



UNITED STATES
COMMISSION ON
CIVIL RIGHTS

624 Ninth Street, N.W.
Washington, D.C. 20425

May 9, 2010

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Holder:

This letter addresses many unfulfilled discovery requests relating to the U.S. Commission on Civil Rights' ("Commission") investigation of the implications of the U.S. Department of Justice's ("Department") actions in the New Black Panther Party ("NBPP") litigation. It also raises several important questions regarding the proffered testimony of Assistant Attorney General Thomas Perez before the Commission, all of which require satisfactory resolution with sufficient time before the Commission's scheduled May 14 hearing to ensure that Mr. Perez's appearance will be worthwhile. To avoid another delay, we would appreciate a meaningful response to this letter by noon on Tuesday, May 11.

The Commission has been patient during its now eleven-month-long investigation. Despite its statutory duty to cooperate fully with the Commission's inquiry, the Department has repeatedly delayed the production of critical documents and information. When it has provided information, the Department appears to have done so only to maintain the appearance of cooperation and has timed its production of voluminous, but largely non-responsive documents to prevent adequate review by the Commission before critical junctures in the Commission's scheduled proceedings. It has further refused outright to provide answers and documents to some of the Commission's most critical questions and requests, and has refused to permit its employees with substantive knowledge of this case to cooperate with the Commission's subpoenas. Most recently, it has essentially ignored our General Counsel's request for a meeting with Department representatives regarding unresolved discovery disputes, despite the Department's earlier agreement to schedule such a meeting. Nevertheless, in good faith and despite the fact that it is out of turn, the Commission has been willing to accept the Department's proffer of Mr. Perez's testimony.

While it appreciates that the Department has made Mr. Perez available, the Commission needs answers and/or assurances with respect to the following in advance of the Assistant Attorney General's testimony so as to adequately prepare:

(1) *Is Mr. Perez available to testify for a longer or additional period of time?* The Department has indicated that Mr. Perez may only be free to testify for 90 minutes on May 14. This is unlikely to be sufficient for his oral statement and for eight commissioners to adequately

question him. If Mr. Perez cannot reserve three hours to testify on May 14, the Commission could probably reschedule his appearance on or around its next scheduled in-person meeting date of June 11. Alternatively, Mr. Perez could appear on May 14 and on or around the date of the Commission's next in-person meeting. If none of those options is possible for Mr. Perez, we request that the Department substitute the Associate Attorney General, who supervised the Civil Rights Division during the time period critical to the decisions in this case and was informed of and approved the litigation decisions at issue, at either the May 14 hearing or on or around the Commission's June 11 meeting date.

(2) *Will the Department commit to providing other witnesses to the Commission within a reasonable period of time, and if so, whom will it permit to provide testimony?* The Department needs to confirm that Mr. Perez will not be the only Department employee or official permitted to provide testimony to the Commission. The Assistant Attorney General was not with the Department during the conduct of the NBPP litigation and his direct knowledge of the case is therefore limited. However, there are other officials with far more direct knowledge of the actions taken in the NBPP litigation and others with experience investigating and litigating other voter intimidation incidents. For example, according to the Department's Response to Interrogatory No. 4 and Supplemental Interrogatory Response Nos. 1 and 6, Associate Attorney General Thomas Perrelli supervised the Civil Rights Division during the time when the decisions were made to dismiss three defendants and file for a narrow injunction against the fourth in this case. The responses also show that Mr. Perrelli was informed of the decisions when they were being made and may have briefed others like you on the Civil Rights Division's decision. Senior, career litigators in the Voting Section could also answer important questions about the facts in the NBPP litigation (even if the Department instructs them not to discuss internal deliberations) as well as key questions regarding prior (and now closed) investigations, which evidence is sought by the Commission.

(3) *Has President Obama or you formally invoked executive privilege to prevent the disclosure of information to the Commission?* The Department continues to object to answering questions and providing documents on vague "deliberative process" grounds, but that is insufficient to override DOJ's statutory duty to comply "fully" with the Commission's requests unless the President's constitutional executive privilege has been properly invoked, and even then, the privilege is not absolute.¹ The Supreme Court has stated plainly that executive privilege must be invoked personally by the President or a department head.² The Commission is entitled to know whether executive privilege actually has been invoked, by whom, and what the process will be to discuss selective waiver for various answers and documents.

(4) *Will the Department appoint a special counsel to enforce the Commission's subpoenas for the appearance of Department witnesses?* The Commission is examining the manner in which the Department handled the New Black Panther Party litigation. In furtherance of this examination, the Commission has asked the Department to enforce subpoenas that have been issued to Department employees. The Department has refused to do so. We believe the

¹ *United States v. Nixon*, 418 U.S. 683, 706 (1974).

² See *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). Executive privilege "is not to be lightly invoked. There must be formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* (citations omitted).

Department is in an untenable position regarding such enforcement. Yet we have received no response to our request for the appointment of a special counsel with the authority to litigate on behalf of the Commission to seek enforcement of Commission subpoenas. We renew our request for the appointment of a special counsel with no interest in the outcome of the case. In the alternative, the Department should explain why it does not believe that there is a conflict sufficient to warrant the appointment of a special counsel

(5) Finally, will Mr. Perez come to the Commission's hearing prepared to testify knowledgeably about the above issues, as well as the following?

- If executive privilege has been invoked, the process to consider waiver of alleged privileges for information and documents that are central to the Commission's investigation and do not seriously implicate Department interests.
- All Department officials involved in the decision (regardless of the deliberations or the deliberative process details) to dismiss aspects of the NBPP lawsuit and their degree of knowledge of the facts that gave rise to the lawsuit.
- The purpose and scope of the OPR investigation, what actions or incidents prompted it, when it will be completed, and whether it is primarily investigating the original filing decision or the decision to dismiss.
- The scope and applicability of section 11(b) of VRA and 18 U.S.C. § 245(b), as well as the remedies available under these statutes.
- Past reports and investigations of voter intimidation.
- Other examples of cases (voting rights or otherwise) in which the Department abandoned all or most of its claims not in the course of ongoing and contested litigation, but after default by defendants and an entry of that default pursuant to the Federal Rules of Civil Procedure.
- The specific First Amendment issues implicated by defendants' appearance or conduct that the Department has asserted justified its dismissal against three defendants and its pursuit of a narrow injunction binding the fourth.
- The relevance of one of the defendant's credentials as an official poll watcher to the decision to dismiss the case against him.

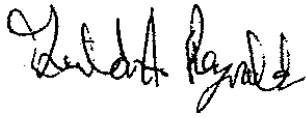
In addition to the issues discussed above, an appendix to this letter is attached which lists outstanding discovery disputes. The Department has offered to meet with representatives of the Commission to discuss and resolve these disputes. To reduce the need for additional hearings, such meeting must occur as early as practicable next week, but not later than Wednesday, May 12. Documents provided to the Commission as a result of this meeting would have to be delivered to the Commission by close of business on Wednesday, May 12, to provide any chance for even cursory review before the May 14 hearing.

Finally, we would appreciate answers in writing to the above by noon on Tuesday, May 11, for the Commission to evaluate whether Mr. Perez's testimony can reasonably be expected to

advance its investigation, which it has undertaken pursuant to its statutory authority to, among other things, assess the Department's enforcement of the Voting Rights Act.

Thank you for your attention to these matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Gerald A. Reynolds". The signature is written in a cursive, slightly slanted style.

Gerald A. Reynolds
CHAIRMAN

Attachment

Appendix

Outstanding Discovery Issues in the New Black Panther Party (NBPP) Voter Intimidation Investigation

GENERAL DISCOVERY ISSUES

1. DOJ has refused to permit subpoenaed employees to provide testimony.
2. DOJ has not answered whether it will appoint a special counsel to seek to enforce the Commission's subpoenas against the Department.¹
3. DOJ has failed to say whether it has invoked executive privilege, who has invoked it, and as to which document or issue it has been invoked.²
4. With regard to documents withheld, DOJ has failed to specify the privilege being invoked to withhold the document.³
5. DOJ has not provided a privilege log for documents withheld.⁴
6. Redacted declarations, incident reports, and other documents.
7. Although Assistant Attorney General Thomas Perez has been offered to testify, "he is not at liberty to discuss internal deliberations."⁵
8. DOJ has said it "is constrained by the need to protect against disclosures that would harm its deliberative processes **or that otherwise would undermine its ability to carry out its mission.**"⁶
9. DOJ says it "has provided documents responsive to the Commission's requests . . . through the date of the court's May 18, 2009 order entering judgment To the extent that any documents after this date provide additional information that is **material** to the Department's decision to obtain relief against [Minister King Samir Shabazz] and to dismiss claims against the other three defendants, we have provided those documents as well. We have not included documents that post-date the May 18, 2009 ruling resolving the litigation and that do not provide additional information **material** to the Commission's examination of decisions in that litigation."⁷

DOCUMENTS KNOWN OR BELIEVED TO EXIST

1. Incident reports with regard to the events in question
2. Any reports of other instances of voter intimidation by the NBPP during the 2008 election
3. Any reports received from third parties with regard to the activities, practices, or actions of the NBPP during the 2008 election

Documents Referred to in the memo from Christopher Coates et al. to Grace Chung Becker (Dec. 22, 2008)

Witness statements (not signed Declarations) for the following:

4. Mike Mauro

¹ See Letter from David Blackwood to Joseph Hunt of March 30, 2010.

² See Instruction No. 10, Interrogatories and Document Requests (Dec. 8, 2009); Letter from Blackwood to Hunt of Dec. 8, 2010.

³ See Instruction No. 10, Interrogatories and Document Requests (Dec. 8, 2009).

⁴ See Letter from Blackwood to Hunt of March 30, 2010; Letter from Gerald Reynolds to Eric Holder of April 1, 2010.

⁵ See Letter from Hunt to Blackwood of April 16, 2010.

⁶ See Letter from Joseph Hunt to Gerald Reynolds of Jan. 11, 2010 (emphasis added).

⁷ Letter from Joseph Hunt to David Blackwood of April 16, 2010 (emphasis added).

5. Chris Hill
6. Steve Morse
7. Police Officer Richard Alexander
8. Joe DeFelice
9. John Giordano
10. Wayne Byman
11. Joe Fischetti
12. Larry Counts
13. Angela Counts
14. Harry Lewis
15. Malik Zulu Shabazz⁸

16. Draft Notice Letter to defendants
17. Draft Consent Decree

Documents Referred to in Appellate Section memo (email from Diana Flynn to Steven Rosenbaum of May 13, 2009)

18. Email from Voting Section to Civil Rights Division sent on or about May 1, 2009
19. Memo from Coates et al. to Loretta King (May 6, 2009) (submitted to Commission by Rep. Wolf)
20. Draft Motion for Default Judgment (dated April 30, 2009)
21. Draft Memorandum of Law in Support of Motion for Default Judgment (dated April 30, 2009)
22. Draft Proposed Order (dated May 6, 2009)

UNFULFILLED REQUESTS FOR PRODUCTION OF DOCUMENTS

Document Request Nos. 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 25, 26, 27, 38, 39, 48, and 49

UNANSWERED INTERROGATORIES

Interrogatory Nos. 2, 5, 8, 10, 11, 14, 19, 20, 21, 30, 33, 37, 39, 40, 42, 43, 44, 45, and 46

⁸ See also Memo from Coates et al. to Loretta King at 4 (May 6, 2009).