforcing it.[173]

Despite numerous demands that the Department allow Mr. Coates and Mr. Adams to testify, the Department refused to change its position.[174] In the meantime, in January 2010, Mr. Coates was transferred to the U.S. Attorney's Office for South Carolina.

This impasse changed following the testimony of Assistant Attorney General Thomas Perez before the Commission. Although Mr. Perez had not been at DOJ during the NBPP litigation, he was selected by the Department as its representative to testify on the issue. As part of his preparation, a meeting was held the day before between Mr. Perez and several members of the trial team. Participating in the meeting were Mr. Perez, Mr. Coates (by telephone), Mr. Adams, and Robert Popper. Other Department staff were also present. Both Mr. Coates and Mr. Adams have testified that, during this meeting, they discussed the merits of the NBPP litigation.[175]

This meeting had consequences. Both Mr. Coates and Mr. Adams have testified that, despite their providing the Assistant Attorney General with detailed information about the NBPP

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[173] *See* Adams Testimony, *supra* note 51, at 9, 83; *see also* 42 U.S.C. § 1975a(e)(2). Adams also rebutted allegations that he was a disgruntled employee, testifying that he had received a promotion two weeks before he resigned. *See* Adams Testimony, *supra* note 51, at 70.

[174] In a letter to Congressman Frank Wolf, the Department argued that "The disclosure of internal recommendations and deliberations would have a chilling effect on the open exchange of ideas, advice and analyses that is essential to our decisionmaking process. Based on this policy, the Department declined to authorize Mr. Coates to testify before the Commission in connection with the Commission's review of the Department's actions in *United States v. New Black Panther Party for Self Defense*, Civil Action No. 2:09-cv-0065." [Weich letter to Wolf dated 10/15/10]

[175] *See* Adams Testimony, *supra* note 51, at 68-69; Coates Testimony, *supra* note 2, at __. This meeting, and subsequent events, are discussed more fully *infra* _____.

litigation, Mr. Perez's testimony before the Commission was inaccurate.[176] As a result of the nature of Mr. Perez's testimony, Mr. Adams submitted his resignation to the Department later the same day.[177] After formally leaving the Department, Mr. Adams then complied with the pending subpoena and testified before the Commission on July 6, 2010.[178]

A similar process occurred with regard to Mr. Coates. Although he is still currently employed by the Department, he testified that he was troubled by the inaccuracies of Mr. Perez's testimony before the Commission. He did not take immediate action, however, because he was hopeful that revisions would be made.[179] When this did not occur, he decided that he should appear before the Commission to correct the record. He did so on September 24, 2010. Explaining his reasons for appearing before the Commission, he testified:

> I do not lightly decide to comply with your subpoena in contradiction to the DOJ's directives to me not to testify. I had hoped that this controversy would not come to this point. However, I have determined that I will not fail to respond to your subpoena and thereby fail to give this Commission accurate information pertinent to your investigation.
>
> Quite simply, if incorrect representations are going to successfully thwart inquiry into the systemic problems regarding race-neutral enforcement of the Voting Rights Act by the Civil Rights Division, problems that were manifested in the DOJ's disposition of the *New Black Panther Party* case, that end is not going to be furthered or accomplished by my sitting idly or silently by at the direction of my supervisors while incorrect information is provided.

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[176] *See* Coates Testimony, *supra* note 2, at 8-10; Adams Testimony, *supra* note 51, at 68-69.
[177] *See* Adams Testimony, *supra* note 51, at 69-70.
[178] He explained to the Commission he would not testify about "genuine deliberative process" for which the Department had asserted a privilege. *See id.* at 10-11.
[179] Coates Testimony at ___, U.S. Comm'n on Civil Rights, Sept. 24, 2010, *available at* http://www.usccr.gov/NBPH/TestimonyChristopherCoates_09-24-10.pdf.

> I do not believe that I am professionally, ethically, legally, much less morally bound to allow such a result to occur. In addition, in giving this testimony, I am claiming the protections of all applicable federal whistleblower statutes.[180]

ii. Hostility to Race-Neutral Enforcement

Both Mr. Coates and Mr. Adams testified that the decisions in the NBPP case should not be viewed in isolation; that it needed to be viewed in the context of overall hostility by many in the Civil Rights Division to race-neutral enforcement of the Voting Rights Act.[181] This portion of the report relates to their testimony on this topic.

Mr. Coates and Mr. Adams testified that the overwhelming number of cases on which they worked while at the Department involved the protection of minority rights. On two occasions, however, they worked on cases in which the victims were white and the defendants were black.[182] These two cases were the Ike Brown case and the New Black Panther Party litigation.[183] In the Ike Brown case, the Department filed a civil suit against Mr. Brown for violation of the Voting Rights Act. It was alleged that Mr. Brown, who is black, systematically violated the rights of whites and blacks in Noxubee County, Mississippi. The matter was tried, won, and successfully defended on appeal.[184]

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[180] Coates Testimony, *supra* note 2, at 10-11.
[181] *See* J. Christian Adams, *PJM Exclusive: Unequal Law Enforcement Reigns at Obama's DOJ*, PAJAMAS MEDIA, June 28, 2010, http://pajamasmedia.com/blog/j-christian-adams-you-deserve-to-know-%E2%80%94-unequal-law-enforcement-reigns-at-obamas-doj-pjm-exclusive/ (last visited Oct. 20, 2010); [need Coates cite]
[182] *See* Adams Testimony, *supra* note 51, at 44, 49.
[183] *Id.* at 49.
[184] *See* United States v. Brown, 494 F. Supp.2d 440 (S.D. Miss. 2007), *aff'd*, 561 F.3d 420 (5th Cir. 2009).

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

> To understand what occurred in the *NBPP* case, those action [sic] must be placed in the context of *United States v. Ike Brown et al.* Prior to the filing of the *Brown* case in 2005, the CRD [Civil Rights Division] had *never* filed a single case under the VRA [Voting Rights Act] in which it claimed that white voters had been subjected to racial discrimination by defendants who were African American or members of other minority groups… I am very familiar with the reaction of many employees, both line and management attorneys and support staff in both the CRD and the Voting Section, to the *Ike Brown* investigation and case because I was the attorney who initiated and led the investigation in that matter and was the lead trial attorney throughout the case in the trial court.[185]

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

- Attorneys refused to work on the Ike Brown case. At least one attorney stated, "I'm not going to work on the case because I didn't join the voting section to sue black people."[186]

[185] Statement of Christopher Coates at 3, U.S. Comm'n on Civil Rights, Sept. 24, 2010, *available at* http://www.usccr.gov/NBPH/TestimonyChristopherCoates_09-24-10.pdf (emphasis in original) [hereinafter "Coates Statement"].
[186] *See* Adams Testimony, *supra* note 51, at 49. Coates Statement, *supra* note 185, at 5; *see also* von Spakovsky Affidavit, *supra* note 80, at 2-3 (stating that Coates told von Spakovsky that lawyers refused to work on the Ike Brown case).

- Mark Kappelhoff, the chief of the Criminal Section, at a meeting of the chiefs of the Civil Rights Division, allegedly stated about the Ike Brown case, "That's the case that has gotten us into many problems with civil rights groups."[187]

- Robert Kengle, deputy in the Voting Section, allegedly stated to Mr. Coates during a trip to investigate the Ike Brown case, "Can you believe we are being sent down to Mississippi to help a bunch of white people?"[188]

- Attorneys in the civil rights division allegedly told Adams that "until blacks and whites achieved economic parity in Mississippi, we had no business bringing this case." A similar comment was made by a career attorney to Mr. Coates.[189]

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[187] Adams Testimony, *supra* note 51, at 54; *see also* Coates Statement, *supra* note 185, at 6.

[188] Adams Testimony, *supra* note 51, at 55; *see also* Coates Testimony, *supra* note 2, at 4, 103; von Spakovsky Affidavit, *supra* note 80, at 3. In a declaration submitted to the Commission in response to Mr. Coates' testimony, Mr. Kengle stated, in part:

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

He further stated:

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

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

Shortly after Mr. Kengle submitted his declaration, Mr. von Spakovsky submitted a response challenging many of Mr. Kengle's representations. *See* von Spakovsky letter of October 28, 2010. [need link]

- A non-lawyer minority employee at the Department was "relentlessly harassed by Voting Section staff for his willingness as a minority to work on the case of *United States v. Ike Brown*."[190]

- "Others assigned to the case were harassed in other ways, such as being badgered and baited about their evangelical religious views or their political beliefs. In these instances, the victimized employee was openly assumed to espouse various political positions hostile to civil rights, simply because he worked on this case."[191]

- Adams testified: "There was outrage that was pervasive that the laws would be used against the original beneficiaries of the civil rights laws. Some people said 'we don't have the resources to do this. We should be spending our money elsewhere.' And that was how they would cloak some of these arguments."[192]

- In another instance, "[a]nother deputy in the section said in the presence of Mr. Coates, 'I know that Ike Brown is crooked and everybody knows that, but the resources of the division should not be used in this way.'"[193]

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[189] Adams Testimony, *supra* note 51, at 54; *see also* Coates Testimony, *supra* note 2, at 16.
[190] Adams Testimony, *supra* note 51, at 56-57, 93; *see also* Coates Testimony, *supra* note 2, at 6, 17. Mr. Coates also indicated that this treatment extended to the harassed employee's mother. *See id.*
[191] Adams Testimony, *supra* note 51, at 57; *see also* von Spakovsky Affidavit, *supra* note 80, at 3-4 (discussing harassment of employees).
[192] Adams Testimony, *supra* note 51, at 58.
[193] Coates Testimony, *supra* note 2, at 102 (statement by David Blackwood).

As part of his testimony, Mr. Adams indicated that he had heard a report that Joe Rich, who was then Chief of the Voting Section, had allegedly altered a memorandum prepared by Mr. Coates that urged the filing of a suit against Ike Brown. Mr. Adams testified that he had heard Mr. Rich "omitted all of the discussion that Mr. Coates made about why a civil lawsuit was the best course of action" and made it appear that Mr. Coates only supported monitoring the situation.[194] Following this testimony, Mr. Rich submitted a declaration to the Commission in which he countered many of Mr. Adams' general allegations and specifically denied any alleged revisions to Mr. Coates' memorandum recommending that a civil suit be filed against Ike Brown.[195] Mr. Rich stated: "No recommendation made by Mr. Coates was removed or deleted from this memo."[196]

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

> Some time [sic], as best I recall, in the Winter of 2003 or 2004 . . . I wrote a preliminary memorandum summarizing the evidence that we had to that point and made a recommendation as to what action to take in Noxubee County. In that memorandum, I recommended that the Voting Section go forward with an investigation under the Voting Rights Act and argued that a civil injunction against Ike Brown and the local Democratic Committee was the most effective way of stopping the pattern of voting discrimination that I had observed.

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[194] *See* Adams Testimony, *supra* note 51, at 56.
[195] *See* Declaration of Joseph D. Rich, Aug. 23, 2010, *available at* http://www.usccr.gov/NBPH/RichDeclaration_08-23-10.pdf.
[196] *Id.* Mr. Adams' version of events was corroborated by Hans von Spakovsky, former counsel to the Assistant Attorney General for Civil Rights, in his affidavit submitted to the Commission. *See* von Spakovsky Affidavit *supra* note 80, at 3.

> I forwarded this memorandum to Joe Rich, who was Chief of the Voting Section at that time. I later found out that Mr. Rich had forwarded the memorandum to the Division front office, but he had omitted the portion of the memorandum in which I discussed why it was best to seek a civil injunction in the *Brown* case. Because I am aware that Mr. Rich and Mr. Hans von Spakovsky have filed conflicting affidavits on this point with this Commission, I believe that I am at liberty to address this issue without violating DOJ privileges.
>
> I want to underscore that my memorandum in which Mr. Rich omitted portions was not the subsequent justification memorandum that sought approval to file the case in Noxubee County, but was a preliminary memorandum that sought permission to go forward with the investigation.
>
> Nevertheless, it is my clear recollection that Mr. Rich omitted a portion of my memorandum, a highly unusual act, and that I was later informed by the Division front office that Mr. Rich had stated that the omission was because he did not agree with my recommendation that the investigation needed to go forward or that a civil injunction should be sought. Nevertheless, approval to go forward with the investigation was obtained from the Bush administration Civil Rights Division front office in 2004.[197]

In response to the testimony of Mr. Coates, Mr. Rich submitted a second declaration in which he contends that Mr. Coates' version of events is also in error.[198]

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

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[197] Coates Testimony, *supra* note 2, at 14-15; *see also* von Spakovsky Affidavit, *supra note* 80; Hans von Spakovsky, *Enough Is Enough, Joe Rich: An Uncivil Man from the Civil Rights Division*, PAJAMAS MEDIA, Sept. 20, 2010, http://pajamasmedia.com/blog/enough-is-enough-joe-rich-an-uncivil-man-from-the-civil-rights-division/ (last visited Nov. 9, 2010).

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

That opposition to the *Ike Brown* case existed within the Civil Rights Division is further bolstered by an article that appeared in *The Washington Post* subsequent to Mr. Coates and Mr. Adams testifying before the Commission. In this article, attorneys within the Civil Rights Division confirmed that "the decision to bring the Brown case caused bitter divisions in the voting section and opposition from civil rights groups:"[199]

> Three Justice Department lawyers, speaking on the condition of anonymity because they feared retaliation from their supervisors, described the same tensions, among career lawyers as well as political appointees. Employees who worked on the Brown case were harassed by colleagues, they said, and some department lawyers anonymously went on legal blogs "absolutely tearing apart anybody who was involved in that case," said one lawyer.
>
> "There are career people who feel strongly that it is not the voting section's job to protect white voters," the lawyer said. "The environment is that you better toe the line of traditional civil rights ideas or you better keep quiet about it, because you will not advance, you will not receive awards and you will be ostracized."[200]

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

Mr. Coates described the following:

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[199] Markon & Thompson, *supra* note 83.
[200] *Id.*

> When I was Chief of the Voting Section in 2008, and because I had experienced, as I have described, employees in the Voting Section refusing to work on the *Ike Brown* case, I began to ask applicants for trial attorney positions in their job interviews whether they would be willing to work on cases that involved claims of racial discrimination against white voters as well as cases that involved claims of racial discrimination against minority voters. For obvious reasons, I did not want to hire people who were politically or ideologically opposed to the equal enforcement of the voting statutes the Voting Section is charged with enforcing.
>
> The asking of this question in job interviews did not ever to my knowledge cause any problems with applicants to whom I asked that question and, in fact, every applicant to whom I asked the question responded that he or she would have no problem working on a case involving white victims, such as the Ike Brown case.
>
> However, word that I was asking applicants that question got back to Loretta King. In the spring of 2009, Ms. King, who had by then been appointed the Acting Assistant Attorney General for Civil Rights by the Obama administration, called me to her office and specifically instructed me that I was not to ask any other applicants whether they would be willing to, in effect, race-neutrally enforce the Voting Rights Act.
>
> Ms. King took offense that I was asking such a question of job applicants and directed me not to ask it because I do not believe she supports equal enforcement of the provisions of the Voting Rights Act and she has been highly critical of the filing and the civil prosecution of the *Ike Brown* case.[201]

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

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

[201] Coates Testimony, *supra* note 2, at 19-20.

> one of the Voting Section trial attorneys asked Ms. Fernandes what criteria would be used to determine what type of Section 2 cases the Division front office would be interested in pursuing.
>
> Ms. Fernandes responded by telling the gathering there that the Obama administration was only interested in bringing traditional types of Section 2 cases that would provide equality for racial and language minority voters. And then she went on to say that this is what we are all about or words to that effect.
>
> When Ms. Fernandes made that statement, everyone in the room, talking about the conference room on the seventh floor, where the Voting Section is located, understood exactly what she meant: no more cases like *Ike Brown* and no more cases like the *New Black Panther Party* case.
>
> Ms. Fernandes reiterated that directive in another meeting held in December 2009 on the subject of federal observer election coverage, in which she stated to the entire group in attendance that the Voting Section's goal was to ensure equal access for voters of color or language minority.[202]

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

> QUESTION: The Justice Department has never denied that Jule [sic] Fernandes said the things that multiple witnesses have alleged about not enforcing civil rights laws equally. Did you ask the DOJ if she said it or not, and what do you think of their response?

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

> REPORTER: Hi, thanks for the chat. Yes I asked the Justice Department several times if she said it. Their response was to say that their policy is to enforce the laws equally, without regard to race. I can't really "assess" their response, because that gets into personal opinion, and I don't do that. I will say that they never directly answered the question. It is something that Mr. Coates had alleged, and as we wrote, Ms. Fernandez declined to comment.[203]

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

> Deputy Assistant Attorney General Julie Fernandes, when asked about Section 8 [of the National Voter Registration Act],[204] said, 'We have no interest in enforcing this provision of the law. It has nothing to do with increasing turnout, and we are just not going to do it.' Everybody in the Voting Section heard her say it.[205]

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

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

[204] According to Adams, "Section 8 is a general obligation to do [voter] list maintenance. In other words, no dead people can be on the voter rolls, no duplicates, people who have moved away. They have to be taken off the rolls." Adams Testimony, *supra* note 51, at 63-64.

[205] *Id.* at 64; *see also id.* at 76-77, 96; Coates Testimony, *supra* note 2, at 33-35. Before her appointment to the Justice Department, Ms. Fernandes had voiced objections regarding enforcement of § 8. *See generally Voting Section of the Civil Rights Division of the U.S. Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2007), *available at* http://judiciary.house.gov/hearings/printers/110th/38637.PDF (last visited Oct. 20, 2010). [Is there a pincite?]

> In June 2009, the Election Assistance Commission issued a biannual report concerning what states appeared not to be in compliance with Section 8's list maintenance requirements.
>
> The report identified eight states that appeared to be the worst in terms of their noncompliance with the list maintenance requirement of Section 8.
>
> These were states that reported that no voters have been removed from any of their voters' lists in the last two years. Obviously this is a good indication that something is not right with the list maintenance practices in a state.
>
> As Chief of the Voting Section, I assigned attorneys to work on this matter. And in September 2009, I forwarded a memo to the Division front office asking for approval to go forward with the Section 8 list maintenance investigations in these states.
>
> During the time that I was Chief, no approval was given to this project. And it is my understanding that approval has never been given for that Section 8 list maintenance project to date. That means that we have entered the 2010 election cycle with eight states appearing to be in major noncompliance with list maintenance requirements of Section 8 of the NVRA. And, yet, the Voting Section, which has the responsibility to enforce that law, has yet to take any action.
>
> From these circumstances, I believe that Ms. Fernandes's statement to the Voting Section in November 2009 not to, in effect, initiate Section 8 list maintenance enforcement activities has been complied with.[206]

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

> If anyone doubts that the Civil Rights Division and the Voting Section have failed to enforce the Voting Rights Act in a race-neutral manner,

[206] Coates Testimony, *supra* note 2, at 36.

> one only has to look at the enforcement of Section 5's pre-clearance requirements.
>
> The statutory language of Section 5 speaks in terms of protecting all voters from racial discrimination. But the Voting Section has never interposed an objection under Section 5 to a voting change on the ground that it discriminated against white voters in the 45-year history of the Act.
>
> This failure includes no objections in the many majority-minority jurisdictions in the covered states. Indeed, the personnel in the Voting Section's unit which handles Section 5 submissions are instructed only to see if the voting change discriminates against racial, ethnic, and language minority voters.
>
> This practice of not enforcing Section 5's protections for white voters includes jurisdictions, such as Noxubee County, Mississippi, where the *Ike Brown* case arose, where white voters are in the racial minority. It is in those jurisdictions that the Voting Section's failure to apply Section 5's protections for white minority voters is particularly, in my opinion, problematic.
>
> On two occasions while I was Chief of the Voting Section, I tried to persuade officials at the Division level to change this policy so that white voters would be protected by Section 5 in appropriate circumstances, but to no avail. I believe that present management at both the Division and the Section are opposed to the race-neutral enforcement of Section 5 and continue to enforce those provisions in a racially selective manner.[207]

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

> There should be no misunderstanding: the Civil Rights Division is firmly committed to the evenhanded application of the law, without

[207] *Id.* at 24-26.

> regard to the race of the victims or perpetrators of unlawful behavior. Any suggestion to the contrary is simply untrue.[208]

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

> Civil rights officials from the Bush administration have said that enforcement should be race-neutral. But some officials from the Obama administration, which took office vowing to reinvigorate civil rights enforcement, thought the agency should focus on cases filed on behalf of minorities.
>
> "The Voting Rights Act was passed because people like Bull Connor were hitting people like John Lewis, not the other way around," said one Justice Department official not authorized to speak publicly, referring to the white Alabama police commissioner who cracked down on civil rights protesters such as Lewis, now a Democratic congressman from Georgia.[209]

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

iii. The Connection with the New Black Panther Party Lawsuit

In prior sections of this report, the factual arguments raised by the Department to justify the reversal in course of the NBPP litigation were examined. These arguments were challenged by the testimony of Christopher Coates and J. Christian Adams, and often at odds with internal DOJ documents received independently by the Commission. None of this evidence,

[208] See Perez letter of August 11, 2010 to Gerald Reynolds.
[209] Markon & Thompson, *supra* note 82.

however, presented a motive as to why the Department would reverse its course even though the NBPP defendants had conceded liability.

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

> It is my opinion that the disposition of the Panther case was ordered because the people calling the shots in May 2009 were angry at the filing of the *Brown* case and angry at the filing of the *Panther* case. That anger was the result of their deep-seated opposition to the equal enforcement of the Voting Rights Act against racial minorities and for the protection of white voters who had been discriminated against.
>
> Ms. King, Mr. Rosenbaum, Mr. Kappelhoff, Ms. Clarke, a large number of the people working in the Voting Section and in the Civil Rights Division and many of the liberal [interest] groups at work in the civil rights field believe incorrectly but vehemently that enforcement of the protections of the Voting Rights Act should not be extended to white voters but should be extended only to protecting racial, ethnic, and language minorities.
>
> The final disposition of the *Panther* case, even in the face of a default by the defendants, was caused by this incorrect view of civil rights enforcement, and it was intended to send a direct message, in my opinion, to people inside and outside the Civil Rights Division. That message is that the filing of voting cases like the *Ike Brown* case and the *New Black Panther Party* case would not continue in the Obama administration.
>
> The disposition of the *Panther* case was not required by the facts developed during the case or the applicable case law, as has been claimed, but was because of this incorrect view of civil rights enforcement that is at war with the statutory language of the Voting

> Rights Act, which is written in a race-neutral manner, and at war with racially fair enforcement of federal law.[210]

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

iv. Reducing the Authority of Chris Coates

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

> ADAMS: And at this time period, Rosenbaum was reviewing absolutely everything that Coates was doing, everything. And so he had a heavy workload because he was essentially acting in large status as the chief of the Voting section in place of Coates. So I can understand that Mr. Rosenbaum was probably backed up.
>
> QUESTION: All right. What you just mentioned, that Mr. Rosenbaum was monitoring Mr. Coates, when did that begin?
>
> ADAMS: After the inauguration and Mr. Rosenbaum moved into that position...
>
> QUESTION: All right. So it wasn't just the *Black Panther* case that precipitated this dispute or being reviewed. It was shortly after the election that Mr. Rosenbaum was overseeing Mr. Coates -- how do you put it -- rather closely or excessively closely?

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

> ADAMS: That's the gentle way... [E]very single paper that would go to court would have to be reviewed by Mr. Rosenbaum, which was a departure from the previous eight years, at least, the previous four years in my personal experience. No front office in my mind would have ever had the time to do that sort of thing, but they found it.[211]

Mr. Coates described the situation as follows:

> QUESTION: When Mr. Adams was here and testified, he indicated that after the election, when President Obama was elected, you were rather closely supervised. Could you describe what happened after the election?
>
> COATES: The relationships, the relationship, between Ms. King and Mr. Rosenbaum and I were not good. That relationship was not good.
>
> And as the -- as I continued to serve in the capacity as the Chief of the Voting Section, my -- the responsibilities and powers that a section chief in the Civil Rights Division normally has, such as assigning particular lawyers to cases, assigning the particular deputies to supervise cases, things of that sort, that those powers were taken away as the months went by in 2009, after the Obama administration came to power in January of 2009.[212]

Mr. Coates testified that his authority continued to diminish:

> [M]y powers to run the Section, to assign cases, to assign deputies, was being substantially reduced to where I believe that, by the late Fall of 2009, that I was serving as Chief only in name and that the decisions were being made by other management people in the Section and at the Division level.

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[211] Adams Testimony, *supra* note 51, at 41-42. The index produced in the *Judicial Watch* litigation reflects that all draft pleadings relating to the decision to limit the NBPP litigation were reviewed not only by Mr. Rosenbaum, but by members of the office of the Associate Attorney General as well. *See* Judicial Watch *Vaughn* Index, *supra* note 70, at [cite].

[212] Coates Testimony, *supra* note 2, at 48-49.

> And, of course, as a manager who has -- who is blamed when things go wrong, you don't want to be in a situation where you're supposed to be running a section when, in fact, you're not. And so I took that into consideration.
>
> I took into consideration I knew that a number of people in the Section did -- in the Division, I mean, the managers in the Division, some of them, did not want me as the Chief, including Ms. King, quite frankly, Mr. Rosenbaum, quite frankly.
>
> And there were a number of the people in the civil rights groups who did not want me as Chief of the Voting Section. And some of those groups, as I have described, have significant influence, I believe, in the Obama administration.[213]

At this stage in this investigation, the very serious allegations raised by Mr. Coates and Mr. Adams have been partially corroborated. Former Department attorneys Karl Bowers,[214] Hans von Spakovsky,[215] Asheesh Agarwal, Mark Corallo and Robert Driscoll[216] have all concurred that a generally hostile attitude toward race-neutral enforcement of civil rights laws exists among many career attorneys and some specific incidents of harassment have also been corroborated. Efforts to obtain evidence relating to the current administration's policies regarding race-neutral enforcement, however, have been met with extraordinary resistance by the Department.

The nature of these charges paints a picture of a Civil Rights Division at war with its core mission of guaranteeing equal protection of the laws for all Americans. During the Bush

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[213] *Id*. at 64-65.
[214] *See* Sworn Statement of Karl S. Bowers, Jr., Jul. 15, 2010, *available at* http://www.usccr.gov/NBPH/BowersStatement_07-15-10.pdf.
[215] *See* von Spakovsky Affidavit, *supra* note 80.
[216] [need link to statement]

administration, the press reported ideological conflict within the Division.[217] If the testimony before the Commission is true, the current conflicts extend beyond policy differences to encompass allegations of inappropriately selective enforcement of laws, harassment of dissenting employees, and alliances with outside interest groups, at odds with the rule of law. These issues need to be thoroughly investigated and properly resolved or public confidence in the Civil Rights Division will be seriously eroded.[218]

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

[217] *See* OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION (2008), *available at* http://www.justice.gov/oig/special/s0901/final.pdf (last visited Oct. 20, 2010); OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), *available at* http://www.justice.gov/oig/special/s0807/final.pdf (last visited Oct. 20, 2010).

[218] By letter dated September 13, 2010, Glenn A. Fine, the Inspector General for the Department of Justice, provided notice to Congressmen Lamar Smith and Frank Wolf that his office was opening an investigation into "the types of cases brought by the Voting Section and any changes in these types of cases over time; any changes in Voting Section enforcement policies or procedures over time; whether the Voting Section has enforced the civil rights laws in a non-discriminatory manner; and whether any Voting Section employees have been harassed for participating in the investigation or prosecution of particular matters." [need citation/link]

B. Prior Claims Of Voter Intimidation

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

> One example is the recent instance we have identified that most clearly resembles the facts in [the NBPP case]. The Civil Rights Division received a complaint from a national civil rights organization regarding a matter in Pima, Arizona alleging that during the 2006 election, three well-known anti-immigration advocates – one of whom was wearing a gun – allegedly intimidated Latino voters at a polling place by approaching several persons, filming them, and advocating against printing voting materials in Spanish. In that instance, the Department declined to bring any action for alleged voter intimidation.[219]

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

> Volunteer election monitors say three men armed with a video camera and a gun were intimidating voters at various polling stations throughout Tucson during voting on Tuesday.
>
> From about 9:45 a.m. to noon, the men approached Hispanic voters as they attempted to enter Iglesia Bautista Kairos . . . said Diego Bernal, a lawyer with the Mexican American Legal Defense Fund.

[219] Perez Statement, *supra* note 54, at 3.

> * * *A third man, wearing an American flag T-shirt and camouflage shorts, stood nearby with his hand on a handgun in a holster strapped around his hips, he said.
>
> * * *
>
> "It's pure, old-fashioned voter intimidation," he said. "If shoving a videotape [sic] in your face while someone with a gun stands next to you isn't intimidation, I don't know what is."[220]

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

> [A] Glock 9mm on his hip, and a bullhorn to amplify his outrage, Roy Warden . . . emerged this spring as one of the country's most controversial, volatile, and, many believe, dangerous characters of the anti-immigration movement. Along with . . . Russ Dove, a former militia leader and convicted car thief . . . Warden has burned and trampled Mexican flags in public, nearly started at least one riot, regularly wreaked havoc on Tucson City Council proceedings, and E-mailed a death threat to a prominent local public defender.[221]

Another press report presented a different version of events, claiming that only one man was carrying a gun, that he never came within 150 feet of any polling locations, and that he never had any interactions with voters.[222]

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[220] Claudine Lomonaco, *Anti-Immigrant Activists Accused of Voter Harassment*, TUCSON CITIZEN, Nov. 7, 2006, *available at* http://tucsoncitizen.com/morgue/2006/11/07/31837-anti-immigrant-activists-accused-of-voter-harassment/ (last visited Oct. 20, 2010).

[221] Southern Poverty Law Center, *Deadly Force*, INTELLIGENCE REPORT, fall 2006, *available at* http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2006/fall/deadly-force?page=0,0 (last visited Oct. 20, 2010).

[222] *See* Quin Hillyer, *First Democratic Congressman Calls for Charges Against Black Panthers*, WASH. TIMES WATER COOLER, July 27, 2010, http://www.washingtontimes.com/blog/watercooler/2010/jul/27/first-democratic-congressman-calls-charges-against/ (last visited Oct. 20, 2010).

At this stage, the extent of the investigation undertaken by the Department with regard to the incident in Pima is unknown. In addition, the Commission has no information relating to the decisionmaking process that led to the determination not to pursue the matter federally. In their testimony before the Commission, J. Christian Adams indicated that he had no connection with the case,[223] while Christopher Coates had only a limited knowledge of what had occurred.[224] In any case, this is an additional area of inquiry that should be included as part of this investigation.[225]

[223] *See* Adams Testimony, *supra* note 51, at 72.
[224] *See* Coates Testimony, *supra* note 2, at 86-90. Coates testified, "I learned about it after it occurred and after it came to the Department. So I can talk to you more about it in 2008 than I can 2006 and 2007." He then described what knowledge he had about the case. *Id.* at 87.
[225] Other allegations of voter intimidation that were not ultimately pursued by DOJ include a cross-burning incident in Grand Coteau, Louisiana and mailings targeted at immigrants in Orange County, California. These also may be proper areas of inquiry.

PART IV

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

A. Summary of Commission Information Requests and Department Responses

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

In accomplishing these tasks, Congress gave the Commission two main tools. First, Congress mandated that "All federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties."[226] Second, the Commission was granted the power to "issue subpoenas for the attendance of witnesses and the production of written or other matter."[227] The Commission, however, does not have express authority to enforce its own subpoenas. Instead, the relevant statute provides that it is "the Attorney General [who] may in a Federal court . . . obtain an appropriate order to enforce the subpoena."[228]

[226] 42 U.S.C. § 1975b(e).
[227] 42 U.S.C. § 1975a(e)(2).
[228] *Id.*

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

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

As more fully described below, the inability to appeal to an independent authority to enforce the Commission's information requests leaves the Justice Department as the sole arbiter of what will be produced. This is a situation of particular concern when the Department's enforcement policies are under scrutiny. The record in this case proves the point. The Department has provided only limited cooperation with the Commission, and attempted to prevent Christopher Coates and J. Christian Adams from testifying.[229] Absent the production of materials and information by third parties, the Department and its policies would have avoided the scrutiny that the Commission's charter requires.

i. Initial Letters and the Basis for an Expanded Inquiry

[229] While the Department has provided about 4,000 pages of documents, most of these relate to either already public documents, or documents relating to other voter intimidation cases. While useful, the documents provided do not go to the core issue of the decision making relating to the New Black Panther Party litigation. Indeed, the Department has gone so far as to withhold witness statements from the Commission and has yet to provide witnesses or information about alleged instructions by Deputy Assistant Attorney General Julie Fernandes or similar comments as to which no privilege could apply.

The Commission's interest in the New Black Panther Party litigation began shortly after three of the defendants were dismissed from the case on May 15, 2009. In a letter sent on June 16, 2009, the Commission asked the Department to detail (i) its rationale for dismissing most of the case, (ii) its evidentiary and legal standards in voter intimidation cases, and (iii) any similar cases where the Civil Rights Division unilaterally dismissed charges against defendants.[230] The Department responded on July 24 that three of the defendants were dismissed because it was determined "after a careful and thorough review of the matter,"[231] that the "facts and the law" did not support pursuing claims against them.

The Commission found the Department's letter to be "largely non-responsive" to its specific questions and requests for information in which to form its own judgment on the matter.[232] The Commission next sought all documents relating to the NBPP case, including witness statements taken by the Department regarding the incident in Philadelphia.[233] On September 9, the Department informed the Commission that the NBPP matter had been referred to the

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

[231] Letter from Portia L. Roberson, Dir., Office of Intergovernmental & Public Liaison, U.S. Dep't of Justice, to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (July 24, 2010), *available at* http://www.usccr.gov/correspd/Roberson_Reynolds-07-24-09.pdf. This letter claimed that one of the dismissed defendants, Jerry Jackson, lived at the building where the polling place was located. The Department later acknowledged that this claim was incorrect. *See* Discovery Responses, *supra* note 133, at 29-30 (Response to Document Request No. 22).

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

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

Office of Professional Responsibility (OPR), and that the Department "will not provide further response until that review is complete."[234]

Congressmen Lamar Smith, House Judiciary Committee Ranking Member, and Frank Wolf, Ranking Member on the Commerce-Science-Justice Subcommittee, House Appropriations Committee, have pointed out that OPR restricts its investigations to whether attorneys have met basic ethical obligations, and that it is beyond the scope of OPR's duties to investigate the broader questions raised in the NBPP investigation.[235] It was also pointed out that any potential investigation by OPR under the present circumstances is tainted by the fact that OPR reports directly to the Attorney General. As noted by Representative Wolf: "I do not believe that this office [OPR] is capable of conducting an unbiased and independent review of this case given that it reports to a political appointee – an inherent conflict-of-interest that can only be avoided by an independent inspector general (IG) investigation."[236] Similar concerns about the independence of OPR have also been raised by members of Congress with regard to investigations involving the Bush administration.[237]

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[234] Letter from Portia L. Roberson, Dir., Office of Intergovernmental & Public Liaison, U.S. Dep't of Justice, to Gerald A. Reynolds, Chairman, et al., U.S. Comm'n on Civil Rights (Sept. 9, 2009), *available at* [link].

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

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

[237] *See* Ryan J. Reilly, *Internal DOJ Ethics Office is Broken, Panel Says*, MAIN JUSTICE, Feb. 25, 2010, http://www.mainjustice.com/2010/02/25/opr-report-shows-internal-doj-ethics-office-is-broken-say-panelists/

Given these concerns, and the fact that OPR still has not completed its investigation, which has been pending for over a year, Representatives Smith and Wolf have repeatedly asked Department Inspector General Glenn Fine to investigate the Department's handling of the NBPP case and related issues.[238] For over a year, the Inspector General's position has been that his office does not have jurisdiction to investigate these matters because the allegations relate to Department attorneys exercising their authority to litigate and make legal decisions.[239] The two congressmen expressed their view that Mr. Fine's reading of both his jurisdiction and the NBPP matter was too narrow, as the NBPP matter is about more than litigation decisions.[240] In light of J. Christian Adams' testimony before the Commission, Representatives Smith and Wolf renewed their request for the Inspector General to investigate.[241]

(last visited Oct. 20, 2010); Ryan J. Reilly, *OPR Report Kickstarts Push to Strengthen Inspector General*, MAIN JUSTICE, Mar. 19, 2010, http://www.mainjustice.com/2010/03/19/opr-torture-memos-report-kickstarts-push-to-strengthen-inspector-general/ (last visited Oct. 20, 2010).

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

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

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

[241] *See* Letter from Congressman Frank Wolf to Glenn Fine, Inspector Gen., U.S. Dep't of Justice (July 14, 2010), *available* at http://wolf.house.gov/uploads/fine%207%2014_20100714124633.pdf (last visited Oct. 20, 2010); Letter from Congressman Lamar Smith to Glenn A. Fine, Inspector Gen., U.S. Dep't of Justice (Aug 3, 2010), *available at* http://republicans.judiciary.house.gov/Media/PDFs/080310_Smith%20to%20Fine.pdf (last visited Oct. 20, 2010).

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

> Through this letter I want to inform you that the OIG plans to initiate a review of the enforcement of civil rights laws by the Voting Section of the Department's Civil Rights Division. This review will examine, among other issues, the types of cases brought by the Voting Section and any changes in these types of cases over time; any changes in the Voting Section enforcement policies or procedures over time; whether the Voting Section has enforced the civil rights laws in a non-discriminatory manner; and whether any Voting Section employees have been harassed for participating in the investigation or prosecution of particular matters.[242]

In the same letter, the Inspector General also noted that: "In response to my recent inquiry, OPR officials have informed us that they are near the end of their investigation and are beginning to draft their report of investigation."[243]

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

[242] Letter from Glenn Fine, Inspector Gen., U.S. Dep't of Justice, to Congressman Frank Wolf (Sept. 13, 2010), *available at* [cite].
[243] *Id.*

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

After the Commission voted on September 11, 2009 to make the NBPP investigation the subject of its annual enforcement report, and after another round of correspondence with the Department,[244] the Commission on November 18 subpoenaed two Department employees for deposition: Christopher Coates, the Chief of the Voting Section, and J. Christian Adams, a Voting Section attorney. Both attorneys had been part of the NBPP litigation team. In response, the Department told the Commission that Coates and Adams would not be permitted "to provide the Commission with any information (in writing, by testimony, or otherwise) unless and until the Department has had an opportunity to fully review and consider the Commission's demand."[245] The Commission was also copied on a letter from counsel for Mr. Adams, who made it clear that Adams had been ordered by the Department not to comply with the Commission's subpoena.[246] On January 29, 2010, the Commission asked the Department whether it would reconsider its position and permit Coates and Adams to testify.[247] On March 12, 2010, the Department said that it was still evaluating the request.[248]

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

[245] Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (Nov. 24, 2009), *available at* [cite?]. [need to confirm source]

[246] *See* Letter from Jim Miles [title?] to Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice (Nov. 25, 2010), *available at* [cite] [need to confirm source]; *see also* Adams Testimony, *supra* note 51, at 9.

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

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

Having not received a decision from the Department, the Commission asked the Department on March 30 to appoint a special counsel. The purpose of this request was to have an independent third party seek enforcement of the subpoenas directed to the Department and its employees. On April 16, 2010, the Department stated that it would not authorize Coates or Adams to provide testimony to the Commission. The Department did not respond to the Commission's request that a special counsel be appointed until May 13, 2010, stating that it "[did] not believe it [was] appropriate to appoint a special counsel," based on the Department's "need to protect the confidentiality of the work product of our attorneys."[249]

J. Christian Adams submitted his letter of resignation to the Department on or about May 14, due in part to what he characterized as the inaccurate testimony given by Assistant Attorney General Thomas Perez on that date to the Commission.[250] Adams's resignation was effective in June,[251] and he provided testimony to the Commission on July 6. Under oath, he testified that he resigned for two reasons: first, he believed he was placed in an untenable position in that the Department instructed him not to cooperate with a lawful subpoena issued by the Commission; and second, he believed the testimony of Perez before the Commission was inaccurate, despite Perez's having been briefed by the trial team the day before.[252]

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

[250] *See* Adams Testimony, *supra* note 51, 69-70.

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

[252] *See* Adams Testimony, *supra* note 51, at 68. Mr. Adams went on to state, "I have not said that he testified falsely. I have not said that he lied. I think he believes in some measure what he is saying." *Id.*

Pursuant to a majority vote of the Commission during its July 16, 2010 business meeting, the Commission offered on July 28 to limit its initial questioning of Mr. Coates to "non-deliberative statements or actions relating to whether there is a policy and/or culture within the Department of discriminatory enforcement of civil rights laws and whether there is a policy not to enforce Section 8 of the National Voter Registration Act."[253]

On August 11, 2010, Mr. Perez responded to the letters of July 28 and August 6, 2010. In that letter, Mr. Perez simply asserted that the Department applies civil rights laws in a race-neutral fashion (without admitting, denying, acknowledging, or attempting to explain the specific testimony to the contrary), and reiterated the Department's position that Christopher Coates would not be permitted to testify.

Like Mr. Adams, Mr. Coates testified that the information provided by Mr. Perez and the Department was misleading and inaccurate. As a result, he decided to testify before the Commission on September 24, 2010.[254] In describing his decision to appear before the Commission, he stated:

> [I] reviewed Mr. Perez's August 11th letter to the Chairman, in which he again denied your request that I be allowed to testify before you and in which he made various representations concerning the Department's enforcement practices.

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

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

> Based upon my own personal knowledge of the events surrounding the Division's actions in the *Panther* case, and the atmosphere that has existed and continues to exist in the Division and in the Voting Section against fair enforcement of certain federal voting laws, I do not believe these representations to this Commission accurately reflect what occurred in the *Panther* case and do not reflect the hostile atmosphere that has existed within the Division for a long time and against race-neutral enforcement of the Voting Rights Act.[255]

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

iii. Executive Privilege and Asserted Departmental Interests

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

> If any claim of privilege is raised relating to any document or information request, identify with specificity the privilege asserted, any legal authorities relied upon, and indicate whether any privilege so asserted can be addressed by agreements of confidentiality between the parties. If any claim of executive privilege is raised, identify the highest official within the Department connected with the specific document or information, and indicate whether the President of the United States has specifically exercised said privilege.[256]

The Department did not comply with this instruction. Many of its responses merely referred to "General Objections," which included objecting to each interrogatory and document

[255] Coates Testimony, *supra* note 2, at 9.
[256] *See* U.S.C.C.R. Discovery Requests, *supra* note 154, at 3

request "to the extent they seek information protected by the attorney-client, attorney-work product, deliberative process, law enforcement, or other recognized privilege."[257] In addition, the Department seemed to create a new privilege, claiming that it was "constrained by the need to protect against disclosures that would harm its deliberative processes *or that otherwise would undermine its ability to carry out its mission*." (emphasis added)[258] The Department simply ignored the question of whether the President, or any Department official on his behalf, had invoked executive privilege.

On March 30, the Commission asked the Department to specify the specific privileges asserted, and legal authorities relied upon, to justify withholding the information requested. The Department has never done so, "apparently seek[ing] to obfuscate the basis for its refusal to provide the requested information."[259]

On April 16, the Department indicated that Assistant Attorney General Thomas Perez would agree to testify before the Commission on May 14, 2010. In anticipation of Mr. Perez's testimony, Chairman Reynolds wrote to the Attorney General on May 9, 2010, asking whether President Obama or the Attorney General had invoked executive privilege and seeking an answer prior to Perez's scheduled testimony.[260] On May 13, the day before Mr. Perez's scheduled testimony, the Department stated for the first time that President Obama

[257] Discovery Responses, *supra* note 133, at 1.
[258] Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights (Jan. 11, 2010), *available at* http://www.usccr.gov/correspd/1-12-10_Hunt2ReynoldsCL.pdf.
[259] Letter from David P. Blackwood, Gen. Counsel, U.S. Comm'n on Civil Rights, to Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice (Mar. 30, 2010), *available at* http://www.usccr.gov/correspd/03-30-10_DOJ-NPPP.pdf.
[260] *See* Letter from Gerald A. Reynolds, Chairman, U.S. Comm'n on Civil Rights, to Eric Holder, Atty. Gen., U.S. Dep't of Justice (May 9, 2010), *available at* http://www.usccr.gov/NBPH/UnfillDiscReq_05-09-10.pdf.

had not asserted and would not assert executive privilege, which Mr. Perez reiterated in his testimony the next day.[261]

During the May 14 hearing, Mr. Perez was questioned regarding the rationale for the Department's refusal to appoint a special counsel.[262] Perez's answer was largely non-responsive, but seemed to focus on the fact that there was no explicit statutory provision addressing the issue.[263]

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

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

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

> [F]or all documents or information withheld pursuant to an objection or a claim of privilege, identify:
>
> A. the author's name and title or position;

[261] *See* Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to Gerald Reynolds, Chairman, U.S. Comm'n on Civil Rights (May 13, 2010), *available at* http://www.usccr.gov/NBPH/UnfillDiscReq_05-13-10.pdf; Perez Testimony, *supra* note 54, at 90-91.
[262] *See* Perez Testimony, *supra* note 54, at 90.
[263] *See id*. at 90-93.

B. the recipient's name and title or position;

C. all persons receiving copies of the document;

D. the number of pages of the document;

E. the date of the document;

F. the subject matter of the document; and the basis for the claim to privilege.[264]

This demand was followed by correspondence on behalf of the Commission dated March 30, April 1, April 26, and May 13, 2010. Despite the Commission's demands, the Department refused to detail the types of documents it claimed were privileged. Instead, on May 13, 2010 the Department asserted: "We do not intend to provide a log of withheld materials; our confidentiality interests in attorney work product are so conventional that we do not see a basis for creating a log of these materials."[265]

Despite the Department's refusal to provide a log of withheld documents to the Commission, on September 20, 2010 it was learned that just such an index had been provided by the Department to Judicial Watch as a result of a Freedom of Information Act (FOIA) lawsuit filed by said organization.[266] The log provided to Judicial Watch, known as a Vaughn Index,[267] provides exactly the type of information originally requested by the Commission.[268]

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[264] U.S.C.C.R. Discovery Requests, *supra* note 154, at 2-3.
[265] Letter from Joseph H. Hunt, Dir., Fed. Programs Branch, Civil Div., U.S. Dep't of Justice, to Gerald Reynolds, Chairman, U.S. Comm'n on Civil Rights (May 13, 2010), *available at* http://www.usccr.gov/NBPH/UnfillDiscReq_05-13-10.pdf.
[266] *See* Judicial Watch, Inc. v. U.S. Dep't of Justice, No. 10-CV-851-RBW (D.D.C.).
[267] *See* Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).
[268] *See* Judicial Watch *Vaughn Index*, *supra* note 70.

The fact that the Department provided such information to Judicial Watch, but not to the Commission, is telling. The Department's duty to respond to the Commission is based on a statutory mandate requiring federal agencies to "cooperate fully" with the Commission.[269] The Department also is charged with enforcement of the Commission's subpoenas.[270] Thus, reliance on DOJ to follow the first statute above and to enforce the Commission's subpoenas in court arguably leaves the Commission without recourse in the event, as here, that the Department itself refuses to provide subpoenaed information and also refuses to even appoint a special counsel to represent the Commission's interests or independently evaluate its position.

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

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[269] 42 U.S.C. § 1975b(e) provides, "All Federal agencies shall cooperate fully with the Commission to the end that it may effectively carry out its functions and duties."

[270] Under the terms of 42 U.S.C. § 1975a(e)(2), "[i]n case of contumacy or refusal to obey a subpoena, the Attorney General may in a federal court of appropriate jurisdiction obtain an appropriate order to enforce the subpoena."

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

v. Outstanding Discovery Issues

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

1. The Department refused to authorize Christopher Coates and J. Christian Adams to testify before the Commission. These individuals appeared over the objections of the Department. Even then, Mr. Coates and Mr. Adams felt obligated to honor the Department's privilege claims that some on the Commission believe are not valid in the absence of an invocation of executive privilege.
2. With regard to documents withheld, the Department has not specified the privileges being invoked, other than implying in its May 13, 2010 letter that the Department's "well-established *confidentiality interests*" (emphasis added) override the statutory command that "[a]ll federal agencies shall cooperate fully with the Commission."[271] In addition, as discussed above, the Department has refused to provide a privilege log as requested by the Commission.
3. The Department refused to provide witness statements from poll watchers Mike Mauro, Chris Hill, Steve Morse, Wayne Byman, Joe Fischetti, Larry Counts, Angela

[271] 42 U.S.C. § 1975b(e).

Counts, and Harry Lewis; defendant Malik Zulu Shabazz; police officer Richard Alexander; and Republican Party officials Joe DeFelice and John Giordano.[272]

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

5. The Department refused to provide the draft pleadings that were the subject of the dispute between the trial team and the management team of Loretta King and Steve Rosenbaum.[273]

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

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

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

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[272] *See* J. Memo, *supra* note 11; *see also* Remedial Memo, *supra* note 75, at 4. It should be noted that the Department never produced the three memos regarding the NBPP case that the Commission has obtained. These three memos were submitted to the Commission by Congressman Frank Wolf at its April 23, 2010 hearing.

[273] *See* J. Memo, *supra* note 11, at 13 n.15.

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

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

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

APPENDIX A

PART V

PART V Interim Findings and Recommendations

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

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

B. Although the U.S. Department of Justice has cooperated with many previous Commission investigations and requests, the DOJ has an inherent conflict of interest when it would prefer not to cooperate fully with the Commission's investigations of DOJ actions. In the NBPP investigation

> that is the subject of this report, the Department of Justice refused to comply with certain Commission requests for information concerning DOJ's enforcement actions, and it instructed its employees not to comply with the Commission's subpoenas for testimony. Moreover, the Department's denial of the Commission's request for the appointment of a special counsel to help resolve the discovery disputes in federal court was communicated by a career attorney without addressing or acknowledging the Department's conflict of interest and without any indication the Commission's request was ever brought to the attention of the Attorney General.
>
> [Chairman Reynolds and Commissioners Gaziano, Heriot, Kirsanow, and Taylor voted in favor; Comissioner Yaki voted against; Commissioner Melendez abstained; Vice Chair Thernstrom was absent.]

Recommendation:

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

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

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

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

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

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

APPENDIX A

APPENDIX A § 11(b) of Voting Rights Act

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

A. The Statute

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

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under [relevant sections of this title].[274]

Under the terms of the statute, one does not have to successfully intimidate voters in order to be in violation of § 11(b). An attempt to intimidate is sufficient to establish liability.[275] In addition, as acknowledged by Assistant Attorney General Thomas Perez in his testimony before the Commission, the statute protects not only voters, but poll watchers as well.[276] Accordingly, in the New Black Panther Party litigation, Section 11(b) was used as the basis for four causes of action: (1) intimidation of voters; (2) attempted intimidation of voters; (3) intimidation of individuals aiding voters; and (4) attempted intimidation of individuals aiding voters.

[274] 42 U.S.C. § 1973i(b).
[275] Perez Testimony, *supra* note 54, at 45.
[276] *Id.* at 69.

B. Legislative History

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

> While the purpose of the VRA was to eliminate racial discrimination in voting, § 11(b) of the act does not explicitly require proof that racial discrimination motivated the intimidation, threats, or coercion …The House report on § 11(b) states that "[t]he prohibited acts of intimidation need not be racially motivated; indeed, unlike 42 U.S.C. 1971(b) (which requires proof of a 'purpose' to interfere with the right to vote), no subjective purpose or intent need be shown."[277]

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

> The legislative history of this law makes clear that Congress wanted to expand the scope of voter protection by enacting a law that would bar voter intimidation. In fact, Congress's explanations of the purposes behind Section 11(b) support the view that neither proof of *intent* to intimidate nor proof of any actual *effect* of voter intimidation must be shown to establish a violation of Section 11(b). Rather, as DOJ has read the statute, an interpretation I share, plaintiffs need only show that the conduct engaged in had a tendency to intimidate, threaten or coerce a reasonable voter. Importantly, there is no requirement that to prevail under Section 11(b) that a plaintiff prove any purpose of subjective intent to intimidate.[278]

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[277] Willingham v. County of Albany, 593 F. Supp. 2d 446, 463 (N.D.N.Y. 2006) (citing H.R. REP. NO. 89-439, at 30 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2462).

[278] J. Gerald Hebert, Rattling the Vote Cage – Part I, The Campaign Legal Center Blog, http://www.clcblog.org/blog_item-245.html (Aug. 8, 2008) (emphasis in original) (last visited Oct. 21, 2010). Mr. Hebert served at the Justice Department from 1973 to 1994. According to his website, he "served in many supervisory capacities, including Acting Chief, Deputy Chief, and Special Litigation Counsel in the Voting Section of the Civil Rights Division." He has also served part-time as a staff attorney for the national office of

Section 11(b) was part of the original Voting Rights Act of 1965 and was later codified as 42 U.S.C. § 1973i(c). The legislative history of this section illustrates that its purpose was to assure ballot security for the expanded franchise contemplated by the Voting Rights Act. At the time the statute was passed, Congress had previously enacted a provision designed to govern expenditures to influence voting in an election for a federal official.[279] Section 1973i(c) was intended as something more than a mere replication of the existing provision. Instead, its protections were extended to include coverage of local elections held in conjunction with those for federal office.[280]

C. Penalties

As originally enacted, § 11(b) was among those sections of the Voting Rights Act which provided for fines and imprisonment for violations.[281] In 1968, this was revised, and currently the only available remedy under § 11(b) is injunctive relief.[282]

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

The Department of Justice reports that it has filed three civil lawsuits alleging voter intimidation under § 11(b), in addition to the New Black Panther Party case.[283] The three

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the Lawyers' Committee for Civil Rights Under Law and as the General Counsel to the National Redistricting Project for Congressional Democrats. *See* J. Gerald Hebert, P.C., Biography, http://www.voterlaw.com/bio.htm (last visited Oct. 21, 2010).

[279] *See* 18 U.S.C. § 597.

[280] *See* United States v. Simms, 508 F. Supp. 79, 1183 (W.D. La. 1979).

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

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

[283] *See* Discovery Responses, *supra* note 133, at 14-16 (Response to Interrogatory No. 29).

cases identified by the Department are *U.S. v. Harvey*, *U.S. v. North Carolina Republican Party et al*., and *U.S. v. Brown*. These cases offer little insight into the requirements or effectiveness of § 11(b). In two of the cases, the matter was decided on other grounds, with the § 11(b) claim being rejected with minimal discussion. In the third suit, the case was resolved by consent decree, with no discussion of § 11(b) or its requirements.

What follows is a brief summary of each DOJ case:[284]

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

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

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

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

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

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

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

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

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

In *Harvey*, the U.S. sought an injunction enjoining defendants from employing coercive and intimidating economic penalties against African Americans who registered to vote, including termination of sharecropping and tenant farming relationships, eviction, termination of employment, and the imposition of rents on houses which were formerly occupied in connection with sharecropping or tenant farming agreements. The court, after questioning § 11(b)'s constitutionality, concluded that "the evidence in this case is completely and totally void of any proof of intimidation, threats, or coercion."[285] Further, the court noted that, even if the alleged acts were committed for the reasons asserted by the plaintiffs,

> [t]here is simply no way that legislation allegedly designed solely to protect the constitutionally guaranteed right to be free from discrimination in the exercise of franchise, which, in its operation, confiscates one's use of his private property and awards it to another as a penalty for the owner's individual acts of discrimination could be considered constitutional.[286]

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

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

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

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

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

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

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

In this case, a suit was filed against the North Carolina Republican Party, the Helms for Senate Committee, and various others. The Complaint alleged violations of the Voting Rights Act (11(b) and 12(d) – 42 U.S.C. 1973i(b) and 1973j(d)) and the Civil Rights Act (131(c) – 422 U.S.C. 1971(b) and 1971(c)), based on a "ballot security program" "purportedly designed to combat and deter election fraud."[287] According to the complaint, the North Carolina Republican Party sent first class mailings and post cards, targeting black voters, pertaining to voter registration and voter addresses. The postcards contained false information regarding residency requirements and eligibility to vote.[288]

The consent decree, entered into prior to trial, provided that defendants (i) "are enjoined from engaging in any activity or program which is designed, in whole or in part, to intimidate, threaten, coerce, deter, or otherwise interfere with a qualified voter's lawful exercise of the franchise;" (ii) "are enjoined from engaging in any ballot security program directed at qualified voters in which the racial minority status of some or all of such voters is a factor in the decision to target those voters;" and (iii) "shall not engage in any ballot security program unless and until such program has been determined by this Court to comply with the provisions of this decree and applicable federal law."[289] The 1992 decree was to remain in effect until December 1, 1996.

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

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

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

> (a) During the absentee in-person voting period before the 2003 primary election, Defendant Mickens [Circuit Court Clerk of Noxubee County] received an absentee ballot that had been voted in the courthouse by an eligible voter. After receiving the ballot form this voter, Mickens set it aside without placing it in a sealed envelope as required by law. When this voter objected and asked that the unsealed ballot be spoiled and that she be allowed to vote a new ballot, Defendant Mickens loudly and abusively berated the voter and complained to the voter that she had cast her ballot for Defendant Mickens' white opponent. As a result of this experience, this voter has resolved never to cast another absentee ballot at the courthouse as long as Defendant Mickens remains Circuit Clerk.
>
> (b) Prior to the August 2003 primary election, Defendant Mickens and others acting in concert with him coerced a voter to vote by absentee ballot, failed to

> provide that voter privacy in which to case his absentee ballot at the Circuit Clerk's office, then instructed the voter on what candidates the voter should vote for, including Defendant Mickens, and looked on during the voting process to make sure that the voter followed the instruction.[290]

The court found for the plaintiff on § 2 grounds, but offered little discussion of § 11(b), noting only that, while there was a racial element to defendant's publication of a list of white voters who would be challenged if they attempted to vote in the Democratic primary, "the court does not view the publication as the kind of threat or intimidation that was envisioned or covered by Section 11(b)."[291] The court noted that "the Government has given little attention to this claim, and states that it has found no case in which plaintiffs have prevailed under this section."[292] The case was affirmed on appeal.[293]

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

APPENDIX B

APPENDIX B: Background on the New Black Panther Party for Self Defense

The Election Day 2008 incident in Philadelphia raises questions as to the power the New Black Panther Party for Self Defense (NBPP) exercises over its members, as well as the extent of such control over the activities of King Samir Shabazz and Jerry Jackson on Election Day. While the Commission has attempted to depose King Samir Shabazz, Jerry Jackson, and Malik Zulu Shabazz, the first two have refused to testify, asserting their Fifth Amendment rights against self-incrimination,[294] while the Chairman of the Party, Malik Zulu Shabazz, has contested the Commission's subpoena in court. Accordingly, the following section examines the publicly available information on this issue.

The NBPP is a recognized hate group that is explicitly anti-Semitic and anti-white.[295] The NBPP is based on hierarchical principles with a military structure. Party members often appear in public wearing paramilitary uniforms and carrying weapons. According to Party rules, all panthers must learn to operate and service weapons correctly.[296] In addition, officials are given military titles and the Party advocates armed struggle and violence against its enemies.[297] Even its membership application form reflects a military-style orientation,

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

[295] The Anti-Defamation League called the NBPP "the largest organized anti-Semitic and racist black militant group in America." Anti-Defamation League, New Black Panther Party for Self Defense: Introduction, http://www.adl.org/main_Extremism/new_black_panther_party.htm (last visited Oct. 21, 2010).

[296] *See* MySpace Groups, New Black Panther Party for Self Defense, Rules of the New Black Panther Party, Rule No. 16, http://groups.myspace.com/index.cfm?fuseaction=groups.groupprofile&groupID=103327617 (last visited Oct. 21, 2010).

[297] [cite to article on KSS & JJ criminal records]

seeking information about an applicant's military training, martial arts skills and whether one has served as a Navy Seal, Army Ranger or in other special forces.[298]

The Party openly acknowledges its hostility to police and governmental authorities. Its ten-point platform contains the following representative statements:

> We believe the Black People should not be forced to fight in the military service to defend the racist government that holds us captive and does not protect us. We will not fight and kill other people of color in the world who, like black people, are being victimized by the white racist government of America. We will protect ourselves from the force and violence of the racist police and the racist military, by any means necessary. (emphasis added)[299]
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> * * *
>
> We believe we can end police brutality in our community by organizing black self-defense groups (Black People's Militias/Black Liberation Armies) that are dedicated to defending our Black Community from racist, fascist, police/military oppression and brutality. The Second Amendment of white America's Constitution gives a right to bear arms. We therefore believe that all Black People should unite and form an African United Front and arm ourselves for self defense.[300]

The Party even has a requirement that "If we ever have to take captives do not ill-treat them."[301]

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[298] New Black Panther Party, Membership Application, http://www.newblackpanther.org/newsite/membership2.html (last visited Oct. 21, 2010).
[299] New Black Panther Party, 10 Point Platform, http://www.newblackpanther.org/newsite/102.html (last visited Oct. 21, 2010).
[300] *Id.*
[301] MySpace Groups, New Black Panther Party for Self Defense, 8 Points of Attention, Point No. 8, http://groups.myspace.com/index.cfm?fuseaction=groups.groupprofile&groupID=103327617 (last visited Oct. 21, 2010).

All members must submit to the authority of officers within the Party. The Party reserves the right to impose discipline or suspend its members. As noted in its Rules:

> Every member of the New Black Panther Party throughout this country of racist America must abide by these rules as functional members of this party. Central Committee members, Central Staffs and Local Staffs, including all captains subordinated to either national, state, and local leadership of the Black Panther Party will enforce these rules. Length of suspension or other disciplinary action necessary for violation of these rules will depend on national decisions by national, state or state area, and local committees and staffs where said rule or rules of the New Black Panther Party were violated. Every member of the party must know these verbatim by heart. And apply them daily. Each member must report any violation of these rules to their leadership or they are counter-revolutionary and are also subjected to suspension by the Black Panther Party.[302]

The head of the New Black Panther Party is Malik Zulu Shabazz, designated as its chairman and "attorney at war." He often appears in the media making statements on the goals and actions of the Party. In these appearances, he often wears elaborate uniforms marked with stripes, insignia and symbols of his rank, including four stars on his lapel.[303]

The Philadelphia Chapter is recognized as a key unit within the Party. As noted by Malik Zulu Shabazz:

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[302] MySpace Groups, New Black Panther Party for Self Defense, http://groups.myspace.com/index.cfm?fuseaction=groups.groupprofile&groupID=103327617 (last visited Oct. 21, 2010).

[303] *See, e.g.*, David Holthouse, Southern Poverty Law Center, *New Black Panther Party Holds Strategy Summit*, HATEWATCH, Oct. 17, 2007, http://www.splcenter.org/blog/2007/10/17/new-black-panther-party-holds-strategy-summit/ (last visited Oct. 21, 2010).

> "We're going to be very active in Philadelphia," says Malik. "We're going to work on the minds and hearts of black people to eliminate the negative habits that keep us in a raggedy condition in Philadelphia. Philadelphia is a key city. I see it as being one of our best cities."[304]

This assertion was made in the same magazine article in which the head of the Philadelphia Chapter, King Samir Shabazz, is quoted as making virulent statements advocating violence against whites. In the article, King Samir Shabazz is described as "readying for war," wearing "battle dress" and acting as a "soldier."[305] He is quoted as describing the white man as "our open enemy." Other statements include the following:

> He's [Whitey] never going to let us live inside the Constitution," he says. "Until we realize that, we're going to remain dumb, deaf and blind. I can't wait for the day that they're all dead. I won't be completely happy until I see our people free and Whitey dead."
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> By "dead," King means socially, economically, politically – and, if necessary, yes, physically.
>
> * * *
>
> "I'm proud to be a Panther," says King. "We won't ease up. We're going to keep putting our foot up the white man's ass until they understand completely. We want freedom, justice and muthafuckin' equality. Period. If you ain't gonna give it to us, muthafucka, we're gonna take it, in the name of freedom."[306]

The article goes on to describe that weapons training is part of King Samir Shabazz's Party duties.

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[304] Kia Gregory, *F*** Whitey's Christmas*, PHILA. WEEKLY, Dec. 17, 2003, *available at* http://www.philadelphiaweekly.com/news-and-opinion/cover-story/the_cats_came_back-38373074.html (last visited Oct. 21, 2010).
[305] *Id.*
[306] *Id.*

> Thursday is military training night for the New Black Panthers. King goes over how to pat someone down for weapons and how to enforce security for high-ranking officials at public events. Arms training, CPR and guerilla warfare are reviewed.[307]

Although Malik Zulu Shabazz, the chairman of the Party, is also quoted in the article, and presumably was aware of these statements, there is no public indication that Malik Zulu Shabazz or the Party used its authority to discipline King Samir Shabazz in any way for the above statements.

In July 2008, the NBPP generally, and the Philadelphia Chapter in particular, were featured in a broadcast by National Geographic.[308] In the broadcast, Party members are shown marching on, and burning an American flag. Other members are shown posing with weapons.

In perhaps the most searing moments of the broadcast, King Samir Shabazz is filmed bluntly denouncing and advocating direct violence against whites. His statements include:

> I hate white people. All of them. Every last iota of a cracker, I hate him.
>
> * * *
>
> There's too much serious business going on in the black community to be out here sliding through South Street with white, dirty, cracker, whores [bleep] on our arm. And we call ourself black men with African garb on. What the hell is wrong with you, black man? . . . We keep beggin' white people for freedom. No wonder we not free. Your enemy cannot make you free, fool. You want freedom, you going to

[307] *Id.*
[308] *See Inside the New Black Panthers* (National Geographic television broadcast 2009).

> have to kill some crackers. You're going to have to kill some of their babies.[309]

Although much of the broadcast focused on King Samir Shabazz, two members who were later named in the NBPP litigation were also shown. The first of these was Jerry Jackson, who later appeared with King Samir Shabazz at the polling location on Fairmount Street. In the National Geographic broadcast, Mr. Jackson is shown playing a subordinate role to King Samir Shabazz, following his lead, working in tandem, and always appearing in his paramilitary uniform. He is described as Mr. Shabazz's chief of staff. In several scenes, Mr. Jackson poses with King Samir Shabazz with firearms. He also is shown handing out pamphlets as King Samir Shabazz made the above statement, urging the killing of "crackers" and their babies.

Also appearing in the broadcast is the Party's Chairman, Malik Zulu Shabazz. His appearance would seem to indicate that he approved of the broadcast and did not object to its contents.[310] As with the *Philadelphia Weekly* article, there is no public record that Malik Zulu

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[309] *Id.* (beginning at the 13:34 mark). The statements of King Samir Shabazz mirror reported statements made by Malik Zulu Shabazz several years earlier:

> At an April 2002 protest outside B'nai B'rith headquarters in Washington, DC, he [Malik Zulu Shabazz] said, "Kill every goddamn Zionist in Israel! Goddamn little babies, goddamn old ladies! Blow up Zionist supermarkets!"

Richard J. Rosenthal, *The New Black Panther Mouthpiece*, FRONTPAGEMAGAZINE.COM, February 9, 2004, http://archive.frontpagemag.com/readArticle.aspx?ARTID=14294 (last visited Oct. 21, 2010).

[310] *See Inside the New Black Panthers* (National Geographic television broadcast 2009)

Mr. Shabazz was asked about King Samir Shabazz's statement about killing "crackers" in an interview with Fox News reporter Megyn Kelly. This interview occurred on July 9, 2010 while Malik Zulu Shabazz was under subpoena by the Commission and after J. Christian Adams had testified. The reluctance of Malik Zulu Shabazz to criticize the statements of King Samir Shabazz is captured in the following colloquy:

MEGYN KELLY: I mean, that's disgusting, isn't it, sir?

Shabazz or the Party in any way repudiated or denounced the statements or actions of King Samir Shabazz in the National Geographic video, including advocating violence and posing before the camera with firearms. Given the Party's avowed powers of discipline, the lack of any such action following the inflammatory statements of King Samir Shabazz is relevant to the events that occurred on Fairmount Street and afterwards.

In sum, the publicly available evidence suggests that at no point did Malik Zulu Shabazz, or the NBPP as an organization, exert any discipline or rebuke to either King Samir Shabazz or Jerry Jackson prior to the filing of the lawsuit arising out of the events on Election Day 2008. To the contrary, Malik Zulu Shabazz and the NBPP appear to have approved and supported

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SHABAZZ: I would say that he should be careful in how he speaks, but I would still say that his words are being manipulated by a right-wing conspiracy here, and the Republicans are manipulating his words into, again, an attack on blacks and to drum up racial fears . . .

[Two voices simultaneously]

MEGYN KELLY: What part—Let me ask you, do you agree that white people . . .

SHABAZZ: . . . and to increase voter turnout.

MEGYN KELLY: Do you agree that white people should be killed, and their babies should be killed?

SHABAZZ: That is not the position of our organization, that is not the position of myself. We have an official platform and a position. That is not our position.

[Two voices simultaneously]

MEGYN KELLY: So you say that's not the position, I'm just asking you as a human being, sir. That is a disgusting comment he made, and do you agree with it, or don't you?

SHABAZZ: No, I do not agree that he should have said that, no I do not.

MEGYN KELLY: No, no, I'm not asking about whether he should have said it. I'm asking about whether you agree with the sentiment.

SHABAZZ: No, ma'am, I don't.

America Live (Fox News television broadcast July 9, 2010), *available at* http://video.foxnews.com/v/4277314/new-black-panther-party-head-responds-to-allegations (last visited Oct. 20, 2010).

the arms training, threats of violence, and openly racist statements of King Samir Shabazz and his subordinate, Jerry Jackson.