

September 24, 2010

Dear Mr. Blackwood:

This is in response to your letter of September 16, 2010, which enclosed excerpted portions of a draft report of the U.S. Commission on Civil Rights (draft report) and invited written comments from the Department of Justice. We appreciate your interest in receiving our comments.

At the outset, we note that the Department's review of the document was hampered by our inability to view the excerpted portions in full context, and we regret that you denied our request, made in a telephone conversation on September 20, for a complete copy of the draft report.

Moreover, we are precluded by longstanding Department of Justice policy from commenting on portions of the draft report that purport to describe confidential internal deliberations within the Department, based on the unauthorized disclosure of Department records and, in several instances, hearsay from anonymous sources. To address those portions of the report would require us to undermine the well-established confidentiality interests in pre-decisional deliberations that are integral to the Department's discharge of its law enforcement responsibilities. As a result, our silence on those portions of the report should in no way be construed as confirmation of the accuracy of anything they contain.

Despite these constraints, we have reviewed the portions of the report provided to the Department and have the following comments. Overall, we note that the selected portions of the draft we received rely heavily on unsubstantiated press accounts, while largely ignoring the more than 4,000 pages of documents and interrogatory answers that the Department provided to the Commission in connection with this matter.

In addition, we are aware of the Commission's press release indicating that it intends to take the testimony of Department of Justice employee Christopher Coates. As we have previously informed you, Mr. Coates has not been authorized to testify before the Commission. Testimony by Mr. Coates regarding this matter implicates the Department's longstanding institutional interest in protecting deliberative communications among Department attorneys. Furthermore, we do not believe that Mr. Coates, who has been on detail to the U.S. Attorney's Office for the District of South Carolina since January 2010, is an appropriate witness to discuss the Civil Rights Division's current enforcement policies. To the extent that the Commission revises its report to include any additional information relevant to the Department's litigation of this action, however, the Department requests the opportunity to comment on the revised draft.

More specific comments are set forth below. They are not intended to be exhaustive, but they illustrate the kinds of serious inaccuracies, distortions and other problems that, in our view, characterize the draft.

- Significant information about the reasons for the Department's decisions, which was set forth in the May 14, 2010 written statement of Assistant Attorney General for Civil Rights Thomas E. Perez to the Commission (Perez Statement), is omitted altogether from the draft. For example, as the Assistant Attorney General indicated, the Department had

the legal and ethical obligation to ensure that any relief sought was consistent with the law and supported by the evidence, even when the defendants did not appear (*id.* at 5). He also explained—with citation to authority—the basis for the Department’s conclusion that a nationwide injunction against Minister King Samir Shabazz was not legally supportable (*id.* at 7), and the reasons for the Department’s dismissal of claims against the New Black Panther Party and the national head of the party (*id.* at 6). None of this is reflected in the draft report. Inexplicably, the report does not discuss the legal precedent the Department has identified explaining the reasons for the dismissal of claims against the national Party and its leader, and for the scope of its request for relief against the sole defendant who brought a nightstick to the polls. This legal precedent goes to the heart of the Commission’s inquiry in this matter and therefore merits serious and detailed consideration.

- The draft inaccurately describes the acting Assistant Attorney General for Civil Rights who made the decision, and the acting Deputy Assistant Attorney General involved in the decision, as “political appointees” when the decision was made (draft report at 17-18). The draft bases this conclusion on an article in *The Weekly Standard* that the draft report says “argued that” these officials were political appointees. To the contrary, it cannot be disputed that both Loretta King and Steven Rosenbaum are long-time career civil service employees who remained career employees while serving in the capacities of Acting Assistant Attorney General and Acting Deputy Assistant Attorney General, respectively. Ms. King was one of a number of career employees designated, pursuant to 5 U.S.C. § 3345, *et seq.*, to perform the functions and duties of a Senate-confirmed Department of Justice component head in an acting capacity during the presidential transition before political appointees were named to fill those positions. Mr. Rosenbaum, who like Ms. King was in the career Senior Executive Service (SES), was assigned to perform temporarily the duties of another SES position – Deputy Assistant Attorney General – that can be filled, even on a permanent basis, by a career (as well as a non-career) employee. As with any career employee who is asked to serve in an acting role, their status as career employees did not change during that period and they are not properly characterized as political appointees.
- In the same section, the draft states, “If no plausible explanation is offered for overruling numerous career lawyers, it raises questions as to whether the purported explanation is accurate and/or legitimate” (draft report at 17). However, the Department has indeed explained the decision to dismiss some of the claims in the complaint through the Department’s answers to interrogatories and the testimony of the Assistant Attorney General for Civil Rights; *see, e.g.*, Perez Statement at 5-8. As Mr. Perez’s statement notes, we believe that this decision “reflect[ed] the kind of good faith, case-based assessment of the strengths and weaknesses of claims that the Department makes every day.” (*Id.* at 8.) The Commission’s unfounded decision to ignore explanations such as these does not negate their accuracy or legitimacy.
- The draft offers only a brief, out-of-context quotation from Assistant Attorney General Perez’s oral testimony describing the basis for the conclusion that the claims against the New Black Panther Party and its chairman lacked sufficient evidentiary support (draft

report at 16-17). The factual and legal bases for this conclusion are set forth more fully in Mr. Perez's written statement on pages 5-6, in which he explained that the claims against these defendants were dismissed because of the absence of proof that the party or its chairman directed or controlled unlawful activities at the polls, and the existence of evidence -- the statement on the party's website disavowing the conduct and its notice suspending the Philadelphia chapter -- contradicting the claim that they approved or endorsed such conduct.

- The chronology appended to the draft omits important facts, such as the New Black Panther Party's disavowal, on its website, dated November 2008, of conduct at the Philadelphia polling place, and its notice suspending the Philadelphia chapter in January 2009. The chronology also does not mention the fact that, as of May 2009, the Department had information indicating that the party's notice condemning the conduct at the Philadelphia polls had been posted on the Party's website before the Department filed suit in this matter (*see* Perez Statement at 6).
- The draft asserts that the Commission "has not received any evidence of management-level communications and decision making about the NBPP litigation other than . . . statements submitted by the Department," and then dismisses those statements because they cannot be independently verified (draft report at 20). Although the Department is not at liberty to publicly disclose internal deliberations regarding law enforcement decisions, the Department's answers to the Commission's interrogatories and production of relevant documents set forth information about the Department's decision-making. For instance, the Civil Rights Division's Weekly Reports were provided by the Department and appear to be precisely the kind of evidence of management-level communications to which the draft report refers. We believe that the Department's answers to the Commission's interrogatories and production of other relevant documents deserve recognition and fair consideration, yet they are not fully discussed in the draft report.
- The assertion that a request within the Civil Rights Division for analysis from the Division's appellate section is "an extraordinary step" (draft report at 10) is incorrect. As noted in the Department's answers to the Commission's interrogatories, it is not uncommon for the appellate section to be consulted on potential trial positions.
- The lack of balance in the draft's presentation is manifested by all of the shortcomings we have identified above, and by others as well. For example, although there is a footnote stating that the "legal expertise and professionalism of Mr. Coates has been recognized" (draft report at 2, n. 2), there is no similar statement regarding other Department employees named in the report, such as Ms. King and Mr. Rosenbaum, both of whom have received numerous awards during their careers in the Department of Justice. At various times in his 32-year career in the Civil Rights Division, Mr. Rosenbaum has served as Chief of the Housing and Civil Enforcement Section, the Special Litigation Section and the Voting Section, respectively. He also has worked in the Appellate Section and what is now the Employment Litigation Section. During both Republican and Democratic Administrations, he has handled personally some of the most

complicated cases in the Division and received numerous awards, including the Division's highest award for litigation, the Walter W. Barnett Award. During her tenure in the Civil Rights Division, Loretta King has not only served as Acting Assistant Attorney General, she has worked in the Employment Litigation Section, the Voting Section and as a Deputy Assistant Attorney General in the Civil Right Division's Front Office, and also has received numerous performance awards.

- Numerous smaller errors also appear in the draft. For example, the Associate Attorney General's name is repeatedly misspelled (draft report at 19, 20) and Julie Fernandes is one of four Deputy Assistant Attorneys General for Civil Rights, and thus it is incorrect to refer to her as "the" Deputy (draft report at 25).

Finally, we object to the inclusion of references to Department employees who have not been involved in the litigation of *United States v. New Black Panther Party for Self-Defense*, who are named solely on the basis of claims by a former Department employee regarding which he did not purport to have any first-hand knowledge (*see, e.g.*, draft report at 23). We request that their names be removed.

Regrettably, the concerns identified above lead us to question the impartiality of this draft and whatever conclusions reached by the Commission arrived based on it. Most importantly, if the report is released in anything like its current form, it will fail to provide a complete, objective or credible examination of the issues it addresses.

Thank you for your consideration of our concerns in this matter. We request that the Commission revise the draft in accordance with our comments and append this letter to its final report.

Sincerely,

Joseph H. Hunt
Federal Programs Branch
Civil Division