DEPARTMENT OF JUSTICE

OFFICE OF PROFESSIONAL RESPONSIBILITY

REPORT

Investigation of Dismissal of Defendants in *United States v. New Black Panther Party for Self-Defense, Inc., et al.*, No. 2:09cv0065 (E.D. Pa. May 18, 2009)

March 17, 2011

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INTRODUCTION AND SUMMARY

In a joint letter dated July 9, 2009, U.S. Representatives Frank Wolf, Lamar Smith, and eight other congressmen wrote to Department of Justice (Department or DOJ) Inspector General (IG) Glenn Fine, questioning the government's voluntary dismissal of its complaint against three of the four defendants in *United States v. New Black Panther Party for Self-Defense, et al.*, No. 2:09cv65 (E.D. Pa. May 18, 2009). The January 2009 complaint in that case alleged that defendants Minister King Samir Shabazz, Jerry Jackson, Malik Zulu Shabazz, and the New Black Panther Party for Self-Defense, Inc. (NBPP) violated the Voting Rights Act by directing or engaging in coercion, threats, and intimidation toward poll workers and voters at a polling place in Philadelphia, Pennsylvania during the 2008 federal general election.

After the defendants failed to answer the complaint, the clerk of the court duly entered defaults against all four defendants. In order to obtain a default judgment, however, the government still had to satisfy the district court that the relief it was seeking – a nationwide injunction against each of the four defendants – was both necessary and appropriate under the facts and the law. In early May 2009, the new leadership of the Civil Rights Division (CRT) decided to dismiss the case against the national defendants, NBPP and its president, Malik Zulu Shabazz, and one of the two individual defendants, Jerry Jackson, and to pursue more narrowly-tailored injunctive relief against the other individual defendant, King Samir Shabazz.

The congressmen questioned whether the government's May 2009 voluntary dismissal of the claims against three of the four defendants was politically motivated. The letter noted that Jackson had credentials indicating he was a member of the local Democratic Committee. The congressmen further noted that a judge essentially had ruled in favor of the United States when the defendants failed to respond to the allegations. In addition, the congressmen stated that they were unaware of: (1) any changes in the facts between the filing of the original complaint and the Department's subsequent decision to dismiss three of the four defendants; and (2) any impropriety in the filing of the original complaint. Citing the absence of any satisfactory explanation for the dismissals of which the congressmen were aware, the letter raised the possibility that the Department's decision to dismiss three defendants might have been politically motivated and requested an investigation to determine whether the decision was based on any improper considerations. IG Fine referred the matter to the Office of Professional Responsibility (OPR) because the allegations fall within OPR's investigative jurisdiction.

OPR initiated an investigation and identified Thomas Perrelli, Associate Attorney General; Samuel Hirsch, Deputy Associate Attorney General; Loretta King, former Acting Assistant Attorney General (AAG), CRT; and Steven

Rosenbaum, former Acting Deputy Assistant Attorney General (DAAG), CRT, as subjects of our investigation. OPR obtained written responses from numerous DOJ employees: Perrelli; Hirsch; King; Rosenbaum; Christopher Coates, former Chief, Voting Section, CRT; Robert Popper, Deputy Chief, Voting Section, CRT; [redacted], former Trial Attorney, Voting Section, CRT; [redacted], Trial Attorney, Voting Section, CRT; Mark Kappelhoff, former Chief, Criminal Section, CRT; Diana Flynn, Chief, Appellate Section, CRT; [redacted], Attorney, Appellate Section, CRT.

We also reviewed the Voting Section's NBPP file, as well as thousands of pages of internal DOJ e-mails, memoranda, and notes. We conducted 44 interviews of current and former DOJ employees, including Attorney General Eric Holder and members of his staff; current and former members of the Deputy Attorney General's staff; Associate Attorney General Perrelli and his deputy, Hirsch; current and former CRT "front office" staff, including former Acting AAG Grace Chung Becker, King, Rosenbaum, Kappelhoff, former CRT Chief of Staff Pamela Barron, former CRT Acting DAAG John Wodatch, and CRT DAAG Julie Fernandes; the Voting Section's NBPP team (Coates, Popper, [redacted], and [redacted]; other current and former attorneys with CRT's Voting Section and Criminal Section; CRT Appellate Chief Flynn and Appellate Section Attorney [redacted]; Department employees from the Office of Public Affairs, the Office of Legislative Affairs, and the Office of Intergovernmental and Public Liaison; and attorneys in the United States Attorney's Office (USAO) for the Eastern District of Pennsylvania (Philadelphia USAO).

Based on the results of our investigation, we concluded that Perrelli, Hirsch, King, and Rosenbaum did not commit professional misconduct or exercise poor judgment, but rather acted appropriately in the exercise of their supervisory duties. We found that King, as the decision maker, conferred with and obtained the advice of Rosenbaum and Hirsch, as well as that of Voting Section attorneys Christopher Coates and Robert Popper. The Associate Attorney General was kept apprised of the developments in the decision-making process. We concluded that King's decision to dismiss three of the four defendants and to seek more narrowly-tailored injunctive relief against Samir Shabazz was based on a good faith assessment of the law and facts of the case and had a reasonable basis. We found no evidence that partisan politics was a motivating factor in reaching the decision.

We further concluded that the decision to initiate the NBPP case was based upon a good-faith assessment of the facts and the law. We found no evidence that partisan politics was a motivating factor in authorizing the suit against the four defendants.

Finally, we found no evidence to support allegations that the decision makers, either in bringing or dismissing the claims, were influenced by the race

of the defendants or any considerations other than an assessment of the available evidence and the applicable law.

I. BACKGROUND

A. The History and Enforcement of Section 11(b) of the Voting Rights Act

1. Section 11(b)

Section 11(b) of the Voting Rights Act of 1965 makes it a federal offense to threaten, intimidate, or coerce voters or those assisting voters, or to attempt to do so:

> 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, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e).

42 U.S.C. § 1973i(b). On its face, section 11(b) is race neutral; it protects any voter or poll worker from intimidation, coercion, or threats, regardless of his or her race.

The predecessor statute to section 11(b) of the Voting Rights Act is found in the Civil Rights Act of 1957, 42 U.S.C. § 1971(b), which also prohibits a person from intimidating, threatening, or coercing voters. Section 1971(b), however, required a plaintiff to prove that the defendant acted with a subjective, racial motivation. This evidentiary burden of proving racial motivation made it difficult for plaintiffs to prevail under section 1971(b). *See, e.g., United States v. Board of Education of Greene County*, 332 F.2d 40, 46 (5th Cir. 1964) (Rives, J., concurring); *United States v. Edward*, 333 F.2d 575, 579 (5th Cir. 1964).

In testifying in support of proposed section 11(b) of the Voting Rights Act of 1965, Attorney General Katzenbach expressed his frustration with the evidentiary burden imposed by section 1971(b):

> [P]erhaps the most serious inadequacy [of the existing statute prohibiting voter intimidation] results from the practice of district courts to require the Government to

> carry a very onerous burden of proof of "purpose." Since many types of intimidation, particularly economic intimidation, involve subtle forms of pressure, this treatment of the purpose requirement has rendered the statute largely ineffective.

1965 House Hearings at 11. The Attorney General also stated that the proposed section 11(b) would be a "substantial improvement over 42 U.S.C. § 1971(b)" because "no subjective purpose need be shown, in either civil or criminal proceedings, in order to prove intimidation." 1965 House Hearings at 11. In other words, unlike the existing law, "defendants would be deemed to intend the natural consequences of their acts." *Id.*

2. Caselaw Interpreting Section 11(b)

In interpreting section 11(b) of the Voting Rights Act of 1965, the courts have not always remained true to Congress's intent. First, despite specific legislative history to the contrary, some courts nonetheless have required proof of subjective racial motivation to sustain a section 11(b) claim. *Willing v. Lake Orion Community Schools*, 924 F. Supp. 815, 820 (E.D. Mich. 1996); *Gremillion v. Rinaudo*, 325 F. Supp. 375, 378 (E.D. La. 1971).

Second, although the legislative history shows that Congress did not intend to require proof that defendants in a section 11(b) case had a subjective intent to intimidate, coerce, or threaten voters or those aiding voters, some courts have required such a showing. In *Olagues v. Russoniello*, the Ninth Circuit held that there is a two-part test which applies equally to cases under section 1971(b) and section 11(b): (1) the voter must be intimidated; and (2) the defendants must have intended to intimidate the voter. 770 F.2d 791, 804 (9th Cir. 1985); *see Pincham v. Illinois Judicial Inquiry Bd.*, 681 F. Supp. 1309, 1317 (N.D. Ill. 1988); *see also United States v. Harvey*, 250 F. Supp. 219 (E.D. La. 1966) (requiring showing that voters subjectively felt intimidated, threatened, or coerced by the defendant's actions).

Against this backdrop of unfavorable court interpretation and application of section 11(b), cases brought under the statute have been generally unsuccessful. In fact, there is not a single reported case in which a plaintiff brought an action under section 11(b), fully litigated it, and won.

3. Recent Section 11(b) Cases Brought by the Voting Section

In recent history, the Voting Section has filed complaints alleging violations of section 11(b) in only three cases, one of which was NBPP. First, in *United States v. North Carolina Republican Party*, No. 91-161-CIV-5-F (E.D.N.C. 1992), the

Voting Section, under then-Chief Steven Rosenbaum, brought an action under section 11(b) in response to a mailing to voters by the North Carolina Republican Party. The government alleged that the mailing was misleading and intended to intimidate the recipients so that they would not vote. The case was not litigated; instead, the defendants entered into a consent decree before discovery began.

Recently, the government raised a section 11(b) claim in its case against Ike Brown, Chairman of the Noxubee County Democratic Executive Committee, in Noxubee County, Mississippi. *United States v. Brown*, 494 F. Supp. 2d 440 (S.D. Miss. 2007). Christopher Coates handled this litigation with the assistance of, among others, [redacted]. The primary focus of the *Brown* case was the Voting Section's claims under section 2 of the Voting Rights Act that Brown, as Chairman of the Noxubee County Democratic Executive Committee, discriminated against white voters in the electoral process in Noxubee County. However, the government also brought a section 11(b) claim based on a newspaper ad Brown published, which listed the names of 174 registered voters and stated that they might be subject to challenge if they attempted to vote. At trial, the government presented the testimony of a voter whose name appeared on the list and who refused to vote because she feared she would be arrested if she attempted to vote. The government also presented evidence that Brown confronted another voter at the polls whose name was on the list and summoned law enforcement when the voter refused to leave.

The *Brown* court ruled against the United States on its section 11(b) claim, holding that this evidence was not sufficient to prove a violation of section 11(b).[1] In support of its ruling, the court briefly explained:

> Although the court does conclude that there was a racial element to Brown's publication of this list, the court does not view the publication as the kind of threat or intimidation that was envisioned or covered by Section 11(b). *Cf. U.S. v. McLeod*, 385 F.2d 734, 741 (5th Cir. 1967) (trial court erred in failing to find that acts of county officials in arresting and prosecuting various persons intimidated and coerced prospective black voters). The court notes, too, that the Government has given little attention to this claim, and states that it has found no case in which plaintiffs have prevailed under the section.

Brown, 494 F. Supp. 2d at 477 n.56.

[1] The government prevailed on its section 2 claims.

B. The Incident on Election Day in Philadelphia

1. The New Black Panther Party

The New Black Panther Party for Self-Defense, Inc. is an active black-separatist group composed of as many as 35 chapters in at least 13 cities. Southern Poverty Law Center, *Intelligence Report: Snarling at the White Man* (2000). The group is not associated with the original Black Panthers of the civil rights movement, but is a group focused almost exclusively on hate rhetoric about Jews and whites. *Id.* Given its violent and racist rhetoric, the group has been monitored by diverse organizations such as the Southern Poverty Law Center and the Anti-Defamation League (ADL).

The leader of the Philadelphia chapter of the NBPP at the time of the November 2008 election was King Samir Shabazz.[2] Samir Shabazz is a well-known black militant in Philadelphia, to whom violent and racist comments have been attributed. *See, e.g.*, Dana DiFilippo, *New Panthers' War on Whites*, Phila. Daily News, Oct. 29, 2008, at 4 ("I'm about the total destruction of white people. I'm about the total liberation of black people. I hate white people. I hate my enemy . . . .").

2. NBPP Members at 1221 Fairmount Avenue on Election Day

On November 4, 2008, Samir Shabazz and another member of the Philadelphia chapter of the NBPP, Jerry Jackson, stood side-by-side in front of the entrance to a polling place located at 1221 Fairmount Avenue in Philadelphia. Both men were dressed in the uniform of the NBPP, which consisted of a black beret, black tunic with NBPP insignia, and black pants tucked into black boots. Samir Shabazz held in his hand a black nightstick, which was secured to his wrist by a leather lanyard. At various times, Samir Shabazz tapped the nightstick against his hand or leg, or pointed it at individuals to whom he was speaking. Jackson was not armed. The men reportedly stood 8 to 15 feet from the entrance to the building, and faced those approaching the building. To enter the polling place, voters and others had to walk past the two men, but there was sufficient space to walk around them and enter the building.

[redacted], a poll watcher for the Republican Party, was at 1221 Fairmount Avenue in the morning as part of his election day duties, and saw Samir Shabazz and Jackson. [redacted] described the two men as "menacing and

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[2] Samir Shabazz has gone by several different names. He identified himself as El Shabazz Moccka to the police on election day. For purposes of this report, we will refer to him as Samir Shabazz.

intimidating." [redacted] said that he viewed them as "the type you don't confront unless you are ready for a confrontation."[3]

[redacted], an attorney poll watcher for the Republican Party, arrived at 1221 Fairmount Avenue after [redacted] and watched the two New Black Panthers, whom he described as "alarming." [redacted] claimed that members of the local community who were present also appeared alarmed and annoyed with the New Black Panthers. [redacted] spoke with [redacted] and [redacted], two African American poll watchers for the Republican Party who were stationed inside the polling place at 1221 Fairmount Avenue. According to [redacted], the [redacted] were concerned about their safety because of the presence of the New Black Panthers.[4] [redacted] reported the New Black Panthers to the Philadelphia Republican Party headquarters.

Following [redacted] report, the Republican Party sent more poll watchers to 1221 Fairmount Avenue. An intern, [redacted], was sent to videotape the two New Black Panthers. [redacted] video shows Samir Shabazz and Jackson standing in front of the entrance to 1221 Fairmount Avenue, and Samir Shabazz can be heard claiming they are "security."

One of the Republican Party poll watchers, [redacted], reported that when he approached the polling place, Samir Shabazz and Jackson moved together as if to block his entrance. [redacted] walked around them and entered the polling place without further incident.

The police soon arrived on the scene in response to reports of "voter intimidation."[5] Philadelphia Police Officer [redacted] arrived with his partner, Officer [redacted].[6] The officers observed Samir Shabazz and Jackson standing 10 to 12 feet from the entrance to the polling place. The officers told the two men to step over to the police cruiser. Samir Shabazz went willingly, but Jackson at first refused to comply. [redacted] told the two men that they could

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[3] Our description of the election day observations and impressions of various poll workers derives from the notes of Voting Section interviews with those individuals.

[4] *But see infra* n.19 (describing testimony of [redacted] and [redacted] before the U.S. Commission on Civil Rights).

[5] Based on eyewitness accounts, it appears that the men were at the polling place for about an hour before the police arrived.

[6] Our information about the police encounter with Samir Shabazz and Jackson derives from an FBI 302 dated November 13, 2008, memorializing an interview of Officer [redacted] on November 12, 2008, as well as notes taken by Voting Section attorneys who interviewed Officer [redacted] on December 3, 2008.

not intimidate voters. The men denied that they were intimidating voters. [redacted] asked the men what they were doing. Jackson produced his poll watcher certificate, claiming that he had a right to be there. Samir Shabazz claimed that he was supporting Jackson. [redacted] verified with the Judge of Commissions inside the polling place that Jackson was a certified poll watcher. Based on that information, [redacted] permitted Jackson to stay, but escorted Samir Shabazz from the location.[7] As he left, Samir Shabazz said, under his breath: "This is just a white man holding a black man down." [redacted] immediately retorted that he [redacted] is a black man.

Officer [redacted] stated that he asked the people standing outside of the polling place whether the two men had threatened them, and all of those questioned responded that they had not been threatened. Officer [redacted] said that one of the persons outside of the polling place admitted to calling in the complaint to the police. The caller declined to give his name or any identifying information, but claimed the two men had been intimidating voters. Officer [redacted] asked the caller if the two men had threatened him. The caller said that he had not been threatened by them, but alleged that their mere presence was intimidating.

The police continued to monitor the polling place throughout the day, but no further incidents occurred.

3. Election Coverage by the Department of Justice

CRT's Voting Section enforces civil provisions of the Voting Rights Act. The Criminal Division's Public Integrity Section and CRT's Criminal Section have jurisdiction to enforce criminal violations of the Voting Rights Act. In preparation for the 2008 presidential election, CRT's Criminal Section and Voting Section worked with the Public Integrity Section to identify potential problems and to conduct training for Assistant United States Attorneys (AUSAs), FBI agents, and election officials around the country on how to handle potential issues. Each USAO appointed a District Election Officer (DEO) who was to be the point person within each district to handle election concerns, and who received training about how to handle complaints and issues that might arise on election day.

As part of election coverage for the November 2008 presidential election, attorneys with CRT's Voting Section, CRT's Criminal Section, and the Public Integrity Section shared responsibility for fielding complaints received by telephone, e-mail, and fax, and sharing with each other the information received.

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[7] Samir Shabazz was not arrested.

The Voting Section has authority to send federal observers to monitor voting and vote counting in selected precincts around the country, either in response to specific complaints, or to ensure compliance with existing consent decrees. As part of the November 2008 election coverage, Voting Section Deputy Chief Robert Popper headed a team in Philadelphia responsible for observing voting procedures in the city to ensure compliance with an existing consent decree regarding bilingual voting assistance.

On November 4, 2008, Voting Section attorney [redacted] and CRT Criminal Section attorney [redacted] first learned of the Philadelphia incident in the early afternoon while they were monitoring election complaints from their offices in Washington, D.C.[8] They shared the story, which had already been reported by FOX News, with colleagues who were monitoring and responding to election issues.

In Philadelphia, Popper contacted [redacted], an attorney for the City of Philadelphia, who confirmed that the police had responded to the incident and had asked one of the men to leave the polling place. [redacted] told Popper she had spoken with the police and believed no further action needed to be taken. Similarly, [redacted] contacted the Philadelphia USAO's DEO, AUSA [redacted], who also spoke with [redacted] in the Philadelphia District Attorney's (DA) Office and an inspector from the Philadelphia Police Department. [redacted] said that [redacted] was concerned about the situation, and that Philadelphia Police Commissioner Charles Ramsey had decided to send officers to the scene. [redacted] said that people were calling the Philadelphia USAO to complain about the incident, but that all of the callers were individuals outside of Pennsylvania who had seen the incident on television. [redacted] said he did not receive any complaints from individuals who were voters in Philadelphia.

Craig Donsanto, then-Director, Election Crimes Branch, Public Integrity Section, Criminal Division, was considered a Department expert on election issues. He co-authored a Department of Justice publication for prosecutors and investigators, *Federal Prosecution of Election Offenses* (7th rev. ed. Aug. 2007). Donsanto was one of the criminal attorneys monitoring complaints on November 4, 2008, and was involved in consultations with attorneys in CRT and the Philadelphia USAO. After conferring with DEO [redacted] in Philadelphia, Donsanto

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[8] [redacted] e-mailed a link to a *YouTube* video of the incident to his supervisors Popper and Christopher Coates at 1:22 p.m. Similarly, at 1:35 p.m. [redacted] e-mailed a link to the FOX News story to the Philadelphia USAO's DEO, [redacted], and Philadelphia FBI agent [redacted], asking if they had heard of the reports that Black Panthers were blocking the polls in Philadelphia. Neither [redacted] nor [redacted] could remember how they initially heard of the incident; both speculated that it was either from a telephone call (both were fielding telephone complaints related to voting issues), or from seeing the story on television.

e-mailed attorneys in the Public Integrity Section, CRT's Criminal Section and Voting Section, the Philadelphia USAO, and the FBI at 2:53 p.m. on November 4, informing them of the incident in Philadelphia. The e-mail correctly stated that one of the two men was a poll watcher, but incorrectly stated that he was also a resident of the building in which the polling place was located.[9] The e-mail also noted that one of the men was carrying "a stick of some sort." The e-mail stated that a GOP poll watcher had called the police, that the police had removed the man with the stick, and that the other man remained outside of the polling place. Donsanto noted that the FOX News network had been broadcasting stories about the incident. Donsanto's e-mail concluded:

> NO VOTERS – OR POTENTIAL VOTERS – OR POLL WORKERS – HAVE COMPLAINED TO ANYONE ABOUT THIS.
>
> AUSA [redacted] advises that this seems to be [an] entirely "media invented incident."
>
> If we interview the GOP poll watcher (who's at the moment the only "victim" identified here[]], he'll go to Fox News and the entire incident will be further escalated.
>
> Thus, AUSA [redacted] and I agreed that for the moment we (FEDS) will do NO INVESTIGATION here unless and until we receive a complaint from a voter.

E-mail from Donsanto to [redacted], FBI, *et al.*, re: Philly Black Panther Incident, Nov. 4, 2008, at 2:53 p.m. (emphasis in original).[10]

Coates disagreed with Donsanto's proposed approach, and suggested:

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[9] [redacted] told OPR that he was told early on by local authorities (either an attorney in the Philadelphia DA's Office or a Philadelphia police inspector) that one of the individuals resided in the building at 1221 Fairmount Avenue. We also noted that a FOX News TV report on election day reported that one of the individuals was a resident of the building. Regardless of how the incorrect statement originated, the incorrect statement that one of the two men resided in the building was later repeated by the CRT front office during its decision-making process and by the Department after the case was concluded. Jackson was not a resident of the building; in fact, the police report taken by the Philadelphia police on election day lists a different address for Jackson.

[10] [redacted] told OPR that a reporter had told the Philadelphia USAO that the Philadelphia DA's Office had characterized the New Black Panther incident as a "non-incident" and that the same reporter in speaking with the FBI referred to the incident as a "media-generated" incident.

> We should quietly attempt to get the name of the man who had the stick in front of the polling place and the name[s] of any witnesses who saw these men threaten any voters. If standing in front of a polling place with a stick in Black Panther clothing and talk[ing] about how you are going to keep whites from voting (that is what the guy on the tape complained of), does not violate the intimidation prohibition in [section] 11(b), I do not know what does. We need to get the names of any witnesses so this can be followed up after today.

E-mail from Coates to Donsanto, *et al.*, re: RE: Philly Black Panther Incident, Nov. 4, 2008, at 3:07 p.m.

Mark Kappelhoff, Chief of CRT's Criminal Section, proposed:

> As a measured step, I think it would make sense to reach out to the local police to see if we can get any investigative information from the officers who responded. Those officers may have taken down the names of potential witnesses, etc. We would not want [to] lose any potential leads. I think this could be done fairly discretely.

E-mail from Mark Kappelhoff to Christopher Coates, *et al.*, re: Philly Black Panther Incident, Nov. 4, 2008, at 3:20 p.m.

It was decided that AUSA [redacted] and the Philadelphia FBI agents would contact the local police to obtain any information they had about the identities of the men standing in front of the polling place and any witnesses to the incident. Both [redacted] and Kappelhoff told OPR that the Department is reluctant to send law enforcement officers to a polling place, or have law enforcement officers remain at a polling place, because the mere presence of law enforcement officers at a polling place could have an intimidating effect on voters. [redacted] said that FBI Special Agents [redacted] and [redacted] went to the scene to observe the polling place from their car, but that by the time they arrived Samir Shabazz had left. The agents saw Jackson continuing to stand in front of the polling place wearing his NBPP uniform.

In addition, Popper sent one of his CRT election monitoring teams to the Fairmount Avenue polling place to attempt to locate witnesses. The CRT election monitors, [redacted] and [redacted], spoke with [redacted], [redacted], and [redacted] at 1221 Fairmount Avenue. According to the monitors' notes, [redacted] was a certified poll watcher, and [redacted] and [redacted] were attorneys assisting the

Republican Party as election monitors. The three men, all of whom are white, said they had received a telephone call from a poll watcher who complained that he had been threatened by two men in "paramilitary garb" with a nightstick, that as he walked out of the building, he was called a "race traitor" because he is African-American and was working for the McCain campaign, and that another poll watcher was inside and afraid to leave the site. The notes did not include the names of the poll watchers who allegedly felt threatened. [redacted] said that when he, [redacted], and [redacted] arrived, the NBPP members were standing about five feet from the entrance to the polling place. While slapping a nightstick in his hand, one of the men stated that white supremacy is over and they would be ruled by a black man. [redacted] called the police. The police arrived, confiscated the nightstick, and made the man who possessed it leave. The poll watchers identified the man with the nightstick as "Shabazz" and said he was well known in the Center City area of Philadelphia for causing trouble. The police allowed the other, taller man to stay at the polling place, but made him move away from the door. According to the monitors' notes, the taller man in uniform was a poll watcher for the Obama campaign and lived in the building.[11]

At 3:40 p.m., Coates, Popper, [redacted], and then-Voting Section Deputy Chief Chris Herren received a complaint by e-mail from [redacted], Executive Director, Republican Party of Pennsylvania, requesting that CRT investigate reports of intimidation of poll workers and voters at 1221 Fairmount Avenue in Philadelphia. The complaint contained links to videos showing the New Black Panthers outside the polling place and alleged that the individuals were brandishing a nightstick and using terms like "whitey" to intimidate poll workers and possibly voters. The complaint noted that one of the individuals was a poll worker for the Obama campaign. The complaint provided contact information for [redacted], who was a witness to the incident at the polling place.

In response to [redacted] complaint, Popper called [redacted] and spoke with him. Popper said [redacted] explained that he was a poll watcher, described the two men, and confirmed the incident that Popper had already heard described and seen in videos. [redacted] described statements the men made, such as calling him "cracker" and asking how he would like being ruled by a black man. Popper Transcript at 38. Popper found [redacted] to be a credible witness. Popper said he specifically asked [redacted] if he was aware of any voters who were claiming that they had been intimidated, and [redacted] responded that he was not aware of any such voters. *Id.* at 38-39.

[11] As noted earlier, Jackson was a poll watcher for the Democratic party, but he did not live in the building.

Later that afternoon, Donsanto sent the following e-mail to attorneys in the Public Integrity Section, copying Coates, Kappelhoff, and [redacted]:

> EASTERN DISTRICT OF PENNSYLVANIA: Philadelphia, Voter Intimidation. During the late morning of [E]lection Day, Fox News aired a piece involving two black males who were standing out in front of a polling precinct wearing Black Panther ideated clothing. One of the men was carrying what looked to be a night stick. A white Republican poll watcher called the local police who responded and removed the man who had the stick. The other man was allowed to remain as he was an accredited poll watcher. In late afternoon of Election Day, DEO in ED-PA received Police Report of the incident and through it determined th[e] names of the two men. The man who was carrying the stick has been identified as a suspected member of the New Black Panthers Gang. Also, in the late afternoon of Election Day at least two individuals have come forward and claimed that they were threatened by this man when coming to vote. Donsanto and DEO [redacted] agreed that the matter warranted federal investigation, to be confined initially to interviewing any self-identifying victims to ascertain the facts underlying their conclusions that they were "threatened." As this incident is currently receiving fairly wide media attention (both Fox and CNN have picked it up), it is currently though[t] reasonable that further victims can be expected to self identify in the future. Interviews with victims will await end of the election.

E-mail from Craig Donsanto to Criminal Division attorney [redacted], *et al.*, re: New Intimidation Matter in ED-PA, Nov. 4, 2008, at 5:23 p.m. Although [redacted] told us that he provided much of the information contained in this e-mail to Donsanto throughout the afternoon, he was not aware of any voters who claimed to have been intimidated, and does not know the source of that statement in Donsanto's e-mail.

C. Post-Election Investigation

1. Criminal Investigation

Neither CRT's Criminal Section nor the Public Integrity Section opened a criminal matter on the incident involving the New Black Panthers in Philadelphia.

Instead, the Voting Section took the lead in pursuing a civil investigation. Mark Kappelhoff, then-Chief of CRT's Criminal Section, told OPR that, to pursue a criminal prosecution, the Criminal Section would want to have evidence of the use of force or attempted use of force (for example, evidence that an individual swung a nightstick at a voter or poll watcher, rather than merely holding a nightstick or pointing it). Kappelhoff further explained that it would be difficult to prove beyond a reasonable doubt that an individual intended to intimidate a voter without some compelling evidence on the use or attempted use of physical force. In addition, Kappelhoff and the other criminal attorneys with whom OPR spoke agreed that a criminal prosecution would be difficult in the absence of an identifiable victim, even if the statute did not require such evidence.

Kappelhoff said that he expected the Voting Section attorneys to share any information they learned in their investigation with the Criminal Section before proceeding civilly. If evidence supporting a criminal prosecution were uncovered by the civil attorneys, the Criminal Section would consider opening a criminal matter.

AUSA [redacted] opened a criminal file concerning the New Black Panther Party incident. Like Kappelhoff and Donsanto, he viewed an identifiable victim as a necessary component to any potential criminal prosecution. Accordingly, [redacted] asked the FBI to interview the police officers who responded to 1221 Fairmount Avenue on election day. [redacted] also spoke with the Philadelphia DA's Office, as well as an inspector at the Philadelphia Police Department, and learned that neither of those local law enforcement agencies had succeeded in identifying any victims or witnesses to the incident at 1221 Fairmount Avenue. [redacted] told OPR that FBI Special Agent [redacted] had attempted to interview [redacted], who was on the scene at the time of the New Black Panther Party incident, but that [redacted] had declined to speak with the FBI. [redacted] told us that he believed that other efforts were made to identify voters who may have been intimidated, but, to his knowledge, none were identified.

[redacted] met with Voting Section attorneys [redacted] and [redacted] when they were in Philadelphia to interview individuals in the weeks following the election. [redacted] said that he wished he had been apprised of witness statements [redacted] and [redacted] obtained in their investigation. [redacted] said that although there was an understanding that the Voting Section would share information it uncovered in its investigation with the Philadelphia USAO, that did not occur. In the absence of any identifiable victim who claimed to have been intimidated, and because an alternative remedy had been pursued through the civil litigation, [redacted] closed his Office's criminal file on the New Black Panther Party matter in July 2009.

2. Civil Investigation

a. The NBPP Team

Voting Section Chief Christopher Coates assigned the New Black Panther Party matter to [redacted] and [redacted]. [redacted] was an experienced attorney. He joined the Voting Section in 2005, after having practiced law for twelve years.[12] [redacted] had joined the Voting Section as a law clerk several months before the events discussed herein, in June 2008.[13]

The trial attorneys working on the NBPP matter were supervised by Deputy Chief Robert Popper. Popper had been a litigator in private practice for fifteen years before joining the Department in December 2005, and had expertise in voting law.[14]

The Chief of the Voting Section at the time of the NBPP investigation and litigation was Christopher Coates.[15] Coates had spent his entire career handling

[12] [redacted]

[13] [redacted]

[14] Popper spent seventeen years engaged in private practice in New York, handling a range of civil litigation matters, including voting rights. As a solo practitioner, he successfully tried a voting rights case before a three-judge panel in the Eastern District of New York, and obtained a summary affirmance of that decision from the U.S. Supreme Court. Popper also authored articles on voting law and crafted a proposal to curtail political gerrymandering. Popper's litigation and articles in the voting rights area brought him to the attention of attorneys in the Civil Rights Division's Voting Section. Then-Voting Section Chief John Tanner and then-CRT AAG Brad Schlozman recruited Popper, and he joined the Voting Section in December 2005 as a Special Litigation Counsel. In September 2008, Popper was promoted to Deputy Chief of the Voting Section, and currently remains in that position.

[15] Since graduating from law school in 1972, Coates has been engaged in civil rights litigation; in private practice, with an organization that provided civilian representation to those in the military stationed overseas, and with the ACLU. As part of Coates's practice, he handled voting rights cases, including a voting rights case that he argued before the United States Supreme Court. Coates joined the Department's Voting Section as a Trial Attorney in 1996. Coates was promoted to Special Litigation Counsel in 1999, and served in that capacity until 2005, when he was promoted to Principal Deputy Chief. In December 2007 Coates was named the Acting Chief

civil rights cases, was an expert in voting law, and recently had litigated claims of voter intimidation under section 11(b) in *United States v. Brown*, the most recent section 11(b) case the Voting Section had brought.

b. The I Memo

In 2008, the practice in the Voting Section required attorneys to obtain approval of an investigation before they could contact targets as part of their investigation. The memorandum seeking authorization for the investigation was referred to as an "I Memo." On November 13, 2008, the Voting Section forwarded an I Memo on the NBPP matter to then-Principal DAAG Lisa Krigsten for approval. The memorandum was from Coates, Popper, [redacted], and [redacted]. It set forth the facts surrounding the incident on election day at 1221 Fairmount Avenue, including descriptions of and links to the videos of the incident, which were available on the Internet.

The I Memo also provided information on the NBPP. It noted that the Southern Poverty Law Center, which monitors activities of hate groups, had described the NBPP as "an active black-separatist group constituting a 'federation of as many as 35 chapters in at least 13 cities with informal links to Black Muslims.'" Memorandum from Christopher Coates, Chief, Voting Section, *et al.*, re: Request for Investigative Authorization: Potential Election Day Voter Intimidation Under Section 11(b) in Philadelphia, PA, at 2 (Nov. 13, 2000) (quoting Southern Poverty Law Center, *Intelligence Report: Snarling at the White Man* (2000)) (I Memo). According to the Southern Poverty Law Center, the NBPP was known for hate rhetoric about Jews and whites. *Id.* The NBPP was known to arrive armed at demonstrations, and to preach violent, racist, and extremist views on its website. *Id.*

The I Memo noted that the national leader of the NBPP, Malik Zulu Shabazz, claimed in an interview with FOX News on election day that while more than 300 New Black Panthers were deployed in several cities across the United States to ensure that the voting process went smoothly and to quell potential or actual voter intimidation by white supremacists, no New Black Panthers were working in any official capacity in Philadelphia. I Memo at 3 n.3 (citing FOXNews.com, *Party Leader Says Black Panther Presence at Polls Provoked by "Neo-Nazis,"* http://elections.foxnews.com/2008/11/07/party-leader-says-black-panther-presence-polls-provoked-neo-nazis/). On its website a few days later, however, the NBPP posted a statement claiming that the NBPP presence in Philadelphia on

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of the Voting Section, and that position became a permanent appointment in May 2008. Coates accepted a detail as an Assistant United States Attorney in the District of South Carolina in the fall of 2009, and he currently remains in that position. Chris Herren was appointed Chief of the Voting Section in his stead.

election day was in response to white members of the Aryan Nation and Nazi Party who had been intimidating black voters and elderly residents at the Fairmount Avenue polling place. I Memo at 3 n.3.

The I Memo also briefly described the accounts of [redacted], [redacted], and [redacted], poll watchers for the McCain campaign who were interviewed by a CRT election monitoring team on election day. In addition, the I Memo noted that the Criminal Division had reported that in the late afternoon of election day, at least two voters had claimed that they were threatened by the two NBPP members. I Memo at 3 (citing e-mail from Donsanto to Coates, Nov. 4, 2008, at 5:23 p.m.). The I Memo noted, however, that no such complaints by voters had been lodged with the Philadelphia police, the Philadelphia DA's Office, or local community organizations.

Finally, the I Memo briefly described the evidence required to prove a section 11(b) claim of voter intimidation. The authors explained that they would seek to allege either an actual or an attempted threat of physical violence, aimed at voters or those seeking to assist voters. The NBPP team expected to rely on the video evidence and corroborating police reports and witness testimony to establish that the men were dressed in military-style clothing, brandishing a nightstick, and standing astride the entrance to a polling place. They would also seek to establish that the intimidation was race-based, through the racist reputation of the NBPP, the documented racist views of the individual holding the nightstick, and the race-based comments of the two men involved in the incident.

The NBPP team explained that they needed authorization to investigate further to determine whether the poll watchers or any voters were objectively intimidated, threatened or coerced. They also intended to investigate further the two potential individual defendants (Samir Shabazz and Jackson) and the NBPP to determine whether their actions were motivated by racial considerations. The NBPP team opined: "In the event that we could establish that what we now believe is, in fact, true, we could file what arguably would be one of the strongest section 11(b) claims ever brought by the Department." I Memo at 5. The NBPP investigation was approved by the Civil Rights Division front office on November 18, 2008.

c. NBPP Team's Investigation

[redacted] and [redacted] began their investigation by contacting for interviews individuals they believed had witnessed the incident in Philadelphia on election day (primarily poll watchers and others working for the McCain campaign). [redacted] e-mailed [redacted] and Donsanto and asked for information about the identities of the two voters who claimed to have been threatened, whom Donsanto had mentioned in his 5:23 p.m. e-mail on election day. [redacted] explained that he

was unaware of any voters who had complained. Donsanto separately responded that he was unaware of any voters who had complained about being threatened or intimidated, and referred [redacted] to [redacted]. Donsanto never explained to [redacted] the basis for the reference to threatened voters in his election day e-mail.[16]

In early December 2008, [redacted] and [redacted] traveled to Philadelphia to conduct interviews. They spoke with FBI Special Agent [redacted]; Philadelphia Police Officer [redacted], who had responded to 1221 Fairmount Avenue on election day; and Republican poll watchers and election observers [redacted], [redacted], [redacted], [redacted], and [redacted], all of whom were at the polling place at some point on election day.

[redacted], [redacted], and [redacted] said that they arrived at the polling place together. [redacted] stated that Samir Shabazz had yelled "cracker" and "How will you like being ruled by a black man?", and described how Samir Shabazz stepped in front of him and slapped the nightstick in his hand. [redacted] said that he walked between the two men to enter the polling place. [redacted] said that a Republican poll watcher inside the polling place named [redacted] had been harassed by the New Black Panthers, and that they had called [redacted] a "race traitor." [redacted] provided [redacted] and [redacted] with an e-mail he had authored on November 25, 2008, providing his account of the NBPP incident. In that e-mail, [redacted] stated that at no time did the taller New Black Panther [Jerry Jackson] speak to him or anyone else.

[redacted] generally corroborated [redacted] account. [redacted] noted that one of the men called him a "white supremacist" while batting the nightstick in his hand. [redacted] also said that he saw voters arrive and appeared surprised at the presence of the New Black Panthers. [redacted] said he saw African-American people congregating and talking about the NBPP members. [redacted] saw no white voters at the polling place.

[redacted] also corroborated [redacted] account. [redacted] said that he found the New Black Panthers to be intimidating. Nonetheless, [redacted] said he did not recall any voters reacting negatively to the New Black Panthers.

[redacted] arrived after Samir Shabazz had left. He saw Jackson standing near the entrance speaking with some people. He heard Jackson say, "what's the big deal?" [redacted] did not see any white voters. [redacted], however, saw an elderly African-American woman who was going to vote. [redacted] said the woman appeared apprehensive as she approached Jackson and the entrance to the polling place, but that she did not turn away.

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[16] Donsanto retired from the Department in early 2010 for health reasons, and OPR was unable to interview him.

[redacted] arrived at 1221 Fairmount Avenue in the morning. He saw the two men in black uniforms standing in front of the door. When he entered the polling place, the men tried to give [redacted] a palm card,[17] which he refused. When he left, the two men again tried to give [redacted] a card. [redacted] said the men looked intimidating and menacing and had a nightstick. [redacted] said that neither man spoke to him.

After interviewing the witnesses in Philadelphia, [redacted] and [redacted] realized for the first time that there was at least one poll worker inside the polling place at 1221 Fairmount Avenue who might have been intimidated by the New Black Panthers and whom the New Black Panthers allegedly called a "race traitor." After returning to Washington, D.C., [redacted] and [redacted] contacted various Republican attorneys who had assisted the McCain campaign on election day in Philadelphia in an attempt to learn the name of the poll worker. They eventually learned that husband and wife [redacted] and [redacted] were inside the polling place as poll watchers for the Republican party on election day. They obtained a Philadelphia address for the [redacted], but did not have a telephone number for the couple.

After compiling the information they learned on election day and during the interviews in Philadelphia in early December, viewing videos of the election day incident, and reviewing information they found about the New Black Panther Party online and from the FBI, [redacted] and [redacted] drafted a memorandum requesting authorization to file a civil action under section 11(b) of the Voting Rights Act. This type of memorandum is referred to as a "J Memo." Upon reviewing a draft of the J Memo on Friday, December 19, Popper decided that [redacted] and [redacted] should travel to Philadelphia to speak with the [redacted] and, if unable to make contact, leave a letter at their address.

On Saturday, December 20, [redacted] and [redacted] traveled to Philadelphia to speak with the [redacted]. [redacted] told OPR that he vehemently argued against traveling to Philadelphia the weekend before Christmas to try to meet the [redacted], but that Popper directed them to do so. The two attorneys arrived unannounced and knocked on the [redacted] door at about 8:00 p.m. on Saturday evening. [redacted] told OPR that, rather than answering the door, the [redacted] leaned out of an upstairs window and asked who was there. [redacted] showed his credentials, identified himself as an attorney with the Department of Justice, Civil Rights Division, and convinced the [redacted] to speak with them. The attorneys

[17] A "palm card" is a small card (the size of a business card) sometimes handed out by political campaigns which may contain basic information about a candidate or issues.

did not record the interview with the [redacted] or take notes during the interview.[18]

Immediately following the interview, on the train back to Washington, D.C., [redacted] reported the substance of the interview in an e-mail to Popper. [redacted] reported that the [redacted] were not forthcoming with information, which [redacted] attributed at least in part to the unexpected visit to their home on a Saturday evening in inner city Philadelphia. [redacted] reported that the [redacted] confirmed that they were Republican poll workers who were inside the polling place that day. However, they said that they had had no interaction with the two men at the polling place, and denied having been called a "race traitor." [redacted] reported that Mr. [redacted] emphasized that he was not scared by the two men. Mr. [redacted] also said, however, that, at the end of the day, he and his wife checked to be sure that the two men had left because they would not leave the polling place until the New Black Panthers were gone.

[redacted] reported that Mrs. [redacted] said that she kept looking out of the window at the two men with concern. [redacted] stated: "She spe[cif]ically mentioned 'bomb the place' but there is a[m]biguity as to what specifically she was referring to – but she mentioned a concern involving bombs." E-mail from [redacted] to Popper, re: Re: Any News?, Dec. 20, 2008, at 8:29 p.m. In [redacted] view, based on his experience in other cases, the [redacted] were the type of witnesses who would not be fully forthcoming unless the Department attorneys were able to develop their trust. [redacted] said that the [redacted] demeanor indicated to him that there was more to their story than they were willing to tell two Department attorneys who unexpectedly showed up at their door the Saturday evening before Christmas.[19]

d. The J Memo

The J Memo requested authorization to file suit under section 11(b) of the Voting Rights Act against the New Black Panther Party for Self-Defense; the NBPP

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[18] [redacted] explained that the [redacted] were reluctant to admit him and [redacted] to their home and speak with them late on a Saturday night, and that if he had recorded everything they said, it would have made the situation worse. [redacted] Transcript at 248.

[19] The [redacted] later testified under oath before the U.S. Commission on Civil Rights during its investigation into the NBPP incident. [redacted] testified that he did not leave the polling place during the day, that he did not see the NBPP members, and that he did not talk with any of the other Republican poll watchers, such as [redacted] or [redacted], that day. He also denied having spoken with Department of Justice attorneys. [redacted] likewise testified that she did not leave the polling place during the day and that she did not see the NBPP members. Mrs. [redacted] did recall two gentlemen from the Department of Justice coming to her home to speak with her, but she testified that she told them that she did not see the NBPP members.

Chairman, Malik Zulu Shabazz; King Samir Shabazz; and Jerry Jackson. *See* Memorandum to Grace Chung Becker, Acting Assistant Attorney General, from Christopher Coates, Chief, Voting Section, *et al.*, Subject: Recommended Lawsuit Against the New Black Panther Party for Self-Defense and Three Individual Members for Violations of Section 11(b) of the Voting Rights Act (Dec. 22, 2008) (J Memo).

Among other things, the memorandum provided information about the NBPP and described its reputation as a hate group hostile to whites and Jews. It stated that Samir Shabazz was the chairman of the NBPP's Philadelphia chapter and was well-known in "Philadelphia street politics."[20] J Memo at 2.

The J Memo described the accounts of [redacted], [redacted], [redacted], [redacted], and [redacted], Republican Party poll watchers and attorneys who witnessed the NBPP members' actions at 1221 Fairmount Avenue. The J Memo included their accounts of the conduct of Samir Shabazz toward the poll watchers, including tapping the nightstick in his hand, and making race-based comments, and described the incident in which Jackson and Samir Shabazz moved together to block [redacted] from entering the polling place. *See* J Memo at 6. The J Memo also included statements by some of the poll watchers that voters appeared apprehensive about the presence of the New Black Panthers. In addition, the J Memo included the information the Voting Section attorneys learned in their interview of the [redacted] - that Mrs. [redacted] was concerned that someone might "bomb the place" and that the [redacted] did not want to leave the polling place until they were sure the two NBPP members were gone. J Memo at 6.

The J Memo described statements made by NBPP Chairman Malik Zulu Shabazz to Department attorneys and to the media:

> We interviewed by telephone Chairman Malik Zulu Shabazz from his Washington D.C. law office. He told us, "there were members of the party in many areas [on Election Day]." According to an interview with Fox News Zulu Shabazz[] said that there were more than 300 Panthers deployed in several cities across the U.S. to

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[20] According to the J Memo, both the FBI and the Philadelphia Police Department had noted that Samir Shabazz regularly gives race-based speeches using a bullhorn on street corners. [redacted] A Philadelphia newspaper article published days before the federal general election attributed to Samir Shabazz statements such as: "I'm about the total destruction of white people. I'm about the total liberation of black people. I hate white people. I hate my enemy," and "the only thing the cracker understands is violence." J Memo at 3 (quoting Dana DiFilippo, *New Panthers' War on Whites*, Phila. Daily News, Oct. 29, 2008, at 4).

> ensure the voting process went fairly and smoothly. Zulu Shabazz told Fox News that the NBPP is comprised "of thousands" with a "very active grass roots." Zulu Shabazz also specifically endorsed the use and display of the weapon at 1221 Fairmount Street [sic] by Samir Shabazz in our telephone conversation with him as well as in an . . . interview with Fox News. For his part, the NBPP leader has claimed that his members were at the polling place merely to quell voter intimidation by white supremacists.

J Memo at 7 (citations and footnotes omitted). The authors noted that they had been unable to ascertain whether the NBPP had actually deployed members at any other polling locations throughout the United States, and had been unable to interview either Samir Shabazz or Jackson.

The memorandum discussed the legal standards and noted the difficulty the Department has had in bringing cases under section 11(b). The authors noted that the NBPP's military-style uniform, the notoriety of the party and the individuals involved, and the statements advocating racially-motivated violence made both by the party and the individuals involved, would all support a finding that section 11(b) was violated. The J Memo stated that the United States would argue at trial that the evidence of men standing before a polling place brandishing a weapon objectively establishes a violation of section 11(b), and that the government did not need to produce evidence that any voter was subjectively intimidated, threatened, or coerced. Nonetheless, the authors stated that they would proffer evidence showing that the intimidation was directed at white voters, as well as African-American voters who were not inclined to vote for the candidate favored by the NBPP. Accordingly, the J Memo stated, "the evidence at trial would include testimony concerning the reactions of both white and black voters who came to the polling station to vote." J Memo at 11-12. The J Memo did not explain who would provide this testimony, and did not identify or provide any information about voters' reactions to the NBPP members, other than the testimony by two poll watchers that voters appeared apprehensive.

The J Memo did not discuss potential defenses other than the defendants' stated justification that they were present to prevent intimidation by white supremacists. The J Memo contained no discussion of the application of the First Amendment or whether it provided a potential defense in this case.

The J Memo concluded by stating that the Voting Section attorneys proposed seeking an injunction that would prohibit members of the NBPP from deploying in front of polling places in future elections. In a footnote, the attorneys noted that they had attached for review a notice letter and proposed consent

decree, in accordance with the usual practice in the Voting Section. The Voting Section attorneys, however, stated:

> We recommend . . . that you consider foregoing the sending of the notice letter and the attempt to negotiate the consent decree in this case. The nature of the NBPP is such that the letter and consent decree may not be received seriously or addressed in good faith by the defendants, who may instead seek to gain favorable publicity by publishing these documents and/or characterizing their contents in a tendentious manner. Accordingly, we recommend that you consider simply authorizing the commencement of a lawsuit.

J Memo at 13 n.15.

D. Acting AAG Becker Approves the Lawsuit

The Voting Section forwarded the J Memo, as well as a proposed complaint, notice letter, and consent decree, to DAAG Lisa Krigsten on December 29, 2008. E-mail from Popper to Krigsten, cc: Coates, re: FW: Lawsuit against New Black Panther Party, Dec. 29, 2008, at 5:22 p.m. Krigsten reviewed the documents and in turn forwarded them to Acting AAG Grace Chung Becker. E-mail from Krigsten to Becker, re: FW: Lawsuit against New Black Panther Party, Dec. 29, 2008, at 6:38 p.m.

Becker told OPR that she reviewed the J Memo and discussed the case with Coates and Krigsten. Coates believed it was a strong case, and stated that the entire NBPP team agreed that the suit should be filed. Becker told OPR she was not concerned that the Voting Section had not identified an individual voter who claimed to have been intimidated. Instead, she considered the totality of the evidence described in the J Memo, including eyewitness accounts describing the actions of the NBPP members and the fact that voters were giving the NBPP members a wide berth. In addition, the incident was captured on camera. Becker said she had viewed footage of the incident on election day and thought at that time that the NBPP members appeared intimidating. With regard to the national defendants, Becker credited the statement by the national organization that they were deploying people to the polls on election day, and the later statement by the national chairman endorsing what had occurred in Philadelphia. Becker did not view the relief sought to be unreasonable based upon the evidence.

Becker approved the filing of the lawsuit on January 6, 2009. She did not view her decision as a controversial one. Everyone in the chain (the NBPP team and Krigsten) agreed that the suit should go forward.

Becker told OPR that her decision was not based on political considerations. She noted that, during the time period between the election and the end of the Bush Administration, she also had approved two criminal actions against individuals who acted with violence against Obama supporters.

E. The Complaint is Filed

[redacted] traveled to Philadelphia on January 7 to file the complaint. Then-United States Attorney for the Eastern District of Pennsylvania Laurie Magid declined to sign the complaint or to have her name listed in the signature block on the complaint. Magid explained to OPR that the local rules did not require a local attorney to sign the filing. Although Magid had heard about the NBPP incident on election day, she had no knowledge about the Voting Section's investigation and only learned on January 6 that they planned to file a lawsuit on January 7. Because she had not had time to study the proposed complaint and had no knowledge of the investigation and the evidence supporting the complaint, Magid said she was not comfortable putting her name on the complaint.

The complaint, filed on January 7, was signed by Becker, Coates, and [redacted]. Then-Attorney General Mukasey and Popper were also listed on the signature block. The complaint named the NBPP, Malik Zulu Shabazz, King Samir Shabazz, and Jerry Jackson as defendants. The complaint alleged the following four causes of action under section 11(b) of the Voting Rights Act against the defendants: (1) intimidation of voters; (2) attempted intimidation of voters; (3) intimidation of individuals aiding voters; and (4) attempted intimidation of those aiding voters. In support of these causes of action, the complaint alleged that Samir Shabazz and Jackson "deployed" at the entrance to the polling place at 1221 Fairmount, Philadelphia, on November 4, 2008, wearing military-style uniforms associated with the NBPP; that Samir Shabazz was armed with a nightstick, which he pointed at individuals or "menacingly tapped"; that Samir Shabazz and Jackson made statements containing racial threats and racial insults toward individuals at the polling place; that Samir Shabazz and Jackson made "menacing and intimidating gestures, statements and movements directed at individuals who were present to aid voters"; and that the NBPP and Malik Zulu Shabazz "managed, directed, and endorsed the behavior, actions and statements" of Samir Shabazz and Jackson. Complaint ¶¶ 8-12.

On January 8, 2009, the day after the complaint was filed, [redacted] noticed that the home page of the NBPP website contained an "Official Statement," dated November 4, 2008, regarding the 2008 election and voter intimidation. Among others things, the statement said:

> To be clear, the New Black Panther Party does not now nor ever has, engaged in any form of voter intimidation. . . .
>
> * * *
>
> 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. . . .

[redacted] forwarded this statement in an e-mail to [redacted] and Popper and noted that the statement was not on the home page of the website on January 7, even though it was dated November 4. E-mail from [redacted] to [redacted] and Popper, re: RE: Panthers respond, Jan. 8, 2009, at 11:10 a.m. [redacted], however, responded that he had seen it before. E-mail from [redacted] to [redacted] and Popper, re: RE: Panthers respond, Jan. 8, 2009, at 11:13 a.m. In an e-mail that evening, however, [redacted] stated: "I checked on the previous version of the NBPP's official statement on 11/04/08 that I had printed out. The references to the Philadelphia chapter were not included and must have been added today." E-mail from [redacted] to [redacted], re: Phila 11(b): research, Jan. 8, 2009, at 6:33 p.m.

F. Change in Administration

On January 21, 2009, President Obama was sworn in. As part of the transition to the new Administration, Loretta King, a career CRT attorney, was appointed Acting Assistant Attorney General for that Division.[21] Steven Rosenbaum, also a career CRT attorney, was named Acting Deputy Assistant

[21] King joined the Department through the Honors Program in 1980, and was assigned to the Civil Rights Division's Employment Litigation Section. After ten years, King moved to the Civil Division's Torts Branch. Two years later, King returned to the Civil Rights Division as a Deputy Chief of the Voting Section. She was appointed career Deputy Assistant Attorney General in 1994. King continues to hold that position today. From January 2009 until July 2009, King served as Acting Assistant Attorney General of the Civil Rights Division. She is a member of the District of Columbia Bar.

Attorney General, with responsibility for reviewing the work of the Appellate, Housing and Civil Enforcement, and Voting Sections.[22]

1. King and Rosenbaum Learn About the NBPP Case

To inform them about matters under their supervision in their new supervisory roles, King and Rosenbaum received voluminous reports from the various CRT sections, listing pending litigation, including the newly-filed NBPP case. King met with all of the section chiefs in early January. She recalled that Coates had mentioned the NBPP case during their meeting and offered to send her more information about the case. King Transcript at 35-38. King said Coates sent her the J Memo. *Id.* at 66.

Rosenbaum said he was aware that the NBPP case had been filed, because he saw the Department's press release about the case in early January. Rosenbaum Transcript at 100-05. It caught his attention because it was unusual to file a case under section 11(b), and he read the complaint, which he obtained online. *Id.* at 104, 116. After being named Acting DAAG, Rosenbaum saw the case listed on periodic reports of pending litigation that he received from the Voting Section, but he made no effort to educate himself about the case. Rosenbaum said he expected that the case would proceed with discovery and that there would be nothing substantive to review during his tenure as Acting DAAG. *Id.* at 115-16. Rosenbaum said he inherited no front office or DAAG files about the case. *Id.* at 133.

2. The *Missouri* Case

Early in their tenure in the CRT front office, in February 2009, King and Rosenbaum dealt with Coates and Popper on a case they were handling, *United States v. Missouri*, No. 05-4391-CV-C-NKL (W.D. Mo. 2005). This case was filed under the previous Administration to enforce section 8 of the National Voter Registration Act (NVRA), which requires states to maintain accurate voter registration lists by, among other things, purging the names of ineligible people, including the deceased, from the voting rolls. The Voting Section had sued the State of Missouri, and the State moved to dismiss, arguing that the federal government must sue each individual county board of elections to enforce section

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[22] Rosenbaum joined the Department through the Honors Program in 1978, and was assigned to CRT's Employment Litigation Section. In 1983, Rosenbaum moved to the Voting Section as a line attorney. He was promoted to Deputy Chief of the Voting Section in 1988, and was named Chief of the Voting Section in 1992. From 1994 to 1996, Rosenbaum worked in CRT's Appellate Section. In 1996, he was named Chief of CRT's Special Litigation Section. Since 2003, he has served as the Chief of the Housing and Civil Enforcement Section. Rosenbaum served as Acting Deputy Assistant Attorney General from January 2009 to July 2009. He is a member of the District of Columbia and New York State Bars.

8. The district court agreed with the State. On appeal, the Eighth Circuit largely agreed with the district court, but remanded on a narrow issue, instructing the district court to consider one aspect of the State's responsibility under the NVRA. *United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008).

Rosenbaum said that he was told that the government had to file a brief on remand. He received the brief by e-mail late in the day on a Monday, and it was due to be filed on Wednesday. Rosenbaum noted that that time period was not sufficient to allow him time to conduct a meaningful review. After this experience with the *Missouri* case, Rosenbaum had directed the Voting Section, and all sections under his supervision, that he must be given advance notice of impending deadlines and that all briefs must be submitted for his review at least three days before the filing deadline. Rosenbaum Transcript at 78-79, 121; Popper Transcript at 116.

The Voting Section had provided Rosenbaum with no background on the case, and what he knew he learned primarily from reading the brief itself. Rosenbaum had some concern about the position the Voting Section was advocating in the brief. He called Coates, but Coates was not in the office. Rosenbaum then called the acting principal deputy of the Voting Section, Becky Wertz, to see if she knew when Coates would be available to discuss the *Missouri* case. During their conversation, Wertz mentioned to Rosenbaum that the Voting Section had tried unsuccessfully to settle the case and that a brief the Section filed on remand had been rejected by the district court. Rosenbaum Transcript at 80.

Rosenbaum reached Coates later that afternoon and asked him to explain the background of the case. Coates explained that, on remand, the government had requested discovery, which the court denied. The Voting Section asked the court to certify an interlocutory appeal, but the district court denied that request as well. The Section then tried to settle the case, but was unsuccessful. In the face of the district court's refusal to allow the government to conduct discovery or submit new evidence, and after settlement attempts failed, Popper proposed that the government dismiss the action. Then-Acting AAG Becker disagreed and directed Popper to litigate the case. The Section thereafter filed its brief on remand, which the court struck because it went beyond the scope of the narrow issue on remand. Rosenbaum then understood for the first time that the brief he was reviewing was similar to the brief that had previously been struck, with some modifications intended to make it fit within the scope of the court's order. Rosenbaum Transcript at 81-82; *see* Popper Transcript at 114-16. Rosenbaum, however, did not have a copy of the brief that had been struck or any indication what changes had been made to the brief to comply with the court's order. Rosenbaum Transcript at 82.

Rosenbaum was upset that he had not been provided any of the context and background to the brief he was asked to review, and had only learned of it fortuitously. He angrily informed Coates and Popper that it was their responsibility to provide the front office with sufficient background information so that they could conduct a meaningful review. Popper responded that they did not know what the expectations would be in the new Administration, and that they expected the front office to pose questions if it required more information. *See* Rosenbaum Transcript at 83-85. Rosenbaum viewed that attitude as unacceptable and informed them that it had nothing to do with the new Administration, but was simply a matter of the Section's obligations to provide information to the front office. Rosenbaum Transcript at 83. Coates and Popper, however, were frustrated that Rosenbaum was claiming that they had not been forthcoming with information, and insisted that they had kept the front office apprised of the case every step of the way (albeit the front office under the previous Administration). *See* Coates Transcript at 80-81 (Nov. 17, 2010).

G. Entry of Default

On or before February 10, 2009, the trial team had served all of the defendants in the NBPP case with the complaint. None of the defendants timely answered the complaint, and on March 9 the NBPP team sent each of the defendants a letter informing them that if they did not file a responsive pleading, the United States would seek entry of default. The team then began researching the procedure and legal standard for obtaining a default judgment in the Eastern District of Pennsylvania.[23]

The NBPP case was assigned to U.S. District Judge Stewart Dalzell. On March 16, Judge Dalzell's clerk wrote to [redacted] and [redacted], informing them that if no responsive pleading were filed by March 30, the United States could file a request for entry of default with the clerk. The letter explained that if a request for default were not filed by April 3, the court would dismiss the case for lack of prosecution.

Coates informed Rosenbaum of the April 3 deadline at a bi-weekly docket meeting on March 23, and documented it in a weekly report to Rosenbaum that same day. Rosenbaum told Coates that he would not need to review the requests for entry of default that the NBPP team would file with the court. Under CRT

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[23] When a party fails to plead or otherwise defend against a complaint, the clerk, upon request of the plaintiff, will enter the party's default. Fed. R. Civ. P. 55(a). Clerical entry of default, however, does not automatically entitle a plaintiff to a default **judgment** and the relief requested. Instead, the plaintiff must satisfy the court that it is entitled to a default judgment and the relief requested. Fed. R. Civ. P. 55(b)(2). The court may conduct hearings to establish the truth of any allegation, Fed. R. Civ. P. 55(b)(2)(C), or to investigate any matters. Fed. R. Civ. P. 55(b)(2)(D).

policy, however, the front office reviewed all substantive briefs, and therefore Rosenbaum expected to review the substantive motion for default judgment, when the time came to file it. Rosenbaum Transcript at 112-14.

Accordingly, on April 1, the NBPP team filed requests for entry of default for each defendant. The papers, supported by declarations from [redacted], stated only that each defendant had been properly served and had failed to answer the complaint. The court granted the requests on April 2.

H. Government's Motion for Default Judgment

1. April 28 Draft Motion for Default Judgment and Proposed Order

The NBPP team began work on a motion for default judgment. Uncertain as to whether the court would hold an evidentiary hearing or decide the matters on the papers, [redacted] contacted the judge's chambers. The court's deputy clerk informed [redacted] that the court would order the United States to file a motion for default judgment. The clerk told [redacted] that the case was "unusual" and that the court would likely hold a hearing. The clerk said that the court did not expect the government to file declarations with the motion for default judgment. E-mail from [redacted] to Popper, re: Black Panthers, April 13, 2009, at 3:44 p.m.

On April 17, the court ordered the government to file its motion for default judgment by May 1. Based on [redacted] conversation with Judge Dalzell's clerk, the team expected that the court would schedule a hearing. Therefore, in addition to drafting a motion for default judgment, the team began lining up potential witnesses for a possible hearing. *See* [redacted] Transcript at 260-61. They contacted expert witnesses at the Anti-Defamation League, and also prepared declarations from some of the eyewitnesses to the election day incident. *See* Written Response of [redacted] at 12. Rosenbaum learned of the court's latest order and the May 1 deadline from Coates on Friday, April 24. Rosenbaum Transcript at 122-23. In a weekly report dated April 27, Coates informed Rosenbaum that the Voting Section would provide documents for his review on April 28, in advance of the May 1 filing deadline. *Id.* at 123-24. Rosenbaum acknowledged that that was consistent with his direction to the litigating sections to provide documents for his review at least three days in advance of filing deadlines. *Id.* at 121, 124.

On the evening of April 28, Coates forwarded to Rosenbaum by e-mail a draft motion for default judgment, a draft memorandum of law in support of the motion, and a draft proposed order. E-mail from Coates to Rosenbaum, re: FW: Phila. NBPP documents, Apr. 28, 2009, at 6:27 p.m. The draft memorandum of law discussed the Third Circuit's standard for granting a default judgment, as set

forth in *Chamberlain v. Giampapa*, 210 F.3d 154, 164 (3d Cir. 2000). Under *Chamberlain*, in granting a default judgment, the court is to consider whether: (1) there is "prejudice to the plaintiff if default is denied"; (2) "the defendant appears to have a litigable defense"; and (3) the "defendant's delay is due to culpable conduct." The NBPP team's brief argued that the United States would be prejudiced by a decision to deny default judgment because of its "compelling interest in ensuring that voters attempting to vote are not met by men in paramilitary uniforms brandishing weapons." Draft Memorandum of Law at 3 (Apr. 28, 2009). Second, the draft did not attempt to address potential defenses, but merely asserted that the defendants had presented no defenses. *Id.* at 4. The draft argued that the second factor is primarily focused on what defenses are raised after a default judgment is challenged, and has no relevance when the defendants have made no appearance and have provided no indication of what defenses they might present. *See Nationwide Mut. Ins. Co. v. Starlight Ballroom Dance Club, Inc.*, 175 Fed. Appx 519, 522 (3d Cir. 2006) (The second factor in the *Chamberlain* test is the threshold issue in opening a default judgment.). Finally, the draft argued that the defendants' delay was due to their own reckless conduct in ignoring the documents and correspondence served on them by the United States. Draft Memorandum of Law at 4 (Apr. 28, 2009).

The draft also described the evidence the United States would present to establish a violation of section 11(b) of the Voting Rights Act. First, the draft argued that, in the absence of an answer by the defendants, all of the allegations in the complaint should be taken as true, and were sufficient to warrant judgment for the United States. Notwithstanding that argument, the draft went on to describe the evidence that the government would present at a hearing on the motion:

> Specifically, the United States intends to present statements by the national chairman of the New Black Panther Party, Defendant Malik Zulu Shabazz, announcing, on national television, a nationwide effort to deploy "300 party members" at polling locations across the country on election day. The United States also will present statements by Malik Zulu Shabazz and Defendant King Samir Shabazz, both on election day and at other times, establishing their racial animus and intent.
>
> The United States will call several eyewitnesses who observed Defendants' conduct on election day at the polling place at 1221 Fairmount Street [sic] in Philadelphia, and who can testify about a video recording of the event. This evidence will establish that King

> Samir Shabazz and Defendant Jerry Jackson posted side by side, in the military-style uniform of the New Black Panther Party for Self-Defense, at the entrance to the polling station. The evidence will show that King Samir Shabazz brandished a nightstick, pointing it at persons coming to the polls, tapping it in his hand in a menacing fashion, and confronting poll watchers with racial slurs. The evidence will establish that Shabazz and Jackson tried to prevent one person authorized to aid voters from entering the polling station. The evidence also will include chairman Shabazz's recorded reactions to this behavior.
>
> Finally, the United States intends to proffer expert testimony concerning the nature of the New Black Panther Party for Self-Defense. This testimony will establish the relationship between the central organization and the Philadelphia chapter. This testimony also will establish the racist purpose of the organization, and the racist, violent, and threatening rhetoric its officers and members employ.

Draft Memorandum of Law at 5-6 (Apr. 28, 2009) (footnote omitted).

The draft proposed order requested an order permanently enjoining defendants, or their agents, from appearing within 200 feet of any polling place during an election while wearing the uniform of the NBPP or possessing a weapon. The draft proposed order also requested an order enjoining defendants from taking or attempting to take any action or making any statement which intimidates, threatens, or coerces voters or those aiding voters.

a. Rosenbaum's Review

The next morning, after reading through the draft documents, Rosenbaum e-mailed Coates, asking to see the video evidence. E-mail from Rosenbaum to Coates, re: Phila. NBPP documents, Apr. 29, 2009, at 10:03 a.m. Later that morning, Rosenbaum again e-mailed Coates, expressing concerns about the merits of the motion and requested relief. Rosenbaum stated:

> I have serious doubts about the merits of the motion for entry of a default judgment and the request for injunctive relief. Most significantly, this case raises serious First Amendment issues, but the papers you've submitted make no mention of the First Amendment.

With regard to liability, why aren't the following protected by the First Amendment?

- "statements by the national chairman of the New Black Panther Party, Defendant Malik Zulu Shabazz, announcing, on national television, a nationwide effort to deploy '300 party members' at polling locations across the country on election day."

- "statements by Malik Zulu Shabazz and Defendant King Samir Shabazz, both on election day and at other times, establishing their racial animus and intent."

- "King Samir Shabazz and Defendant Jerry Jackson posted side by side, in the military-style uniform of the New Black Panther Party for Self-Defense, at the entrance to the polling station."

- "chairman Shabazz's recorded reactions to this behaviour."

Indeed, with regard to Malik Zulu Shabazz, what is the evidence that he "managed, directed ... the behavior, actions ... of [the other defendants at the Philadelphia polling place]" (Complaint para. 12)? I gather he wasn't there. Even if he "endorsed" what happened afterwards, that doesn't mean he managed or directed the other defendants, or that he specifically managed or directed the behavior we contend violates Section 11(b). I have the same question about the New Black Panther Party. The only other allegations about these defendants are in paragraph 13 of the complaint. But those allegations make no reference to conduct relating to voting.

Do we have any evidence that anyone was intimidated, threatened or coerced? The papers refer only to observers and one person authorized to assist voters but there is no statement that any of them felt intimidated, threatened or coerced.

Did any of the defendants make any statements threatening physical harm to voters or persons aiding voters? On this issue, there is a body of case law on what constitutes "true threats".

With regard to the proposed injunction:

- What is the factual predicate for requesting a nationwide injunction? Actions by two defendants at one polling place in one election? See, for example, case law under the Freedom of Access to Clinic Entrances Act ("Access Act")?

- What is the factual predicate for enjoining the Party, as opposed to the individual defendants? Why doesn't such an injunction violate the First Amendment?

- Why doesn't an injunction preventing the wearing of the uniform of the Party violate the First Amendment?

- What is the basis for a 200-foot barrier around polling places, particularly if there is an injunction against brandishing weapons? See Access Act cases, for example.

Let me know your thoughts right away.

E-mail from Rosenbaum to Coates, re: FW: Phila. NBPP documents, Apr. 29, 2009, at 11:32 a.m. Rosenbaum forwarded his e-mail to King, advising her that he had reviewed the Voting Section's draft papers and had serious doubts about the case and the papers submitted for review. E-mail from Rosenbaum to King, re: New Black Panther Party, Apr. 29, 2009, at 11:35 a.m.

b. Voting Section's Response To Rosenbaum

The NBPP team collaborated on preparing a response to Rosenbaum's concerns. Coates e-mailed the team's response on the evening of April 29. First, Coates advised Rosenbaum that, due to technical difficulties, they had not yet

been able to provide Rosenbaum access to the video data base. The team responded to Rosenbaum's concerns as follows:

1. There is no 1st Amendment problem citing the

"statements by the national chairman of the New Black Panther Party, Defendant Malik Zulu Shabazz, announcing, on national television, a nationwide effort to deploy '300 party members' at polling locations across the country on election day,"

because we are not seeking to enjoin the making of those (or any) statements. We plan to introduce them as evidence to show that what happened in Philadelphia on Election Day was planned and announced in advance by the central authority of the NBPP, and was an NBPP initiative. For the same reasons, we plan to present

"chairman Shabazz's recorded reactions to this behavior,"

to show that, after the fact, he ratified and confirmed that the NBPP had done what he had said in advance it was going to do. The evidence is strong detailing the entire series of events.

2. Similarly, we have no intention of seeking to enjoin

"statements by Malik Zulu Shabazz and Defendant King Samir Shabazz, both on election day and at other times, establishing their racial animus and intent."

We intend to use this solely to establish that the defendants were motivated by a racially discriminatory intent. This is sometimes cited by courts as a required showing under Section 11(b). Though the matter is not settled in the courts, we do have such evidence, so we should be prepared to present it. See footnote 4 on page 7 of the memo of law.

3. The following actions of the defendants:

"King Samir Shabazz and Defendant Jerry Jackson posted side by side, in the military-style uniform of the

New Black Panther Party for Self-Defense, at the entrance to the polling station"

are not protected speech when they are used with the brandishing of a weapon to intimidate people going to the polling station. Even if these were expressive acts under the 1st Amendment, the government has a compelling interest in assuring basic public safety.

4. The evidence that Malik Zulu Shabazz "managed, directed ... the behavior, actions ... of [the other defendants at the Philadelphia polling place]" consists of the statements on the NBPP's website before the election as to what the NBPP planned to do, and on-air statements by Malik Zulu after the election as to what the NBPP had done. These statements were consistent with what actually happened. Moreover, we have documentary evidence tying Malik Zulu Shabazz to King Samir Shabazz in a long relationship through the NBPP.

Given that we have this evidence, the argument you mention concerning the sufficiency of the proof that the effort was "managed or directed" by the NBPP seems to be more of an affirmative defense, which the defendants will have to present evidence to establish. We think they would fail in that effort if they tried.

5. We have direct evidence that [redacted], [redacted], and [redacted], all of whom were engaged in aiding voters, were intimidated. There was a physical aspect to the intimidation of [redacted], in that the NBPP members physically blocked his path when he approached the polling station. [redacted] and [redacted] certainly will testify that they felt intimidated. [redacted] also described the defendants as an intimidating presence at the polls. We have declarations from all of these men. We are enduring computer problems now with our Wordperfect documents but will forward these declarations to you as soon as we can.

The complaint reflects this, in for example, par. 16, when it states that "The loud and open use of racial slurs and insults at this polling location, directed at both black and white individuals, enhanced the intimidating and

threatening presence at the polling location. The behavior and statements of the Defendants intimidated and threatened voters and potential voters, in violation of Section 11(b) of the Voting Rights Act." Note that this allegation will be taken as true, given that a default has been entered against all defendants.

We have no direct statements by the defendants threatening or promising physical harm. (1) We do not think we need it, given the nightstick, the brandishing of it, the confrontational language used, and the physical blocking of [redacted] The context suggests the threat of violence in a most basic way. Any of us might hesitate to walk into that polling station. We believe the court will look at this behavior from the objective point of view of a reasonable voter coming to vote. (2) We also have an "attempt" claim, which should obviate the need for any direct showing of successful intimidation.

For both of these reasons we do not believe we need "true threats." Indeed, the Department has never taken the position that Section 11(b) requires a "true threat." As recently as the early 90s, we brought US v. NC Republican Party to enjoin a prospective voter challenge program under Section 11(b). There was no threat of violence in that case. It was ultimately settled with a consent decree. Given that the statute enjoins not just threats, but intimidation and coercion, this makes sense.

6. With regard to your questions about the proposed injunction, we would like a nationwide injunction as the most effective way to deter this kind of conduct in the future. The factual predicate is not merely the presence of two individuals at one polling place on one election day, but rather an announced intent to have a nationwide program. We know that the national party chairman planned similar visits in as many locations as he could staff. We have no doubt that the NBPP is capable of repeating this kind of behavior. We will point out to the court (1) the party's internet and public expressions of engaging in a nationwide program, (2) the implicit threat of violence by party members on the scene and away from it in this case, (3) the hateful, racial

rhetoric of the organization, which includes an explicit aspect suggesting violence and violent threats. The last point is established by the defendants' public statements. Again, no 1st Amendment problem is posed by using these statements as evidence of an intent to break the law concerning the intimidation of voters.

The injunction against the wearing of the uniform makes sense because of the implicit threat the uniform implies. The views of the NBPP and their views are well known in the community (and we have testimony to establish this fact). Moreover, this kind of injunction is not unknown in the law when it comes to the regulation of polling places. Many jurisdictions have restrictions on electioneering within 100 feet of a polling place. This restriction often bars the wearing of partisan attire. We have heard of voters being banned from entering polling places on account of the messages on their T-shirts.

As for the 200-foot barrier, we were crafting an equitable prohibition and the number is, necessarily, somewhat arbitrary. We think it makes sense to seek the kind of injunction that would protect voters, those assisting them, and the voting process. Another number might work.

We strongly believe that this is one of the clearest violations of Section 11(b) the Department has come across. There is never a good reason to bring a billy club to a polling station. If the conduct of these men, which was video recorded and broadcast nationally, does not violate Section 11(b), the statute will have little meaning going forward.

E-mail from Coates to Rosenbaum, re: FW: NBPP case, Apr. 29, 2009, at 7:35 p.m.

c. Rosenbaum's Reply

The next morning, after reading the NBPP team's response to his concerns, Rosenbaum responded:

1) Please send me the video data base, the declarations, and the statements that support the

"manage and direct" allegations against the Party and Malik Zulu Shabazz.

2) I view the "manage and direct" allegation to be our burden and we can't slough it off by arguing it's an affirmative defense.

3) Your arguments on the scope of the proposed injunctions need to be informed by the case law.

E-mail from Rosenbaum to Coates, re: NBPP Case, Apr. 30, 2009, at 9:43 a.m.

d. NBPP Team Provides Additional Information and Research

In response to Rosenbaum's request, Popper sent him three witness declarations [redacted], [redacted], and [redacted]) and instructions on how to access the NBPP team's video data base. E-mail from Popper to Coates and Rosenbaum, re: Declarations and video, Apr. 30, 2009, at 9:50 a.m.

With regard to Rosenbaum's concerns, especially about the need to address First Amendment case law and case law supporting the scope of the requested injunctive relief, the NBPP team sent Rosenbaum an e-mail citing and discussing case law under the Freedom of Access to Clinic Entrances Act (FACE), and other cases generally discussing the appropriate scope of injunctive relief. The NBPP team, citing cases, asserted that FACE does not place limits on nationwide injunctions, and that such injunctions had been issued and upheld under FACE. In addition, the team noted that once a court has obtained personal jurisdiction over the defendant, the court has the power to enforce the terms of the injunction beyond the territorial jurisdiction of the court, including nationwide. E-mail from Coates to Rosenbaum, re: FW: Research on New Black Panther Party case, Apr. 30, 2009, at 1:17 p.m.

Rosenbaum replied: "If the Section wants to have credibility, it needs to identify and address negative precedent as well." E-mail from Rosenbaum to Coates, re: Research on New Black Panther Party case, Apr. 30, 2009, at 1:42 p.m.

e. April 30 meeting of King, Rosenbaum, Coates and Popper

Rosenbaum met with Coates and Popper around 4:00 p.m. on April 30. Coates Transcript at 154 (Jun. 14, 2010). Rosenbaum said that they had an extensive discussion about the concerns he had raised, focusing primarily on the

evidence that supported a judgment against the national defendants. Written Response of Steven Rosenbaum at 3. Not satisfied with the answers he received, Rosenbaum suggested that the team obtain an extension of the filing deadline so that they would have more time to think about the motion. Rosenbaum Transcript at 195. Coates and Popper resisted that suggestion, based upon their belief that Judge Dalzell did not favor granting extensions and might dismiss the case outright. Rosenbaum Transcript at 195; *see* Popper Transcript at 132-33. Coates and Popper asked if they could meet with King to discuss the matter.

King then joined the meeting.[24] Both King and Rosenbaum raised issues concerning whether the NBPP team's evidence was sufficient to prove a violation of section 11(b) by all four of the defendants; whether the nationwide injunctive relief the Voting Section had proposed was supported by that evidence; whether defendants King Samir Shabazz and Jerry Jackson had acted as agents for defendants New Black Panther Party and Chairman Malik Zulu Shabazz; and whether the team could overcome potential First Amendment defenses that could be raised by the defendants as to both liability and the scope of injunctive relief. Popper got the impression that Rosenbaum and King did not believe that there was sufficient evidence against any of the defendants. *See* Popper Transcript at 127-30, 134-37, 141. Coates believed that Rosenbaum and King did not like the lawsuit and did not like the fact that Department resources were being used to file a lawsuit against members of a racial minority and on behalf of some white poll workers. Coates Transcript at 166-68 (Jun. 14, 2010). Coates argued that no one would question the case if the defendants were Ku Klux Klan members, rather than NBPP members. King insisted that even were the Klan the defendants, they would not proceed if the evidence did not support the claims. Popper Transcript at 136-37. Coates recalled that King stated that she did not believe that the case against any of the defendants should have ever been filed.[25] Written Response of Christopher Coates at 2; Coates Transcript at 157 (Jun. 14, 2010).

At the conclusion of the meeting, King directed Coates and Popper to file a motion for an extension of time. The Voting Section attorneys asked if they could instead provide her with revised papers that would satisfy the First Amendment concerns she and Rosenbaum had expressed, and King agreed to consider revised papers if she received them early in the day. Written Response of Steven

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[24] King was aware of Rosenbaum's concerns about the Voting Section's proposed papers. In the face of Rosenbaum's and Coates's disagreement, King, as Acting AAG, recognized that she would serve as "the tie breaker." Accordingly, before the April 30 meeting, she had begun to review the draft papers the NBPP team had prepared, as well as the NBPP complaint and J Memo, which Coates had previously provided to her. King Transcript at 64, 67-68, 76-77.

[25] Rosenbaum and King both stated that they came to that view after reviewing the Voting Section's proposed motion for default judgment and the evidence supporting the complaint. King Transcript at 61, 231-32, 236-37; Rosenbaum Transcript at 215-18.

Rosenbaum at 4; Popper Transcript at 137.

2. May 1 Revised Draft Motion for Default Judgment and Meeting

Popper stayed at the office all night conducting research in an effort to produce a brief that would satisfy the First Amendment concerns of the front office. After he hit a perceived snag in his research (concerning unincorporated associations), and running out of time to meet the May 1 deadline, Popper proposed to the team in an e-mail at 3:59 a.m. on May 1 that they seek a more limited injunction against only Samir Shabazz and Jackson, rather than risk the court denying the motion for extension and dismissing the case altogether. Popper attached to his e-mail redrafted papers that would seek default judgments against only those two individual defendants, and proposed a more limited nationwide injunction that would enjoin the two from: (1) bringing weapons within 200 feet of any polling station on an election day; (2) blocking entry to a polling station; and (3) physically confronting, threatening, intimidating, or coercing voters, poll watchers, or those aiding voters at a polling station. E-mail from Popper to Coates, [redacted], and [redacted], re: Bad news, May 1, 2009, at 3:59 a.m. The revised proposed injunction did not attempt to enjoin wearing uniforms, and the revised memorandum of law included a discussion of potential First Amendment defenses.

Coates forwarded the revised papers, as drafted by Popper, to King. He explained that, in light of their discussions on April 30, the team agreed "that the best course is not to seek injunctive relief against the Party or its Washington-based chairman, Malik Zulu Shabazz, and to only see[k] relief against the two individuals at the polling place in Philadelphia." Coates stated that the team believed it was imperative to file papers on May 1 to avoid having the case dismissed but, if King disagreed, the team was also preparing a motion for extension of time. E-mail from Coates to King, re: FW: NBPP motion for Default, May 1, 2009, at 9:23 a.m.

a. May 1 Meeting of King, Rosenbaum, Coates and Popper

King said that when she arrived at the office on the morning of May 1, she began reviewing NBPP papers again, including not only the April 28 draft papers, but also the J Memo. The J Memo described the NBPP and referenced the organization's website, and King decided to look at the website for herself. King Transcript at 108. King said that she immediately saw that the NBPP had posted a statement on its website suspending its Philadelphia chapter as of January 7, 2009. In addition, the NBPP had posted an official statement, dated November 4, 2008, disavowing the "actions of people purporting to be members" at the

Philadelphia polling place and stating that their actions "do not represent the official views of the New Black Panther Party and are not connected nor in keeping with [its] official position as a party. The publicly expressed sentiments and actions . . . do not speak for either the party's leadership or its membership." Written Response of Loretta King at 3 and Attachment 3. King stated that she was "incensed" and "floored" upon seeing this information, because neither the suspension nor the disavowal had been mentioned by Coates or Popper during the meeting the night before, notwithstanding the fact that the information was directly relevant to the issues of liability and relief. Written Response of Loretta King at 3; King Transcript at 108.

King immediately walked to Rosenbaum's office, showed him the pages from the website, and demanded to know how she could not have been told about the purported suspension and disavowal. Rosenbaum had not seen the NBPP website and was not aware of the suspension or disavowal. King showed him copies of the statements on the website. Rosenbaum and King were both concerned that this information, which they considered relevant and potentially exculpatory with regard to injunctive relief, if not also liability, had not been mentioned during the course of the lengthy meeting the day before, during which much of the focus was on the government's ability to obtain injunctive relief against the national defendants. Rosenbaum Transcript at 231-34; King Transcript at 112-13.

King and Rosenbaum immediately discussed the matter with Deputy Associate Attorney General Hirsch. The three reached a consensus that the government should seek an extension of time, and not file any papers that day.

King and Rosenbaum then called Coates and Popper to a meeting in Rosenbaum's office. They had copies of printouts from the website face down on the table. King and Rosenbaum asked Coates and Popper if they knew what the NBPP had said about the Philadelphia incident. Popper admitted that the NBPP had disavowed the incident and had claimed that Samir Shabazz and Jackson did not represent them. Rosenbaum added that the Philadelphia chapter had been suspended, and Popper agreed. Written Response of Robert Popper at 17. Rosenbaum repeatedly asked whether they agreed that the statements were relevant. In response, Coates and Popper explained that they believed the statements were not determinative on the issues of liability or relief because they were statements made in anticipation of litigation and were probably backdated, and because the team had evidence that Samir Shabazz continued to be affiliated with the national organization, despite the purported suspension. Written Response of Robert Popper at 17; Rosenbaum Transcript at 236. They mentioned that the team planned to let the court know about this information at the default judgment hearing.

Rosenbaum responded that Coates and Popper knew about the evidence,

agreed it was relevant and planned to inform the court, and accused Coates and Popper of intentionally withholding it. Rosenbaum Transcript at 236-37; Written Response of Robert Popper at 17; Written Response of Christopher Coates at 3; Written Response of Loretta King, Attachment 4. Popper and Coates both strenuously objected; Coates used profanity, and Popper vigorously denied Rosenbaum's apparent claim that he had lied. Written Response of Robert Popper at 17; Coates Transcript at 179 (Jun. 14, 2010). King attempted to calm the meeting, stating that she was not calling anyone a liar, but wished that they had brought up the issue in the meeting the day before. Written Response of Robert Popper at 17; Written Response of Loretta King, Attachment 4.

Both Popper and Coates insisted that they had not deliberately withheld the information, but that it simply had not come up in the meeting the day before. Instead, Coates explained, they had responded to direct questions about the strength of the evidence and the theory for obtaining injunctive relief. Written Response of Christopher Coates at 3; Written Response of Robert Popper at 17. Coates said he also told Rosenbaum and King that, if they had read the draft papers closely, they would have seen that the proposed drafts did raise the disclaimer and renunciation issues. Coates Transcript at 180-82 (Jun. 14, 2010).

Rosenbaum and King, however, thought that Coates and Popper should have brought the matter to their attention during the April 30 meeting in response to their questions about what evidence supported a nationwide injunction against the party and its national leader. Rosenbaum Transcript at 238-41; King Transcript at 116-18. At the conclusion of this contentious meeting, King directed Coates and Popper to seek a two-week extension. King and Rosenbaum also directed Coates and Popper to prepare a supplemental memorandum, explaining what remedy the government was entitled to and the basis for that relief, and addressing the concerns King and Rosenbaum had raised with them.

b. Motion for Extension of Time

At the May 1 meeting, Popper asked what the motion for extension of time should say, and Popper suggested mentioning the change of Administrations as the reason the government needed more time. Popper Transcript at 157-59. Rosenbaum told us he disagreed. In his opinion, the need for more time was not due to the change in Administrations. Rosenbaum volunteered to OPR that he and King had not received any instructions from the political leadership in the Obama Administration regarding the case. Rosenbaum Transcript at 246. Instead, Rosenbaum said, the need for more time was due to the weaknesses of the case and what he perceived to be the lack of candor in representations the NBPP team had made to him. *Id.*

The team filed the motion for extension on May 1, after obtaining approval

from King. E-mail from King to Popper, Coates, and Rosenbaum, re: Emailing: Motion for Extension (2), May 1, 2009, at 2:08 p.m. The motion stated that the United States needed two additional weeks to draft and submit a proposed order that sought appropriate final equitable relief. Because the defendants did not answer the complaint, the government did not have the benefit of discovery and development of a complete factual record before having to craft an appropriate order. Motion for Extension of Time to Comply with This Court's Order of April 20, 2009 at 2 (May 1, 2009).

On May 4, the court granted the government's motion, directing it to file a motion for default judgment by May 15, 2009.

c. Coates and Popper Request an Apology

On Monday, May 4, Popper re-read the April 28 draft memorandum of law in support of the motion for default judgment that the team had forwarded to Rosenbaum for review. He noticed that, in reference to the defendants' conduct at the polling place on election day, the draft memorandum stated: "After accounts and video of this behavior were broadcast nationwide on election day, the New Black Panther Party for Self-Defense and Chairman Shabazz first endorsed and defended the behavior **(though he later appeared to disclaim it)**." Draft Memorandum of Law in Support of Motion for Default Judgment at 10 (Apr. 28, 2009) (emphasis added). In an e-mail to Coates, Popper quoted this sentence and asserted that Rosenbaum was wrong when he said at the May 1 meeting that the NBPP team had failed to bring the disclaimer to his attention, and had withheld this information in order to deceive the front office. E-mail from Popper to Coates, re: NBPP, May 4, 2009, at 10:12 a.m. Popper asked that Coates forward his e-mail to the front office.

Coates forwarded Popper's e-mail to King and Rosenbaum, arguing that the sentence quoted in Popper's e-mail clearly showed that neither he nor Popper attempted to mislead anyone about the disclaimer. Instead, Coates explained: "The reason that this particular issue was not discussed at our meeting on Thursday afternoon was not because it was hidden but because neither of you asked about it. Instead, you asked about other issues pertaining to the case that we answered at length and in a completely honest fashion." Coates concluded by asking for an apology for the accusation that he and Popper had intentionally misled management about the disclaimer. E-mail from Coates to King and Rosenbaum, re: FW: NBPP, May 4, 2009, at 11:17 a.m.

Neither Rosenbaum nor King responded to Coates's e-mail. Rosenbaum told us that the reference to an apparent later disclaimer did not inform the front office that the NBPP had affirmatively posted a disavowal and suspension of the Philadelphia Chapter on its website. Rosenbaum Transcript at 250-51.

3. Remedial Memorandum

During the week of May 4, the NBPP team met and decided to prepare a supplemental memorandum and proposed order that supported judgment and injunctive relief against all four defendants (notwithstanding the revised drafts Coates had forwarded to King and Rosenbaum on May 1, seeking judgment and relief against only defendants Samir Shabazz and Jackson). [redacted] and [redacted] drafted the memorandum and forwarded it to Popper for his review and revision. During the evening of May 6, Popper forwarded a final version to Coates. E-mail from Popper to Coates, re: NBPP, May 6, 2009, at 7:21 p.m. Coates in turn e-mailed the memorandum and proposed order to Rosenbaum and King. E-mail from Coates to King, cc: Rosenbaum, re: FW: NBPP, May 6, 2009, at 7:34 p.m.

The memorandum briefly set out the facts surrounding the incident on election day in Philadelphia, and described the rhetoric of the NBPP, Malik Zulu Shabazz, and King Samir Shabazz, as set forth in the J Memo. The NBPP team proposed seeking a default judgment against the four defendants, enjoining them from "deploying or appearing within 200 feet of any polling location on any election day in the United States with weapons, and from otherwise engaging in coercing, threatening, or intimidating behavior in violation of Section 11(b) of the Voting Rights Act, 42 U.S.C. § 1973i(b)." Remedial Memorandum Concerning Proposed Injunction Order, to King from Coates, Popper, [redacted], and [redacted], at 2 (May 6, 2009) (Remedial Memo).

a. NBPP Team's Remedial Memo Argued That All Four Defendants are Liable and Should be Enjoined

First, the memorandum explained why the relief was appropriate with regard to each of the four defendants. The NBPP team argued that a permanent injunction against the two individual defendants, Samir Shabazz and Jackson, was appropriate because of voluminous evidence that they had intimidated, or attempted to intimidate, voters and those aiding voters, in violation of section 11(b). Samir Shabazz possessed and brandished a weapon in front of the polling place, which by itself is an intimidating act. Remedial Memo at 3 (citing *United States v. Johnson*, 199 F.3d 123, 127 (3d Cir. 1999)). In addition, the NBPP team asserted that injunctive relief against the two individuals was appropriate because they "formed ranks," *i.e.*, they purposefully moved together, in an attempt to block [redacted], a Republican poll worker, from entering the polling place. Remedial Memo at 3. The memorandum stated that [redacted] would testify that the two defendants "intentionally blocked his path and sought to intimidate him." *Id.*

The NBPP team further argued that Samir Shabazz and Jackson violated section 11(b) because a reasonable person would find their actions to be an objective attempt to intimidate voters or those aiding voters. In addition to

brandishing the weapon and attempting to physically block [redacted] from entering the polling place, the NBPP team noted that the two individuals wore "a recognizable uniform of a hate group known to advocate racially-motivated murder" and "shouted racial slurs" at voters and those assisting voters. Remedial Memo at 3.

Next, the NBPP team argued that Zulu Shabazz should be enjoined from organizing and participating in future deployment of an intimidating NBPP presence at the polls because he "oversaw and helped organize the deployment" for the November 4, 2008 election and "endorsed and ratified the events in Philadelphia." Remedial Memo at 3. In support, the team cited to statements by Zulu Shabazz that the NBPP would be at election sites nationwide on election day to counter voter intimidation and threats of violence against African-Americans. In an interview with FOX News on November 7, 2008, the NBPP team asserted, Zulu Shabazz endorsed the behavior by the two individual Philadelphia defendants, stating:

> We were there to counter [skinhead activity]. There were members of the party not only in Pennsylvania but in many areas. Obviously we don't condone bringing billy clubs to polling sites. But when we found out this was an emergency response to some other skinheads . . . there was some explanation for that. That's not something that we normally do, but it was an emergency response.[26]

Id. at 4 (quoting FOXNews.com, The Strategy Room, http://www.foxnews.com/story/0,2933,65535,00.html). The NBPP team also asserted that, during a telephone conversation with Zulu Shabazz on December 4, 2008, Zulu Shabazz "endorsed the use of the nightstick."[27] Remedial Memo at 4.

Based on these statements, the NBPP team argued that Zulu Shabazz was liable and should be enjoined because of his admitted involvement and supervision of a plan to deploy party members to polling locations, and because he ratified and endorsed the behavior of his agents in Philadelphia, including their

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[26] The NBPP team noted that they found no evidence that white supremacists had been active at 1221 Fairmount Avenue or anywhere else in Philadelphia on election day. Remedial Memo at 4 n.1.

[27] [redacted] and [redacted] spoke with Zulu Shabazz by telephone during their investigation of the NBPP matter. They said that Zulu Shabazz made statements to them that were consistent with his statements to FOX News, that NBPP members nationwide had gone to the polls and that the weapon present in Philadelphia was an emergency response to the presence of skinheads and white supremacists. [redacted] Transcript at 61-62 (Jun. 18, 2010); [redacted] Transcript at 196-97.

bringing a weapon to the polling place. Remedial Memo at 4-5.

Finally, the NBPP team argued that the national organization was liable, based upon the actions of its chairman and members, and should be enjoined. The proposed injunction would not hold members liable for mere membership in the party. Instead, the injunctive relief was a prospective remedy, and would be enforced against members or agents of the party who were not named in the complaint, who had actual notice of the injunction, and were acting with, or in support of, the party in violating the terms of the injunction. Remedial Memo at 5-6.

b. NBPP Team Explained Why the Disclaimer and Suspension of the Philadelphia Chapter did not Preclude Injunctive Relief

The Remedial Memorandum argued that the disavowal of the incident in Philadelphia and suspension of the Philadelphia chapter posted on NBPP's website did not preclude obtaining injunctive relief against the organization and its chairman. The NBPP team explained that, to obtain injunctive relief, the government had the burden to show the court that relief was needed because there was a danger of a recurrent violation. Remedial actions that appear to be responses to threatened or pending litigation are not likely to support a finding that the conduct will not recur. Remedial Memo at 7-8 (citing cases).

Here, the NBPP team argued, there were strong indications that the national defendants' disclaimers were not trustworthy because, first, they were inconsistent with endorsing statements made by Malik Zulu Shabazz both on television and to Department attorneys. Remedial Memo at 7. Second, the statements disavowing the actions of the Philadelphia members and the suspension of the chapter were inconsistent with each other, because the disavowal referred to the individuals as "purported members," while the suspension statement implied that the Philadelphia chapter was affiliated with the national organization. *Id.* Third, the memorandum stated that the statements were "inconsistent with earlier versions, and were back-dated." *Id.* at 8. Finally, the memorandum asserted that the statements "were issued the same day as, and obviously in response to, the filing of this lawsuit." *Id.*

c. NBPP Team Explained why the First Amendment was not an Impediment to Injunctive Relief

First, the NBPP team argued that the defendants' conduct was not activity protected by the First Amendment. They explained that "there is no First Amendment right to violate the law by illegitimately engaging in voter intimidation during an election directly in front of a polling place." Remedial Memo at 9

(footnote omitted). The memorandum discussed *United States v. Brown*, 561 F.3d 420, 436-38 (5th Cir. 2009), in which the Voting Section successfully obtained an injunction against the defendant appearing at the polls or communicating with poll workers to remedy violations of section 2 of the Voting Rights Act. *See* Remedial Memo at 9-10.

Next, the NBPP team argued that, assuming the defendants' conduct was protected speech, the proposed injunction would be upheld as a reasonable time, place, and manner restriction necessary to promote a significant governmental interest. The NBPP team proposed a prohibition on the defendants appearing with weapons within 200 feet of open polling locations during elections.[28] They argued that the proposed injunction was narrowly tailored to ensure that voters and poll workers would not be intimidated, threatened, or coerced. For support, they cited *Burson v. Freeman*, 504 U.S. 191 (1992), in which the Supreme Court upheld Tennessee's establishment of a 100-foot zone around a polling place in which no political campaigning could occur. Remedial Memo at 12.

4. Analysis of the NBPP's Website Disclaimer

After the May 1 meeting, King spent some time reading the memoranda and other papers related to the NBPP case, Rosenbaum's e-mails to Coates and Coates's response, as well as reviewing the videotapes of the incident and interviews with Malik Zulu Shabazz. *See* King Transcript at 136-40. After reviewing the May 6 Remedial Memorandum, King asked Rosenbaum if there were some way to determine when the national organization had posted its statements disavowing the Philadelphia incident. E-mail from King to Rosenbaum, re: RE: New Black Panther Party, May 7, 2009, at 7:07 p.m.

Rosenbaum then e-mailed Coates and Popper, asking about their assertions that the NBPP's disavowal of the Philadelphia actions was added after the lawsuit was filed on January 7, 2009, and backdated to November 4, 2008. *See* Remedial Memo at 6, 8. Rosenbaum asked how the team knew when the statement was first posted on the website, how it knew that the disclaimer was added after January 7, and whether other changes were made to the statement after it was

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[28] The injunction that the NBPP team proposed on May 6 provided:

> Defendants, their agents, and successors in office, and all persons acting in concert with them who receive actual notice of this order, by personal service or otherwise, are permanently enjoined and restrained from deploying or appearing within 200 feet of any polling location on any election day in the United States with weapons, and from otherwise engaging in coercing, threatening, or intimidating behavior in violation of Section 11(b) of the Voting Rights Act, 42 U.S.C. § 1973i(b).

first posted. E-mail from Rosenbaum to Coates, cc: Popper, re: New Black Panther Party, May 7, 2009, at 7:51 p.m.

In response, Coates e-mailed Rosenbaum that the Voting Section commenced its investigation in mid-November. Sometime in November or early December, [redacted] accessed the NBPP website and printed a copy of a statement, dated November 4, 2008, entitled: "The New Black Panther Party Issues Official Statement re: Election 2008 and Voter Intimidation." E-mail from Coates to Rosenbaum, re: FW: New Black Panther Party, May 8, 2009, at 11:24 a.m. The statement was similar to the Official Statement King and Rosenbaum read on the NBPP website on May 1, except that it did **not** include the following text specifically disavowing the incident in Philadelphia:

> 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. At this critical time in history, emotions and rhetoric are bound to be intense.

Coates informed Rosenbaum that, after recording the version of the November 4, 2008 Official Statement of the NBPP, [redacted] or [redacted] checked the NBPP website at least once a week. According to them, the above-quoted disclaimer of the Philadelphia incident was inserted into the Official Statement on January 8, 2009. E-mail from Coates to Rosenbaum, re: FW: New Black Panther Party, May 8, 2009, at 11:24 a.m.

Rosenbaum instructed the NBPP team to check Internet Archives, to see if they could learn more information about when the disclaimer was added. E-mail from Rosenbaum to Coates, re: FW: New Black Panther Party, May 8, 2009, 12:59 p.m. [redacted] accessed the Internet Archives, but it provided no useful information, because the most recent information for the NBPP in the Archives was dated February 2008. In a further effort to determine when the disclaimer was posted, [redacted] contacted the Anti-Defamation League, which monitors the NBPP website. [redacted] had previously interviewed [redacted] of the ADL as a potential expert witness for the NBPP case. In a telephone conversation on May 8, [redacted] told [redacted] that she believed part of the NBPP's disclaimers were posted prior to the filing of the lawsuit. Her belief was based on an e-mail that was sent within the ADL's offices on November 5, 2008, which contained some, but not all, of the NBPP language disclaiming the actions in Philadelphia. Written Response of [redacted] at 30.

In an e-mail to Rosenbaum, Coates informed him that the ADL's information differed from what the team had previously provided:

> [T]he Anti-Defamation League told us on Friday that they believe [the disclaimer] was added to the NBPP's website on November 5 before the lawsuit commenced. Our observations of the website lead us to believe that the statement was not posted at least during some of the period between the November 5 and the January 7 filing date. The ADL does not think that this statement was changed after it was initially posted, but we know from watching their website that the NBPP changes its website quite a lot. . . . The present bottom line is that we just don't have enough information to know for sure when the statement was added or removed after it was added. As argued in our memos, we do not believe that this statement, even if posted on the NBPP website before the filing of the lawsuit, is a ground for not seeking injunction relief against the defendant-party or the chairman.

E-mail from Coates to Rosenbaum, re: FW: Further Follow-up On When NBPP's Renunciation Of Philadelphia Occurred, May 11, 2009, at 4:10 p.m.

Rosenbaum forwarded the latest information about NBPP's disclaimer to King, and recounted the e-mails he had exchanged with Coates, pressing him for more information about when the disclaimer was posted. Rosenbaum noted: "This exchange renews my serious concerns about the Voting Section's handling of this case and the representations it makes to the front office about the case." E-mail from Rosenbaum to King, re: New Black Panther Party, May 11, 2009, at 6:01 p.m. Rosenbaum also forwarded the new information to Hirsch. E-mail from Rosenbaum to Hirsch, re: New Black Panther Party, May 11, 2009, at 6:07 p.m.

5. Rosenbaum Confers with the Appellate Section

On May 7, Rosenbaum e-mailed Diana Flynn, Chief, Appellate Section, CRT, informing her that he and King wanted the Appellate Section's views on the Voting Section's proposed remedial order. E-mail from Rosenbaum to Flynn, cc: Coates and King, re: New Black Panther Party: Proposed Remedial Order, May 7, 2009, at 12:37 p.m. Rosenbaum provided Flynn with the May 6 Remedial Memorandum and proposed order; the April 28 draft motion, memorandum of law, and proposed order; the e-mail containing Rosenbaum's concerns about the April 28 drafts and the Voting Section's reply e-mail; the May 1 drafts which sought relief only from the individual defendants; the Voting Section's additional research on FACE

caselaw; declarations of [redacted], [redacted], and [redacted]; and information about how to access the videotapes of the incident. Rosenbaum told Flynn they wanted Appellate's view by noon on May 13.[29] E-mail from Rosenbaum to Flynn, cc: Coates and King, re: New Black Panther Party: Proposed Remedial Order, May 7, 2009, at 12:37 p.m.

a. [redacted] Comments

Flynn assigned the matter to a senior attorney, [redacted], who reviewed the materials provided by Rosenbaum, as well as the complaint, and familiarized herself with the procedural history of the case. She provided a memorandum, setting forth her opinion, to Flynn on May 12, 2009. E-mail from [redacted] to Flynn, re: Comments on the proposed default judgment filings in NBPP, May 12, 2009, at 5:15 p.m.

[redacted] began by noting that the Third Circuit's standard for obtaining a default judgment includes consideration of whether the defendants have litigable defenses, and that, notwithstanding the defendants' failure to articulate such defenses, the district court would want to know the government's views on the obvious First Amendment issues raised by the government's proposed relief. [redacted] also suggested that the Voting Section had not made a sufficient showing that the government would be prejudiced by denial of a default judgment, rather than having to prove its case on the merits in a hearing.

With regard to the merits of the government's case, [redacted] expressed reservations about whether the government had a sufficient factual basis to state a claim against the NBPP and its national leader, Malik Zulu Shabazz. [redacted] noted that she saw no evidence that the NBPP or Zulu Shabazz had suggested, counseled, or endorsed the bringing or brandishing of weapons to the polls in advance of the incident in Philadelphia. [redacted] did not consider the evidence of the NBPP's violent and racist views as an adequate basis for a nationwide order enjoining all party members from bringing weapons to the polls. [redacted] noted information in the Remedial Memorandum about the NBPP's past actions of bringing weapons to political rallies, but again expressed doubt that such evidence would be sufficient to enjoin the national party in this case.

[redacted] noted that the Voting Section relied primarily on statements Zulu Shabazz made after the events in Philadelphia, in which he defended the actions of Samir Shabazz and Jackson. [redacted] noted that that "endorsement" was

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[29] Rosenbaum forwarded the Voting Section's May 6 Remedial Memorandum and proposed order to Hirsch, and informed him that he had asked the Appellate Section to provide an opinion on it by May 13. E-mail from Rosenbaum to Hirsch, re: New Black Panther Party, May 8, 2009, at 6:57 p.m.

complicated by the statements on the NBPP website and the Voting Section's apparent inability to determine when the statements were added. [redacted] opined that, "[a]t least as to the [NBPP], those statements could be an impediment to proving a violation at all, not just an impediment to injunctive relief."

[redacted] stated that, as to the individual defendants, the Voting Section had established a sufficient basis to obtain the type of limited injunctive relief that Coates had proposed on May 1 (*i.e.*, an injunction against bringing weapons to the polls or otherwise violating section 11(b)). The May 6 proposed injunction, however, sought to enjoin defendants "from deploying or appearing within 200 feet of a polling location . . . with weapons." In [redacted] opinion, the term "deploying" related to troops, and suggested that appearing in the NBPP's military-style uniform, the military-type stance, and the threatening language all were a part of the conduct the Voting Section sought to enjoin. [redacted] noted that wearing a uniform would likely be viewed as expressive conduct protected by the First Amendment. In her view, it was a close question as to whether the Voting Section's arguments about the intimidating nature of the uniforms were sufficient to overcome First Amendment concerns.

b. Section Chief Flynn's Opinion

On May 13, Flynn forwarded to Rosenbaum and Coates [redacted] comments on the Voting Section's proposed motion and injunction. E-mail from Flynn to Rosenbaum, cc: Coates and [redacted], re: New Black Panther Party FW: Comments on the proposed default judgment filings in NBPP, May 13, 2009, at 11:54 a.m. Flynn stated that [redacted] comments also reflected Flynn's views. In addition, Flynn added four observations.

First, Flynn opined that the government "can make a reasonable argument in favor of default relief against all defendants and probably should, given the unusual procedural situation." Flynn noted that "it would be curious not to pray for the relief on default that we would seek following trial."

Second, Flynn noted that, because the case involved "areas central to First Amendment activity," it was likely the court would not order relief without an evidentiary proceeding.

Third, Flynn opined that, "[b]y far, the most difficult case to make at this stage is against the national party and Malik Shabazz." Flynn observed that "[o]ur case against the nationals may be a bit of a reach, particularly at this stage, particularly because of First Amendment concerns." Nonetheless, Flynn stated that she assumed that the allegations in the complaint that the national defendants managed, directed, and endorsed the individuals' activity "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."

Finally, Flynn agreed with [redacted] that the government needed to anticipate possible defenses in its papers, especially the First Amendment concerns. Flynn concluded: "The First Amendment concerns [Rosenbaum] 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."

After receiving Flynn's opinion, in which, despite reservations, she appeared to give the green light to proceeding against all four defendants, Coates believed that the Voting Section would be permitted to file for such relief. Accordingly, he directed the NBPP team to revise the papers to reflect the suggestions and concerns raised by Appellate. Coates forwarded the revised drafts to Rosenbaum on May 14. E-mail from Coates to Rosenbaum, re: FW: NBPP documents, May 14, 2009, at 5:14 p.m. Rosenbaum in turn forwarded the drafts to King, Hirsch, and Flynn.

c. Appellate Section's Views on Proceeding Against Only the Individual Defendants

The next morning, Rosenbaum asked for Appellate's views on two additional issues, assuming that CRT decided not to seek relief against the national defendants. First, Rosenbaum asked whether the NBPP team's latest proposed injunction was appropriate as to the individual defendants. Second, Rosenbaum queried whether the best course of action would be to dismiss the national defendants, or to file an amended complaint.

Flynn provided Appellate's views by e-mail that morning. E-mail from Flynn to Rosenbaum, re: New Black Panther Party - your questions, May 15, 2009, at 10:46 a.m. Both Flynn and [redacted] agreed that, if the national defendants were no longer in the case, there would be no basis for a nationwide injunction. Because there was no evidence that the individual defendants were likely to commit similar acts in other areas of the country, and the First Amendment requires that relief be narrowly tailored, [redacted] opined that the geographic scope of the injunction could not be stretched beyond the metropolitan area of Philadelphia.

In addition, the May 14 draft remedial order enjoined the individual defendants from appearing with weapons, or in the uniform of the NBPP, or both, within 200 feet of a polling place. Flynn and [redacted] noted that the revised

wording appeared to enjoin the wearing of the NBPP uniform, without any other intimidating conduct, which they agreed was too broad to survive First Amendment scrutiny.

With regard to the second question, both Flynn and [redacted] advised amending the complaint, which would provide additional time to ensure that the Division was comfortable with the relief requested.

6. Rosenbaum's Review of the J Memo

Rosenbaum told us that from May 9 through May 13, most of his time was spent preparing for and presenting oral argument before the U.S. Court of Appeals for the Seventh Circuit, sitting *en banc*, on a very important issue arising under the Fair Housing Act. When Rosenbaum returned to the office on May 14, he immersed himself in the NBPP case, reviewing the evidence and memoranda that had been provided to him. During that review, Rosenbaum said, he realized that he had not been provided the J Memo, and asked Coates to send it to him. E-mail from Rosenbaum to Coates, re: New Black Panther Party, May 14, 2009, at 4:02 p.m. Popper e-mailed it to Rosenbaum ten minutes later. E-mail from Popper to Rosenbaum, cc: Coates, re: NBPP j-memo, May 14, 2009, at 4:12 p.m.

Rosenbaum told us that he had worked closely with former Acting AAG Becker and had "enormous respect" for her legal abilities. Rosenbaum Transcript at 104-05, 188. He wanted to see the J Memo that Becker had reviewed in approving the lawsuit, to determine if it contained sufficient evidence to support all of the allegations in the complaint, or a more extensive presentation of the strengths and weaknesses of the case. *Id.* at 302-04.

Rosenbaum said that, in his opinion, the information in the J Memo reflected an incomplete factual investigation. Rosenbaum Transcript at 307. He was surprised at the absence of basic information about the specifics of what transpired at 1221 Fairmount Avenue on election day, such as how long the NBPP members were present or what Jackson did or said after Samir Shabazz left. *Id.* at 306, 308. Rosenbaum said he expected a memorandum that described the NBPP team's efforts to contact witnesses, such as contacting both the Republican and Democratic officials who may have been present; interviewing all of the poll watchers and poll workers to determine what they saw or heard; interviewing people who lived or worked in the building, to determine if they had witnessed the incident, or if Jackson and Samir Shabazz were known in the community and how they were regarded. *Id.* at 307-09. Rosenbaum said the NBPP team also could have accessed the voter list to try to contact voters who may have witnessed the incident, particularly if they were able to identify individuals who voted in the morning. *Id.* at 308-09. Instead, Rosenbaum noted, it appeared that the factual investigation was based largely on talking only to Republican party members who

were in Philadelphia or at the polling place, without including the accounts of Democratic party officials or other people who were present at the polls that day. *Id.* at 306.

Rosenbaum also said he was struck that the most compelling description of the [redacted] experience was primarily based on representations made by [redacted] and how he thought the [redacted] were acting, rather than on the statements made by the [redacted] themselves. As evidence, Rosenbaum thought [redacted] account was unusable. Instead, Rosenbaum believed that if the Voting Section intended to use the [redacted] in the lawsuit, the J Memo should have described an interview with them and what they were prepared to testify.[30] Rosenbaum Transcript at 313-14.

Likewise, Rosenbaum was not persuaded by the accounts of [redacted] and [redacted] contained in the J Memo, in which they reported that voters appeared apprehensive or intimidated. Rosenbaum Transcript at 315-16. Instead, Rosenbaum said, had he been supervising this investigation, he would have instructed the attorneys to "Go find the voters." The best evidence of intimidation would be to have voters testify that they were intimidated, not to have individuals testify that they thought some voters looked apprehensive or intimidated. *Id.* at 316.

Finally, Rosenbaum said the J Memo did not discuss evidence that could undermine the case. *Id.* at 306. Moreover, although the memorandum described how the leader of the NBPP at one point apparently endorsed the Philadelphia incident, Rosenbaum did not see how it supported the allegations in the complaint that the national organization and its leader "managed and directed" the incident. *Id.* at 317-18.

7. Rosenbaum Considers an Alternate Approach

After having reviewed again the evidence and papers in the case on May 14, Rosenbaum said he was troubled by the prospect of seeking default judgment when he did not believe that the Voting Section had evidence to support all of the allegations. For example, Rosenbaum did not believe the Voting Section had sufficient evidence to demonstrate that the national defendants managed and directed the Philadelphia individuals' actions on election day. Complaint ¶ 12. In addition, Rosenbaum had not seen evidence to support allegations that Jackson "made statements containing racial threats," Complaint ¶ 10, or had made "menacing and intimidating . . . statements" directed at those aiding voters.

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[30] Rosenbaum also noted that the information in the J Memo describing the [redacted] experience is completely inconsistent with the sworn testimony they later gave before the U.S. Commission on Civil Rights. Rosenbaum Transcript at 315.

Complaint ¶ 11. The only evidence Rosenbaum believed the Voting Section had about Jackson was that Jackson attempted to block [redacted] from entering the polls. Rosenbaum Transcript at 330-33.

These concerns led Rosenbaum to consider two options. First, he considered whether a better approach would be to amend the complaint, removing not only the national defendants, but all of the allegations in the complaint that were not supported by evidence. He discussed this possible approach with Hirsch and asked for the Appellate Section's opinion.

Second, Rosenbaum e-mailed Coates and asked him to identify the evidence that supported the allegations against Jackson in paragraphs 10 and 11 of the complaint. E-mail from Rosenbaum to Coates, cc: Popper, re: New Black Panther Party, May 15, 2009, at 9:52 a.m.

In response to Rosenbaum's e-mail, Coates replied that the allegation about Jackson making intimidating movements directed at those assisting voters occurred when Jackson and Samir Shabazz moved to attempt to block [redacted] entrance to the polling place, as described in [redacted] declaration. The incident was witnessed by another poll watcher, [redacted]. E-mail from Coates to Rosenbaum, re: FW: New Black Panther Party, May 15, 2009, at 1:02 p.m.

The NBPP team provided four sources of evidence of intimidating statements and gestures by Jackson: (1) Republican poll watcher [redacted] said in an interview with the NBPP team that he received complaints that Republican poll watchers were approached and harassed by "the large NBPP member," referring to Jackson; (2) Republican poll watcher [redacted] said poll watcher [redacted] was scared and worried about his safety at the polling place; (3) [redacted] told [redacted] and [redacted] in an interview that he and his wife were afraid to leave the polling place while the two NBPP members were present, and [redacted] told the NBPP team that she was afraid the NBPP members would bomb the place; and (4) poll watcher [redacted] said the NBPP members were chanting "black man will rule white man." The NBPP team noted that in many of the witness statements, as well as the declarations of [redacted] and [redacted], no differentiation was made between the two NBPP members, suggesting that the men were operating in conjunction with each other. E-mail from Coates to Rosenbaum, re: FW: New Black Panther Party, May 15, 2009, at 1:02 p.m.

Rosenbaum said that he did not find the above evidence compelling. He thought the best piece of evidence was [redacted] statement, but his statement was not corroborated by anyone else, [redacted] did not differentiate between Jackson and Samir Shabazz, and the statement attributed to them appeared to Rosenbaum to be more of a racial insult, rather than a racial threat. Rosenbaum Transcript at 332. Accordingly, Rosenbaum concluded that the NBPP team did

not have sufficient evidence to support the allegations in paragraph 10 of the complaint as to Jackson. *Id.* at 332-33. Rosenbaum acknowledged that [redacted] testimony about Jackson moving to block his entry did provide support for the allegations in paragraph 11 of the complaint. *Id.* at 333.

8. The Civil Rights Division Leadership Reaches a Consensus

That afternoon, King and Rosenbaum discussed the case with other CRT front office attorneys, then-Chief of Staff Pamela Barron and then-Acting DAAG John Wodatch. After viewing the videotapes, reviewing the papers, and conferring with their colleagues, King and Rosenbaum agreed that the national defendants should be dismissed from the case for lack of evidence that they managed and directed the incident, and for conflicting evidence about whether they later endorsed the incident. Everyone agreed that Samir Shabazz should be enjoined from bringing a weapon to a polling place.

Rosenbaum also recommended, and King agreed, that Jackson should be dismissed from the case because: (1) he did not wield a weapon; (2) there was insufficient evidence that he had made verbal threats to voters or poll workers; and (3) he was a credentialed poll watcher and therefore had a right to be present at the polls.

Rosenbaum also considered the fact that the police had made Samir Shabazz leave the polling place, but allowed Jackson to stay, as some evidence of the law enforcement officers' contemporaneous judgment about how serious the conduct was and how best to handle it. Rosenbaum Transcript at 208. While Rosenbaum conceded in his OPR interview that the police decision to allow Jackson to stay did not prove that Jackson had not intimidated, coerced, or threatened voters or poll workers, or attempted to do so, *id.* at 212, he viewed the local police action as relevant to an assessment of the seriousness of the section 11(b) violation, and whether any violation was likely to recur. *Id.* at 210-15, 334-35.

Rosenbaum acknowledged that Jackson's attempt to block [redacted] entrance to the polls was a potential violation of section 11(b). He noted, however, that [redacted] gave a televison interview after the incident in which he said he was not scared by the NBPP members. Rosenbaum Transcript at 328. Rosenbaum was concerned that if the government's case rested largely on [redacted] testimony, his television interview statements would undercut the government's evidence. *Id.* at 328-29.

King told us that the complaint and declarations were written by the NBPP team and appeared to her to be full of hyperbole and exaggeration. King Transcript at 145. For example, she did not know what was meant by the term "formed ranks" in the [redacted] Declaration, which stated: "[T]he two men formed ranks

and attempted to impair my entrance into the polling place. They formed ranks by standing in such a way to make them a significant obstacle to my entrance." Declaration of [redacted] ¶ 4. King said Coates had pointed her to the videotapes to view the type of conduct they were engaging in, but the videotapes King viewed showed the NBPP members standing side-by-side, with plenty of room for people to walk around them; in fact, people were walking past them and approaching the polls. King Transcript at 145-46, 155. For those reasons, King was not willing to rely solely on the single declaration of [redacted] to support pursuing relief against Jackson. *Id.* at 156-57.

King and Rosenbaum also debated the terms of the injunction as to Samir Shabazz to ensure that it was not so broad that it would violate the First Amendment. Because Samir Shabazz was affiliated with the NBPP's Philadelphia chapter, had appeared at a Philadelphia polling place, and in the absence of any evidence that Samir Shabazz had ever traveled outside of Philadelphia to engage in behavior violative of section 11(b), Rosenbaum and King determined that the injunction should be limited to polling places in Philadelphia. Rosenbaum Transcript at 340-41.

Next, they discussed the radius of the injunction. The NBPP team had proposed a 200-foot radius. Because many polling places in an urban area like Philadelphia are located in residences or apartment buildings, like the one at 1221 Fairmount Avenue, King and Rosenbaum believed that a 100-foot radius would keep Samir Shabazz relatively far away from a polling place, without the injunction being overly broad. Rosenbaum Transcript at 341-42.

Finally, CRT practice in recent history had been to put time limitations on its proposed injunctions. King Transcript at 172-73. King suggested three years, which they thought would cover several election cycles. Rosenbaum Transcript at 342-44.

9. Three Defendants are Dismissed and the Government Moves for Default Judgment Against Samir Shabazz

Rosenbaum called Coates and informed him of King's decision and provided instructions on how the papers should be revised. Coates later called Rosenbaum back and asked if the injunction could extend until 2013, in order to encompass the next presidential election cycle. King agreed to the change. Coates Transcript at 208 (Jun. 14, 2010). In addition, Coates asked if the dismissal of the three defendants could be without prejudice, so that the claims could be re-filed if additional evidence was developed. E-mail from Coates to King and Rosenbaum, re: NBPP, May 15, 2009, at 3:14 p.m. King agreed to that request as well. *See* E-mail from Rosenbaum to Coates and King, re: RE: NBPP, May 15, 2009, at 3:28 p.m.

Coates forwarded revised versions of the papers to the CRT front office. King, Rosenbaum, and Hirsch all reviewed and edited the documents. The motion for default judgment against Samir Shabazz and dismissals of the other three defendants were filed with the court that evening.

The court granted the government's motion for default judgment, without an evidentiary hearing or oral argument, on May 18, 2009.

I. The Department's Leadership Was Kept Apprised of Developments in the Decision Making Process

1. The Involvement of the Associate AG and His Staff

The Associate Attorney General is responsible for overseeing the Civil Rights Division. On April 30, Associate Attorney General Thomas Perrelli[31] held a routine weekly meeting with the CRT front office. At that meeting, Rosenbaum informed Perrelli, and his deputy, Samuel Hirsch,[32] that the Voting Section proposed filing papers the next day, May 1, seeking default judgment and nationwide injunctive relief against all four defendants in the NBPP case. Rosenbaum explained that he had concerns that the proposed relief would violate the First Amendment. Perrelli suggested that, if the CRT front office and the Voting Section attorneys could not reach a consensus by the next day, they should seek an extension of time from the court. Perrelli Transcript at 11-12 (Jul. 1, 2010); Rosenbaum Transcript at 192; Chronology re New Black Panther Party case at 6 (May 31, 2009), appended to Written Response of Samuel Hirsch (Nov. 13, 2009) (Hirsch Chronology). Perrelli said that he instructed Hirsch to keep apprised of the matter, given the disagreement about it within the Division and the fact that it might be a case in which the media was interested. Perrelli Transcript at 14-15 (Jul. 1, 2010). Later that day, Rosenbaum forwarded the NBPP team's April 28 draft papers to Hirsch, who forwarded them to Perrelli.

King and Rosenbaum advised Perrelli of the status of the NBPP case at their regular weekly meeting on May 7. They mentioned their strong disagreement with the broad injunctive relief that the Voting Section had proposed and also expressed concern that the Voting Section had not been forthcoming in providing

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[31] After five years in private practice, Perrelli joined the Department in 1997 on the staff of then-Attorney General Janet Reno. From 1999 until 2001, Perrelli served as Deputy Assistant Attorney General in the Civil Division. Perrelli returned to private practice from 2001 until 2009. He was confirmed as Associate Attorney General on March 12, 2009.

[32] Hirsch was engaged in private practice for twelve years and spent two years serving as legal advisor to the Iran-United States claims tribunal before joining the Department in March 2009 as Deputy Associate Attorney General.

relevant information about the case (*i.e.*, the disavowal posted on the NBPP website) to the front office. Written Response of Thomas Perrelli at 2; Perrelli Transcript at 30-32 (Jul. 1, 2010).

Perrelli and Hirsch briefly discussed the NBPP case at the Associate AG's daily staff meeting on May 11. Perrelli directed Hirsch to ask the CRT front office for a memorandum outlining the available options and to make a recommendation. Perrelli was concerned that, if the Division could not reach a consensus on the appropriate course of action, the leadership offices would need to weigh in. Accordingly, he wanted himself and the Deputy Attorney General[33] to be briefed on the matter and the available options before the May 15 deadline, so that they would have time to determine the appropriate course of action if called upon to do so. Hirsch Chronology at 13-14, 19-20. Accordingly, on May 12, Hirsch instructed Rosenbaum to prepare an options memorandum by May 14, for the leadership's use if the Division could not reach a consensus. Hirsch Chronology at 19.

Perrelli told OPR that he did not direct or guide CRT in reaching a particular outcome. Written Response of Thomas Perrelli at 2. Instead, Perrelli had explained to Hirsch that it was entirely within the purview of the CRT leadership to decide what course of action to take in the case. Perrelli told Hirsch he would support CRT's decision, so long as it fell somewhere within two extremes: he would not support an injunction so broad it violated the First Amendment; nor would he support dismissing all of the defendants without obtaining any relief, which he referred to as "doing nothing." Written Response of Thomas Perrelli at 2; Perrelli Transcript at 37-38 (Jul. 1, 2010). Any decision by CRT that fell within those two boundaries was acceptable to Perrelli, so long as CRT believed it was appropriate under the facts and the law.[34] Perrelli Transcript at 38 (Jul 1, 2010). Perrelli said he anticipated becoming involved in the decision making only in the event that the CRT leadership could not agree on an approach and asked for assistance from a higher-level decision maker. *Id.* at 40.

By the morning of May 14, Perrelli told Hirsch at a daily staff meeting that he wanted the CRT front office to reach a decision or to seek another extension of

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[33] Although Perrelli anticipated that Deputy Attorney General (DAG) David Ogden would need to be consulted if CRT could not reach a decision in the case, we determined in the course of our investigation that DAG Ogden was not consulted or involved in the decision making in this case.

[34] Perrelli told OPR that he received no direction from Department leadership or the White House about a desired outcome in the NBPP case. Perrelli Transcript at 58-59 (Jul. 1, 2010). Perrelli and Hirsch said they had no substantive discussions whatsoever with anyone at the White House about the case. Perrelli Transcript at 41-42 (Feb. 1, 2010); Hirsch Transcript at 12 (Feb. 1, 2010).

time. He did not believe that there was adequate time for Department leadership, including the Deputy Attorney General, to be briefed on the available options and reach a decision by the next day, May 15. Hirsch Chronology at 20; *see* Perrelli Transcript at 41-43 (Jul. 1, 2010). Perrelli repeated this instruction to Rosenbaum at his regular weekly meeting with the CRT front office later that morning. Hirsch Chronology at 20-21.

On the morning of May 15, Rosenbaum told Hirsch that he had sought additional views from the Appellate Section with regard to two issues: (1) the appropriate scope of the injunction if the national defendants were dismissed; and (2) whether it would be a better approach to amend the complaint rather than to simply dismiss the national defendants. With regard to the second issue, Rosenbaum was concerned that the complaint contained allegations about Jackson that lacked evidentiary support. He queried whether the Voting Section should amend the complaint to not only remove the national defendants, but also to remove the allegations about Jackson.[35] *See* Rosenbaum Transcript at 330-34.

Hirsch did not support amending the complaint; he did not want to give Samir Shabazz a second chance to respond to the complaint. Hirsch Chronology at 23. Hirsch conferred with Perrelli at a daily staff meeting, and Perrelli agreed that there was no need to prolong the case by amending the complaint. Perrelli reiterated that if the CRT leadership could agree on the scope of appropriate injunctive relief, they could file that day; otherwise, they should seek another extension from the court. Hirsch Chronology at 23.

Later that morning Rosenbaum informed Hirsch that the Appellate Section favored amending the complaint. Hirsch opposed that approach and asked to see whatever papers were going to be filed in the case before they were finalized. Hirsch Chronology at 24.

After the Voting Section prepared the final papers dismissing three defendants and seeking a limited injunction against Samir Shabazz, as they were directed to by King, Hirsch reviewed the papers and made minimal edits. Hirsch also informed Perrelli of CRT's final decision, and sent him a copy of the final papers.

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[35] In his chronology, Hirsch recounts that Rosenbaum was concerned about unsupportable allegations in the complaint about Samir Shabazz. Hirsch Chronology at 23. Hirsch was mistaken. As Rosenbaum explained, he was concerned about the allegations in paragraphs 10 and 11 of the complaint that Jackson made statements containing racial threats or other intimidating statements, when he had not seen any witness testimony or video evidence to specifically support those allegations. Rosenbaum Transcript at 331-33. That was one of the reasons that Rosenbaum ultimately recommended dismissing the claims against Jackson.

2. Meeting with the Attorney General

On May 5, King and Hirsch attended a meeting with Attorney General Eric Holder and his staff to discuss personnel matters within the Civil Rights Division. In attendance at the meeting were the Attorney General, King, Hirsch, and, for parts of the meeting, Don Verrilli, then-Counsel to the Deputy Attorney General; Aaron Lewis, Counsel to the Attorney General; and Monty Wilkinson, Counsel to the Attorney General. During the course of the meeting, King and Hirsch briefed the Attorney General about the NBPP case. They described the incident that led to filing the case, the deliberations regarding the motion for default judgment, and their view that the case against the national defendants was weak, and that some of the defendants might need to be dismissed and a narrower injunction sought. The Attorney General told OPR that this May 5 meeting was the first time he recalled learning about the incident on election day in Philadelphia involving the NBPP and the government's civil action filed in response to the incident.

The attendees at the meeting all agreed that in discussing the case, King was informing the Attorney General about a litigation decision that she was considering making; she was not seeking advice or approval. The Attorney General told OPR, and all the attendees at the meeting agreed, that the Attorney General did not offer any direction or explicitly approve King's proposed course of action. Instead, he trusted King and Rosenbaum, two experienced Department attorneys with whom he was familiar, to pursue the correct course of action under the facts and the law. During the meeting, the Attorney General acknowledged the negative media attention that might result from King's decision. *See, e.g.*, Hirsch Chronology at 12; King Transcript at 210-13.

After the May 5 meeting, King continued to provide brief updates regarding the status of the NBPP matter to the Attorney General at weekly meetings with all component heads. Among other things, King informed him that on May 18, 2008, the claims against three of the defendants had been dismissed and default judgment obtained against one defendant. King said that these reports were very brief and factual, and that she did not seek or elicit any response from the Attorney General. King Transcript at 213.

J. Allegation That Some CRT Attorneys Supported Enforcing the Civil Rights Laws Only for the Benefit of Racial Minorities

Coates told OPR that he believed the "real reason" that the three defendants in the NBPP case were dismissed was due to a perceived hostility to the race-neutral enforcement of the Voting Rights Act. Coates Transcript at 66 (Jun. 14, 2010). Coates said that he thought that King's and Rosenbaum's hostility to the NBPP case, and King's statement during the April 30 meeting that the case never should have been brought in the first place, was not because of the weakness of

the case, but because of King's and Rosenbaum's disagreement with a case that was brought against members of a racial minority on behalf of white poll workers.[36] Coates Transcript at 166-68 (Jun. 14, 2010). Similarly, Coates said that he did not believe that the NBPP's apparent renunciation of the Philadelphia defendants on its website posed a legitimate concern to King and Rosenbaum, but that they used it as a pretext to avoid pursuing this case against racial minority defendants. *Id.* at 194. Coates believed that if a factually similar case arose under the Obama Administration in which the wrongdoers were white Ku Klux Klan members wearing their uniforms, with a nightstick in hand, and shouting racial slurs at African-American voters, he has no doubt that the current Administration would initiate and prosecute a claim under section 11(b). *Id.* at 66. When Coates posed this hypothetical during the April 30 meeting, however, King insisted her view would not change if the defendants were the Ku Klux Klan, rather than the NBPP. Popper Transcript at 136-37.

Some current and former CRT attorneys interviewed by OPR stated that there was a view among other attorneys in the Voting Section (and the Civil Rights Division generally) that the civil rights laws were originally enacted to benefit racial minorities who historically had been the subject of discrimination and that, although on their face many provisions of the civil rights laws, including section 11(b) of the Voting Rights Act, are race neutral, the Department's resources should be used only to enforce the laws to benefit racial and other minorities, not white voters. *See, e.g.*, Coates Transcript at 98, 114-16 (Jun. 14, 2010); [redacted] Transcript at 136-45; Popper Transcript at 67-69; King Transcript at 216-17; Interview of Voting Section Deputy Chief Timothy Mellett; Interview of Voting Section Attorney [redacted]; Interview of Voting Section Chief Chris Herren. However, none of the attorneys OPR interviewed personally espoused that view.

Coates and [redacted] told OPR that attorneys in the Voting Section refused to work on *United States v. Brown* and criticized the Division for bringing the case, because it was brought against an African-American defendant to protect the rights of white voters in a majority African-American district in Noxubee County, Mississippi. Coates Transcript at 114-16 (Jun. 14, 2010); [redacted] Transcript at 136-45. According to Coates and [redacted], these attorneys believed that the Voting Rights Act should be enforced only for the benefit of racial minorities, for whom it was originally enacted, and that Department resources should not be spent to sue members of racial minorities to protect the rights of white voters. Coates Transcript at 56, 114-16 (Jun. 14, 2010); [redacted] Transcript at 140, 143-44. Coates said that a respected former attorney in the Voting Section, [redacted]

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[36] Coates also noted that King had directed him to stop asking job applicants during an interview whether they would be able to enforce the law in a race-neutral manner. Coates believed that that direction demonstrated King's belief that the voting laws should be enforced only for the benefit of racial minorities. Coates Transcript at 46-47 (Jun. 14, 2010).

went to Noxubee County with him for election coverage. Coates said that [redacted] asked him: "[C]an you believe that we're actually going to Mississippi to protect white voters?" Coates Transcript at 221 (Jun. 14, 2010). Coates observed: "That's the mentality that you're fighting against. They do not believe in the enforcement [of the Voting Rights Act] in [a] race neutral fashion." *Id.*

OPR interviewed [redacted] who gave a very different account. He denied that he was critical of the Division for attempting to protect the rights of white voters. [redacted] did not recall making the comment Coates attributed to him, but explained that he complained to Coates repeatedly during the trip about his frustration and outrage that the CRT front office had refused to approve many recommendations to monitor elections and open investigations into potential discrimination against racial minorities, but agreed to pursue the *Brown* case. [redacted] emphasized that he did not have a problem with pursuing cases in which white voters were the victims, so long as other cases benefitting racial minorities were also pursued. [redacted] gave similar testimony in a sworn declaration dated October 10, 2010, submitted to the U.S. Commission on Civil Rights.

Other current and former CRT attorneys explained to OPR that people within the Division were upset or displeased about the decision to bring the *Brown* case not because it was an unmeritorious case or because the defendant was African-American and the victims were white, but because other meritorious section 2 cases in which racial minorities were the subjects of discrimination were not being approved. Witnesses told us that, during the Bush Administration, there was a long period of time in which the CRT front office did not approve any new section 2 cases. Because section 2 cases are designed to remedy discrimination, the victims are almost always racial minorities, and this enforcement program had been effectively shut down. After years of being stymied in their efforts to bring these cases to remedy discrimination against racial minority voters, many CRT attorneys expressed frustration that the first section 2 case that was approved was the *Brown* case, which benefitted white voters.[37]

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[37] This was not only an opinion and frustration within the Division; outside advocacy groups were vocal in criticizing the Department for the Bush Administration's handling of the section 2 enforcement program. Interview of CRT DAAG Julie Fernandes; Interview of Voting Section Deputy Chief Timothy Mellett; Coates Transcript at 96-97 (Jun. 14, 2010). Statistics show that the Voting Section initiated 15 section 2 cases during the Bush Administration, fewer than half the number (34) initiated during the Clinton Administration. E-mail from Rosenbaum to [redacted], re: Tom Perez: Voting Section, Apr. 8, 2009, at 11:46 a.m. (final.vot.litigation.stats.xls attached).

We found no evidence that outside advocacy groups had any contact with or influence over the decision makers in this case. Coates alleged that a former Voting Section attorney, [redacted], who is now employed by the NAACP Legal Defense Fund, expressed her group's disagreement with the case to a Voting Section attorney, [redacted] (who had no involvement in the NBPP case and is not related to [redacted] told us that her

See, e.g., Rosenbaum Transcript at 354-58; Interview of [redacted]

Coates and a number of other CRT attorneys recounted a Voting Section brown bag luncheon meeting with the new DAAG, Julie Fernandes, during the fall of 2009, months after the NBPP case was resolved. The attendees recalled Fernandes making remarks to the effect that the Division was interested in pursuing "traditional civil rights" enforcement cases under the Voting Rights Act, which many understood meant cases in which racial minorities were the victims. *See* Interview of Timothy Mellett; Interview of Chris Herren; Coates Transcript at 169 (Jun. 14, 2010).

During her OPR interview, Fernandes denied having a preference for bringing cases to benefit any particular race, and explained that her reference to bringing "traditional civil rights cases" referred to bringing section 2 cases based on the merits to remedy discrimination against any racial minority, whether African-American, Latino, or white. Fernandes said that there was a perception among some in the civil rights community that enforcement of the Voting Rights Act had been politicized during the Bush Administration by bringing only cases that fit their political ideology, rather than bringing cases that were meritorious.[38]

II. OPR'S ANALYTICAL FRAMEWORK

OPR finds professional misconduct when an attorney intentionally violates or acts in reckless disregard of a known, unambiguous obligation imposed by law, rule of professional conduct, or Department regulation or policy. In determining whether an attorney has engaged in professional misconduct, OPR uses the preponderance of the evidence standard to make factual findings.

An attorney intentionally violates an obligation or standard when the attorney: (1) engages in conduct with the purpose of obtaining a result that the obligation or standard unambiguously prohibits; or (2) engages in conduct knowing its natural or probable consequence, and that consequence is a result that the obligation or standard unambiguously prohibits.

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conversation with [redacted] occurred in June 2009, after the NBPP case had been resolved.

[38] Coates also complained that Fernandes said, during a brown bag luncheon meeting, that she was not interested in bringing cases to enforce section 8 of the NVRA, which Coates believed was another example of Fernandes's (and the Obama Administration's) bias against race-neutral enforcement of the law. Coates Transcript at 170-71 (Jun. 14, 2010). Fernandes told OPR that section 8 protects against voter fraud and that, when it comes to prioritizing work in the Division with limited resources, combating voter fraud (as opposed to finding ways to promote voter access) is not her top priority. Nonetheless, Fernandes said that she would consider authorizing suit in a meritorious section 8 case if one were presented to her.

An attorney acts in reckless disregard of an obligation or standard when: (1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard; (2) the attorney knows or should know, based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate, or cause a violation of, the obligation or standard; and (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances. Thus, an attorney's disregard of an obligation is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

If OPR determines that an attorney did not engage in professional misconduct, OPR determines whether the attorney exercised poor judgment, engaged in other inappropriate conduct, made a mistake, or acted appropriately under all the circumstances. An attorney exercises poor judgment when, faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding. A mistake, on the other hand, results from an excusable human error despite an attorney's exercise of reasonable care under the circumstances.

III. APPLICABLE STANDARDS OF CONDUCT

A determination of what rules of professional conduct apply to the conduct at issue is governed by Department of Justice regulations set forth at 28 C.F.R. part 77.3, Ethical Standards for Attorneys for the Government, which implement 28 U.S.C. § 530B. The regulations provide that government attorneys shall, in all cases, conform to the rules of ethical conduct of the court before which a particular case is pending. Because the NBPP case was pending before the United States District Court for the Eastern District of Pennsylvania, we first reviewed that court's local rules. Pursuant to Local Rule of Civil Procedure 83.6(IV), the court adopted the Pennsylvania Rules of Professional Conduct as the applicable standards of professional conduct for all attorneys appearing before it.

Pennsylvania Rule of Professional Conduct 1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client." Comment 1 to Rule 1.3 notes: "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take

whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client." Pennsylvania Rule of Professional Conduct 3.1 provides: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

We note that the bars of which the subjects of our investigation are members all have rules similar to that of Pennsylvania's Rules 1.3 and 3.1.[39] *See* District of Columbia Rules of Professional Conduct 1.3(a), 3.1; Maryland Lawyers' Rules of Professional Conduct 1.3, 3.1; New York Rules of Professional Conduct 1.3(a), 3.1; Virginia Rules of Professional Conduct 1.3, 3.1.

In addition to state bar rules concerning zealous advocacy and bringing meritorious claims, Department of Justice rules provide that, in determining whether to take action against an individual, a Department attorney should not be influenced by "[t]he person's race, religion, sex, national origin, or political association, activities or beliefs." United States Attorneys' Manual (USAM) § 9-27.260. The USAM applies not only to Assistant United States Attorneys, but also to all Department attorneys responsible for the prosecution of violations of federal law. USAM § 1-1.100.

IV. ANALYSIS

OPR's investigation was triggered by an inquiry from ten congressmen questioning whether the decision to dismiss the three defendants in the NBPP case may have been politically motivated. As a corollary, OPR also investigated whether the decision to bring the case was politically motivated. Neither the congressmen who wrote to the IG, nor any of the current or former Department employees with whom OPR spoke, provided any direct evidence that the decision in the NBPP case was politically motivated. Rather, the congressmen reasoned that the apparent lack of any other plausible explanation for the dismissals in the NBPP case led them to question whether partisan politics might be the motivation for the decision.

In addition, during the course of OPR's investigation, two witnesses (Coates and [redacted] alleged that the decision to dismiss the three defendants was motivated by the decision makers' alleged hostility to the race-neutral enforcement

[39] Perrelli is an active member of the D.C. Bar and an associate (inactive) member of the Virginia Bar. Hirsch is a member of the D.C. and Maryland Bars. King is a member of the D.C. Bar. Rosenbaum is a member of the New York and D.C. Bars.

of the Voting Rights Act. As discussed below, we found no evidence to support any of these allegations.

A. The Three Defendants Were Dismissed, and Limited Injunctive Relief Sought Against Samir Shabazz, Based on Legitimate Concerns About the Sufficiency of the Evidence and First Amendment Law

The focus of OPR's investigation was to determine whether the decision to dismiss the three defendants was made for partisan political purposes. We found no evidence to support that hypothesis. We found that the decision was made by King, based primarily upon her close consultation with Rosenbaum, a CRT supervisory attorney with thirty years of experience. Both King and Rosenbaum are career Department employees, although each was temporarily acting in a position subsequently filled by a political appointee.

1. Perrelli and Hirsch Did Not Direct the Outcome of the Case

In making the decision to dismiss the three defendants, King did not receive direction from any political appointees. King reported developments in the case to the Associate Attorney General and the Attorney General and their staffs, but those offices did not instruct her to reach a particular outcome.

Although the Attorney General was briefed about the case in meetings, those briefings were merely reports to advise him on the status of the case and possible future media interest. King neither requested nor received the Attorney General's input regarding the outcome of the case; nor was the matter presented to the Attorney General for his decision on how to proceed. The Attorney General stated that he did not direct the outcome of the case, and we found no evidence to the contrary. Accordingly, we found that the Attorney General and his staff did not dictate or direct the decision in this case.

Associate Attorney General Perrelli told King and Rosenbaum that he would accept any outcome in the case so long as the entire case was not dismissed outright (because a man with a nightstick at a polling place appeared to present a case of voter intimidation) and the proposed relief did not violate the Constitution. Perrelli Transcript at 38-39 (Jul. 1, 2010). Similarly, although Rosenbaum discussed the case with Deputy Associate Attorney General Hirsch and kept him apprised of developments, Hirsch did not direct the outcome in the case.

Both Perrelli and Hirsch expected King to make the decision, preferably by reaching a consensus among the CRT front office, on how to resolve the case. The Associate's role, they explained to OPR, was to be available to assist if the Division

reached an impasse and could not reach such a consensus. Hirsch Transcript at 55-56 (Aug. 13, 2010); Perrelli Transcript at 40 (Jul. 1, 2010). In fact, Hirsch told OPR that he would have reached a different decision with regard to Jackson if it were up to him, but that the Associate's office deferred to King's decision. Hirsch Transcript at 196, 222 (Aug. 13, 2010); *see* Perrelli Transcript at 55 (Jul. 1, 2010).

We found Perrelli's and Hirsch's explanation of their roles to be credible and that they acted within the scope of their supervisory responsibilities. Accordingly, we concluded that Perrelli and Hirsch did not commit professional misconduct or exercise poor judgment, but rather acted appropriately in exercising their supervisory duties.

2. Rosenbaum's Advice and King's Decision Were Based on a Good Faith and Reasoned Assessment of the Law and Facts

We found no evidence that Rosenbaum began his review of the NBPP case with an agenda to derail the case. Although he had been aware of the case since early January, when it was filed, Rosenbaum said he assumed, based on his respect for former Acting AAG Becker, that the lawsuit was meritorious. Further, Rosenbaum expected the case to proceed through discovery and did not anticipate any front office involvement in the case during his tenure as Acting DAAG.

Similarly, although King had been aware of the case since early January, she had formed no opinion of the case. Her views were largely informed by Rosenbaum's critique of the NBPP team's drafts and the information they provided in response to his questions, her own review of the information provided by the NBPP team, and the information she found on the NBPP website.[40]

We found no evidence that either King or Rosenbaum received guidance about the desired outcome in the case from the leadership offices in the Department or the White House. The only guidance they received was from the Associate Attorney General, who told them he would accept, without question, any decision by the CRT leadership that was not unconstitutional and that did not dismiss the entire case outright. We found no evidence to support the suggestion that the three defendants were dismissed for partisan political reasons.

We next considered whether CRT's decisions had a reasonable basis in fact and law. After reading the NBPP's April 28 draft motion and memorandum of law in support of default judgment, Rosenbaum and King were immediately and

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[40] Although King and Rosenbaum both stated that, after reviewing the available evidence, they did not believe the case should have been brought, those opinions were formed only after reviewing the initial draft papers and other information from the NBPP team in late April. *See* King Transcript at 61, 231-36; Rosenbaum Transcript at 215-18.

particularly concerned about the facts supporting the claims against the national defendants. They understood, as confirmed by the trial team and the Appellate Section, that the fact that the clerk of court had entered defaults against the defendants when they failed to answer the complaint did not ensure victory for the United States.[41] Instead, under Third Circuit law, to obtain a default judgment, the government had to demonstrate that it was entitled to such a judgment. Every CRT attorney involved in the NBPP matter believed, based upon a conversation with the district judge's clerk and the case law, that the court would hold an evidentiary hearing at which the government would have to demonstrate that it was entitled to the injunctive relief requested. Thus, in order to obtain default judgments against the national defendants, the government would be expected to present evidence at a hearing to support its allegations in the complaint that the national defendants managed and directed the actions of Samir Shabazz and Jackson.

Rosenbaum and King believed that there was insufficient evidence to prove, as alleged in the complaint, that the national defendants managed or directed the actions of the two individual defendants. In their opinion, the fact that the national organization had encouraged its members to go to the polls on election day was not a compelling fact, in the absence of any direction that the members should be armed or otherwise engage in intimidating or threatening behavior. In post-election interviews, Malik Zulu Shabazz claimed that more than 300 members had been deployed in several cities across the United States to ensure that the voting process went smoothly and to quell voter intimidation by white supremacists, but Zulu Shabazz did not indicate that the NBPP members were directed or encouraged to threaten or intimidate voters or those aiding voters. *See* J Memo at 7; I Memo at 3 n.3. Moreover, the NBPP team had uncovered no evidence that any NBPP members were at the polls anywhere other than Philadelphia.

Similarly, Rosenbaum and King did not share the trial team's view of Zulu Shabazz's alleged subsequent endorsement of the incident. King said she listened carefully to Zulu Shabazz's post-election interview with FOX News, and printed a transcript of the interview so that she could carefully consider his statements, and found them to be more equivocal than the NBPP team had represented to her. King Transcript at 119. King did not view Zulu Shabazz's statements as an endorsement of Samir Shabazz's behavior. *Id.* at 137-38. Moreover, Rosenbaum noted, even if Zulu Shabazz had endorsed the actions of the individual members after election day, that fact was not sufficient to prove that the national

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[41] The entry of default is a clerical action, signifying merely that a defendant has failed to respond to the complaint or otherwise appear in the case. Default judgment, on the other hand, is a judicial action, requiring the court to impose judgment based on the evidence and the law, often after an evidentiary hearing on contested issues.

defendants managed and directed the individual defendants.

When King and Rosenbaum discovered that the national organization had posted on its website, apparently the day after the election, a disclaimer, and later suspended the Philadelphia chapter for its actions on election day, they were convinced that the Department lacked sufficient evidence to prove its claims against the national defendants.

The Appellate Section, after identifying problems with the case against the national defendants,[42] ultimately recommended proceeding against them. That recommendation, however, was based largely on the fact that the claims against the national defendants had already been filed and that there was some evidence to support them. In her opinion, Appellate Chief Flynn acknowledged that the case against the national defendants was by far the most difficult to prove, and that, in light of First Amendment concerns, obtaining injunctive relief against the national defendants would be "a bit of a reach" and a "very close call." In light of that equivocal opinion, and the serious questions about the sufficiency of the evidence against the national defendants, we concluded that King and Rosenbaum had a basis in fact and law to decide to dismiss the national defendants.

For similar reasons, Rosenbaum, mindful that the government would have to prove its allegations against Jackson in an evidentiary hearing on the government's motion for default judgment, was concerned about the sufficiency of the evidence with regard to Jackson. In his review of the NBPP team's drafts, declarations, and memoranda, he could find no specific conduct or statements attributed to Jackson that could be viewed as threatening or intimidating, other than the incident in which Jackson and Samir Shabazz moved together in an attempt to block the path of poll worker [redacted]. Accordingly, Rosenbaum was concerned that the Department would be unable to prove allegations in the complaint that Jackson had made racial insults or threats, or that he had intimidated poll workers or voters. Rosenbaum found it significant that Jackson did not have a weapon; had poll watcher credentials[43] which entitled him to be

[42] Like King and Rosenbaum, the Appellate Section attorneys were concerned about the facts that the national defendants did not direct members to show up at the polls with weapons and that Zulu Shabazz's post-election endorsement was contradicted by the disclaimer posted on the NBPP's website.

[43] King and Rosenbaum both said that, although they knew that Jackson was a credentialed poll watcher, they did not learn until after the NBPP defendants were dismissed that Jackson's credentials were issued by the Democratic Party.

present at the polling place; reportedly resided in the building[44] and therefore was entitled to be present at the polling place; that, unlike Samir Shabazz, he was allowed to stay at the polling place by the police; and that there was no evidence that Jackson acted inappropriately after Samir Shabazz left the scene. Finally, with regard to the incident with [redacted], Rosenbaum had viewed an interview with [redacted] on election day, in which [redacted] described the incident but claimed he was not scared of the two NBPP members. In fact, [redacted] walked around Samir Shabazz and Jackson and entered the polling place. Therefore, Rosenbaum doubted that [redacted] would be a particularly compelling witness for the government. Rosenbaum acknowledged that an attempt to intimidate a poll worker is a violation of section 11(b) and that there was evidence that Jackson made such an attempt. Nevertheless, given the other allegations in the complaint against Jackson that Rosenbaum believed lacked evidentiary support, Rosenbaum recommended that the Department not pursue a default judgment against Jackson.

King and Rosenbaum told OPR that their decision making in the case was influenced by their belief that Coates and Popper had not been forthcoming with all pertinent evidence and facts. Both King and Rosenbaum said they believed that Coates and Popper inappropriately withheld relevant, material evidence regarding the NBPP website disclaimer and its suspension of the Philadelphia chapter.[45] Their belief was reinforced by their earlier experience with the *Missouri* case, in which they felt that Coates and Popper had failed to fully inform them of the background of the case and the specific pleading they were asked to review.[46]

Finally, King and Rosenbaum believed that in order to avoid successful challenge under the First Amendment, the relief sought against Samir Shabazz had to be more narrowly tailored. Once the national defendants were no longer in the case, King and Rosenbaum saw no basis for a nationwide injunction; to pass First Amendment scrutiny, the relief sought should be no more restrictive than necessary to enjoin the offending conduct. Because there was no evidence that Samir Shabazz had appeared or was likely to appear with a weapon at any polling place outside of Philadelphia, they limited the requested relief to the confines of the city. Likewise, they limited the geographic scope of the injunction

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[44] Although it turned out that Jackson did not reside in the building, the media incorrectly had reported on election day that he did, and King and Rosenbaum both mistakenly believed during the decision-making process that he was a resident at 1221 Fairmount Avenue.

[45] Coates and Popper adamantly denied that they had misled the CRT front office about the NBPP's disclaimer and suspension of the Philadelphia chapter. We make no findings about this issue, but merely note that King and Rosenbaum's beliefs about the incident influenced their decision making.

[46] Again, we make no findings on this issue, but note it only insofar as it bears on King's and Rosenbaum's decision making.

to prohibit Samir Shabazz from going within 100 feet of the polling place, rather than 200 feet as the NBPP team suggested, because they believed 100 feet was adequate in an urban setting. In addition, they followed customary CRT policy in placing a time limit on the requested relief. In accordance with their own First Amendment concerns and the opinion of the Appellate staff, they did not seek to enjoin Samir Shabazz from wearing the NBPP uniform, but only from bringing a weapon or engaging in other intimidating, threatening or coercive behavior at a polling place in Philadelphia. Rosenbaum and King, however, considered and adopted Coates's recommendations that the injunction be extended so as to encompass the next presidential election, and also to dismiss the complaint without prejudice so that the case could be re-filed if additional evidence were subsequently discovered.

We concluded that King and Rosenbaum had a reasonable basis under the facts and law to dismiss Jackson and tailor the relief sought against Samir Shabazz. Although it appears that the NBPP team had sufficient evidence to show that Jackson attempted to intimidate a poll worker, Rosenbaum was correct that the team did not have the type of specific evidence about Jackson that they did with regard to Samir Shabazz, and therefore could reasonably question whether the government could prove all of the allegations in the complaint pertaining to Jackson at an evidentiary hearing. Rosenbaum also was concerned that [redacted] might not be a compelling witness regarding the incident about him, given his insistence that he was not scared. Although the legislative history indicates that section 11(b) does not require evidence of a voter or poll worker who was subjectively intimidated, but only evidence of behavior that would be intimidating to a reasonable voter or poll worker, courts have frequently grafted additional requirements onto the elements of proof needed to prevail on a section 11(b) claim. *See supra* pp. 3-5 (discussing cases interpreting section 11(b)). Accordingly, we found that Rosenbaum's and King's concerns about the sufficiency of the evidence with regard to Jackson were not unreasonable or without a basis in fact and law.

We made no finding as to whether King and Rosenbaum reached the correct outcome in the NBPP case. Rather, we found that both the NBPP team and the CRT leadership made good faith, reasonable assessments of the facts and law and reached different conclusions. Because there was a reasonable basis for the outcome that the CRT leadership decided upon, after they made a careful and considered examination of the evidence and arguments presented to them by the NBPP team, and in the absence of evidence of any improper motive, we found they did not commit professional misconduct or exercise poor judgment, but rather acted appropriately in the exercise of their supervisory duties.

B. The NBPP Case Authorization Was Based on the Totality of the Evidence

In their July 9, 2009 letter, the congressmen noted that they were unaware of allegations that the initial filing of the complaint was improper, leading them to question whether the dismissal of three of the four defendants was improper. Accordingly, in investigating this case, OPR considered whether the decision to file the complaint was politically motivated or otherwise improper. We found no evidence that partisan political considerations played a role in the decision to investigate the NBPP incident and to file the civil complaint in the case.

The incident on election day in Philadelphia immediately and understandably caught the attention of CRT attorneys. There was general agreement among all the components involved, including CRT, the Criminal Division, and the Philadelphia USAO, that the presence at the entrance to a polling place of two men in the military-style uniforms of the NBPP, allegedly calling out racial slurs, while one of the men reportedly brandished a nightstick, was an incident worthy of further investigation as a potential violation of civil rights law. The fact that the men's actions were caught on videotape, which was widely distributed and reported in the national media, accentuated the visibility of the matter.

Although CRT's Criminal Section and the Philadelphia USAO initially opened criminal files on the matter, both Kappelhoff, then-Chief of the Criminal Section, and AUSA [redacted] ultimately determined that, as a practical matter, a criminal case of voter threats or intimidation would be difficult to prove beyond a reasonable doubt in the absence of an identified victim. Instead, they deferred to the Voting Section to proceed with its civil investigation, expecting that the Voting Section would keep them informed of the results of its investigation. Neither Kappelhoff, [redacted], nor anyone else we interviewed, suggested that the incident was not worthy of investigation.

The Voting Section attorneys assigned to the matter interviewed poll workers, election monitors, and police officers who they believed had seen and/or interacted with the NBPP members on election day, and reviewed publicly available information about the NBPP and its leadership's statements about the election day incident.[47] The Voting Section's NBPP team viewed the incident as a clear and compelling violation of section 11(b); they believed that the two NBPP

[47] The NBPP team did not identify or speak with any voters who were present at the polling place that day. Although the NBPP team pointed out that a proper interpretation of section 11(b) does not require proof that a voter was actually intimidated – only evidence that would lead the court to conclude that a reasonable person would have been intimidated – as a practical matter, the case would have been strengthened by the testimony of a voter.

members were at the polls in order to intimidate, threaten or coerce voters and those aiding voters. They had statements that the two men had moved together in an attempt to block a poll worker from entering the polling place. Their presence at the polling place, one of them brandishing a nightstick, was captured on videotape. Moreover, the NBPP's chairman gave an interview on FOX News shortly after election day in which he appeared to endorse the presence of the NBPP members at the Philadelphia polling place with a weapon because of the alleged presence of Aryan Nation members trying to intimidate voters.

Then-Acting AAG Becker told us that she found the facts and the law sufficiently compelling to warrant civil action. She remembered viewing the videotape of the two NBPP members and opined that they appeared intimidating. Based on the behavior of the NBPP members described by the poll watchers (standing together in front of the polling place in their military-style uniforms; Samir Shabazz tapping and pointing the nightstick menacingly; the men shouting racial slurs at bystanders) and the fact that the poll watchers opined that voters appeared to be intimidated, Becker thought the case was meritorious. She also gave weight to the evidence that the national organization encouraged its members to go to the polls and, after the fact, the national chairman endorsed the behavior exhibited by the Philadelphia members.[48]

Becker told us that she based her decision to file the lawsuit on the totality of the evidence, not political considerations, and we found her to be credible. Becker noted that during the time period between the election and the end of the Bush Administration, she also had authorized two criminal cases against individuals who acted with violence against Obama supporters.

We found that Acting AAG Becker based her decision on her assessment of the law and facts of which she was aware at the time she made her decision in early January 2009. For these reasons, we found no basis to conclude that the suit was brought for political purposes. Accordingly, based upon the results of our investigation, we concluded that the decision to file suit against the four defendants in the NBPP case was based upon the law and the facts as presented by the NBPP team.

C. OPR Found No Evidence That the Race of the Defendants or Victims in this Matter Played a Role in the Decision to Dismiss Three Defendants

During the course of our investigation, Coates and [redacted] alleged that King

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[48] Becker believed that the disclaimer by the national organization and its suspension of the Philadelphia chapter was posted on the NBPP website after the lawsuit was filed. She did not remember learning of a disclaimer posted before the lawsuit was filed.

and Rosenbaum reached the decision they did because of their ideological opposition to the case. Coates and [redacted] contended that King and Rosenbaum, along with others in CRT, were opposed to the race-neutral enforcement of the Voting Rights Act, including section 11(b), and therefore were opposed to this case in which the defendants were African-American and some, but not all, of the poll worker victims were white. We found no evidence to support this allegation.

As noted above, while witnesses told us that they had heard some CRT attorneys express the view that the Department's resources should be used to enforce the civil rights laws for the benefit of racial minorities, no one with whom OPR spoke espoused that view. Instead, many witnesses said that was a view that was most frequently heard when the Division brought the *Brown* case. The witnesses explained that hostility to the *Brown* case stemmed from the fact that after five years in which no section 2 cases were brought to remedy discrimination against racial minority voters, the first one approved by the Bush Administration was one to benefit white voters.[49] We found no evidence to suggest that such alleged hostility was the motivating factor behind the decision in the NBPP case. Instead, we found credible King and Rosenbaum's explanation of their factual and legal concerns about the sufficiency of the evidence to support the relief sought. Moreover, contrary to Coates's allegation, we did not find that discovery of the disclaimer on the NBPP website was a pretext for dismissing the national defendants. Rather, we found that the disclaimer posed a grave concern to King and Rosenbaum. They learned late in the decision-making process that the NBPP website carried the disclaimer of the Philadelphia members' conduct on election day possibly as early as the day after the election. That discovery, in their view, undermined evidence of the national defendants' liability for managing and directing the individual defendants and the need for a nationwide injunction. In addition, it further eroded their trust in Coates and Popper to be forthcoming about potential weaknesses in the case.

We also considered whether, as alleged by Coates and [redacted], DAAG Fernandes's remarks at brown bag lunch meetings indicated that she opposed race-neutral enforcement of section 11(b) or the Voting Rights Act generally and, if so, whether that provided evidence of a policy objective of the Civil Rights Division under the Obama Administration that may have influenced King or Rosenbaum. We credited Fernandes's explanation of her remarks -- that she wanted to focus on traditional civil rights work -- to mean that she did not want to politicize enforcement of the Voting Rights Act and did not want to bring cases to benefit any one constituency group. Her remarks about returning to traditional civil rights work, which were made in the fall of 2009, could not have been a factor in a decision made two months before she assumed her position as DAAG and

[49] OPR makes no finding regarding the accuracy of these claims.

several months before she made the remarks. Thus, we found that Fernandes's remarks provided no evidence of an underlying ideological objective of the Division and shed no light on the decision makers' motivation in the NBPP case.

CONCLUSION

Based on the results of our investigation, we concluded that Perrelli, Hirsch, King, and Rosenbaum did not commit professional misconduct or exercise poor judgment in the NBPP case, but rather acted appropriately in the exercise of their supervisory duties. We found that King, a 28-year career Department employee, was the decision maker; that she primarily relied upon the advice of Rosenbaum, a 30-year career CRT supervisory attorney, and also conferred with Hirsch and Voting Section supervisory attorneys Coates and Popper; and that she kept the Associate Attorney General apprised of the developments in the decision making process.

Both King and Rosenbaum credibly contended that the decision to dismiss the three defendants and to limit injunctive relief against Samir Shabazz was based solely on their assessment of the law and facts. We found that neither King nor Rosenbaum received direction about how to resolve the case from the Department's leadership offices or the White House. The only guidance they received was from Perrelli, who told them that he would accept, without question, any resolution of the case that was not unconstitutional and that did not dismiss the entire case outright. Accordingly, we found no evidence to conclude that the three defendants were dismissed for partisan political reasons.

We found that CRT's resolution of the case had a reasonable basis in fact and law. King and Rosenbaum, as well as the NBPP team and CRT's Appellate Section, understood that the fact that the court had entered defaults against the defendants when they failed to answer the complaint did not ensure victory for the United States. Instead, under Third Circuit law, to obtain a default judgment, the government had to show that it was entitled to such a judgment. Based on the Third Circuit standard and a conversation with the judge's clerk, every CRT attorney involved in the NBPP matter believed that the court would hold an evidentiary hearing at which the government would have to prove the allegations in its complaint and show that it was entitled to the requested injunctive relief.

King and Rosenbaum believed that there was insufficient evidence to prove the allegation in the complaint that the national defendants NBPP and Zulu Shabazz managed or directed the actions of the two individual defendants. They noted that the national defendants, while encouraging members to go to the polls on election day, did not direct members to take weapons or otherwise engage in intimidating or threatening behavior. King did not find Zulu Shabazz's post-election statements in which he allegedly endorsed the actions taken by Jackson

and Samir Shabazz in Philadelphia to be sufficient proof that the national organization managed or directed the individual defendants. In addition, in King's and Rosenbaum's view, the fact that the national organization posted on its website, apparently the day after the election, a disclaimer disavowing the actions of the individual members in Philadelphia, and later purported to suspend the Philadelphia NBPP chapter after the United States filed suit against them, presented further impediments to proving the allegations in the complaint. Although the CRT Appellate Section ultimately advised pursuing default judgment against the national defendants, it expressed reservations as to whether the government would be successful in obtaining injunctive relief against those defendants and called the Voting Section's case against the national defendants "a bit of a reach" and "a very close call."

Likewise, Rosenbaum was concerned that the government did not have sufficient evidence to prove all of the allegations in the complaint against Jackson. Rosenbaum acknowledged that the [redacted] Declaration, which stated that Jackson and Samir Shabazz moved together to block his entrance to the polling place, provided evidence of an apparent attempt to intimidate a poll worker. Rosenbaum, however, doubted that [redacted] would be a convincing witness, based on a television interview in which [redacted] stated that he was not scared of the NBPP members and had walked past them to enter the polling place. Furthermore, Rosenbaum noted that the NBPP team had no direct evidence that Jackson made racial threats or had otherwise engaged in specific conduct that could be viewed as threatening or intimidating voters, or attempting to do so. In making his recommendation to dismiss claims against Jackson, Rosenbaum relied on the facts that Jackson did not have a weapon; had poll watcher credentials which entitled him to be at the polling place; reportedly resided in the building (a fact later determined to be incorrect) and therefore was entitled to be present at the polling place; was allowed to remain at the polling place by the Philadelphia police; and that there was no evidence that Jackson acted inappropriately after Samir Shabazz left the scene. For these reasons, Rosenbaum recommended dismissing the claims against Jackson, and King agreed.

King and Rosenbaum believed that, in order to avoid a First Amendment challenge, the relief sought against Samir Shabazz would have to be more limited than what the NBPP team proposed. Once the national defendants were dismissed, King and Rosenbaum concluded that there would be no basis for a nationwide injunction. In the absence of any evidence that Samir Shabazz was likely to appear at any polling place outside of Philadelphia, they decided to limit the injunctive relief to the confines of the city. They also limited the radius of the injunction to 100 feet from a polling place, rather than 200 feet, based on their belief that a 100-foot radius in an urban setting would be sufficiently restrictive to protect voters and poll workers. King and Rosenbaum also followed CRT policy in setting a time limit on the requested relief. King and Rosenbaum shared

concerns raised by the Appellate Section that enjoining wearing of the NBPP uniform raised First Amendment problems, and they therefore did not seek to enjoin Samir Shabazz from wearing the uniform, but only from appearing with a weapon or engaging in other intimidating, threatening, or coercive behavior at a polling place.

Coates recommended that, if the injunction had to be limited temporally, that it be extended at least through the next presidential election in 2012. King accepted Coates's recommendation and agreed to extend the injunction until 2013. In addition, Coates requested that the dismissal of the three defendants be without prejudice, thereby allowing the government to re-file claims against those defendants if additional evidence were subsequently discovered. King agreed to this request as well.

For these reasons, we concluded that King's decision to dismiss three of the defendants and to seek narrowly-tailored injunctive relief against the fourth was based on a good faith assessment of the law and the evidence and had a reasonable basis. We made no finding as to whether King and Rosenbaum reached the correct outcome in the case. Rather, we found that both the NBPP team (Coates, Popper, [redacted], and [redacted] and the CRT leadership (King and Rosenbaum) made good faith, reasonable assessments of the facts and law, but reached different conclusions.

We also concluded that the decision to initiate the NBPP case was based upon a good faith assessment of the facts and the law and had a reasonable basis. We found no evidence that partisan politics was a motivating factor in authorizing the suit against the four defendants. Instead, then-Acting AAG Becker relied upon the totality of the evidence in authorizing the suit against the individual and national defendants.

Finally, we found no evidence to support allegations that the decision makers were influenced by the race of the defendants, or any other improper considerations. Statements made by DAAG Fernandes in the fall of 2009 did not provide evidence of any improper motive by the CRT leadership and, since Fernandes joined the Department months after the NBPP case was resolved, provided no insight into the decision makers' motivation in this case. Accordingly, we consider this matter to be closed.