111TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { 111–404

RESOLUTION OF INQUIRY DIRECTING THE ATTORNEY GENERAL TO TRANSMIT TO THE HOUSE OF REPRESENTATIVES ALL INFORMATION IN THE ATTORNEY GENERAL'S POSSESSION RELATING TO THE DECISION TO DISMISS UNITED STATES V. NEW BLACK PANTHER PARTY

JANUARY 27, 2010.—Referred to the House Calendar and ordered to be printed

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Mr. CONYERS, from the Committee on the Judiciary, submitted the following

ADVERSE REPORT

together with

DISSENTING VIEWS

[To accompany H. Res. 994]

[Including Committee Cost Estimate]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 994) directing the Attorney General to transmit to the House of Representatives all information in the Attorney General's possession relating to the decision to dismiss United States v. New Black Panther Party, having considered the same, reports unfavorably thereon without amendment and recommends that the resolution not be agreed to.

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89–008

PURPOSE AND SUMMARY

H. Res. 994, introduced by Representative Frank Wolf, directs the Attorney General to transmit to the House of Representatives copies of any document, memo, or correspondence of the Department of Justice with regard to *United States v. New Black Panther Party,* or any portion of any such document, memo, or correspondence that refers or relates to—

(1) any Department communications with regard to the case between November 5, 2008, and November 15, 2009;

(2) any communication with the defendants or the defendants' attorneys between November 5, 2008, and November 15, 2009;

(3) any communication with third-party organizations or individuals between November 5, 2008 and November 15, 2009; or

(4) any evidence with regard to the dismissal of the case.

BACKGROUND

Under the rules and precedents of the House of Representatives, a resolution of inquiry is one of the methods that the House can use to obtain information from the Executive Branch.[1] It "is a simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch."[2] The typical practice has been to use the verb "request" when asking for information from the President, and "direct" when addressing Executive department heads.[3] Clause 7 of rule XIII of the Rules of the House of Representatives provides that if the committee to which the resolution is referred does not act on it within 14 legislative days, a privileged motion to discharge the resolution from the committee is in order on the House floor.

While recognizing the importance of effective enforcement of the Voting Rights Act, the Committee believes that H. Res. 994 is unwarranted. The Department of Justice has provided and continues to provide relevant information on the subject and to respond to Congressional requests.

First, on July 9, 2009, Ranking Member Lamar Smith, Representative Wolf, and several other House Members wrote to DOJ's Inspector General requesting an investigation concerning the partial dismissal of the case. The request was referred to DOJ's Office of Professional Responsibility (OPR), which informed Representative Smith and the other requesting Members that it had initiated an inquiry and would contact them with the results when complete. In response to a further inquiry by Representative Smith and Representative Wolf, OPR explained on November 24, 2009, that in accordance with standard Department procedures, a complete investigation would take more time, that the investigation was proceeding apace, and that OPR would inform them of the results "as soon as we are able to do so."

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[1] Christopher Davis, House Resolutions of Inquiry, CRS Report, November 25, 2008, at 1 (quoting U.S. Congress, House, Deschler's Precedents of the United States House of Representatives, H. Doc. 94–661, 94th Cong., 2nd sess., vol. 7, ch. 24, § 8).

[2] Id.

[3] Id.

Second, prior to the initiation of the OPR investigation, Representative Smith and Representative Wolf requested information and briefings from DOJ on the case. Chairman Conyers directed Committee staff to help facilitate such a briefing for all interested Committee Members. DOJ wrote separately to Representative Smith and Representative Wolf on July 13, 2009, providing a four-page analysis of the legal and factual issues and DOJ's actions in the case, enclosing to Representative Smith all non-privileged documents relating to the dismissal as he had requested, and noting to Representative Smith that DOJ had already contacted Committee staff about arranging a briefing. Copies were sent to Chairman Conyers, Chairman Nadler, and Representative Sensenbrenner. A briefing for Representative Wolf was held on July 20, 2009. As scheduling and other arrangements were underway with respect to Representative Smith, OPR initiated an inquiry, and DOJ determined to await the outcome of the OPR inquiry before responding further. DOJ wrote to Representative Smith on September 11, 2009, providing some additional information and stating its plan to await the outcome of the OPR report. There has been no further correspondence relating to a DOJ briefing.

Third, Assistant Attorney General for Civil Rights Thomas E. Perez has responded to questions by Committee Members about the case. During the December 3, 2009 hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Mr. Perez explained that the decisions with respect to the disposition of the case were made by two career attorneys with over 60 years of combined experience, including one who was serving as acting director of the Division earlier in 2009, prior to Mr. Perez's confirmation. Mr. Perez discussed the significant injunctive relief that was obtained in the case, and stated that he was looking forward to the results of the OPR review. Written follow-up questions have been sent to Mr. Perez.

Fourth, the Committee is already in receipt of documents requested by H. Res 994. On January 11, 2010, DOJ determined that a number of documents relating to the case could appropriately be released in response to requests by Congress, and accordingly sent more than 1,850 pages of documents concerning the case and related matters to Representatives Smith and Wolf, Chairman Conyers, and the U.S. Civil Rights Commission, along with answers to written questions from the Commission. The documents produced include correspondence between the Department of Justice and each of the defendants in the case, as requested by H. Res. 994.

HEARINGS

No hearings were held in the Committee on H. Res. 994.

COMMITTEE CONSIDERATION

On January 13, 2010, the Committee met in open session and ordered H. Res. 994 adversely reported, without amendment, by a rollcall vote of 15 yeas to 14 nays, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following

rollcall vote occurred during the Committee's consideration of H. Res. 994:

H. Res. 994 was ordered reported unfavorably by a vote of 15 to 14.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Delahunt	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley			
Ms. Chu			
Mr. Gutierrez			
Ms. Baldwin	X		
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz			
Mr. Maffei	X		
Mr. Smith, Ranking Member		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Issa		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz		X	
Mr. Rooney		X	
Mr. Harper		X	
Total	15	14	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this resolution does not provide new budgetary authority or increased tax expenditures.

COMMITTEE COST ESTIMATE

In compliance with clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee estimates that implementing the resolution would not result in any significant costs. The Congressional Budget Office did not provide a cost estimate for the resolution.

PERFORMANCE GOALS AND OBJECTIVES

Clause 3(c)(4) of rule XIII of the Rules of the House of Representatives is inapplicable, because H. Res. 994 does not authorize funding.

CONSTITUTIONAL AUTHORITY STATEMENT

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives is inapplicable, because H. Res. 994 is not a bill or a joint resolution that may be enacted into law.

ADVISORY ON EARMARKS

Clause 9 of rule XXI of the Rules of the House of Representatives is inapplicable, because H. Res. 994 is not a bill or a joint resolution.

SECTION-BY-SECTION ANALYSIS

H. Res. 994 directs the Attorney General to transmit to the House of Representatives, not later than 14 days after the date of adoption of this resolution, copies of any document, memo, or correspondence of the Department of Justice with regard to *United States v. New Black Panther Party,* or any portion of any such document, memo, or correspondence that refers or relates to—

(1) any Department communications with regard to the case between November 5, 2008 and November 15, 2009;

(2) any communication with the defendants or defendants' attorneys between November 5, 2008 and November 15, 2009;

(3) any communication with third-party organizations or individuals between November 5, 2008 and November 15, 2009; or

(4) any evidence with regard to the dismissal of the case.

DISSENTING VIEWS

I. INTRODUCTION

We strongly support H. Res. 994 and oppose adversely reporting this resolution to the House of Representatives. H. Res. 994 directs the Attorney General to transmit to the House of Representatives all information in the Attorney General's possession relating to the decision to dismiss *United States v. New Black Panther Party.*

On Election Day 2008, outside of a Philadelphia, Pennsylvania, polling location, two men were dressed in paramilitary uniforms, one brandishing a baton in front of voters. The men cursed at voters, shouted racial obscenities at voters, and tried to block the entry of voters, and those assisting them, into the polling location. These men were members of The New Black Panther Party for Self-Defense, an organization so radical that the original Black Panther Party has found it necessary to denounce it.

On January 7, 2009, the Civil Rights Division of the Department of Justice (the Department) filed a complaint against the New Black Panther Party, the Chairman of the organization, and the two members involved in the Philadelphia Election Day incident for violating the Voting Rights Act, which prohibits any attempt to intimidate, threaten, or coerce any voter and those aiding voters.

According to the Department's complaint, the two individuals involved in the Philadelphia incident "made statements containing racial threats and racial insults to both black and white individuals," and "made menacing and intimidating gestures, statements, and movements directed at individuals who were present to aid voters." [1]

Neither the New Black Panther Party nor its members responded to the lawsuit. Thus, the Department was instructed by the Court to prepare a motion seeking a default judgment. Rather than seek this default judgment, however, and ensure that defendants could not participate in future voter intimidation tactics, the Department abruptly dropped charges against all but one of the defendants. With regard to that remaining defendant, the Department narrowed the scope of its proposed remedy. Rather than being permanently enjoined from engaging in such conduct at any polling location the remaining defendant was prohibited only from engaging in this behavior outside of polling locations in the city of Philadelphia, and only until mid-November of 2012.

The Department's actions in this case have led many to ask why the Obama Administration would suddenly drop most of the charges in a case it had effectively won. No facts had changed. No new evidence was uncovered. The law had remained unchanged. The only thing that did change is the political party in charge of the Department of Justice. Judiciary Committee Ranking Member Lamar Smith and Commerce-Justice-Science Appropriations Subcommittee Ranking Member Frank Wolf wrote the Department eight times since the case dismissal seeking the answer to one simple question: what changed between January 2009 and May 2009 such that the law necessitated the dismissal of most of the Depart-

[1] *United States v. New Black Panther Party for Self-Defense,* Civ. No. 09–0065 SD (E.D. Pa. filed Jan. 7, 2009) (Comp. ¶¶ 10–11).

ment's claims and the narrowing of the remedy for the remaining defendant?

The Department's inability or unwillingness to address this question leaves the minority members of this Committee with no other alternative but to conclude that improper—likely partisan political—motivations were behind the Department's actions, that politics improperly played a role in its decision to enforce the Voting Rights Act. These concerns were only heightened when it was learned that one of the defendants against whom charges were dropped was a Democratic poll watcher.[2] Through media reports it was later learned that the lead career attorneys on the case strongly advocated in favor of seeking the default judgment against all original defendants in this case.[3] When Department officials sought a second opinion from its career appellate attorneys, they agreed with the recommendation of the lead attorneys that default charges should be finalized as against all original defendants.[4] Those same media reports assert that senior political appointees may have overridden the decision of career attorneys.[5]

II. THE APPROPRIATENESS OF A DEFAULT JUDGMENT AGAINST ALL ORIGINAL DEFENDANTS

The Department asserts that default judgments are not automatic, and that the government must still prove the case based on the law and the facts. The minority members of this Committee find this argument unpersuasive because one would assume that the Department would not have brought the case against the Defendants unless it believed the evidence supported it and that it could prove each alleged act based upon that evidence. Furthermore, we know from news reports that the attorneys in charge of the case never wavered from their belief that the evidence did prove the allegations against each defendant.

Ultimately, the question that minority members of the Committee wish to have the Department explain and that the Department has thus far refused to do, is why. Either the facts were not strong enough for the case to have been brought, or they were but the Department decided not to move forward with the case. If the Department would simply explain what standard it used in early May to analyze the facts and why these facts did not meet these legal standards that the Department had concluded just five months earlier did would go a long way towards addressing concerns raised by the minority members of this Committee. However, the Department's failure—or refusal—to engage in this discussion has led us and observers to wonder whether DOJ has something to hide. And in this instance the Department's silence appears to be an admission of guilt.

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[2] Letter from Members of the U.S. Commission on Civil Rights to the Honorable Eric Holder, Attorney General, U.S. Department of Justice, (Aug. 10, 2009) (on file with minority staff of the Committee on the Judiciary).

[3] *See* Jerry Seper, *Exclusive: No. 3 at Justice OK'd Panther Reversal,* the WASH. TIMES, July 30, 2009.

[4] *See Id.*

[5] *See Id.*

III. WHETHER THE DEPARTMENT PURSUED THE FULL SCOPE OF THE REMEDY ALLOWED UNDER THE VOTING RIGHTS ACT INTIMIDATION PROVISIONS

The Department asserts that with regard to the remedy sought against the remaining original defendant in this case it sought to punish him to the fullest extent under the law, an injunction. However, the Department fails to address why it rejected the original permanent injunction sought in the January filings and instead submitted a more narrow request to the court in May that requested an injunction applicable only to polling locations in the city of Philadelphia and only through mid-November 2012.

IV. THE DEPARTMENT'S ATTEMPTS TO RESPOND TO U.S. COMMISSION ON CIVIL RIGHTS INQUIRIES

Twenty-four hours before H. Res. 994 was marked up by this Committee, the Department provided responses to interrogatories served upon it by the U.S. Commission on Civil Rights (the Commission). The Department provided copies of these responses to the Committee. It also produced approximately 1800 pages worth of Department documents.

Unfortunately, the Department's responses to the Commission's interrogatories provided little, if any, information that would assist Congress in the performance of oversight on this matter. The Department refused to answer, either wholly or in part, 31 of the Commission's 49 interrogatories. The Department asserts that it did respond to the Commission's interrogatories and document request last week. However, its answers for those 31 questions consisted of the statement that it "generally objected" to the question being asked. In some instances the Department explained in greater detail he source of its objections. Nonetheless, it cannot be argued that the Department answered the questions asked of it by the Commission. Instead, they answered by saying that they would not answer those 31 questions.

Furthermore, the 1800 pages worth of documents provided by the Department while voluminous, failed to provide Congress any information about the dismissal of this case, particularly with regard to how the case could be strong enough to be filed one month and too weak to pursue four months later. So Congress remains unable to explore the application of the Voting Rights Act to the New Black Panther Party case.

V. THE AFFECT OF THE DEPARTMENT'S OFFICE OF PROFESSIONAL RESPONSIBILITY REVIEW ON CONGRESS'S OVERSIGHT OF THE DEPARTMENT'S ACTIONS IN THIS CASE

It has been argued by some that Congress should not investigate the New Black Panther Party case dismissal because of the ongoing review by the Department's Office of Professional Responsibility (OPR).

At its heart, the Department's handling of the New Black Panther Party case is really a policy question: how can the conduct underlying the case be allowable under the Voting Rights Act and, if it is, what changes, if any, should be made to the law to prevent such conduct in the future? Policy is set by Congress, not the Department, and it is up to Congress to determine whether current

law reaches the conduct that Congress intended the law to reach when enacted.

It is unclear in this case based on what is publicly known why the incident of Election Day 2008 is not prosecutable as intimidation under the Voting Rights Act, Thus, Congress has a constitutional responsibility to inquire into whether the law as currently written is strong enough to prohibit such conduct.

The law either currently is strong enough, and the Department made its decision to drop the case based on reasons other than substantive legal analysis, a decision which would show partisan political influence, or it is not, in which case Congress has a duty to review whether the Voting Rights Act needs to be revised to cover such acts.

Thus far, in response to inquiries and document requests from Republican members of this Committee, the Department has stated that the claims were not appropriate under the Voting Rights Act, despite the fact that based on the same set of facts, the Department had but months earlier decided the facts did merit the initiation of the suit.

In light of the Department's current view of the law, it appears Congress must consider whether to strengthen the Voting Rights Act. In order to have that debate, Congress needs to know the facts that the Department had in front of it when it decided to file this case and when it decided to dismiss it.

The Department's review of whether its employees committed misconduct while implementing policies set by Congress has no relationship to Congress's obligation to ask the above questions about implementation of the Voting Rights Act. Congress still has an independent duty to ask whether the policies it has set, and the laws enacted to implement those policies, work. This duty cannot be performed by the agency tasked with implementing Congress's policy determinations. Nor can it be extinguished by an agency's decision to investigate the conduct of its employees in relation to the implementation of those laws.

OPR's review is merely an internal inquiry into the conduct of Department lawyers in the course of performing their duties. In this case, those duties involve the enforcement of the same Voting Rights Act provisions, the application of which Congress has grown concerned about after the November 2008 incident in Philadelphia.

In the course of its investigation OPR will review whether Department attorneys were competent in their knowledge of the applicable area of the law, whether they were diligent in efforts to prepare materials and arguments made before the court, and whether their conduct complied with the law, governing ethical requirements, and the duty of care owed by all attorneys.

With regard to the questions raised by the Department's case against the New Black Panther Party, it is simply outside the scope of an OPR inquiry to determine how broad the scope of the Voting Rights Act currently is or should be and whether the Voting Rights Act as written reaches the conduct Congress wishes to regulate or prohibit.

While both Congress and OPR will find relevant some of the same information, the two entities have different focuses. It is, however, the exclusive province of Congress to determine and set policy. And the Department has yet to articulate how Congress's

review of these documents, in furtherance of that duty, at the same time OPR reviews those documents will interfere with OPR's ability to assess the import of those documents.

VI. CONCLUSION

What if on election day in Philadelphia, Mississippi, two white men in white robes and hoods, one of them armed with a baton, station themselves in front of a polling place and make threatening comments to African-Americans arriving to vote.

In the wake of that election, a Democratic Justice Department files suit against the two Klansmen and the Klan, who fail to respond, and the federal judge directs the Department to submit an unopposed order resolving the case.

Instead, a new Republican Justice Department dismisses the case and files only a very limited injunction against the one Klansman with the baton.

In the case of this hypothetical, would our Committee colleagues in the majority not be demanding information justifying what led to the Department's about-face? Of course they would be, and the minority members of this Committee would join them, because the intimidation provisions of the Voting Rights Act were designed with precisely that case in mind.

In the New Black Panther Party case we have a case that seems tailor-made for the application of the intimidation prohibition in the Voting Rights Act, and Department lawyers apparently came to that conclusion as well in filing the suit.

But a new set of eyes at the Department apparently saw the case differently. We need to know why.

In its meager responses to congressional inquiries, the Department suggests that the Voting Rights Act may not be adequate to address the actions of these defendants, but that analysis should have occurred before the suit was filed. And the Department fails to point out any change in the law after the case was filed or any newly uncovered facts that would justify its change of heart. The only fact that appears to have changed is the change in political control of the Department.

So we are left with one of two choices: either the Department erred in filing the suit or it erred in dropping the suit. We should be able to make that judgment, but we cannot on the basis of the inadequate response from the Department to Mr. Smith's and Mr. Wolf's letters.

We need to know because it is up to us, on this Committee, to decide whether the intimidation provisions of the Voting Rights Act need to be strengthened, or if this matter reflects simply a new judgment by the new President and his team that he does not want to harm his political allies. If that is the case, as it appears now to be, then the majority may have finally found the first case in which actual political influence appears.

For more than two years, the majority on this Committee has been looking for such a case as it pursued its investigation into the firing of political appointees. The problem is they have looked only for such cases during the last administration. But in its first six months, the new administration has apparently provided an instance that we have yet to uncover during our microscopic inves-

tigation of the previous one: a case tainted by partisan political influence.

There cannot be true justice if those responsible for ensuring justice rely on a political compass rather than facts and evidence.

It is unfortunate that this Committee chose not to obtain answers to the serious questions raised by the Department's conduct in this case by reporting this resolution out favorably. The right to cast a ballot free of intimidation is at the heart of our democracy. We jeopardize our democracy if we look the other way in this case.

LAMAR SMITH.
F. JAMES SENSENBRENNER, JR.
HOWARD COBLE.
ELTON GALLEGLY.
BOB GOODLATTE.
DANIEL E. LUNGREN.
STEVE KING.
TRENT FRANKS.
LOUIE GOHMERT.
JIM JORDAN.
TED POE.
JASON CHAFFETZ.

DISSENTING VIEWS OF MR. HARPER

I join Sections I–V of the dissenting views offered by Ranking Member Smith.

GREGG HARPER.

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