FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

RANKING MEMBER—COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD

CO-CHAIR—TOM LANTOS
HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

June 8, 2009

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wolf.house.gov

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave NW Rm 5111
Washington DC 20530

Dear Attorney General Holder:

I am troubled by your recent decision to drop the Department of Justice's lawsuit against the "New Black Panther Party for Self-Defense," a militant supremacist organization and hate group, and its two members who threatened voters as part of a national voter intimidation effort on Election Day last November.

According to the DOJ complaint, two uniformed men stood outside a polling station located at 1221 Fairmont Street in Philadelphia, Pennsylvania, brandishing weapons to intimidate voters. New Black Party Chairman and self-proclaimed "Attorney at War" Malik Zulu Shabazz confirmed that the placement of these men, Samir Shabazz and Jerry Jackson, in front of the polling station was part of a nationwide effort to position armed party members at precincts.

The complaint also stated that Samir Shabazz "pointed the weapon at individuals, menacingly tapped it [on] his other hand, or menacingly tapped it elsewhere. This activity occurred approximately eight to fifteen feet from the entrance to the polling station." Additionally, both men made "racial threats and racial insults at both black and white individuals" and made "menacing and intimidating gestures, statements, and movements directed at individuals who were present to aid voters," according to witness statements in the DOJ complaint. One of the witnesses, an experienced civil rights attorney who worked with Charles Evers in Mississippi, has publicly called this "the most blatant form of voter intimidation" he has ever seen.

On January 7, the Department of Justice appropriately filed suit in the U.S. District Court in Philadelphia against three men and the New Black Panther Party for Self-Defense under the Voting Rights Act. In the department's news release, Acting Assistant Attorney General Grace Chung Becker stated, "The Voting Rights Act of 1965 was passed to protect the fundamental right to vote and the Department takes allegations of voter intimidation seriously."

I worry that the department's commitment to protecting the "fundamental right to vote" is wavering under your leadership. I fail to understand how you could dismiss a legitimate case against a party that deployed armed men to a polling station – one of whom brandished a weapon to voters – who harassed and intimidated voters, and could then decide that such actions do not constitute a violation of section 11(b) of the Voting Rights Act of 1965, which prohibits "intimidation, coercion, or threats" against voters. What message does this send to other like-minded groups -- whoever their target -- about this administration's commitment to voting rights?

None of the defendants filed an answer to the lawsuit, which means that legally they admitted all of the allegations in the complaint. Yet your department dismissed the suit it had already won by default against three of the defendants. Not only did the department dismiss the civil suit, but it has also failed to criminally prosecute the defendants. The actions of these defendants are all violations of criminal provisions of the U.S. Code that prohibit intimidating, threatening and coercing voters. This is outlined on pages 54-63 of "Federal Prosecution of Election Offenses," the handbook provided by the Public Integrity Section of the Criminal Division to Justice Department prosecutors. These defendants could have (and should have) been charged under a number of provisions, including 42 U.S.C §1973gg-10(1); 18 U.S.C. §§ 241, 242, 245(b)(1)(A), and 594.

In 2006, then-Senator Barack Obama called such intimidation tactics "deplorable," citing similar intimidation of Native American voters in South Dakota in 2004 and a number of other incidents targeting African American voters. Your inexplicable dismissal of the civil case and the failure to file a criminal prosecution flies in the face of the president's stand on voting rights and sullies the good name of your department. It calls into question your commitment to protecting all voters and guaranteeing that they can exercise their franchise freely without fear.

The American people and this Congress deserve a full and transparent accounting of your decision to drop this case.

Best wishes.

Sincerely,

Frank R. Wolf
Member of Congress

FRW:tc

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10TH DISTRICT, VIRGINIA

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The Hon. John Conyers
Chairman
House Judiciary Committee
2138 Rayburn HOB
Washington, DC 20515

The Hon. Lamar Smith
Ranking Member
House Judiciary Committee
2142 Rayburn HOB
Washington, DC 20515

Dear Chairman Conyers and Ranking Member Smith:

I write to urge the House Judiciary Committee to hold a hearing on Attorney General Eric Holder's decision to dismiss the Department of Justice's (DOJ) case against the New Black Panther Party for voter intimidation on November 4, 2008. The dismissal of this case, which civil rights activist Bartle Bull called, "the most blatant form of voter intimidation I have encountered in my life in political campaigns in many states, even going back to the work I did in Mississippi in the 1960s," merits congressional attention, if only to force the department to explain its decision to dismiss this case.

Following the department's surprising dismissal, I sent the attorney general the enclosed letter requesting additional information regarding his decision. Additionally, the U.S. Commission on Civil Rights, which I oversee as ranking member of the House Commerce-Justice-Science Appropriations subcommittee, voted unanimously to send the enclosed letters to the department on June 16 and June 22. To date, neither the commission nor I have received any response to our inquiries.

Upon his installation as attorney general, Eric Holder declared, "**We will protect the civil rights of our fellow citizens, all of our fellow citizens** – in the workplace, in the housing market, in our educational institutions **and in the voting booth,** as well as in their day to day lives." I believe that the House Judiciary Committee has an obligation to determine whether Mr. Holder's deeds match his words, especially in light of the many unanswered questions posed by the Commission on Civil Rights and members of Congress.

Thank you for your consideration. Please do not hesitate to contact me at 5-5136 if I can provide additional information on my inquiry regarding the dismissal of this case.

Best wishes.

Sincerely,

FRANK R. WOLF
Member of Congress

Congress of the United States
Washington, DC 20515

July 9, 2009

The Honorable Glenn A. Fine
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Inspector General,

We write today to request that you investigate whether improper political considerations led the Justice Department to dismiss a voter intimidation case it previously brought against the New Black Panther Party and two individuals affiliated with it. Following the dismissal, Judiciary Committee Ranking Member Lamar Smith and Ranking Member Frank Wolf each submitted letters to the Justice Department requesting information regarding the decision to drop the voter intimidation charges. To date, the Department has not responded to either request. Copies of the letters are attached.

The dismissal of the Department's case against the New Black Panther Party raises significant concerns about possible politicization of the Justice Department. The case in question was filed by the Department against members of the New Black Panther Party and two individuals affiliated with it. Significantly, one of those individuals carried credentials indicating he was a member of the local Democratic Committee. As both of our letters recount, the individuals are alleged to have engaged in brazen acts of voter intimidation outside of polling locations in Philadelphia, Pennsylvania, on Election Day 2008. After reviewing the facts, the Justice Department brought charges against the two individuals and the Party under the Voting Rights Act.

Despite the fact that a judge essentially ruled in favor of the Justice Department's complaint when the defendants failed to respond to the allegations, the Civil Rights Division under the Obama Administration decided to dismiss the case instead of obtaining a default judgment. We are unaware of any changes in the facts underlying this case between the Department's filing of its initial complaint and the subsequent filing of its motion to dismiss. Nor are we aware of any allegations of prosecutorial misconduct in the bringing of the initial complaint.

As Inspector General of the Justice Department, you spent more than a year investigating allegations of wrongful political influence in the removal of several U.S. Attorneys. Allegations of wrongful political influence by Obama Administration officials in the dismissal of a voting rights case are equally important and should be subject to an equally thorough investigation.

Voter intimidation threatens the very core of democracy. The American people need to know that the Justice Department takes seriously cases of voter intimidation, regardless of the political party of the defendants. We respectfully request that you open an investigation into the dismissal of the Black Panther Case and report to Congress.

We appreciate your timely consideration of our request.

Sincerely,

Lamar Smith
Ranking Member
House Judiciary Committee

Frank Wolf
Ranking Member
Commerce, Justice, Science Subcommittee
House Appropriations Committee

F. James Sensenbrenner
Ranking Member
Constitution, Civil Rights, Civil Liberties
Subcommittee
House Judiciary Committee

John Culberson
Member of Congress

Steve King
Member of Congress

Robert Aderholt
Member of Congress

Trent Franks
Member of Congress

Jo Bonner
Member of Congress

Louie Gohmert
Member of Congress

Jim Jordan
Member of Congress

May 28, 2009

Ms. Loretta King
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
Washington DC 20530

Dear Ms. King,

It has come to my attention that on Election Day 2008, several members of the New Black Panther Party intimidated voters at a polling place in Philadelphia. These members brandished a baton in a threatening manner and made verbal threats to potential voters. After investigating the incident, the Civil Rights Division filed a complaint against the New Black Panther Party and several of its members for violations of Section 11(b) of the Voting Rights Act, which prohibits any "attempt to intimidate, threaten, or coerce" any voter and those aiding voters.

I understand that neither the New Black Panther Party nor its members filed a response to the complaint or any motion. As a result, the federal judge directed the Division to file a motion for a default judgment against the Party and its members. Instead of submitting the default judgment against the Party and its members to the court for signature, however, I understand the Division voluntarily moved to dismiss the complaint, even though it had effectively won the case.

This case was an uncontested lawsuit against defendants including one who, by the terms of the Division's own complaint, had "made statements containing racial threats and racial insults at both black and white individuals," and who "made menacing and intimidating gestures, statements, and movements directed at individuals who were present to aid voters." That individual, Jerry Jackson, had been carrying credentials as a member of the local Democratic committee. The Division sought relief only against the one defendant who carried and waived a baton on Election Day, and not against Mr. Jackson, and it sought only to enjoin that defendant from "displaying a weapon within 100 feet of any open polling location" in Philadelphia.

These actions raise a number of troubling questions. For example, why did the Civil Rights Division voluntarily dismiss a lawsuit that it had effectively already won, against defendants who were physically threatening voters? Is the Division concerned that this dismissal will encourage the New Black Panther Party, or other groups, to intimidate voters? Why did the Division seek such limited relief against a defendant who was actually carrying and brandishing a weapon at a polling station on Election Day? What role did the change of administrations play in the unusual resolution of voluntarily dismissing a case on which the Division had already prevailed?

In an effort to obtain answers to these and related questions, I request that the appropriate employees of the Division brief my staff regarding this lawsuit and the circumstances surrounding its dismissal. I am also requesting all non-privileged documents relating to the Division's dismissal of the suit.

Please respond to Crystal Jezierski, minority chief oversight counsel, or Paul Taylor, minority chief counsel on the Subcommittee on the Constitution, Civil Rights, and Civil Liberties at (202) 225-6906 by June 19 to arrange the briefing and the document delivery.

Thank you for your prompt consideration of this request.

Sincerely,

Lamar Smith
Ranking Member

cc: The Honorable Ron Weich
The Honorable John Conyers, Jr.
The Honorable Jerrold Nadler
The Honorable F. James Sensenbrenner, Jr.

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

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According to the DOJ complaint, two uniformed men stood outside a polling station located at 1221 Fairmont Street in Philadelphia, Pennsylvania, brandishing weapons to intimidate voters. New Black Party Chairman and self-proclaimed "Attorney at War" Malik Zulu Shabazz confirmed that the placement of these men, Samir Shabazz and Jerry Jackson, in front of the polling station was part of a nationwide effort to position armed party members at precincts.

The complaint also stated that Samir Shabazz "pointed the weapon at individuals, menacingly tapped it [on] his other hand, or menacingly tapped it elsewhere. This activity occurred approximately eight to fifteen feet from the entrance to the polling station." Additionally, both men made "racial threats and racial insults at both black and white individuals" and made "menacing and intimidating gestures, statements, and movements directed at individuals who were present to aid voters," according to witness statements in the DOJ complaint. One of the witnesses, an experienced civil rights attorney who worked with Charles Evers in Mississippi, has publicly called this "the most blatant form of voter intimidation" he has ever seen.

On January 7, the Department of Justice appropriately filed suit in the U.S. District Court in Philadelphia against three men and the New Black Panther Party for Self-Defense under the Voting Rights Act. In the department's news release, Acting Assistant Attorney General Grace Chung Becker stated, "The Voting Rights Act of 1965 was passed to protect the fundamental right to vote and the Department takes allegations of voter intimidation seriously."

I worry that the department's commitment to protecting the "fundamental right to vote" is wavering under your leadership. I fail to understand how you could dismiss a legitimate case against a party that deployed armed men to a polling station – one of whom brandished a weapon to voters – who harassed and intimidated voters, and could then decide that such actions do not constitute a violation of section 11(b) of the Voting Rights Act of 1965, which prohibits "intimidation, coercion, or threats" against voters. What message does this send to other like-minded groups -- whoever their target -- about this administration's commitment to voting rights?

None of the defendants filed an answer to the lawsuit, which means that legally they admitted all of the allegations in the complaint. Yet your department dismissed the suit it had already won by default against three of the defendants. Not only did the department dismiss the civil suit, but it has also failed to criminally prosecute the defendants. The actions of these defendants are all violations of criminal provisions of the U.S. Code that prohibit intimidating, threatening and coercing voters. This is outlined on pages 54-63 of "Federal Prosecution of Election Offenses," the handbook provided by the Public Integrity Section of the Criminal Division to Justice Department prosecutors. These defendants could have (and should have) been charged under a number of provisions, including 42 U.S.C §1973gg-10(1); 18 U.S.C. §§ 241, 242, 245(b)(1)(A), and 594.

In 2006, then-Senator Barack Obama called such intimidation tactics "deplorable," citing similar intimidation of Native American voters in South Dakota in 2004 and a number of other incidents targeting African American voters. Your inexplicable dismissal of the civil case and the failure to file a criminal prosecution flies in the face of the president's stand on voting rights and sullies the good name of your department. It calls into question your commitment to protecting all voters and guaranteeing that they can exercise their franchise freely without fear.

The American people and this Congress deserve a full and transparent accounting of your decision to drop this case.

Best wishes.

Sincerely,

Frank R. Wolf
Member of Congress

FRW:tc

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 13, 2009

The Honorable Frank R. Wolf
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Wolf:

This responds to your letter, dated June 8, 2009, concerning *United States v. New Black Panther Party for Self-Defense, Civ. No. 09-0065 SD (E.D. Pa.)*, a case filed to enforce Section 11(b) of the Voting Rights Act of 1965, 42 U.S.C. § 1973i(b).

This case was filed on January 9, 2009. The United States obtained an injunction against a defendant who held a nightstick in front of a polling place in Philadelphia, Pennsylvania. The injunction is tailored appropriately to the scope of the violation and the requirements of the First Amendment, and the Department will fully enforce the terms of the injunction.

The Department voluntarily dismissed the Section 11(b) claims against three other defendants named in the complaint because the facts and the law did not support pursuing those claims against them. That decision was made after a careful and thorough review of the matter by the Acting Assistant Attorney General for Civil Rights, a career employee with nearly 30 years experience in the Department, including nearly 15 years as the career Deputy Assistant Attorney General for Civil Rights.

Although, as you note, these defendants failed to respond to the complaint, that does not mean the Department "had effectively won the case" against them. The Court of Appeals for the Third Circuit "does not favor entry of defaults or default judgments." *United States* v. *$55,518.05 In U.S. Currency*, 728 F.2d 192, 194 (3d Cir. 1984). Rather, it is its "preference that cases be disposed of on the merits whenever practicable." *Hritz* v. *Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984); *see also Hill* v. *Williamsport Police Dept.*, 69 Fed. Appx. 49, 51 n.3 (3d Cir. 2003) (factors to consider in granting a default judgment include "whether material issues of fact or issues of substantial public importance are at issue"). Accordingly, an entry of a default judgment in the district court is not automatic. Moreover, even if a court were to grant a default

judgment on liability, the court still would need to assess the propriety of any requested injunction. *Broadcast Music, Inc.* v. *Sprint Mount Area Bavarian Resort, Ltd.*, 555 F. Supp. 2d 537, 543 (E.D. Pa. 2008) (granting injunctive relief following entry of default judgment only after considering propriety of remedy sought); *cf. Shields* v. *Zuccarini*, 254 F.3d 476, 482 (3d Cir. 2001) (identifying factors a court must consider before granting permanent injunctive relief).

Section 11(b) prohibits intimidation, threats or coercion of "any person for voting or attempting to vote, or ... for urging or aiding any person to vote or attempt to vote." The United States is authorized to enforce Section 11(b) through civil litigation and to obtain declaratory and injunctive relief. For a variety of reasons, including the limited remedies available under Section 11(b), the Department has filed only three cases under this provision in the three decades for which we have reliable records on the subject. Indeed, in the 44 years since Congress passed the Voting Rights Act, fewer than 10 reported cases have ever been brought by any party prior to the case in question.

In *U.S. v. New Black Panther Party for Self-Defense,* 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, dated 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 on any election day in the City of Philadelphia, or from otherwise violating 42 U.S.C. § 1973i(b)." Judgment, dated May 18, 2009. We believe this injunction is tailored appropriately to the scope of the violation and the requirements of the First Amendment. We intend to enforce fully the terms of this injunction. Section 11(b) does not authorize other kinds of relief, such as monetary damages or civil penalties.

The United States had, prior to these rulings, voluntarily dismissed claims against the three other defendants named in the complaint: The New Black Panther Party for Self-Defense ("the Party"), Malik Zulu Shabazz and Jerry Jackson. The Department considered not only the allegations in the complaint, but also the evidence that had been amassed by the Department to support those allegations.

The complaint alleges that the Party "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." Complaint, para. 12. Notably, the complaint does not allege that those statements or the notice called for any Party member to display weapons at polling locations or do anything that would violate Section

11(b). Nor is there any allegation in the complaint that Malik Zulu Shabazz made any such statement in advance of the election.

The complaint does allege that the Party and Malik Zulu Shabazz "managed" and "directed" "the behavior, actions and statements of Defendants Samir Shabazz and [Jerry] Jackson at [the Philadelphia polling place], alleged in this Complaint." Complaint, para. 12. The Department considered the evidence developed to support this allegation and concluded that the factual contentions in the complaint did not have sufficient evidentiary support.

The complaint also alleges that the Party and Malik Zulu Shabazz "endorsed" the alleged activities at the Philadelphia polling place after the election. Even assuming that a post-event "endorsement" is sufficient to impose Section 11(b) liability, the Department found the evidence on this allegation to be equivocal. The Party posted statements on its web site specifically disavowing the Philadelphia polling place activities and suspending the Party's Philadelphia chapter because of these activities.

With regard to the alleged activities at the Philadelphia polling place, the Department concluded that the allegations in the complaint regarding Samir Shabazz, the person holding the nightstick, were sufficient to state a claim under Section 11(b) and that the evidence developed supported those allegations. As noted above, we therefore sought and obtained a judgment against this defendant and appropriately tailored injunctive relief.

The Department decided not to proceed with its claims against Jerry Jackson, who was a resident of the apartment building where the polling place was located and was certified by city officials as a poll watcher. The local police officers who were called to the polling place ordered Samir Shabazz to leave the polling place, but allowed Jackson to remain. Considering the contemporaneous response of the local police officers to Jackson's activities, as well as the evidence developed to support the allegations against Jackson, the Department concluded that the factual contentions in the complaint did not have sufficient evidentiary support.

In response to your question about why criminal charges were not brought regarding this matter, the Department determined in 2008 that the conduct at issue did not present a prosecutable violation of any of the relevant federal statutes. As you know, the standard of proof to successfully pursue a criminal matter is significantly higher than that associated with a civil case.

We can 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.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of assistance with this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

Congress of the United States
Washington, DC 20515

July 17, 2009

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

Dear Attorney General Holder:

Thank you for the July 13, 2009, letter we received from Assistant Attorney General Ronald Weich responding to our concerns about the Department's highly unusual (if not unprecedented) dismissal of its Voting Rights Act (VRA) lawsuit against the New Black Panther Party and its members in the wake of the district court's offer to grant the United States a default judgment. We appreciate the Department's response and commitment to brief us and other members on this case. In advance of those briefings, we would like to share with you in more detail some specific concerns we have about the Department's actions in this matter. We ask that the Department be prepared to address these questions when it briefs Members of Congress on this matter in the coming weeks.

The Department maintains that the decision to dismiss the case against three Defendants – the New Black Panther Party, its Chairman, Malik Zulu Shabazz, and Jerry Jackson – was fully justified. This conclusion is based, in part, on the view that the New Black Panther Party's publicly announced plan to position several hundred of its members at polling places on election day did not violate Section 11(b) of the VRA because the announcement did not go so far as to expressly call on party members to "display weapons" at the polls. The fact that at least one New Black Panther Party member actually appeared at a polling place on Election Day with a weapon, and another member stood side-by-side in formation with his armed colleague in an effort to intimidate potential voters, does not change the Department's analysis.

However, to suggest that the New Black Panther Party failed to contravene the VRA merely because it avoided any reference to "weapons" in its pre-Election Day announcement eviscerates critical civil rights protections and establishes a dangerous precedent. Is the Justice Department's position now that a paramilitary organization is free to send its members en masse to polling places – in uniform no less – without fear of legal repercussions, as long as there is no explicit mention of weaponry? Had the Ku Klux Klan or Aryan Brotherhood made a similar announcement prior to November 4, 2008, would the Civil Rights Division have viewed the group's failure to mention weapons as an exculpatory omission?

A violation of Section 11(b) does not require the use of weapons, or even the threat to use weapons. The appearance of uniformed members (at least one of whom was armed) of the New Black Panther Party is exactly the kind of conduct that Section 11(b) was intended to address. The fact that the New Black Panther Party was clever enough not to publicly call for the use of weapons does not – nor should not – absolve the organization of liability.

The Department's response also states that the Division did not find sufficient evidence that the New Black Panther Party and Malik Zulu Shabazz managed, directed, or endorsed the behavior of the other Defendants. This conclusion appears, however, to be directly contradicted by statements made by Mr. Shabazz on national television on November 7, 2008. In an interview, Mr. Shabazz claims that his activities in Philadelphia were part of a nationwide effort involving hundreds of party members, and that the display of the weapons was a necessary part of the New Black Panther Party deployment.

It could be argued that this admission, standing alone, should settle the issue. At a minimum, however, the Department should have responded by at least conducting a deposition of the Defendants and engaging in some minimal discovery to determine the full composition and character of the Defendants' intimidating activities. For the Department to state that there was not sufficient evidence to support proceeding against a party chairman who admits that weapons were part of a nationwide deployment is remarkable. It is unclear from your response whether or not Civil Rights Division attorneys actually interviewed Mr. Shabazz, and, if so, what the results of that interview were. We have a strong suspicion that, given Mr. Shabazz's statements to the national media, any interview conducted by Civil Rights Division attorneys would have yielded similarly useful evidence. The fact that the Defendants did not respond to the complaint, however, leads us to believe that no discovery took place in the case.

In addition, we wonder whether the videos and statements that can be found on the Internet, produced by organizations such as the Anti-Defamation League, were considered to provide context to the violent nature of the New Black Panther Party deployment on November 4, 2008. If so, we would request that you provide the undersigned a list of the videos and statements that the Department considered before dismissing the case against the New Black Panther Party and Malik Zulu Shabazz.

Additionally, the Department maintains that the case was dismissed because the New Black Panther Party disavowed the actions in Philadelphia *after* the election. Yet on May 4, 2009, the Civil Rights Division filed a response to a motion for partial summary judgment by the defendants in a housing discrimination lawsuit in Kansas that took exactly the opposite position. In *U.S. v. Sturdevant*, the defendants argued that the case should be dismissed because they fired the employee accused of discriminatory conduct, had not authorized such conduct, and no longer owned the apartment property where the

discrimination occurred. The Department argued in its response brief that the case should not be dismissed because there were still disputed issues of material facts regarding which of the defendants' employees were ultimately responsible for monitoring and correcting the employee's discriminatory conduct, when the defendants knew about the discrimination, and what steps were taken to correct the problem. The Department's brief in that case also argued that even if the defendants were *now disavowing* the discriminatory actions of their former employee, there were no assurances that the defendants' failure to "train, monitor, and discipline" the former employee would not be repeated with other employees at other properties owned by the defendants. *See United States v. Sturdevant,* Case No. 2:07-02233 (D. Kan.), United States' Response to the AIMCO Defendants' Motion for Partial Summary Judgment, pages 10-12.

The same principle is at play in the New Black Panther Party case. By not engaging in discovery and eschewing a default judgment, the Department has no assurances that the New Black Panther Party will not engage in exactly the same type of behavior again. Nor are there any assurances that the New Black Panther Party will "train, monitor, and discipline" its members so that the behavior that occurred in Philadelphia will not be repeated in future elections. In fact, we would not be surprised if the members of the New Black Panther Party will likely be encouraged to engage in similar activities given the likely minimal deterrent effect of the sactions levied against it after its reprehensible conduct last fall.

Turning to Defendant Jerry Jackson, your letter cites a variety of reasons for the voluntary dismissal. One of these is the "contemporaneous response" of the local Philadelphia police officers as justifying the dismissal against Mr. Jackson, in so far as they did not arrest or remove him. We urge you to reconsider this position. Whether or not Federal law has been violated is not determined by the behavior of local law enforcement officials, and we are unaware of the Civil Rights Division ever taking such a position before. In this vein, we would request that you provide any interview notes members of the career trial team made upon interviewing the local police officers. These attorneys' interview notes regarding their impressions of the local police officers is of critical importance given the weight the Department placed upon the officers' actions when deciding to dismiss the charges against Mr. Jackson.

Reports indicate that the Department had sworn statements from multiple victims that Mr. Jackson stood in formation with the armed Defendant, Samir Shabazz, and attempted to block the entrance to the polls. Messrs. Jackson and Shabazz were identically dressed. Their military uniforms alone were intimidating. Others, including voters, witnessed their behavior. We thus ask that you provide us with the executed sworn statements of witnesses Bartle Bull, Christopher Hill, Michael Mauro, and any other witnesses of which we may be unaware.

The Department's response also suggests that the First Amendment was somehow implicated by a publicly announced nationwide plan to position paramilitary members of an organization at the entrance to a polling location. However, he First Amendment would implicate only the scope of any remedy, not underlying liability. For example, statements and party activities may be protected by the First Amendment, but would still be admissible evidence to show that the Voting Rights Act was violated. Although the Defendants may have exercised their First Amendment Rights in making statements that they intended to implement a nationwide plan to place uniformed members at the entrance to polls, such statements would still be admissible to demonstrate liability even if they cannot be enjoined.

In addition to the above questions we would also ask that the Department be prepared to reply to the following questions:

- Is the FBI aware of the activities of the Defendants, and if so, what is its assessment of their behavior and threatening nature? Does the FBI share your characterization of the response of local law enforcement officials on the scene, assuming it is accurate?

- What did the Department do to determine the extent of New Black Panther Party members deploying in other locations throughout the United States before dismissing the case? Did the Department's political appointees inquire about the possibility of a nationwide Panther deployment?

- Although the Department maintains that there was insufficient evidence to proceed to default against the New Black Panther Party and its Chairman Malik Zulu Shabazz, we are not aware thatany discovery was conducted by the Department. Why, then, would the Department not simply have informed the District Court that it did not wish a default finding against the three defendants and instead wished to proceed to full discovery? This approach would have enabled the Department to resolve any evidentiary uncertainties and ensure a vigorous enforcement of voter intimidation statutes.

- Has the Department provided all communications with third-party interest groups about the case? For example, if memoranda or emails from third-party interest groups were sent to the Department or any official at the Department, such documents would not be privileged as you well know.

- Did Department staff apart from the four-person career trial team engage in any discussions with Defendants or their representatives? Did current Department political appointees conduct discussions with the Defendants or their agents prior to January 20? If so, have they recused themselves? Are there any career

attorneys in the Voting Section or the Civil Rights Division who worked on the case besides the four Section attorneys named on the pleadings?

- What specific new facts did the Department learn between the filing of the complaint and its dismissal that caused the Civil Rights Division lawyers who had approved the filing of the suit in January to change their position and decide that the suit could not be maintained against those defendants against whom the suit was dismissed? How did the Department come to learn about those specific facts?

We appreciate your attention to this important matter and look forward to the Department's briefing.

Sincerely,

Lamar Smith
Ranking Member
Committee on the Judiciary

Frank R. Wolf
Ranking Member
Commerce-Justice-Science
Subcommittee House Appropriations
Commitee

cc: The Honorable John Conyers, Jr.

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

RANKING MEMBER – COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD

CO-CHAIR – TOM LANTOS HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

July 22, 2009

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The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave NW Rm 5111
Washington DC 20530

Dear Attorney General Holder:

Veteran civil rights activist Bartle Bull, who managed campaigns for Robert F. Kennedy in New York in1968 and other prominent Democratic state candidates, recently opined, "Martin Luther King did not die to have people in jack boots with billy clubs, block the doors of polling places... And neither did Robert Kennedy. It's an absolute disgrace." The disgrace Bull refers to is your unwarranted dismissal of *U.S. v. the New Black Panther Party for Self-Defense, Malik Zulu Shabazz, Minister King Samir Shabazz aka Maurice Heath, and Jerry Jackson.*

My commitment to voting rights is without question. In fact, in 1981 upon my vote for the Voting Rights Act, the *Richmond Times-Dispatch* published the enclosed editorial, "A More Offensive Law," castigating me for my vote when every other member of the Virginia congressional delegation opposed it. The editorial chastised me stating, "Mr. Wolf will be partly to blame [for federal voting rights oversight]."

During my meeting Monday with Ms. Loretta King and Mr. Steven Rosenbaum of the Civil Rights Divisions, they refused to answer my questions claiming the "privileged" nature of the information. I would remind you that such defenses do not apply to requests from members of Congress. The Freedom of Information Act (FOIA) includes a provision that states quite clearly that most of the FOIA exemptions – including deliberative process – do not apply to requests from Congress. *See* 5 U.S.C. § 552(d). This exemption has been affirmed by at least two D.C. Circuit opinions, which hold that FOIA requests from individual members of Congress satisfy the congressional request requirement and thus render any FOIA exemptions inapplicable. See *Murphy v. Department of the Army*, 613 F.2d 1151, 1157 (D.C. Cir. 1979); *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 974 n.16 (D.C. Cir. 1980); see also *Rockwell Int'l Corp. v. U.S. Department of Justice*, 235 F.3d 598, 603 (D.C. Cir. 2001) (noting that disclosure of deliberative process memo to member of Congress did not waive FOIA exemption as to member of general public because FOIA carved out Congress from the statute's disclosure obligation exemptions).

Accordingly, I would respectfully reiterate my requests for the following information and documents:

1. Why am I being prevented from meeting with the trial team on this case?

2. What was the nature of Acting Assistant Attorney General for Civil Rights Loretta King's communication, if any, with you, Deputy Attorney General Ogden, or Associate Attorney General Perrelli's offices prior to the case dismissal?

3. Did you, Deputy Attorney General Ogden, or Associate Attorney General Perrelli approve (or express reservations about) the dismissal of this case and/or sign-off on any communication with regard to the dismissal? If so, will those communications be provided to members?

4. Mr. Ronald Weich's letter of July 13 states that Ms. King is a 30-year career employee and was acting in that capacity when the case was dismissed.

   However, I understand that the Vacancy Reform Act characterizes her position at the time, Acting Assistant Attorney General for Civil Rights, as a "Presidential appointment with Senate confirmation" (PAS) and in that capacity she would be acting in a political capacity, *assuming the Office of the Associate Attorney General, Deputy Attorney General or Attorney General also did not opine on the matter*. Could you please clarify?

5. The former attorney general was a signatory to the complaint. Are you a signatory to any legal document or internal directive regarding the dismissal of this case?

6. In an affidavit taken by your department, civil rights activist Bartle Bull states, "I have never encountered or heard of another instance in the United States where armed men blocked the entrance to a polling location," and "It would qualify as the most blatant form of voter intimidation I have encountered in my life."

   According to DOJ's own interpretation of 18 U.S.C. § 594 in its "Federal Prosecution of Election Offenses" manual (p. 56): "Section 594 prohibits intimidating, threatening, or coercing anyone, or attempting to do so, for the purpose of interfering with an individual's right to vote or not vote in any [federal] election."

   a. Do you believe that this and other witness testimony fails to support issues of "intimidation, threatening, or coercing" behavior on the part of the defendants?

   b. On what grounds did you find that the appearance of members of a widely recognized hate group wearing paramilitary-style uniforms did not constitute intimidation?

c. What precedent does this set for other like-minded groups -- whoever their target -- about federal enforcement of voter intimidation by hate groups outside of polling stations?

d. If showing a weapon, making threatening statements, and wearing paramilitary uniforms in front of polling station doors does not constitute voter intimidation, at what threshold of activity would these laws be enforceable?

7. Mr. Weich's letter cites uncertainty as to the outcome of "default judgments" as your justification for dismissal of the charges against Jerry Jackson, Malik Zulu Shabazz, and the New Black Panther Party.

   The letter also alleges that the body of evidence amassed further informed your decision to dismiss this case. Will you provide Members with:

   a. Copies of the sworn statements by witnesses?

   b. An inventory of video evidence?

   c. Examples of such evidence that influenced dismissal?

   d. The names of individuals and third-party groups contacted and any documents that they provided in prosecuting this case?

8. Did the department contact the Southern Poverty Law Center and/or Anti-Defamation League, which list the New Black Panther Party as a hate group along with the KKK and American Nazi Party? If so, with whom did the department speak?

9. Is certainty of favorable judgment a new precedent for this department?

10. Did the signatories of the complaint concur with your decision to dismiss?

11. Mr. Weich's letter cites the local police officer's decision not to remove Jerry Jackson because he was a resident of the apartment building and certified by city officials as a poll watcher.

    It has come to my attention that your justification that Jackson lived at the building where the polling place was located is false. The polling place was at a high-rise at 1221 Fairmount Street in Philadelphia, a senior living facility called the Guild House. Jackson, I understand, resides at 813 North Parks Street in Philadelphia and has never resided at 1221 Fairmount Street.

a. Please explain this discrepancy. Did your office do its due diligence before dismissing this case or responding to members?

b. Do you believe that Jerry Jackson's affiliation, uniform, statements, and behavior at 1221 Fairmont Street on November 4 are justified since he was a registered poll watcher?

c. Is it the policy of this Justice Department that any individual registered as a poll watcher may wear any form of uniform, brandish weapons, make unsolicited comments to voters, or loiter at the polls?

d. Does the Department believe that the possession of papers allowing one to be present at a polling place also allows the holder to violate Section 11(b) of the VRA?

e. Was Jerry Jackson registered as a poll watcher with a particular political party or campaign? If so, which one?

f. Was that political party or campaign interviewed with regard to Jackson's role in this complaint? If so, were they aware and did they condone his appearance on November 4?

g. In a video of the event, Jackson and Shabazz state that they are providing "security" for the polling precinct. Who authorized them to provide these services and under what authority?

12. Mr. Weich's letter states that the dismissal was based, in part, on the view that the New Black Panther Party's publicly announced plan to position several hundred of its members at polling places on Election Day did not violate Section 11(b) of the VRA because the announcement did not go so far as to expressly call on party members to "display weapons" at the polls.

    How do you justify this response given that a violation of Section 11(b) does not require the use of weapons, or even the threat to use weapons?

13. Mr. Weich's letter asserts that evidence does not support the complaint regarding Malik Zulu Shabazz and the party "endorsing" or directing the "behavior, actions, and statements" of Shabazz and Jackson.

    However, it would seem that the confession *on national television* by Malik Zulu Shabazz on November 7, 2008, flatly contradicts your assertion. Mr. Shabazz unequivocally claims that his activities in Philadelphia were part of a nationwide effort

involving hundreds of party members, and that the use of the weapons was a necessary part of the Black Panther deployment.

a. Given Jackson and Shabazz's open membership in Malik Zulu Shabazz's New Black Panther Party, how do you justify that post-event endorsement of their actions is not sufficient to impose Section 11(b) liability?

b. Even if this connection is not entirely certain, why would you not allow the court to render judgment on this to make such a determination?

14. Specifically, you cite the Party's "disavowal" of Shabazz and Jackson actions on its Web site as your justification for dismissing these charges.

a. Was this disavowal posted on the Web site before or after DOJ filed its complaint?

b. On what date was the disavowal posted and who was the author?

c. How does this disavowal negate Malik Zulu Shabazz's earlier public declarations that his party coordinated efforts to have party members posted in front of polling locations?

15. Can you provide an example of another case, whether civil rights, tax, anti-trust, or criminal enterprise, when the defendants' post-behavior disavowal resulted in the department similarly dismissing the case?

16. It is my understanding that Mr. Steven Rosenbaum brought a voter intimidation case against the North Carolina Republican Party in 1992 based on misleading postcards.

Could you please provide the complaint, justification memo, and consent decree in this case as well as any additional documents that discuss First Amendment implications?

17. Mr. Weich's letter states that you believe the injunction against Samir Shabazz "is tailored appropriately to the scope of the violation" – enjoining Shabazz from "displaying a weapon within 100 feet of any open polling location on Election Day in the City of Philadelphia."

The letter also states that "Section 11(b) does not authorize other kinds of relief, such as monetary damages or civil penalties."

a. Why is the injunction from displaying weapons in front of polling places only limited to the City of Philadelphia and not extended to other cities that fall within

the Eastern District of Pennsylvania, such as Allentown, Reading, Lancaster and Bethlehem?

b. What will happen if Shabazz brandishes a weapon at a polling place in another city?

c. Is it true that this injunction stands only through Election Day 2012?

d. What is the precedent for limiting this injunction to one geographic location?

Please consider these questions as an addendum to my July 17 letter with House Judiciary Committee Ranking Member Lamar Smith.

Sincerely,

Frank R. Wolf
Member of Congress

Cc: Nelson Hermilla, Chief
FOIA/PA Branch
Civil Rights Division
NALC, Room 311
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

BEST AVAILABLE COPY

Richmond Times-Dispatch

JOHN STEWART BRYAN III, Publisher
[illegible] EARL, Executive Editor
[illegible], Managing Editor
EDWARD GRIMSLEY, Editor of the Editorial Page

Thursday, October 15, 1981

A More Offensive Law

A recent news story from Washington reported that Tenth District Republican Rep. Frank R. Wolf didn't want to talk about his vote in favor of extending the odious federal Voting Rights Act. No wonder. There is absolutely no way that he can justify this endorsement of a measure that officially brands Virginia a second-class state and denies Virginians some of their most precious political rights. Mr. Wolf was the only Virginia congressman to support the bill when it moved through the House of Representatives last week.

Grossly unfair in its present form, the Voting Rights Act would be made even more offensive by changes the House approved. The despicable preclearance provision, which now is subject to periodic reconsideration, would become a permanent feature of the law. Under this provision, covered states and localities must obtain federal approval of any law, action or decision that might affect the voting rights or strength of minorities, especially blacks. The House's new version outlines a procedure by which a state might, theoretically, purify itself and gain exemption from the act. But the process is so cumbersome and vague that it is likely to prove to be worthless. One important aspect of the act that would remain unchanged in the House version is its inequitable selectivity. The law's heaviest impact would continue to fall mainly on the South. Efforts to persuade the House to apply the act uniformly throughout the nation were unsuccessful.

Indeed, the House was unwilling to make even the slightest gesture toward fairness. As the bill had emerged from the House Judiciary Committee, it provided that any state or locality seeking to obtain exemption from its coverage would have to get the approval of the United States District Court in Washington. Sixth District Republican Rep. M. Caldwell Butler, one of the principal leaders of the valiant but vain fight against the act, offered an eminently sensible amendment that would have permitted states and localities to sue for relief in a local federal district court. The necessity to go to Washington, he argued, would be so costly and cumbersome that many communities would be discouraged from even attempting to qualify for exemption. But the House summarily rejected his proposal.

Not in many years has Virginia followed the kinds of restrictive voting practices that originally inspired the Voting Rights Act. Not in many years has Virginia attempted to abridge the right of its black citizens to vote. Yet if the House bill prevails, Virginia, and most of the South, will continue to be treated as wards of the federal government and denied political rights that the rest of the nation freely exercises. And Mr. Wolf will be partly to blame.

Fortunately, the House bill [illegible] opposition in the Senate. And Virginia's two representatives in that body — Senators Harry F. Byrd Jr. and John Warner — can be counted on to support, enthusiastically and aggressively, efforts to transform the Voting Rights Act from a selectively punitive measure into a fair and reasonable law.

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

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RANKING MEMBER—COMMERCE-JUSTICE-SCIENCE

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CO-CHAIR—TOM LANTOS
HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

July 31, 2009

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The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave NW Rm 5111
Washington DC 20530

Dear Attorney General Holder:

In light of the troubling reports of political influence in the enclosed article from yesterday's *Washington Times*, as well as the many unanswered questions to members of Congress, I implore you to re-file the voter intimidation case against the New Black Panther Party and other defendants so that impartial judges -- not political benefactors -- may rule on the merits of this case. Given your declaration on July 22 that the department's Civil Rights Division is "back and open for business," I would urge you to demonstrate your commitment to enforcing the law above political interests by re-filing.

My commitment to voting rights is unquestioned. In 1981, I was the only member -- Republican or Democrat -- of the Virginia delegation in the House to vote for the Voting Rights Act and was harshly criticized by the editorial page of the *Richmond Times Dispatch*, and when I supported the act's reauthorization in 2006, I was again criticized by editorial pages.

Given my consistent support for voting rights throughout my public service, I hope you can understand why I am particularly troubled by the dismissal of this case. The video evidence of the defendants' behavior on Election Day, as well as a January National Geographic Channel documentary, "Inside: The New Black Panther Party," should leave no question of the defendants' desire to intimidate or incite violence.

The ramifications of the dismissal of this case were serious and immediate. Defendant Jerry Jackson received a new poll watcher certificate, a copy of which I have enclosed, on May 19, 2009, immediately after the case was dismissed. Mr. Jackson faced no consequences for his blatant intimidation and promptly involved himself in the next election. Is that justice served?

As you will read in the enclosed memorandum of opinion from the Congressional Research Service's American Law Division, there is no legal impediment that would prevent you from re-filing this case. Unlike a criminal case, a civil case seeking an injunction against the other defendants could be brought again at any time. According to the memo provided to me, "It appears likely that the Double Jeopardy Clause would not bar a subsequent civil action against the [New Black Panther] Party or most of its members," and "second, because the United States voluntarily dismissed its suit against the Party and two of the three individual members before those defendents had filed an answer or motion to dismiss the suit, the previous action had not moved sufficiently beyond preliminary steps so as to implicate the Double Jeopardy Clause."

I was surprised to learn from *The Washington Times* report of the existence of the enclosed correspondence from the chief of the department's Appellate Division recommending that the department proceed with the case and the default judgment. These opinions were never disclosed to me or other members of Congress by the department in its previous responses to questions regarding the dismissal of the case. According to the report:

> "Appellate Chief Diana K. Flynn said in a May 13 memo obtained by The Times that the appropriate action was to pursue the default judgment unless the department had evidence the court ruling was based on unethical conduct by the government.
>
> "She said the complaint was aimed at preventing the 'paramilitary style intimidation of voters at polling places elsewhere' and Justice could make a 'reasonable argument in favor of default relief against all defendants and probably should.' She noted that the complaint's purpose was to 'prevent the paramilitary style intimidation of voters while leaving open 'ample opportunity for political expression.'
>
> "An accompanying memo by Appellate Section lawyer Marie K. McElderry said the charges not only included bringing the weapon to the polling place, but creating an intimidating atmosphere by the uniforms, the military-type stance and the threatening language used. She said the complaint appeared to be 'sufficient to support the injunctions' sought by the career lawyers.
>
> "The government's predominant interest is preventing intimidation, threats and coercion against voters or persons urging or aiding persons to vote or attempt to vote, she said."

Given that both the department's trial team and the Appellate Division argued strongly in favor of proceeding with the case, I can only conclude that the decision to overrule the career attorneys Associate Attorney General Thomas Perrelli, or other administration officials, was politically motivated. This report further confirms my suspicions that the Department of Justice under your watch is becoming increasingly political.

It is imperative that we protect all Americans right to vote. This is a sacrosanct and inalienable right of any democracy. The career attorneys and Appellate Division within the department sought to demonstrate the federal government's commitment to protecting this right by vigorously prosecuting any individual or group that seeks to undermine this right. The only legitimate course of action is to allow the trial team to bring the case again and allow the our nation's justice system to work as it was intended -- impartially and without bias.

Sincerely,

Frank R. Wolf
Member of Congress

Commonwealth of Pennsylvania
COUNTY OF PHILADELPHIA
WATCHER'S CERTIFICATE
THIS CERTIFICATE AUTHORIZES THE INDIVIDUAL TO WATCH IN ANY WARD / DIVISION IN PHILADELPHIA

THIS WILL CERTIFY That Mary Jackson residing at 813 N. Marshall St. Phila, has been regularly appointed as a **WATCHER** in the 14 Ward for the 04 Election Division of Philadelphia, representing, Joyce Gabbanbo Candidate for Judge of Common Pleas Court on the **DEMOCRATIC BALLOT** to serve at a Primary Election to be held May 19, 2009.

Witness our hand and official seal

Note.- Each candidate is entitled to two Watchers per Division in his or her District, but no candidate or party shall be represented by more than one Watcher in the same voting room at any time.

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16-68 (Rev. 1/09) - DEMOCRATIC

Congressional Research Service

MEMORANDUM July 30, 2009

To: Hon. Frank Wolf
Attention: Thomas Culligan

From: Anna Henning, Legislative Attorney, 7-4067

Subject: **Application of the U.S. Constitution's Double Jeopardy Clause to Civil Suits**

This memorandum responds to your request for an analysis of the application of the Double Jeopardy Clause to successive civil suits in federal courts. In particular, it examines the clause's potential application in the context of a civil suit brought against the New Black Panther Party for Self-Defense or its members, against whom the United States had previously brought an action for injunctive relief. In sum, it appears likely that the Double Jeopardy Clause would not bar a subsequent civil action against the Party or most of its members.

Double Jeopardy Clause: Application to Civil Penalties

The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb."[1] It has been interpreted as prohibiting only successive punishments or prosecutions that are criminal in nature.[2] However, some penalties designated as "civil" by statute have been found to be sufficiently "criminal" to implicate double jeopardy concerns. In other words, whether a particular punishment is criminal or civil may require an interpretation of congressional intent and the extent to which the penalty can be characterized as penal in nature.[3]

Factors that courts consider when determining whether a penalty is criminal in nature include: (1) "whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment – retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the

[1] U.S. Const. amend. V. Although federal proceedings are the focus of this analysis, the Supreme Court has held that the Double Jeopardy Clause also applies to the states. See Benton v. Maryland, 395 U.S. 784 (1969).

[2] *See* Breed v. Jones, 421 U.S. 519, 528 (1975) ("In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution").

[3] Hudson v. United States, 522 U.S. 93, 99 (1997) ("Even in those cases where the legislature 'has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect,' ... as to 'transform what was clearly intended as a civil remedy into a criminal penalty.'") (quoting United States v. Ward, 448 U.S. 242, 248 (1980); Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)).

alternative purpose assigned."[4] However, Congress' designation of a penalty as "civil" creates a presumption which must be overcome by clear evidence to the contrary.[5] Thus, civil penalties are not typically found to be criminal in nature. For example, in *Hudson v. United States*, the U.S. Supreme Court held that monetary assessments and an occupational debarment order did not implicate the Double Jeopardy Clause, because neither type of penalty constituted a "criminal punishment."[6]

Regardless of the nature of the penalty sought, the Double Jeopardy Clause does not bar a subsequent action if no more than preliminary proceedings commenced in the prior action.[7] Typically, an action must have reached at least the stage where jury members have been sworn (in a jury trial) or where the first evidence has been presented to the judge (in a bench trial).

Application to a Subsequent Suit Against the New Black Panther Party for Self-Defense or its Members

In January 2009, the U.S. Department of Justice filed a civil suit in a U.S. district court against the New Black Panther Party for Self-Defense and three of its members.[8] The suit was brought by the Department's Civil Rights Division pursuant to the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et. seq.*, which prohibits intimidation of "any person for voting or attempting to vote" and authorizes the Attorney General to bring civil actions to obtain declaratory judgment or injunctive relief to prohibit such actions.[9] The Department alleged that members of the Party had intimidated voters and those aiding them during the November 2008 general election and sought an injunction banning the Party from deploying or displaying weapons near entrances to polling places in future elections.[10] However, after the Department obtained an injunction barring one member's future use of weapons near polling places, it voluntarily dismissed its suit against the Party and the other members.[11]

For two reasons, it appears likely that the Double Jeopardy Clause would not prohibit the Justice Department from bringing a similar suit on the same or similar grounds against at least the Party and the individual members for whom the previous suit was dismissed. First, it is likely that a court would find that the injunctive relief sought in the previous action constitutes a civil, rather than criminal, punishment.

---

[4] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

[5] *Hudson*, 522 U.S. at 100 ("'[o]nly the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.") (quoting *Ward*, 448 U.S. at 249).

[6] 522 U.S. 93 (1997).

[7] *See, e.g.*, Ludwig v. Massachusetts, 427 U.S. 618 (1976) (holding that the Double Jeopardy Clause did not bar a conviction imposed as part of a two-tiered system wherein a defendant's speedy trial motion had been denied and he had been convicted and then he was convicted in a second trial after appeal).

[8] United States v. New Black Panther Party, No. 2:09-cv-0065 (E.D.Penn. filed Jan. 7, 2009).

[9] 42 U.S.C. § 1973i(b) ("No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote"); 42 U.S.C. § 1973gg-9(a) ("The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as is necessary to carry out this subchapter").

[10] Department of Justice, Press Release, *Justice Department Seeks Injunction Against New Black Panther Party*, Jan. 7, 2009, http://www.usdoj.gov/opa/pr/2009/January/09-crt-014.html.

[11] The United States dismissed the suits pursuant to Federal Rule of Civil Procedure 41(a)(1)(A), which authorizes a plaintiff to voluntarily dismiss a suit without a court order if a defendant has not yet served either an answer to the plaintiff's complaint or a motion for summary judgment. The New Black Panther Party and two of the three individual members who had been sued had not yet filed an answer or a motion for summary judgment in the case.

Although Congress' designation of the injunctive relief actions as a civil penalty is not ultimately dispositive, it is unlikely, based on the seven factors noted previously, that injunctive relief sought by the Justice Department would be viewed as sufficiently criminal in nature so as to overcome the presumption in favor of accepting Congress' characterization. Most importantly, the injunctions seem to have been primarily designed to prohibit the use of guns at polling places for the purpose of implementing the purposes of the Voting Rights Act, rather than to impose punishment on the defendants.

Second, because the United States voluntarily dismissed its suits against the Party and two of the three individual members before those defendants had filed an answer or motion to dismiss the suit, the previous action had not moved sufficiently beyond preliminary steps so as to implicate the Double Jeopardy Clause. With respect to the one member against whom an injunction was obtained, this second factor would not apply. However, due to the likely characterization of the injunction as a civil penalty, it remains unlikely that a subsequent action would be barred.

From: Flynn, Diana K (CRT)
Sent: Wednesday, May 13, 2009 11:54 AM
To: Rosenbaum, Steven (CRT)
Cc: Coates, Christopher (CRT); McElderry, Marie K (CRT)
Subject: New Black Panther Party FW: Comments on the proposed default judgment filings in NBPP

We have been asked to provide comments on the Voting Section's proposed motion and papers in support of default judgment and relief. Marie McElderry and I have reviewed the papers and discussed. Her comments, which also reflect my views, are below. I add the following observations:

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

2. The fact that *Chamberlain's* minimal standard for entry of a default judgment may be satisfied does not entitle us to one. See Marie's discussion of the case law below. The district court will retain considerable discretion to withhold relief on default and schedule a hearing. Given that we are seeking relief against political organizations and members in areas central to First Amendment activity, it is likely that the court will not order relief absent such further proceedings. That said, the procedural posture leaves few good alternatives to filing in support of such relief now.

3. By far, the most difficult case to make at this stage is against the national party and Malik Shabazz. There is discussion in the internal papers of the history of the organization with respect to voter intimidation with the use of weapons and uniforms. If the Voting Section opts for seeking relief against the national defendants at this stage, we suggest including that history in our supporting Memorandum. Our case against the nationals may be a bit of a reach, particularly at this stage, particularly because of First Amendment concerns. But we already brought the case and made the allegations. See *COMPLAINT*, par. 12. I assume that this reflects the Division's policy judgment that it is appropriate to seek such relief after trial. We probably should not back away from those allegations just because defendants have not appeared. And Voting does seem to have evidence in support of the allegations.

4. We would NOT say that First Amendment defenses are irrelevant at this stage. (Contra, *MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT at 4).* The court should anticipate likely defenses and so should we. See Marie's detailed discussion

below. We think a discussion of the narrowness of the proposed relief, which is generally discussed throughout the memorandum, can be used explicitly at this point to explain why First Amendment defenses are unlikely to prevail. In other words we can argue up front that the proposed order is carefully crafted to avoid any First Amendment concerns. Emphasis can be placed on the fact that our proposal is designed to prevent the paramilitary style intimidation of voters, and otherwise leaves open ample opportunity for political expression.

The First Amendment concerns Steve expressed earlier are well-taken, and I think proceeding against the nationals is a very close call. But it appears to us that there is a basis for the relief we seek, and the unusual posture of the case probably requires that we say the relief is appropriate on default. In any event, we should expect to be required to try these issues.

Marie may make some additional suggestions to the wording of the papers, if permitted.

From: McElderry, Marie K (CRT)
Sent: Tuesday, May 12, 2009 5:15 PM
To: Flynn, Diana K (CRT)
Subject: Comments on the proposed default judgment filings in NBPP

Comments on proposed filings re default judgment in *United States* v. *New Black Panther Party For Self-Defense*, No. 2:09-cv-0065 SD (E.D. Pa.)

We have been asked to comment on whether the United States should seek injunctive relief against all defendants, and, if so, what relief we should request. As I understand the situation, the documents Voting proposes to file are the Motion for Default Judgment (dated April 30), the Memorandum of Law in Support of Motion for Default Judgment (dated April 30), and the proposed Order (dated May 6). Further support for these filings is contained in the May 6 internal Remedial Memorandum Concerning Proposed Injunction Order.

Standard for obtaining default judgment. An overarching principle that we need to keep in mind is that the Third Circuit "does not favor entry of defaults or default judgments." *U.S.* v. *$55,518.05 In U.S. Currency*, 728 F.2d 192, 194 (3d Cir. 1984). Rather, it is its "preference that cases be disposed of on the merits whenever practicable." *Hritz* v. *Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984).

Our proposed Memorandum of Law relies on the three-part test in *Chamberlain* v. *Giampapa*, 210 F.3d 154, 164 (3d Cir. 2000), as governing a district court's determination whether a default judgment is proper. As the Third Circuit more recently acknowledged in an unreported decision, however, *Chamberlain* cites *U.S.* v. *$55,518.05, supra*, as the source of that standard, and *$55,518.05* is a case where a defendant sought to overturn a default judgment. *Hill* v. *Williamsport Police Dept.*, 69 Fed. Appx. 49, 51 (3d Cir. 2003). In *Hill*, the court noted that "both major treatises on federal practice and procedure, as well as the Ninth Circuit, set out additional factors to those listed in *Chamberlain* as appropriate for consideration when ruling on motions to grant default judgments." 69 Fed. Appx. at 51 n.3.[1] Among those factors are "whether material issues of fact or issues of substantial public importance are at issue," "how harsh an effect a default judgment might have," and "the strong policy of the Federal Rules of Civil Procedure." *Ibid.*

Nonetheless, the court in *Hill* determined that it is bound to follow *Chamberlain* in determining whether a district court has abused its discretion in deciding whether to issue a default judgment in the first place. The problem with importation of the three-part test to that context is that step two of the test requires the court to determine "whether the defendant appears to have a litigable defense," and that determination is complicated where, as here, the defendant has totally failed to file a response to the complaint (as opposed to having filed late). Our proposed Memorandum of Law, pg. 4, alludes to that complication by quoting the unreported decision in *Nationwide Mutual Insurance Company* v. *Starlight Ballroom Dance Club, Inc.*, 175 F. Appx. 519, 522 (3d Cir. 2006) ("The second factor is the 'threshold issue in *opening* a default judgment.'"). We then take the position that the presence or absence of a meritorious defense "has no relevance at this stage of the proceedings." Memo. at 4. That is not actually the case, however, since the Court will be following *Chamberlain*.

In any event, I think that we can get over that hurdle by anticipating, as we do in our May 6 internal Remedial Memorandum, possible defenses that might be raised, *i.e.*, First Amendment claims and the post-litigation

denunciation of the conduct of the Philadelphia chapter by the Party (and possibly by Malik Zulu Shabazz). I believe that the district court will anticipate such possible defenses and will want to know how we would address them. Indeed, by the time we file this motion and/or the court sets a hearing, the defendants may file something raising those or other defenses. Given that the court is bound to follow the three-part test, I think that we need to address in the Memorandum in support of the Motion at least those defenses that we have already identified.

I am also not sure that we have made a sufficient showing that we would be prejudiced by denial of a default judgment. When we filed the Complaint, we assumed that we would be engaging in the usual course of litigation, including discovery and filing of legal briefs. The opportunity to receive a judgment without pursuing all of those steps would be a benefit to us, but I am not sure that the court will be persuaded that we would be prejudiced by having to try the case on the merits, which is the preferred method of proceeding under Third Circuit case law. Especially in a case such as this, which is not cut and dried, I think the court will feel that its judgment would be informed by a more deliberate process.

Whether the unchallenged facts constitute a legitimate cause of action against the Party and its national leader. I have some reservations about whether we have a sufficient factual basis to state a claim against the Party and Malik Zulu Shabazz. Paragraph 12 of the Complaint alleges that they "managed, directed, and endorsed the behavior, actions and statements of Defendants Samir Shabazz and Jackson." The May 6 internal memorandum refers to an announcement made in advance of the November 4 election of a "plan to post party members at polling places." But nowhere do I see that we can show that either the Party or Malik Zulu Shabazz suggested, counseled, or endorsed the bringing or brandishing of weapons in advance of what happened in Philadelphia. Assuming that the main behavior we seek to enjoin is bringing weapons to the polls, I am not convinced that we can establish a basis for an injunction against the Party or Malik Shabazz by showing that the Party has violent and racist views against non-blacks and Jews. The additional information discussed on page 8 of the May 6 internal memorandum about

the Party's past actions of bringing weapons to political rallies may, however, be the basis for an argument that both the Party and Malik Shabazz should reasonably have known that the Philadelphia defendants might believe they were authorized to carry weapons to the polls, but I am not sure that would be sufficient to justify the relief we are seeking.

As I read our justification for relief against the Party and Malik Shabazz, it is based largely on Malik Shabazz's statements *after* the events in Philadelphia in which he defended the actions of King Samir Shabazz and Jerry Jackson on national television as based on the alleged presence of members of the Aryan brotherhood or the American Nazi party at that particular polling place. In addition, the Voting Section is relying on admissions made by Malik Shabazz to members of the section. It is unclear how we would present that evidence to the court. That "endorsement," however, is complicated by the statements on the Party's website renouncing the events in Philadelphia and suspending the Philadelphia chapter. It appears that we may have difficulty proving when those statements were added. At least as to the Party, those statements could be an impediment to proving a violation at all, not just an impediment to injunctive relief.

What type of injunctive remedy should be sought. Certainly, we have established a sufficient basis for the very limited injunctive relief that is recited in the proposed order dated April 30 against defendants King Samir Shabazz and Jerry Jackson. But I understand that such a limited injunction will not accomplish very much.

As to those "Philadelphia" defendants, however, the proposed order dated May 6 goes somewhat further. It seeks to enjoin defendants "from deploying or appearing within 200 feet of any polling location on any election day in the United States with weapons." Presumably, both deploying and appearing are meant to be modified by "with weapons." It is not clear what we mean by deploying, especially since the Voting Section indicated in its May 1, 2009, email that, in light of discussions with the Front Office, it does "not seek to enjoin the wearing of the NBPP uniforms at the polls." According to most dictionary definitions, the term "deploy" is used mainly in the context of

troops. I think it suggests that the military-type uniforms used by the Party are an integral part of what we want to enjoin, regardless of our stated intent not to seek to enjoin the wearing of those uniforms.

It appears that, at least as to the Philadelphia defendants, the violation we have alleged encompasses not only bringing the weapon, but also the intimidating atmosphere created by the uniforms, the military-type stance, and the threatening language used. I have not had time to do a comprehensive analysis of the First Amendment implications of attempting to enjoin members of the New Black Panther Party (or any other hate group, such as the American Nazi Party or the Klan) from wearing their uniforms at the polls on election day. The Supreme Court has stated that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas* v. *Johnson*, 491 U.S. 397, 406 (1989) (flag-burning case). It may not, however, "proscribe particular conduct *because* it has expressive elements."

In this case, Party members' wearing of the uniform would likely be viewed as "expressive conduct." It would be relevant, then, to know whether the government has asserted an interest in regulating the wearing of the uniform that is unrelated to the suppression of expression. Here, the government's predominant interest, as expressed in 42 U.S.C. 1973i(b), is preventing intimidation, threats, and coercion (or attempts to do so) against voters or persons urging or aiding persons to vote or attempt to vote. Part of the intimidation in this case is wearing a military-style uniform, which suggests some kind of authority to take action. That aspect of the uniform could theoretically be separated from the particular message that this uniform is intended to convey, *e.g.*, racial hatred. Thus, appearing at the polls in such a uniform with a weapon is more intimidating than appearing in street clothes with a weapon. Interestingly, all three of the Declarations that we propose to present to the court focus on a combination of the uniform and the weapon. None of them mentions the third element of intimidation, *i.e.*, the verbal threats and racial taunts and slurs.

The April 30 Memorandum in support of our Motion addresses the

possible First Amendment claims of the Philadelphia defendants in the context of whether injunctive relief would harm them, *i.e.*, the third part of the traditional test for obtaining an injunction. Memo. at 13-14. As to those defendants, our arguments appear to be sufficient to support the narrow injunction that the Voting Section was seeking as of April 30. It is obviously a closer question whether it would also support either Paragraph V of the May 6 proposed order, either as presently worded using the word "deploy," or a proposed order that explicitly mentions the Party uniform in some way.

As discussed above, my problems with applying Paragraph V to the Party and Malik Shabazz involve whether we have enough evidence to show that they violated the statute. If a decision is made that the evidence is sufficient, I would suggest a separate paragraph in the order for injunctive relief against these defendants that is narrowly tailored to the scope of their violation. That violation is described at various points of the Complaint as "deployment of armed and uniformed personnel at the entrance to [a] polling location," which involves the organization and planning of such activities involving the members of the Party. This portion of the injunction should therefore be geared to enjoining those actions. We might also want to ask the court to order these defendants to undertake some type of procedures or training, such as mentioned on page 8 of the May 6 internal Remedial Memorandum, that would make abundantly clear that the national organization and its leaders do not endorse intimidation, threats or coercion of voters or those who are urging or aiding them to vote.

Marie K. McElderry
Appellate Section
Civil Rights Division

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1 As the concurring judge in *Hill* pointed out, the Eighth Circuit does not use

the three-part test outside of the context where a party against whom default has been entered has moved to set aside the judgment. 69 Fed. Appx. at 53.

The Washington Times

Originally published 04:45 a.m., July 31, 2009, updated 10:57 a.m., July 31, 2009

Lawmakers want answers, seek refiling in Panther case

Jerry Seper (Contact)

Congressional Republicans on Thursday escalated their criticism of the Justice Department for dismissing a controversial voter-intimidation case, demanding that civil charges against the New Black Panther Party be restored. They also renewed their request to interview career attorneys who disagreed with the administration's decision to dismiss the charges.

Rep. Frank R. Wolf of Virginia, a senior Republican on the House Appropriations Committee, obtained an opinion Thursday from the Congressional Research Service (CRS) affirming that charges could legally be refiled without violating the double-jeopardy clause of the U.S. Constitution and said he thought Attorney General Eric H. Holder Jr. was obligated to refile the case.

"In all fairness, he has a duty to protect those seeking to vote and I remain deeply troubled by this questionable dismissal of an important voter-intimidation case in Philadelphia," Mr. Wolf told The Washington Times.

The Times on Thursday reported that Associate Attorney General Thomas J. Perrelli, the department's No. 3 political appointee, approved the decision to drop the case against the NBPP and its members even after the government had won judgments against them for their actions in November at a Philadelphia polling location.

Justice spokeswoman Tracy Schmaler said the department has an "ongoing obligation" to be

sure that claims it makes are supported by the facts and the law and a review of the NBPP complaint by "the top career attorneys in the Civil Rights Division" found that they did not.

She said Justice did obtain an injunction against the defendant who brandished a weapon at the polling place from doing so again and "will fully enforce the terms of that injunction."

Rep. Lamar Smith of Texas, ranking Republican on the House Judiciary Committee, also Thursday renewed his request that Mr. Holder make available the head of the department's Voting Section of the Civil Rights Division for a closed-door briefing on its decision to seek the complaint's dismissal.

Mr. Smith, unsuccessful since May in getting answers to questions on whether political appointees were involved in the complaint's dismissal, wants to know why the department has refused to respond to congressional inquiries requesting specific information on the investigation.

"Time and again, I have sought information from the Justice Department regarding the sudden dismissal of a case against members of the New Black Panther Party," Mr. Smith said. "Time and again, the Justice Department has claimed there was no wrongful political interference in the dismissal of the case.

"Now, according to news reports, it appears the Justice Department's political appointees did in fact play a role in the dismissal of this case," he said.

In January, Justice filed a civil complaint in federal court in Philadelphia against the NBPP and three of its members. Two NBPP members, wearing black berets, black combat boots, black dress shirts and black jackets with military-style markings, were charged with intimidating voters, including brandishing a nightstick and issuing racial threats and racial insults. A third was accused of managing, directing and endorsing their behavior. The incident was captured on videotape.

A Justice memo shows that the front-line lawyers who brought the case decided as early as Dec. 22 to seek a complaint against the NBPP; its chairman, Malik Zulu Shabazz, a lawyer and D.C. resident; Minister King Samir Shabazz, a resident of Philadelphia and head of the Philadelphia NBPP chapter who was accused of wielding the nightstick; and Jerry Jackson, a resident of Philadelphia and a NBPP member.

Witnesses said Mr. Samir Shabazz, armed with the nightstick, and Mr. Jackson used racial slurs and made threats as they stood at the door of the polling place. The department's injunction against Mr. Samir Shabazz prohibits him from displaying a weapon at a polling place until 2012.

Mr. Jackson was an elected member of Philadelphia's 14th Ward Democratic Committee and was credentialed to be at the polling place Nov. 4 as an official Democratic Party polling watcher, according to the Philadelphia city commissioner's office. A check of his MySpace Web page shows similar taunts. It also shows him in numerous poses with a variety of weapons.

Records show Mr. Jackson obtained new credentials as a poll watcher "at any ward/division in Philadelphia" just days after the charges against him were dismissed.

None of the NBPP members responded to the charges or made any appearance in court.

Four months after the complaint was filed, at a time career lawyers who brought the charges were in the final stages of seeking actual sanctions, they were told by their superiors to seek a delay after a meeting between political appointees and career supervisors, according to federal records and interviews.

The delay was ordered by Loretta King, who was acting assistant attorney general, after she discussed concerns about the case with Mr. Perrelli. Ms. King, a career senior executive service official, had been named by President Obama in January to temporarily fill the vacant political position of assistant attorney general for civil rights while a permanent choice could be made.

She and other career supervisors ultimately recommended dropping the case against two of the men and the party and seeking a restraining order against the one man who wielded the nightstick. Mr. Perrelli approved that plan, officials said.

None of the front-line lawyers has been made available for comment, and the department has yet to provide any records sought by The Times under a Freedom of Information Act request filed in May seeking documents detailing the decision process.

In an opinion sought by Mr. Wolf, the CRS said it "appears likely that the Double Jeopardy Clause would not prohibit the Justice Department from bringing a similar suit on the same or similar grounds against at least the Party and the individual members for whom the previous suit was dismissed."

Mr. Smith said if Mr. Perrelli knew about discussions to dismiss the complaint, the Justice Department's responses to Congress "make no mention of his involvement. Instead, he said, the department offered "vague justifications" for the dismissal, none of which included a legitimate explanation.

Ms. King and Steve Rosenbaum, chief of the department's special litigation section, were scheduled to brief Mr. Smith and committee Chairman John Conyers Jr., Michigan Democrat, on

Thursday, but conflicting schedules have forced that meeting into next month.

The Washington Times

Friday, July 31, 2009

EDITORIAL: Hack Panthers

The Justice Department's decision to drop an already-won voter-intimidation case against members of the New Black Panther Party merits multiple, independent investigations.

On Tuesday, Rep. Frank R. Wolf, Virginia Republican, officially asked Attorney General Eric H. Holder Jr. to refile the case. Mr. Holder should comply.

So far, the Justice Department has stonewalled legitimate inquiry. It has yet to provide records sought by this newspaper back in May. It has yet to answer a July 22 letter from Mr. Wolf that asks 35 questions on 17 different subjects relating to the Black Panther case. Justice has claimed, falsely, that the decision to drop the case was made by career attorneys only, not by political appointees. And it has declined to let congressmen interview the career attorneys who originally filed, and won, the case against the Black Panthers

As first reported by The Washington Times, career attorneys at Justice already had won a default judgment against three Black Panthers and the party as a whole for intimidating voters at a Philadelphia polling place while wearing paramilitary-style garb, as one of them brandished a nightstick and made racial threats.

One of the Black Panthers, Jerry Jackson, was an official poll watcher for the Democratic Party and the Obama campaign. Justice Department spokesman Tracy Schmaler refused several times to say whether department lawyers consulted with any outsiders. Yet Kristen Clarke of the NAACP Legal Defense Fund confirmed that she talked about the case with Justice Department lawyers.

Ms. Schmaler said she would not talk about "internal deliberations." But if they consulted with

outside groups, those deliberations by definition are not just internal.

Robert N. Driscoll, former chief of staff of the Civil Rights Division of the Justice Department, told us it would be ethically dubious if political appointees consulted with outside interest groups without telling the career attorneys who filed the case. "I would be hammered if I were to have had such a meeting," he said.

Mr. Wolf's July 22 letter raised numerous discrepancies between Justice Department explanations and readily available facts. In a July 13 letter to the congressman, Assistant Attorney General Ronald Welch wrote that the department dropped the cases against the New Black Panther Party as a whole and its leader, Malik Zulu Shabazz, because "the factual contentions in the complaint did not have sufficient evidentiary support" to prove that they "managed" and "directed" the intimidating behavior of the two Panthers deployed at that polling place.

Mr. Wolf responded that, "the confession on national television by Malik Zulu Shabazz on Nov. 7, 2008, flatly contradicts your assertion. Mr. Shabazz unequivocally claims that his activities in Philadelphia were part of a nationwide effort involving hundreds of party members, and that the use of weapons was a necessary part of the Black Panther deployment."

Mr. Welch claimed one reason the charges against Mr. Jackson were dropped was that "he was a resident of the apartment building where the polling place was located," and thus allowed to be there. Mr. Wolf wrote back that Mr. Jackson "has never resided" at that address, which is a senior living facility called Guild House. At a fit and trim age 53, Mr. Jackson hardly qualifies for a retirement home.

Mr. Jackson's MySpace page still lists one of his main "general interests" as "Killing Crakkkas." Four days after the Justice Department dropped the complaint against Mr. Jackson, he again was named an official election poll watcher for the Democratic primary in Philadelphia's municipal election. How convenient.

The Washington Times

Originally published 04:45 a.m., July 30, 2009, updated 07:49 p.m., July 30, 2009

EXCLUSIVE: No. 3 at Justice OK'd Panther reversal

Jerry Seper (Contact)

EXCLUSIVE:

Associate Attorney General Thomas J. Perrelli, the No. 3 official in the Obama Justice Department, was consulted and ultimately approved a decision in May to reverse course and drop a civil complaint accusing three members of the New Black Panther Party of intimidating voters in Philadelphia during November's election, according to interviews.

The department's career lawyers in the Voting Section of the Civil Rights Division who pursued the complaint for five months had recommended that Justice seek sanctions against the party and three of its members after the government had already won a default judgment in federal court against the men.

Front-line lawyers were in the final stages of completing that work when they were unexpectedly told by their superiors in late April to seek a delay after a meeting between political appointees and career supervisors, according to federal records and interviews.

The delay was ordered by then-acting Assistant Attorney General Loretta King after she discussed with Mr. Perrelli concerns about the case during one of their regular review meetings, according to the interviews.

Ms. King, a career senior executive service official, had been named by President Obama in

January to temporarily fill the vacant political position of assistant attorney general for civil rights while a permanent choice could be made.

She and other career supervisors ultimately recommended dropping the case against two of the men and the party and seeking a restraining order against the one man who wielded a nightstick at the Philadelphia polling place. Mr. Perrelli approved that plan, officials said.

TWT RELATED STORIES:

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- EDITORIAL: Return of the Black Panther
- EDITORIAL: Flack Panthers

Questions about how high inside the department the decision to drop the case went have persisted in Congress and in the media for weeks.

Justice Department spokeswoman Tracy Schmaler told The Washington Times that the department has an "ongoing obligation" to be sure the claims it makes are supported by the facts and the law. She said that after a "thorough review" of the complaint, top career attorneys in the Civil Rights Division determined the "facts and the law did not support pursuing the claims against three of the defendants."

"As a result, the department dismissed those claims," she said. "We are committed to vigorous enforcement of the laws protecting anyone exercising his or her right to vote."

While the Obama administration has vowed a new era of openness, department officials have refused to answer questions from Republican members of Congress on why the case was dismissed, claiming the information was "privileged," according to congressional correspondence with the department.

Rep. Frank R. Wolf, Virginia Republican and a senior member of the House Appropriations Committee who has raised questions about the case, said he also was prevented from interviewing the front-line lawyers who brought the charges.

"Why am I being prevented from meeting with the trial team on this case?" Mr. Wolf asked. "There are many questions that need to be answered. This whole thing just stinks to high heaven."

Ms. Schmaler said the department has tried to cooperate with Congress. "The Department

responded to an earlier letter from Congressman Wolf in an effort to address his questions. Following that letter, the Department agreed to a meeting with Congressman Wolf and career attorneys, in which they made a good-faith effort to respond to his inquiries about this case. We will continue to try to clear up any confusion Congressman Wolf has about this case."

Ms. King and a deputy are expected to travel to Capitol Hill on Thursday to meet behind closed doors with House Judiciary Committee Chairman John Conyers Jr., Michigan Democrat, and Rep. Lamar Smith of Texas, the top Republican on the panel, to discuss continuing concerns about the case.

The department also has yet to provide any records sought by The Times under a Freedom of Information Act request filed in May seeking documents detailing the decision process. Department officials also declined to answer whether any outside groups had raised concerns about the case or pressured the department to drop it.

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

She said the National Association for the Advancement of Colored People has consistently argued that the department should bring more voter intimidation cases, adding that it was "disconcerting" that it did not do so.

Mr. Perrelli, a prominent private practice attorney, served previously as a counsel to Attorney General Janet Reno in the Clinton administration and was an Obama supporter who raised more than $500,000 for the Democrat candidate in the 2008 elections. He authorized a delay to give department officials more time to decide what to do, said officials familiar with the case but not authorized to discuss it publicly. He eventually approved the decision to drop charges against three of the four defendants, they said.

At issue was what, if any, punishment to seek against the New Black Panther Party for Self-Defense (NBPP) and three of its members accused in a Jan. 7 civil complaint filed in U.S. District Court in Philadelphia.

Two NBPP members, wearing black berets, black combat boots, black dress shirts and black jackets with military-style markings, were charged in a civil complaint with intimidating voters at a Philadelphia polling place, including brandishing a 2-foot-long nightstick and issuing racial threats and racial insults. Authorities said a third NBPP member "managed, directed and endorsed the behavior."

The election-day incident gained national attention when it was captured by a voter-fraud citizen activist group on videotape and distributed on YouTube (below).

None of the NBPP members responded to the charges or made any appearance in court.

"Intimidation outside of a polling place is contrary to the democratic process," said Grace Chung Becker, a Bush administration political appointee who was the acting assistant attorney general for civil rights at the time the case was filed. "The Voting Rights Act of 1965 was passed to protect the fundamental right to vote and the department takes allegations of voter intimidation seriously."

Mrs. Becker, now on a leave of absence from government work, said she personally reviewed the NBPP complaint and approved its filing in federal court. She said the complaint had been the subject of numerous reviews and discussions with the career lawyers.

Mrs. Becker said Ms. King was overseeing other cases at the time and was not involved in the decision to file the original complaint.

A Justice Department memo shows that career lawyers in the case decided as early as Dec. 22 to seek a complaint against the NBPP; its chairman, Malik Zulu Shabazz, a lawyer and D.C. resident; Minister King Samir Shabazz, a resident of Philadelphia and head of the Philadelphia NBPP chapter who was accused of wielding the nightstick; and Jerry Jackson, a resident of Philadelphia and a NBPP member.

"We believe the deployment of uniformed members of a well-known group with an extremely hostile racial agenda, combined with the brandishing of a weapon at the entrance to a polling place, constitutes a violation of Section 11(b) of the Voting Rights Act which prohibits types of intimidation, threats and coercion," the memo said.

The memo, sent to Mrs. Becker, was signed by Christopher Coates, chief of the Voting Section; Robert Popper, deputy chief of the section; J. Christian Adams, trial attorney and lead lawyer in the case; and Spencer R. Fisher, law clerk. None of the four has made themselves available for comment.

Members of Congress continue to ask questions about the case.

"If showing a weapon, making threatening statements and wearing paramilitary uniforms in front of polling station doors does not constitute voter intimidation, at what threshold of activity would these laws be enforceable?" Mr. Wolf asked.

Mr. Smith also complained that a July 13 response by Assistant Attorney General Ronald Weich to concerns the congressman had about the Philadelphia incident did not alleviate his concerns.

"The administration still has failed to explain why it did not pursue an obvious case of voter intimidation. Refusal to address these concerns only confirms politicization of the issue and does not reflect well on the Justice Department," Mr. Smith said.

Mr. Smith asked the department's Office on Inspector General to investigate the matter, and the request was referred to the department's Office of Professional Responsibility.

Lawmakers aren't alone in the concerns.

The U.S. Commission on Civil Rights said in a June 16 letter to Justice that the decision to drop the case caused it "great confusion," since the NBPP members were "caught on video blocking access to the polls, and physically threatening and verbally harassing voters during the Nov. 4, 2008, general election."

"Though it had basically won the case, the [Civil Rights Division] took the unusual move of voluntarily dismissing the charges , " the letter said. "The division's public rationale would send the wrong message entirely — that attempts at voter suppression will be tolerated and will not be vigorously prosecuted so long as the groups or individuals who engage in them fail to respond to the charges leveled against them."

The dispute over the case and the reversal of career line attorneys highlights sensitivities that have remained inside the department since Bush administration political appointees ignored or reversed their career counterparts on some issues and some U.S. attorneys were fired for what Congress concluded were political reasons.

Mr. Weich, in his letter to the congressman, sought to dispel any notion that politics was

involved. He argued that the department dropped charges against three of the four defendants "because the facts and the law did not support pursuing" them. He said the decision was made after a "careful and through review of the matter " by Ms. King. He said:

• While the NBPP made statements and posted notice that more than 300 of its members would be deployed at polling places throughout the United States during the Nov. 4 elections, the statement and posting did not say any of them would display a weapon or otherwise break the law.

• While the complaint charged that the NBPP and Mr. Zulu Shabazz endorsed the activities at the polling places, the evidence was "equivocal" since both later disavowed what happened in Philadelphia and suspended that city's chapter after the incident.

• The charges against Mr. Jackson were dropped because police who responded to the polling place ordered Mr. Samir Shabazz to leave but allowed Mr. Jackson to stay. He also noted that the department approved "appropriately tailored injunctive relief" against Mr. Samir Shabazz for his use of the nightstick.

The injunction prohibits Mr. Samir Shabazz from brandishing a weapon outside a polling place through Nov. 15, 2012, and Ms. Schmaler said the department "will fully enforce the terms of that injunction."

On its Web page, the NBPP said the Philadelphia chapter was suspended from operations and would not be recognized until further notice. It said the organization did not condone or promote the carrying of nightsticks or any kind of weapon at any polling place.

"We are intelligent enough to understand that a polling place is a sensitive site and all actions must be carried out in a civilized and lawful manner," it said.

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Witnesses who supported the Justice Department case said they were surprised by the reversal.

Stephen R. Morse, a blogger hired by Republicans to be at the polls and who videotaped the confrontation, said the NBPP members blatantly used racial insults on would-be voters and

other poll watchers, telling one man, "Cracker, you about to be ruled by a black man."

Mr. Morse, a University of Pennsylvania alumnus, said he was "outraged" that the complaint was dismissed, saying he hoped Democrats would join Mr. Smith and Mr. Wolf in attempting to ensure that the incident "doesn't become a partisan issue, but rather an issue of right vs. wrong."

Chris Hill, national director of operations for a Gathering of Eagles, an organization dedicated to the support of U.S. troops, said the NBPP members visibly intimidated voters with racial slurs as they tried to enter the building.

Mr. Hill, a U.S. Army veteran who also served as a Philadelphia poll watcher for Republicans, said several voters at the location said they were afraid. He said the NBPP members tried to deny him access to the poll although he was a certified poll watcher, telling him, "White power don't rule here."

A Justice Department memo also says that a black couple, Larry and Angela Counts, both Republican poll watchers, told authorities they were scared, worried about their safety and concerned about leaving the polling place at the end of the day because of the actions of the NBPP members. Mrs. Counts said she wondered whether someone might "bomb the place" and Mr. Counts said the NBPP members called him a "race traitor," the memo said.

U.S. District Judge Stewart Dalzell in Philadelphia entered default judgments against the NBPP members April 2 after ordering them to plead or otherwise defend themselves. They refused to appear in court or file motions in answer to the government's complaint. Two weeks later, the judge ordered the Justice Department to file its motions for default judgments by May 1 — a ruling that showed the government had won its case.

The men also have not returned calls from The Times seeking comment.

On May 1, Justice sought an extension of time and during the tumultuous two weeks that followed the career front-line lawyers tried to persuade their bosses to proceed with the case.

The matter was even referred to the Appellate Division for a second opinion, an unusual event for a case that hadn't even reached the appeals process.

Appellate Chief Diana K. Flynn said in a May 13 memo obtained by The Times that the appropriate action was to pursue the default judgment unless the department had evidence the court ruling was based on unethical conduct by the government.

She said the complaint was aimed at preventing the "paramilitary style intimidation of voters" at polling places elsewhere and Justice could make a "reasonable argument in favor of default relief

against all defendants and probably should." She noted that the complaint's purpose was to "prevent the paramilitary style intimidation of voters" while leaving open "ample opportunity for political expression."

An accompanying memo by Appellate Section lawyer Marie K. McElderry said the charges not only included bringing the weapon to the polling place, but creating an intimidating atmosphere by the uniforms, the military-type stance and the threatening language used. She said the complaint appeared to be "sufficient to support" the injunctions sought by the career lawyers.

"The government's predominant interest ... is preventing intimidation, threats and coercion against voters or persons urging or aiding persons to vote or attempt to vote," she said.

The front-line lawyers, however, lost the argument and were ordered to drop the case.

Bartle Bull, a civil rights activist who also was a poll watcher in Philadelphia, said after the complaint was dropped, he called Mr. Adams to find out why. He said he was told the decision "came as a surprise to all of us" and that the career lawyers working on the case feared that the failure to enforce the Voting Rights Act "would embolden other abuses in the future."

U.S. Department of Justice
Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266
Washington, DC 20530

AUG 28 2009 SEP 9 2009

The Honorable Frank Wolf
Ranking Member
Commerce, Justice, Science Subcommittee
House Appropriations Committee
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Wolf:

Your July 9, 2009 letter to Department of Justice Inspector General Glenn Fine regarding the government's voluntary dismissals in *United States v. New Black Panther Party for Self-Defense, et al.*, Case No. 2:09-cv-0065 (E.D. Pa.), was referred to this Office for review. We also have seen and reviewed your June 8, 2009 letter to Attorney General Eric Holder regarding this matter. Please be advised that we have initiated an inquiry into the matter. We will contact you with the results of our inquiry once it is complete.

Thank you for bringing this matter to the attention of the Department. If you have any questions, please do not hesitate to call me or Assistant Counsel Mary Aubry on 202-514-3365.

Very truly yours,

Mary Patrice Brown
Acting Counsel

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 16, 2009

The Honorable Frank Wolf
Ranking Minority Member
Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Wolf:

This is in response to your letter of November 10, 2009, which inquired about the status of the Office of Professional Responsibility (OPR) inquiry regarding the government's voluntary dismissals in *United States v. New Black Panther Party for Self-Defense, et al.*, and your letter of November 16, 2009, which requested copies of certain materials you describe as having been prepared for OPR in connection with that inquiry. A separate letter has been sent to Representative Smith, who joined your November 10 letter to us.

Your letters have been referred to the Office of Professional Responsibility for reply. To ensure the independence of the OPR inquiry, we do not believe it would be appropriate for other Department officials to attempt to set arbitrary deadlines on OPR's work, or to provide copies of any materials that may have been prepared in connection with its inquiry. We are therefore unable to provide the information or documents you have requested, and we will continue to await the outcome of the OPR process before providing a further response to your requests for information regarding this matter.

Please be assured that the Department is committed to vigorous enforcement of the Voting Rights Act.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Alan B. Mollohan, Jr.
Chairman

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

RANKING MEMBER—COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD

CO-CHAIR—TOM LANTOS HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

November 16, 2009

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wolf.house.gov

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave NW Rm 5111
Washington DC 20530

Dear Attorney General Holder:

On November 9, House Judiciary Committee Ranking Member Lamar Smith and I wrote to you to request an update on the Department of Justice's (DOJ) Office of Professional Responsibility (OPR) investigation into the inexplicable dismissal of the serious voter intimidation case, *U.S. v. New Black Panther Party*. This investigation has now been open for more than two months.

In addition to our request for an update on the investigation by November 20, 2009, I also request copies of the reports prepared for OPR by the career DOJ attorneys responsible for this case -- Mr. Christopher Coates, Mr. Robert Popper, Mr. J. Christian Adams, and Mr. Spencer Fisher. The American people deserve a full accounting of the facts surrounding the incomprehensible dismissal of this case, including the statements provided by the trial attorneys to OPR.

Sincerely,

Frank R. Wolf
Member of Congress

U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530

November 24, 2009

The Honorable Frank Wolf
Ranking Minority Member
Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Wolf:

I am writing in response to your November 10, 2009 letter, submitted jointly with Congressman Lamar Smith, as well as your separate November 16, 2009 letter, to Attorney General Eric H. Holder regarding the Office of Professional Responsibility's (OPR) investigation into the dismissal of certain charges relating to the New Black Panther Party and two individuals associated with the organization. Your letters were referred to OPR for a response.

OPR initiated an investigation into this matter in July 2009, and the investigation is being conducted consistent with OPR's Policies and Procedures (available at usdoj.gov/opr/polandproc.htm). As described in the Policies and Procedures, "the first step is usually to request a written response from the attorney involved in the allegation." In addition, "[s]upporting documentation and any other relevant material should be included with the response, and other individuals with relevant information should be identified." Attorneys also must provide to OPR "[c]ase files [and] investigative files." As with any investigation, OPR's review of these documents and responses could lead to additional requests for documents and information. After the gathering of evidence is completed, OPR prepares a written report to the Attorney General and the Deputy Attorney General.

I trust the above description of OPR's policies and procedures demonstrates that an appropriately complete investigation takes more time than has lapsed since the investigation was commenced in July 2009. Please be assured that OPR's investigation is proceeding apace. We will inform you of the results of our investigation as soon as we are able to do so.

Sincerely,

Mary Patrice Brown
Acting Counsel

.....

(Original Signature of Member)

111TH CONGRESS
1ST SESSION

H. RES. _____

Directing the Attorney General to transmit to the House of Representatives all information in the Attorney General's possession relating to the decision to dismiss *UnitedStates* v. *New Black Panther Party*.

IN THE HOUSE OF REPRESENTATIVES

Mr. WOLF submitted the following resolution; which was referred to the Committee on _____

RESOLUTION

Directing the Attorney General to transmit to the House of Representatives all information in the Attorney General's possession relating to the decision to dismiss *UnitedStates* v. *New Black Panther Party*.

Resolved, That the Attorney General is directed to transmit to the House of Representatives, not later than 14 days after the date of adoption of this resolution, copies of any document, memo, or correspondence of the Department of Justice with regard to *United States.* v. *New Black Panther Party*, or any portion of any such document, memo, or correspondence that refers or relates to—

(1) any department communications with regard to the case between November 5, 2008 and November 15, 2009;

(2) any communication with the defendants or the defendants' attorneys between November 5, 2008 and November 15, 2009;

(3) any communication with third-party organizations or individuals between November 5, 2008 and November 15, 2009; or

(4) any evidence with regard to the dismissal of the case.

FRANK R. WOLF
10TH DISTRICT, VIRGINIA

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEES:

RANKING MEMBER—COMMERCE-JUSTICE-SCIENCE

TRANSPORTATION-HUD

CO-CHAIR—TOM LANTOS
HUMAN RIGHTS COMMISSION

Congress of the United States
House of Representatives

January 26, 2010

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wolf.house.gov

Mr. Glenn Fine
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington DC 20530

Dear Mr. Fine:

I have been disappointed by your reluctance to investigate the unfounded dismissal of an important voter intimidation case, *U.S. v. New Black Panther Party*. As you may recall, this case was inexplicably dismissed last year -- over the ardent objections of the career attorneys overseeing the case as well as the division's own appeal office. Despite repeated requests for information by members of Congress, the press, and the U.S. Commission on Civil Rights, the Department of Justice (DOJ) continues to stonewall all efforts to obtain information regarding the case's abrupt dismissal. This obstruction should be of great concern to you and merit an immediate investigation.

According to the Council of the Inspectors General on Integrity and Efficiency (CIGIE), the role of federal inspectors general is to "detect and prevent fraud, waste, abuse, and violations of law and to promote economy, efficiency and effectiveness in the operations of the Federal Government." I firmly believe that in this case, officials at the Department of Justice are engaged in activities that are an abuse of power, a blatant violation of voting rights enforcement, and potentially even defrauding of members of Congress and the U.S. Commission on Civil Rights by obstructing legitimate investigations of this matter.

In response to my letter to you last July, you referred the case to the department's Office of Professional Responsibility (OPR), which reports to the attorney general. Although OPR opened a preliminary investigation into the dismissal, more than seven months later I still have received no additional information. I do not believe that this office is capable of conducting an unbiased and independent review of this case given that it reports to a political appointee -- an inherent conflict-of-interest that can only be avoided by an independent inspector general (IG) investigation.

I have been a stalwart supporter of voting rights enforcement. Voting is a sacrosanct and inalienable right of any democracy. I was the only member of the Virginia congressional delegation -- Republican or Democrat -- to vote for the Voting Rights Act in 1982. I was heavily criticized by state newspapers, including the *Richmond Times-Dispatch*, for my vote. I was

criticized again by editorials in my district when I supported the Voting Rights Act extension in 2006.

Given my longstanding support for voting rights, I have been deeply concerned with the department's mismanagement of this case and its continued obstructive tactics. These concerns rise far above the scope of the OPR preliminary investigation and are more appropriately handled by your office. Specifically, I would like you to consider the following concerns:

1. The attorney general has still not responded to the questions and concerns I shared in my six letters to him since last June 8. I have only received one response from DOJ, from Ron Weich last July, that was vague and, at least in one instance factually inaccurate. Members of Congress should be able to interact with the department and expect a response that attempts to answer questions.

2. The dismissal of this case was wholeheartedly opposed by the four career attorneys managing the case as well as the division's own appellate office, which is also staffed by career DOJ attorneys. In a memo penned by career Appellate Chief Diana K. Flynn, she wrote that DOJ could make a "reasonable argument in favor of default relief against all defendants and probably should." She further noted that the complaint's purpose was "to prevent the paramilitary style intimidation of voters while leaving open ample opportunity for political expression." I fear that only politicization from the department's leadership can explain why the department acted contradictory to the recommendations of its career trial attorneys and appellate office.

3. Ms. King and Mr. Rosenbaum, the two officials identified in recommending this case for dismissal, have a history of questionable judgment. Earlier this month, U.S. Magistrate Judge David Waxse -- former legal counsel for the ACLU in Kansas and western Missouri -- imposed sanctions on King and Rosenbaum for their refusal to provide information in a housing discrimination case. King was also reprimanded and sanctioned $587,000 in attorneys' fees imposed against the department in an earlier case, *Johnson* v. *Miller*.

4. I am deeply concerned about allegations that Associate Attorney General Perrelli consulted with the White House counsel's office in his decision to dismiss this case. *The Washington Times* has reported a series of meetings between Mr. Perrelli and the deputy White House counsel corresponding to key dates in the decision to dismiss this case. Last week, *The Washington Times* further reported that Perrelli visited the White House counsel's office, including visits with former deputy Cassandra Butts and former counsel Greg Craig, on dates corresponding with key actions in the decisions that led to the dismissal of this case. The pace of these visits immediately slowed following the final dismissal of the case. If true, this represents a dangerous breakdown of the "firewall" policy that former Attorney General Mukasey put in place in 2007 to prevent politicization on active cases.

5. The department has thwarted all attempts by the U.S. Commission on Civil Rights to investigate this matter. The commission has repeatedly sought this same information, in fulfillment of its statutory responsibility to ensure the enforcement of civil rights law. After being similarly rebuffed, the commission filed subpoenas with the department for this information as well as to interview the career attorneys that handled the case.

6. DOJ is flagrantly obstructing the U.S. Commission on Civil Rights' statutory authority to provide oversight of the enforcement of civil rights laws. The department has instructed its career attorneys not to comply with subpoenas issued by the commission. This is an inherent conflict of interest with DOJ's statutory responsibility to enforce the commission's investigations and subpoenas.

7. Your office should be deeply troubled by the broad scope of the seven privileges claimed by DOJ in refusing to answer interrogatory questions submitted by the commission. What precedent will these broad claims of dubious privilege have on future congressional oversight of DOJ? DOJ even went as far as to claim that seven pages of a letter that I sent to the attorney general were considered privileged documents.

   According to Michael Carvin, former deputy assistant attorney general for both the Civil Rights Division and the Office of Legal Counsel:

   > "They are relying on privileges that the Office of Legal Counsel says do not exist. There is no privilege, for instance, saying that the Justice Department will not identify personnel working on the case. ... Generally, a number of these privileges [are ones] I've literally never heard of. Normally there is no general attorney-client privilege unless you are dealing with the president. So a claim would have to come under the 'work product' or 'deliberative process' exemption. But 'work product' is very narrow, and the deliberative-process privilege is moot ... once the case closes. This is especially true when the [request for the information] does not involve litigants but instead an agency with statutory responsibilities concerning civil rights."

8. My staff has reviewed all of the documents provided by DOJ to the commission in response to their interrogatory request. The documents provided to the commission have little or no relevance with regard to the decision to dismiss this case. The "document dump" was merely a smokescreen designed to give the allusion of cooperation. In fact, the department failed to even provide all of the scant information that it agreed to share.

9. New Black Panther Party leader Malik Zulu Shabazz has been quoted issuing threatening comments toward Rep. Lamar Smith and me in a recent statement, saying, "These right-wing white, red-faced, red-neck Republicans are attacking the hell out of the New Black Panther Party, and we're organizing now to fight back... We gearing up for a showdown with this cracker... He keep talking – we going to Capitol Hill, we're just gearing up

right now, we'll go to Capitol Hill." When laws aren't enforced, lawless men like Mr. Shabazz feel more emboldened to spread their intimidation.

In light of these new developments surrounding the department's refusal to reply to of congressional inquiries, its undermining of an investigation by the U.S. Commission on Civil Rights, and questionable meetings between Mr. Perrelli and the White House corresponding with keys dates in the dismissal of this case, I believe that you have an imperative to investigate these potential improprieties. Given that neither the Congress nor the commission can obtain critical information from the department, your authority as inspector general is the only way to learn whether the department has engaged in improper conduct with regard to the dismissal of this case and its hostility to the commission's statutory authorities and responsibilities.

In light of information that surfaced since my initial letter to you, I ask that you revisit your decision and immediately open an investigation. I would appreciate a decision on this matter no later than Friday, January 29.

Please do not hesitate to contact me or my staff member, Thomas Culligan, at 202-225-5136 if I can provide additional information on this matter.

Best wishes.

Sincerely,

Frank R. Wolf
Member of Congress

enclosures

U.S. Department of Justice

Office of the Inspector General

February 2, 2010

The Honorable Frank R. Wolf
United States House of Representatives
Washington, DC 20515

Dear Congressman Wolf:

This is in response to your letter to me, dated January 26, 2010, in which you asked the Office of the Inspector General (OIG) to open an investigation of the Department of Justice's (Department or DOJ) handling of the New Black Panther Party case.

We have carefully reviewed your letter and appreciate the importance of the matters that you have raised. As you note, we received the first letter from you and nine other members of Congress in July 2009 requesting that the OIG investigate the Department's handling of the case and whether political considerations influenced the Department's decisions in the case. When we received that letter, we referred the matter to the Department's Office of Professional Responsibility (OPR).

We did so because, by statute, OPR has jurisdiction to investigate allegations of misconduct relating to Department attorneys' handling of litigation or legal decisions. Such matters are expressly excluded by statute from the OIG's jurisdiction. In the 2002 Department of Justice Reauthorization Act (Act), Congress codified into statute the Attorney General Orders which gave this jurisdiction to OPR.

According to the Act, the OIG has jurisdiction to investigate allegations of misconduct against all employees in any DOJ component with one exception: DOJ attorneys acting in their legal capacity (or investigators acting at an attorney's direction). Specifically, Section 308 of the DOJ Reauthorization Act, entitled "Authority of the Department of Justice Inspector General," states that the Inspector General

> shall refer to OPR allegations of misconduct involving attorneys, investigators, or law enforcement personnel, where the allegations relate

to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice. . . ."[1]

The issues that you raised regarding the New Black Panther Party case involved the exercise by Department attorneys of their authority to litigate and make legal decisions, and whether those decisions were based on improper considerations, such as political influence. That is why we referred the matter to OPR for investigation.[2]

In your letter dated January 26, 2010, you again ask us to open an investigation of the Department's handling of the New Black Panther Party matter. Your letter stated that you are disappointed in our "reluctance to investigate the unfounded dismissal of an important voter intimidation case," and you expressed concern about OPR handling the matter. You stated that you do not believe that OPR "is capable of conducting an unbiased and independent review of this case given that it reports to a political appointee – an inherent conflict-of-interest that can only be avoided by an independent inspector general (IG) investigation." You also stated that in light of several recent issues, including your inability to obtain information from the Department about the case, the Department's actions in response to the U.S. Civil Rights Commission's requests for information, and allegations of contacts between Associate Attorney General Thomas Perrelli and the White House, the OIG should revisit our decision and immediately open an investigation.

I understand your desire to have the OIG investigate the Department's handling of the New Black Panther Party case because of our independence. I have advocated changing the OIG's jurisdiction to allow us to investigate all matters within the Department, including matters such as this one that involve Department attorneys' exercise of their legal duties. Unfortunately, unlike all other OIGs which have unlimited jurisdiction to investigate all allegations of waste, fraud, or abuse within their agencies, the Department of Justice OIG does not.

For several years I have expressed my position that Congress should change this jurisdiction and give the OIG the authority to investigate all matters within the Department. I have raised various arguments for this

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[1] See Public Law 107-273, Section 308 (21st Century Department of Justice Appropriations Authorization Act), codified at 5 U.S.C. App. 3 § 8E(b)(3). See also 28 C.F.R. § 0.29c(b).

[2] Over the years, we have received letters from members of Congress, on both sides of the aisle, asking the OIG to handle various allegations related to the Department's handling of litigation or legal decisions. In accord with the Attorney General Orders and the statute, we have referred such matters to OPR for it to handle, often to the disappointment of the members who asked us to conduct the investigation.

change, including, as you note in your letter, the independence issues that arise because OPR reports to the Attorney General.[3]

When Congress most recently considered this issue in its deliberation on the IG Reform Act, which was enacted in 2008, I again advocated for a change in the jurisdiction between OPR and OIG, to allow us to investigate all matters within the Department. However, Congress did not include this change in the IG Reform Act.[4] Therefore, the jurisdiction to investigate Department attorneys' legal and litigation decisions, such as DOJ attorneys' litigation and legal actions related to the handling of the New Black Panther Party, remains with OPR.

However, in response to your recent letter, we asked OPR about the status of its ongoing investigation. It reported to us that it is in the midst of its investigation – which is a full investigation, not a preliminary investigation or inquiry. OPR reported that it has gathered documents and other relevant materials, has interviewed witnesses, and has numerous other witness interviews scheduled. OPR also told us that it intends to share the results of its investigation with Congress.

In addition, OPR informed us that it has included in its investigation the allegations relating to whether any improper political influence affected the Department's handling of the case. It has specifically included as part of its

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[3] See, e.g., my statement before the Senate Homeland Security and Governmental Affairs Committee, July 11, 2007, available at http://www.justice.gov/oig/testimony (the current limitation on the DOJ OIG's jurisdiction should be changed because it assigns jurisdiction to OPR, which is not statutorily independent and reports directly to the Attorney General and the Deputy Attorney General; this creates a conflict of interest and contravenes the rationale for establishing independent Inspectors General); my testimony before the Senate Judiciary Committee, May 2, 2006 ("[U]nfortunately, in my view, the jurisdiction of the Inspector General in the Department of Justice is limited to some degree because there's a Department of Justice Office of Professional Responsibility that has jurisdiction to review the actions of attorneys in the exercise of their legal authority up to and including the Attorney General . . . It originally arose from an Attorney General order issued by Attorney General Reno and then Attorney General Ashcroft, and then it was codified in the DOJ Reauthorization Act by the Congress. So it would require a congressional action to change it at this point."); my testimony before the Senate Judiciary Committee, July 30, 2008 ("We don't have jurisdiction, unfortunately, over attorneys in the exercise of their legal duty. I have testified about that and I am hopeful, I hope that the Congress will do something about that because I believe that the Inspector General's Office ought to have unlimited jurisdiction in the Department of Justice. We're independent, we're transparent, and there's no conflict of interest. So I think that ought to be changed."); my testimony before House Judiciary Committee, October 3, 2008 (OIG does not have the authority to investigate prosecutive decisions made by DOJ attorneys; Congress would have to amend this carve-out to our jurisdiction, and I have suggested that it be amended).

[4] Although we believed this should be a bipartisan issue, the prior Administration opposed the change, and Congress did not include the change in the final bill.

investigation the issue you raised in your letter regarding any alleged contact between Associate Attorney General Perrelli and the White House, and whether any alleged contact improperly influenced the Department's decisions regarding the case.

Your letter also raises concerns about the appropriateness of the Department's response to requests by Congress and the U.S. Civil Rights Commission for information about this case, including the appropriateness of Department's legal position on the assertion of certain privileges. We have inquired of the Department about its decisions regarding providing information to Congress and the U.S. Civil Rights Commission. The Department has indicated to us that it is still in the process of considering the legal issues about what information it can and should provide to the U.S. Civil Rights Commission, and that searches to identify responsive documents are still underway. Moreover, we believe, based on our inquiry, that the appropriateness of the legal position the Department takes in responding to these requests is also a matter involving attorneys' legal decisions, which would fall within OPR's jurisdiction.

Therefore, while we understand and appreciate the reason for your request that the OIG investigate the Department's handling of the New Black Panther Party case, we do not have jurisdiction to do so. We believe, and have advocated, that Congress should change this jurisdiction, but it has not done so. Therefore, in accord with the law, we referred the matter to OPR, and OPR is in the midst of its investigation.

If you have any questions about this letter or these issues, please feel free to contact us.

Sincerely,

Glenn A. Fine
Inspector General

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 2, 2010

The Honorable Frank R. Wolf
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Wolf:

This follows up on your letter, dated January 26, 2010, to Inspector General (IG) Glenn Fine regarding your concerns about the Department's response to your allegations about improper partisan political considerations affecting the Department's decision last year to dismiss claims against some of the defendants in *United States v. New Black Panther Party for Self-Defense, et al.*, Case No. 2:09-cv-0065 (E.D. Pa.) (the NBPP case). While we understand that IG Fine has responded to your letter, we believe it is important for the Department to address your concerns about the Office of Professional Responsibility (OPR), the pending matters before the U.S. Commission on Civil Rights, and our responses to your previous inquiries.

As you know, OPR initiated an investigation into the conduct of Department attorneys in the summer of 2009. Since then, OPR has advised that it has reviewed voluminous documents, conducted numerous interviews and its comprehensive investigative efforts are continuing. Once that phase is completed, OPR will draft its report, which OPR expects will be extensive. If OPR's draft report includes findings of professional misconduct, then the affected Department attorney(s) will have an opportunity to comment on the draft before OPR completes its final report. Thereafter, the Department will follow established practices, which may vary depending on the nature of any OPR findings. We will supplement this response when that process is concluded.

We must respectfully take issue with your questioning of OPR's ability to conduct an "unbiased and independent review" of this matter. We believe that such a charge is groundless. On the contrary, the Department expects that is precisely what OPR will do with all of the energy, dedication, and professionalism that the Office has demonstrated for more than thirty years. It has a long history of investigating allegations that improper political considerations affected the Department's prosecution and litigation decisions. Moreover, OPR is staffed entirely by career Department of Justice employees, most of whom have, prior to joining OPR, distinguished themselves as Assistant United States Attorneys, trial lawyers in the Department's litigating divisions, and/or litigating partners in private law firms. They are particularly well suited by their experience and career status to conduct full and fair investigations into allegations such as those at issue here, and report their independent findings to appropriate decision-makers within the Department. Any suggestion to the contrary is patently false.

Congress of the United States
Washington, DC 20515

March 2, 2010

The Honorable Glenn A. Fine
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Inspector General,

We write regarding your letter of February 2, 2010, in which you declined to investigate the Department of Justice's dismissal of its voter intimidation case against the New Black Panther Party (NBPP) and affiliated individuals. We urge you to reconsider your decision, which we believe to be based on a too narrow reading of both the scope of your investigative jurisdiction and the scope of the NBPP matter.

The Department's actions in May 2009 to dismiss most of the charges in its Voting Rights Act voter intimidation lawsuit against the NBPP and three of the Party's associates, a lawsuit it initiated only four months prior, has raised many issues for Congress's consideration. Chief among them is whether the Voting Rights Act's scope stretches broadly enough to reach such a clear instance of voter intimidation. However, it also raises a host of troubling questions about whether the Department's political appointees abused their power in this case for political purposes.

These include questions of whether White House officials attempted for partisan political purposes to influence either the NBPP case, the broader class of voting rights cases against minority defendants or both; whether senior Department management officials and political appointees actually colluded for these purposes with White House officials to derail the NBPP case or cases against minority defendants in general; whether senior Department management officials or political appointees unduly interfered with the recommendations of the NBPP trial attorneys to move forward with a default judgment when invited to do so by the trial judge upon the NBPP defendants' default; and whether Department management or political appointees, in concert with White House officials or on their own initiative, have acted improperly to impede the U.S. Commission on Civil Rights' investigation of this affair. Concerns raised in the NBPP matter also include, for example, whether White House or Department officials acted contrary to the letter or spirit of recommendations that you made and Attorney General Michael Mukasey adopted in connection with the U.S. Attorneys investigation last reported on by your office in September 2008.

We readily acknowledge that strict issues of prosecutorial misconduct raised by the case may be within the investigative and ethics jurisdiction of the Department's Office of Professional Responsibility (OPR). While OPR reviews the performance of the Department's attorneys to ensure that they meet basic ethical obligations, it is beyond the scope of OPR's duties and expertise to investigate the politically charged questions raised by the Department's management of the NBPP case. As the above recitation makes clear, the full set of issues presented by the NBPP matter extends well beyond strict issues of prosecutorial misconduct, reaches into the area of Department "politicization" by the White House and senior Department management, and may implicate the sufficiency of the recommendations you made in the U.S. Attorneys matter. Moreover, in the U.S. Attorneys matter itself, both you and OPR demonstrated the ability of your offices to conduct coordinated or parallel investigations of matters that raise companion issues within each of your respective jurisdictions.

For these reasons, we believe there is no impediment to your investigating the NBPP matter, regardless of whether you have properly or improperly already referred some issues in the case to OPR. Moreover, the larger issues in this affair, whether for the pursuit of impartial justice, the pursuit of criminal justice for government officials or the credibility of the Department, lie within your jurisdiction, not OPR's. In the U.S. Attorneys matter, you pursued your investigative authority promptly and zealously to its limits and then pressed for the appointment of a special prosecutor to take the investigation further when you could not, due to your lack of subpoena power over White House officials. It is imperative that you likewise quickly commence a thorough and zealous investigation of the NBPP matter and carry that investigation to its conclusion. We fear that further delay could compromise your ability to obtain all of the facts concerning the potential "politicization" of the Department and that your own hesitation could compromise the credibility of the Office of the Inspector General.

To date, we remain confident of your ability and willingness to investigate allegations within your jurisdiction wherever they may lead. It is precisely our high regard for the Office of the Inspector General that drives our request that your office investigate this matter. Given the Department's refusal thus far to provide meaningful answers to Congress or the U.S. Commission on Civil Rights as to what led to the abrupt reversal of its litigation position in the case we look to you to provide the thorough and impartial investigation called for. Knowing that the NBPP matter raises issues squarely within your jurisdiction and consistent with the precedent that you set in the U.S. Attorneys investigation, we are optimistic that, following your receipt of this letter, you will reconsider and reverse your prior decision not to initiate an Office of the Inspector General investigation of the NBPP affair.

Thank you for your attention to this matter. We look forward to receiving your reply no later than March 12, 2010.

Sincerely,

Lamar Smith
Ranking Member
House Judiciary Committee

Frank Wolf
Ranking Member
Commerce-Justice-Science Subcommittee
House Appropriations Committee

cc: The Honorable John Conyers, Jr.

U.S. Department of Justice

Office of the Inspector General

April 19, 2010

The Honorable Lamar Smith
United States House of Representatives
Washington, DC 20515

The Honorable Frank R. Wolf
United States House of Representatives
Washington, DC 20515

Dear Congressmen Smith and Wolf:

This is in response to your letter to me, dated March 2, 2010. In that letter, you urged the Office of the Inspector General (OIG) to reconsider our decision regarding your request that the OIG investigate the Department of Justice's handling of the New Black Panther Party case.

Our original decision, conveyed in our letter dated February 2, 2010, was that by statute jurisdiction to investigate the Department's handling of the New Black Panther Party litigation fell within the Office of Professional Responsibility's (OPR) jurisdiction rather than the OIG's jurisdiction. Your March 2 letter stated that our decision was based on too narrow a reading of our investigative jurisdiction and the scope of the New Black Panther Party matter. Your letter also stated that the Department's actions "raise a host of troubling questions whether the Department's political appointees abuse their power for political purposes," and you listed those questions.

We have carefully considered the issues you raise in your March 2 letter. However, it still appears to us that each of the issues you urge us to investigate relate to the Department's handling of the New Black Panther Party case or other cases. Specifically, the questions you raise concern whether improper political factors or actions affected the handling of the New Black Panther Party case or other related cases. Even though these allegations concern possible "politicization" of Department decisions, the issues to be investigated consist of whether the alleged politicization had an improper impact on the Department's handling of a case or cases. For the reasons laid out in more detail in our February 2 letter, we believe that, by statute, those issues fall within OPR's jurisdiction, not the OIG's jurisdiction.

According to the statute which defines the jurisdiction of the OIG and OPR, OPR's jurisdiction is not limited to "strict issues of prosecutorial

misconduct." Rather, it extends to allegations that "relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice." 5 U.S.C. App. 3 § 8E (b)(3).[1] Moreover, while you stated that "it is beyond the scope of OPR's duties and expertise to investigate the politically charged questions raised by the Department's management of the NBPP case," the statute does not exempt OPR from investigating the matter when it is alleged that politicization has affected an attorney in the exercise of the authority to investigate, litigate or provide legal advice, or give us the jurisdiction to do so.[2]

Your letter also refers to the OIG's role in investigating the firing of the U.S. Attorneys, and it questions why the OIG would have jurisdiction to review that matter but not have jurisdiction to review the Department's dismissal of the New Black Panther Party litigation. The investigation concerning the U.S. Attorneys was initially assigned to OPR by the former Attorney General. Because the matter involved the firing of U.S. Attorneys (as well as allegations involving the hiring of career Department attorneys), we argued, before OPR started its investigation, that these issues did not involve the handling of litigation, and therefore the matter fell within our jurisdiction. OPR disagreed, arguing that the firing of at least some of the U.S. Attorneys was alleged to have occurred in order to influence a particular case, which gave OPR jurisdiction to investigate the matter. Eventually, because of this jurisdictional ambiguity, we agreed to conduct the investigation jointly.

By contrast, there does not appear to us to be a similar jurisdictional ambiguity with regard to the New Black Panther Party matter, because it involves the Department's actions in the handling of a specific case or cases. That is true even though the allegations are that the handling of this case or class of cases was affected by improper political considerations.

It is also important to note that OPR has been actively investigating this matter for several months (including whether political considerations affected the Department's decisions about the case). We recently inquired again about the status of OPR's investigation and were informed that OPR is in the latter stages of its investigation.

Finally, as described in our February 2 letter, we believe that the jurisdiction between OPR and the OIG should be changed and that we should

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[1] See also 28 C.F.R. § 0.29c(b) (the Inspector General "shall refer to OPR allegations of misconduct involving attorneys, investigators, or law enforcement personnel, where the allegations relate to the exercise of the authority of an attorney to investigate, litigate, or provide legal advice. . . .")

[2] As discussed in our February 2 letter, we believe it would be a better policy to give an independent Inspector General jurisdiction to investigate all matters within the Department of Justice, including allegations that politicization affected a decision to bring or dismiss a case. However, that is not what the statute currently provides.

have jurisdiction throughout the Department of Justice. Congress did not make such a change in 2008 in connection with its consideration of the Inspector General Reform Act. Recently, however, several members of Congress have expressed support for such a change. In light of the sentiments you express in your letter about the benefit of OIG investigating these types of matters, we hope that you will consider supporting legislation extending the OIG's jurisdiction to include matters now reserved to OPR's jurisdiction.

In sum, while we continue to understand your desire that the OIG investigate the Department's handling of the New Black Panther Party case, our reading of the statute indicates that the matter by law falls within OPR's jurisdiction. However, we would be willing to meet with you to discuss these issues further, and the concerns you raise, in order to understand more fully why you believe that under the jurisdictional statute the matter is within the OIG's jurisdiction.

If you have any questions about this letter, please feel free to contact us.

Sincerely,

Glenn A. Fine
Inspector General