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Yes, the Black Panther Case Is Small Potatoes
A reply to Andrew McCarthy.

Almost a month ago, I published a piece in NRO titled “The New Black Panther Case: A Conservative Dissent.” The main thrust of the article — now forgotten by everyone, it seems — was that the Obama Justice Department’s enforcement of the Voting Rights Act was deeply troubling. I am no fan of Attorney General Eric Holder’s policies, and the voting section had just proposed important new regulations interpreting the statute that will likely result in the widespread racial gerrymandering of legislative districts following the 2010 census. The revised regulations will deeply affect the landscape of American politics for the decade to come — and perhaps beyond — yet they have received scant attention.

In contrast, the New Black Panther Party (NBPP) incident — involving two black racists who showed up at a polling place in a largely black precinct in Philadelphia — has become the focus of a conservative media firestorm, driven in part by accusations of voter intimidation of the kind that were once ubiquitous in the Jim Crow South.

DOJ’s decision to drop the case may have been wrong, I went on to say in my earlier piece. But so far we have only very weak evidence on the matter. There is certainly no direct or hard evidence of either an effective voter-suppression effort or Justice Department indifference to such cases. This was an isolated incident in 2008 that, while involving reprehensible behavior, does not deserve the level of attention it has received when there are much more important questions involving voting-rights enforcement on which to focus. I did not write to defend the Panthers or DOJ, but rather to plead for some perspective on the matter.

In his July 20 NRO piece, Andrew McCarthy offered a rejoinder. He responded not to my larger argument, but just to the Panther issue. Reasonable observers can disagree about this complicated incident, but McCarthy’s screed falls far short of reasonable disagreement, offering superheated and sarcastic rhetoric where evidence and logical analysis are needed.

McCarthy contends that I have ignored important facts about what happened at the Philadelphia polling place targeted by the NBPP in the November 2008 election. Upon close inspection, these “facts” turn out to be unverifiable assertions.

McCarthy begins by charging me with a glaring inconsistency for allegedly forgetting that I signed a June 2009 letter that took a very different view of the case than the one I now hold. Yes, at that early date I joined other conservative members of the Civil Rights Commission in expressing grave concern about the Justice Department's handling of the case. In fact, I still have questions about DOJ's conduct, and I remain interested in knowing more about why the department declined to pursue the case. I would thus join my colleagues in welcoming further testimony. I would love to hear firsthand from Christopher Coates about DOJ's handling of this case. Similarly, I think the world deserves to know what Deputy Assistant Attorney General Julie Fernandes actually said about the Civil Rights Division's enforcement priorities.

The more I learned about the Black Panther case, however, the more doubtful I became that this was the egregious example of voter intimidation that it first appeared to be. When the Commission decided to make the Philadelphia incident the subject of its annual civil-rights law-enforcement report — the major report we work on throughout the year — I could not support that decision. Whatever the facts turned out to be, I felt, the incident was not of sufficient importance to be the primary focus of our yearlong project. If this small and isolated incident were truly the single most important civil-rights issue in America today, we would have much to celebrate.

As the Commission's work on the matter proceeded, my doubts only grew. I concluded that the claim that the Panthers "were caught on video engaging in voter suppression" is simply wrong. The only available video records an encounter between two Panthers and a young white man who was videotaping the incident. Questioning the two Panthers, he says, "I think you might be a little bit intimidating that you have a stick in your hand. . . . That's a weapon." A fair question for him to raise — but hardly conclusive evidence of actual or attempted intimidation.

As I said in my NRO piece, conservative commentators habitually describe the Panthers as wearing "jackboots" and being "armed." It strikes me as a somewhat overwrought characterization; while a stick or club may be a weapon, I think the word "armed" usually connotes images of guns or knives in most peoples' minds, and it seems gratuitous to object to the Panthers' choice of footwear. The courts, as far as I know, have not established standards for prosecution of intimidating attire, and the libertarian in me questions why boots (not unlike ones my husband owns) are relevant to the question of voter intimidation.

McCarthy is thrown into a tizzy by my mild observations. Apparently, I am to be excoriated for feeling that the allegations of "armed" and jackboot-clad Panthers invoke inappropriate images of Kristallnacht. His fulminations on this question quickly elide from the Panthers' attire to their comments; he quotes them as saying things like "you're about to be ruled by the black man," "kill some crackers," and "kill some of their babies." But who said what to whom — and when?

The first statement was indeed made at the polling place, but it was directed to Bartle Bull, a Republican poll-watcher, not a voter. Bull later claimed that the conduct he

witnessed that day in Philadelphia was “the most blatant form of voter intimidation” that he had encountered in his life, dating back to elections in Mississippi in the 1960s.

McCarthy and Bull can't be serious. In Mississippi, before the 1965 Voting Rights Act was passed, fewer than 7 percent of eligible black voters had been allowed to register to vote. They were disfranchised by fraudulent literacy tests, widespread (and often lethal) violence, and intimidation. Whites in the Jim Crow South did not need to stand around polling places looking menacing to keep blacks at home on voting day: Would-be black voters knew they were putting their lives, their homes, and their jobs on the line if they approached a polling booth.

The actions of two Black Panthers in one Philadelphia precinct in 2008 were not remotely equivalent to the effort to keep blacks from exercising their democratic rights throughout the South; the equation is breathtakingly ignorant. The Panthers are a tiny fringe group — a handful of racist nuts. The KKK was a serious criminal conspiracy that terrorized millions of black Americans, and only massive intervention by the federal government could stamp it out. No competent historian would possibly endorse McCarthy and Bull's contention that the actions of two Panthers in one little corner of Philadelphia were more blatant than what went on in Mississippi in the 1960s. If this ludicrous and poisonous idea gains acceptance in conservative circles, it will do more damage to American race relations than anything the Panthers could possibly do.

McCarthy refers to the testimony of two other Philadelphia poll-watchers. He writes: “two African-American poll watchers testified to the Commission that they were personally threatened by the Panthers.” He notes they “were black Republicans.” In fact, they were registered Democrats, working for the Republican party. Their statements to the Justice Department and the Civil Rights Commission were contradictory on this point; they initially said they had been intimidated, but their later deposition did not make that claim.

Nor is it established, McCarthy's allegations to the contrary notwithstanding, that “voters approaching the polls promptly turned around and left upon seeing the menacing Panthers stationed out front.” Over the course of the day, some witnesses noticed a few people who approached the polling place and then turned away — but the depositions and testimony heard at the Commission have failed to establish that any of the individuals in question were potential voters who had been frightened away. A picky little legal point, you might think, but the outcome of prosecutions can hinge on such distinctions.

McCarthy's reference to the comment made to Bartle Bull (“you're about to be ruled by a black man”) is followed by a deceptive segue in which he quotes blood-curdling remarks about killing “crackers.” Ugly stuff, certainly — but irrelevant, since the remarks were made during an interview with the one of the two Panthers, King Samir Shahazz, on an entirely different occasion. Clearly, Shahazz is a nasty, racist lunatic — but that does not constitute proof that he engaged in attempted or actual voter intimidation. The First Amendment protects such odious speech.

Is there an open-and-shut case that the conduct of the Panthers at that Philadelphia polling place in November 2008 constituted “voter intimidation” or “vote suppression” under Section 11(b) of the Voting Rights Act? I argued previously that it was doubtful, because “the legal standards that must be met . . . are very high.” McCarthy claims, to the contrary, “the legal standards are actually quite easy to meet.” Upon reflection, I think neither of us was correct. My oversimplified formulation ignored the fact that this section of the act has been litigated so rarely that there are no clear legal standards at all, no substantial body of precedent to define precisely what is needed to prove a violation.

McCarthy, though, is surely wrong in asserting that the standards are “quite easy to meet.” The Voting Rights Act has governed the conduct of the last eleven presidential elections, 22 congressional elections, and literally thousands of state and local elections. And yet there have been only three successful prosecutions of voter intimidation under Section 11 (b). Is it possible that nothing conceivably intimidating to prospective voters ever occurred in our vast country over such a long span of time? No. Clearly, it is not “quite easy” to prove voter intimidation, or else there surely would be a very different track record to examine.

DOJ’s assistant attorney general for civil rights, Thomas Perez, testified before the Commission that DOJ was concerned that it could not meet the standard of proof required for these cases. That is a debatable proposition — but that was exactly Perez’s point: This is a judgment call that falls within DOJ’s discretion, not per se evidence of a policy of racial double standards.

The Bush Justice Department chose to prosecute the two Panthers who were at the polling place, as well as the chairman of the NBPP and the party itself. None of the defendants bothered to answer or contest the charges. In May 2009, the Obama Justice Department recommended to the judge that King Samir Shabazz be ordered to refrain from displaying a weapon within 100 feet of an open polling location in Philadelphia through the year 2012, and the order was issued. The department decided to drop the pending charges against the other three defendants.

A federal judge agreed with the remedy sought by DOJ — an injunction prohibiting Samir Shabazz from displaying a weapon of any kind within 100 feet of an open polling location in Philadelphia through 2012. There is scant evidence to support a prosecution of the NBPP itself, or of its chairman; Justice would have needed some evidence that Shabazz was carrying out their orders.

McCarthy claims I “blithely skipped” the Commission testimony of J. Christian Adams, who left DOJ and has been the leading critic of its decision to drop the case. Adams himself knew that neither I nor the only two Democrats on the Commission could make the July 6 hearing. It was, in fact, particularly important to set a date when Commissioner Michael Yaki could attend; he is not only very knowledgeable about the case, but without him or Commissioner Arlan Melendez, a bipartisan federal agency was choosing to have a partisan hearing on a highly contentious political incident. We asked our colleagues to hold the hearing on another date (such as July 16, a regularly scheduled meeting of the

Commission). That request was rejected. No one “blithely skipped” such an important event.

Adams is actually a friend of mine whom I respect for his expertise in this field; unlike McCarthy, Adams understands that serious people can have legitimate disagreements about complex questions. I can respect his opinion on this matter while coming to different conclusions on some key points.

Perhaps because of the problems with the Commission’s initial investigation, my conservative colleagues on the panel have now shifted the focus of their investigation to the broader question of racial double-standards in the enforcement of voting rights — that is, whether the Obama DOJ has a policy of offering protections for black voters but not white ones. That issue greatly interests me, and I hope that the Justice Department will send additional representatives who will be willing to discuss the Commission’s old and new concerns.

This whole brouhaha over the Panther incident has been a sad chapter in our national “conversation” on race. So much of the argument between McCarthy and me over precise details is a tempest in a teapot — although there seem to be no teapots when it comes to questions of race. Hysteria sets in the minute there is a whiff of a story involving actors who might be labeled racially identifiable victims. Perhaps this is the true test of racial progress in America: Whether we can have a calm and collected debate over racially complicated issues that involve conflicting or murky evidence. We are making slow progress in that direction — but we still have a long way to go.

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