

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?

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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 sanctions 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, the 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:

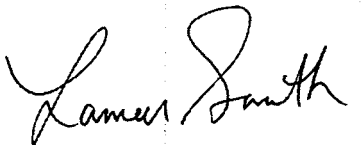
- Is the FBI aware of the activities of the Defendants, and if so, what is its assessment of their behavior and threatening nature? Does the FBI share your characterization of the response of local law enforcement officials on the scene, assuming it is accurate?
- What did the Department do to determine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

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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.



Lamar Smith
Ranking Member
Committee on the Judiciary

Sincerely,



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

cc: The Honorable John Conyers, Jr.



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 13, 2009

The Honorable Lamar S. Smith
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Smith:

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

