

## Holding Holder Accountable

The U.S. Commission on Civil Rights steps up.

by Jennifer Rubin

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The U.S. Commission on Civil Rights (USCCR) is in the news again, for the first time since then-chairman Mary Frances Berry tried to prevent seating a George W. Bush appointee. This time, though, it is challenging liberal civil rights orthodoxies, and Democrats and left-leaning civil rights groups are the ones in the crosshairs. Since January, the commission has been helping to fill the gap left by the lack of congressional and media oversight of a liberal administration. The commission, according to Kenneth Marcus, the USCCR staff director from 2004 to 2008, becomes more important "when the president and Congress are of one party and major civil rights organizations are aligned with them."

The USCCR is something of an oddity. Created in 1957 as part of the Civil Rights Act, it conducts investigations, holds hearings, and publishes reports--about four a year--on the key civil rights issues it decides the nation is facing. (Half of its eight commissioners are appointed by the president, half by Congress, with not more than four allowed from the same party.) It has a minuscule budget (\$9 million) and no power to enforce legislation. As Marcus explains, "Its sole power is the power of the bully pulpit. . . . It is the power to shame."

Today a majority of commissioners favor a "conservative" view of civil rights--opposition to racial preferences and adherence to a colorblind vision of the Constitution--which they believe mirrors the original vision of our civil rights legislation. The USCCR's agenda includes voter fraud, the adverse impact of economic regulation on minority opportunity, school choice, and a number of other topics in conflict with liberals' civil rights agenda. The commission has lately opposed law school and state bar racial preference policies and exposed the lawless preservation of racial preferences in government contracting. The USCCR commissioned compelling research pointing to the deleterious impact of racial preferences on minority students pursuing science, technology, and math careers. And it just announced an investigation into the admissions practices of nonelite universities, which may in the name of "gender balance" be suppressing the number of female admittees. The issue has failed to attract the interest of the self-styled feminist groups, and it's no wonder. As Roger Clegg of the Center for Equal Opportunity wryly observes, if women's groups were to argue that gender should be irrelevant and women admitted based on their superior merit, "That's a slippery slope. If that's true for gender, why not for race?"

The USCCR's efforts are putting it in conflict with leftist civil rights groups devoted solely to expanding racial preferences. Commissioner Gerald Reynolds points to the commission's examination of a provision in the Democrats' health care plan that would encourage race preferences in medical schools in order to improve health care for minorities. USCCR research showed that instituting race preferences for medical school would not improve the health care in minority communities. "When you peel it back and analyze the issue," Reynolds says, "it is not [racial] disparity which has created the two-tier health system." It is "a non-sequitur."

The USCCR is also taking a major role in the high-profile New Black Panther party (NBPP)

voter intimidation case. On Election Day 2008, members of the NBPP were caught on video threatening voters at a Philadelphia polling station. Department of Justice lawyers investigated and were poised to enter a default against the NBPP and three individual members. In May, though, Obama administration officials dismissed the case without explanation. The decision enraged legal groups and Republican congressmen, forcing an investigation by the Justice Department's Office of Professional Responsibility (OPR). But no congressional hearings are forthcoming, and doubts about OPR's rigor and independence have been raised. Republican representative Frank Wolf says that he is "not so sure OPR is really digging": "They are not really talking to a lot of people and about a lot of things."

Into this breach has stepped the USCCR. It sent letters in June and August to Justice demanding to know the reasons for the dismissal and whether the department had changed its longstanding interpretation of the Voting Rights Act. The USCCR's concern goes beyond potential ethical violations by Obama appointees meddling with career attorneys' work, Reynolds explains. No one, he notes, would "seriously entertain the view that the Justice Department would have taken the same approach if we moved this out of Philadelphia, to the South with white men . . . in hoods, swinging billy clubs and saying 'This is a white man's world.'" The USCCR's interest, he explains, is in the "precedent": "I don't want any organization or group to point to the New Black Panther party controversy and say, 'We did the same exact things, and we want the same treatment.'"

Attorney General Eric Holder has so far ignored requests for relevant documents despite a statutory mandate to cooperate. Notes Commissioner Peter Kirsanow, "We thought we had made a very reasonable information request. We got a cursory response, and we've continued to be stiffed." Hans von Spakovsky--a former counsel to the assistant attorney general for civil rights--thinks Holder must have "something to hide."

There is no reason why the pleadings and other documents in the case cannot be turned over to the Civil Rights Commission. The case is over with--it is not an ongoing matter. If they did nothing wrong and made the correct decision on the law and the facts, they should want to turn over their legal opinions and analysis.

The USCCR has decided to conduct its own year-long inquiry and hold hearings.

The USCCR advised Holder of its plans in a September 30 letter noting that, if he didn't respond to its request for documents, "it will be necessary for us to propound our interrogatories and interview requests directly on the affected Department personnel." Holder again did not respond, and on October 30 the USCCR voted 5-2 to authorize issuance of subpoenas. A source unrelated to the commission with knowledge of the case describes what the subpoena will force the government to disclose:

Justification memos, investigative memos, witness statements and affidavits, remedial memos, proposed remedial orders, emails discussing the facts and applicable law, information obtained from potential expert witnesses the Department consulted prior to dismissal, emails and memos responding to political appointees, emails from third parties to political appointees including from any NAACP officials lobbying for a dismissal, and perhaps most interesting of all--the

responses about the case the four career attorneys prepared for the Office of Professional Responsibility regarding their investigation of then Acting Deputy Assistant Attorney General Steve Rosenbaum and then Acting Assistant Attorney General Loretta King which were provided to OPR back in September. The latter are likely the best source of the truth about the case.

Such data and the testimony from witnesses would likely focus a public debate on Obama officials' political interference with career attorneys' work. On November 16, the Justice Department finally responded, tersely informing the USCCR that it would await completion of the OPR investigation before cooperating.

Late last week, the USCCR went ahead and issued subpoenas to depose a number of witnesses, including at least one Justice Department employee, with accompanying demands for relevant documents concerning the NBPP case. That employee has informed the Justice Department that he has been served. On November 20 the commission voted to approve procedures for an array of depositions and a complete discovery plan, but the USCCR has not divulged the number or the identities of those subpoenaed at this stage. Commissioner Todd Gaziano says that the USCCR will not be dissuaded by the Justice Department's refusal to cooperate and may proceed to vote as early as December 4 on conducting a full hearing.

A legal standoff is likely if Holder defies a subpoena issued to the department or seeks to prevent individual Justice Department employees from complying. Justice is charged with enforcing subpoenas in federal court--an action Holder's subordinates certainly would not take against their boss or colleagues. Spakovsky says: "If Holder defies the subpoena, there should be calls for congressional action. There certainly would have been during the Bush administration." Reynolds says that he doesn't think "it will get to that": If "the Department of Justice is comfortable with its decision it should have no problem discussing the facts and its rationale in a public setting."

However the legal wrangling progresses, the USCCR has raised the NBPP case's profile. Any efforts to block witnesses from appearing will certainly attract notice and may spur Republicans in Congress to address the issue by resolution or in oversight hearings. Clegg notes, "They can certainly put pressure, public pressure on the Justice Department to expose a cover-up if they can get anybody to listen." If there was improper pressure brought to bear on career attorneys, "That's a story," says Clegg.

Meanwhile, Republican congressmen have been redoubling their efforts. On November 10, Wolf and Lamar Smith of Texas sent a letter to the attorney general expressing concern "that close to three months after OPR's inquiry began, we have yet to receive a clear explanation of the basis on which the Civil Rights Division dismissed the complaint against the New Black Panther party." On November 16, Wolf followed up with a letter asking for copies of reports prepared by the trial team in the NBPP case.

A minority of the commissioners is not pleased with pursuing the matter and would rather defer to Holder. Two Democratic commissioners have publicly criticized the commission's investigation of the NBPP case, deeming it "deeply troubling." One can expect that future

Obama appointees will concur. There is also speculation that the Democratic Congress and White House will try to disband the USCCR.

But the Obama team may simply choose to hunker down until it can stock the USCCR with sympathetic commissioners. Given the staggered terms, the present majority likely will continue until the end of 2010, when President Obama will be able to replace the chairman and another commissioner.

For now, the commission is doing what no other government entity is: challenging the Justice Department's lack of transparency and politicization. An effort by the administration to shut down or muzzle the commission would, as Clegg points out, "look ham-handed" if its NBPP work gains "traction." It'll be one more controversy the Obama administration could do without.

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