Statement of Gregory G. Katsas

Partner, Jones Day

Former Acting Associate Attorney General

Before the United States Commission on Civil Rights

DOJ Handling of the *New Black Panther Party* Litigation

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Chairman Reynolds and Members of the Commission: Thank you for inviting me to testify about the handling of *United States v. New Black Panther Party for Self-Defense* by the Department of Justice. In my testimony, I will address the specific questions asked by Chairman Reynolds in his February 4, 2010 letter to me.

Let me begin with a few words about my background. I am a partner in the Washington office of the law firm Jones Day. Between 2001 and 2009, I held many senior positions in the Department of Justice ("DOJ"). These included Deputy Assistant Attorney General, Civil Division (June 2001 to August 2006); Principal Deputy Associate Attorney General (August 2006 to April 2008); Acting Associate Attorney General (August 2007 to April 2008); Acting Assistant Attorney General, Civil Division

(May 2008 to June 2008); and Assistant Attorney General, Civil Division (June 2008 to January 2009). As the Acting Associate Attorney General, I was the third-ranking officer in the Justice Department (on an interim basis), and I was responsible for supervising the Civil Rights Division. I also helped to supervise that Division as the Principal Deputy Associate Attorney General, the top advisor to the Associate Attorney General.

My successors in the Office of the Associate Attorney General were Kevin O'Connor and Thomas Perrelli. Mr. O'Connor supervised the Civil Rights Division when the *New Black Panther Party* case was filed, and Mr. Perrelli supervised the Division when the government abandoned most of its claims in the case. Given their likely involvement in internal deliberations about the case, government privileges may constrain each of them from freely testifying here. On the other hand, I had left the Office of the Associate Attorney General before the case was filed; I was not involved in any internal DOJ deliberations about it; and I thus can testify without any privilege constraints.

1. Based on your experience, would the Office of the Associate Attorney General normally be consulted in the decision to file a Section 11(b) lawsuit similar to the one filed against the NBPP defendants, and if so, what role would the Office typically have played?

Yes. The Office of the Associate Attorney General ("OASG") is the DOJ leadership office that directly supervises the Civil Rights Division,

which is responsible for pursuing civil actions under Section 11(b) of the Voting Rights Act. In order to discharge its supervisory responsibilities, OASG hosts regular meetings with the leadership of the Civil Rights Division, at which the Division is expected to report on significant developments in its important cases. Such meetings typically include the Associate Attorney General and the Principal Deputy Associate Attorney General, both of whom have supervisory responsibilities extending to each DOJ component that reports to OASG; the Deputy Associate Attorney General whose portfolio includes the Civil Rights Division; the Assistant Attorney General for the Civil Rights Division; and each of the Deputy Assistant Attorneys General for the Civil Rights Division, including the Deputy responsible for supervising its Voting Section. In my experience, these meetings typically occur weekly and last between 30 minutes and one hour. In them, each Deputy Assistant Attorney General is expected to report on significant matters within his or her area of responsibility. Under these institutional arrangements, the filing of a new voter-intimidation lawsuit – particularly one involving conduct that already had attracted national attention – would easily have warranted reporting from the Civil Rights Division to OASG.

In the vast majority of cases, OASG would immediately and informally approve (or at least decline to object) to proposed filings reported by a litigating division. In rare instances, the Associate Attorney General might become actively involved in internal deliberations; he or she might do so, for example, if a proposed filing raised significant questions of legal policy, or if different litigating divisions were proposing to take inconsistent positions. Neither of those considerations would have applied to the decision whether to file the *New Black Panther Party* complaint: on its face, the complaint appears to involve a straightforward and overwhelmingly strong case of voter intimidation, which would have raised neither policy sensitivities nor the possibility of conflicting positions within DOJ. Therefore, I would expect that OASG approved the decision to file the complaint quickly and informally, during the course of its regular meetings with the Civil Rights Division.

2. Assuming the Office of the Associate Attorney General was consulted in the filing of a lawsuit of this type, what procedures, standards, and other considerations normally would be used to determine whether to approve the filing of such a Section 11(b) action?

The decision whether to file a civil-enforcement action under Section 11(b) is vested in the Assistant Attorney General for the Civil Rights Division, subject only to the general supervisory authority of the Associate Attorney General. Accordingly, there would have been a formal

authorization process within the Civil Rights Division, which would have included written recommendations presented to the Assistant Attorney General, and a formal written authorization signed by the Assistant Attorney General. In contrast, the process of OASG review almost certainly would have been much more informal; as explained above, it most likely would have occurred in the ordinary course of the weekly meetings between the Civil Rights Division and OASG.

The standards of OASG review are at the discretion of the Associate Attorney General. Because the Associate is responsible for supervising thirteen different DOJ components, he or she can spend only limited time even on the Department's most important cases. Out of practical necessity, the Associate usually addresses only a limited number of threshold questions: Is the proposal of a litigating division egregiously wrong? Does it conflict with legitimate policy positions of the Department or the Administration? Does it conflict with positions taken by any other litigating division? In the *New Black Panther Party* case, the answer to all of those questions would have been no, and I would expect that OASG signoff was quickly provided on that basis.

3. In aid of our factfinding mission, the Commission will hear testimony from fact witnesses who observed the actions that are the subject of the NBPP complaint at the hearing on February 12. Assuming the allegations in the initial complaint are true, however, do

they present strong grounds to file the NBPP action and seek injunctive relief against all defendants?

On its face, the complaint states a strong case of voter intimidation against each of the four defendants. Section 11(b) of the Voting Rights Act makes it unlawful for any person to "intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." 42 U.S.C. § 1973i(b). Although sparse, the relevant caselaw indicates that Section 11(b) "is to be given an expansive meaning." See *Jackson* v. *Riddell*, 476 F. Supp. 849, 859-60 (N.D. Miss. 1979).

The case for voter intimidation appears overwhelmingly strong against defendants Minister King Samir Shabazz and Jerry Jackson. As alleged in the DOJ complaint, those defendants "deployed" together to a Philadelphia polling station dressed in military uniforms of the New Black Panther Party; hovered together, "side by side, in apparent formation," around the entrance of the station; hurled "racial threats and racial insults at citizens attempting to vote; "made menacing and intimidating gestures, statements, and movements directed at individuals who were present to aid voters; and brandished, pointed, and "menacingly tapped" a nightstick carried by Minister Shabazz. See Complaint ¶¶ 8-10. Videotapes of this behavior are readily available on the Internet, and appear to confirm the allegations in the complaint. Assuming that these allegations are true,

Minister Shabazz and Mr. Jackson plainly engaged in actual and attempted intimidation of voters and individuals aiding voters.

The complaint also alleges facially valid claims against Malik Zulu Shabazz and the New Black Panther Party itself. According to the complaint, Minister Shabazz and Mr. Jackson are members of the Philadelphia chapter of the New Black Panther Party (Complaint ¶¶ 5-6), and Malik Shabazz is the national head of the Party (*id.* ¶ 4). The complaint further alleges that Malik Shabazz and the Party "managed directed or endorsed" the behavior of Minister Shabazz and Mr. Jackson, and that, after the incidents at issue, Malik Shabazz "made statements adopting and endorsing the deployment, behavior, and statements" of Minister Shabazz and Mr. Jackson. *Id.* ¶ 12. If those allegations are true, then Malik Shabazz would be liable for the conduct of Minister Shabazz and Mr. Jackson under general principles of supervisory liability, see, *e.g.*, *International Action Center* v. *United States*, 365 F.3d 20, 28 (D.C. Cir. 2004) (Roberts, J.), and the Party would be liable under general principles of agency law, see, *e.g.*, *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 456 U.S. 556, 566 (1982).

4. Assuming the allegations in the initial complaint are true, do you think there are other strong reasons *not* to file the NBPP action?

To the contrary, if the allegations in the complaint are true, then there were particularly strong reasons to file. The alleged misconduct appears egregious and intentional. Moreover, the complaint further alleges that the New Black Panther Party and Malik Shabazz "avowedly endorse and support racially-motivated violence"; that the Party "is a black-supremacist organization which uses military-style uniforms"; and that the Party "is explicitly hostile toward non-black and Jewish individuals in both rhetoric and practice." Complaint ¶ 13. Assuming the truth of those allegations, the kind of aggressive conduct alleged in the complaint, if not enjoined, seems especially likely to recur. Finally, the nine-page complaint is legally and factually straightforward, and many of its key allegations appear corroborated by videotape and by incendiary public comments in the public record by Malik Shabazz and the Party itself. Thus, it is unlikely that litigation of the case would have been difficult or protracted.

5. Once a case like the NBPP matter was filed, would the Office of the Associate Attorney General normally be consulted before DOJ reversed course and refused to take a default judgment against several defendants, and if so, what role would the Office typically play?

Yes. As explained above, I would expect that OASG was kept routinely apprised of significant developments in the *New Black Panther*

Party litigation. Certainly DOJ's decision to abandon all claims against the Party, Malik Shabazz, and Mr. Jackson, despite their refusal even to defend the case, would have qualified as important enough for the leadership of the Civil Rights Division to raise with OASG. So too would have DOJ's decision to substantially narrow the scope of its requested injunction against Minister Shabazz.

I would expect that OASG played a far more active role in these decisions than it likely played in the initial decision to file the case. The initial decision – to file a straightforward and seemingly strong voter-intimidation lawsuit – would not likely have raised concerns with OASG. In contrast, the decisions at the end of the case would have been anything but straightforward. They amounted to nothing less than a decision by DOJ, following a change in presidential administrations, to reverse legal positions asserted in a pending case. Such reversals are extremely rare – and for good reason: they inevitably undermine DOJ's credibility with the courts, and they inevitably raise suspicion that DOJ's litigating positions may be influenced by political considerations. Accordingly, while a new Administration obviously has wide discretion to change its enforcement priorities and even its litigating positions in new cases, it is extremely rare for DOJ to shift course so dramatically in the course of a pending case.

Several considerations specific to the *New Black Panther Party* case would have exacerbated these general concerns. For one thing, DOJ did not merely abandon some of its claims in the course of ongoing and contested litigation; instead, it abandoned most of its claims after a default by all of the defendants, and an entry of that default pursuant to Federal Rule of Civil Procedure 55(a). I cannot think of any other instance when that has occurred. Moreover, the New Black Panther Party had endorsed President Obama in the 2008 election, and Mr. Jackson, during the events at issue, apparently was a registered poll watcher for the Democratic Party. Those facts inevitably would raise suspicion that the highly unusual decision to abandon a defaulted case was politically motivated, and that suspicion, in turn, would have heightened the sensitivity of deliberations within DOJ.

For these reasons, I believe that OASG would have been actively involved in deliberations about whether to reverse positions in the *New Black Panther Party* litigation. However, I cannot say whether OASG ultimately made the final decision or left it to the Acting Assistant Attorney General for the Civil Rights Division. In either case, no lower-ranking official would have been authorized to abandon claims approved by the prior Assistant Attorney General.

6. Assuming the allegations in the complaint are true, do you think there are serious First Amendment concerns with seeking discovery and maintaining the litigation against all defendants?

Assuming the allegations in the complaint, the *New Black Panther Party* litigation would have raised no serious First Amendment concerns.

The alleged conduct of Minister Shabazz and Mr. Jackson was not constitutionally protected. To begin with, the First Amendment does not protect intimidation in any context, even if carried out through speech or expressive conduct. See *Virginia* v. *Black*, 538 U.S. 343, 360 (2003). Moreover, to prevent against voter intimidation, states may prohibit even pure political speech around entrances to polling places. See *Burson v. Freeman*, 504 U.S. 191, 196-210 (1992) (plurality opinion) (upholding ban on such speech within 100 feet of entrance); *id.* at 213 (Scalia, J., concurring in the judgment) ("restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot").

The alleged conduct of Malik Shabazz and the New Black Panther Party, in directing and ratifying the conduct of Minister Shabazz and Mr. Jackson, also was unprotected. Even in cases involving some activity protected by the First Amendment, a supervisor "may be held liable for unlawful conduct that he himself authorized or incited." *NAACP* v. *Claiburne Hardware Co.*, 458 U.S. 886, 920 n.56 (1982). And a political

party or advocacy group, "like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority." *Id.* at 930.

Finally, the relief requested would have raised no significant First Amendment problems. In its original complaint, DOJ asked the court for an order that "[p]ermanently enjoins Defendants, their agents and successors in office, and all persons acting in concert with them, from deploying athwart the entrance to polling locations either with weapons or in the uniform of the Defendant New Black Panther Party, or both, and from otherwise engaging in coercing, threatening, or intimidating, behavior at polling locations during elections." Complaint ¶ 33(e). The first clause describes the specific unlawful conduct committed or authorized by the defendants, and the second clause describes more generally the conduct of intimidating voters "at polling locations during elections." Neither clause plausibly encompasses constitutionally protected conduct.

7. Assuming the allegations in the complaint are true, do you think the suit should have been dropped against three defendants, and do you think the Department should have obtained a broader injunction against Minister King Samir Shabazz than the one sought?

Assuming the allegations in the complaint, I do not think the suit should have been dropped against the Party, Malik Shabazz, or Mr. Jackson.

As explained above, the complaint stated strong claims of voter intimidation against each defendant, and there would have been no good reason to abandon those claims near the end of the case, on the verge of a favorable default judgment.

Moreover, there is no basis for distinguishing the conduct of Minister Shabazz (against whom DOJ continued to litigate) from that of Mr. Jackson. The complaint alleges that Minister Shabazz and Mr. Jackson deployed together to the entrance of a polling place, dressed in the military uniform of an organization known for supporting racially-motivated violence; "stood side by side, in apparent formation, throughout most of this deployment"; hurled racial threats and insults at voters and poll workers; and "made menacing and intimidating gestures, statements, and movements directed at individuals who were present to aid voters." Complaint ¶¶ 9-11. That conduct amounts to voter intimidation jointly perpetrated by two individuals. To distinguish between them on the ground that only Minister Shabazz actually brandished a weapon (*id.* ¶ 9) is akin to saying that, if two individuals conspire to rob a bank, the driver of the getaway car should not be held responsible for the acts of the triggerman. For obvious reasons, settled law is to the contrary. See, *e.g.*, *Salinas* v. *United States*, 522 U.S. 52, 63-64 (1997); *Pinkerton* v. *United States*, 328 U.S. 640, 646 1946).

Even as to Minister Shabazz, the injunction ultimately requested and obtained by DOJ seems unduly narrow. That injunction prevents Minister 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" Section 11(d) of the Voting Rights Act, see Order ¶ 2 (May 18, 2009). Moreover, the district court is to "maintain jurisdiction over this matter until November 15, 2012 to enforce this Order as necessary." *Id.* ¶ 3. The injunction requested and obtained by DOJ after the default thus contains several limitations not present in the injunction originally requested by DOJ in the complaint: the injunction does not apply to persons acting in concert with Minister Shabazz; it does not apply to voter intimidation perpetrated outside of Philadelphia; and, while the substantive prohibition appears to be permanent, the injunction appears to be jurisdictionally unenforceable after 2012. Assuming the allegations in the complaint, none of these restrictions seems justified.

8. Under DOJ policies regarding contacts between the Department and the White House in place while you were at the Department, which Attorney General Holder pledged to keep in place, is it likely that the Associate Attorney General or other DOJ officials would have discussed with the White House staff whether to reverse course in a suit like the NBPP matter?

During my last year at DOJ, this question would have been governed by a December 19, 2007 memorandum from Attorney General Mukasey

titled "Communications with the White House." In order to foster "public confidence that the laws of the United States are administered and enforced in an impartial manner," the Mukasey memorandum significantly restricted communications between DOJ and the White House "with respect to pending criminal or civil-enforcement matters." For such matters, communications between DOJ and the White House would have been allowed only to the extent that they were "important for the performance of the President's duties" and "appropriate from a law enforcement perspective."

Under these rules, I think it unlikely that DOJ would have consulted the White House regarding whether to reverse course in the *New Black Panther Party* litigation. That litigation was a pending civil-enforcement matter. Moreover, because DOJ (not the White House or the President) is charged with enforcement of the Voting Rights Act, it is difficult to see how consulting the White House would have been either "important for the performance of the President's duties" or "appropriate from a law enforcement perspective." To be sure, the White House may fairly become involved in establishing general legal policy or enforcement priorities for DOJ. But the decision to abandon most of the government's claims in the *New Black Panther Party* litigation involved no such broad question of legal

policy or enforcement priorities. Instead, in my judgment, it should have involved simply an assessment of the merits of one individual enforcement action. In my experience, the White House does not, and should not, become involved that kind of decision.

9. Pursuant to such established DOJ policies, which DOJ and White House personnel would normally have been involved in discussions (assuming they existed) on whether to reverse course in a lawsuit like the NBPP case? How would those communications normally have been conducted?

The Mukasey memorandum also would have restricted which DOJ and White House officials could have engaged in any communications about the *New Black Panther Party* case while that case was pending. On the DOJ end, the communications could have involved only the Attorney General, the Deputy Attorney General, the Associate Attorney General, or other lower-ranking individuals specifically authorized by one of these three leadership officers to communicate with the White House about the case. On the White House end, the communications could have involved only the Counsel to the President or the Deputy Counsel to the President.

There is no specific procedure for making authorized communications between DOJ and the White House. In my experience, such communications frequently occur by telephone, by e-mail, or in meetings at the White House.

10. Assuming that DOJ officials had contacts with White House Counsel staff on litigation of this nature, would it be unusual for officials in the White House Counsel's office to consult others within the White House on such matters, e.g., the White House Chief of Staff or the President?

In my experience, upon learning of information from DOJ about pending cases, lawyers within the White House Counsel's Office often disseminate the information to other interested parties within the White House, including individuals responsible for domestic or foreign policy, congressional relations, media, or politics. I do not know how often lawyers in the White House Counsel's Office share such information with the Chief of Staff or the President, or whether they likely would have done so in this case.