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10TH DISTRICT, VIRGINIA

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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 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."

The Honorable Eric H. Holder, Jr.
July 31, 2009
Page 2

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.'

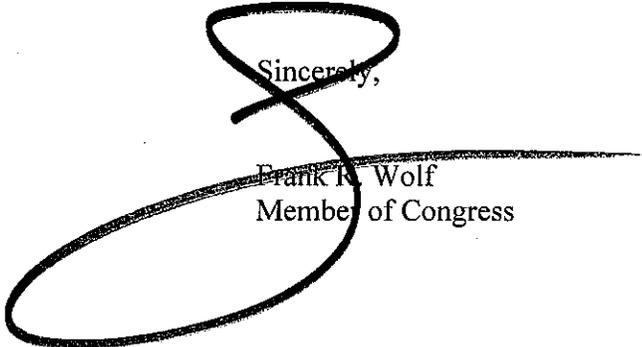
"An accompanying memo by Appellate Section lawyer Marie K. McElderry said the charges not only included bringing the weapon to the polling place, but creating an intimidating atmosphere by the uniforms, the military-type stance and the threatening language used. She said the complaint appeared to be '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 Shirley We Jacobs residing at
813 N. Market St.
 the 15 Ward for the 24 Election Division of Philadelphia, representing,
Shirley We Jacobs Candidate for Philadelphia City Council
 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.
 COUNTY BOARD OF ELECTIONS

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

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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

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.

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 Schmalzer 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.

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The Washington Times Close Print

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 Schmalzer 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. Schmalzer 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 Crakkas." 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.

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The Washington Times

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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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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 Schmalzer 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. Schmalzer 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."

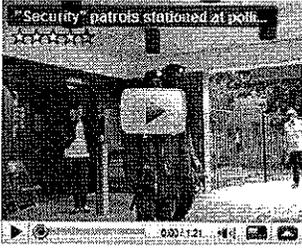
She said the National Association for the Advancement of Colored People has consistently argued that the department should bring more voter intimidation cases, adding that it was "disconcerting" that it did not do so.

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. Schmalzer 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."

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