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Abigail Thernstrom, The New Black Panther Case: A Conservative Dissent

Never mind this one-off stunt by fringe radicals; the DOJ is engaged in much more important voting-rights mischief.

Forget about the New Black Panther Party case; it is very small potatoes. Perhaps the Panthers should have been prosecuted under section 11 (b) of the Voting Rights Act for their actions of November 2008, but the legal standards that must be met to prove voter intimidation — the charge — are very high.

In the 45 years since the act was passed, there have been a total of three successful prosecutions. The incident involved only two Panthers at a single majority-black precinct in Philadelphia. So far — after months of hearings, testimony and investigation — no one has produced actual evidence that any voters were too scared to cast their ballots. Too much overheated rhetoric filled with insinuations and unsubstantiated charges has been devoted to this case.

A number of conservatives have charged that the Philadelphia Black Panther decision demonstrates that attorneys in the Civil Rights Division have racial double standards. How many attorneys in what positions? A pervasive culture that affected the handling of this case? No direct quotations or other evidence substantiate the charge.

Thomas Perez, the assistant attorney general for civil rights, makes a perfectly plausible argument: Different lawyers read this barely litigated statutory provision differently. It happens all the time, especially when administrations change in the middle of litigation. Democrats and Republicans seldom agree on how best to enforce civil-rights statutes; this is not the first instance of a war between Left and Right within the Civil Rights Division.

The two Panthers have been described as "armed" — which suggests guns. One of them was carrying a billy club, and it is alleged that his repeated slapping of the club against his palm constituted brandishing it in a menacing way. They have also been described as wearing "jackboots," but the boots were no different from a pair my husband owns.

A disaffected former Justice Department attorney has written: "We had indications that polling-place thugs were deployed elsewhere." "Indications"? Again, evidence has yet to be offered.

Get a grip, folks. The New Black Panther Party is a lunatic fringe group that is clearly into racial theater of minor importance. It may dream of a large-scale effort to suppress voting — like the Socialist Workers Party dreams of a national campaign to demonstrate

its position as the vanguard of the proletariat. But the Panthers have not realized their dream even on a small scale. This case is a one-off.

There are plenty of grounds on which to sharply criticize the attorney general — his handling of terrorism questions, just for starters — but this particular overblown attack threatens to undermine the credibility of his conservative critics. Those who are concerned about Justice Department enforcement of the Voting Rights Act should turn their attention to quite another matter, where the attorney general has been up to much more important mischief: his interpretation of the act's core provisions.

The department has just proposed new guidelines intended to assist the "covered" jurisdictions in their efforts to comply with the demands of section 5, which forces "covered" states to obtain federal approval ("preclearance") for all proposed changes in voting procedure. All southern states are "covered"; so are Texas, Arizona, Alaska, and numerous scattered counties in New York, California, and elsewhere. Redrawn districting maps are changes that must be precleared.

Every state must draw new lines every ten years when the new census figures reveal demographic changes; the old districting maps seldom meet the "one person, one vote" standard.

Redistricting is always a delicate, politically charged process in which much is at stake. The DOJ under Holder will undoubtedly insist that states draw the maximum possible number of majority-minority districts — a reversion to old legal standards that were suspended after a 2000 Supreme Court decision. Those standards rest on a core conviction of the civil-rights community: In a nonracist society, minorities would be elected to political office in numbers proportional to the black and Hispanic populations.

Thus, race-conscious districts will have to be the top priority of legislative-redistricting committees. If they give greater weight to other considerations, they risk litigation and a consequent delay in their ability to hold elections. This distortion of the American political process can only be justified by a fear that blacks, left without extraordinary federal protection, will be excluded from public office. That fear does not reflect current reality.

The revised guidelines increase the authority of largely invisible and unaccountable career attorneys in the voting section of the DOJ's Civil Rights Division. The Voting Rights Act robs states of one of their most important constitutional prerogatives: setting the rules that govern elections. Southern black disfranchisement once justified a drastic change in the balance of power between the federal government and the states, but blacks throughout the nation are now important political players. Decisions to overrule districting and other policies made by democratically elected officials should not rest with low-level attorneys whose work is barely scrutinized and rarely challenged.

The proposed guidelines also redefine intentional electoral discrimination, putting meat on the bones of a congressional statutory amendment in 2006. The new regulations would

allow voting-section attorneys to consider various kinds of circumstantial evidence as pertinent to finding discriminatory intent: the failure to draw the maximum number of majority-minority districts; deviation from "normal" practices; a sequence of events that might suggest something suspicious; a dubious legislative or administrative history; or a suspect racial record in the jurisdiction.

These guidelines provide inadequate guidance. They rest explicitly on a problematic 1977 Supreme Court decision that blurred the line between discriminatory intent and impact, and left too many terms undefined. States involved in politically difficult negotiations over redistricting have been left to guess what lines will be acceptable to the particular DOJ attorneys assigned to oversee their mapmaking.

Three suits are currently challenging the continuing constitutionality of preclearance. Arguably, the proposed new regulations, if instituted, will increase the odds that the Supreme Court will soon rule section 5 unconstitutional. And then perhaps Congress will fashion a Voting Rights Act that recognizes the political revolution in the South since 1965, one which responds to contemporary voting problems (the definition of which will need to be hammered out in the legislative process).

The new guidelines will not get much press. Neither the media nor the American public is likely to get exercised over regulations buried in the Federal Register implementing a statutory provision. "Yet students of public policy and public administration are increasingly aware that out of such bureaucratic boilerplate . . . can come fundamental shifts in public policy," historian Hugh Davis Graham once wrote.

The proposed regulations will deeply affect the landscape of American politics for the decade to come, and perhaps beyond. The New Black Panther Party incident bears no resemblance to voter intimidation in the Jim Crow South. The DOJ's decision to drop the case may have been wrong; so far, we have no hard evidence that can definitely settle the question. But we do know that, in 2008, it was a unique case. And there are much more important questions involving voting-rights enforcement upon which to focus.

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