Testimony of Christopher Coates

U.S. Commission on Civil Rights

September 24, 2010

Good morning, Chairman Reynolds, Vice-Chair Thernstrom, and other members of this Commission. I am here to testify about the Department of Justice's (DOJ) final disposition of the New Black Panther Party (NBPP) case and the hostility in the Civil Right Division (CRD) and Voting Section toward the equal enforcement of some of the federal voting laws.

This Commission served me with a subpoena in December 2009 to testify in its investigation of the DOJ's actions in the *NBPP* case. Since service of that subpoena, I have been instructed by DOJ officials not to comply with it. I have communicated with these officials, including Assistant Attorney General for Civil Rights, Thomas Perez, and expressed my view that I should be allowed to testify concerning this important civil rights enforcement issue. I have pointed out that I have personal knowledge that is relevant to your investigation - - - personal knowledge that Mr. Perez does not have - - - because he was not serving as AAG for Civil Rights at the time of the final disposition of the *NBPP* case. My requests to be allowed to testify and your repeated requests to the DOJ for it to allow me to respond to the lawfully-issued subpoena have all been denied.

Furthermore, I have reviewed the written statements and the testimony that Mr. Perez and others from the DOJ have given to this Commission and to Congress concerning the CRD's enforcement activities, including its enforcement activities in the *NBPP* case. In addition, I have reviewed Mr. Perez' August 11, 2010 letter to this Commission in which he again denied your request that I be allowed to testify before you and in which he made various representations concerning the CRD's enforcement practices. Based upon my own personal knowledge of the events surrounding the CRD's actions in the *NBPP* case and the atmosphere that has existed and continues to exist in the CRD and in

the Voting Section against fair enforcement of certain federal voting laws, I do not believe these representations to this Commission accurately reflect what occurred in the *NBPP* case and do not reflect the hostile atmosphere that has existed within the CRD for a long time against race-neutral enforcement of the Voting Rights Act (VRA).

In giving this testimony, I do not claim that Mr. Perez has knowingly given false testimony to either this Commission or to Congress. Indeed, as I have previously indicated, Mr. Perez was not present in the CRD at the time the decisions were made in the *NBPP* case, and he may not be fully aware of the long-term hostility to the race-neutral enforcement of the VRA in either the CRD or in the Voting Section. Instead, my testimony claims that DOJ's public representations to this Commission and other entities do not accurately reflect what caused the dismissals of three defendants in the *NBPP* case and the very limited injunctive relief obtained against the remaining defendant, and they do not accurately describe the long-standing opposition in the CRD and in the Voting Section to the equal enforcement of the provisions of the VRA.

I did not lightly decide to comply with your subpoena in contradiction to the DOJ's directives not to testify. I had hoped that this controversy would not come to this point; however, I have determined that I will no longer fail to respond to your subpoena and thereby fail to provide this Commission accurate information pertinent to your investigation. Quite simply, if incorrect representations are going to successfully thwart inquiry into the systemic problems regarding race-neutral enforcement of the VRA by the CRD - - - problems that were manifested in the DOJ's disposition of the *NBPP* case - - - that end is not going to be furthered or accomplished by my sitting silently by at the direction of my supervisors while incorrect information is provided. I do not believe that I am professionally, ethically, legally, much less, morally bound to allow such a result to occur. In addition, in giving this testimony I am claiming the protections of all applicable federal whistleblower statutes.

On the other hand, in giving this testimony I will not answer questions which will require me to

disclose communications in the NBBP case that are protected by the deliberative process privilege. That privilege that the DOJ has asserted in this matter can, in my opinion, be protected while at the same time, I can provide you information that you need to conduct your investigation - - - indeed, first hand information you will not have if I do not testify - - - that respects the privilege.

THE *IKE BROWN* CASE

To understand what occurred in the *NBPP* case, those action must be placed in the context of *United States v. Ike Brown et al.* Prior to the filing of the *Brown* case in 2005, the CRD had *never* filed a single case under the VRA in which it claimed that white voters had been subjected to racial discrimination by defendants who were African American or members of other minority groups. Moreover, the CRD and the Voting Section had never objected to any voting change under the preclearance requirement of Section 5 of the VRA on the ground that the change had a racially discriminatory purpose or effect on white voters. (No such objection, even in jurisdictions that have majority-minority populations, has been interposed to date. I will return to that subject later in my presentation.) I am very familiar with the reaction of many employees, both line and management attorneys and support staff in both the CRD and the Voting Section, to the *Ike Brown* investigation and case because I was the attorney who initiated and led the investigation in that matter and was the lead trial attorney throughout the case in the trial court.

Opposition within the Voting Section was widespread to taking actions under the VRA on behalf of white voters in Noxubee County, MS, the jurisdiction in which Ike Brown is and was the Chairman of the local Democratic Executive Committee. In 2003, white voters and candidates complained to the Voting Section that elections had been administered in a racially discriminatory manner and asked that federal observers be sent to the primary run-off elections. Career attorneys in the Voting Section recommended that we not even go to Noxubee County for the primary run-off to do election coverage,

but that opposition to going to Noxubee was overridden by the Bush Administration's CRD Front Office. I went on the coverage and while traveling to Mississippi, the Deputy Chief who was leading that election coverage asked me, "can you believe that we are going to Mississippi to protect white voters?" What I observed on that election coverage in Noxubee County was some of the most outrageous and blatant racially discriminatory behavior at the polls committed by Ike Brown and his allies that I have seen or had reported to me in my thirty three-plus years as a voting rights litigator. A description of this wrongdoing is well summarized in Judge Tom Lee's opinion in that case, which is reported at 494 F. Supp. 2d 440 (2007) and in the Fifth Circuit Court of Appeals' opinion affirming the judgment and injunctive relief against Mr. Brown and the local Democratic Executive Committee, which is reported at 561 F. 3d 420 (2009).

Sometime, as best I recall, in the winter of 2003-04 I wrote a preliminary memorandum summarizing the evidence we had to that point and made a recommendation as to what action to take in Noxubee County. In that memorandum, I recommended that the Voting Section go forward with an investigation under the VRA and argued that a civil injunction against Ike Brown and the local Democratic Executive Committee was the most effective way of stopping the pattern of voting discrimination that I had observed. I forwarded this memorandum to Joe Rich who was the Chief of the Voting Section at that time. I later found out that Mr. Rich had forwarded the memorandum to the CRD Front Office, but he had omitted the portion of the memorandum in which I discussed why it was best to seek civil injunctive relief in the *Brown* case. Because I am aware that Mr. Rich and Mr. Hans von Spakovsky have filed conflicting affidavits on this point with this Commission, I believe that I am at liberty to address this issue without violating DOJ privileges.

I want to underscore that my memorandum in which Mr. Rich omitted portions was not the subsequent justification memorandum that sought approval to file the case in Noxubee County, but was a preliminary memorandum that sought permission to go forward with the investigation. Nevertheless,

it is my clear recollection that Mr. Rich omitted a portion of my memorandum - - - a highly unusual act - - - and that I was later informed by the Division Front Office that Mr. Rich had stated that the omission was because he did not agree with my recommendation that the investigation needed to go forward or that a civil injunction should be sought. Nevertheless, approval to go forward with the investigation was obtained from the Bush Administration CRD Front Office in 2004.

Once the full investigation into Ike Brown's practices commenced, opposition to it by career personnel in the Voting Section was widespread. Several examples will suffice. I talked with one career attorney with whom I had previously worked successfully in a voting case and ask him whether he might be interested in working on the *Ike Brown* case. He informed me in no uncertain terms that he had not come to the Voting Section to sue African American defendants. One of the social scientists who worked in the Voting Section and whose responsibility it was to do past and present research into a local jurisdiction's history flatly refused to participate in the investigation. On another occasion, a Voting Section career attorney informed me that he was opposed to bringing voting rights cases against African American defendants, such as in the *Ike Brown* case, until we reached the day when the socio-economic status of blacks in Mississippi was the same as the socio-economic status of whites living there. Of course, there is nothing in the statutory language of the VRA that indicates that DOJ attorneys can decide not to enforce the racial-neutral prohibitions in the Act against racial discrimination or intimidation until socio-economic parity is achieved between blacks and whites in the jurisdiction in which the cases arises.

But with the help of one attorney and one paralegal who was new to the Voting Section, and the support of the CRD Front Office, we were able to investigate and bring suit. By the time the case went into discovery and to trial in 2007, the Bush Administration had hired some attorneys, such as Christian Adams and Joshua Rogers, who did not oppose working on lawsuits of this kind. They and I were able to complete discovery and try the case and win and obtain meaningful injunctive relief, including the

removal of Ike Brown from his position as Superintendent of the Democratic Primary elections. However, I have no doubt that this investigation and case would not have gone forward if the decision had been ultimately made by the career managers in the Voting Section when the case was first approved for investigation and then filing.

A regrettable incident occurred during the trial of the case. A young African American who worked in the Voting Section as a paralegal volunteered to work on the *Ike Brown* case, and he later volunteered to work on the *NBPP* case. Because of his participation in the *Ike Brown* case, he and his mother who was an employee in another Section of the CRD were harassed by an attorney in that other Section and by an administrative employee and a paralegal in the Voting Section. I reported this to the Bush Administration CRD Front Office, and the harassment was addressed.

But even after the favorable ruling in the *Ike Brown* case, opposition to it continued to occur. At a meeting with CRD management in 2008 concerning preparations for the general election, I pointed to the ruling in the *Ike Brown* case as precedent supporting race-neutral enforcement of the VRA. Mark Kappelhoff, then Chief of the CRD's Criminal Section, complained that the *Brown* case had caused the CRD problems in its relationship with civil rights groups. Mr. Kappelhoff was correct in claiming that a number of these groups are opposed to the race-neutral enforcement of the VRA, that they only want the Act enforced for the benefit of racial minorities, and that they had complained bitterly about the *Ike Brown* case. But of course, what Mr. Kappelhoff had not factored in his criticism of the *Brown* case was that the primary role of the CRD is to enforce the civil rights laws enacted by Congress, not to serve as a "crowd pleaser" for many of the civil rights groups.

Many of those groups on the issue of race-neutral enforcement of the VRA frankly have not pursued the goal of equal protection of law for all people. Instead, many of these groups act, as they did in the *Brown* case, not as civil rights groups, but as special interest lobbies for racial and ethnic minorities and demand, not equal treatment, but enforcement of the VRA only for racial and language

minorities. Such a claim for unequal treatment is the ultimate demand for preferential racial treatment.

When I became Chief of the Voting Section in 2008 and because I had experienced, as I have described, employees in the Voting Section refusing to work on the *Ike Brown* case, I began to ask applicants for trial attorney positions in their job interviews whether they would be willing to work on cases that involved claims of racial discrimination against white voters, as well as cases that involved claims of discrimination against minority voters. For obvious reasons, I did not want to hire people who were politically or ideologically opposed to the equal enforcement of the voting statutes the Voting Section is charged with enforcing. The asking of this question in job interviews did not ever, to my knowledge, cause any problems with the applicants to whom I ask that question, and in fact every applicant to whom I asked the question responded that he or she would have no problem working on a case involving white victims such as in the *Ike Brown* case.

However, word that I was asking applicants that question got back to Loretta King. In the spring of 2009, Ms. King, who by then had been appointed Acting AAG for Civil Rights by the Obama Administration, called me to her office and specifically instructed me that I was not to ask any other applicants whether they would be willing to, in effect, race-neutrally enforce the VRA. Ms. King took offense that I was asking such a question of job applicants and directed me not to ask it because she does not support equal enforcement of the provisions of the VRA and had been highly critical of the filing and civil prosecution of the *Ike Brown* case. From Ms. King's view, why should I ask that question when a response that an applicant would not be willing to work on a case against minority election officials would not in any way, in her opinion, weigh against hiring that applicant to work in the Voting Section.

The election of President Obama brought to positions of influence and power within the CRD many of the very people who had demonstrated hostility to the concept of equal enforcement of the VRA. For example, Mr. Kapplehoff, who had complained in 2008 that the *Brown* case had caused

problems with civil rights groups, was appointed as the Acting Chief of Staff for the entire CRD. And Loretta King, the person who forbid me even to ask any applicants for a Voting Section position whether he or she would be willing to enforce the VRA in a race-neutral manner, was appointed as Acting Assistant Attorney General for Civil Rights.

Furthermore, one of the groups who had opposed the CRD's civil prosecution of *Ike Brown* case the most adamantly was the NAACP Legal Defense Fund (LDF), through its Director of Political Participation, Kristin Clark. Ms. Clarke has spent a considerable amount of her time attacking the CRD's decision to file and prosecute the *Ike Brown* case. Grace Chung Becker, the Acting AAG for Civil Rights during the last year of the Bush Administration, and I were involved in a meeting in the fall of 2008 with representatives of a number of civil rights organization concerning the Division's preparations for the 2008 general election. At this meeting Ms. Clarke spent considerable time criticizing the Division and the Voting Section for bringing the *Brown* case when, in fact, the district court had already ruled in the case. Indeed, it was reported to me that Ms. Clarke approached an African American attorney who had been working in the Voting Section for only a short period of time in the winter of 2009 before the dismissals in the *NBPP* case and ask that attorney when the *NBPP* case was going to be dismissed. The Voting Section attorney to whom I refer was not even involved in the *NBPP* case. This reported incident led me to believe in 2009 that LDF Political Participation Director, Ms. Clarke, was lobbying for the dismissal of the *NBPP* case.

THE DECISION TO DISMISS AND TO LIMIT INJUNCTIVE RELIEF IN THE *NBPP* CASE

It was within this atmosphere, with these managers, and with pressure being applied by an organization - - - NAACP LDF - - - that is close to the Obama Administration's CRD management, that the decision to gut the *NBPP* case was made. Although there have been recent reports that indicate that senior political appointees at higher levels in the Department were involved in the *NBPP* case, it was

Ms. King, along with her Deputy, Steve Rosenbaum, who the Justice Department has claimed made the decision to dismiss three of the party-defendants in the case and ordered the limitation on the broader injunctive relief recommended by both Voting Section and Appellate Section attorneys against the one remaining defendant.

It is my opinion that this disposition of the *NBPP* case was ordered because the people calling the shots in May 2009 were angry at the filing of the *Ike Brown* case and angry at our filing of the *NBPP* case. That anger was the result of their deep-seated opposition to the equal enforcement of the VRA against racial minorities and for the protection of whites who have been discriminated against. Ms. King, Mr. Rosenbaum, Mr. Kappelhoff, Ms. Clarke, a large number of the people who work in the Voting Section and the CRD, and many of the liberal private groups that work in the civil rights field believe, incorrectly but vehemently, that enforcement of the protections of the VRA should not be extended to white voters but should be limited to protecting racial, ethnic and language minorities.

The final disposition of the *NBPP* case, even in the face of a default by the defendants, was caused by this incorrect view of civil rights enforcement, and it was intended to send a direct message to people inside and outside the CRD. That message is that the filing of voting cases like the *Ike Brown* and the *NBPP* cases would not continue in the Obama Administration. The disposition of the *NBPP* case was not required by the facts developed during the case or the applicable law, as has been claimed, but was because of this incorrect view of civil rights enforcement that is at war with the statutory language in the VRA and with racially fair enforcement of federal law.

FAILURE TO ENFORCE SECTION 5

If anyone doubts that CRD and the Voting Section have failed to enforce the VRA in a race-neutral manner, one only has to look at the enforcement of the Section 5 preclearance requirements. Those requirements mandate that federal preclearance for voting changes within the covered

jurisdictions be obtained for any covered change and that preclearance not be given for changes that have a racially discriminatory purpose or effect. The statutory language of Section 5 speaks in terms of protecting all voters from racial discrimination. But the Voting Section has *never* interposed an objection under Section 5 to a voting change on the ground that it discriminated against white voters in the forty-five (45) year history of the Act.

This failure includes no objections in the many majority-minority jurisdictions in the covered states. Indeed, the personnel in the Voting Section's unit which handles Section 5 submissions are instructed only to see if the change discriminates against racial, ethnic, and language minority voters. This practice of not enforcing Section 5's protections for white voters includes jurisdictions, such as Noxubee County, Mississippi where the *Ike Brown* case arose, where white voters are in the racial minority. It is in those jurisdictions the Voting Section's failure to apply Section 5's protections for the white minority is particularly problematic. On two occasions, while I was Chief of the Voting Section, I tried to persuade officials at the CRD level to change this policy so that white voters would be protected by Section 5 in appropriate circumstances, but to no avail. I believe that present management in both the CRD and the Voting Section are opposed to race-neutral enforcement of Section 5 and continue to enforce those provisions in a racially selective manner.

REASONS GIVEN BY THE DOJ FOR ITS ACTIONS IN *NBPP* CASE

As I have indicated, I am not going to testify about the statements made during my meetings with Ms. King and Mr. Rosenbaum, because of the DOJ's assertion of the deliberative process privilege. However, the DOJ and Mr. Perez have publicly articulated the reasons for the disposition of the *NBPP* case, and I will therefore address here several of these publicly stated reasons for dismissals of three of the defendants and the limitation on the injunctive relief.

The primary reason cited by the CRD for not obtaining injunctive relief against Black Panther

Jerry Jackson who stood at the Philadelphia polling place in uniform with follow Panther King Samir Shabazz , but without a weapon, was that a Philadelphia police officer who came to the polling place made the determination that King Samir Shabazz had to leave the polling place, but that Black Panther Jackson could stay because he was a certified Democratic Party poll watcher. During my thirteen and one-half (13 1/2) years in the Voting Section, I cannot remember another situation where the decision not to file suit under the VRA, much less to dismiss pending claims and parties, as in the NBPP case, was made in whole or in part on a determination of a local police officer. In my experience, officials in the Voting Section and the CRA always reserved for themselves, and correctly so, the determination as to what behavior constitutes a violation of federal law, and what does not. One of the reasons for this federal preemption of the determination of what constitutes a VRA violation is that a local police officer is not normally trained in what constitutes a VRA violation. In addition, in the Philadelphia Police Incident Report provided to this Commission, the Philadelphia police officer who came to the polling place did not determine that Black Panther Jackson's actions were not intimidating; instead, he simply reported that Mr. Jackson was certified by the Democratic Party to be a poll watcher at the polling place.

Further, as the history underlying the enactment and extension of the VRA shows, local police on occasion have had sympathy for persons who were involved in behavior that adversely affected the right to vote and violated the protections of the VRA. In this case, however, the fact that one Philadelphia police officer did not require Black Panther Jackson to leave the area became such a compelling piece of evidence that it was cited by the Assistant Attorney General Perez in his May 14, 2010 statement to this Commission. There Mr. Perez stated that "the Department placed significant weight on the responses of the law enforcement first responder to the Philadelphia polling place," in allowing Black Panther Jackson to escape a default judgment and escape the entry of injunctive relief against his future actions. Based upon my experience, this reasoning is extraordinarily strange and an

unpersuasive basis to support the CRD's disposition of the *NBPP* case.

Another publicly stated reason by the DOJ was in a July 13, 2009 letter to Congressmen Frank Wolf and Lamar Smith that pointed out that Panther Jackson lived at the apartment building whose lower level was being used as the polling place. This reason was later abandoned by the CRD, but the fact that it was asserted by the DOJ as a reason for the dismissals in the *NBPP* case strongly suggests that it was a reason asserted at some point close to the time of the dismissals. Regarding the location of Black Panther Jackson's residence, our investigation determined that Jackson's claim that his residence was at this apartment building was not true. However, even if Black Panther Jackson had resided there, it should be quite clear to all that such a fact would not have provided him a legal basis for intimidating voters.

To understand the irrationality of these articulated reasons for gutting this case, one only has to state the facts in the racial reverse. Assume that two members of the KKK, one of which lived in an apartment building that was being used as a polling place, showed up at the entrance in KKK uniform and that one of the Klansman was carrying a billy stick. Further assume that the two Klansmen were yelling racial slurs at black voters who were a minority of people registered to vote at this polling place, and the Klansmen were blocking ingress to the polling place. Assume further that a local policeman comes on the scene and determines that the Klansman with the billy club must leave but that the other Klansman could stay because he was certified as a poll watcher for a local political party.

In those circumstances does anyone seriously believe that the Assistant Attorney General for Civil Rights would contend that on the basis of the facts and law, the CRD did not have a case under the VRA against this hypothetical Klansman because he resided in the apartment building where the polling place was located, or because he was allowed to stay at the polling place by a local police officer because he was a poll watcher? I certainly hope Mr. Perez would not find that hypothetical case lacking in merit, and I will guarantee you that Ms. King, Mr. Rosenbaum, Mr. Kappelhoff and Ms.

Clarke would not either. However, such reasons are a part of the publicly articulated grounds for the CRD's decision to instruct me to dismiss a significant portion of the *NBPP* case.

Based upon my own personal knowledge of the events surrounding the *NBPP* case and the atmosphere that has existed in the CRD and the Voting Section against racially fair enforcement of certain federal voting laws, I do not believe these publicly stated representations to this Commission and other entities accurately reflect what occurred in the *NBPP* case. They do not knowledge the hostile atmosphere that has existed within the CRD against race-neutral enforcement of the VRA.

MS. FERNANDEZ'S STATEMENTS TO THE VOTING SECTION

In the summer of 2009, Julie Fernandez was appointed as the Deputy Assistant Attorney General for Civil Rights by the Obama Administration. One of her responsibilities is to oversee the Voting Section. Ms. Fernandez and I had worked together in the Voting Section during the Clinton Administration. She had spent years working for civil rights groups since our Clinton Administration days, mainly with the Leadership Conference for Civil Rights, but I hoped that she might have an enforcement approach different than Ms. King's and Mr. Rosenbaum's. I was to be disappointed.

Mr. Fernandez began scheduling lunches in the conference room of the Voting Section at which times the various statutes the Voting Section has the responsibility for enforcing were discussed as well as other enforcement activities. In September 2009, Ms. Fernandez held such a meeting to discuss enforcement of the anti-discrimination provisions of Section 2 of the VRA. At this meeting one of the Voting Section trial attorneys asked Ms. Fernandez what criteria would be used to determine what type of Section 2 cases the CRD Front Office would be interested in pursuing.

Ms. Fernandez responded by telling the gathering that the Obama Administration was only interested in bringing traditional types of Section 2 cases that would provide political equality for racial and language minority voters, and she went on to say that this is what we are all about, or words to that

effect. When Ms. Fernandez made that statement, everyone in the room understood exactly what she meant - - - no more cases like the *Ike Brown* or *NBPP* cases. Ms. Fernandez reiterated that directive in another meeting held in December 2009 on the subject of federal observer election coverage, in which she stated to the entire group in attendance that the Voting Section's goal was to ensure equal access for voters of color or minority language.

In November 2009, a similar lunch meeting was held by Ms. Fernandez on the subject of the National Voter Registration Act (NVRA). The NVRA has three provisions that have led to enforcement activity by the Voting Section. The first is Section 7 which requires that certain government offices, such as the local office that provides public assistance, also provide their clients the opportunity to register to vote. The other two provisions of the NVRA are found in Section 8 of that Act. They require states to ensure that voter registration list maintenance be conducted so that registration lists do not have the names of persons who are no longer eligible to vote in the jurisdiction. Further, Section 8 also provides that certain notice procedures are to be followed in order to legally remove persons from a voter registration list.

In discussions specifically addressing the list maintenance provision of Section 8 of the NVRA, Ms. Fernandez stated that list maintenance had to do with the administration of elections. She went on to say that the Obama Administration was not interested in that type of issue, but instead interested in issues that pertained to voter access. During the Bush Administration, the Voting Section began filing cases under the list maintenance provision of Section 8 to compel states and local registration officials to remove ineligible voters. These suits were very unpopular with a number of the groups that work in the area of voting rights. When Ms. Fernandez told the Voting Section that the Obama Administration was not interested in Section 8 list maintenance enforcement activity, everyone in the room understood exactly what she meant. We understood that she was *not* talking about Section 8 cases in which there is a claim that the removal procedures of Section 8 were not being complied with; instead, she was

talking about the types of cases that the Voting Section filed during the Bush Administration whose purpose was to compel the states to comply with the Section 8 directive that they do list maintenance by removing ineligibles from the list.

In June 2009, the Election Assistance Commission (EAC) issued its bi-annual report concering which states appeared not to be complying with Section 8's list maintenance requirements. The report identified eight states that appeared to be the worst in terms of their non-compliance with the list maintenance requirements of Section 8. These were states that reported that no voters had been removed from any of their voters' list in the last two years. Obviously, this is a good indication that something is not right with the list maintenance practices in that state. As Chief of the Voting Section, I assigned attorneys to work on this matter, and in September 2009, I forwarded a memorandum to the CRD Front Office asking for approval to go forward with Section 8 list maintenance investigations in these states.

During the time that I was Chief, no approval was given to this project, and it is my understanding that approval has never been given for that Section 8 list maintenance project to date. That means that we have entered the 2010 election cycle with eight states appearing to be in major noncompliance with the list maintenance requirements of Section 8 of the NVRA, and yet the Voting Section which has the responsibility to enforce that law has yet to take any action. From these circumstances I believe that Ms. Fernandez's statement to the Voting Section in November 2009 not to, in effect, initiate Section 8 list maintenance enforcement activities has been complied with.

In Mr. Perez's letter to this Commission of August 11, 2010, he stated that the CRD currently has active matters under the NVRA, "including investigations under Section 8." In making this statement, I do not believe Mr. Perez was referring to Section 8 list maintenance cases, the kind of cases Ms. Fernandez was referring to when she talked about no interest in enforcing Section 8, because I do not believe that Voting Section has recently been involved in any list maintenance enforcement

during the Obama Administration.

I believe that federal prosecutors, criminal and civil, have prosecutorial discretion in deciding how we are going to use our resources, but I do not think that discretion goes so far as to allow us to decide not to do *any* enforcement of a law enacted by Congress, because political appointees determine that they are not interested in enforcing that law. That is an abuse of prosecutorial discretion.

Further, not to enforce the list maintenance provisions of Section 8 are likely to have partisan consequences as well. A number of the jurisdictions that have bloated voter registration lists are where there are sizable minority populations and are Democratic strongholds. For example, at the time of the trial in the *Ike Brown* case, the Noxubee County Election Commission had not purged its list, as required by Mississippi law and Section 8 of the NVRA, so that the number of persons on the voter registration list was approximately 130 percent of the number of people in that county who were eighteen (18) years or older. As Congress recognized in enacting the list maintenance provisions of Section 8, bloated voter registration lists increase the risk of voter fraud.

THE IMPORTANCE OF RACIAL-NEUTRAL ENFORCEMENT OF THE VRA

Equal enforcement of the VRA is absolutely essential for a number of reasons. First, it is required by the statutory language of the VRA. Congress did not use statutory language that speaks in terms of discrimination against racial or language minorities, but in terms of discrimination on the basis of race or color. In extending and amending Section 5 of the Act in 2006, the Congress used the term "any voter", not racial or ethnic minority voters. Further, the statutory construction given the VRA by the courts supports that the Act is written in race-neutral terms and is intended for the protection of all.

When we go to work with the DOJ, we all take an oath faithfully to enforce the laws of the United States. Enforcing the VRA in a racially selectively manner or choosing not to enforce certain provisions of federal voting law is not in compliance with the oaths that we have taken.

Second, when the VRA was originally enacted in 1965, it probably did not make a great deal of difference, as a practical matter, whether its prohibitions against race discrimination and intimidation were enforced against minority wrongdoers as well as white wrongdoers. During that time period, there were very few minority election officials in the overwhelming majority of jurisdictions, and in a number of jurisdictions there were no minority election officials. However, during the last forty-five (45) years, the United States has changed for the better. Large numbers of minority persons now serve as election and poll officials in hundreds of jurisdictions throughout America. In such a multi-racial and multi-cultural country, not the one of Bull Connor or Ross Barnett, but the country in which an African American serves as the President and as the Attorney General of the United States, and it is absolutely essential that the VRA be enforced equally against all racial and ethnic groups.

During my years in the Voting Section, and particularly during the time I served in a management capacity, I became acutely aware based on complaints and conducting investigations that a sizable number of voting illegalities are committed by members of racial and ethnic minorities. Noxubee County, Mississippi is a prime example. Noxubee was not, as some critics have claimed, a mere aberration. Let me give you two other examples.

During the time I was Chief of the Voting Section, we conducted a prolonged investigation in Wilkinson County, Mississippi, a majority-black county in the southwestern part of the State. A long battle between an all-black faction and a racially integrated faction had been going on for a substantial period of time in that country. Relations between the two factions had reached the point where the all-black faction would not allow members of the racially-integrated faction to play any role in the conduct of the local elections, including the counts of absentee ballots or the choosing of persons to work at the polls. After a local election in Wilkinson County in 2007, the home of a white candidate for local office was burned. No one was ever prosecuted for this burning, and the burning of this candidate's home never received any national attention. The Voting Section in the end did not file a VRA lawsuit

in Wilkinson County for a number of reasons, including the pendency of multiple election contests in state courts during the time of our investigation and the fear that the filing of suit by the DOJ would suggest we were taking sides in election disputes. We did send federal observers to elections there, including the 2008 election. I came away from the Wilkinson County investigation with the clear impression that African American officials there were involved in voting-related acts of racial discrimination against whites.

In addition in 2005, I conducted an investigation in Hale and Perry Counties, Alabama, two other majority-black counties. Again, there were political factions in these counties with one faction all-black and the other a racially integrated faction. There were multiple claims by the racially integrated faction of absentee ballot and other types of voter fraud being perpetrated by the all-black factions in these counties. While investigating in Hale County, I learned that there had been a recent highly contentious election, and on the night of that election, election materials, including absentee ballots, were placed for safe keeping in a local bank vault so that those materials could be reviewed the next morning by election officials. Overnight that bank was set on fire. No one was ever prosecuted for that burning. Again, the Voting Section did not end up filing a VRA lawsuit in either of these Alabama counties for a number of reasons, including on-going voting fraud investigations by the state Attorney General's office in those counties. I have recently learned that several African American political officials have been convicted for absentee ballot fraud in Hale County. Again, I came away from the Hale and Perry County investigations with the clear impression that some individual African Americans in those counties were involved in acts of racial discrimination against whites.

In pointing these examples out, I am not suggesting that minority election and poll officials or minority political activists are more likely to commit voting law violations than are their white counterparts. What I am pointing out is that I believe that some minorities are just as likely to resort to lawlessness in the voting area as are some whites. For the CRD and Voting Section to pursue

enforcement practices that ignore VRA violations by members of minority groups will encourage lawlessness in the voting area by those who will have no fear that the Federal Government will enforce the federal law against them. In our increasingly multiethnic society, that is a clear recipe to undermine the public's confidence in the legitimacy of our electoral process.

I have heard some argue that prosecutors, both criminal and civil, have prosecutorial discretion that gives attorneys in the CRD and the Voting Section the authority not to bring VRA lawsuits against minority wrongdoers. It is certainly true that prosecutors have discretion to decide what cases to bring based upon resource issues and other legal considerations. But we do not have the discretion to decide not to enforce the law based upon the race of the perpetrators or the race of the victims of the wrongdoing. Those discretionary decisions cannot constitutionally be based upon race.

In conclusion, I thank you for the time you have given me to testify on these important enforcement issues. I commend the Civil Rights Commission for making inquiries into these areas. Individuals of good will, regardless of their race, ethnicity or language-minority status, should be concerned about the CRD not enforcing laws in a race-neutral manner. As important as the mandate in the VRA is to protect minority voters, white voters also have an interest in being able to go to the polls without having race-haters such as Black Panther King Samir Shabazz whose public rhetoric includes such statements as "kill cracker babies" standing at the entrance of the polling place with a billy club in his hand hurling racial slurs. Given this outrageous conduct, it was a travesty on justice for the DOJ not to allow attorneys in the Voting Section to obtain nation-wide injunctive relief against all four of the defendants.