U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

AUG 11 2010

The Honorable Gerald A. Reynolds
United States Commission on Civil Rights
624 Ninth Street, N.W.
Washington, D.C. 20425

Dear Chairman Reynolds:

I write in response to your letters dated July 14, July 28, and August 6, 2010, in which you raise concerns about, and request information regarding, the Civil Rights Division's policy regarding enforcement of our nation's civil rights laws. There should be no misunderstanding: the Civil Rights Division is firmly committed to the evenhanded application of the law, without regard to the race of the victims or perpetrators of unlawful behavior. Any suggestion to the contrary is simply untrue.

In testimony before the Commission, I explained in detail the circumstances surrounding the Division's successful effort in *United States v. New Black Panther Party for Self-Defense* to obtain an injunction against an individual who brought a nightstick to a Philadelphia polling place in November 2008. A copy of my written statement to the Commission is enclosed. *See* Statement of Thomas E. Perez before the U.S. Commission on Civil Rights (May 14, 2010). As I testified, the decision to proceed with all of the Division's original claims against the only defendant in that case who brought a weapon to a polling place and to dismiss the claims against the three other defendants reflects the kind of good faith, case-based assessment of the strengths and weaknesses of claims that the Civil Rights Division makes every day.

Our mission is to enforce all of the civil rights laws under our jurisdiction and to do so in a fair, thorough and independent manner. Since January 2009, we have successfully completed three times as many employment cases on behalf of servicemembers who were unlawfully terminated from their jobs because they were called to active duty as were brought in the preceding three years combined. We have put renewed focus on the prosecution of hate crimes, expanded enforcement of laws that protect persons with disabilities, and obtained a landmark lending discrimination settlement against insurance giant AIG. We are reinvigorating the Division's work in a wide range of areas. In so doing, we have followed the evidence where it leads and based enforcement decisions on the merits.

Our commitment to evenhanded enforcement of our civil rights laws extends to every part of the Division, and our work in the voting area is no exception. This commitment is evidenced by our ongoing work in Mississippi. There, the Division recently filed a Motion to

prevent actions by defendants Ike Brown and the Noxubee County (Mississippi) Democratic Executive Committee on the ground that the actions were motivated in part by racial animus against white voters. *See* United States' Memorandum Of Law In Support Of Its Motion For Additional Relief Against Defendants Ike Brown And The Noxubee County Democratic Executive Committee, *United States v. Brown et al.*, Civil Action No. 4:05-cv-33 (TSL/LRA) (S.D.Miss.) (copy enclosed). We have also undertaken to address claims that in 2005 armed agents from the Mississippi Attorney General's Office went to the homes of African Americans, many of whom were elderly, and demanded to know for whom they voted in a recent election. When we became aware of those allegations, we advised the Mississippi Attorney General's office of our concern that such intimidation not occur in the future and placed them on notice we will actively investigate any recurrence of such actions. We believe our actions in Mississippi clearly illustrate our commitment to even handed law enforcement.

Since becoming the Assistant Attorney General in October 2009, a cornerstone of my message to the entire Division, to career personnel and political appointees alike has been that we must recommit the Division to enforcing all the laws on the books that we are empowered to enforce, and that we must not pick and choose among them. This was a central part of the message in my address to the Division on October 14, 2009, which took place shortly after I arrived, in which I said that, "we must and will restore public confidence in the Division, and we can do so by enforcing the laws, all the laws, fairly and aggressively . . . ." I delivered a similar message at my installation ceremony, which included representatives from the Department and the civil rights community. Within days of my arrival, I visited every section in the Division, including the Voting Section, and emphasized the importance of a fair and independent approach to our work that involves enforcing all the laws on the books. Moreover, in testimony before both the House and Senate, in public speeches, and in meetings that I have held with more than 20 U.S. Attorney's offices and many local and national civil rights groups, I have reiterated the same message with regard to enforcing all of the laws in an fair, independent, evenhanded manner. In light of this clear message, I am certain that every Division employee should understand the mandate of equal enforcement of the law from the first day of my tenure as Assistant Attorney General.

In addition, your letter raised concerns about the Civil Rights Division's enforcement of the National Voter Registration Act *of* 1993 (NVRA). Our commitment to full and fair enforcement of all civil rights laws of course includes the provisions of the NVRA. Indeed, the Division currently has active matters involving a variety of allegations that implicate many different provisions of the NVRA, including investigations under Section 8 of the statute. In addition, for the first time, we have prepared and disseminated plain English guidance on how jurisdictions can comply with all provisions of the NVRA. I am confident that managers in the front office, the Voting Section and, indeed, throughout the Division, share my commitment to fair, independent, and evenhanded enforcement and will continue to communicate this message. There is no policy of selective enforcement, and our actions bear this out.

We have carefully considered your renewed request for Mr. Coates to testify before the Commission. In your letter of July 28, 2010, you state that the scope of the testimony would be limited to "non-deliberative statements or actions relating to whether there is a policy and/or culture within the Department of discriminatory enforcement of civil rights laws and whether

there is a policy not to enforce Section 8 of the [NVRA.]" In light of my clear articulation of our enforcement policy to the Division's employees and my having now confirmed that policy to the Commission both in sworn testimony and in this letter, we do not believe that a Civil Rights Division attorney who has been on detail to the United States Attorney's Office for the District of South Carolina since mid-January 2010 is the appropriate witness to testify regarding current Division policies. We are hopeful that the information and assurances contained in this letter will address the Commission's concerns about the Division's enforcement policies.

Please do not hesitate to contact me if I can be of further assistance regarding this, or any other matter.

Sincerely,

Thomas E. Perez
Assistant Attorney General

Enclosures

Statement of Thomas E. Perez
Assistant Attorney General, Civil Rights Division
U.S. Department of Justice
Before the U.S. Commission on Civil Rights

May 14, 2010
9:30 a.m.

Thank you for the opportunity to testify today. The Civil Rights Division is committed to upholding the civil and constitutional rights of all individuals, particularly those who are the most vulnerable members of our society. The Division has primary responsibility for enforcing federal laws to protect voting rights.

The Department is providing this statement in accordance with its ongoing cooperation with the Commission and specifically in furtherance of our efforts to cooperate with the Commission in the preparation of its planned statutory enforcement report. The areas the Commission has chosen as the focus of its planned enforcement report – the Department's efforts to combat voter intimidation and the litigation in *United States v. New Black Panther Party for Self-Defense* – represent just a small part of the Department's work to enforce federal voting laws. The Civil Rights Division is also responsible for enforcing the many protections of the Voting Rights Act, including the non-discrimination requirements, preclearance requirements, minority language accessibility requirements, federal observer provisions, assistance protections for voters who are illiterate or have disabilities, the protections of the Uniformed and Overseas Citizens Absentee Voting Act, which ensure that members of our armed services and overseas citizens have access to the ballot, the voter registration requirements of the National Voter Registration Act, and the election administration and technology standards of the Help America Vote Act.

Protection of the right to vote is one of the Department's top priorities, and we want to be as responsive as possible to requests for information about our law enforcement activities in this area consistent with the Department's need to protect confidential information. However, as noted in the written responses to the Commission's inquiries, we are constrained by the need to protect against disclosures that would undermine well-established confidentiality interests that are integral to the discharge of our law enforcement responsibilities, particularly those related to litigation decisions. These limitations are described in the Department's January 11, 2010 response to the Commission's December 8, 2009 requests and in later correspondence with the Commission.

Set forth below is information that may be useful to you in addition to the information already provided to the Commission – including over 4,000 pages of documents – in response the Commission's December 8, 2009 requests.

I. The Civil Rights Division's Voter Intimidation Work

The Department is strongly committed to the enforcement of laws that protect the right of citizens to vote. There are both civil and criminal federal statutes enforced by the Department that relate to voter intimidation. Enforcement responsibility within the Department of Justice for combating voter intimidation rests with both the Criminal Division and the Civil Rights Division.

As the Assistant Attorney General for the Civil Rights Division, I supervise, among other matters, the anti-voter intimidation work of the Division's Voting Section and the Criminal Section. 28 C.F.R. § 0.50. The Assistant Attorney General for the Criminal Division supervises the work conducted by the Public Integrity Section of the Criminal Division to combat voter intimidation. 28 C.F.R. § 0.55.

A. *Criminal Enforcement of Voter Intimidation Laws*

Criminal statutes that can be enforced by the Department against voter intimidation include the following: 18 U.S.C. § 594, which prohibits intimidating, threatening or coercing anyone, or attempting to do so, with the purpose of interfering with an individual's right to vote or not to vote in a federal general election; 18 U.S.C. § 609, which prohibits the use of military authority to influence the vote of a member of the Armed Forces or to require a member of the Armed Forces to march to a polling place, or attempts to do so; 18 U.S.C. § 610, which prohibits the intimidation or coercion of a federal employee's "political activity," which includes voting; 18 U.S.C. § 241, which prohibits conspiracies to, among other things, intimidate any person in the free exercise of any right or privilege secured by the Constitution or federal law, including the right to vote; 18 U.S.C. § 242, which prohibits deprivation under color of law of a right secured by the Constitution or federal law, including voting; and 18 U.S.C. § 245(b)(1)(A), which makes it illegal to use or threaten to use physical force to intimidate individuals from, among other things, voting or qualifying to vote.

In addition, Section 12 of the National Voter Registration Act (NVRA), 42 U.S.C. § 1973gg-10(1), makes it a federal crime to intimidate, threaten or coerce, or attempt to intimidate, threaten or coerce any person for: (1) registering to vote, or voting, or attempting to register or vote; (2) aiding any person in so doing; or (3) exercising any right under the NVRA. A more comprehensive overview of the federal voting and election statutes and the Department's enforcement program can be found in the "Federal Prosecution of Election Offenses Manual" issued by the Public Integrity Section of the Criminal Division.

The Civil Rights Division handles all racially motivated voting offenses, including racially motivated voter intimidation offenses. For example, recently we secured the conviction of four defendants on Staten Island who, on election night 2008, targeted African Americans because the defendants perceived that they had voted for Barack Obama. The defendants used a baton, metal pipe and even their automobile to attack their victims, causing significant injuries, which rendered one victim comatose. *United States v. Nicoletti, et al.* (E.D.N.Y.). But these criminal cases can be difficult cases to prove because under the criminal voter intimidation statutes we enforce, we must show beyond a reasonable doubt that the defendants by force or

threat of force willfully interfered with a voter because of his or her race or national origin, or other enumerated characteristic.

In threats cases, where the subject does not actually use force, we must carefully decide whether the subject's threats are legally actionable "true threats" or protected speech. The Supreme Court has held that a true threat is one in which a speaker directs a threat to another person with the intent of placing that person in fear of bodily harm or death. *Virginia* v. *Black*, 538 U.S. 343, 360 (2003). On the other hand, speech or expressive acts that are insulting, outrageous, hostile, or even advocate the general use of force and violence may be protected under the First Amendment. See *Madsen* v. *Women's Health Ctr.*, 512 U.S. 753, 774 (1994); *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969).

These are often difficult calls to make. One example is the recent instance we have identified that most closely resembles the facts in the 2009 Philadelphia Section 11(b) case that is a primary focus for this hearing. The Civil Rights Division received a complaint from a national civil rights organization regarding a matter in Pima, Arizona alleging that during the 2006 election, three well-known anti-immigration advocates – one of whom was wearing a gun – allegedly intimidated Latino voters at a polling place by approaching several persons, filming them, and advocating against printing voting materials in Spanish. In that instance, the Department declined to bring any action for alleged voter intimidation.

In addition to the criminal matters within the Civil Rights Division's jurisdiction, the Criminal Division handles a far broader array of election-related offenses, including some voter intimidation matters in which race is not a factor. Both the Criminal Division and the Civil Rights Division also work with the United States Attorney's Offices and the FBI field offices throughout the United States to enforce the federal voting and election statutes. Intimidation referrals are, however, a relatively rare component of the election-related criminal cases handled by the Department.

B. *Civil Enforcement of Voter Intimidation Laws*

With regard to civil enforcement, the Voting Section of the Civil Rights Division enforces Section 11(b) of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973i(b). This statute prohibits anyone, whether or not acting under color of law, from intimidating, threatening, or coercing, or attempting to intimidate, threaten, or coerce, any person for voting or attempting to vote or for aiding any person to vote or attempt to vote or for exercising any powers or duties under certain sections of the Voting Rights Act. Section 12(d) of the Voting Rights Act, 42 U.S.C. § 1973j(d), provides for the filing of a civil action by the Attorney General to secure preventive relief for a violation of such statute. In 1968, Congress repealed the criminal penalties for violations of Section 11(b) that were part of the original 1965 Voting Rights Act. Pub. Law No. 90-284, § 103, 82 Stat. 73, 75 (1968).

There have been very few cases brought under Section 11(b). Possible explanations include the limited remedies available under Section 11(b) of the Voting Rights Act and the challenging legal standard of proof. As a result, the Department can find records of only three civil actions filed under this provision since its enactment in 1965, prior to the case of *United*

States v. New Black Panther Party for Self-Defense. One of these cases settled before trial, and in both of the others, the court ruled that the Department had failed to establish a Section 11(b) claim: 1) *United States v. Harvey*, 250 F. Supp. 219 (E.D. La. 1966) (Threats of eviction and other economic penalties against black sharecroppers who had recently registered to vote found not to be form of intimidation, threat or coercion prohibited by Section 11(b)); 2) *United States v. North Carolina Republican Party*, Civil Action No. 91-161-CIV-5-F (E.D.N.C.) (Section 11(b) claim regarding pre-election mailing resolved by consent decree dated Feb. 27, 1992); 3) *United States v. Brown*, 494 F. Supp. 2d 440, 477 n. 56 (S.D. Miss. 2007) (Publication by county political party chairman of list of voters to be challenged if they attempted to vote in party primary election found not to be form of intimidation, threat or coercion prohibited by Section 11(b)). Indeed, as demonstrated in the *Brown* case, Section 11(b) cases can be extremely difficult to prove. In that case, the most recent federal district court to reject a Section 11(b) claim noted that the United States had "found no case in which plaintiffs have prevailed under this section." *Id.*

In some cases, because voter intimidation cases are difficult to prove, the Department has declined even to bring a case. In 2005, the Civil Rights Division received a complaint that armed Mississippi state investigators had allegedly intimidated elderly minority voters during an investigation of possible vote fraud in municipal elections by visiting them in their homes and asking for whom they voted, in spite of state law protections for the secrecy of the ballot. The Division did not bring a voter intimidation case in this instance.

The Voting Section also has jurisdiction to enforce 42 U.S.C. § 1971(b), part of the Civil Rights Act of 1957, which prohibits anyone, whether or not acting under color of law, from intimidating, threatening, or coercing, or attempting to intimidate, threaten, or coerce, any person for voting or attempting to vote in a federal election. Where appropriate, the Voting Section may also consider whether it has civil jurisdiction over complaints of voter intimidation or harassment under other sections of the Voting Rights Act, such as Section 2 of the Act, 42 U.S.C. § 1973.

C. *Process for Investigating, Evaluating, and Commencing Voter Intimidation Cases*

The Department of Justice may receive allegations of possible voter intimidation from a variety of sources, including but not limited to newspaper or other media accounts, complaints from organizations or groups, citizen calls or letters, referrals from state or local officials, other federal agencies, or Members of Congress.

Within the Department, such a complaint may fall within the supervisory or consultative criminal jurisdiction of the Election Crimes Branch of the Public Integrity Section of the Criminal Division, the U.S. Attorney's Offices, or the jurisdiction of the Criminal Section of the Civil Rights Division, or within the civil jurisdiction of the Voting Section of the Civil Rights Division. *See, e.g.*, 28 C.F.R. §§ 0.50, 0.55; U.S. Attorneys' Manual 8-1.000, 9-4.000; Federal Prosecution of Election Offenses (7th ed. 2007).

Upon the Department's receipt of such a complaint, the appropriate component (or components) review the allegations contained in the complaint and make a determination of whether there is jurisdiction to pursue the complaint, as well as whether to investigate the

allegations. Based upon the facts that are identified in a matter, a decision is made whether to pursue criminal or civil litigation in federal court. In each case or matter, decisions on investigation and/or litigation are based on its unique facts and the application of existing law to this set of facts. The Division continues to collect facts even after litigation in a matter is commenced and therefore the evaluation concerning claims and relief continues throughout the course of a case through the time of final disposition, and in some instances even thereafter, if necessary to enforce the terms of such disposition as set forth in an injunction or judgment.

II. The Civil Rights Division's Work in the *New Black Panther Party* Litigation

The following summary is based on information that is available to me as Assistant Attorney General for Civil Rights.

The events in this matter took place at a polling place in Philadelphia, Pennsylvania on the day of the most recent federal general election, November 4, 2008. The Department became aware of these events on Election Day and decided to conduct further inquiry, a decision in which the Civil Rights Division, the Criminal Division and the United States Attorney's Office for the Eastern District of Pennsylvania concurred. After reviewing this matter, the Civil Rights Division determined that the facts did not constitute a prosecutable violation of the federal criminal civil rights statutes. In July 2009, the United States Attorney's Office for the Eastern District of Pennsylvania declined prosecution in the matter. Our understanding is that local law enforcement officials also declined to pursue state criminal charges.

The Department did, however, initiate a civil action in federal court. On January 7, 2009, the Department filed a complaint seeking injunctive and declaratory relief under Section 11(b) of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973i(b), against four defendants: the New Black Panther Party for Self-Defense and its leader Malik Zulu Shabazz, and two individuals who appeared at the Philadelphia polling place on November 4, 2008, Minister King Samir Shabazz and Jerry Jackson. 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, that did not absolve the Department of its legal and ethical obligations to ensure that any relief sought was consistent with the law and supported by the evidence. The entry of a default judgment is not automatic, and the Pennsylvania Bar Rules impart a clear duty of candor and honesty in any legal proceeding; those duties are only heightened in the type of ex parte hearing that occurred in this matter. See Pa. RPC 3.3(d). At the remedial stage, as with the liability stage, the Department remains obliged to ensure that the request for relief is supported by the evidence and the law. In discharging its obligations in that regard, the Department considered not only the allegations in the complaint, but also the evidence collected by the Department both before and after the filing of the complaint.

After reviewing the evidence, the Department concluded that there was insufficient evidence to establish that the Party or Malik Zulu Shabazz violated Section 11(b).

Prior to the election, the New Black Panther Party for Self-Defense made statements and posted notice that over 300 members of the New Black Panther Party for Self-Defense would be deployed at polling locations during voting on November 4, 2008, throughout the United States. To the Department's knowledge, the single polling place in Philadelphia is the only location where an incident occurred. This apparent fact is inconsistent with the notion that the Party or Malik Zulu Shabazz directed a campaign of intimidation. The Department also considered the statement posted by the Party on its website regarding the incident. The statement posted on the Party web site provided: "Specifically, in the case of Philadelphia, the New Black Panther Party wishes to express that the actions of people purported to be members do not represent the official views of the New Black Panther Party and are not connected nor in keeping with our official position as a party. The publicly expressed sentiments and actions of purported members do not speak for either the party's leadership or its membership." As of May 2009, the Department had information indicating that this statement was posted prior to the filing of the civil action. A separate statement posted on the Party website, dated January 7, 2009 (the same date that the complaint in this case was filed), reported the suspension of the Philadelphia chapter because of these activities.

At a minimum, without sufficient proof that New Black Panther Party or Malik Zulu Shabazz directed or controlled unlawful activities at the polls, or made speeches directed to immediately inciting or producing lawless action on Election Day, any attempt to bring suit against those parties based merely upon their alleged "approval" or "endorsement" of Minister King Samir Shabazz and Jackson's activities would have likely failed. See *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982). The Department therefore decided, based on its review of applicable legal precedent and the totality of the evidence, to dismiss the claims against the New Black Panther Party and Malik Zulu Shabazz.

With regard to the alleged activities at the Philadelphia polling place by the Minister King Samir Shabazz and Jerry Jackson, the Department considered all available information, including signed statements of poll observers or poll watchers at the polling place. In addition, Philadelphia police who arrived at the polling place on Election Day to assess the situation decided to direct Minister King Samir Shabazz to leave the polling place, but allowed Jackson, a certified pollwatcher, to remain.

The Department concluded that the evidence collected established that Minister King Samir Shabazz violated Section 11(b) by his conduct at the Philadelphia polling place on Election Day. This evidence included his display of a nightstick at the polling place during voting hours, an act which supported the allegation of voter intimidation. The Department therefore decided to seek an injunction against defendant Minister King Samir Shabazz. In approving the injunction, the district court found that the United States had alleged that Minister King Samir Shabazz "stood in front of the polling location at 1221 Fairmont Street in Philadelphia, wearing a military style uniform, wielding a nightstick, and making intimidating statements and gestures to various individuals, all in violation of 42 U.S.C. § 1973i(b)," (Order of May 18, 2009, at 1), and entered judgment "in favor of the United States of America and against Minister King Samir Shabazz, enjoining Minister King Samir Shabazz from displaying a weapon within 100 feet of any open polling location in the City of Philadelphia, or from otherwise violating 42 U.S.C. § 1973i(b)." Judgment (May 18, 2009). The federal court retains jurisdiction over its enforcement until 2012.

The Department concluded that a nationwide injunction was not legally supportable in the case against Minister King Samir Shabazz. The Supreme Court has emphasized that an injunction must be "no broader than necessary to achieve its desired goals." *Madsen* v. *Women's Health Ctr.*, 512 U.S. 753, 765 (1994). To that end, a reviewing court must pay "close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech" in keeping with the "general rule . . . that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." See *ibid.* (citation omitted).

Because injunctive relief is tailored to its objectives, a focus upon the facts alleged by the Department was critical to determining the scope of the injunction that could have been obtained. The Department alleged that Minister King Samir Shabazz is a resident of Philadelphia and is the leader of the Philadelphia chapter of the NBPP. Complaint ¶ 5. The complaint alleged that on November 4, 2008, Minister King Samir Shabazz brandished a weapon and made racially threatening and insulting remarks while standing in front of the entrance of a polling place in Philadelphia. Complaint ¶¶ 8-10. The complaint further alleged that on this specific occasion Minister King Samir Shabazz pointed the weapon at individuals, tapped it in his hand and elsewhere, and made menacing and intimidating gestures, statements and movements toward individuals who were present to aid voters. Complaint ¶¶ 9-10.

The evidence was insufficient to show that Minister King Samir Shabazz had engaged or planned to engage in a nationwide pattern of such conduct as he exhibited at the polling place in Philadelphia, or that he was inclined to disregard the injunction. Cf. *United States* v. *Dinwiddie*, 76 F.3d 913, 929 (8th Cir. 1996) (finding the scope of a nationwide injunction in a Freedom of Access to Clinic Entrance Act (FACE) case appropriate because of a protestor's "consistent, repetitious, and flagrant unwillingness or inability to comply" with the proscriptions of the law, his "serious intent to do bodily harm to the providers and recipients of reproductive health services," and the possibility, if the injunction were geographically limited, that he "could easily frustrate the purpose and spirit of the permanent injunction simply by stepping over state lines and engaging in similar activity at another reproductive health facility" (quotation and citation omitted)). Absent such facts, in other FACE cases, the geographic scope of injunctions the Department has obtained has been quite narrow, generally limited to a certain number of feet from a given clinic, see *United States* v. *Scott*, No. 3:95cv1216 1998 U.S. Dist. LEXIS 10420 (D. Conn. June 25, 1998), or simply preventing protestors from impeding ingress and egress to a particular clinic. See *United States* v. *Burke*, 15 F. Supp. 2d 1090 (D. Kan. 1998); *United States* v. *Brock*, 2 F. Supp. 2d 1172 (E.D. Wis. 1998).

Given the facts presented, the injunction sought by the Department prohibited Minister King Samir Shabazz from displaying a weapon within 100 feet of any open polling location on any election day in the City of Philadelphia, or from otherwise violating 42 U.S.C. 1973i(b), (see Order of May 18, 2009, at 4). The Department considers this injunction tailored appropriately to the scope of the violation and the requirements of the First Amendment, and will fully enforce the injunction's terms. Section 11(b) does not authorize other kinds of relief, such as criminal penalties, monetary damages, or other civil penalties.

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

The decisions regarding the disposition of the case, both seeking an injunction as to one defendant and voluntarily dismissing three other defendants, ultimately was made by the career attorney then serving as the Acting Assistant Attorney General for the Civil Rights Division. Another career attorney who was then serving as the Acting Deputy Assistant Attorney General with responsibility for supervising the Voting Section also participated directly in the decision-making process. These two career Civil Rights Division attorneys have over 60 years of experience at the Department between them, and each worked in the Voting Section at some point during their careers. Based on the totality of the evidence and the relevant legal precedent, the Acting Assistant Attorney General made a judgment about how to proceed, choosing to seek an injunction against the only defendant who brought a weapon to the Philadelphia polling place on Election Day and to voluntarily dismiss the other three defendants.

The decision to proceed with the claims against Minister King Samir Shabazz and to dismiss the claims against the three other defendants was based on the merits and reflects the kind of good faith, case-based assessment of the strengths and weaknesses of claims that the Department makes every day.

We assure you that the Department is committed to comprehensive and vigorous enforcement of both the civil and criminal provisions of federal law that prohibit voter intimidation. We continue to work with voters, communities, and local law enforcement to ensure that every American can vote free from intimidation, coercion or threats.

Thank you for giving the Department the opportunity to present this statement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 4:05-cv-33 (TSL/LRA)
	)	
IKE BROWN, et al.,	)	
	)	
Defendants.	)	
	)	

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR ADDITIONAL RELIEF AGAINST DEFENDANTS IKE BROWN AND THE NOXUBEE COUNTY DEMOCRATIC EXECUTIVE COMMITTEE

A. INTRODUCTION

Plaintiff United States of America respectfully submits this Memorandum of Law in Support of its Motion for Additional Relief. As set forth in greater detail below, the United States filed this motion after Defendants Ike Brown and the Noxubee County Democratic Executive Committee ("NDEC"), adopted and made a submission to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, seeking preclearance of a motion to implement a new party loyalty standard in all federal, state, and municipal Democratic Party primaries in Noxubee County and to close those primaries accordingly ("NDEC Submission"; *see* Exhibit A). The party loyalty standard is embodied in a March 3, 2010 "Motion to close Democratic Primary," signed by Chairman Ike Brown plus ten other members of the NDEC. *Id.* at 3.

The Attorney General, by letter dated July 12, 2010, has rejected this attempt by Mr. Brown and the NDEC to make this purported submission seeking to implement a party loyalty standard and to close the party primary elections. The Attorney General concluded, under the

terms of this Court's Remedial Order in this case, that the Defendants are not proper officials to make such a submission, and that the only proper submitting official is the Referee-Administrator appointed by this Court. *See* Exhibit B (Letter from T. Christian Herren, Jr., Chief, Voting Section, to Wilbur O. Colom, Esq.).

By seeking to dictate the terms of electoral qualifications and by submitting these qualifications to the Attorney General for preclearance, the Defendants have violated the Remedial Order in this case in two ways. First, the Defendants have assumed electoral duties that this Court has exclusively reserved for the Referee-Administrator. Second, the evidence surrounding the Defendants' decision to implement this new party loyalty standard indicates that, like the party loyalty standard previously implemented by Defendants in Noxubee County, its genesis is one that is, at least in part, racially motivated.

Accordingly, the United States respectfully requests that the Court grant the additional relief set forth in the accompanying motion, namely, 1) enjoining the Defendants from implementing their "Motion to close Democratic Primary"; 2) expressly providing that any further efforts to seek preclearance under Section 5 of the Voting Rights Act for voting changes to be implemented in Democratic Party primary elections shall be made only by the Referee-Administrator; and 3) extending the time period covered by the Court's Remedial Order until November 20, 2013.

B. RELEVANT PROCEDURAL HISTORY

In its June 29, 2007 liability Order, this Court found that Defendants Ike Brown and the NDEC had violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, in Democratic Party primary elections in Noxubee County by having "administered and manipulated the political

process in ways specifically intended and designed to impair and impede participation of white voters and to dilute their votes." *United States v. Brown,* 494 F. Supp. 2d 440, 485 (S.D. Miss. 2007). As this Court concluded,

> where the proof establishes a specific racial intent by black election officials to disenfranchise white voters, Section 2 applies with ease. No one could reasonably argue that an election official's racially motivated decision to count the votes of black voters while rejecting those of white voters is discrimination that can be countenanced under any view of Section 2. In purpose and in effect, that is what has occurred in this case.

Id. at 486.

The Defendants' discriminatory actions pervaded the 2003 Democratic primary, resulting *inter alia,* in the wrongful rejection of white voters' ballots. Moreover, as Chairman of the NDEC, Mr. Brown expressly advocated taking actions which decreased the likelihood of white candidates being elected to local office, including attempting to enforce a party loyalty standard in a racially discriminatory fashion. *Id.* at 472-77.

On August 27, 2007, the Court granted the United States' request for comprehensive remedial relief, which included the appointment of a Referee-Administrator to preside over the Noxubee County Democratic Party primary and primary runoff elections through November 20, 2011. In delineating the duties of the Referee-Administrator, the Court ordered that:

> In serving as the Superintendent of Elections, all electoral duties of the Chairman of the Noxubee County Democratic Executive Committee and the Noxubee County Democratic Executive Committee shall be executed by the Referee-Administrator, with advice and assistance from the Noxubee County Democratic Executive Committee as he deems appropriate. These duties, which would otherwise be undertaken by the NDEC Chairman, include, but are not limited to, the following: certification of candidates, appointment of poll officials, assignment of poll officials to the various voting precincts, distribution of regular ballots and ballot boxes containing absentee ballots, supervision of polling locations and poll officials, and certification of election results.

United States v. Brown, 2007 WL 2461965, *1 ¶ 4 (S.D. Miss.). The Court further mandated that the "defendants shall not interfere or attempt to interfere in any way with the responsibilities of the Referee-Administrator." *Id.* at *2 ¶ 10. The Court particularly explained that, "to prevent a recurrence of past transgressions by NDEC Chairman Brown in the conduct of Democratic primary elections, the person appointed by the court must be given broad authority to act in the place and stead of Mr. Brown . . ." *Id.* at *1 n.1.

This injunctive relief, in addition to other, comprehensive relief, was ordered after the Defendants were shown, in an August 21, 2007 hearing, to have unlawfully involved themselves in the August 7, 2007 Democratic Party primary, conducted after the entry of the court's liability opinion, notwithstanding their prior assurances to the Court that they would abstain from interfering in that election in any way. *See, e.g.,* Doc. # 225 at 3-4, and cited exhibits; *see also* Gov't Exh's A-E (federal observer reports) from August 21, 2007 remedial hearing.

Included in the other relief addressed in the Court's Remedial Order was a prohibition on racially discriminatory enforcement of party loyalty requirements. *See* 2007 WL 2461965 at *5 ¶ 34. In the liability opinion, the Court had specifically addressed the threatened use of challenges based on party loyalty. 494 F. Supp. 2d at 472-77.[1] The Court considered, at length,

[1] These party loyalty challenges came about during a 2003 controversy in which Mr. Brown had threatened to challenge 174 white voters under the authority of Miss. Code Ann. § 23-15-575, which states, "No person shall be eligible to participate in any primary election unless he intends to support the nominations made in the primary in which he participates." The Mississippi Attorney General had strongly cautioned Mr. Brown not to attempt to enforce a party loyalty standard, noting, in part, that the Department of Justice had indicated that "challenging a person's right to vote based on his or her alleged lack of support of party nominees pursuant to Section 23-15-575 would be viewed as a change in practice that requires pre-clearance pursuant to Section 5 of the Voting Rights Act." *Brown*, 494 F. Supp. 2d at 474 n.53, 474-75 (quoting Cole Opinion, 2003 WL 21962318 (Miss. A.G. July 21, 2003)).

the question of whether Mr. Brown's attempt to enforce a party loyalty standard "was pretext for a true purpose to discourage white voters from coming to the polls, or some combination of the two." *Id.* at 476. The Court concluded that Mr. Brown's attempt to enforce a local party loyalty standard in Noxubee County was taken, "in part because of party loyalty concerns, but also as an attempt to discourage white voters from voting . . ." *Id.* at 477.[2] Therefore, in its Remedial Order, the Court explicitly stated, "Defendants and their agents shall not enforce any party loyalty requirements in a racially discriminatory manner." 2007 WL 2461965 at *5 ¶ 34; *see also* *1 ¶ 1 (enjoining discrimination proscribed by the Voting Rights Act).

On appeal, the Fifth Circuit specifically upheld the findings of the liability opinion and the relief implemented in the Remedial Order. *United States v. Brown*, 561 F.3d 420 (5th Cir. 2009). With respect to the Remedial Order, the Fifth Circuit noted that "[d]espite their representations to the court and despite the court's prior liability holding, defendants recidivated. In so doing, defendants demonstrated that they could not be relied upon to voluntarily remedy their § 2 violation." *Id.* at 436.

C. CURRENT CONTROVERSY

Since the Court issued its Remedial Order, the Referee-Administrator has taken on all the duties of the Superintendent of Elections for the Noxubee County Democratic Party primaries. To the United States' knowledge, since the issuance of the Order, all of the electoral duties that

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[2] The existence of partisan motivations did not make the racial motivations irrelevant. As the Court noted, "Racial discrimination need only be one purpose, and not even a primary purpose, of an official act in order for a violation of the Fourteenth and the Fifteenth Amendments to occur . . . " *Id.* at 475 n.54 (quoting *Velasquez v. City of Abilene, Tex.*, 725 F.2d 1017, 1022 (5th Cir.1984), and citing *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265 (1977)).

fall under the broad language of the Order have been executed by former Mississippi Supreme Court Justice Reuben Anderson – that is, until earlier this year.

Specifically, on March 3, 2010, NDEC Chairman Ike Brown and the NDEC met and adopted a "Motion to close Democratic Primary," which provided as follows:

> The Democratic Primary in Noxubee Co. at all levels Municipal, State, and Federal will be closed to any voter who either served on Republican Executive Committee, hold office as Republican or voted in any Republican Primary at any level after Feb. 1st 2008. All other voters will be eligible. Any such voter shall be ineligible for a period of (18 months) after voting in any such Primary or serving on Executive Committee.

Exhibit A at 3.

The motion was signed by Ike Brown and ten other members of the NDEC. *Id.* at 3. By letter dated May 12, 2010, NDEC Chairman Ike Brown and the NDEC, through counsel, made a submission to the Attorney General purporting to seek preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to enforce Miss. Code Ann. § 23-15-575 "within the county to further party loyalty . . ." Exhibit A at 1-2. The Attorney General received the submission on May 13, 2010. Neither the cover letter for the submission, nor the motion itself, makes any reference to *United States v. Brown*, the Court's orders in this case, or the Referee-Administrator. There is no indication, from the NDEC motion, the NDEC submission, or the docket of this Court, that the Defendants apprised the Court or the Referee-Administrator of these developments. On July 12, 2010, the Attorney General responded by letter to counsel for the Defendants, rejecting the purported submission, concluding, "the Referee-Administrator, and not the Noxubee County Democratic Executive Committee, is the only proper submitting official under Section 5 for any proposed voting change in Democratic Party primary elections in

Noxubee County during the term of the Remedial Order. Accordingly, it would be inappropriate for the Attorney General to make a determination concerning your submission." Exhibit B.

On June 17, 2010, a story entitled "Dem chief seeks DOJ approval to banish GOP voters" appeared in *The Beacon*, the local newspaper for Noxubee County. *See* Exhibit C (Scott Boyd Declaration and Attachment A thereto). The article, written by reporter Scott Boyd, reported that Mr. Brown and the NDEC had submitted, under Section 5 of the Voting Rights Act, the aforementioned "Motion to close Democratic Primary." *Id.* Mr. Boyd did not report on the "Motion to close Democratic Primary" when it first was adopted in March of 2010, because neither Mr. Brown, nor anyone on the NDEC, informed Mr. Boyd of the meeting. *Id.* ¶ 7.

Mr. Brown approached Mr. Boyd after the publication of the story and expressed irritation that the story had publicly revealed the NDEC's plan to implement a new party loyalty standard. *Id.* ¶ 4. During the course of his discussion with Mr. Brown, Mr. Boyd questioned Mr. Brown's motives for implementing the party loyalty standard, and asked whether Noxubee County Justice Court Judge Dirk Dickson, a Democrat who is black, would be prohibited from voting in the Democratic primary. *Id.* ¶¶ 3, 5. Mr. Boyd knew that the party loyalty plan would exclude voters who had voted in prior Republican primaries; and he also knew that Judge Dickson had voted in the August 7, 2007 Republican primary. *Id.* ¶¶ 2, 3. Upon being asked by Mr. Boyd whether Judge Dickson would face a challenge, Mr. Brown explained, "That's why we picked the date." *Id.* ¶ 6. Mr. Boyd understood this to mean that the Defendants had chosen February 1, 2008 as the cutoff date in order to avoid excluding Judge Dickson under the new party loyalty standard, since Judge Dickson had voted in the August 7, 2007 Republican primary. *Id.*

D. REQUESTED RELIEF

Based on the foregoing reasons, the United States respectfully requests that the Court amend its August 27, 2007 Order to grant additional relief to 1) enjoin the Defendants from implementing or enforcing their "Motion to close Democratic Primary," 2) provide that any further efforts to seek preclearance under Section 5 of the Voting Rights Act for voting changes to be implemented in Democratic Party primary elections shall be made only by the Referee-Administrator; and 3) extend the time period covered by the Court's Remedial Order until November 20, 2013.

1. Enjoining the "Motion to close Democratic Primary"

The United States moves the Court to enjoin the Defendants from moving forward with the proposed "Motion to close Democratic Primary," because it constitutes a violation of this Court's Order. In formulating this new party loyalty standard, the Defendants have ignored the authority of this Court and the Referee-Administrator.

According to this Court's Remedial Order, "*all electoral duties* of the Chairman of the Noxubee County Democratic Executive Committee and the Noxubee County Democratic Executive Committee shall be executed by the Referee-Administrator . . ." 2007 WL 2461965, *1 ¶ 4 (S.D. Miss.) (emphasis added). Therefore, to the degree that state law or state party rules deem it appropriate for the NDEC to make changes to voter requirements and qualifications, this is one of the "electoral duties" which now is under the sole authority of the Referee-Administrator. By making this decision, and thereafter submitting this proposed change to the Attorney General, the Defendants have usurped the authority of the Referee-Administrator, who is the only official authorized to make such changes until the termination of the Remedial Order.

Based on the Defendants' demonstrated malfeasance in the past, as found by this Court, there is every reason to believe that, unless expressly banned from acting to the contrary, the Defendants will continue to move forward with their unlawful attempt to enforce this change.

The "Motion to close Democratic Primary" is, moreover, an attempt to enforce a party loyalty standard through racially disparate means, again in violation of the Court's Order. The Court has directed that "Defendants and their agents shall not enforce any party loyalty requirements in a racially discriminatory manner." 2007 WL 2461965 at *5, ¶ 34. This directive was necessitated by Defendant Ike Brown's numerous, well-documented attempts to disenfranchise white voters through the enforcement of a party loyalty standard. 494 F. Supp. 2d 440, 472-77 (United States' Proposed Findings at pp. 34-40).

The current effort by the Defendants is a part of the same pattern of behavior described by the Court in its liability opinion, in which Mr. Brown was seen to combine partisan motives with underlying racial motives. In the liability opinion, the Court noted that the list of 174 voters Mr. Brown threatened to challenge on party loyalty grounds included only white voters, despite the presence of black voters who met the terms of his party loyalty standard. *Brown*, 494 F. Supp. 2d at 476. These facts established that Mr. Brown's actions were motivated in part by racial concerns.

In the present situation, the facts show that, as Mr. Brown explained to Mr. Boyd, the February 1, 2008 cut-off date for his new loyalty standard was chosen in order to ensure that it would not unfavorably impact a black Democrat, Noxubee County Justice Court Judge Dirk Dickson, who voted in the 2007 Republican primary. These facts again suggest that Mr. Brown is motivated, at least in part, by racial concerns. This conclusion is bolstered by Mr. Brown's

prior history of using a party loyalty standard to reduce white voter participation in Noxubee County Democratic Party primaries, while at the same time not applying a party loyalty standard to similarly situated black voters. Mr. Brown's interest in executing a party loyalty campaign in this way is similar to his 2003 attempt to enforce a party loyalty standard. In 2003, Mr. Brown personally knew that a black Democrat, Shuqualak Mayor Velma Jenkins, publicly supported a Republican candidate, yet he did not include her in the list of 174 white voters whom he threatened to challenge on party loyalty grounds. (Trial Tr. 2475-76.) Indeed, after Mr. Brown learned that Mayor Jenkins was supporting Republican Congressman Chip Pickering, he did not withdraw his support for her for Mayor of Shuqualak. *Id.*

The United States therefore respectfully requests that the Court enjoin the Defendants from making any attempt to enforce the provisions of their "Motion to close Democratic Primary."[3]

2. *Providing That All Efforts to Seek Section 5 Preclearance for Voting Changes to Be Implemented in Democratic Party Primary Elections in Noxubee County must Be Made by the Referee-Administrator*

Under Section 5 of the Voting Rights Act, all changes affecting voting in covered jurisdictions must be precleared by the Attorney General or the District Court for the District of Columbia. 42 U.S.C. § 1973c. Noxubee County is a political subdivision of the State of Mississippi, which is subject to Section 5. 28 C.F.R. Part 51 Appendix. Submissions under Section 5 of the Voting Rights Act may only be made by the "appropriate official of the submitting authority . . ." 28 C.F.R. 51.23(a). Again, according to this Court's Remedial Order,

[3] Additionally, because Defendants' "Motion to close Democratic Primary" is subject to Section 5 of the Voting Rights Act, and has not received preclearance under Section 5, it is legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991).

"*all electoral duties* of the Chairman of the Noxubee County Democratic Executive Committee and the Noxubee County Democratic Executive Committee shall be executed by the Referee-Administrator . . ." 2007 WL 2461965, *1 ¶ 4 (S.D. Miss.) (emphasis added). Hence, the United States respectfully requests that this Court order that any efforts to seek preclearance under Section 5 for voting changes to be implemented in Democratic Party primary elections in Noxubee County during the term of this Court's Remedial Order must be made only by the Referee-Administrator, rather than by Defendants.

3. Extending the Time Period Covered by the Remedial Order

The United States also moves the Court to extend the term of the Remedial Order until November 20, 2013, two years past the original expiration date. The Defendants' actions necessitating the instant motion constitute a violation of the orders of this Court. Notwithstanding the Court's clear liability ruling, in which the Defendants' past attempts to enforce a party loyalty standard were determined to encompass a racially discriminatory motive; and notwithstanding the Court's detailed Remedial Order, in which Justice Reuben Anderson was appointed Referee-Administrator, with sweeping electoral authority in Democratic Primary elections, the Defendants met and crafted a motion that again would implement a party loyalty standard, to all appearances without the knowledge or approval of the Referee-Administrator. When the fact was discovered by a diligent reporter, Mr. Brown's first response was to rebuke that reporter for disclosing the new effort to implement a party loyalty requirement, while essentially admitting, in the same conversation, that the rules had been structured to aid Judge Dickson.

The United States is concerned that, a year and a half before the expiration of the Court's Order, the Defendants already are seeking to circumvent it by bypassing the Referee-Administrator and returning to the same type of practices that led to the filing of this case in the first place. It seems apparent that Defendants will again "recidivate," in the language of the Fifth Circuit, and return to old practices. An extension of the Court's Order is necessary to protect the voting rights of the citizens of Noxubee County. An extension also will remind the Defendants of the seriousness of their obligations under the Order, and assist them in developing a pattern of compliance that will last beyond the expiration of the Order.

E. CONCLUSION

The Defendants have done more here than commit a mere oversight in usurping the authority of the Referee-Administrator by enacting and submitting their "Motion to close Democratic Primary" to the Attorney General. In attempting to bypass both the Referee-Administrator and the Court to implement a new party loyalty standard, one with a long history in this case that has been accompanied by racially discriminatory motives, the Defendants have again ignored this Court's orders. For the foregoing reasons, the United States therefore moves the Court to 1) enjoin the Defendants from implementing or enforcing their "Motion to close Democratic Primary"; 2) provide that any further efforts to seek preclearance under Section 5 of the Voting Rights Act for voting changes to be implemented in Democratic Party primary elections shall be made only by the Referee-Administrator; and 3) extend the time period covered by the Court's Remedial Order until November 20, 2013.

The United States believes that this motion can be decided upon the record, but the United States is prepared to appear should the Court desire to hold a hearing on this motion.

Respectfully Submitted,

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Date: July 13, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2010, I served a true and correct copy of the foregoing via the Court's ECF filing system to the following counsel of record:

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