UNITED STATES COMMISSION ON CIVIL RIGHTS

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

April 1, 2010

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

Dear Attorney General Holder:

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

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

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

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

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

"the most blatant form of voter intimidation I have encountered in my life in political campaigns in many states, even going back to the work I did in Mississippi in the 1960s." Bull Aff. ¶ 6.

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

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

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

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

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

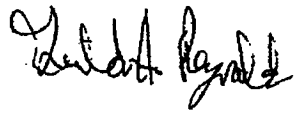
[4] Letter from Joseph H. Hunt to Gerald A. Reynolds (Jan. 11, 2010).

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

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

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

Respectfully submitted,



Gerald A. Reynolds
CHAIRMAN

Attachment

UNITED STATES COMMISSION ON CIVIL RIGHTS

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

March 30, 2010

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

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

Dear Mr. Hunt:

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

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

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

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

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

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

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

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

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

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

- Having rejected the opportunity to meet, the Department refused to provide any substantive response to the Commission's discovery requests relating to the New Black Panther Party litigation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[6] Response to Document Request No. 4.

[7] Response to Interrogatory No. 20.

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

[9] Response to Document Request No. 24.

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

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

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

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

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

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[10] The complaint sought the following relief:

> Permanently enjoins Defendants, their agents and successors in office, and all persons acting in concert with them, from deploying athwart the entrance to polling locations either with weapons or in the uniform of the Defendant New Black Panther Party, or both, and from otherwise engaging in coercing, threatening, or intimidating, behavior at polling locations during elections. (Complaint, *United States of America v. New Black Panther Party for Self Defense et al*, entered January 8, 2009)

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

> Defendant Minister King Shabazz is enjoined from displaying a weapon within 100 feet of any open polling location on any election day in Philadelphia, Pennsylvania, or from otherwise engaging in coercing, threatening or intimidating behavior in violation of Section 11(b) of the Voting Rights Act ...

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

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

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

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

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

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

Thank you for your attention to these matters.

Sincerely,

David P. Blackwood
General Counsel