

## U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING ON REDISTRICTING AND THE 2010 CENSUS:  
ENFORCING SECTION 5 OF THE VOTING RIGHTS ACT

+ + + + +

FRIDAY, FEBRUARY 3, 2012

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The Commission convened in Room 540 at 624  
Ninth Street, Northwest, Washington, D.C. at 10:40  
a.m., Martin R. Castro, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman

ABIGAIL THERNSTROM, Vice Chair

ROBERTA ACHTENBERG, Commissioner

TODD F. GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner

DAVID KLADNEY, Commissioner

MICHAEL YAKI, Commissioner

KIMBERLY TOLHURST, Delegated the Authority of  
the Staff Director + Acting General Counsel

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## STAFF PRESENT:

MARGARET BUTLER, Acting Chief, OCRE

LENORE OSTROWSKY, Acting Chief, PAU

CHRISTOPHER BYRNES, Senior Attorney-Advisor

to the Office of the Staff Director

PAMELA DUNSTON, Chief, ASCD

TORRENCE MONTGOMERY

DAVID SNYDER

## COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTEN

ALEC DEULL

TIM FAY

DOMINIQUE LUDVIGSON

JOHN MARTIN

RICHARD SCHMECHEL

ALISON SOMIN

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P-R-O-C-E-E-D-I-N-G-S

(10:40 a.m.)

I. INTRODUCTORY REMARKS BY CHAIRMAN

CHAIRMAN CASTRO: Good morning. This meeting is going to come to order. My name is Marty Castro. I am Chairman of the U.S. Commission on Civil Rights. I want to welcome you all to this business meeting of the U.S. Commission on Civil Rights. It is now 10:40 a.m. on February 3, 2012.

The purpose of this meeting is to address the Justice Department's efforts with respect to enforcement of Section 5 of the Voting Rights Act post the 2010 census. We will be addressing the Justice Department's efforts with respect to Section 5 preclearance, including the effectiveness of the preclearance procedures, implementation of the 2006 amendments to the Voting Rights Act, and concerns that may come to light regarding specific jurisdictions' redistricting plans.

Issues such as the constitutionality of Section 5, issues such as bailout or voter ID and voter suppression are topics beyond the scope of this briefing and beyond the scope of the concept paper. So I would ask all panelists and commissioners to focus their questions on the subject matter of the

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1 briefing. Should you have comments that are not  
2 germane to the briefing, they will not be included in  
3 the briefing report. So, we know that folks have  
4 limited time and limited questions and we ask everyone  
5 as best as possible to please stay focused on the  
6 subject matter at hand.

7 Of course, commissioners will ask what  
8 they wish and if they choose to use their limited time  
9 to ask questions that are not germane, that would  
10 result in colloquy, will result in information that  
11 will not end up in the report.

12 Today's briefing includes eight  
13 distinguished speakers who will provide us with a  
14 diverse array of expertise and viewpoints. The  
15 speakers have been evenly divided between two panels,  
16 with Panel I addressing the Commission this morning  
17 and Panel II later this afternoon.

18 During the briefing, each panelist will  
19 have ten minutes to speak. After the panelists have  
20 made their presentations, the commissioners will then  
21 have an opportunity to ask them questions within the  
22 allotted period of time.

23 In order to maximize the amount of  
24 opportunity for discussion between the commissioners  
25 and the panelists, and to ensure that the panelists

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1 this afternoon also receive their fair share of time,  
2 I am going to strictly enforce the time allotments  
3 given to each panelist to present his or her  
4 statement.

5 As in the past, what I will do is I will  
6 recognize commissioners who raise their hands and give  
7 them an opportunity to ask questions. That has worked  
8 well for us in the past briefings. As in the past, I  
9 would like to be fair with everyone so that everyone  
10 has an opportunity to ask questions.

11 Panelists, you will notice that there is a  
12 system of warning lights that we have set up here in  
13 front. When the light turns from green to yellow,  
14 that means there are two minutes remaining. When the  
15 light turns red, you should conclude your statements.

16 Please be mindful again of other  
17 panelists' time. I don't want to have to try to cut  
18 anybody off. I want to give you the opportunity to  
19 make your presentations. And again, I ask my fellow  
20 commissioners to be considerate of the panelists and  
21 of one another. So when you are asking a question,  
22 try to be concise. Please ask only one question at a  
23 time. Given that these are a smaller panel than our  
24 briefing for statutory topic last year, we should all  
25 have an opportunity to ask more than one question but,

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1 just in fairness, try not to ask too many questions at  
2 once. If you could limit it to one at a time, that  
3 would be great.

4 With those bits of housekeeping out of the  
5 way, we will now proceed with Panel I, the 2006 VRA  
6 amendments and observations regarding post-2006  
7 redistricting.

8 II. PANEL I - THE 2006 VRA AMENDMENTS AND  
9 OBSERVATIONS REGARDING POST-2006 REDISTRICTING

10 CHAIRMAN CASTRO: Let me briefly introduce  
11 each of the panelists in the order that they will  
12 speak. Our first panelist this morning is Justin  
13 Levitt, Associate Professor of Law at Loyola Law  
14 School in Los Angeles. Professor Levitt is also the  
15 creator of the website All About Redistricting, an  
16 Interactive Guide to State-by-State Redistricting.

17 Our second panelist is Keith Gaddie,  
18 Political Science Professor at the University of  
19 Oklahoma.

20 And our third panelist is Nathaniel  
21 Persily, Professor of Law and Political Science and  
22 Director of the Center for Law and Politics at  
23 Columbia Law School.

24 And our fourth panelist is Guy Charles,  
25 Founding Director of the Duke Law Center on Law, Race,

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1 and Politics at the Duke Law School.

2 So I'm now going to swear you all in.

3 (Whereupon, the panel was sworn.)

4 CHAIRMAN CASTRO: Thank you.

5 COMMISSIONER KLADNEY: Excuse me, Mr.  
6 Chairman.

7 CHAIRMAN CASTRO: Yes, sir, Mr. Kladney?

8 COMMISSIONER KLADNEY: Would you ask  
9 somebody to shut the air conditioning off?

10 VICE CHAIR THERNSTROM: Thank you!

11 COMMISSIONER KLADNEY: You're welcome.

12 CHAIRMAN CASTRO: Please, Mr. Levitt,  
13 proceed -- Professor.

14 PROFESSOR LEVITT: Thank you, Mr. Chair,  
15 Madam Vice Chair, distinguished commissioners. I want  
16 to offer one correction for the record, if I may,  
17 before I get started. You have seven distinguished  
18 speakers before you and myself but I am honored to  
19 join their company. And I thank you very much for the  
20 opportunity to testify before you.

21 As you mentioned, my name is Justin  
22 Levitt. I teach constitutional law and election law  
23 at Loyola Law School in Los Angeles. I am paying  
24 particular attention to redistricting in that regard,  
25 including the process by which each of our 50 states

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1 conducts state and federal redistricting. That is  
2 where I have really focused my efforts in this  
3 cycle...and the litigation that seemingly inevitably  
4 results.

5 This cycle I am trying to make the  
6 redistricting process accessible through the website  
7 that you mentioned, Mr. Chair. And today I hope to  
8 continue in that regard with really a brief overview.  
9 I think that is part of why you have asked me to speak  
10 first. I know my colleagues will address many more of  
11 the specific elements of how the preclearance process  
12 has proceeded in this cycle, particularly with respect  
13 to redistricting, since this hearing is about the  
14 process following the 2010 census, the most notable in  
15 the redistricting era.

16 The overview that I hope to present is  
17 really about the preclearance process, how it may have  
18 changed since the last redistricting cycle. I have  
19 submitted more extensive remarks in my written  
20 testimony and I thank you very much for the  
21 opportunity to submit that before you. Obviously my  
22 presentation here will be a short overview but I am  
23 more than happy to answer any questions that you have  
24 afterward.

25 The main drive, just as deep background,

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1 the main drive to redraw electoral districts comes  
2 from the Constitution. It may be seen in many state,  
3 local, and federal statutes and ordinances but the  
4 main impetus is the Constitution itself.

5 To foster equality of representation, the  
6 Constitution demands that, for every representative  
7 body, at least every elected representative body, that  
8 the districts where those representatives are elected  
9 from have approximately equal population. As the  
10 population grows and shifts and moves, districts must  
11 keep pace.

12 And so under the Constitution, after every  
13 national census tells us where which people live,  
14 jurisdictions in every level of government redraw  
15 districts accordingly, in order to ensure that the  
16 electoral districts have approximately the same  
17 numbers of people within them. When they do, as you  
18 know well, some jurisdictions must ensure that the  
19 districts they redraw in order to achieve this  
20 compliance also comply with Section 5 of the Voting  
21 Rights Act.

22 As you know, Section 5 prevents covered  
23 jurisdictions, certain jurisdictions covered by a  
24 formula in the statute, from implementing any  
25 election-related change, including redistricting

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1 plans, until those changes have been approved either  
2 by a D.C. Federal Court, by the District Court for the  
3 District of Columbia, or until those changes have been  
4 presented to the Department of Justice and no  
5 objection has been lodged, either within a given  
6 period of time or when the Department of Justice  
7 indicates that it will not interpose an objection.

8 Changes will be precleared—and this is  
9 the statutory standard—if the jurisdiction can show  
10 that its plan neither has the purpose nor will have  
11 the effect of denying or abridging the right to vote  
12 on account of race or color or membership in a  
13 statutorily-defined language minority group.

14 There are two essential prongs to this  
15 standard, both of which Congress recently changed,  
16 modified to some degree. The effect prong, ensuring  
17 that a redistricting-related change does not have the  
18 effect of denying the right to vote on account of race  
19 or color, focuses on retrogression -- whether a change  
20 decreases minorities' effective exercise of the  
21 electoral franchise, compared to the situation before  
22 the change.

23 In a 2003 Supreme Court case called  
24 *Georgia v. Ashcroft*, the Supreme Court interpreted  
25 this standard to be quite flexible, allowing states

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1 under the statute to trade minority voters' ability to  
2 elect candidates of choice with their ability to,  
3 among other things, influence but not decide the  
4 election of potentially responsive legislators. And,  
5 in fact, there was a long list of items that  
6 jurisdictions could consider under the Supreme Court's  
7 interpretation of the statute, including whether  
8 particular committee chairs had particular seniority  
9 and should be kept in their positions as a result.

10 Congress reacted fairly strongly against  
11 this decision. And in 2006, with a very explicit  
12 reference to *Georgia v. Ashcroft* in the legislative  
13 history, it amended Section 5 specifically clarifying  
14 that a redistricting plan that diminishes minorities'  
15 ability to elect candidates of choice violates Section  
16 5. If minority voters in covered areas have the  
17 ability to elect candidates, the new statute is quite  
18 clear that a redistricting plan may not permissibly  
19 decrease that ability. This language is written, I  
20 think, intentionally in one direction. That is, it is  
21 clear that a plan diminishing the ability to elect  
22 candidates of choice violates Section 5. And it is  
23 clear that that is a correction to *Georgia v.*  
24 *Ashcroft's* interpretation of the statute.

25 Yet what the statute, what the amendments

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1 do not say, may also be important, I think also are  
2 important. That is, the 2006 amendment says that  
3 diminishing the ability to elect is retrogression.  
4 But it does not say that retrogression is only  
5 diminishing the ability to elect. That is, it takes  
6 one subset of activities, and clarifies that a  
7 diminishment of the ability to elect will constitute a  
8 violation of Section 5, but leaves open other  
9 potential activities that might decrease the effective  
10 exercise of the electoral franchise as additional  
11 potential violations of Section 5 of the Voting Rights  
12 Act, additional ways in which a new plan may  
13 retrogress.

14 In a covered area where minority voters do  
15 not have the ability to elect candidates of choice  
16 currently or rather under a benchmark plan, it may  
17 also constitute retrogression if that jurisdiction in  
18 a new plan, in a change, dilutes the influence of the  
19 minority group in question and thereby abridges their  
20 electoral, their effective exercise of the electoral  
21 franchise.

22 That is a very brief overview of the  
23 effect prong of the new Section 5 standard as amended  
24 by Congress. The purpose prong of Section 5 was also  
25 amended in 2006 and also in reaction to a Supreme

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1 Court case. In 2000, the Supreme Court decided a  
2 case: *Reno v. Bossier Parish School Board*. *Bossier*  
3 *Parish* said that Section 5 allows preclearance of a  
4 plan -- it interpreted the statute to allow  
5 preclearance of a plan with the intent to  
6 discriminate, as long as that plan did not -- as long  
7 as the jurisdiction did not intend to retrogress.

8 That is to say, *Bossier Parish* allowed  
9 plans passed with the intent not to decrease electoral  
10 power, but to limit minority power by "keeping  
11 minorities in their place," that such a plan would  
12 violate the Constitution if enacted with  
13 discriminatory intent but, as the Supreme Court  
14 interpreted the Voting Rights Act, would not violate  
15 Section 5.

16 In 2006 when Congress amended the Voting  
17 Rights Act, it also addressed the purpose prong, to  
18 correct *Bossier Parish* as well. Now, Section 5  
19 prohibits redistricting plans with any discriminatory  
20 purpose, retrogressive or not.

21 In the limited time remaining, I think as  
22 I see that my traffic lights are on, I would like to  
23 address one notable aspect of the preclearance process  
24 new to this cycle in addition to the statutory  
25 changes. Last year in 2011, jurisdictions turned to

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1 the courts to preclear 24 redistricting plans, 21  
2 state plans and three local plans. That is an option  
3 under the statute. Jurisdictions may either seek  
4 preclearance from the Department of Justice or the  
5 courts and may in fact do both. But this is a newly-  
6 exercised option, or at least new to the extent that  
7 it was exercised.

8 Most of the plans that were submitted to  
9 the courts were submitted at the same time that they  
10 were submitted to the Justice Department. Seven plans  
11 from Michigan and Texas were submitted exclusively to  
12 the courts.

13 The vast majority of plans, particularly  
14 local plans, 1103 local plans of the 1106 total plans,  
15 were submitted purely to the Department of Justice.  
16 The administrative route is still the norm. But  
17 particularly for statewide plans, the rate at which  
18 plans are heading to court, either exclusively or in  
19 conjunction with the submission to the Department of  
20 Justice, is substantial and new.

21 These new choices may have several side  
22 effects. I will mention one. It is relatively rare  
23 that courts interpret Section 5 in the redistricting  
24 context because redistricting only comes around every  
25 ten years or less, because most submissions, about 96

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1 percent, are precleared in the normal course by the  
2 Department of Justice, and because those decisions to  
3 preclear are not reviewable. There are fairly few  
4 judicial interpretations of the substantive Section 5  
5 standard. And the new turn to the courts may in fact  
6 result in more cases that interpret Section 5 and let  
7 us understand more from the judicial point of view  
8 what that standard means.

9 CHAIRMAN CASTRO: Thank you, Professor  
10 Levitt.

11 PROFESSOR LEVITT: Thank you very much,  
12 Mr. Chair. I appreciate it.

13 CHAIRMAN CASTRO: There will be more time  
14 with questions to elaborate.

15 PROFESSOR LEVITT: Thank you.

16 CHAIRMAN CASTRO: You're welcome.

17 Next, we would ask Professor Gaddie to  
18 present his remarks.

19 PROFESSOR GADDIE: Thank you, Mr.  
20 Chairman, Madam Vice Chairman, and distinguished  
21 commissioners. It is a pleasure to appear again  
22 before this body.

23 Seven years ago I testified in front of  
24 this Commission that the nature of Section 5 has  
25 become so blurred by recent litigation that the

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1 provision is emerging as a vehicle for the pursuit of  
2 partisan advantage, rather than ensuring access to the  
3 political process. At that point, I also indicated  
4 that we had a need to talk about the political nature  
5 of Section 5 and discuss it frankly and openly, and  
6 then also discussed other matters that are not before  
7 the Commission today.

8 What I would hope to talk with you about  
9 today is briefly delve a bit more into the application  
10 of the new non-retrogression baseline standard as it  
11 is being applied since the amendment of the Act in  
12 2006, with very few data points to deal with in this  
13 process but we will discuss them briefly.

14 And then I would like to discuss a bit  
15 further this issue of simultaneous submission that  
16 Professor Levitt brought up. I will leave to him the  
17 humility but will attempt to replicate his brevity.

18 In my 2009 book, *Triumph of Voting Rights*  
19 *in the South*, Chuck Bullock and I discussed the notion  
20 that there is a party incumbent race dynamic,  
21 especially in Southern politics, that has to be  
22 understood to understand the implementation of Section  
23 5. Put simply, we now implement the Act in a partisan  
24 environment and different political parties are  
25 differentially advantaged from the treatment and use

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1 of minority voters.

2 Section 5 as currently designed, and  
3 preclearance as currently implemented, is relatively  
4 conservative. It does not require the implementation  
5 of redistricting plans that officially allocate  
6 Democratic voters in redistricting plans. And indeed  
7 when you look at the practical implementation of  
8 Section 5, one thing you will discover in the  
9 preclearance process is that arguments for lower  
10 racial concentration or coalitional districts is being  
11 required to be the retrogression standard have not  
12 been followed up on or have not been supported in the  
13 Section 5 review process. We continue to see a  
14 conservative treatment of the nature of the districts  
15 that meet the retrogression standard in the Southern  
16 preclearance states.

17 Now, as a practical matter, when we look  
18 at the implementation of Section 5 in redistricting  
19 since the renewal of the Voting Rights Act, we  
20 discover that there are a total of four redistricting  
21 preclearances that have occurred where there was an  
22 objection. These were all local cases: Lowndes  
23 County, Georgia; Fairfield County, South Carolina  
24 School Board; Amite County, Mississippi; and East  
25 Feliciana Parish, Louisiana.

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1           What is interesting about these cases is  
2           that, in three of the four cases, part of the  
3           objection in the preclearance was that the denominator  
4           of seats was being changed in the redistricting. So  
5           we have a change in the number of seats against which  
6           the baseline for performance for minorities will be  
7           measured. The number of opportunities in terms of the  
8           number of districts was maintained, but the proportion  
9           is not. So when we see objections occurring, it is in  
10          part because the change in the denominator of seats  
11          often through the use of either at-large or floterial  
12          districts, is resulting in a reduction of minority  
13          influence in terms of opportunities to elect. I  
14          believe that these objections were instructive to the  
15          way that the Department of Justice and the D.C. Court  
16          has reacted to the Texas Redistricting Plan for  
17          Congress where we have an increase in the number of  
18          seats but not a proportional increase in the number of  
19          opportunities for minority voters, Hispanic voters in  
20          particular.

21                 This leads me to conclude, based upon  
22                 limited evidence, that the Department of Justice is  
23                 applying a relatively conservative, relatively  
24                 consistent retrogression baseline to redistricting  
25                 plans. Beyond that, there is very little to glean

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1 from the objections because again, as I note, they are  
2 so few, four local objections in total.

3 Now with regard to this other issue of  
4 simultaneous submission approach, as of January 28, of  
5 the 16 states covered in whole or part by Section 5,  
6 eight have pursued simultaneous judicial and  
7 administrative preclearance: Alabama for Congress and  
8 presumably for state legislature, Arizona, Georgia,  
9 Louisiana, North Carolina, South Carolina, Texas, and  
10 Virginia. Texas was denied preclearance in the DCDC.  
11 Arizona's districts have only recently entered the  
12 process.

13 If we look at these preclearance attempts,  
14 what we see is that overwhelmingly they were  
15 successful. Texas is the only state to enter this  
16 process, get to court -- to enter this process and to  
17 not be precleared by the Justice Department so far.

18 Now if you look at the remaining states,  
19 Alaska and Michigan pursued administrative  
20 preclearance only. South Dakota is awaiting  
21 preclearance approval on legislative maps.  
22 California, New York, and New Hampshire have yet to  
23 complete and submit plans to DOJ. Florida has yet to  
24 complete and submit maps. And these maps must first  
25 undergo a review by the State Supreme Court much like

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1 California, because Florida is implementing new  
2 Constitutional guidelines under Amendments 5 and 6 to  
3 guide their redistricting. Mississippi's congressional  
4 map will not undergo a preclearance and was crafted by  
5 a federal district court as an amendment to its  
6 previous map from 2002. And the state legislative  
7 maps in Mississippi, through a quirk in the law, do  
8 not have to be redrawn until the end of 2012. So  
9 Mississippi ran their legislative elections last year,  
10 based upon the maps that they drew a decade ago.

11 Simultaneous submission is working for the  
12 states. As I said, seven of the eight states who have  
13 entered it have successfully precleared 18 maps.  
14 Three maps have been rejected by a court. Louisiana  
15 for the first time successfully precleared a state  
16 house map on its initial effort. Georgia for the  
17 first time successfully precleared all of their maps  
18 on initial submission. So simultaneous submission  
19 appears to be an avenue for success.

20 Now it could be argued that this is having  
21 some impact on the implementation of Section 5 by the  
22 Department of Justice, but it could also be argued  
23 that, given that the states were finding that they  
24 will have to affirmatively fight to import the  
25 implementation of their maps, given the changes in

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1 political control and the change in political  
2 priorities of those map makers, especially in the  
3 Southern jurisdictions, it is easier to meet a  
4 conservative retrogression baseline that puts a  
5 premium on majority-minority districts.

6 I will be happy to answer any questions  
7 from the Commission and thank you again for the  
8 invitation to appear.

9 CHAIRMAN CASTRO: Thank you, Professor  
10 Gaddie. Professor Persily?

11 PROFESSOR PERSILY: Thank you for inviting  
12 me as well. As you can see in my bio, I wear many  
13 hats when it comes to the redistricting process. I am  
14 a law professor, a political scientist, and a  
15 practitioner right now. I am also the Special Master  
16 in drawing the congressional districts for the  
17 Connecticut Supreme Court. So that is by way of also  
18 excuse at how late my testimony was in getting to you.

19 I can say that you can tell which hat I am  
20 wearing depending on what I am saying. So if I am a  
21 political scientist, I usually have data without any  
22 opinions. If I am a law professor, I have opinions  
23 without data.

24 (Laughter.)

25 PROFESSOR PERSILY: And then if I am a

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1 practitioner, it depends who my client is.

2 On that, let me say a little bit about the  
3 global questions, I think, concerning the Department  
4 of Justice and enforcement of Section 5 of the Voting  
5 Rights Act. As has been well-debated both inside and  
6 outside of court, Section 5 of the Voting Rights Act  
7 is unique in our constitutional and statutory  
8 structure. So the selective application to certain  
9 states, the inversion of the federal/state balance,  
10 and various other characteristics, which were  
11 absolutely necessary at the time that the VRA was  
12 proposed, are now the subject of so much  
13 constitutional litigation.

14 I want to talk a little bit about  
15 something I think that gets lost in this discussion,  
16 which is the unique role in our system that DOJ has in  
17 policing American elections at the federal level. We  
18 don't have a nonpartisan civil service like most  
19 countries do in policing election law. And the DOJ  
20 preclearance process is about as close as we have  
21 gotten, even though it only applies to some portion of  
22 the country.

23 Needless to say, given the state of our  
24 politics, the polarization of our politics, any  
25 institution in that capacity right now is going to be

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1 under a lot of fire. And no matter how they do their  
2 job, they are going to be under a lot of fire. And I  
3 think that we should recognize that, given the level  
4 of debate, I think, over this preclearance process.

5 What I would like to do is just talk a  
6 little bit about the statute, the 2006  
7 reauthorization, the VRA, add some meat onto the bones  
8 of what my previous speakers had said, and then also  
9 talk about one or two of the most salient cases that  
10 the DOJ has participated in. One is not technically a  
11 redistricting case but it does have implications for  
12 how we deal with preclearance in the redistricting  
13 context.

14 So first let me talk about the two reforms  
15 in the Voting Rights Reauthorization Act of 2006.  
16 They are known, as Justin Levitt explained, as the  
17 *Georgia v. Ashcroft* Fix and the *Reno v. Bossier Parish*  
18 *Fix*, named after the cases that they overturned.

19 The *Georgia v. Ashcroft* Fix says that the  
20 DOJ and also the U.S. District Court for the District  
21 of Columbia should deny preclearance to laws that  
22 diminish the ability of a racial group to elect their  
23 preferred candidates of choice. This was, of course,  
24 to overturn the decision of the Supreme Court that  
25 allowed for the tradeoff, particularly of so-called

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1 influence districts with ability to elect districts,  
2 in a context in which the partisan gerrymander in  
3 Georgia at the time had been seen and advocated for as  
4 serving a minority interest there.

5 The reauthorized VRA overturns *Georgia v.*  
6 *Ashcroft*, but it doesn't settle the controversies as  
7 to what an ability to elect district is. And so much  
8 of the arguments, I think, and in some ways the  
9 motivation to go to the D.C. District Court instead of  
10 the DOJ, is over disagreement, particularly among the  
11 parties, as to what an ability to elect district is.  
12 For those who participate in the reauthorization, and  
13 I include myself in that, these debates were not  
14 settled at the time Congress passed the law. And so  
15 what we are seeing, I think, in court, in discussions  
16 of this redistricting process, are the unfinished  
17 debates of the reauthorization period over what this  
18 critical language means. In particular, you have  
19 Republicans who tend to think ability to elect  
20 districts refers to majority-minority districts, and  
21 Democrats who tend to take a more flexible standard on  
22 that ability to elect as a function both of the  
23 population percentages in a particular district, plus  
24 things like turnout, voting behavior, etcetera.

25 The *Reno v. Bossier Parish* Fix, which

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1 received comparably little attention is, in many ways,  
2 should have maybe received more attention, given the  
3 number of preclearance denials in the pre-Bossier  
4 Parish period which actually were based on  
5 discriminatory purpose. And so while we have, as I  
6 will say in a second, very few preclearance denials  
7 even since the 2006 reauthorization, the purpose prong  
8 of the Voting Rights Act is a very powerful tool the  
9 DOJ can use because the burden of proof is on the  
10 jurisdiction to show that a redistricting plan or  
11 other voting law is passed without a discriminatory  
12 purpose. And there are several instances including  
13 the *Texas* redistricting case where the DOJ is taking  
14 the position that there is a discriminatory purpose  
15 underlying that plan.

16 So, by my count, there have been 20  
17 preclearance denials since the 2006 reauthorization.  
18 Now, many of those do not deal with redistricting.  
19 Some of them are mixed cases of different types of  
20 electoral mechanisms. And so that is after tens of --  
21 as compared to tens of thousands, maybe 30,000  
22 submissions. There are about 19,000 in the 2010-2011  
23 period, something like that, according to the DOJ  
24 website. And so it is always going to be a very small  
25 number. And, from my look at it, it does not seem to

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1 be much different than previous cycles in the way that  
2 DOJ has been denying preclearance. The one exception  
3 might be the fact that we have a new purpose prong now  
4 after the reinstatement of the pre-*Reno v. Bossier*  
5 *Parish* standards. So in the period following *Reno v.*  
6 *Bossier Parish*, obviously there wouldn't have been  
7 preclearance denials based on discriminatory purpose.  
8 But when you have an N of 20 and an N maybe of 4 with  
9 redistricting plans, there isn't a whole lot you as a  
10 political scientist can do.

11 So let me talk as a lawyer.

12 (Laughter.)

13 PROFESSOR PERSILY: And so let me talk --  
14 I'm going to talk about the two cases, one the *City of*  
15 *Kinston* case which has received so much attention, and  
16 then I will talk about the *Texas* redistricting case.

17 The reason the *Kinston* case is relevant to  
18 redistricting is because of the way, the logic of why  
19 that preclearance denial led to -- basically what the  
20 theory was behind the preclearance denial and how that  
21 would affect redistricting submissions as well.

22 Just to be clear on what the facts were,  
23 while not a redistricting plan, it was a local  
24 initiative to move toward nonpartisan elections in  
25 Kinston. And the DOJ denied preclearance based on the

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1 fact that that would have a retrogressive effect,  
2 because it would make it less likely for African  
3 Americans in Kinston, where they did constitute a  
4 majority but often not a voting majority when it came  
5 time to election, that it would make it less likely  
6 for African Americans to elect their candidates of  
7 choice.

8 Now why is that? The move to nonpartisan  
9 elections would remove so-called partisan cue from the  
10 ballot. And, as a result, whites who would sometimes  
11 cross over for the African-American candidate of  
12 choice would be less likely to do so once the partisan  
13 cue was removed. So, in particular, there would be  
14 less white cross-over voting.

15 The *Kinston* case is significant in this  
16 respect because it does, as I will say in a second, do  
17 what also the *Texas* case does, which looks at not just  
18 the number of voters in a particular election, but  
19 also the degree of racially-polarized voting in there.  
20 And so since my time is limited, let me go to the  
21 *Texas* case and I can answer more about the *Kinston*  
22 case in the comment period.

23 Let me politely disagree a little bit with  
24 Keith Gaddie on this, which is that I think in the  
25 *Texas* case it is clear that the position of the DOJ is

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1 not that you tally up the number of majority-minority  
2 districts and then subtract them and see whether that  
3 is retrogressive. As I said before, in the differing  
4 interpretations of Section 5 there is a functional  
5 definition to the ability to elect, which focuses on  
6 racially-polarized voting turnout and other factors  
7 that will affect minority political opportunity.

8 And so in Texas, there are so-called  
9 coalitional districts which are at issue there, which  
10 the DOJ took the position in litigation the  
11 elimination of which were retrogressive. There are  
12 other arguments about even majority-minority  
13 districts, which were kept in the same population  
14 percentages but, nevertheless, because of the likely  
15 voter turnout of minorities in those districts, they  
16 were seen as retrogressive. Okay?

17 And finally there is, as Professor Gaddie  
18 mentioned, this issue about proportionality and  
19 whether, when Texas gains more congressional  
20 districts, maintaining the same number of majority or  
21 performing districts or ability to elect districts,  
22 whether that avoids retrogression. The DOJ is taking  
23 the position no. At a minimum, they say that the  
24 failure to create another Latino ability to elect  
25 district might be evidence of discriminatory purpose.

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1           There is a lot more to say, of course,  
2           about both the *Texas* case, the *Kinston* cases, and so I  
3           am eager to do so in the question period. Thank you.

4           CHAIRMAN CASTRO: Thank you, Professor  
5           Persily.

6           Professor Charles, you have the floor.

7           PROFESSOR CHARLES: Thank you, Mr.  
8           Chairman and Madam Vice Chairman and members of the  
9           Commission. It is my pleasure to be before you today  
10          and to assess you and to help you in understanding the  
11          Department of Justice's performance in enforcing  
12          Section 5 of the Voting Rights Act in the wake of the  
13          2010 census and this latest round of redistricting.

14          I will build upon the comments of the  
15          previous commentators and, per the Commission's  
16          briefing memo, I will try to address briefly three  
17          issues: first, my sense of the effectiveness of the  
18          Department's guidelines for assessing discriminatory  
19          purpose; second, my sense of the Department's  
20          guidelines for determining retrogression; and then  
21          lastly, if time permits, I might say a few words about  
22          the development of more states going to the courts,  
23          the federal district court, as opposed to the DOJ.

24          With respect to the purpose prong, I will  
25          conclude that, even though the Department has

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1 thoughtfully attempted to try to apply the revised  
2 purpose prong, but I think as a matter of  
3 administrative ease that it essentially has attempted,  
4 has applied the prior *Bossier Parish* standard, as  
5 opposed to the new standard that the court -- excuse  
6 me -- that Congress outlined.

7           With respect to the retrogression inquiry,  
8 I will conclude that the Department is applying that  
9 standard consistent with Congress' intent to restore  
10 the pre-*Georgia v. Ashcroft* approach.

11           First, the discriminatory purpose prong.  
12 The Department of Justice's Civil Rights Division has  
13 adopted guidelines to address both substantive changes  
14 of the VRA per the requirements of the amendment.  
15 With respect to the reversal of *Bossier II* as we have  
16 heard about, and the standard of discriminatory  
17 purpose, the Department has explained that it will  
18 examine the circumstances surrounding the submitting  
19 authority's adoption of submitted voting change, such  
20 as the redistricting plan, to determine whether direct  
21 or circumstantial evidence exists on any  
22 discriminatory purpose of denying or abridging the  
23 right to vote on the basis of the categories  
24 prohibited by the Act.

25           The Department has explained that it will

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1 be guided in its discriminatory purpose analysis by  
2 the factors set out by a Supreme Court decision,  
3 *Village of Arlington Heights v. Metropolitan Housing*  
4 *Development Corporation*. One of the things that is  
5 interesting about this development is the Department  
6 has anchored its discriminatory purpose prong  
7 essentially in a constitutional standard,  
8 notwithstanding Congress' amendment of Section 5 to  
9 expand the discriminatory purpose inquiry beyond the  
10 purpose to retrogress and the Department's good faith  
11 effort in implementing that standard. It seems that  
12 the reversal of *Bossier II* really matters less in  
13 practice as it does in theory.

14 As far as I can assess, all of the  
15 Department's objections on the basis of discriminatory  
16 purpose can be justified under the prior *Bossier II*  
17 purpose to retrogress standard. Indeed, in an  
18 objection letter responding to a submission to  
19 preclear the redistricting plan for Lowndes County,  
20 Georgia, the Department explicitly referred to and  
21 applied the purpose to retrogress standard, instead of  
22 the broader discriminatory purpose standard. And I  
23 think that is one of the reasons why, as Professor  
24 Gaddie stated, that you see a fairly conservative  
25 application of the retrogressive discriminatory

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1 purpose standard. The Department is in fact applying  
2 a fairly conservative approach perhaps as a matter of  
3 practicalities. How do you determine purpose? It is  
4 easy to apply that under the old *Beer* counting  
5 standard and harder to assess and to develop evidence  
6 of discriminatory purpose, notwithstanding the fact  
7 that the burden is on the covered jurisdictions. It  
8 is so much easier to assess the contextual factors or  
9 to simply look at, where there two majority-minority  
10 districts under the benchmark plan, now there is only  
11 one, now you have to explain why that is.

12 So I think you can look at the objections  
13 on discriminatory purpose, almost all of them, perhaps  
14 with one exception, can really be explained as  
15 discriminatory purpose under the *Beer* standard, unless  
16 under the broader standard, which is why I think you  
17 see a fairly conservative approach with respect to  
18 discriminatory purpose.

19 Let me say a word about retrogression.  
20 The Department has also adopted guidelines to provide  
21 covered jurisdictions guidance on the retrogression  
22 inquiry. The retrogression inquiry essentially asks  
23 whether a racial or a language minority group is worse  
24 off under the proposed redistricting plan as opposed  
25 to the benchmark plan. The benchmark plan is usually

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1 the last legally-operative plan. The fundamental  
2 inquiry under the amended Section 5 is determining  
3 whether a racial or language minority group's ability  
4 to elect their preferred candidate of choice has been  
5 diminished.

6 According to the Department, that  
7 assessment is made by engaging in a functional  
8 analysis of the electoral behavior within the  
9 particular jurisdiction or election district. This  
10 functional inquiry takes into account demographic data  
11 as well as data on different rates of electoral  
12 participation within discrete portions of a  
13 population. The inquiry also includes comparative  
14 registration and turnout data by race. Presumably,  
15 the department compares the proposed plan and the  
16 benchmark plans along the parameters noted above.

17 The Department's application of the new  
18 Section 5 standard is fairly conventional. The  
19 Department applies the standard to essentially  
20 preserve the majority-minority districts where  
21 districts are not strictly majority/minority because  
22 the racial minority does not constitute more than 50  
23 percent but the district is a performing district,  
24 meaning the district enables a racial group to elect  
25 the candidate of its choice under the benchmark plan.

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1           The Department presumably uses the  
2 benchmark plan to identify performing districts from  
3 majority-minority districts. This approach enables  
4 the Department to easily apply the ability to elect  
5 standard. The Department can look at the benchmark  
6 plan and ascertain whether the racial group in  
7 question has been able to elect its candidates of  
8 choice in the relevant district or districts. The  
9 Department has then to ascertain whether the proposed  
10 plan maintains the current ability to elect or  
11 diminishes the ability to elect. This is a manageable  
12 and predictable inquiry.

13           The Department's interpretation of Section  
14 5 is consistent with Congress' intent in amending  
15 Section 5, which is to restore the status quo ante  
16 *Georgia v. Ashcroft*. The status quo before *Georgia v.*  
17 *Ashcroft* privilege majority-minority districts as  
18 against coalition or influence districts. Prior to  
19 *Georgia v. Ashcroft*, covered jurisdictions were  
20 limited in their ability to make tradeoffs among  
21 different types of electoral arrangements. So they  
22 were limited in their ability to swap, say, one  
23 majority-minority district for, say, two coalition or  
24 influence districts, as an example.

25           Additionally, the pre-*Georgia v. Ashcroft*

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1 standard was easy to apply. One had only to count the  
2 number of majority-minority districts, and also think  
3 about the contextual factors, but at least the  
4 counting gave you a sense of what the problem was.  
5 Though Congress fully intended to restore the status  
6 quo ante *Georgia v. Ashcroft* as Professor Persily  
7 said, did not provide sufficient guidance on the  
8 substantive standard. Namely, how does one determine  
9 the racial groups or language minorities' preferred  
10 candidate of choice. The difficult issue presented in  
11 *Georgia v. Ashcroft* is determining whether the state  
12 actors or the covered jurisdiction are moving voters  
13 of color around so as to enhance their electoral  
14 prospects or whether they are moving them around so as  
15 to deprive them of their candidate of choice. All of  
16 the justices in *Georgia v. Ashcroft* agree that, in  
17 light of the changed circumstances, some appreciable  
18 number, some moving around may in fact be permitted.  
19 Depending upon the circumstances, a 60 percent black  
20 district could be vote dilution by packing.

21 In light of the changed factual  
22 circumstances, the fundamental question was figuring  
23 out whether, for example, a state is reducing in order  
24 to help, or reducing in order to hurt. Depending upon  
25 the facts on the ground, it might be the case that a

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1 majority-minority district is not the best  
2 configuration to promote the ability to elect for  
3 voters of color. The best that can be said about what  
4 Congress did, and that it proceduralized the issue by  
5 creating an even stronger presumption against change.  
6 But differently, one can view the congressional  
7 override of the court's approach in *Georgia v.*  
8 *Ashcroft* as Congress' attempt to send a very strong  
9 signal to cover jurisdictions that they ought to bear  
10 the cost of change.

11 The signal probably points the Department  
12 in the general direction, but that is probably all  
13 that it does. This lack of guidance compels a  
14 decision-maker, in this case the Department, to place  
15 a greater emphasis on contextual factors and  
16 variables.

17 So at the end of the day what you might  
18 see, and I will conclude with this, at the end of what  
19 you might see is that eventually the Department might  
20 have to rely more on these contextual variables. To  
21 the extent that racial bloc voting decreases, the  
22 extent that there might be more cross-overs by white  
23 voters, if racial bloc voting increases or stays the  
24 same, then the fix, I think, will actually work. But  
25 a lot of this depends upon the contextual variables on

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1 the ground, what the facts are on the ground, to  
2 assess how best to implement the change that Congress  
3 has sought to implement in amending Section 5 of the  
4 Voting Rights Act.

5 I will stop here and be happy to answer  
6 any questions that the commissioners may have.

7 CHAIRMAN CASTRO: Thank you, Professor  
8 Charles. At this point, we will have the  
9 commissioners ask questions and we will do that until  
10 12:30, at which time we will take a break.

11 III. PANEL I: QUESTIONS FROM  
12 COMMISSIONERS AND STAFF DIRECTOR

13 The Chair recognizes Commissioner  
14 Kirsanow.

15 COMMISSIONER KIRSANOW: Thank you, Mr.  
16 Chair. I want to thank you all for coming here. As  
17 usual, the staff has done a splendid job of bringing  
18 some very competent witnesses.

19 Maybe Vice Chair Thernstrom may remember,  
20 but I think this is at least our third, possibly the  
21 fourth, briefing on this issue or something related to  
22 this issue. And I remember Professor Gaddie was here  
23 a few years ago.

24 Despite all those briefings, I am still  
25 completely ignorant on the Voting Rights Act. I just

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1 got a real -- and it has nothing to do with the  
2 witnesses -- I just have this mental block associated  
3 with it. And I have even read Commissioner  
4 Thernstrom's books and I still can't absorb it.

5 COMMISSIONER YAKI: In fact you haven't  
6 voted in what, 30 years?

7 COMMISSIONER KIRSANOW: Yes. I'm not sure  
8 how I'm registered. Klingon probably.

9 VICE CHAIR THERNSTROM: Commissioner  
10 Kirsanow, can I just interrupt for a second here? My  
11 husband said to me the other day -- He has gone line-  
12 by-line through both my books. He edits them for me.  
13 He looked at me and said, "I still don't understand  
14 the books."

15 (Laughter.)

16 COMMISSIONER KIRSANOW: But what strikes  
17 me, and I think all of you kind of touched upon this,  
18 especially Professor Charles, is the manner in which  
19 DOJ determines retrogression, specifically with  
20 respect to the ability to elect candidates of choice.  
21 To me that is a very interesting phrase, because it  
22 seems to me that a base is always stolen or, to put it  
23 another way, that there is an immutable static  
24 presumption as to what the candidate of choice will be  
25 in a majority-minority district. And Professor

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1 Charles talked about certain data or metrics that are  
2 used, such as demographic data, participation, voter  
3 participation, things of that nature.

4 Does anyone know how it is that DOJ gets  
5 to that first -- gets beyond the first base of the  
6 presumption as to what, and I guess to some extent it  
7 is swerved into it with respect to the *Kinston* case,  
8 why is this presumption and why is it static in terms  
9 of retrogression that over the last 45 years  
10 minorities are presumed to always to be voting for  
11 other minorities and that Latinos, apparently at least  
12 based on what I have seen, are presumed to be more  
13 likely to vote for other minorities than whites would  
14 be presumed to vote for minorities, whether black or  
15 Latino. It seems to me that that needs to be  
16 addressed before you can even suggest that this is  
17 being done in a conservative fashion or the correct  
18 fashion or is presumed to this guidance or overturning  
19 *Georgia v. Ashcroft*. Does anybody have any ideas as  
20 to how DOJ comes to that determination initially?

21 PROFESSOR PERSILY: So the inquiry is not  
22 unlike what we have done in a familiar way since  
23 Section 2 of the Voting Rights Act was passed. And so  
24 the question as to whether a district has the ability  
25 to elect a minority-preferred candidate depends on an

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1 analysis of racially-polarized voting where you look  
2 at whether the candidates that the minority community  
3 has been voting for have actually been elected.

4 COMMISSIONER KIRSANOW: Right. In other  
5 words, what they have done in the past that is  
6 presumed to be what they are going to be doing going  
7 forward ad infinitum, that blacks will always be  
8 voting for blacks, that Hispanics will always be  
9 voting for blacks or Hispanics, that whites may cross  
10 over once in a while, depending on what the party is?  
11 And again, there is another whole aspect to that.

12 But is there any element within its  
13 determination or any consideration, to the extent that  
14 you know and I'm not sure that you do, is there any  
15 consideration within DOJ's voting section as to  
16 possible transition or change or something of that  
17 nature? And is it confined to some type of a  
18 calculus, I guess would be kind of like a gradient  
19 derivative in calculus? Is there kind of a  
20 progression.

21 PROFESSOR PERSILY: Whoa, whoa, whoa,  
22 whoa.

23 COMMISSIONER KIRSANOW: Romulans don't  
24 understand those terms. How do they determine that?

25 PROFESSOR PERSILY: Well again, it is not

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1 presumed that the race of the candidate will predict  
2 whether they are minority-preferred or not. And so  
3 the question is whether, for example, you could have a  
4 minority-preferred candidate that well, we have  
5 preclearance issues where there are white candidates  
6 who are actually said to be the minority-preferred  
7 candidate.

8 COMMISSIONER KIRSANOW: And how is that  
9 determination made?

10 PROFESSOR PERSILY: Because you look at  
11 how they voted in the previous election. Did this  
12 person get the African-American vote or the Latino  
13 vote in the previous elections? And so there are  
14 sticky questions here as to how many challengers, for  
15 example, did that person have to have in a primary  
16 election versus general election over the course of  
17 their sort of experience in order to really identify  
18 whether this person was a minority-preferred  
19 candidate, but it is an empirical question.

20 And over time, and this is what is  
21 critical, as racial polarization decreases, there will  
22 not be a minority-preferred candidate because, if the  
23 minority community splits, then there is no issue as  
24 to whom their candidate of choice is. So that, for  
25 example, if at time one it turns out the minority

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1 community is splitting between different types of  
2 candidates and then you have a redistricting plan,  
3 that redistricting plan will not affect their ability  
4 to elect their preferred candidates, because it is the  
5 interaction of the voting patterns with the  
6 configuration of districts which is going to be used  
7 to determine retrogression.

8 So you can't say that a redistricting plan  
9 that moves minorities around in an area where there is  
10 no racially-polarized voting actually decreases their  
11 ability to elect, because they weren't coalescing  
12 together to elect a particular candidate before you  
13 redistrict it.

14 CHAIRMAN CASTRO: Professor Gaddie and  
15 then Charles, and then we will open it up for another  
16 question from another commissioner.

17 PROFESSOR GADDIE: Commissioner, briefly,  
18 the tools of Section 2, the statistical tools that we  
19 use as part of the Section 2 evaluation, can be used  
20 in doing a Section 5 evaluation performance. And if  
21 you go and look at the relatively brief denial  
22 letters, you will see reference to this sort of  
23 analysis where statistical analysis tries to determine  
24 the relationship between racial voter concentration  
25 and which candidates they vote for.

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1           In fact I am going to plug the book again,  
2           in mine and Chuck Bullock's book, *Triumph of Voting*  
3           *Rights in the South*, there is an appendix in the back.

4           COMMISSIONER YAKI: Is that on Amazon?

5           PROFESSOR GADDIE: It is on Amazon, yes,  
6           sir.

7           COMMISSIONER KIRSANOW: By mentioning it  
8           here, it is going to number four.

9           COMMISSIONER YAKI: And if there is a  
10          secret code we can enter for a discount, we can always  
11          accept that.

12          (Laughter.)

13          VICE CHAIR THERNSTROM: No, no.

14          COMMISSIONER YAKI: If it is a public  
15          secret code, then sure.

16          PROFESSOR GADDIE: I did the self-publish.  
17          There is an appendix in back that describes the  
18          primary methods. But if I can add on to Professor  
19          Persily's comments, which are very much on mark,  
20          without opening the door to talk about the term, talk  
21          about bailout, if you look at the conditions that are  
22          supposed to be met for bailout from under the Section  
23          4 trigger, you will find many of the conditions that  
24          might emerge or many of the efforts that might be  
25          taken by a jurisdiction to alleviate and change the

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1 electoral environment. That might lead to a decline  
2 of racially-polarized voting and lead to a  
3 circumstance where you no longer need a prescriptive  
4 remedy or where the remedy required to elect  
5 candidates of choice doesn't need to be so heavily  
6 concentrated. This includes a variety of efforts to  
7 voter education, increasing minority voter  
8 participation, a decline in racial appeals at  
9 election. There are what, nine substantive points in  
10 the Senate factors and four supplemental factors.  
11 There are a variety of other contextual factors that  
12 have to come into play.

13 It is not, even before *Ashcroft* it wasn't  
14 really majority-minority districts because if you  
15 looked at Texas, Section 5 in part was designed to  
16 protect districts like the historic 18th, the Barbara  
17 Jordan district, which was not a majority black  
18 district for much of its existence.

19 So it has always been fuzzy. Is it just  
20 counting up the majority opportunities? It is  
21 counting up those opportunities that offer the  
22 opportunity to elect. And where it got murky with  
23 *Ashcroft* was how low could you go in terms of taking a  
24 district that was Democratic, where minority voters  
25 were part of a coalition, and to make it part of the

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1 protective baseline.

2 In 2003, a witness testifying against the  
3 Tom DeLay map argued the districts as little as five  
4 percent minority population should be protected from  
5 retrogression because they elected a Democrat and  
6 Hispanics and blacks were voting for that Democrat.  
7 At that point we have gone a little bit too far on the  
8 partisanship dimension because the minority voters are  
9 not a dominant or even a substantial partner in the  
10 coalition that elects. But nonetheless, it is not  
11 just majority districts.

12 CHAIRMAN CASTRO: Professor Charles and  
13 then we will open it up for another line of  
14 questioning.

15 PROFESSOR CHARLES: Just one very quick  
16 point. It goes to, I think, the essence of your  
17 question, Commissioner, which is voting behavior  
18 matters or actual data and empirical data in this  
19 context. So it isn't an assumption about what -- an  
20 essential assumption about what voters are going to do  
21 or what they should do but it is an attempt to look at  
22 their actual patterns of behavior and the surrounding  
23 context. Which I think part of the essence of your  
24 question goes to what extent are communities being  
25 tied into an assumption about what they want to do.

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1 And perhaps it might help to know that looking at the  
2 actual behavior and patterns doesn't matter in making  
3 the assessment.

4 CHAIRMAN CASTRO: Is there another  
5 question from another commissioner? Commissioner  
6 Achtenberg.

7 COMMISSIONER ACHTENBERG: I'm wondering if  
8 the panelists could each express their own opinion on  
9 the significance of simultaneous submission and why we  
10 have seen such an increase in simultaneous submission.  
11 I mean what is really going on?

12 PROFESSOR LEVITT: So I will start with an  
13 "I have no idea."

14 COMMISSIONER ACHTENBERG: By the way, I  
15 don't believe that. I think you do, so I would like  
16 you to tell us what it is.

17 PROFESSOR LEVITT: I have suppositions but  
18 I don't really have data and this goes in part to  
19 something that Professor Gaddie mentioned, that  
20 simultaneous submission seems to be working. And I  
21 guess I would dispute that, because I don't know what  
22 it is supposed to achieve. So simultaneous  
23 submission, those jurisdictions that have  
24 simultaneously submitted, yes, the vast majority of  
25 them have had their plans precleared. But I have no

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1 idea whether there is any causal relation whatsoever.  
2 That is, it seems to me the Department of Justice, as  
3 other witnesses have said, had been preclearing plans  
4 at about the same rate that they have in the past.  
5 And we don't know the counter factual of whether they  
6 would be preclearing these same plans, even if they  
7 didn't also go to court.

8 I do know that the submission process in  
9 court is substantially more expensive and can take  
10 substantially longer. And I think you can see some  
11 cases, as in Michigan's current preclearance  
12 submission which is exclusively to the courts, that  
13 had they submitted to the Department of Justice would  
14 already be over. So the Department of Justice has  
15 filed in court a statement saying we do not have any  
16 objection to these plans, and yet, because the  
17 preclearance process went through the courts  
18 exclusively, the plans have not yet been precleared.

19 A similar circumstance, I think, is true  
20 of the Texas Senate maps that the Department of  
21 Justice said that it would not interpose an objection  
22 to the Texas state Senate maps. It did have an  
23 objection to the state House and the congressional  
24 maps. And had Texas gone the administrative route,  
25 those Texas Senate plans might well have been

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1 precleared. Because they are in court, it is a  
2 different decision-maker and different evidence comes  
3 to light.

4 And so I think the main impact is it takes  
5 longer and it tends to be more expensive. It is not  
6 clear whether it is driving the Department of Justice  
7 to any particular result, or whether it is driving the  
8 Department of Justice to any result any faster. I do  
9 know that in the court process at least when there is,  
10 when the matter proceeds farther along toward trial,  
11 much more evidence is obtained. The administrative  
12 preclearance process is a shortened process with a  
13 relatively limited array of evidence. And in the  
14 Texas case now going to court, you see a lot more  
15 evidence about the process as a whole that will reveal  
16 more about Texas' redistricting decision than the  
17 administrative process would.

18 COMMISSIONER ACHTENBERG: So maybe the  
19 purpose is to drive the Department of Justice crazy  
20 instead of driving it to a particular conclusion.

21 PROFESSOR LEVITT: As I understand it -  
22 so, I don't know how the Department of Justice  
23 allocates its resources in this extent and it may well  
24 be, it may cause additional resources. It may not.  
25 It certainly has an impact in what the jurisdictions

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1 themselves have to put forward in order to meet the  
2 standard.

3 COMMISSIONER ACHTENBERG: Thank you.

4 CHAIRMAN CASTRO: Professor Persily.

5 PROFESSOR PERSILY: So Professor Levitt  
6 gave a politics answer and I will give a political  
7 answer. So I will put on my political scientist hat.

8 The reason that these states are going to  
9 court is because they think they are more likely to  
10 get preclearance there than they would with the DOJ.  
11 And so as well that it does accelerate the process for  
12 them so that in the event they were to get an adverse  
13 decision from the DOJ, then at least they have already  
14 started filing in court as well. I mean I don't think  
15 there is any -- I mean, as you say, what do you think  
16 is going on; that is what they think is going on.

17 And so given that it is difficult as we  
18 are seeing in Texas, which admittedly did go the court  
19 route, it is difficult to get these plans through  
20 litigation in time for the general elections. So  
21 using up all your options at the front end, it makes  
22 it more likely, perhaps, that you will get a favorable  
23 determination from one of those bodies. But that is  
24 what is going on, is that they think that it is more  
25 likely that they will go into practice. Otherwise,

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1 their lawyers wouldn't be advising them that way.

2 CHAIRMAN CASTRO: The chair recognizes the  
3 Vice Chair.

4 VICE CHAIR THERNSTROM: Well I would add  
5 another sentence to what you just said, which is look,  
6 this is the first time that preclearance -- since 1965  
7 -- that preclearance has been conducted with a  
8 Democratic administration. These are mostly states, I  
9 think entirely states, that have Republican governors  
10 and they don't trust Eric Holder's DOJ. It's as  
11 simple as that, it seems to me. So putting your  
12 political hat on, it seems to me another sentence  
13 there.

14 But I actually -- Well, I have lots of  
15 questions but let me just turn to one. I very much  
16 liked Commissioner Kirsanow's question about a static  
17 landscape. And I very much disagree with the whole  
18 definition of racial polarization, which was Brennan's  
19 definition and never accepted by a majority on the  
20 court. And it does mean that in any jurisdiction in  
21 which the majority of whites are Republicans and the  
22 majority of blacks are Democrats, you have  
23 automatically got racial polarization.

24 But that aside, on the question of the  
25 static landscape, it doesn't extend simply to -- the

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1 point doesn't extend simply to those aspects of the  
2 landscape which this panel talked about and which  
3 Commissioner Kirsanow referred to.

4 Look, the landscape is changing because  
5 there is enormous change in the residential  
6 demography. And so it is increasingly not going to be  
7 possible to draw majority-minority districts with the  
8 ease that they were once drawn. And even if you  
9 accept districts that have fingers going in every  
10 direction chasing minority voters, it is still  
11 difficult. And it is made even more difficult by the  
12 fact that these minority voters whom the lines are  
13 chasing, these minority families whom the lines are  
14 chasing, you might try to get a majority black  
15 district or a majority Latino district. But the  
16 assumption is increasingly becoming very dubious that  
17 all blacks think alike, all Latinos think alike, and  
18 especially because there are real changes in social  
19 class associations.

20 I mean, this came up in the *LULAC* case  
21 where two Latino districts hundreds of miles apart  
22 were considered one and the same. Well, they had very  
23 little to do with one another. And blacks who move  
24 out to the suburbs from the inner city, for them to be  
25 connected by districting lines with their former

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1 neighborhoods that they worked hard to escape makes no  
2 sense in an increasingly fluid demographic scene.

3 And so I think Commissioner Kirsanow's  
4 point is a much larger one than the response of the  
5 panel indicated.

6 PROFESSOR LEVITT: If I may?

7 CHAIRMAN CASTRO: Professor Levitt, then  
8 Professor Persily.

9 PROFESSOR LEVITT: Thank you, Mr. Chair.  
10 And if I may, Madam Vice Chair, so I agree with my  
11 fellow panelists that the actual analysis on the  
12 ground from both Section 2 and Section 5 does not  
13 reflect the static assumptions that have been put  
14 forward.

15 In my experience, and I can use my now  
16 hometown of Los Angeles as an example, there was  
17 recently an analysis of obligations under the Voting  
18 Rights Act in Los Angeles. And the way to determine  
19 whether or not racial polarization exists is not  
20 simply to count up the number of voting-age black  
21 citizens and the number of voting-age Latino citizens  
22 but to analyze previous elections, giving more weight  
23 to more recent elections so that you do in fact  
24 account for changing circumstance over time, to look  
25 precinct by precinct to see who the individuals in

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1 question have voted for. And there were findings that  
2 in fact the Latino population of Los Angeles  
3 experiences polarized voting. Many, many Latinos  
4 choose to vote for the same types of candidates and  
5 most non-Latinos choose to vote against those types of  
6 candidates in primaries and in general elections,  
7 both; so also in elections where party is not in fact  
8 an issue.

9 But that African Americans didn't show the  
10 same patterns; that, in fact, African Americans  
11 enjoyed more cross-over voting with other members of  
12 different racial coalitions and could in fact elect  
13 candidates of choice well without specific districts  
14 designed for them.

15 And the Voting Rights Act embraces this  
16 flexible standard, that it looks very much at the hard  
17 data on the ground about how people vote without these  
18 assumptions, in order to determine whether there is  
19 affirmative liability or under Section 5 whether a  
20 particular plan should be precleared.

21 CHAIRMAN CASTRO: Professor Persily and  
22 then the Chair will recognize Commissioner Yaki for a  
23 question.

24 PROFESSOR PERSILY: Let me talk a little  
25 bit about the demographic changes that Vice Chair

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1 Thernstrom mentioned because I have been seeing it,  
2 this redistricting cycle since I have been drawing  
3 plans from various states.

4 So it is becoming easier to draw a  
5 majority of Latino districts. And sometimes you have  
6 to try not to, which is to say that inadvertently you  
7 would end up creating -- as if no one should try not  
8 to-- but the point being that there is a -- that if  
9 you don't in certain areas in the country, one would  
10 be suspicious why you hadn't.

11 With African Americans, you are right, the  
12 story is different both because of, as the *New York*  
13 *Times* reported an article a few months ago, because of  
14 geographic mobility and moving to different areas, but  
15 also that the population in certain areas is not  
16 rising as fast as their neighbors.

17 So that is the truth in New York. I live  
18 in the Harlem district, Charley Rangel's district,  
19 which is now predominantly Latino. We think of Harlem  
20 as a characteristically African-American area but now  
21 that district is predominantly Latino and probably  
22 will end up being majority -- well, we will see how  
23 the district lines are drawn -- but may end up being  
24 majority Latino in the next cycle.

25 Brooklyn, it is becoming more difficult to

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1 draw majority African-American districts. And yes, it  
2 is true in some parts of the South that the same is  
3 true. But it is also the case, as I think you are  
4 suggesting, that majority-minority status is not as  
5 necessary as it was previously in order for African  
6 Americans to elect their preferred candidates, which  
7 is why the decision over whether to adopt bright line  
8 rules at a kind of 50 percent mark is an important one  
9 because it is clear, and I think that DOJ's  
10 regulations are pointing this out, that in certain  
11 areas of the country there is enough cross-over voting  
12 that you don't need to draw an over-50-percent  
13 district.

14           However, in many parts of the country  
15 because of, not in spite of, a lot of the partisan  
16 correlations that you are talking about, it will be  
17 necessary to draw a majority-minority district and for  
18 them to continue to elect their candidates of choice.

19           Now one of the things that we have been  
20 talking about, we have been talking about majority-  
21 minority as if we know what the denominator is. And  
22 so it really makes a difference whether you are  
23 talking about population, voting-age population,  
24 citizen voting-age population, or registered voters.  
25 This has come up in the *Texas* case. The differences

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1 between, for example, the numbers of people who are  
2 Latino in a majority citizen voting-age population  
3 district in Texas and a majority population district  
4 will be vastly different.

5 Now we draw districts, for the most part,  
6 for one-person, one-vote purposes by the number of  
7 people who are in the district. But then for the  
8 Voting Rights Act purposes, these other factors come  
9 into play. As the DOJ regulations say, you have to  
10 look at things like turnout, eligibility, and other  
11 factors.

12 The Supreme Court has been deliberately  
13 unclear, I think, in terms of Section 2 of the Voting  
14 Rights Act as to whether you look at voting-age  
15 population, citizen voting-age population. They  
16 didn't do that in the *Bartlett v. Strickland* case.  
17 But these difficult issues of eligibility and turnout  
18 are ones that are very important. And I should say  
19 they are the ones, if you look at one of the DOJ  
20 objections in *Texas*, the ones in their brief, the  
21 issue of the strategic use of low-turnout Latino  
22 communities in order to keep the population constant  
23 in the district is seen as retrogressive. So even  
24 maintaining a majority-minority district, the  
25 allegation is, could still be retrogressive, because

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1 of the voting behavior of the people you are putting  
2 in and taking out.

3 CHAIRMAN CASTRO: Commissioner Yaki, and  
4 then we will come back to -- Then we will go to  
5 Commissioner Heriot.

6 VICE CHAIR THERNSTROM: Yes, okay. I was  
7 just going to respond very briefly to him.

8 CHAIRMAN CASTRO: I want to give everyone  
9 a chance and then you will have a chance, too. So  
10 Yaki, Commissioner Heriot, Commissioner Gaziano, and  
11 then Vice Chair Thernstrom.

12 COMMISSIONER YAKI: I didn't think we  
13 would go too far down this point but I just wanted to  
14 -- What I hear and what I know from my own experience  
15 with the Voting Rights Act, which may be a little bit  
16 more than Commissioner Kirsanow's in that I am  
17 actually registered to vote and actually know how, is  
18 that when -- There is a subtext and there is an overt  
19 text to this entire review, which is that there is  
20 certain gamesmanship involved in how -- whether to  
21 choose one route of the court to -- whether you choose  
22 to go administrative or whether you choose to go  
23 through the court; how you look at the demographics;  
24 whether you look at what is majority-minority and  
25 everything like that. But I think that all of you

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1 would agree there is still an important underlying  
2 principle behind all of this, which is that, despite  
3 our wishes that we have color-blind and race-blind  
4 voting, that we have color-blind and race-blind  
5 representation, that someone will actually represent  
6 everyone in the district regardless of whether they  
7 are black, white, purple, Klingon in the case of  
8 Commissioner Kirsanow. The fact is, that is not  
9 really what is still happening yet on the ground.

10 I guess -- I don't know if you want to  
11 react or not, but my comment is that there is still a  
12 reason why Congress continued Section 5 and there is a  
13 reason why we have these discussions and these  
14 debates. And that is that there is a long history of  
15 subjugation from the other perspective, from the other  
16 way in terms of minority communities, in terms of  
17 African-American, Latino, Asian, and other minority  
18 communities in this country in terms of what the one-  
19 person, one-vote principle really means in terms of  
20 representative government.

21 CHAIRMAN CASTRO: Professor Charles and  
22 then Professor Gaddie.

23 PROFESSOR CHARLES: I certainly would  
24 agree with much of that, Commissioner Yaki. What you  
25 do see in the Voting Rights Act is an ability, an

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1 attempt to provide for equality and the voting  
2 process. And it has been largely successful.

3 We are in a period of transition. So we  
4 are talking about extent of racial bloc voting. You  
5 have more cross-over voting but we also have -- and  
6 you see this in the DOJ objection letters -- where the  
7 DOJ, for example, talk about decisions that are made  
8 that exclude communities of color and ask why were  
9 they excluded in these electoral decisions. So you do  
10 have still remaining evidence that we have problems in  
11 voting and you do have some problems in racial bloc  
12 voting that are not strictly partisan preferences.  
13 Some of that may be. Some of that may also be related  
14 to what we might still think of as hardcore racial  
15 discrimination. And so part of the goal of the Voting  
16 Rights Act is to provide for electoral quality.

17 That doesn't mean that we are not in the  
18 period of transition and we are still trying to work  
19 out some of those issues. And the role of Latinos is  
20 one that, for example, is front and center today in a  
21 way that it wasn't in 1965. And that is a reflection  
22 of where we are today.

23 CHAIRMAN CASTRO: Professor Gaddie?

24 PROFESSOR GADDIE: I would reflect what  
25 Professor Charles has stated rather eloquently, which

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1 is that it is that we aspire to race-blind processes  
2 and the race-blind implementation of those processes  
3 because we assume we won't have race-blind voting. We  
4 assume it won't happen. We never have had it.

5 With regard to this issue of one person  
6 and what it is meaning to minority communities, there  
7 is a new debate going on concerning the notion of  
8 citizen apportionment. There has been litigation down  
9 in Texas which I was involved in in a minor way  
10 arguing for citizen population one person  
11 apportionment rather than total population one person  
12 apportionment. And such apportionment practically  
13 implemented would make it more difficult to create  
14 majority Hispanic districts in particular or majority  
15 districts of any racial group that has a large non-  
16 citizen population. The argument is predicated on the  
17 assumption that the right to vote is an individual  
18 right vested only in the individual protected under  
19 the 14th Amendment or under Article I and that it is  
20 about voting only.

21 Examination of the broader case law, you  
22 go back to *Reynolds*, in the *Reynolds* decision the  
23 court said that arithmetic precision in the  
24 translation of actual votes and actual seats was not  
25 going to happen. It was too difficult. Now we may be

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1 able to draw maps that can do this now but, if you  
2 look at the larger history of the 14th Amendment, what  
3 you see is that it wasn't just about protecting or  
4 protection in the context of voting. It is about the  
5 larger representative function of representatives.  
6 That it is about constituency service, access to  
7 petition, the ability to choose the lawmaker and have  
8 communities represented relatively equally.

9 So I had entered this citizenship debate  
10 not having my mind made up and then spent a year  
11 reading over it and writing about it. Professor  
12 Persily saw me speak about this last week. And the  
13 conclusion I have come to is that it might be a policy  
14 alternative that a state could pursue, but it opens up  
15 a variety of equal protection of one person issues in  
16 the process.

17 CHAIRMAN CASTRO: Commissioner Heriot.

18 COMMISSIONER HERIOT: Thank you, Mr.  
19 Chairman.

20 I'm curious about the effect of the  
21 *Georgia Ashcroft* Fix. I am like Commissioner Kirsanow  
22 in that I don't know anything about voting rights and  
23 so I need to be instructed to some degree. But I do  
24 get the notion that the fix prohibits the tradeoff  
25 between influence districts and control districts.

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1 I think it was Professor Persily who  
2 mentioned in his written testimony that politics these  
3 days are getting ever more partisan and I definitely  
4 hear you on that. But one area that tends to get  
5 legislative consensus is, wait for it, incumbent  
6 protection. That tends to be very popular in  
7 legislatures everywhere.

8 Now I understand that you probably can't  
9 tell me what motivations were, but is one of the  
10 effects of the fix that incumbents in both parties are  
11 a bit more secure in their seats?

12 PROFESSOR PERSILY: I don't think so. I  
13 mean, because they are so secure to begin with, that  
14 you really can't get the marginal effect of something  
15 like this is so hard to point to. I mean, the degree  
16 to which incumbency, you know, incumbents will lose as  
17 a result of the Voting Rights Act, I think, is so  
18 marginal when you look at the fact that there is over  
19 90 percent, well over 90 percent reelection rates in  
20 almost all of our legislative bodies.

21 So I think that the ability to elect, you  
22 raise an interesting question, a sort of political  
23 scientist question, is what preferred candidates of  
24 choice are. So the phrase is, you cannot diminish the  
25 ability of a racial group to elect their preferred

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1 candidates of choice. And so one interesting question  
2 is, well, is that a particular person, an incumbent,  
3 let's say? Or is that, in the abstract -- and then  
4 generally taking the view, well it's in the abstract -  
5 - you look at whether a district has performed in  
6 minority community over different elections and then  
7 you make an assumption as to whether the  
8 reconfiguration of districts will affect their ability  
9 to elect such people in the future.

10           There are -- because incumbency taints so  
11 many elections -- and taints, I mean in the political  
12 science sense -- it taints the data. There is an all-  
13 things-being-equal quality to the Voting Rights Act  
14 where you are trying to say, well, in the abstract,  
15 how will the minority community be able to elect its  
16 preferred candidate. But as you are suggesting,  
17 because incumbency is such a powerful factor, it is  
18 clear that an ability to elect district will perform  
19 differently depending on whether there is an incumbent  
20 in the race or not. So, for example, and this is what  
21 comes up in your sort of typical Section 2 case, which  
22 is, well, it is often the case that an African-  
23 American incumbent will be able to, even in an area of  
24 racially-polarized voting, win from a district that is  
25 well under 50 percent African-American. Would an

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1 African-American challenger also be likely to win from  
2 a district that is under 50 percent? In an open seat,  
3 what percentage would be necessary?

4 And those are very difficult questions.  
5 And it is a political scientist question. You have  
6 experts who come in and try to establish what is the  
7 likelihood, you know, all other things being equal  
8 settings, that the district will perform for the  
9 minority community.

10 COMMISSIONER HERIOT: Well, incumbents  
11 haven't always been as lucky as they have been in the  
12 last 20, 30 years. Is that correct?

13 PROFESSOR LEVITT: No.

14 COMMISSIONER HERIOT: You look back at the  
15 19th Century, I think you get different numbers.

16 PROFESSOR LEVITT: Not by much.

17 PROFESSOR GADDIE: No, the incumbency  
18 advantage has been around pretty much as long as there  
19 has been incumbents.

20 COMMISSIONER HERIOT: Well, advantage is  
21 one thing. Absolute leasehold on a district is  
22 something completely different. I have seen numbers  
23 that suggested that incumbency was not as great an  
24 advantage. Did I see numbers that were uncommon?

25 CHAIRMAN CASTRO: Commissioner, I'm afraid

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1 we are going to give the floor to Commissioner  
2 Gaziano. Just finish that thought up, Professor  
3 Gaddie, and then we will go to Commissioner Gaziano.

4 PROFESSOR GADDIE: In brief, the size of  
5 the value added of incumbency in districts grew for an  
6 extended period. But prior to the growth of that  
7 value added, which had incumbents winning 70 and 75  
8 percent of the vote, incumbents were still winning 95  
9 percent of the districts but winning with 52 to 58 to  
10 60 percent of the vote.

11 Part of what happened is we have more  
12 homogeneous districts for two reasons. One is that,  
13 as Professor Thernstrom pointed out, people are self-  
14 selecting themselves out as to where they live, and  
15 second, map makers are taking advantage of that and  
16 crafting increasingly safe determined districts.

17 So the incumbents have always gotten  
18 reelected. It is just that they used to have to work  
19 harder.

20 CHAIRMAN CASTRO: Commissioner Gaziano.

21 COMMISSIONER GAZIANO: Yes, I want to  
22 begin by thanking the Chairman for stating up front  
23 that he believes if I ask about the constitutionality  
24 of Section 5 and you answer, that will be stricken  
25 from our report. That is a disagreement we have had

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1 that I will pursue at a later date. I think that  
2 question is both logically and necessarily included  
3 within the framework of what we accepted. But if I  
4 lose my appeal, I don't want my questions. So I am  
5 just noting for the record also that I am following  
6 that what I believe erroneous interpretation under  
7 protest.

8 So instead, I am going to try to follow  
9 the line of questioning that we have really had and  
10 ask again whether the Voting Rights Act, even if you  
11 are studying the actual votes in the data, of course,  
12 it is under the construct that Section 5 previously,  
13 and Section 2 for that matter, has created.

14 I want to read a statement by Professor  
15 Samuel --

16 (Chorus of Issacharoff.)

17 COMMISSIONER GAZIANO: -- Issacharoff --

18 Thank you.

19 (Laughter.)

20 COMMISSIONER GAZIANO: -- who I think  
21 would characterize himself as a progressive professor.  
22 By the way, the statement was made within the *Columbia*  
23 *Law Review* 2004 so it was prior to the change, but it  
24 echoes some things that Professor Gaddie said seven  
25 years ago and that I have read Vice Chairman

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1 Thernstrom and Ed Blum say. So this is the portion.  
2 I want to see if you think that it still impedes the  
3 kind of coalition politics that would otherwise --

4 "The emerging conclusion is that Section 5  
5 has served its purpose and may now be impeding the  
6 type of political developments that could have been  
7 only a distant aspiration when VRA was passed in  
8 1965." I am breaking the quote here . . . "My  
9 suspicion is that the culmination of Section 2 of the  
10 Voting Rights Act, the Protections of the 14th  
11 Amendment and the fact that being in the process and  
12 at the table would afford much protection. Whether  
13 this culmination is enough absent Section 5 is  
14 certainly debatable. What seems less unclear,  
15 however, is the mischief that Section 5 can play in  
16 stalling coalition politics and inviting politically-  
17 inspired interventions from outside the covered  
18 jurisdictions."

19 To what extent do you all think that that  
20 still is true? To what extent do you think the effect  
21 of Section 5 is impeding these other coalition  
22 politics?

23 Let me ask Professor Gaddie first and then  
24 -- since this seemed to echo some testimony you gave  
25 us seven years ago, and then some others can jump in.

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1                   PROFESSOR GADDIE: Well, first of all, let  
2 me note that seven years ago when I went and talked to  
3 Congress, I told them that I thought the coverage  
4 formula needed to be updated. And I also said --

5                   COMMISSIONER GAZIANO: You are venturing  
6 in dangerous territory.

7                   PROFESSOR GADDIE: I know but again, I am  
8 just noting what I have said in the past as a  
9 predicate to my answer.

10                   Second, I observed that there were parts  
11 of the country that needed Section 5 that don't  
12 currently get it. Okay? And there are some parts  
13 that have the ability to use a lot more intense  
14 Section 5, it appears.

15                   I believe that the environment has changed  
16 in the last six years and it has not changed for the  
17 better. I think we are sitting in a poisoned  
18 political environment of hyper-racialized rhetoric  
19 running from several directions but mainly being  
20 driven from aspects of a right wing in American  
21 politics that has rediscovered states' rights. And I  
22 think that this is not necessarily directed at African  
23 Americans as it was in the past, but we have had an  
24 intensification of anti-immigrant and anti-Hispanic  
25 rhetoric that has come into our politics. And as our

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1 states become more diverse, I think that we are  
2 finding pronouncements by politicians and actions in  
3 the electoral environment that reinforce this.

4 The thing is, this environment exists  
5 beyond the Section 5 states. Sometimes it is entering  
6 the Section 5 states, entering their politics, maybe  
7 entering their redistricting. But I think the total  
8 environment has changed in such a fashion that it  
9 necessarily is influencing the electoral dynamic in  
10 areas where Section 5 has been applied, is applied,  
11 and might indicate to us areas where it may need to be  
12 applied.

13 We have declining voter turnout in several  
14 jurisdictions around this country, some of which had a  
15 history of the use of tests and devices or are  
16 creating election laws that some people argue function  
17 like tests and devices.

18 So I think we have a very hard debate. I  
19 think I would encourage all these Commissioners to  
20 become highly literate about the Voting Rights Act and  
21 about voting rights issues, because I think it is  
22 going to come back and be on your table that much  
23 more.

24 I'm a political scientist. I will allow  
25 the attorneys to speak to those from the perspective

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1 of law.

2 CHAIRMAN CASTRO: Professor Charles.

3 COMMISSIONER GAZIANO: Just to clarify my  
4 question, to what extent is Section 5 impeding certain  
5 actual development?

6 CHAIRMAN CASTRO: Professor Charles?

7 PROFESSOR CHARLES: I haven't seen the  
8 evidence of Section 5 impeding developments. And the  
9 evidence that I would be looking for, if the DOJ, for  
10 example, had some very hard-core fast rules saying  
11 something like you must have a 65 percent black  
12 district at all times, otherwise we are not going to  
13 preclear, you must create these wherever you can  
14 always, every time majority-minority districts, to  
15 create an environment such that naturally-occurring  
16 coalitions could not occur or would not occur. Those  
17 are the types of evidence that I would look for, that  
18 I think one would look for, to say okay, that would  
19 impede naturally creating coalitions that would  
20 reinforce the essentialism that we started with,  
21 essentially saying look, you know what, we are going  
22 to assume that because you are black you are going to  
23 vote a certain way and we are going to lock you into  
24 that no matter what.

25 If we saw that evidence, if I saw that

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1 evidence, I would be alarmed by it and I would think  
2 that that would be a problem by the Voting Rights Act.

3 COMMISSIONER GAZIANO: Right.

4 PROFESSOR CHARLES: But honestly, I  
5 haven't seen the evidence. And as we talked about the  
6 preclearance mechanism, you know we are talking about  
7 20 objections over the course of the last four-plus  
8 years. So, it seems to me that the evidence for the  
9 assumption that the Voting Rights Act, specifically  
10 Section 5 in particular, is leading to a sense of  
11 hyper-racialism and hyper-racial essentialism, I just  
12 have not seen that evidence.

13 CHAIRMAN CASTRO: Okay, we are going to go  
14 to Vice Chair Thernstrom. She'll be followed by Ms.  
15 Tolhurst, then followed by Commissioner Achtenberg.  
16 Madam Vice Chair.

17 VICE CHAIR THERNSTROM: I just want to  
18 follow up on Nate Persily's response to my question  
19 before. Look, as I was saying, I very much like  
20 Commissioner Kirsanow's question about a static  
21 landscape. And really it involves this - well, the  
22 whole question of racial essentialism. And, I mean,  
23 the problem here for me is yes, in 1965 the landscape  
24 was static and basically we were a white and black  
25 country. And since then, a lot has changed, including

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1 a huge flow of immigrants and not only Latino  
2 immigrants and Asian immigrants but also black  
3 immigrants. So that assumptions made that even blacks  
4 are fungible members of one group, when in fact  
5 immigrants from Africa don't think of themselves as  
6 the same as the descendants of slaves in this country.  
7 And certainly Latino as an umbrella term is absurd.

8 I mean, you can't lump together as one  
9 happy family Mexican-Americans, Cuban-Americans,  
10 Puerto Ricans, you know, I can go down the list.

11 CHAIRMAN CASTRO: Well you can but I get  
12 your point.

13 VICE CHAIR THERNSTROM: You shouldn't.

14 CHAIRMAN CASTRO: I know. I know.

15 VICE CHAIR THERNSTROM: You shouldn't. I  
16 speak as a social scientist here. You shouldn't.

17 And so it seems to me that this makes the  
18 enforcement of Section 5 increasingly complicated, and  
19 I'm not sure but I can turn this into a question and  
20 you can say I'm wrong on that. I'm not sure that the  
21 Department of Justice is recognizing the increased  
22 degree of complexity here.

23 I have one other point I wanted to make.  
24 Yes, it is on the question of the purpose standard and  
25 returning to the pre-Bossier standards. I mean 1980s,

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1 particularly 1990s, I mean, the purpose standard was  
2 used to deny preclearance to anything that walked and  
3 talked, as it were. I mean, everything in sight. And  
4 I wondered whether you thought we were going to, with  
5 this new much looser definition once again, of  
6 discriminatory purpose, whether we would return to the  
7 patterns of the 1980s and particularly the 1990s.

8 CHAIRMAN CASTRO: Professor Persily, then  
9 Professor Levitt. Then we will move on because we  
10 have three more questioners and we want to get it  
11 done.

12 PROFESSOR PERSILY: Well we are not seeing  
13 it yet. So the paucity of denial is suggesting that.

14 VICE CHAIR THERNSTROM: Right.

15 PROFESSOR PERSILY: Let's also in this  
16 spirit of bearing honestly what is happening in this  
17 process, while I won't talk about the  
18 constitutionality of Section 5, it is casting a big  
19 shadow over what DOJ is doing. So obviously the  
20 specter of a declaring of Section 5 to be  
21 unconstitutional is something that DOJ is well aware  
22 of. And so each preclearance submission and denial is  
23 fraught with the possibility that it becomes the next  
24 case that goes up. So I mean, that is obviously what  
25 is going on here. Which leads many in the civil

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1 rights community to say, well, they are being too  
2 timid, that they should be getting preclearance in  
3 certain other contexts as well. But we have what,  
4 four or five cases going through the court right now  
5 with possible constitutional challenges to Section 5.

6 On the first point, yes, of course there  
7 is greater diversity within both in toto in the United  
8 States and within racial minority groups and that is  
9 also going to be context-specific as to both where it  
10 is happening. In New York it is fascinating to see  
11 the increased diversity within the black population,  
12 African immigrant as well as blacks who have been here  
13 for generations. And the degree to which that is  
14 politically relevant depends on looking at their  
15 voting behavior. And if it turns out that these  
16 groups are going to be less cohesive politically, then  
17 we will see that in the data. And there are some  
18 examples of where that certainly happens, when you  
19 have really diverse Latino communities in particular  
20 areas, who are not voting for the same candidate, well  
21 then you have that. With Asians, that is often the  
22 story in different parts of the country. Some areas  
23 they are going to vote cohesively and some areas they  
24 will not. And you know, this is an empirical question  
25 that can be answered. It can be answered both in the

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1 abstract --

2 VICE CHAIR THERNSTROM: Over time.

3 PROFESSOR PERSILY: -- and also  
4 individually. You have to look in particular context  
5 as to whether there is cohesion or not.

6 CHAIRMAN CASTRO: Professor Levitt.

7 PROFESSOR LEVITT: So I will add to that  
8 only in this respect. Professor Persily keeps using  
9 New York as an example. I will continue using Los  
10 Angeles as an example.

11 (Laughter.)

12 PROFESSOR LEVITT: Stick with what you  
13 know, I suppose.

14 I think you are absolutely right, Vice  
15 Chair, that the purpose prong will begin to show less  
16 and less and less reliance on animus, on hatred as a  
17 reason to find problems with the preclearance process.

18 But this goes to something Commissioner  
19 Heriot said earlier, I think that it embraces far  
20 more. And here I take, this is the Los Angeles  
21 connection, Chief Judge, then-Judge Kozinski's dissent  
22 in the case called *Garza v. County of Los Angeles*  
23 explained the difference in a way that seems quite  
24 compelling to me. This is his example, not mine, but  
25 he said: imagine you were a landlord and you harbor no

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1 ill will toward minorities, but others come to you and  
2 say when more minorities come into our area, more  
3 property values will go down.

4 You may make a decision to keep minorities  
5 out of the area. That doesn't mean that you have  
6 hatred against the minorities, but it sure means that  
7 you have discriminatorily, you have intentionally  
8 acted in a discriminatory fashion if you take these  
9 very race-conscious efforts for completely different  
10 purposes. You may not hate, but there is certainly  
11 intentional racial discrimination.

12 His point in that case was that the  
13 pursuit of incumbency can sometimes run roughshod over  
14 minority rights, particularly where those who are  
15 conducting redistricting are concerned about the level  
16 of minority support for opponents and therefore act  
17 intentionally taking action based on minority status,  
18 not because they have animus against the minorities in  
19 question but very much conscious of intentionally  
20 moving minorities around, as others suggested, in  
21 order to further their own incumbencies. And that,  
22 unfortunately, as Commissioner Heriot suggested, that  
23 may not be something that is going away. And so you  
24 may well see attention to that.

25 You see some of that in the current *Texas*

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1 preclearance court case or at least you see some  
2 evidence of that. And that may be how the Department  
3 of Justice interprets the purpose prong going forward.

4 CHAIRMAN CASTRO: Ms. Tolhurst?

5 ACTING STAFF DIRECTOR TOLHURST: My  
6 question is about the purpose prong as well.

7 And Professor Charles, in your statement  
8 you said that DOJ in its objection letters is relying  
9 on the *Bossier II* purpose to retrogress and not the  
10 any discriminatory purpose. So my question is, can  
11 you elaborate on the practical distinction between  
12 those standards?

13 And to the rest of panel, do you agree  
14 with Professor Charles? And do any of you know of a  
15 change that DOJ has precleared that would have  
16 qualified as any discriminatory purpose but not  
17 purpose to retrogress?

18 PROFESSOR CHARLES: Sure. Two points that  
19 I want to make. One is that the DOJ has purpose  
20 objections. Most of them can be explained and, in  
21 fact as I provided in the testimony, a specific  
22 example where they used the term purpose to  
23 retrogress. So they could either be explained or they  
24 have in fact used the purpose to retrogress standard  
25 as their primary, in part because it is easily

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1 manageable.

2 Now they do supplement that. There is  
3 actually one objection. I can't recall it offhand but  
4 I certainly could send that to you. It could be  
5 explained as a broader discriminatory purpose.

6 Now part of my point is to also show that  
7 the DOJ is using a very conservative standard in  
8 determining discriminatory purpose. Normally after  
9 the '06 amendments have they specifically, at least in  
10 one instance, said purpose to retrogress. But really  
11 when you look at the context of their objections, it  
12 is essentially best explained from that framework with  
13 the exception of one objection letter that really  
14 didn't rely on purpose to retrogress and they were  
15 using broader discriminatory purpose evidence.

16 Now they do supplement this sense of  
17 purpose to retrogress with some broader sense of  
18 discriminatory purpose. Sometimes they will say look,  
19 we conducted other investigation then talked to other  
20 people and recognized that you moved folks of color  
21 around and without any good reason for doing so. So  
22 they will supplement it but there are few of the  
23 purpose objections where you could say the DOJ is  
24 hanging its hat solely on this broader discriminatory  
25 purpose, which is why I don't think, as Professor

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1 Thernstrom alluded to, I don't think you are going to  
2 see much on discriminatory animus. In fact I think  
3 you are going to see the DOJ being rather careful.

4 Now, are they being careful because of  
5 litigation? Maybe. But they may also be careful  
6 because it is so much easier to administer this  
7 purpose to retrogress than it is to try to ferret out  
8 a broader sense of discriminatory purpose, except for  
9 where you can find it, which is often difficult to do.

10 CHAIRMAN CASTRO: Professor Persily?

11 PROFESSOR PERSILY: So let's be clear  
12 about what the pre- and post-*Bossier Parish* standards  
13 are. After *Bossier Parish*, if you say I am drawing  
14 this redistricting plan in order to make minorities  
15 worse off, that is what was denied preclearance as  
16 opposed to now after the reform and I am also going to  
17 discriminate against them. Right? So the difference  
18 is, generally speaking, if you have evidence of  
19 retrogressive purpose, that is going to be enough to  
20 show discriminatory purpose as well.

21 That led to a very funny example used by  
22 Justice Scalia in the *Bossier Parish* case itself, the  
23 so-called incompetent retrogressor. Right? Someone  
24 who tries really hard to retrogress but fails.

25 So there is an evidentiary question and

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1 then there is a practical question. So sometimes the  
2 effect might be difficult to measure and so therefore  
3 one would load more onto the purpose prong and that  
4 might be an avenue for objection, especially if you  
5 have evidence in the record of the *Arlington Heights*  
6 variety, which will then be ammunition for a purpose-  
7 based objection.

8 The *Texas* case is instructive in this  
9 regard and so the issue as to whether the failure to  
10 draw an additional Latino district is evidence of  
11 discriminatory purpose, that is one of the arguments  
12 the DOJ is making. It is also one it seems the D.C.  
13 District Court has credited in that case. And so  
14 while there might not be a retrogressive effect,  
15 assuming that is the test, which is whether you kept  
16 the number of opportunity districts or ability to  
17 elect districts constant, the suggestion is, alright,  
18 well the failure to represent Latinos adequately,  
19 given the meteoric horizon in their share of the Texas  
20 population, might be evidence of discriminatory  
21 purpose.

22 PROFESSOR LEVITT: And just tying these  
23 two very quickly together, one of the reasons that you  
24 may see that extended reliance on purpose in the *Texas*  
25 case and not in the objection letters may simply be

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1 time.

2 So as Professor Charles mentioned, it is  
3 much easier to make an assessment based on the intent  
4 to retrogress standard. You just have less evidence  
5 that you need. You have less evidence before you.

6 When the litigation process continues and  
7 there is more opportunity to gain evidence, then you  
8 might have more access to the sort of *Arlington*  
9 *Heights*-standard evidence that Professor Persily  
10 mentioned.

11 CHAIRMAN CASTRO: Commissioner Achtenberg.

12 COMMISSIONER ACHTENBERG: Professor  
13 Gaddie, in his statement to us, comes to the  
14 conclusion, and you should say if I am  
15 mischaracterizing this, that the Department of Justice  
16 has applied the Section 5 tests apolitically and  
17 fairly. Apolitically and fairly are quotes from your  
18 statement. Could you restate why you concluded that?

19 PROFESSOR GADDIE: Well again, it is based  
20 upon examination of very limited evidence, which is  
21 looking at the objection letters that have been issued  
22 since 2006.

23 If you look across cases, the nature of  
24 the tests that are used, standards that are used, the  
25 nature of the objections that are levied, are

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1 remarkably consistent. And we have had a change in  
2 presidential administration at that time. We have had  
3 a change in political control of many of these states  
4 in that time, as Dr. Thernstrom previously noted.

5 The history, let us be honest, the history  
6 of the Voting Rights Act Section 5 is a history of a  
7 politicized process. In 1991, 1992 the Department of  
8 Justice used the lever of Section 5 to leverage the  
9 affirmative creation of numerous majority-minority  
10 districts in several Southern jurisdictions that were  
11 subsequently found unconstitutional by the U.S.  
12 Supreme Court. The consequence of this was to break  
13 up districts that were majority white with large  
14 minority populations that elected Democrats, and it  
15 facilitated and exacerbated the realignment of the  
16 South towards the Republican party.

17 John Dunne from the voting division noted  
18 under oath that the Act could be implemented to  
19 political advantage and it was. Okay?

20 We see cries in the press in the leaking  
21 of the Texas preclearance document in 2003 regarding  
22 conflict between political and professional staff at  
23 Department of Justice regarding the implementation of  
24 Section 5 and professional staff being overturned. We  
25 don't hear about that. The nature of the environment,

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1 the implementation of the Act has been consistent with  
2 the change in presidential administrations since  
3 *Ashcroft*. The larger chatter that we hear, and we all  
4 hear it, we don't hear in this round. You know, in  
5 fact we are amazed at how relatively conservative this  
6 Justice Department has been in implementing Section 5.

7 So compared to the past, it appears to be  
8 apolitical. It appears to be fair. It appears to be  
9 consistent. There may be other evidence that we are  
10 not privy to that might demonstrate otherwise but,  
11 based upon the evidence that I was asked to examine  
12 when you all requested that we appear here, and in  
13 thinking about this issue and looking at the larger  
14 environment, it is, compared to the past, a much more  
15 neutral process.

16 COMMISSIONER ACHTENBERG: Thank you.

17 CHAIRMAN CASTRO: Anyone else want to  
18 comment? Then Commissioner Kirsanow, you have the  
19 floor.

20 COMMISSIONER KIRSANOW: Not to put  
21 Professor Persily out of business or anything, but I  
22 have heard that DOJ has a number of components or a  
23 number of things it looks to in order to determine  
24 whether or not there has been retrogression or whether  
25 or not somebody has got the ability to effectively

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1 elect their representative of choice. Isn't there an  
2 app for that?

3 (Laughter.)

4 COMMISSIONER KIRSANOW: I mean, can't you  
5 simply take a certain demographic area and then plug  
6 in a certain set of metrics and boom, determine  
7 whether or not you can -- kind of, I guess, like  
8 MapQuest or something. I know there is something  
9 called Maptitude or something. Is there an app for  
10 that?

11 PROFESSOR PERSILY: Well, the difficulty  
12 is in identifying the elections which are good  
13 approximations of what the average sort of minority  
14 turnout and minority support for those candidates  
15 would be.

16 So let's take for an example, take the  
17 presidential election which we are all familiar with.  
18 Would the Obama versus McCain election be relevant in  
19 estimating the likelihood that in a school board  
20 election, the minority community will be able to elect  
21 its candidate of choice, if it turns out that in that  
22 particular district, well it looks like Obama got a  
23 majority there. Right? And some will say, well, no  
24 because school board elections are very different than  
25 presidential elections. The likelihood of cross-over

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1 voting would be lower, say, in that type of an  
2 election. The dynamics, the issues, etcetera, would  
3 be different. And so there is a lot of contestation  
4 about what kind of information should go into that  
5 app.

6 At the same time that is the question.  
7 And so if one were to design an algorithm, it would be  
8 alright, let's figure out which elections in a given  
9 jurisdiction are best able to predict the likelihood  
10 that the minority community will elect its candidate  
11 of choice. And so then you take that and you estimate  
12 how large the minority population needs to be in order  
13 for them to elect their candidate of choice.

14 So to go back to your earlier question, if  
15 there is no racially-polarized voting, then this is a  
16 very simple app because it doesn't make a difference  
17 how you draw the lines, there is going to be no  
18 retrogression because their ability to elect has not  
19 been diminished by their redrawing of the lines.

20 But then at the margins, then you start  
21 getting controversies is trying to figure out well  
22 levels of racial polarization and how polarized are  
23 they in which elections and how big do they need to be  
24 in order for them to have the ability to elect their  
25 preferred candidate.

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1                   COMMISSIONER KIRSANOW: It strikes me that  
2 if there are, did you say 1400 submissions to DOJ or  
3 something of that nature, somewhere in that  
4 neighborhood, that you could simply take those 1400  
5 submissions, upload them and if all but four have been  
6 approved or precleared, then that may give you your  
7 algorithm right there. And you could simply then  
8 impose that over the existing district and then maybe  
9 it could configure a new district or shave off certain  
10 areas to conform to what you have got right there.

11                   Let me ask you this. We have I don't know  
12 how many other jurisdictions. I know there is a few  
13 like New York and a couple of other places outside the  
14 traditional nine preclearance states. So we have got  
15 30-plus states that are not subject to Section 5. And  
16 at least very powerful anecdotal data shows that there  
17 is an incredible partisan mischief going on there and  
18 you have got Republicans and black Democrats getting  
19 together to come up with districts that are safely,  
20 partisanly, majority-minority, or Democrat and  
21 Republican.

22                   I think it was Professor Gaddie who said  
23 that maybe it should be extended elsewhere. Is that  
24 what you are contemplating that maybe it should be  
25 extended to other places?

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1                   PROFESSOR GADDIE: Well you know, again, I  
2 have written about this elsewhere but if you were to  
3 look at an alternative trigger like the one that the  
4 late Charlie Norwood offered seven years ago, just  
5 based upon turnout, it triggers counties in most of  
6 the states of the United States. It triggers half of  
7 my home state of Oklahoma. The problem is that in  
8 many of these jurisdictions you are not going to have  
9 a prior test or device as the second condition of the  
10 Section 4 trigger.

11                   If you look at the areas where we have  
12 voter participation issues in the United States that  
13 are outside the Section 5 states, they tend to be of  
14 two sorts. They tend to be of, well, three sorts.  
15 They tend to be heavily-minority communities. They  
16 tend to be rural, low-socioeconomic-status communities  
17 such as in Appalachia. Or they tend to be in Indian  
18 country. Okay?

19                   Now some of these areas in Indian country  
20 have been, some are picked up by Section 5 like Todd  
21 and Shannon County in South Dakota, but others are  
22 not. And if you were to look at South Dakota again on  
23 an updated trigger, you would pick up seven more  
24 counties in the state, including one, Charles Mix  
25 County, which is currently under a memorandum of

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1 agreement arising from litigation a few years ago over  
2 its county commission.

3           The problem, if I could address your  
4 larger question about the app, is that each  
5 jurisdiction in its own way is somewhat unique and  
6 contextual. Different elections are required for each  
7 one and the problem you are going to get into is your  
8 algorithm is going to become incredibly complex very  
9 quickly. And because it is also moving through time,  
10 the odds are it is probably going to collapse  
11 underneath itself mathematically. So it is better to  
12 take each jurisdiction in a small bite and understand  
13 it.

14           Now if there really was a conspiracy to  
15 use litigation to undermine Section 5, we would have  
16 seen a wave of local submissions. If you can imagine,  
17 imagine that a third of the local jurisdictions  
18 covered by Section 5 had decided to split the DCDC,  
19 you would have 350 submissions. The docket would  
20 creak underneath it. So I don't know if there are  
21 political motives to the use of simultaneous  
22 submission or not but, if there was an effort to  
23 undermine Section 5 using this mechanism, flooding the  
24 DCDC would have been the way to do it.

25           I actually wrote a column about this last

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1 year saying if somebody is looking to do this, this is  
2 how you do it. I don't encourage it, but it is how it  
3 could be done. Because we have to remember the DCDC  
4 is not the alternative. Administrative preclearance  
5 is the alternative. DCDC is the method. So the thing  
6 is, most jurisdictions are opting for the low-expense  
7 approach, rather than opting for the first option of  
8 going to court.

9 But believe me, if we could get together  
10 with Michael McDonald and craft something and patent  
11 it and retire, we would have. I can assure you, sir,  
12 we would have.

13 PROFESSOR PERSILY: Could I just say one  
14 thing on that?

15 CHAIRMAN CASTRO: Very briefly.

16 PROFESSOR PERSILY: Which is that when you  
17 have so few preclearance denials and they are so  
18 unique and so content-specific, that the app, a really  
19 successful app, would say everything is going to get  
20 precleared. Because the data show you that almost  
21 everything gets precleared.

22 And so the real interesting cases are the  
23 ones that don't get precleared and those are very  
24 fact-specific.

25 CHAIRMAN CASTRO: Well, at this point, it

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1 is 12:30 and I want to thank each of the panelists for  
2 their thoughtful presentations and responses. I want  
3 to thank the commissioners for their thoughtful  
4 questions.

5 This will be the point where Panel I  
6 concludes. We are going to take a 60-minute break for  
7 lunch. I would ask all panelists for the next panel,  
8 and all commissioners, and staff, and members of the  
9 public to be back in this room by 1:15 so that we can  
10 be seated, re-miked and be ready to roll at 1:30.  
11 Thank you.

12 (Whereupon, at 12:30 p.m. a lunch recess was taken.)  
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PANEL II: SECTION 5 OF THE VOTING RIGHTS ACT

POST-CENSUS REDISTRICTING

CHAIRMAN CASTRO: I am bringing the session back into order. It is now 1:30, and I'll indicate that, for the record, it is February 3<sup>rd</sup>, 2012. This is the second half of our briefing, Section 5 of the Voting Rights Act -- and its Post-2010 Census Redistricting. We're going to address the Justice Department's effort with respect to Section 5 preclearance, including the effectiveness of the preclearance procedures implementation of the 2006 amendments to the VRA, and any concerns that may come to light regarding the specific jurisdiction's redistricting plans.

Issues such as the constitutionality of Section 5 bailout provisions, or any other topics such as voter I.D. or voter suppression, are specifically beyond the scope of this briefing.

We would ask panelists and Commissioners to respect the focus of this; however, if information to that effect does get brought up, just so everyone

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1 knows, it will not be part of the formal record or  
2 included in the report.

3 At today's briefing earlier we had four  
4 panel members. This afternoon we've got an additional  
5 four distinguished speakers. And if you were here  
6 earlier you know what the procedure is, but just so  
7 that I can go into the details for those who might not  
8 have been here.

9 Every panelist will have 10 minutes to  
10 make your presentation. You see in front of you a  
11 traffic light. That will begin to light up and let  
12 you know when it's time to conclude your speech, so  
13 when you see it turn from green to yellow that means  
14 you've got two minutes left and should start wrapping  
15 up. When it turns from yellow to red that means stop.  
16 Of course, I'll try to, if you're in the middle of a  
17 sentence, give you the chance to finish that, but we  
18 do want to make sure everyone does finish in the  
19 allotted time so that we can respect all the  
20 panelists, as well as have an opportunity for the  
21 Commissioners to ask sufficient questions.

22 As I did before, the Commissioners will  
23 identify by hand when they want to ask a question. I  
24 will try fairly to allocate the time. I'll ask  
25 Commissioners who did this morning to be brief in your

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1 questions, try to make one question at a time. If you  
2 will do that we'll have opportunity for follow-up  
3 questions, and everyone will have their opportunity to  
4 ask questions like we had this morning.

5 So having said that, we'll move on now to  
6 introducing our panel. I'm glad you're all seated and  
7 miked. First of all, I'd like to welcome Anne Lewis,  
8 partner at the law firm of Strickland Brockington &  
9 Lewis, counsel for the Georgia Republican Party, and a  
10 former Special Assistant Attorney General for the  
11 State of Georgia.

12 Our second panelist is John Park with the  
13 Atlanta firm of Strickland Brockington & Lewis, and he  
14 has assisted the Alabama Attorney General's office  
15 with the legal work related to the redistricting and  
16 compliance with the Voting Rights Act.

17 Our third panelist is Mark Posner, Senior  
18 Counsel of the Voting Rights Project of the Lawyers'  
19 Committee for Civil Rights Under The Law. Mr. Posner's  
20 work focuses on the enforcement of the Voting Rights  
21 Act. And, finally, Laughlin McDonald, Director of the  
22 Voting Rights Project for the American Civil Liberties  
23 Union in Atlanta, Georgia.

24 I will now ask the panelists to raise your  
25 right hand and please swear or affirm that the

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1 information you are about to provide us is true and  
2 correct to the best of your knowledge and belief.

3 (Chorus of yeses.)

4 CHAIRMAN CASTRO: Thank you. Ms. Lewis,  
5 please proceed. You have 10 minutes.

6 MS. LEWIS: Thank you, Mr. Chairman, Madam  
7 Vice Chair, and Commissioners. I appreciate the  
8 invitation to be here today to talk about the  
9 preclearance process during the current redistricting  
10 cycle.

11 As I said in my written comments, my  
12 previous experience in the preclearance process in the  
13 1990s and 2000 cycles had been as an objector to  
14 preclearance. We represented the Intervenors in the  
15 *Georgia v. Ashcroft* case in the 2000 cycle. But this  
16 time around my law firm, in particular, my partner,  
17 Frank Strickland, our Associate, Bryant Tyson, and  
18 myself found ourselves on the other side of the table  
19 as counsel to the Leadership of the Georgia General  
20 Assembly in the redistricting process which, of  
21 course, included preparation for preclearance, -- and  
22 then later as Special Assistant Attorney General was  
23 working with our Attorney General, Sam Olens, and his  
24 Senior Deputy, Dennis Dunn.

25 Of course, our purpose this time around

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1 was to make sure that legal plans passed and were  
2 precleared, and we're happy to report that, for the  
3 first time in Georgia history, all three of our plans,  
4 our House, Senate, and Congressional plan were  
5 precleared on a first attempt.

6 Now, our first charge was to ensure that  
7 the General Assembly was ready for that special  
8 redistricting session. It would be held in late  
9 summer, as it always has been in redistricting years.  
10 And taking into consideration all the resources that  
11 the General Assembly would have to assemble, plus the  
12 information that they would need to draw the maps, and  
13 the record that was necessary for Section 5  
14 preclearance, we set about some very specific tasks.

15 The first was to help reorganize and fully  
16 staff the Joint Reapportionment Office. The second was  
17 to make sure that the necessary data was available and  
18 correct prior to the special session beginning. The  
19 third was to assist with your typical redistricting  
20 public hearings and other ways for the public to get  
21 information to the General Assembly. This time around  
22 we had an online process, as well, where citizens  
23 could submit their comments.

24 And, finally, we gave general process  
25 advice to the leadership in the General Assembly so

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1 that the session could be planned, could occur as  
2 expeditiously as possible, and we could be ready to  
3 seek preclearance immediately upon the signing --  
4 passage and signing of the plans.

5 As the people providing legal advice, of  
6 course, we had to be familiar with the various  
7 components of Section 5 law this time around. That  
8 was, of course, the reauthorization, the guidance that  
9 was published by the DOJ, the final rules published by  
10 the DOJ, and 45 years of case law that had to be  
11 reconciled with those things. But that was our task  
12 as the lawyers, but we did provide some just common  
13 sense advice to the General Assembly in terms of  
14 getting ready for and accomplishing redistricting.

15 I will have to say that the amount of  
16 guidance from the two documents that were provided by  
17 the DOJ was limited, and we discussed this with the  
18 DOJ in the context of preclearance. There weren't any  
19 real clear directives, and not unsurprisingly it was a  
20 document that appeared to be written by lawyers  
21 because it was. So, at the end of the day it had a lot  
22 of pages but not necessarily a lot of direction for  
23 General Assembly members who are trying to pass plans  
24 for their state legislative and Congressional  
25 districts.

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1           We didn't expect that the DOJ would say  
2 okay, we're going to tell you how to draw every  
3 district, but we do need some additional guidance. And  
4 I think you can see in terms of the *Texas* case that  
5 the guidance kind of came after, the cart came after  
6 the horse, or the horse came after the cart so to  
7 speak, in that it appears that the Texas standard was  
8 sort of being built along the way. And that's  
9 difficult for Section 5 states, and especially for the  
10 lawyers who are trying to give advice to the Section 5  
11 states about how to comply.

12           We did have quite a heated debate in the  
13 Georgia General Assembly about the plans but,  
14 ultimately, all three plans passed and were signed by  
15 the governor. And the last plan was signed on  
16 September 6<sup>th</sup>, and then we immediately started working  
17 toward filing preclearance, and did that about the  
18 first part of October.

19           We did choose the double track. We filed  
20 litigation in the District Court for the District of  
21 Columbia to seek preclearance. And after that  
22 complaint was served, we also filed an administrative  
23 submission with the Department of Justice.

24           We had previously had a little bit  
25 different process where we filed an Action for

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1 Declaratory Judgment on two other issues, one relating  
2 to the HAVA verification process and one relating to  
3 Georgia's law requiring proof of United States  
4 citizenship for registering to vote.

5 In those cases we filed a lawsuit, came to  
6 an agreement with the Department of Justice that the  
7 Department of Justice would preclear the plans if we  
8 submitted them administratively, so we did that later.  
9 But in this case timing was everything. We simply  
10 have to have our plans in place no later than the end  
11 of May in the election year. And that's necessary  
12 because we have to get our ballots out for UOCAVA  
13 purposes, our candidates need to know where to  
14 qualify, our counties have to send voters cards that  
15 say here are your new districts.

16 So, if you know that the history is that  
17 the General Assembly -- our General Assembly meets  
18 every year beginning the second Monday in January.  
19 Typically, we'll meet until the first part of April  
20 and then go home. Well, in a redistricting year our  
21 census numbers come out right about the time they're  
22 going home, so there's nothing to do but have a  
23 special session. And by popular and probably  
24 unanimous demand, that session gives them part of the  
25 spring and most of the summer off so that they can go

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1 back to their homes and businesses and get some work  
2 done that they haven't done the previous four months.

3 So, we had a special session that was  
4 beginning in August of 2011, could figure that it  
5 would take at least several weeks to get the plans  
6 done. Then we have to prepare the plans for  
7 preclearance, get them to the Department of Justice.  
8 Of course, the Department of Justice automatically has  
9 60 days to respond whether to a lawsuit or to  
10 administrative submission. But on an administrative  
11 submission also has another 60 days, if it so chooses,  
12 and it can stop the clock while it asks for additional  
13 information. So, our reason for double tracking really  
14 was because we wanted to make sure that somebody was  
15 going to decide our preclearance in time for our  
16 elections to take place according to the election  
17 schedule.

18 Once we filed the lawsuit, we sent a  
19 courtesy copy to the Department of Justice. We had  
20 immediate conversations with the Department of Justice  
21 about the fact that we were seeking preclearance from  
22 the court, but that we would be sending an  
23 administrative submission too, and that we hoped to  
24 work with the Department of Justice.

25 While we have filed challenges to the

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1 constitutional of Section 5 in various lawsuits,  
2 including the two I mentioned and this one, we  
3 understand that the current state of the law is we're  
4 covered by Section 5; therefore, in order to use the  
5 plans that our legislature drew, we have to get  
6 preclearance. We can have an argument about the  
7 constitutionality, but for purposes of this cycle we  
8 needed our plans precleared.

9 We found the Department of Justice,  
10 particularly the person in charge of our submission,  
11 Abel Gomez, to be very courteous, very professional,  
12 and really good under the gun. I mean, we put him  
13 under the gun because we wanted to have our plans  
14 precleared, and in time.

15 I think, and I've said in my written  
16 comments, if I could make some suggestions to the  
17 Department of Justice about how to make the process go  
18 easier both for themselves and us, I think two of them  
19 would be really strictly technical. One of them is  
20 more substantive. The technical ones are really  
21 related to the Department of Justice's ability to  
22 process the information, and also to know what it  
23 needs. And I'll just cover those real quickly.

24 We found ourselves having to explain to  
25 the Department of Justice how to process the

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1 information because they do not use a commercial  
2 software that most states do use, which is Maptitude.  
3 Maptitude will give you all sorts of reports, but if  
4 you can't read them they're no good to you. So, we --  
5 the Department of Justice eventually told us they had  
6 an in-house product, which I think is cause for  
7 concern on a lot of levels, but not the least of which  
8 is we're speaking two different languages.

9 Also, sometimes the additional data  
10 requested -- we responded to about 46 or 47 of them in  
11 a two-month period. If the Department of Justice had  
12 known up front we need this information, we could have  
13 run a lot of data requests at the same time rather  
14 than to have run them over and over again.

15 The more substantive criticism I would  
16 have really occurred during the interviews. And in  
17 those interviews of 60 or 70 witnesses, it seemed  
18 clear to me that, as I mentioned in my testimony, a  
19 lot of the questions appeared to be leading toward the  
20 answer that the Department of Justice wanted, which  
21 was that there was some discriminatory intent in the  
22 drawing of the plans. I don't think they ever thought  
23 they could show an effect, but with the intent prong  
24 perhaps their hope was they could show that.

25 They had questions going to members of the

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1 legislature such as, well, do you think the main  
2 motivation with this plan was racial or political?  
3 Answer political five times and still be asked that.  
4 And I see my time is up, so I'll look forward to  
5 answering your questions.

6 CHAIRMAN CASTRO: There'll be questions  
7 where you can elaborate. Thank you. Mr. Park, you  
8 have the floor.

9 MR. PARK: Thank you, Mr. Chairman and Vice  
10 Chair, members of the Commission. Thank you for this  
11 opportunity to participate in the briefing on Section  
12 5 issues. I hope my written and oral remarks will be  
13 helpful to the Commission.

14 What I'd like to do is expand on a couple  
15 of things I mentioned in the written statement. In  
16 particular, I'll discuss why the 2006 statutory change  
17 that extends Section 5's purpose inquiry to any  
18 discriminatory purpose is likely to lead covered  
19 jurisdictions to seek judicial preclearance. I'll also  
20 address the suggestion, the exaggerated suggestion by  
21 some, that the preclearance process is painless and  
22 routine.

23 By way of introduction, I've testified  
24 before the Senate Judiciary Committee in connection  
25 with the reauthorization in 2006, and I suggested

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1 that the bailout criteria be clarified, that the  
2 coverage formula be updated, and that some of the less  
3 controversial submissions be removed from the scope of  
4 Section 5. None of those suggestions was taken up.

5 Congress or the court clarified the  
6 bailout standard in *Northwest Austin Municipal Utility*  
7 *District*. The coverage formula is part of the  
8 constitutional challenges. And on the scope of Section  
9 5 I note that just recently the Birmingham News  
10 reported that the City of Mountain Brook, Alabama,  
11 outside of Birmingham, had to ask for preclearance to  
12 use an alternate polling place. It had dismantled its  
13 old city hall, is building a new one. The new one  
14 will be done in time for the elections but they can't  
15 get 60 days before the elections to ask for  
16 preclearance because it won't be done 60 days in  
17 advance.

18 I think, likewise, there are polling  
19 places that were recently destroyed by tornadoes in  
20 Alabama, some came through in Chilton County, and also  
21 again up near Birmingham. And those jurisdictions are  
22 going to have to ask to use -- ask for preclearance to  
23 use alternate polling places at a time when they'd  
24 much rather probably be choosing to use their  
25 resources to deal with the tornadoes.

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1           And I think my point is that a place like  
2           -- for places like Mountain Brook, moving a polling  
3           place shouldn't really require preclearance, and it's  
4           probably something that could be dealt with at the  
5           local level by a court of competent jurisdiction if  
6           there's a problem.

7           Why seek judicial preclearance? In this  
8           round Alabama chose to go for judicial preclearance.  
9           We filed our complaint. DOJ picked it up on PACER and  
10          called and asked for administrative submissions and we  
11          gave them administrative submissions.

12          In our complaint we said that we'll be  
13          happy to furnish an administrative submission if DOJ  
14          wants it. The two plans at issue were a seven-member  
15          Congressional plan that did not retrogress, and an  
16          eight-member State Board of Education plan that  
17          likewise did not retrogress. In both cases we got  
18          preclearance.

19          One reason to ask is one that folks have  
20          referred to before, and Professor Persily referred to  
21          this. One reason to pursue judicial preclearance is to  
22          shorten time required. And Ms. Lewis referred to  
23          this.

24          If DOJ balks in the process, the covered  
25          jurisdiction is already in court and can proceed with

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1 that judicial preclearance effort. At least 60 days  
2 are saved. The jurisdiction doesn't need to draft a  
3 complaint, file it, serve the Department of Justice,  
4 and then wait 60 days for the Department of Justice to  
5 appear, which the federal civil -- the Rules of Civil  
6 Procedure allow the United States. And there are two  
7 voter I.D. submissions that kind of illustrate the  
8 point.

9 DOJ asked for additional information from  
10 South Carolina, and then objected. Texas filed a  
11 lawsuit pointing to the problems that South Carolina  
12 was having, and filed for judicial preclearance.  
13 Texas is already in court, and if South Carolina  
14 wasn't already in court they're going to have to wait  
15 another 60 days to see whether they can use their  
16 voter I.D. law in the upcoming elections.

17 Another reason for seeking judicial  
18 preclearance is procedural. In the administrative  
19 process, US DOJ conducts interviews and receives input  
20 from concerned citizens that it doesn't have to share  
21 with the covered jurisdiction. It can rely on that  
22 input in denying preclearance, or in asking for  
23 additional information without disclosing the source  
24 or giving the covered jurisdiction an opportunity to  
25 respond to it, or to rebut it.

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1           In contrast, the judicial preclearance  
2 process is, even if the covered jurisdiction bears the  
3 burden of proof, DOJ has to prove -- support its case  
4 with competent admissible evidence. When Ms. Lewis  
5 points to leading questions, the ability of US DOJ to  
6 elicit that evidence in court through leading  
7 questions is questionable.

8           The covered jurisdiction gets to try its  
9 case in public with the full -- with the right to full  
10 appellate review in the event of an unfavorable  
11 decision. And this and the overhang of the  
12 constitutional challenges can act as a restraint on  
13 those who might use Section 5 as a way of challenging  
14 state statutes that they disagree with on political  
15 rather than racial grounds.

16           And the 2006 statutory change heightens  
17 the importance of the public proceeding. First, we  
18 don't have a lot of experience with how it's going to  
19 be applied in the redistricting. We just don't know,  
20 so there's an advantage to airing it all out in court.

21           And if a covered jurisdiction is to be  
22 said to have discriminated, even where a redistricting  
23 plan does not retrogress, that should be done in a  
24 public proceeding so the covered jurisdiction can see  
25 and respond to the evidence against it.

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1           And the more that the administrative  
2 preclearance process approaches a Section 2 inquiry  
3 with looking at dilution claims, for example, the more  
4 a trial is needed. I don't think it's possible to do a  
5 real quick and dirty Section 2 claim.

6           So, in the *Texas* case you see that, among  
7 other things, the three-judge court says that the  
8 failure to draw additional Hispanic ability districts  
9 to match the growth of its Hispanic population was not  
10 retrogressing. But then that can turn around to be  
11 something relevant to the discriminatory purpose  
12 analysis.

13           And one of the big points I think I'd make  
14 is the fit between Section 5 and Section 2 is not a  
15 good one. Section 2 litigation is best done in the  
16 covered jurisdiction in front of judges who know the  
17 jurisdiction, in front of -- with witnesses who know  
18 the jurisdiction. It's at best a bad fit with the  
19 Section 5 process.

20           Just with respect to the burdens of the  
21 preclearance process, it's different in 2012. But it  
22 shouldn't be called painless or routine. Our  
23 submissions involve substantial work, and there's  
24 substantial work to go when we get the legislative  
25 plans.

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1           The big difference is that this time it  
2 went in on disk and not in paper. You can't really say  
3 that less information was involved. In the  
4 Congressional plan we had Exhibits A through I with 14  
5 alternate plans in one exhibit, and eight transcripts  
6 of public hearings. In the State Board of Education  
7 submission which followed and incorporated some of  
8 that by reference, we had nine alternate plans. So, in  
9 terms of the volume it may have been as big a box as  
10 the box I produced in 2006.

11           In Alabama's brief in *Northwest Austin*  
12 *Municipal Utility District* in support of neither  
13 party, Alabama cited another very extensive submission  
14 that modernized the law governing its 67 county  
15 commissions. The Attorney General's office had to  
16 research and chart the litigation and preclearance  
17 histories for the benchmark operations in each of the  
18 67 counties in Alabama, review local legislation back  
19 to the late 1800s. The final submission was made in  
20 three parts and was 1,700 pages long, including an  
21 appendix of 103 pages detailing the research.

22           The last of the three parts was precleared  
23 18 months after Governor Riley signed the act. And at  
24 the end of the day what you're after when you make a  
25 submission, no matter how you do it, is the

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1 preclearance letter. You can't think that a process is  
2 painless if there's the downside of the no.

3 CHAIRMAN CASTRO: Thank you. We'll give you  
4 a chance to expound in the question and answer. Mr.  
5 Posner.

6 MR. POSNER: Yes. Thank you, Chairperson  
7 Castro, Vice Chairperson Thernstrom, and our  
8 distinguished Commissioners. Thank you for inviting  
9 me to this important briefing.

10 What I'd like to do today is sort of jump  
11 right in and read some of the written testimony I've  
12 submitted. I think that will provide the highlights.  
13 So, what I would like to do is to suggest two themes  
14 that have governed the adoption of plans and the  
15 Justice Department's determinations, at least up to  
16 this point in the current redistricting cycle.

17 The first may be summarized by the words  
18 accumulation and continuity; that is, when sitting  
19 down to draw their new plans following the 2010  
20 census, covered jurisdictions, as well as the minority  
21 residents of those jurisdictions, have been able to  
22 rely on a very substantial accumulation of Section 5  
23 redistricting experience.

24 In addition, they have been able to rely  
25 on a well-established body of Section 5 law which

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1 includes Justice Department redistricting standards  
2 which, while adjusted by some intervening changes in  
3 case law and statutory law, nonetheless substantially  
4 mirror the standards the Department has applied in  
5 past Section 5 redistricting rounds.

6 The second theme, which is the direct  
7 result of the first, may be summarized by the words  
8 deterrence and adjustment; that is, it appears that,  
9 more than before, covered states and localities have  
10 properly understood and applied the Section 5  
11 prohibitions on discriminatory purpose and effect in  
12 enacting their new plans for the first theme.

13 The Justice Department and most  
14 jurisdictions covered by Section 5 currently are in  
15 their fifth round of post-census redistricting since  
16 Section 5 was enacted in 1965. This in and of itself  
17 indicates that covered jurisdictions and these  
18 jurisdictions' minority residents now have a very  
19 substantial body of experience and law, and Section 5  
20 objections from the past to draw upon as to the manner  
21 in which the US District Court for the District of  
22 Columbia and its statutory surrogate, the Attorney  
23 General, applies Section 5 to redistricting plans.

24 This accumulation of experience is in part  
25 an accumulation of personal and jurisdiction-specific

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1 experience. In other words, state legislators, county  
2 and city, and school board officials, state and local  
3 attorneys, and map-drawing experts and consultants now  
4 have been around the block on redistricting issues on  
5 numerous occasions. They know the types of  
6 redistricting actions and outcomes that trigger  
7 concerns from the Justice Department, and from the  
8 minority community, and civil rights organizations.

9 As to discriminatory effect the basic  
10 prohibition, of course, is the retrogression  
11 prohibition which dates back to the Supreme Court's  
12 1976 decision in *Beer v. United States*. Accordingly,  
13 insofar as that standard is concerned we are now into  
14 our fourth redistricting cycle in which the standard  
15 is being applied.

16 In the context of redistricting reviews,  
17 it also has been the law -- it has long been the law  
18 that retrogression is defined by the concept of  
19 ability to elect, i.e., covered jurisdictions may not  
20 adopt plans which, when viewed in their totality,  
21 diminish the ability of minority voters to elect  
22 candidates of their choice.

23 This standard was first set forth by the  
24 Supreme Court in its decision in *Beer*, and for all  
25 intents and purposes has been the standard applied in

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1 every redistricting cycle since then.

2 This is a case notwithstanding the  
3 temporary detour the Supreme Court took in 2003 in the  
4 *Georgia v. Ashcroft* decision. As you've heard earlier  
5 today, in that case the court reinterpreted the  
6 retrogressions test as it applies to redistrictings,  
7 requiring a complex and confusing weighing of four  
8 different methods for potentially assessing the  
9 validity of a redistricting plan. That ruling had  
10 relatively little impact on the post-2000  
11 redistricting cycle, however, since almost all of the  
12 post-2000 plans had already been adopted and  
13 precleared by the time the Supreme Court ruled.

14 Congress' action in 2006 in reversing that  
15 decision and going back to the pre-*Ashcroft* standard  
16 thus avoided the confusion that would have occurred if  
17 *Ashcroft's* multi-standard test had been applied in the  
18 current round of redistrictings.

19 Likewise, with regard to discriminatory  
20 purpose, it was three redistricting cycles ago, in its  
21 1982 decision in *Busbee v. Smith* that the D.C.  
22 District Court made clear that a redistricting plan  
23 that is non-retrogressive nonetheless may not pass  
24 muster under Section 5 if it was motivated in whole or  
25 in part by a purpose to minimize minority voting

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1 strength.

2 The Supreme Court's subsequent summary  
3 affirmance of that District Court decision, *Busbee*,  
4 was particularly important to the Justice Department's  
5 application of Section 5, as Georgia's appeal to the  
6 Supreme Court specifically presented the legal  
7 question whether a non-retrogressive redistricting  
8 plan could violate the Section 5 purpose test.

9 The Supreme Court, of course, changed the  
10 standard in 2000 in its ruling in the *Bossier Parish*  
11 *School Board* case. The court held that discriminatory  
12 purpose is limited to a retrogressive purpose.

13 But, again, in the 2006 amendments to the  
14 Voting Rights Act, Congress restored the pre-*Bossier*  
15 *Parish* purpose standard and, thus, the standard in  
16 this redistricting cycle is not something that is new;  
17 rather, it is the same standard that governed  
18 redistrictings prior to the 2000 - post-2000  
19 redistricting reviews.

20 As mentioned, there also are three  
21 important Justice Department documents that have  
22 guided redistricting reviews. In 1987, the Department  
23 amended the Attorney General's procedures for the  
24 administration of Section 5 to include for the first  
25 time specific substantive standards that the

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1 Department considers in making its preclearance  
2 decisions. In 2001, the Department issued a further  
3 guidance document regarding redistrictings, and then  
4 updated that in 2011.

5 In sum, Section 5 jurisdictions and the  
6 minority residents of those jurisdictions are  
7 benefitting in the current redistricting cycle from a  
8 significant and long-lasting continuity in the manner  
9 in which the Justice Department has applied Section 5  
10 redistricting plans. Indeed, in the recent D.C.  
11 District Court ruling in the *Texas* case, the court  
12 said in its December 22<sup>nd</sup>, 2011 opinion denying summary  
13 judgment to Texas that the court, indeed, recognized  
14 this continuity in that opinion.

15 In fact, if you compare the factors that  
16 the court then identified as the appropriate standards  
17 to apply to the trial of that matter and to the  
18 redistricting plans adopted by the State of Texas,  
19 those factors closely track the standards identified  
20 by the Justice Department in its prior document. So,  
21 with all due respect to Ms. Lewis, I don't think there  
22 was any cart and horse problem in that problem -- in  
23 that case, rather, or if there was any cart or horse,  
24 it was the court following what the Justice Department  
25 had done in prior cases.

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1           So, as to my second theme, deterrence and  
2 adjustment. Thus far in the redistricting cycle, I  
3 think we've heard that there have been a couple of  
4 objections to local plans. And then, of course,  
5 there's the opposition to the Texas State House and  
6 Congressional plans by the Justice Department.

7           So, I think trying to look at the big  
8 picture on this in terms of the overall pattern, we  
9 see that the number of redistricting objections  
10 increased from the 1970s, to the 1980s, to the 1990s,  
11 then has been on a downward arc beginning after the  
12 2000 census and continuing to the current round.

13           This pattern, we believe, leads us to  
14 conclude that at least with regard to the  
15 redistricting plans that the Department thus far has  
16 rendered determinations on, the Section 5  
17 jurisdictions have adjusted their map drawing to fit  
18 within the well-established Section 5 parameters, and  
19 have been deterred from enacting discriminatory plans.

20           This, perhaps, is not surprising given the  
21 number of redistricting cycles that have been  
22 undertaken, as I described, and the generally  
23 consistent manner in which Section 5 has been  
24 interpreted and applied.

25           Indeed, during the hearings that preceded

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1 Congress' 2006 reauthorization of Section 5, one of  
2 the major points made to Congress was that Section 5's  
3 deterrent effect has become a significant reason why  
4 Section 5 remains an effective and still necessary  
5 remedy for voting discrimination.

6 So, for the reasons outlined above, the  
7 Lawyers' Committee believes that the application of  
8 Section 5 in the current redistricting cycle, as it  
9 thus far has played out, may best be understand for  
10 those two twin themes that I've just described. Thank  
11 you.

12 CHAIRMAN CASTRO: Thank you, Mr. Posner.  
13 Mr. McDonald, you have the floor.

14 MR. McDONALD: Thank you very much, members  
15 of the Committee. I'm very honored to be here today to  
16 talk on behalf of the ACLU and to discuss the  
17 important issue of enforcement of Section 5 of the  
18 Voting Rights Act.

19 There are many people who have said, well,  
20 we don't really need Section 5 any more because  
21 Section 2 of the Voting Rights Act is an adequate  
22 remedy for discrimination in voting. Well, in 2005 and  
23 2006 Congress heard those arguments and concluded that  
24 Section 2, in light of past experience, would not be  
25 enough to combat the efforts of certain states and

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1 jurisdictions to discriminate against minority  
2 citizens in the electoral process.

3 And I may say that the Voting Rights  
4 Project that I'm the Director of has been engaged in a  
5 lot of Section 2 and constitutional litigation. We  
6 filed a report with Congress during the 2005-2006  
7 hearings in which we discussed some 293 cases that we  
8 had been involved in in 31 states since 1982.

9 Now, some of those we filed amicus briefs,  
10 so it wasn't as if we were the lead undertaking  
11 litigation in all of those lawsuits, but it's enough  
12 to know that Section 2 litigation is extremely time-  
13 consuming. It places the burden of proof on the  
14 possible victims of discrimination rather than its  
15 perpetrators. It imposes a heavy financial burden on  
16 minority plaintiffs. It cannot prevent the enactment  
17 of discriminatory voting measures, but allows them to  
18 remain in effect for years until litigation is  
19 concluded. And it's not just Congress that made that  
20 finding about Section 2 not being an effective  
21 alternative remedy for Section 5, but the federal  
22 courts have rated voting cases among the most complex  
23 tried by federal courts according to a study conducted  
24 for the Federal Judicial Center measuring the  
25 complexity and time needed to handle matters by the

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1 District Court's voting cases. I must say I was a  
2 little surprised at this, but perhaps not.

3 Minority cases were among the top five  
4 most complex cases and given a weight of 3.86 compared  
5 to 1.0 for so-called average case. And just for the  
6 record, the name of the study is the Federal Judicial  
7 Center 2003-2004 District Court case weighting study  
8 2005, and the only cases, you might be interested in  
9 hearing this, the only cases given a higher weight  
10 were civil, RICO, patent, environmental matters, and  
11 death penalty habeas corpus cases.

12 There are a lot of reasons these Section 2  
13 cases are complex, but one of them is the so-called  
14 totality of circumstances analysis that is required by  
15 the legislative history of Section 2, and also by  
16 *Thornburg v. Gingles*, which was the 1986 opinion of  
17 the Supreme Court first construing amended Section 2  
18 as amended in 1982. And it lists a laundry list,  
19 there's seven primary factors. It's not intended to be  
20 exclusive by any means, but you have to examine  
21 geographic compactness, political cohesion, legally  
22 significant racially polarized voting, the extent of  
23 any history of discrimination and its impact on voter  
24 participation, the use of devices that may enhance  
25 discrimination, the existence of candidate slating

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1 processes, socioeconomic disparities and their effect  
2 on political participation, racial campaign appeals,  
3 the extent of minority office holding, a lack of  
4 responsiveness to the needs of minorities, and the  
5 policy underlying the challenged practice. Believe  
6 me, when you do a Section 2 case you end up with box,  
7 after box, after box, after box of documents. You  
8 have to look up the entire legislative history, not  
9 simply of the state but the jurisdictions that you're  
10 suing. You have to read all of the Minutes of the --  
11 to see what they say about race and so on.

12 And aside from the fact that they're very  
13 time consuming and you compile a lot of data, you have  
14 to hire a lot of experts. You've got to have an expert  
15 demographer to draw up plans to determine if the  
16 minority is geographically compact. You have to have a  
17 statistician who can analyze the past 20 or 10 years  
18 of election returns to see if voting is racially  
19 polarized and to determine the extent to which  
20 minorities have been elected to office. And you also,  
21 ideally, if you've got the money to do so, you want to  
22 hire an expert political scientist who can examine all  
23 the data and talk about the impact that the challenged  
24 system has on minority voters. And you probably also  
25 want to get a historian, somebody who's written about

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1 race in the jurisdiction who can testify before the  
2 courts, and who can explain how that past history  
3 affects political participation.

4 Another major problem with Section 2  
5 litigation is that it can be ongoing, and I'll cite  
6 two cases that we are currently involved in. One, we  
7 represented tribal members in Fremont County, Wyoming  
8 who challenged the at-large method of elections there.  
9 We filed our complaint in October of 2005 and we did  
10 not get a decision on the merits until April of 2010,  
11 that's some five years later.

12 The county appealed the single-member  
13 district remedy that the District Court ordered into  
14 effect, and we've had oral arguments on that in the  
15 Court of Appeals, but as of -- as I speak now, we have  
16 still not gotten a final decision from the Court of  
17 Appeals.

18 There's another case, *Levy v. Lexington*  
19 *County, South Carolina*. We filed a lawsuit in  
20 September of 2003 on behalf of black residents of  
21 Lexington County School District No. 3 challenging the  
22 at-large system of elections. Blacks had run for the  
23 school board on numerous occasions and had always  
24 gotten substantial and significant black political  
25 support but had never been elected to office.

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1 Well, we filed a lawsuit in 2003, but it  
2 was not until February of 2009 that we got a decision  
3 on the merits. But in the meantime, following the end  
4 of the trial and the date of the opinion by the  
5 District Court judge, two cycles of elections had  
6 transpired, and we got a favorable decision. The  
7 District Court judge said the system dilutes minority  
8 voting strength, made extensive findings of fact, the  
9 county appealed. One of their arguments was you've  
10 got to consider these intervening elections. So, we  
11 had the argument before the Court of Appeals, and it  
12 all went very pleasantly. And the Fourth Circuit, as  
13 you know, after the argument, the members come by and  
14 they all shake your hand, and the main judge shook my  
15 hand and said, "I thought your argument went very  
16 well, but I don't think you're going to be pleased  
17 with the results." So, the results were that they  
18 vacated and remanded. They didn't find any of the  
19 findings of fact were wrong, but they said the court  
20 had to consider those two cycles of the intervening  
21 elections, so the case went back to the District  
22 Court.

23 We had a series of hearings, more expert  
24 testimony. We had to have our expert witness analyze  
25 those elections. We had more depositions, more time-

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1 consuming hearings. And as I speak, we have still not  
2 gotten an opinion from the District Court. And I have  
3 to ask myself what is it that we want to do? Shall I  
4 file something with the Court of Appeals asking them  
5 to issue a Writ of Mandamus directing the court to  
6 decide. If you do that, you run the risk of annoying  
7 the judge, to put it mildly, so I think maybe what  
8 I'll do is write a letter.

9 But, again, the Supreme Court has so  
10 frequently said that voting restraints on account of  
11 race or color should be removed as quickly as possible  
12 in order to open the door to the exercise of  
13 constitutional rights conferred almost a century ago.

14 The Voting Rights Act implements Congress'  
15 intention to eradicate the blight of voting  
16 discrimination with all possible speed, and that's  
17 what Section 5 does. It's not an option to say that  
18 the burden of litigation ought to be placed on the  
19 possible victims of discrimination, and that Section 2  
20 is an effective remedy. It's not.

21 I had other things which I said in my  
22 written statement which I'm not going to have time to  
23 go into. One of them, the recent trend of states  
24 seeking judicial preclearance. I will just add that I  
25 think that what those states understand is that if

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1 they file a law suit, and if they add a claim that if  
2 you don't preclear this voting change, then we want  
3 you to decide whether or not Section 5 is  
4 constitutional, is an added pressure on either the  
5 courts or the Department of Justice to preclear a  
6 plan.

7 And we know that in the *Kinston County*  
8 case, the Department of Justice what, three or four  
9 days ago, has written a letter to Kinston saying that  
10 they're going to reconsider the objection that they  
11 made. And I think that has a lot to do with the fact  
12 that a claim of the unconstitutionality of Section 5  
13 was raised in the lawsuit that they filed. So, I will  
14 stop.

15 CHAIRMAN CASTRO: Thank you, Mr. McDonald.  
16 At this point we will open it up for questions from  
17 the Commissioners. Commissioner Kirsanow.

18 COMMISSIONER KIRSANOW: Thank you, Mr.  
19 Chair, another splendid panel. Thanks for all of your  
20 remarks.

21 I posed this question to the previous  
22 panel and I'm interested in maybe getting your take on  
23 this. And, again, this goes to retrogression and the  
24 ability to choose a preferred candidate for the  
25 minority voter. Actually, it's kind of a -- let me put

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1 a gloss on this question a little bit.

2 In covered jurisdictions in the south  
3 there has been in Georgia and Alabama, for example,  
4 since the almost 50 years since the enactment of the  
5 Voting Rights Act explosive population growth for a  
6 lot of reasons. One is the influx of northerners, and  
7 influx of immigrants. And in that respect, the  
8 demographics have changed.

9 How -- we heard from the previous panel  
10 when I posed this question, using the markers or  
11 metrics that DOJ employs to determine whether or not  
12 there's been retrogression, they've got a number of  
13 different things, you know, voter participation,  
14 voting age population, et cetera. Do you know how they  
15 factor in that growth that has changed the complexion  
16 of those covered jurisdictions significantly? And I  
17 think it implicates to some extent the *Northwest*  
18 *Austin* case. I suspect in your jurisdictions you  
19 probably have new political subdivisions that,  
20 frankly, don't have any history to rely on.

21 To the extent you know, how does DOJ make  
22 the determination whether or not there's  
23 retrogression, whether or not there is this ability to  
24 choose a preferred candidate?

25 MS. LEWIS: Well, Dr. Persily mentioned

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1 that he thought that the DOJ was recognizing there was  
2 an increased complexity in race and politics. And I  
3 think that is true from what we saw this cycle.

4 I think that when we first started dealing  
5 with the Department of Justice about our preclearance  
6 there was sort of -- maybe a given in some of the  
7 analysts' minds that we should be able to combine  
8 black voters and Hispanic voters and assume that they  
9 vote the same way. And I think it was quite surprising  
10 to the Department of Justice to hear from our two  
11 Hispanic members of our General Assembly, one a  
12 Republican, one a Democrat, that while it may be that  
13 way in Texas, it isn't necessarily that way in  
14 Georgia.

15 So, I think that -- I would say that I  
16 think that perhaps the Department of Justice's  
17 perception was that race, in particular minority race,  
18 may equal Democratic politics, but they're learning  
19 from the jurisdictions, including jurisdictions like  
20 Georgia where we have a -- we don't have a huge  
21 Hispanic population but certainly it was responsible  
22 for a lot of the growth this decade, that we're not  
23 the same as Texas. So, when the Department of Justice  
24 has to judge retrogression it's not necessarily going  
25 to be able to have an app for that, because it

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1 depends on the state.

2           And I wanted to make a comment about your  
3 question about new jurisdictions. We have a lot of new  
4 cities in Georgia, primarily popping up in the Metro  
5 counties. And one of those cities, the City of Sandy  
6 Springs, was formed in 2005, and sought a bailout.  
7 And the Department of Justice gave that city that  
8 bailout pretty much instantaneously, and has cited  
9 that as, see, we're not against Georgia. We gave your  
10 city a bailout. But, of course, that jurisdiction had  
11 only been in existence for five years. Certainly, it  
12 should have gotten a bailout. I'm not sure why it  
13 would even be covered but it was.

14           In Georgia's case though, of course, in  
15 order for Georgia to bail out we'd have to have 967  
16 sub-jurisdictions also be -- have a clean record. So,  
17 I think the answer to the question about how does the  
18 Department of Justice judge the minority population in  
19 the voting record, I think is going to differ with  
20 every state. And I think the Department of Justice  
21 found that out this time, particularly in dealing with  
22 Georgia versus Texas.

23           CHAIRMAN CASTRO: The Chair recognizes  
24 Commissioner Achtenberg.

25           COMMISSIONER ACHTENBERG: Mr. Posner, I was

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1 -- we've been hearing a lot about the theme,  
2 particularly in the Texas preclearance litigation,  
3 about the correlation between minority voting patterns  
4 and Democratic voting patterns, and Texas' defense  
5 that a number of their decisions were based on -- they  
6 were political decisions as compared to racially-  
7 motivated decisions. What do you think of that line of  
8 argument, and how would you suggest those issues be  
9 parsed?

10 MR. POSNER: Well, of course, you know  
11 redistricting as we all know is an extremely political  
12 process, and I think we all know that at least in some  
13 -- I don't think we can make the assumption on a  
14 state-by-state basis, and I don't think in this  
15 reference to Commissioner Kirsanow's question. I don't  
16 think DOJ makes any assumptions about a particular  
17 state, or that particular state is similar to another  
18 state. I mean, they've been dealing with the states  
19 for decades. They know that different states may have  
20 different situations. So, the important thing is then  
21 to look at the evidence, and to gather information,  
22 and to look at the particular circumstances, whether  
23 it's census data, or other things.

24 Now, in terms of the discriminatory  
25 purpose issue, that's true, it can be sometimes

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1 difficult to untangle things. And, indeed, there  
2 isn't -- I don't think jurisdictions act in one single  
3 unified purpose. There may be a variety of purposes,  
4 and it's been well established under Section 5 that  
5 Section 5 preclearance may not be granted if  
6 discriminatory purpose is even one of the purposes  
7 underlying that.

8 So, you do have to look at the effect,  
9 look at the targeted groups, and absolutely Section 5  
10 is not there to be used for political reasons,  
11 whichever administration may be governing things at  
12 the Department. So, the important thing is that it's  
13 not a question of whether there's some political  
14 purpose where one party is going to be helped or not.  
15 It's a question of what is the impact on minority  
16 voters.

17 And, in fact, the Justice Department  
18 looked at all three plans in Texas and decided that  
19 two of them are motivated by discriminatory purpose,  
20 or at least in their view, and one, the Senate plan,  
21 is not. So, they tried to carefully distinguish and  
22 not make assumptions about the level -- the  
23 legislature -- the same legislature adopted all three  
24 plans, so there must be the same exact purpose. That's  
25 not the process they went through.

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1           They looked at the evidence, they looked  
2 at the specific processes that were followed, they  
3 looked at the impact on particular minority groups,  
4 not Democrats or Republicans, and they made their  
5 determination.

6           So, I don't think -- obviously, as a  
7 factual matter those things can be intertwined because  
8 of certain minority groups, in certain places do vote  
9 for one party and not the other, but you have to do  
10 your best to look at the facts and see what the impact  
11 is on minorities, not Democrats or Republicans. And  
12 then make the judgment call after that.

13           COMMISSIONER ACHTENBERG: Thank you.

14           CHAIRMAN CASTRO: The Chair recognizes Ms.  
15 Tolhurst.

16           MS. TOLHURST: This question is for Mr.  
17 Park. You said in your written statement that the 2006  
18 amendment to the purpose standard will make it more  
19 likely that proceedings will involve a trial rather  
20 than summary judgment. I'm curious about that. I  
21 understand that the current standard is very fact-  
22 intensive, but the *Arlington Heights* test is also  
23 fairly fact-intensive, and DOJ and courts have been  
24 using that consistently. Can you elaborate on why you  
25 think that now trial is more likely?

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1 MR. PARK: I think we see it in *Texas*.  
2 *Texas* was denied summary judgment. It's a multi-factor  
3 test and, unless the covered jurisdiction can come up  
4 with a response to each and every allegation, then the  
5 court is not likely to grant summary judgment. And  
6 then if there are contested issues, genuine issues of  
7 material fact, they can't grant summary judgment under  
8 the federal rules. So, I think for both of those  
9 reasons it's going to be difficult for a covered  
10 jurisdiction to gain summary judgment in the face of a  
11 discriminatory purpose allegation.

12 MS. TOLHURST: Even more so.

13 MR. PARK: Well, to the extent that -- even  
14 if they were doing it back in the '80s and '90s, there  
15 have been -- this is kind of new ground with the  
16 statutory change so, again, we don't exactly know how  
17 they're going to deal with this in this context.

18 In *Bossier Parish*, my understanding of the  
19 District Court ruling was that they didn't find a  
20 discriminatory purpose other than a purpose to  
21 retrogress. This was the lower court ruling.

22 CHAIRMAN CASTRO: The Chair recognizes  
23 Commissioner Gaziano, the Vice Chair, then  
24 Commissioner Achtenberg.

25 COMMISSIONER GAZIANO: I would yield to

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1 Commissioner Yaki, though, if he's on the phone and  
2 might need to board a plane, and might not be able to  
3 --

4 CHAIRMAN CASTRO: Is Commissioner Yaki on  
5 the phone?

6 (No response.)

7 CHAIRMAN CASTRO: I think he may have  
8 dropped off earlier. I heard a beep.

9 COMMISSIONER GAZIANO: Well, I thank you  
10 all, and I thank you especially, Mr. McDonald, for  
11 raising two interesting points. One is helping connect  
12 the constitutional issues that we won't talk about on  
13 the merits with one of the arguments I've made why  
14 it's logically necessary. Your statement, of course,  
15 though very persuasive, others have commented on it,  
16 even including on the first panel.

17 But I was also very interested, and I  
18 agree with very much of what you said. Why someone who  
19 is skeptical of a government action would prefer to  
20 force that government to get approval from some  
21 federal bureaucrats who like the exercise of power,  
22 but that is as you know a very unique presumption to  
23 put on anybody, let alone that burden shifting, let  
24 alone on a sovereign state.

25 One question I'll direct partly to you and

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1 partly to the state witnesses. TROs and injunctions,  
2 of course, are in the normal course what would operate  
3 to prevent irreparable harm if you truly could show a  
4 likelihood of success on the merits. So, maybe to you  
5 part of the question is did you seek it, and why did  
6 you not seek it? And if you did, why did you fail to  
7 convince this judge that -- but to the state  
8 witnesses, it's what is the reaction in your state for  
9 being some of the few states who have this continuing  
10 badge of infamy imposed on you. All of the arguments  
11 that Mr. McDonald seemed to make would apply to any  
12 citizen in any other state who is skeptical of their -  
13 - how do you feel, or how do your clients, I suppose,  
14 feel about that continuing badge of infamy, and how  
15 does that affect their relationship with the federal  
16 government? So, maybe you would begin first.

17 MR. McDONALD: Well, in the *Lexington*  
18 *County* case I wrote letters every other month to the  
19 judge. Dear Judge, there are elections pending. We  
20 certainly think it would be very nice to get a  
21 decision before these elections. Never got back any  
22 positive response.

23 Then we did file a motion for a  
24 preliminary injunction, pointing out that the  
25 elections were going to be held and asking that they

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1 be enjoined, and the court in a very sort of concise  
2 three- or four-page order denied the motion for  
3 preliminary injunction. So, we resorted to all of the  
4 remedies that we thought were available, but without  
5 any positive results.

6 COMMISSIONER GAZIANO: So, you sought that.  
7 Okay.

8 MR. PARK: Well, where you get an  
9 injunction is at the front end of the process. Your  
10 legislature is unable to pass a plan, so you've got  
11 the old plan and somebody files an injunction and such  
12 to preclude you from proceeding with the elections  
13 with the old plan that doesn't satisfy constitution  
14 and one-person one-vote standards, and asks that court  
15 to draw a remedial plan.

16 We went through that in 2002 in Alabama  
17 and the three-judge --

18 COMMISSIONER GAZIANO: And that exists,  
19 just to clarify, outside Section 5.

20 MR. PARK: Correct. Although, trying to get  
21 a preliminary injunction in a Section 2 case would be  
22 extraordinarily difficult, just given the nature of  
23 the case. But in the 2002 round, the three-judge court  
24 had experts draw proposed plans, put them out there  
25 and the legislature said we can do better than that,

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1 and tweaked the plans and passed them, and we got them  
2 precleared.

3 As to your larger question, in my personal  
4 capacity I've suggested that there is a problem with  
5 the bailout or with the coverage formula. And I think  
6 that that's a real stress on the Act. I think that the  
7 covered jurisdictions have substantially changed, and  
8 there's a good argument that Section 5 is no longer  
9 needed. I know that argument was made to Congress and  
10 Congress disagreed, and that's now an issue in the  
11 courts.

12 But on voter registration, voter  
13 participation, and minority representation in elected  
14 bodies, the covered jurisdictions have all, including  
15 Alabama, changed substantially.

16 CHAIRMAN CASTRO: The Chair recognizes Vice  
17 Chair Thernstrom.

18 VICE CHAIR THERNSTROM: Two questions, the  
19 first to Laughlin McDonald. He and I have known each  
20 other for now decades, and I'm delighted to see all of  
21 you, but especially him, here.

22 Look, you said with respect to Section 2  
23 so many factors need to be considered, and I would say  
24 when you look at the guidelines of Section 5 and you  
25 look at the incorporation of the *Arlington Heights*

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1 standard, and you've got a laundry list of undefined  
2 terms. So, I don't see a big difference here. I mean,  
3 this list amounts to what one political scientist long  
4 ago called a list of criteria in a criminal case that  
5 amounted to saying, well, among the things you might  
6 be arrested for are... It's guidance that's no real  
7 guidance, so I think your point with Section 2 applies  
8 also to a great extent to Section 5.

9           And then second question. To me, and I --  
10       people know better than I do here. I'm glad to be  
11       corrected, but to me there seems to be a shift in the  
12       way that the civil rights community has been thinking  
13       about preclearance.

14           I mean, more than 20 years ago now, I  
15       argued, hey, folks, with these majority-minority  
16       districts Republicans, especially in the south, are  
17       laughing all the way to the political bank because the  
18       heavily-black districts, of course, have a partisan  
19       impact, the surrounding districts get "bleached," and  
20       they are fertile ground for white Republican  
21       candidates.

22           Well, I was laughed out of town for saying  
23       such a thing. Now, today I see that the cover story of  
24       Nation Magazine is making precisely that argument,  
25       saying well, these majority-minority districts have an

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1       unfortunate partisan impact.   And they're making all  
2       my old arguments that, of course, nobody -- this is a  
3       whine on my part -- nobody remembers I made more than  
4       20 years ago.

5                   But it does seem to me there is a shift in  
6       the way the civil rights community is thinking about  
7       the issue of preclearance, and a recognition of the  
8       cost, the partisan cost of what the ACLU once called  
9       max-black districts, I think it's an unfortunate  
10      phrase but in any case -- so we've got two questions.  
11     These lists of criteria, of undefined criteria, and  
12     then the second, the partisan impact which it seems to  
13     me is being recognized now finally by the civil rights  
14     community itself.  And one should never complain about  
15     one's points being eventually accepted, except I feel  
16     like complaining.

17                   MR.       McDONALD:       Well,       Commissioner  
18     Thernstrom and I are old friends and go back a long  
19     way.

20                   I think that the burden of proof is quite  
21     different under Section 2 and under Section 5.

22                   VICE CHAIR THERNSTROM: Well, sure. Is the  
23     normal burden of proof on the plaintiffs.

24                   MR.       McDONALD: Under Section 2 it's the  
25     plaintiffs who have the burden.  And, also, the -- what

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1 has to be proved is different. The plaintiffs in a  
2 Section 2 case have to prove that a challenged plan  
3 dilutes minority voting strength, and the burden of  
4 proof on a submitting jurisdiction is only to show  
5 that there's no retrogression, that minorities are not  
6 worse off. So, I think it's a much easier burden to  
7 prevail on.

8 VICE CHAIR THERNSTROM: Well, sure, which  
9 made sense in 1965. I think it made a great deal of  
10 sense.

11 MR. McDONALD: And to address the question  
12 about the partisan impact, I think that what people  
13 overlook is the flight of whites from the Democratic  
14 party. That's what the real problem is. It's not  
15 drawing majority-minority districts, it's the fact  
16 that whites are abandoning the Democratic party. And  
17 that's been going on for a very long time. We had  
18 Strom Thurmond who ran on this anti-civil rights  
19 platform, we had George Wallace, segregation today,  
20 segregation tomorrow, segregation forever. And they  
21 carried a large number of white voters.

22 In the last election for the Georgia  
23 legislature I forget how many it was, but there were  
24 three or four people who --

25 VICE CHAIR THERNSTROM: Sure. There are no

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1 white Democrats --

2 MR. McDONALD: -- were elected -- whites  
3 elected as Democrats who quit and joined the  
4 Republican party. So, the real problem is not  
5 creating majority-minority districts, but white  
6 flight.

7 The Democratic party is becoming a party  
8 of blacks, so people like Tyrone Brooks says, who is  
9 in the State Legislature. You know, it's like saying,  
10 well, Section 5 is bad if it has that impact. That's  
11 like saying, when schools were first desegregated,  
12 there were many whites who said don't desegregate the  
13 schools because it will cause white flight. They will  
14 flee the public schools and set up private schools.  
15 Well, I don't think you can deny blacks the right to  
16 go to integrated schools simply because it's going to  
17 displease some whites. And I don't think that you can  
18 tell black voters you're not entitled for us to create  
19 majority-minority districts in which you can elect  
20 candidates of choice because it might upset some  
21 whites who will then flee to the Republican party. I  
22 don't think that's what the Voting Rights Act is all  
23 about, and I don't think that's the position that we  
24 should take.

25 VICE CHAIR THERNSTROM: Well, I never would

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1 take that position myself. My only point was that  
2 there was not a recognition for an awfully long time  
3 of the partisan cost, given the fact that southern  
4 whites were moving into the Republican party, as  
5 you've just said, and that process started a long time  
6 ago. But there wasn't a recognition on the part of  
7 civil rights advocates that this was happening, and  
8 there were partisan costs because civil rights  
9 advocates were Democrats, rightly, I understand.

10 CHAIRMAN CASTRO: Madam Vice Chair, I'm  
11 going to in the interest of having --

12 VICE CHAIR THERNSTROM: Yes.

13 CHAIRMAN CASTRO: -- others ask questions,  
14 I'm going to --

15 VICE CHAIR THERNSTROM: Absolutely.

16 CHAIRMAN CASTRO: -- recognize  
17 Commissioner Achtenberg, and then Commissioner  
18 Kladney.

19 VICE CHAIR THERNSTROM: Absolutely.

20 COMMISSIONER ACHTENBERG: Mr. McDonald, the  
21 ACLU submitted a comment to the Department of Justice  
22 regarding South Carolina redistricting plan that was  
23 ultimately pre-cleared by the DOJ. Could you describe  
24 the ACLU's objection to the plan and where the ACLU  
25 and the Department of Justice differed in their

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1 analysis?

2 MR. McDONALD: Well, this was the  
3 Congressional plan that you're referring to?

4 COMMISSIONER ACHTENBERG: Was it the  
5 Congressional plan?

6 MR. McDONALD: That was the Congressional  
7 plan. South Carolina got an extra Congressional seat  
8 and they had one majority black district, and one  
9 majority black member of Congress who was elected from  
10 that majority black district. And we were of the view,  
11 based on having consulted with a demographer, that you  
12 could draw an additional majority black seat. And we  
13 thought that the Department of Justice ought to take  
14 that into account in determining whether or not to  
15 preclear the plan submitted which created only one  
16 such seat. So, we filed our Section 5 comment letter.

17 And then the question is well, it's been  
18 precleared. Now should we file a Section 2 lawsuit  
19 challenging it, and that's a much, much, much more  
20 difficult question which we have not answered.

21 COMMISSIONER ACHTENBERG: Thank you.

22 CHAIRMAN CASTRO: Commissioner Kladney.

23 COMMISSIONER KLADNEY: Ms. Lewis, Mr. Park,  
24 you talked about a novel preclearance standard. Were  
25 you both referring to the same novel preclearance

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1 standard, and what is it?

2 MR. PARK: From my perspective, it's just  
3 it didn't seem to have anything to do with any  
4 discriminatory purpose in the 2000 round. And as the  
5 result of the statutory change in 2006, we've now got  
6 Justice entitled to look into any discriminatory  
7 purpose. With an eight-member plan and a seven-member  
8 plan, probably not that big a deal. For the seven-  
9 member plan, Alabama's black population is about 26  
10 percent. There's substantial doubt whether you could  
11 draw another compact, contiguous, Shaw-compliant black  
12 majority district in the seven-member plan. And that's  
13 kind of why I say Section 2 litigation ought to be  
14 separated from the Section 5 inquiry.

15 COMMISSIONER KLADNEY: And how did the  
16 Alabama preclearance go, was it difficult?

17 MR. PARK: For those two plans they should  
18 have been pre-cleared, they were in 60 days. We  
19 responded to some requests for additional information,  
20 but it -- the process went as it should have.

21 COMMISSIONER KLADNEY: Not much of a  
22 problem.

23 MR. PARK: Not for those two. The  
24 legislative plans may be different because one is 35  
25 members, and the other is 105.

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1 COMMISSIONER KLADNEY: To be told later?

2 MR. PARK: The legislature is going to take  
3 them up probably in 2012 or 2013. They're not up  
4 until 2014.

5 COMMISSIONER KLADNEY: All right. Ms.  
6 Lewis?

7 MS. LEWIS: I think from my perspective,  
8 Commissioner, what I was talking about in terms of the  
9 cart and the horse is that -- and there is a guidance  
10 from the DOJ. There is the renewal, there are final  
11 rules; yet, nothing specific for states to follow,  
12 although, by the time of the *Texas* case, the DOJ did  
13 seem to develop some specificity. And all I was saying  
14 is it might be helpful to know what that is while  
15 you're drawing your maps rather than after the fact.

16 And I think to the extent that -- your  
17 question to me is also about the trouble of  
18 preclearance. Like I said, we have a very cordial and  
19 professional relationship with the DOJ. They have a  
20 job to do, we have a job to do. But I do think that,  
21 at least from my perspective, the position of the DOJ  
22 is more, how can we not preclear this today than,  
23 here's the plan, and how do -- and do you meet the  
24 standards.

25 I will say that I think that it might be

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1 easier if there were particular required data you had  
2 to provide, and that DOJ knew what that was up front.  
3 And, also, I think that if I were at the DOJ I  
4 probably would revise the interview procedures  
5 somewhat. I didn't find that the interviews of the  
6 Democrats and the Republicans came anywhere close to  
7 being the same length. And like I said, I do also  
8 think that at least in some questioners' minds it was  
9 more of a desire to guide a witness in a particular  
10 direction.

11 For example, there's a Congressional  
12 district in southeast Georgia. Every member was asked,  
13 do you know about Congressional District 12, or most  
14 members were. A lot of members of the General  
15 Assembly live in the northwest Georgia mountains;  
16 they'd say, I don't even know where it is. Well, do  
17 you think the people in that district have the  
18 opportunity to elect the candidate of their choice?  
19 Well, how in the world would they know that?

20 So, I think that, you know, they didn't  
21 ask for my advice on the interviews, but I do think  
22 that in terms of -- I do think one of the advantages  
23 of filing litigation at the same time is that if those  
24 questions are going to be the basis of decision,  
25 they're also going to be an opportunity to object to

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1 them as having no foundation.

2 COMMISSIONER KLADNEY: Well, litigation  
3 seems to perk people up.

4 MS. LEWIS: Excuse me?

5 COMMISSIONER KLADNEY: Perk people up,  
6 litigation.

7 MS. LEWIS: That's right, perk it up.

8 (Laughter.)

9 COMMISSIONER KLADNEY: Oh, now I -- it  
10 slipped my mind. I'm getting old.

11 CHAIRMAN CASTRO: We'll come back to you  
12 later when --

13 COMMISSIONER KLADNEY: All right. Mr.  
14 Gaziano has raised a hand for questions.

15 CHAIRMAN CASTRO: Is there anyone else who-  
16 -

17 COMMISSIONER GAZIANO: I was kind of going  
18 to follow up anyway, Ms. Lewis, on your -- one  
19 possible rejoinder to your thought that these  
20 interviewers were asking leading questions, and not  
21 leading -- is because that's their job. I mean, that  
22 really is the most important thing that they really  
23 need to determine. And there aren't too many people  
24 who can get witnesses to break down on the stand the  
25 first time you ask the question. But I'm also

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1 reminded of Mr. Park's point that he made in his  
2 written testimony that I don't think he spoke to is --  
3 talks about the, what I'll call a public choice  
4 point. The institutional bias of the Department to  
5 increase its power, increase its budget, regardless of  
6 ideological reasons that others have mentioned that a  
7 Republican legislature might be suspicious of just  
8 purely an institutional concern.

9 So, in order to assess that, can you give  
10 us any other context besides what you just did as to  
11 why they weren't just doing their job. Even if they  
12 had -- may concede that they asked the same questions  
13 three times, were you there, was your co-counsel  
14 there? Was it a manner, a tone? What else can you --

15 MS. LEWIS: Yes, I was there for the  
16 interviews of the state witnesses. And most of these  
17 were by telephone, because we're a long way from  
18 Washington. And they had a lot of people to  
19 interview.

20 And I guess where maybe I disagree with  
21 you somewhat is that, if the Department of Justice  
22 objected to the plans in the litigation, I would say  
23 certainly they're going to try to lead the witnesses  
24 to help them support that objection. But in the  
25 administrative preclearance process, at least I think,

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1 the purpose of the process is to gather the facts, to  
2 determine whether or not the plan should be  
3 precleared, not to gather facts to determine that the  
4 plan should not be precleared.

5 And the facts that -- I guess following up  
6 on something that Jack said -- the purpose prong was  
7 at least in our opinion where the Department of  
8 Justice would have all sorts of subjective opinions  
9 and ability to reach those opinions. The effect, no.  
10 But, of course, we didn't know what might -- what they  
11 might think was the purpose. So, I think that when I'm  
12 talking about leading witnesses to a question, if  
13 you're asking a person who's been in the General  
14 Assembly for 20 years, do you think these maps were  
15 motivated by politics or race, and the person tells  
16 you three times politics, you need to believe that.  
17 And if you're still asking for the race answer, then I  
18 think you're trying to get to an answer that you want  
19 that would in turn help you to support the denial of  
20 preclearance because the purpose was discriminatory.

21 So, I guess the bottom line is, if they  
22 objected and we went to litigation, and they wanted to  
23 try to lead those witnesses to that answer, more power  
24 to them. But in the administrative process, I think  
25 that the purpose is to get to the truth, should this

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1 plan be precleared?

2 CHAIRMAN CASTRO: Commissioner Kladney.

3 COMMISSIONER KLADNEY: Isn't that a way to  
4 get to the truth, is to -- I mean, you have to couch  
5 questions several different ways. I mean, I do that.

6 MS. LEWIS: I do that, but I also do that  
7 to get the answer I want.

8 COMMISSIONER KLADNEY: Well --

9 MS. LEWIS: And if I can get the answer I  
10 want, and it's the truth that the witness is telling,  
11 yes, I agree, you would lead your witness to that  
12 answer. But I don't see it being the same thing in  
13 the administrative preclearance process where they're  
14 the decision maker. They should be asking the  
15 questions to get to the facts, not to an answer that  
16 is desired.

17 COMMISSIONER KLADNEY: But the witness is  
18 allowed to give the answer that they want. And if  
19 they have to repeat it a couple of times, that's how  
20 they do it. I mean, that's how I was raised.

21 MS. LEWIS: Oh, I agree with you. No, I  
22 agree with you, but I also think that the witness'  
23 answer when the witness gives an answer, you should  
24 respect that the witness knows the answer to that  
25 question. And the question of whether it's race or

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1 politics, politicians know the answer to that  
2 question.

3 COMMISSIONER KLADNEY: And I have one more  
4 question for you.

5 MS. LEWIS: Yes.

6 COMMISSIONER KLADNEY: How have you both  
7 found it this cycle compared to other cycles you may  
8 have been involved in?

9 MR. PARK: About the same for me in  
10 Alabama. The last time we had a video conference from  
11 then-Assistant Attorney General for Civil Rights,  
12 Ralph Boyd, and other folks at DOJ on the state  
13 legislative plans, and there was one tricky thing in  
14 the House where they created an influence district,  
15 black plurality 49.7 percent down in southeast  
16 Alabama. This time we haven't done the legislative, so  
17 we'll see what happens. So far, the processes have  
18 been about the same.

19 MS. LEWIS: And I think for me, as I said,  
20 I was on a different side the last time in the role of  
21 an objector or an intervenor. I will say that I don't  
22 think the Department of Justice was particularly  
23 interested in what our objectors had to say the last  
24 time around. This time around, though, as the  
25 representative of the state attempting to get

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1 preclearance, as I said, I found the Department of  
2 Justice to be very professional, and very calm under a  
3 gun, because --

4 COMMISSIONER KLADNEY: Outside of that one  
5 thing -- question.

6 MS. LEWIS: I'm sorry?

7 COMMISSIONER KLADNEY: Outside of that one  
8 question.

9 MS. LEWIS: Well, outside of a couple of  
10 questions, but -- no, but I think in terms of trying  
11 to get the job done, I mean, and they also knew that  
12 if we didn't get preclearance from them in about 60  
13 days, we were going to just withdraw that and go to  
14 the District Court because we wanted to get our maps  
15 in place.

16 COMMISSIONER KLADNEY: So, you would ask  
17 for a few more guidelines from DOJ in terms of  
18 information -- in other words, documents they would  
19 want in regularity. You've done for this years now. I  
20 mean, are there certain documents they need all the  
21 time?

22 MS. LEWIS: Yes, there are, and we thought  
23 we sent them all of those, but there were additional  
24 requests. Of course, in three statewide plans we  
25 wouldn't think that was unusual to get additional

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1 requests, but I just think there were times where if  
2 we knew that they wanted information on A, B, and C,  
3 we could have done that all at once. And we have to  
4 rely on the Secretary of State's office to develop the  
5 queries and run them instead of finding out, okay, we  
6 want A. Now we need B, now we need C. We could have  
7 done that all at once, and a three-week process would  
8 have become a one-week process.

9 COMMISSIONER KLADNEY: Mr. Park, same  
10 thing.

11 MR. PARK: We relied on the State  
12 Reapportionment Office there, and the only -- the one  
13 concern I had was that DOJ doesn't seem to talk to the  
14 Census Bureau. They asked for the precinct lines, and  
15 our folks got them from the Census Bureau. And when I  
16 tried to send -- I sent the package of 67 and it was  
17 too big for an email, so I sent an email to the  
18 Department of Justice saying do you want them on a  
19 disk or do you want to get them from the Census  
20 Bureau? I think they just got it from the Census  
21 Bureau.

22 COMMISSIONER KLADNEY: Thank you both very  
23 much, and thank you.

24 CHAIRMAN CASTRO: The Chair recognizes Ms.  
25 Tolhurst.

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1 MS. TOLHURST: Thank you. I'd like to get  
2 you all to talk about coalition districts a little, if  
3 you're able.

4 Since the VRARA, what is the status of  
5 coalition districts as described in *Georgia v.*  
6 *Ashcroft*. May covered jurisdictions create new  
7 coalition districts to avoid retrogression? Are  
8 covered jurisdictions required to protect coalition  
9 districts from retrogression? And have you seen  
10 evidence of what DOJ's view on this would be?

11 MR. PARK: It looks like DOJ says that if  
12 you've got a coalition district -- this is from the  
13 *Texas* litigation, says that if you've got a coalition  
14 district in your benchmark plan you have to preserve  
15 it. *Bartlett v. Strickland* says you don't have to draw  
16 them, so if it doesn't exist, I don't think you have  
17 to draw it.

18 VICE CHAIR THERNSTROM: For Section 2  
19 purposes.

20 MR. PARK: For Section 2 purposes. And I --  
21 if you don't have to do it for Section 2 purposes,  
22 you shouldn't have to draw one for Section 5 purposes.

23 MR. McDONALD: Well, is -- well, you answer  
24 because you're with the Department of Justice.

25 MR. POSNER: I think it all keys back to

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1 that notion of ability to elect. So, I think you have  
2 to look -- if there's a coalition district in which  
3 minorities have combined with other minorities, for  
4 example, or looking at the voting patterns in terms of  
5 white voters, and there's an ability to elect, then  
6 that's been the law since *Beer*, that you can't  
7 retrogress an ability to elect. So, you do certainly  
8 consider voting patterns, whatever those -- and those  
9 voting patterns, of course, can vary from state to  
10 state, or even within a particular state, so you have  
11 to -- I think you have to be cognizant of that.

12 Yes, if there's not an ability to elect  
13 district currently, whether you're talking about  
14 coalition districts or not, then it's not  
15 retrogressive to fail to draw one. And that's also  
16 been the standard law. Whether or not there's  
17 discriminatory purpose involved could be a different  
18 issue.

19 In terms of Section 2, as Commissioner  
20 Thernstrom pointed out, that's an entirely different  
21 question in terms of the three Gingles preconditions,  
22 and whether or not you can meet one particular  
23 precondition. And that has nothing to do with Section  
24 5. Indeed, as the Supreme Court specifically pointed  
25 out in *Bartlett*, that you can -- Section 2 and Section

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1 5 are completely different. Section 2 is not involved  
2 in Section 5 proceedings, and that's been the law  
3 since the Supreme Court decided that in 1997. So,  
4 Section 2 issues are a separate ball game.

5 MR. McDONALD: And can I just add -- I  
6 think Mark can correct me if I'm wrong -- but DOJ  
7 regulations expressly provide that coalition districts  
8 are protected from retrogression under Section 5.

9 MR. POSNER: I'm not sure if they  
10 specifically refer to that. I think they look at the  
11 standard factors that have been looked at in the  
12 redistricting such as fragmentation, packing, turnout  
13 factors. Those are things that election experts have  
14 been using for decades now to look at redistricting  
15 issues.

16 MR. McDONALD: Well, I've looked at the  
17 legislative history. In the House report there's like  
18 two sentences that expressly say that these coalition  
19 districts are protected from retrogression under  
20 Section 5. And then if you look at the Senate report,  
21 which was post legislative history, which the courts  
22 have ruled isn't relevant to interpreting the  
23 legislation there, probably a dozen pages saying the  
24 coalition districts aren't protected and so on. So, I  
25 think that one can ignore the Senate report.

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1 VICE CHAIR THERNSTROM: It is being  
2 ignored.

3 MR. McDONALD: I'm sorry?

4 VICE CHAIR THERNSTROM: It is being  
5 ignored.

6 CHAIRMAN CASTRO: The Chair recognizes  
7 Commissioner Kirsanow.

8 COMMISSIONER KIRSANOW: Thank you. Ms.  
9 Lewis and Mr. Park, to the extent you know, I'm  
10 hopeful we're going to, I think, interview some DOJ  
11 folks later, but with whom were you dealing, not  
12 necessarily by name but at what level were you dealing  
13 with DOJ personnel, and who were the decision makers?  
14 Again, not necessarily by name but in terms of title,  
15 and are they deputies, are they assistants? Who are  
16 they?

17 MS. LEWIS: Well -- and I think I put this  
18 in my written testimony, so I'll say our main contact  
19 for Georgia at the Department of Justice was Abel  
20 Gomez, who I think was called Special Trial Counsel.  
21 So, he was involved both in the litigation and in the  
22 administrative submission. In the litigation he  
23 entered an appearance, in the administrative  
24 submission he was, I think, the Team Leader. So, we  
25 dealt with him.

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1           And then in the interviews, the interviews  
2 were typically conducted by a team that included  
3 attorneys and analysts. So, that was the -- those were  
4 the people we dealt with, essentially the people  
5 assigned to us to investigate our submission. And I  
6 think above them was Mr. Gomez who was managing  
7 everything.

8           We have in the past dealt with Mr. Herron  
9 who's the Act -- he may be the Chief now, of the  
10 Voting Section. But we didn't really have any contact  
11 with him other than we met with the DOJ one day before  
12 -- shortly before the decision and spoke to him, but  
13 we didn't have any communications with him about our  
14 plan.

15           COMMISSIONER KIRSANOW: Mr. Park, with whom  
16 were you dealing?

17           MR. PARK: For my part I remember the names  
18 but not the titles, and if you'd like I can furnish  
19 them to Ms. Tolhurst.

20           COMMISSIONER KIRSANOW: That would be  
21 helpful. I'm trying to determine who makes the  
22 decisions here. What's the process like. You know,  
23 you get interviewed by attorneys and staff members,  
24 analysts, and then I'm presuming that gets kicked  
25 upstairs and somebody signs off or they check boxes

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1 saying yes, we've done all these things. And then  
2 when you get -- because I've never seen it, I don't do  
3 this, but if you get an objection, a notice of -- the  
4 Department of Justice objects or that they've  
5 precleared, who signs off on that?

6 MS. LEWIS: Our letter was signed by Mr.  
7 Perez.

8 COMMISSIONER KIRSANOW: Okay.

9 MR. PARK: He's the Assistant Attorney  
10 General.

11 COMMISSIONER KIRSANOW: Right.

12 MR. PARK: I don't -- I think I've seen in  
13 prior lifetimes more information requests, and I don't  
14 remember who signed them.

15 MR. POSNER: I mean, I could certainly  
16 clarify about that since I worked there for many  
17 years. Objections always are interposed by the  
18 Assistant Attorney General. He's the only -- he or she  
19 is the only one who has the authority, and that's by  
20 regulation.

21 Typically, preclearance letters, and there  
22 may be 4,000 to 5,000 of those letters issued each  
23 year, that's not something the Assistant Attorney  
24 General would have time to deal with, so it's the  
25 Section Chief, or someone signing on behalf of the

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1 Section Chief. The Section Chief also has the  
2 authority to issue --

3 COMMISSIONER KIRSANOW: To delegate?

4 MR. POSNER: Well, obviously, yes, there  
5 are people working and people sign on behalf of the  
6 Section Chief. And it's dealt with in a collaborative  
7 manner within the section, but if something is more  
8 controversial, then that's brought to the Section  
9 Chief's attention who then may bring it to the  
10 Assistant Attorney General's attention. So, it's not -  
11 - there's a certain framework. It's not formulaic in  
12 terms of how they deal with things.

13 And it's been the history since at least  
14 the 1980s or 1970s that Section Chiefs have the  
15 authority to sign additional information requests.

16 COMMISSIONER KIRSANOW: Mr. Park.

17 MR. PARK: I was just going to say that our  
18 preclearance letters come from Mr. Perez signed in  
19 blue ink.

20 MR. POSNER: Well, I guess the -- I'm  
21 sorry. The exception is that, given the importance of  
22 statewide plans, that those typically are -- the  
23 preclearance letters are signed by the Assistant  
24 Attorney General, so that's the exception, recognizing  
25 their significance.

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1 CHAIRMAN CASTRO: The Chair recognizes  
2 Commissioner Achtenberg.

3 COMMISSIONER ACHTENBERG: Thank you, Mr.  
4 Chairman.

5 For Mr. Posner, I was gratified to see  
6 that Professor Gaddie characterized the DOJ's Section  
7 5 enforcement as both apolitical and fair. Does that  
8 come as a surprise to you? And if not, why not?

9 MR. POSNER: Well, I think that over the  
10 years and looking back over decades, I think the  
11 overwhelming majority of the time it has been  
12 apolitical. I don't think that any administration in  
13 the past, and I don't have any reason to think it's  
14 been anything other than apolitical this time. I think  
15 there certainly were a lot of concerns that came out  
16 during the last administration in a lot of different  
17 ways that, unfortunately, the whole division was  
18 politicized to a great degree, and that affected some  
19 of the Section 5 decisions.

20 I think there probably were some examples  
21 prior to that administration where there may have been  
22 a submission here or there that was affected by  
23 political. But I think, the overwhelming amount of  
24 time, I think that decisions are based upon trying to  
25 look at the standards the Department has issued, the

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1 law that the Supreme Court and lower courts have  
2 issued, and try to make a good faith effort to apply  
3 that fairly.

4 CHAIRMAN CASTRO: The Chair recognizes Vice  
5 Chair Thernstrom.

6 VICE CHAIR THERNSTROM: On this question of  
7 coalition districts, the District Court of the  
8 District of Columbia, the decision denying summary  
9 judgment in the *Texas* case, the court did say or at  
10 least imply that a coalition of different ethnic or  
11 racial groups counted as an ability to elect district  
12 where it had been repeatedly successful, and this is  
13 really what one of the panelists said, where it had  
14 been repeatedly successful in electing a candidate of  
15 choice. And jurisdictions with such a working  
16 coalition, the various groups that had joined  
17 together, shared common political bodies and  
18 priorities. The court assumed, et cetera, so I'm just  
19 saying that the District Court in denying summary  
20 judgment dealt with the coalition issue by saying yes,  
21 they count where they have counted.

22 MR. POSNER: Yes.

23 CHAIRMAN CASTRO: Any other questions? Any  
24 other questions?

25 (No response.)

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1 CHAIRMAN CASTRO: I'll ask one more time,  
2 any other questions?

3 VICE CHAIR THERNSTROM: We all want to go  
4 home.

5 CHAIRMAN CASTRO: Hearing none, then I  
6 think we've concluded. I want to thank the panelists  
7 again, those of you who were here this afternoon, for  
8 your thoughtful contributions to our inquiry here, and  
9 thank the Commissioners for their questions. And  
10 thank you, public, for being here, and I know some of  
11 you have been here all day.

12 So, the record in this matter will remain  
13 open for 15 days -- 17 days. I stated that earlier  
14 today. Let me make it clear, 17 days until February  
15 20<sup>th</sup>, so if anyone has any comments from the public  
16 they should submit those materials in writing to us in  
17 the mail at the U.S. Commission on Civil Rights,  
18 Office of the General Counsel, at 624 9<sup>th</sup> Street, N.W.,  
19 Washington, D.C. 20425. And, again, that's 17 days,  
20 and February 20<sup>th</sup>. And you can also do it by email, I'm  
21 told, and what's the email address?

22 MS. OSTROWSKY: [Publiccomments@USCCR.gov](mailto:Publiccomments@USCCR.gov).

23 CHAIRMAN CASTRO: [Publiccomments@USCCR.gov](mailto:Publiccomments@USCCR.gov).  
24 It is now exactly 3:00, and this meeting of the U.S.  
25 Commission on Civil Rights is now adjourned. Thank

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1       you.

2                               (Whereupon, the proceedings went off the  
3       record at 3:00 p.m.)

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