U.S. COMMISSION ON CIVIL RIGHTS

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HEARING ON
THE DEPARTMENT OF JUSTICE'S ACTIONS
RELATED TO THE NEW BLACK PANTHER PARTY
LITIGATION AND ITS ENFORCEMENT OF SECTION 11(b)
OF THE VOTING RIGHTS ACT

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FRIDAY, MAY 14, 2010

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The Commission convened in Room 540 at 624 Ninth Street, Northwest, Washington, D.C. at 9:30 a.m., GERALD A. REYNOLDS, Chairman, presiding.

PRESENT:

GERALD A. REYNOLDS, Chairman
ABIGAIL THERNSTROM, Vice Chairman
TODD F. GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner
ARLAN D. MELENDEZ, Commissioner (via telephone)
MICHAEL YAKI, Commissioner

MARTIN DANNENFELSER, Staff Director
WITNESS:

THOMAS PEREZ, Assistant Attorney General, U.S. Department of Justice, Civil Rights Division

STAFF PRESENT:

DAVID BLACKWOOD, General Counsel, OGC
TERESA BROOKS
MARGARET BUTLER
CHRISTOPHER BYRNES, Director, RPCU
DEMITRIA DEAS
LILLIAN DUNLAP
PAMELA A. DUNSTON, Chief, ASCD
LATRICE FOSHEE
HANNAH GEYER, Legal Intern
ALFREDA GREENE
TINALOUISE MARTIN, Director, OM
EMMA MONROIG, Solicitor
LENORE OSTROWSKY
EILEEN RUDERT
VANESSA WILLIAMSON
AUDREY WRIGHT
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I. INTRODUCTION BY CHAIR

CHAIRPERSON REYNOLDS: This hearing of the U.S. Commission on Civil Rights will come to order. Our purpose today is to collect facts and information regarding the Department of Justice's actions related to the New Black Panther Party litigation and its enforcement of Section 11(b) of the Voting Rights Act.

The Commission began its investigation of this matter almost a year ago, in June of 2009, and held the first hearing on this matter on April 23rd, 2010. During this hearing, the Commission heard testimony from various fact witnesses, who testified, who witnessed the Election Day incident as well as Representative Frank Wolf and former DOJ official Gregory Katsas.

Today's testimony by Assistant Attorney General for the Civil Rights Division, Thomas Perez, is a continuation of that hearing.

By now, the facts of this case should be well-known. On November 4th, 2008, two members of the New Black Panther Party appeared at a polling station in Philadelphia.

Video evidence and eyewitness testimony
show that these two members standing athwart the entrance of the polling place dressed in paramilitary uniforms with black combat boots.

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

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

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

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

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

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

In the days that followed and despite the robust justification memo it had prepared at the inception of the case to support its request to file suit, it appears the experienced line career attorneys responsible for the case were put under intense pressure to justify the lawsuit against the Panthers and required to prepare a defense of its proposed
injunction, as press reports and evidence submitted into the record by Representative Wolf during last month's hearing demonstrate.

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

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

As to King Samir Shabazz, the Department
reduced the injunctive relief it sought against him. Whereas, the original complaint sought an unlimited injunction prohibiting acts of intimidation anywhere in the United States, the final relief sought by the Department was limited solely to the City of Philadelphia and was only to last through November of 2012.

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

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

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

He has pledged to enforce those laws in a fair and independent fashion using all the tools at
the Department's disposal. "We are not simply open
for business," Mr. Perez has said. "We are doing
business in a new, different, and better way."

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

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

Rather than exercise its discretion to
deter this behavior in the future, it declined to
follow the collective wisdom of career attorneys from
several components of the Department, weakened the
remedy it sought, and reduced the number of defendants
it sought a remedy against just to one individual, despite evidence that, at a minimum, he acted in close coordination with his colleague Mr. Jackson.

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

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

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

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

Vice Chair Thernstrom, please proceed.

COMMISSIONER YAKI: Point of information on the voting rights.

CHAIRPERSON REYNOLDS: Yes?
COMMISSIONER YAKI: I just have a question about a statement made in the Chairman's opening remarks. You talked about the --

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

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

CHAIRPERSON REYNOLDS: It may be important --

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

CHAIRPERSON REYNOLDS: Mr. Yaki? Commissioner Yaki?

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

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

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

CHAIRPERSON REYNOLDS: Vice Chair Thernstrom?

COMMISSIONER YAKI: It was not based on any direct evidence --
CHAIRPERSON REYNOLDS: Please proceed.

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

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

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

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

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

CHAIRPERSON REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: I just want to make that point.

CHAIRPERSON REYNOLDS: Commissioner Yaki?

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

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

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

CHAIRPERSON REYNOLDS: Vice Chair
Thernstrom, please?

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

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

CHAIRPERSON REYNOLDS: Okay. Next up, Commissioner Gaziano?

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

CHAIRPERSON REYNOLDS: We are reversing the order.

COMMISSIONER GAZIANO: I will reserve my time as well.

CHAIRPERSON REYNOLDS: Okay. Commissioner Yaki?

COMMISSIONER YAKI: I reserve my time.

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

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

CHAIRPERSON REYNOLDS: Okay. Commissioner Heriot?

COMMISSIONER HERIOT: I'll reserve my time for afterwards.
CHAIRPERSON REYNOLDS: Okay. I will do the same. At this time we would like to welcome -- oh, I'm sorry.

COMMISSIONER KIRSANOW: I reserve my time also.

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

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

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

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

CHAIRPERSON REYNOLDS: Thank you, sir.

Given the limited time here today, we ask that you
adhere strictly to the five-minute time limit for your testimony.

II. TESTIMONY OF ASSISTANT ATTORNEY GENERAL

THOMAS PEREZ, U.S. DEPARTMENT OF JUSTICE,

CIVIL RIGHTS DIVISION

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

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

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

To that end, the Department has responded to interrogatories and document requests it has received and has provided more than 4,000 pages of documents relating to our enforcement of Section 11(b)
of the Voting Rights Act and specifically with respect to the Department's litigation in the New Black Panther Party matter.

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

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

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

The standards for proof are high. And, as in every case, the question to be addressed is whether the evidence is sufficient to sustain the burden of
proof. And on that question, reasonable minds can
differ and can look at the same set of facts but draw
different conclusions regarding whether the burden of
proof has been met. Let me give you a few examples to
illustrate that point.

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

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

In that instance, the Department declined
to bring any action for alleged voter intimidation,
notwithstanding the requests of the complaining
parties.
In 2005, the Division received allegations that armed Mississippi State investigators intimidated elderly minority voters during an investigation of possible voter fraud in municipal elections by visiting them in their home, asking them who they voted for, in spite of state law protections that explicitly forbid such inquiries.

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

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

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

The complaint alleged that the defendants
violated Section 11(b) because they attempted to
engage in and engaged in both voter intimidation and
intimidation of individuals aiding voters.

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

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

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

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

The Department concluded that the
allegations in the complaint against Jerry Jackson, the other defendant present at the polling place, as well as the allegations against the national New Black Panther Party and its leader, Malik Zulu Shabazz, did not have sufficient evidentiary support.

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

CHAIRPERSON REYNOLDS: Thank you, Mr. Perez.

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

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

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

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

MR. BLACKWOOD: Okay. And at the time that the suit got filed, the J memo shows that four attorneys had signed off: Spencer Fisher, Christian
Adams, Robert Popper, Christopher Coates, four line attorneys. There were four attorneys, two of them, one the Chief, the other the Deputy Chief of the Voting Section.

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

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

MR. BLACKWOOD: Sure.

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

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

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

MR. BLACKWOOD: Right. But --
ASST. ATTY. GEN. PEREZ: That is standard procedure in the Department.

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

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

MR. BLACKWOOD: But no new evidence?

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

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

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

Who overruled Ms. Flynn's opinion?

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

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

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

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

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

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

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

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

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

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

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

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

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

ASST. ATTY. GEN. PEREZ: And that's --

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

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

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

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

Now, that's fine. Mr. Rosenbaum and Ms. King came to a different conclusion. But it is, I would think you would agree, slightly unusual that in a case where it's in a default posture, literally the
other side has conceded liability. And the only question is, what is the relief or the remedy?

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

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

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

MR. BLACKWOOD: Okay. If I could --

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

MR. BLACKWOOD: Okay. This goes back to my original question, though. Of the eight career
attorneys looking at it, the six I mentioned and then
Ms. King and Mr. Rosenbaum, they're all looking at the
same evidence, correct? I mean, there's no new
additional evidence that was collected after January
7?

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

MR. BLACKWOOD: Of course.

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

MR. BLACKWOOD: Okay.

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

MR. BLACKWOOD: Okay.

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

CHAIRPERSON REYNOLDS: Okay. Vice Chair
Tħernstrom?
VICE CHAIR THERNSTROM: Thank you very much for appearing.

ASST. ATTY. GEN. PEREZ: Good morning.

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

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

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

I am interested in answers to two questions. One, you have talked about the confidentiality interests of the Department. And I wondered if you would spell those out. I am concerned about those, whether it's a Republican administration or a Democratic administration.
And, two, I wondered if you would spell out -- you had said the standard for the burden of proof in 11(b) cases is very high. And I would like you to spell out what that standard is.

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

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

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

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

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

And one way that is a critical way to
foster that robust dialogue is for people on the front
tlines to appreciate that they can offer me or
whomever, Republican or Democrat, is the Assistant
Attorney General, that honest and candid advice, not
having to constantly wonder whether, if I express this
opinion today, will it show up in a PowerPoint
presentation tomorrow.

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

VICE CHAIR THERNSTROM: I know him well.

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

VICE CHAIR THERNSTROM: Right.

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

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

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

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

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

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

And so the courts have set a high bar. That is the hand we're dealt. And I think that is a
big part of the reason why we proceed as such.

CHAIRPERSON REYNOLDS: Thank you, Mr. Perez.

Commissioner Gaziano?

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

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

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

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

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

COMMISSIONER YAKI: Okay.

COMMISSIONER GAZIANO: Good morning.

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

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

Do you agree that the voting rights laws should always be enforced in a race-neutral manner?
ASST. ATTY. GEN. PEREZ: Yes, sir.

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

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

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

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

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

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

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

COMMISSIONER GAZIANO: Okay. If that
person who held that view that we both disagree with
was in a position to decide which cases to bring or
maintain or continue, wouldn't it potentially taint
their decision with regard to cases where blacks or
other racial minorities were the defendants?

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

COMMISSIONER GAZIANO: Hold on.

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

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

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

COMMISSIONER GAZIANO: So what is the --
ASST. ATTY. GEN. PEREZ: The leadership will so reflect.

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

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

COMMISSIONER GAZIANO: I hope not.

ASST. ATTY. GEN. PEREZ: -- moot question.

And the people who have been involved since January 20th in decision-making roles in the Civil Rights Division have been people for whom I have great respect.

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

COMMISSIONER GAZIANO: Would you be surprised? Would you be surprised, then, if one of your senior political appointees or a supervising
attorney expressed such a view?

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

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

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

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

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

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

COMMISSIONER GAZIANO: I think we are.

ASST. ATTY. GEN. PEREZ: Okay. So I'm
COMMISSIONER GAZIANO: Let me ask you.

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

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

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

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

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

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

ASST. ATTY. GEN. PEREZ: I would talk to all the people involved and figure out what the context of the statement is. And we would move
COMMISSIONER GAZIANO: But wouldn't you want to clarify to all of the people who may have heard it that that is not the policy of the Department and that you would not tolerate that kind of a policy?

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

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

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

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

Did you take a --

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

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

COMMISSIONER GAZIANO: The problem --

ASST. ATTY. GEN. PEREZ: -- the nexus.

And if --

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

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

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

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

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

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

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

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

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

COMMISSIONER YAKI: Sure.

ASST. ATTY. GEN. PEREZ: -- because I have said that there has been a longstanding -- again, by "longstanding," I am referring to it has been a longstanding interest asserted in Republican and Democratic administrations -- a longstanding confidentiality interest in not disclosing internal deliberations. And it is precisely grounded out of the fact that when you are prosecuting cases, you need to have -- and when I refer to "prosecuting," I am referring to civil and criminal cases.
If you're that front-line attorney -- and I was that front-line attorney because I started in the Division as a summer clerk. Then I was an honors hire. Then I was a first-line supervisor. And then I was the Deputy AAG. And now I have the privilege of being the AAG.

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

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

COMMISSIONER YAKI: Sure.

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

That is an interest I have seen Republican administrations assert with the same vigor as
Democratic administrations. And I think it is a good

confidentiality --

COMMISSIONER YAKI: So you would agree

with this one Attorney General who said, "Employees of

the Department of Justice would likely be reluctant to

express candidly their views and recommendations on

controversial and sensitive matters if those views

could be exposed to public scrutiny"?

ASST. ATTY. GEN. PEREZ: I think that is a

fair statement.

COMMISSIONER YAKI: Well, I would tend to

agree. And it is ironic that that came from Edwin

Meese.

I would just like to say that I have one

follow-up on the two instances that you did note that

were declined by the Department of Justice. But I

think that the Pima, Arizona case, where I think the

facts as alleged were that people who were noted

anti-immigrant activists were openly carrying weapons

-- I think they had maybe even hand-made badges or

something like that and were videotaping and following

Latino voters in Tucson, Arizona. That was one in

2006.

And then you talked about the Mississippi

investigation, where I think people were visiting
elderly people in their homes and people who said they were officials of the government.

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

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

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

COMMISSIONER YAKI: There were no notes.

There were no records.
ASST. ATTY. GEN. PEREZ: -- in the Pima case and in the Mississippi case. And, again, I illustrate these to simply make the point that you can look at a set of facts. And people of good faith can draw different conclusions --

CHAIRPERSON REYNOLDS: Thank you.

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

COMMISSIONER YAKI: Okay. Thank you.

CHAIRPERSON MELENDEZ: Commissioner Melendez?

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

COMMISSIONER YAKI: I'll carry it over.

I'll take it over to the next round.

CHAIRPERSON REYNOLDS: Okay. Commissioner Heriot?

COMMISSIONER HERIOT: Thank you.

ASST. ATTY. GEN. PEREZ: Good morning.

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

ASST. ATTY. GEN. PEREZ: My pleasure.

COMMISSIONER HERIOT: I have got just a few questions. And they mainly focus on a statement that you made before the House Subcommittee.
Just preliminary to this, let me ask you some questions about 11(b), like under 11(b), how many persons must be intimidated or threatened or coerced, since all three of those are in the statute, in order to state a cause of action?

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

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

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

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

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

COMMISSIONER HERIOT: And that would include election judges?

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

COMMISSIONER HERIOT: For instance, like Bartle Bull?

ASST. ATTY. GEN. PEREZ: In theory.

COMMISSIONER HERIOT: Yes, in theory.
Okay. And no weapon is required?

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

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

ASST. ATTY. GEN. PEREZ: Yes.

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

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

I take it you're referring to rule 11 of the Federal Rules of Civil Procedure?
ASST. ATTY. GEN. PEREZ: It's actually local rules in the District Court of Philadelphia, as I understand, or Pennsylvania, as well as the law of the circuit, which says that, even in a default judgment context, the -- in order to establish liability and, therefore, get the judgment, you have to demonstrate that you can establish all of the elements of the offense. So rule 11 is part of it but not all of it.

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

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

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

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

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

COMMISSIONER HERIOT: Yes. Let's take it
ASST. ATTY. GEN. PEREZ: -- was -- well, again --

COMMISSIONER HERIOT: -- one at a time.

Start with rule 11.

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

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

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

COMMISSIONER HERIOT: Come on. No.

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

COMMISSIONER HERIOT: No, no.

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

COMMISSIONER HERIOT: I'm asking the questions.

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

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

ASST. ATTY. GEN. PEREZ: And my answer was
COMMISSIONER HERIOT: You were talking about more than one. And I want to talk about rule 11 first.

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

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

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

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

ASST. ATTY. GEN. PEREZ: No.

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

ASST. ATTY. GEN. PEREZ: Must be able -- whether the defendant is pro se, whether the defendant doesn't show up, or whether the defendant is represented by the biggest firm in town, we have to be able to demonstrate to the court in order to obtain a judgment that we have established the elements of the offense and in this case, 11(b) with the high bar that I have articulated and the courts have articulated, we must prove that in this case. That's what we had to
COMMISSIONER HERIOT: Well, of course, that's true. Any lawyer would know that's true. That's always true in any case.

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

COMMISSIONER HERIOT: What's special about this one?

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

COMMISSIONER HERIOT: Wait a minute. Nobody is --

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

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

This is not a tough case here. Of course, the Third Circuit wants more than simply attorneys who have won by default to do more than just waltz into show.
court and say, "We were assigned this."

CHAIRPERSON REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Yes?

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

Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Good morning, Mr. Perez.

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

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

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

COMMISSIONER KIRSANOW: Right.

VICE CHAIR THERNSTROM: Precisely. Thank
COMMISSIONER KIRSANOW: Voter intimidation is not unimportant, in other words?

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

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

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

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

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

COMMISSIONER KIRSANOW: What, to your
knowledge, triggered that? Was there any intervening circumstance, fact, or piece of evidence that was adduced that would cause the Department after this case had been postured in a fashion so that it was poised for default judgment to reverse its position or at least reconsider its position? What instrumentality, what intervening circumstance, occurred?

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

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

COMMISSIONER KIRSANOW: Wasn't the evidence considered beforehand?

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

COMMISSIONER KIRSANOW: And I suppose she
then solicited the opinion of the six line attorneys, career attorneys, who were heavily involved in the case, correct?

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

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

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

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

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

ASST. ATTY. GEN. PEREZ: Well, I have great respect for all of the attorneys who were
involved in this case. And I have certainly had cases
where I, as the front-line attorney in the case,
want to go one way and, at the end of the
investigation, the people above me in the career ranks
of the chain concluded that, based on their
experience, they wanted to go another way.

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

COMMISSIONER KIRSANOW: Yes.

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

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

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

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

COMMISSIONER KIRSANOW: Thank you, Mr. Chairman.

CHAIRPERSON REYNOLDS: -- up next round.

Vice Chair Thernstrom?

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

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

Now, do you think that there has been a
difference between Republican and Democratic administrations in the concern about the confidentiality of attorney work product? That's question number one.

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

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

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

I think it is a good interest. I think it is a critical part of what enables us to do our job. And I respect the job that you have here. And I respect the job that people in Congress have. And
that is why I am here today. And that is why we have
taken so much time to do that.

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

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

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

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

VICE CHAIR THERNSTROM: -- is the bottom
line?

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

VICE CHAIR THERNSTROM: Right. Okay.

ASST. ATTY. GEN. PEREZ: -- proscribe coercion, intimidation, --
VICE CHAIR THERNSTROM: Right.

ASST. ATTY. GEN. PEREZ: -- and attempts

at those issues.

VICE CHAIR THERNSTROM: Mr. Chairman?

CHAIRPERSON REYNOLDS: Okay. Commissioner

Gaziano?

COMMISSIONER GAZIANO: How am I for time?

CHAIRPERSON REYNOLDS: The full five

minutes.

COMMISSIONER GAZIANO: Earlier, in January

of this year when the outgoing, then outgoing, Voting

Chief, Chris Coates, was leaving, there was a farewell

party, farewell reception, in your Division.

I know you attended early. And you, as I

understand, may have left before he gave some very

well-publicized farewell remarks. A summary of those

remarks was published by, written up and published by

-- of the remarks.

And he implies that he believes the New

Black Panther case was dismissed because there are

some in the Department who don't think the Voting

Rights Act should apply evenhandedly across races. I

am glad that you have said that you disagree with

that.

I haven't talked to Chris Coates because
you won't let me. The Department won't let me. So I
don't know what the basis of his belief is in that
regard.

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

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

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

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

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

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

COMMISSIONER GAZIANO: So you did nothing
other than that?

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

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

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

COMMISSIONER GAZIANO: Okay.

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

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

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

And that press report said that the then Acting Chief of the Voting Section, Joe Rich, Kristen Clark, whom we have deposed and has refused to answer questions that she should refuse, and others in the
Division opposed the filing of the Noxubee suit in significant part because the defendants were black.

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

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

COMMISSIONER GAZIANO: That is not my question.

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

COMMISSIONER GAZIANO: Did you do anything --

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

COMMISSIONER GAZIANO: One final question.

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

COMMISSIONER GAZIANO: This is --
ASST. ATTY. GEN. PEREZ: And that is not the first --

COMMISSIONER GAZIANO: There is one strange --

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

COMMISSIONER GAZIANO: There is one strange --

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

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

Let me ask my final question. If we uncovered strong evidence that a current supervising attorney or political appointee senior in your Division made statements that this administration will never bring a voting rights case or, to this effect, will never bring a voting rights case against blacks or other minorities, I hope that you will seriously investigate. And I hope you agree that it would be
highly relevant to this investigation and that we should have access to the witnesses to such a statement.

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

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

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

COMMISSIONER GAZIANO: Yes.

CHAIRPERSON REYNOLDS: Okay. Commissioner Yaki?

COMMISSIONER YAKI: Yes.

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

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

CHAIRPERSON REYNOLDS: Okay.

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

I am a little bit confused by Commissioner Gaziano's last remark because it seems to imply that if any senior official, political or whatever, goes off on a toot, that somehow it constitutes whatever hearsay, however, whatever context it is, it somehow
constitutes probative evidence of something going on. And that to me is very interesting.

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

ASST. ATTY. GEN. PEREZ: Yes.

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

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

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

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

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

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

Obviously we have a broad-ranging program under the motor voter law to ensure access to the ballot. And we have vigorous enforcement in that
area. Section 12, by the way, of MVRA also is an intimidation provision.

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

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

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

We want to have guidance across the board so that people, that entities understand what the statute sets out and what the road map for compliance is because there is -- there are right ways and wrong
ways to enforce Section 4, to implement Section 7, to implement Section 8. And we want to make sure that everybody has the proper road map so that we can ensure access to the ballot and we can ensure that we prevent fraud.

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

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

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

COMMISSIONER YAKI: Okay.

ASST. ATTY. GEN. PEREZ: And so we will continue to address that. There was a submission, for instance, from Arizona that was pre-cleared a couple of years ago.
And so as those issues come up and as covered entities enact laws in that area, again, that is their prerogative to do so as long as it doesn't violate the retrogression provisions of the -- of Section 5 of the Voting Rights Act.

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

COMMISSIONER YAKI: Okay. Thank you.

I reserve the balance of my time.

CHAIRPERSON REYNOLDS: Which is four minutes.

Commissioner Heriot?

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

ASST. ATTY. GEN. PEREZ: Correct.

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

ASST. ATTY. GEN. PEREZ: Well, again, looking at the totality of the evidence, including the actions and responses of the police officer who
responded to the scene. He was the first responder.

He interviewed Mr. Jackson, determined that he was indeed a poll watcher who was authorized to do that work --

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

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

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

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

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

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

COMMISSIONER HERIOT: Okay.

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

And there was no local action taken. They
concluded that the activities did not rise to the level of intimidation. And that was certainly a fact that was a fact of relevance that Ms. King and --

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

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

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

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

COMMISSIONER HERIOT: But you're at the
default stage at this point.

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

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

ASST. ATTY. GEN. PEREZ: Yes.

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

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

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

This happens all of the time in the course
of looking at factual circumstances, understanding
11(b) and the high bar that exists in that case.

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

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

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

COMMISSIONER HERIOT: Different capacities.

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

They made a judgment on the merits. These are the sort of good faith robust deliberations that occur time and time again.
I have had any number of cases when I was a front-line prosecutor where I felt strongly that the facts suggested A and my supervisors took a look at it and decided that --

COMMISSIONER HERIOT: At the default stage?

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

CHAIRPERSON REYNOLDS: I think that --

COMMISSIONER HERIOT: At the default stage?

CHAIRPERSON REYNOLDS: Thank you.

Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Thank you.

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

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

And also I think one thing to note is when
the complaint was filed, there's whatever, 30 days to
file an answer, whatever the time period is -- I don't
know precisely how or what the time frame is.

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

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

ASST. ATTY. GEN. PEREZ: Default
judgments?

COMMISSIONER KIRSANOW: Yes.

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

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

ASST. ATTY. GEN. PEREZ: I would actually
respectfully disagree with that because of the reasons
that we have been discussing. The Department has a
continuing obligation, whether or not they don't answer, whether or not they're pro se, whether or not they're represented by the biggest firm in town, to continue to conduct the analysis to determine whether there's a sufficient evidentiary base to support the charges. So I don't think it's ever late in the game or too late in the game to make those judgments.

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

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

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

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

ASST. ATTY. GEN. PEREZ: Well, then, one, I just want to be clear. Mr. Shabazz, the person at the scene with the stick, we sought the judgment and
obtained the judgment because we made the conclusion that --

COMMISSIONER KIRSANOW: You obtained a certain injunctive relief?

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

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

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

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

ASST. ATTY. GEN. PEREZ: Well, the
evidence that was chosen had both -- the evidence that was chosen in this case is I think a very reasonable avenue, which was the avenue of choosing a default judgment against Mr. Shabazz but --

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

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

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

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

COMMISSIONER KIRSANOW: Okay.

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

COMMISSIONER KIRSANOW: Was there any
political leadership involved in the decision not to pursue this particular case any further than it was?

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

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

CHAIRPERSON REYNOLDS: Commissioner Kirsanow, I will --

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

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

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

But are you saying that, in the Obama
administration, decisions within the Department of Justice, or at least some decisions, can be made by career civil servants?

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

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

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

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

ASST. ATTY. GEN. PEREZ: Sure.

CHAIRPERSON REYNOLDS: -- the responsibility and the ownership for those decisions, whether they are right or wrong, rests with the
politicals. Is that the same approach taken by the Obama administration?

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

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

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

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

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

So that happens. That happened when I was
in Bush I. And that happens now. I think that's kind
of been the standard operating procedure in the --

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

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

CHAIRPERSON REYNOLDS: Okay. Thank you.

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

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

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

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

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

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

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

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

COMMISSIONER GAZIANO: No, not the press release.

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

COMMISSIONER GAZIANO: Did you --

ASST. ATTY. GEN. PEREZ: -- of something
in the press --

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

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

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

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

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

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

VICE CHAIR THERNSTROM: I would like to
actually yield the amount of my time to Commissioner Yaki and if there is time left over to please come back to me.

CHAIRPERSON REYNOLDS: Yes?

COMMISSIONER YAKI: Thank you.

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

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

Certainly, in the case of Mr. Shabazz, I think we all agree that carrying a nightstick and acting in a threatening manner, to me, and apparently
to you or to the Division as well, constituted an 11(b) violation.

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

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

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

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

There has been no evidence produced that this precinct had any -- there was some evidence produced that maybe two or three people may have
turned away from voting at that particular time but, as I said, Mr. Shabazz was gone by 9:30.

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

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

What I am trying to get at, Mr. Assistant Attorney General, is that, despite your efforts here today and despite the evidence that the Panthers, this particular New Black Panther Party's attempts to spark a 300-precinct revolt failed miserably in the hands of two overly aggressive and misguided individuals and
despite the fact that there have been no other allegations against the Department that they have failed to prosecute 11(b) violations anywhere else in this country, nevertheless, the likelihood is very high.

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

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

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

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

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

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

ASST. ATTY. GEN. PEREZ: No problem.

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

CHAIRPERSON REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: You're yielding?

CHAIRPERSON REYNOLDS: No. You have five minutes.

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

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

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

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

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

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

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

COMMISSIONER GAZIANO: No. I'm glad --

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

COMMISSIONER GAZIANO: I have denied you
--

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

COMMISSIONER GAZIANO: That's partly the
letter --

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

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

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

But, in the absence of the Attorney
General or the principal or the President invoking
executive privilege to deny us material, you have
asserted that you are confident -- that is not the exact words -- but you think your other interests, other interests, confidentiality interests, override our statute, override our subpoena. Okay. We have a dispute about that, a legal dispute about that.

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

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

ASST. ATTY. GEN. PEREZ: The confidentiality interests again, this back and forth that we have had in terms of providing the 4,000 pages of documents, and including FBI statements, including other materials, is exactly the back and forth that we do when we have the House Judiciary Committee or other committees that ask us for information and ask us to produce the front-line attorneys. So there's --
COMMISSIONER GAZIANO: There's a difference. There's a difference. They can hold you in contempt. And they can go to court. Our statute says that you are to enforce our subpoenas, the Department is to enforce the subpoenas. That is the conflict. And so we have asked for a special counsel.

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

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


Commissioner Yaki?

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

CHAIRPERSON REYNOLDS: That is correct.

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

CHAIRPERSON REYNOLDS: That is correct.

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

Just to go back to the question that I had raised before, getting aside from the fact that we seem to be devolving into Whitewater territory all
over again, if the Commission were to, based on its re-prosecution of the evidence in the Black Panther case, come to a conclusion that the Department of Justice has been failing in its efforts to deal with voter intimidation in this country, how would you respond?

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

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

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

So I know that you have your job to do. And we have our job to do. Our job is law
enforcement, to apply the facts to the law to make sure that we are fully and effectively enforcing those laws to the best of our ability. And that is what we will continue to do.

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

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

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

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

CHAIRPERSON REYNOLDS: Commissioner Melendez?

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

COMMISSIONER YAKI: I'll carry it over.

CHAIRPERSON REYNOLDS: Okay. Commissioner Heriot?

COMMISSIONER HERIOT: I wanted to ask a question about the injunction that did issue. Why was
the decision made to limit it to the City of Philadelphia? Why not the suburbs? It's easy enough for someone like Mr. Shabazz, if he's told he can't repeat this activity in the City of Philadelphia, to just hop on a bus. Why just the city? Why not --

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

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

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

If someone like Mr. Shabazz is a wrongdoer -- and I think you agree he is a wrongdoer -- he is
not so stupid that he doesn't know how to get on a
bus. And at that point, he could repeat the same
activity and not be subject to contempt of court --

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

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

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

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

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

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

COMMISSIONER HERIOT: Yes. You know, should --

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

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

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

COMMISSIONER HERIOT: Well, if that had happened --

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

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

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

ASST. ATTY. GEN. PEREZ: The City of
Philadelphia is pretty big. The --

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

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

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

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

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

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

COMMISSIONER HERIOT: What about the Nicoletti case?

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

COMMISSIONER HERIOT: What injunction are you requesting there?

ASST. ATTY. GEN. PEREZ: They're going to jail. The --
COMMISSIONER HERIOT: Did you bring an 11(b)?

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

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

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

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

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

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

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

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

ASST. ATTY. GEN. PEREZ: And there was no
liability --

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

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

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

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

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

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

COMMISSIONER HERIOT: I assume you --

CHAIRPERSON REYNOLDS: Thank you, Mr. Perez.

COMMISSIONER HERIOT: -- did that in one
CHAIRPERSON REYNOLDS: Okay. Thank you, Mr. Perez.

Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes. Thank you.

Mr. Perez --

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

CHAIRPERSON REYNOLDS: Thank you.

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

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

Did the Department come to a position as to whether or not their activity on Election Day of 2008 constitutes protected activity under the First Amendment?
ASST. ATTY. GEN. PEREZ: Well, again, as it relates to Mr. Shabazz, the determination was made that his activities constituted -- I should say Mr. Shabazz, who was at the polling place because there are --

COMMISSIONER KIRSANOW: Right.

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

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

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

ASST. ATTY. GEN. PEREZ: Well, again, as it relates to Mr. Shabazz, the determination was made
that his activities constituted --

COMMISIONER KIRSANOW: Understood. Were any of the activities that we observed protected?

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

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

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

COMMISIONER KIRSANOW: Some of the discrete facts that we have here are, we have two individuals who belong to what has been described as a hate group, in military garb, with one of them having
a baton. Racial slurs were invoked.

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

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

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

ASST. ATTY. GEN. PEREZ: We apply the facts to the law in every single case that we do. And we make our best judgments as to whether the facts sustain the evidentiary burden, an admittedly high evidentiary burden that we had under Section 11(b).
We do that analysis in every case that we bring. In every statutory context in which we bring a case, we apply the facts to the law and make our best judgment possible. And that is what happened in this case.

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

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

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

ASST. ATTY. GEN. PEREZ: This was the judgment that was made by the two people with 60 years of experience. And they looked at the entire totality of the circumstances. They reviewed all the evidence that they had before them. And they made their best judgment on the merits.
And, again, this is a -- we will continue to have cases in the Department of Justice where we move up the chain and we have robust dialogue and debate.

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

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

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

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

ASST. ATTY. GEN. PEREZ: Thank you.

III. CLOSING REMARKS BY CHAIR

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

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

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

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

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

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

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

VICE CHAIR THERNSTROM: Well, I had a closing question for him, but I am not sure I have a
closing statement. I guess I will say two things. One, I very much appreciate Mr. Perez coming today. I thought he answered the questions in a forthright way and with integrity.

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

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

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

That's it.

CHAIRPERSON REYNOLDS: Commissioner Gaziano?

COMMISSIONER GAZIANO: I think that there
are two -- what comes to mind about the conflicts that we have with the Department's refusal to cooperate comes down to this.

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

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

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

Those individuals include Perelli, King,
Rosenbaum, and some of the trial team. There might be one or two others if we were allowed to do our job back in October and begin where we are.

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

CHAIRPERSON REYNOLDS: Commissioner Yaki?

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

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

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

When you look at what happened during the Bush administration, when you look at the fact that they declined people wearing guns and intimidating
Latino voters, that they declined people interviewing elderly black voters in their homes in Mississippi, interviewing elderly Latino voters in New Mexico, going into Philadelphia in sort of Men in Black-type outfits and this Commission has turned a blind eye to that for years, turned a blind eye to Katrina, turned a blind eye to so many other issues but, somehow in this particular instance, we're going to find fault with the Justice Department is the height, height of hypocrisy.

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

CHAIRPERSON REYNOLDS: Commissioner Melendez?

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

CHAIRPERSON REYNOLDS: Commissioner Heriot?

COMMISSIONER HERIOT: Well, I had thought I wouldn't make a statement, but I guess I am going to go back to my plan to make a statement here. And that
thought was just to make, I think, what is one single point. And that is, in the year running up to the 2008 election, there was a lot of very partisan bickering about election procedures.

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

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

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

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

But, lo and behold, what I regard and what
I think most people regard as an extremely strong case got dropped at a point where the resources necessary to follow through were really very, very small. And so that was surprising to me.

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

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

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

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

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

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

CHAIRPERSON REYNOLDS: Okay. And I would
just like to share some observations. I listened to Mr. Perez. And some of the thoughts that came to mind were, well, I was just surprised at the cramped, narrow approach taken by the Obama administration on this point. It was very technical, very conservative, just giving me the impression that the administration was just uncomfortable with this case.

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

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

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

In any event, at this point, though, I would like to say that this concludes our hearing for today. We are adjourned sine die until a later date.
We will hold the record open for additional evidence pursuant to 45 CFR section 702.8. Individuals who wish to submit items for consideration to be included in the record may send them to the General Counsel at the U.S. Commission on Civil Rights at 624 9th Street, Northwest, Washington, D.C. 20425.

Thank you.

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

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