

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

May 14, 2010
9:30 a.m.

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

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

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

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

I. The Civil Rights Division's Voter Intimidation Work

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

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

A. *Criminal Enforcement of Voter Intimidation Laws*

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

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

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

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

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

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

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

B. *Civil Enforcement of Voter Intimidation Laws*

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

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

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

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

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

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

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

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

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

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

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

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

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

The Department did, however, initiate a civil action in federal court. On January 7, 2009, the Department filed a complaint seeking injunctive and declaratory relief under Section 11(b) of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973i(b), against four defendants: the New Black Panther Party for Self-Defense and its leader Malik Zulu Shabazz, and two individuals who appeared at the Philadelphia polling place on November 4, 2008, Minister King Samir Shabazz and Jerry Jackson. The complaint alleged that the defendants violated Section 11(b) because they attempted to engage in, and engaged in, both voter intimidation and intimidation of individuals aiding voters.

Although none of the defendants responded to the complaint, that did not absolve the Department of its legal and ethical obligations to ensure that any relief sought was consistent with the law and supported by the evidence. The entry of a default judgment is not automatic, and the Pennsylvania Bar Rules impart a clear duty of candor and honesty in any legal proceeding; those duties are only heightened in the type of ex parte hearing that occurred in this matter. See Pa. RPC 3.3(d). At the remedial stage, as with the liability stage, the Department remains obliged to ensure that the request for relief is supported by the evidence and the law. In discharging its obligations in that regard, the Department considered not only the allegations in the complaint, but also the evidence collected by the Department both before and after the filing of the complaint.

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

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

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

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

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

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

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

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

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

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

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

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

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

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