

# Redistricting and the 2010 Census:

Enforcing Section 5 of the Voting Rights Act

U.S. Commission on Civil Rights

## **U.S. COMMISSION ON CIVIL RIGHTS**

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957.

It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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### **U.S. Commission on Civil Rights**

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U.S. Commission on Civil Rights

September 2012



## UNITED STATES COMMISSION ON CIVIL RIGHTS

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624 NINTH STREET, NW, WASHINGTON, DC 20425

www.usccr.gov

On behalf of the U. S. Commission on Civil Rights, and pursuant to Public Law 103-419, I am pleased to announce that our 2012 statutory report, *Redistricting and the 2010 Census: Enforcing Section 5 of the Voting Rights Act*, is now available on the Commission's website. The purpose of the report is to examine the U.S. Department of Justice's preclearance procedures for the 2011-2012 redistricting cycle pursuant to Section 5 of the Voting Rights Act.

The Commission gathered data surrounding the Department of Justice's preclearance of new redistricting plans after the 2010 Census and 2006 amendments to the Voting Rights Act. This data included responses from state officials within covered jurisdictions. In addition, the Commission convened a day-long briefing with renowned experts and practitioners who testified on the subject of enforcing Section 5 of the Voting Rights Act and preclearance procedures. The panelists who testified at the briefing were:

- Guy-Uriel E. Charles, Charles S. Rhyne Professor of Law, and Director, Center on Law, Race, & Politics, Duke Law School
- Ronald Keith Gaddie, Professor, Department of Political Science, Oklahoma University
- Justin Levitt, Associate Professor of Law, Loyola Law School, Los Angeles
- Anne W. Lewis, Partner, Strickland Brockington Lewis LLP
- Laughlin McDonald, Director, Voting Rights Project, American Civil Liberties Union
- John J. Park, Jr., Of Counsel, Strickland Brockington Lewis LLP
- Nathaniel Persily, Charles Keller Beekman Professor of Law & Political Science, and Director, Center for Law & Politics, Columbia Law School
- Mark Posner, Senior Counsel, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law

The report offers the results of the extensive research conducted by the Commission and the panelists involved in the briefing. We believe you will find the results both useful and insightful.

The full report is available at: <http://www.usccr.gov/pubs/2012statutory.pdf>.

For the Commissioners,

A handwritten signature in black ink, appearing to read "Martin R. Castro". The signature is fluid and cursive, with a long, sweeping underline.

Martin R. Castro  
Chairman

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## Chapter 1. EXECUTIVE SUMMARY

This Report examines the U.S. Department of Justice Civil Rights Division's (DOJ's) enforcement of Section 5 of the Voting Rights Act (Section 5) in the 2011-2012 redistricting cycle. Section 5 requires certain jurisdictions with a history of discrimination to obtain preclearance from DOJ or the U.S. District Court for the District of Columbia for any proposed changes to their voting practices and procedures, including redistricting plans.

To obtain preclearance, a jurisdiction must show that the proposed voting changes (1) will not have the effect of denying or abridging the right to vote on the basis of race, color, or membership in a language minority group, and (2) do not have a discriminatory purpose.

Historically, both DOJ and the courts have understood a discriminatory "effect" under Section 5 to mean that the proposed change will result in retrogression—a decrease in minorities' ability to elect their preferred candidate. In 2003, however, the U.S. Supreme Court in *Georgia v. Ashcroft* called for a more expansive legal standard. In explaining how this new standard would be implemented, the Court articulated the notion of "coalition" districts in which coalitions of voters would help to elect minorities' preferred candidate. Congress rejected this more expansive legal standard, and it amended Section 5 in 2006 to explicitly state that a discriminatory "effect" means retrogression. However, the House and Senate Committee Reports contradicted each other on whether "coalition" districts are protected under Section 5.

In 2011, the DOJ issued new guidance and preclearance procedures that accounted for the 2006 amendments to Section 5. The new guidance described the "functional analysis" DOJ uses to determine whether a redistricting plan has a discriminatory effect. Rather than looking at census data in isolation, a "functional analysis" also includes consideration of voter history, electoral cohesiveness, and minority political activity.

Although DOJ's guidance did not address the ambiguity with respect to "coalition" districts, in practice, DOJ has taken the position that Section 5 prohibits retrogression of "coalition" districts. DOJ has also taken the position that Section 5 prohibits "proportional regression"—situations

where the total number of seats in an electoral body increases but there is no increase in the number of districts where minorities can elect their candidate of choice.

In determining whether a redistricting plan has a discriminatory purpose, DOJ and courts consider several factors, including but not limited to: the impact on minority groups; historical background; the sequence of events leading up to the redistricting plan; any departure from normal procedures in the decision-making process; and the legislative or administrative history. In 2000, the Supreme Court in *Reno v. Bossier Parish School Board* held that a discriminatory “purpose” is limited to an intent to retrogress. But in 2006, Congress rejected the Court’s ruling and amended Section 5 to define “purpose” as “*any* discriminatory purpose.”

While Section 5 prohibits discrimination based on race, ethnicity, or membership in a language-minority group, gerrymandering based on political party affiliation is both legal and commonplace. Where voters’ membership in a minority group correlates with their political preference, discriminatory purpose is difficult to identify. Despite the potential breadth of the “any discriminatory purpose” standard, DOJ’s objections based on the “purpose” prong have tended to be based on an intent to retrogress.

In 2011, an unprecedented number of redistricting plans were submitted to the Federal District Court for the District of Columbia for preclearance, either in lieu of or simultaneously with a submission to DOJ. As of approval of this report, the vast number of cases filed in Federal District Court have been resolved.

## Chapter 2. INTRODUCTION AND BACKGROUND

Section 5 of the Voting Rights Act (Section 5) requires certain jurisdictions to submit to the U.S. Department of Justice or the U.S. District Court for the District of Columbia (DDC) any proposed changes that they intend to make to their voting practices and procedures, including redistricting plans.<sup>1</sup> Most of the covered jurisdictions, but by no means all, are in the Deep South and had a history of egregious racial discrimination when the Act was passed in 1965. The submitting jurisdiction must demonstrate in its submission that its proposal “neither has the purpose nor will have the effect of denying or abridging the right to vote” on account of race, color, or membership in a language minority group.<sup>2</sup> Most covered jurisdictions elect to submit their proposals to the Justice Department; unless the Department objects to the changes or fails to respond within 60 days, the proposals are deemed “precleared” and may be implemented.<sup>3</sup> In 2006, Congress voted to reauthorize the Voting Rights Act (VRA), including Section 5, in the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARA).<sup>4</sup> In doing so, Congress amended the statute’s ‘effect’ and ‘purpose’ standards in response to two recent Supreme Court decisions, *Georgia v. Ashcroft*<sup>5</sup> and *Reno v. Bossier Parish Sch. Bd. (Bossier Parish II)*,<sup>6</sup> respectively. The U.S. Department of Justice’s Civil Rights Division (DOJ) subsequently released new guidance<sup>7</sup> and preclearance procedures<sup>8</sup> that, in part, accounted for Congress’ amendments. The 2006 amendments—and DOJ’s implementation and enforcement of these amendments—have recently been put to a test as states and localities devise new redistricting plans in light of population data from the 2010 Census.

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<sup>1</sup> Voting Rights Act of 1965, 42 U.S.C. § 1973c(a) (2011)

<sup>2</sup> *Id.* as amended by reference to 42 U.S.C. § 1973b(f)(2) (language minority group). “Language minority group” refers to persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage. *See id.* § 1973l(c)(3); 28 C.F.R. § 51.2.

<sup>3</sup> *Id.* As discussed at pp. 18–27 of this report, the Department of Justice may also make a request for additional information, a process that suspends the 60-day time period allotted for making a determination.

<sup>4</sup> Pub. L. No. 109-246, 120 Stat. 577 (2006). The Commission examined the reauthorization of Section 5 in its February 2006 Briefing Report, *Reauthorization of the Temporary Provisions of the Voting Rights Act: An Examination of the Act’s Section 5 Preclearance Provision*.

<sup>5</sup> 539 U.S. 461 (2003).

<sup>6</sup> 528 U.S. 320 (2000).

<sup>7</sup> Office of the Asst. Atty. Gen., Civil Rights Div., U.S. Dep’t of Justice, Notice, Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470 (Feb. 9, 2011) [hereinafter DOJ Guidance].

<sup>8</sup> Civil Rights Div., U.S. Dep’t of Justice, Final Rule, Revision of Voting Rights Procedures, 76 Fed. Reg. 21,239 (Apr. 15, 2011) [hereinafter DOJ Preclearance Procedures Final Rule].

This report examines the Justice Department's preclearance efforts during the 2011-2012 redistricting cycle, including the Department's preclearance process and its implementation of the 2006 amendments to the VRA. Because this report was drafted and published mid-cycle, it relies primarily on the Justice Department's efforts during 2011 and early 2012. This report serves as the latest installment in the Commission's long tradition of chronicling the history, implementation and enforcement of Section 5.<sup>9</sup>

In its study of the Justice Department's enforcement of Section 5, the Commission:

- Held a briefing on February 3, 2012, where it received testimony from nationally-renowned experts, including legal scholars, representatives from civil rights groups, and private attorneys who serve as outside counsel to covered jurisdictions;
- Submitted extensive discovery requests to DOJ seeking records, answers to interrogatories, and data regarding the preclearance process;
- Submitted requests for information and records to 10 states regarding their experiences in the preclearance process;
- Reviewed all objections issued by DOJ since 2000;
- Conducted legal and documentary research; and
- Tracked DOJ's preclearance proceedings via publicly-available sources, including media reports and DOJ's website.

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<sup>9</sup> See, e.g., U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT & REAUTHORIZATION: THE DEPARTMENT OF JUSTICE'S RECORD OF ENFORCING THE TEMPORARY VOTING RIGHTS ACT PROVISIONS (May 2006); U.S. COMM'N ON CIVIL RIGHTS, REAUTHORIZATION OF THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT: AN EXAMINATION OF THE ACT'S SECTION 5 PRECLEARANCE PROVISION: BRIEFING REPORT (Feb. 2006); U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS ACT: UNFULFILLED GOALS (Sept. 1981); U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS ACT: TEN YEARS AFTER (Jan. 1975); U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION (1968); U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS ACT: THE FIRST MONTHS (1965).

Redistricting and the 2010 Census Every 10 years, the United States conducts a national census to collect data regarding the nation’s population.<sup>10</sup> Because populations invariably shift from decade to decade, state and local governments subsequently use that data to redraw electoral district lines (for Congressional districts, state legislative districts, city or county commission districts, etc.) so as to maintain districts that are approximately equal in population size. This process is generally known as redistricting. In addition, because the Constitution requires the apportionment of Congressional seats based on state population, census data is used every 10 years to increase or decrease states’ Congressional delegations based on population shifts.<sup>11</sup>

Between 2000 and 2010, the nation’s overall resident population grew by 9.7 percent, from 281,421,906 to 308,745,538, respectively.<sup>12</sup> State populations generally grew at a faster rate in the South than in the Midwest and Northeast.<sup>13</sup> The most extensive growth occurred in Texas and Florida. Much of the increase was a result of increases in minorities—particularly in the Hispanic population.<sup>14</sup>

As states and localities engage in redistricting, their work is affected by both state and federally imposed requirements. First, each state and/or locality adopts its own criteria for use in the redistricting process; for example, it may emphasize the protection of incumbents, compactness of districts, or the consolidation of communities of interest. Second, states and localities must draw districts that are approximately equal in size—known as the constitutional “one person, one vote” standard.<sup>15</sup> Third, federal constitutional law generally prohibits states and localities from using race as the “predominant factor” while redistricting.<sup>16</sup> Fourth, Section 2 of the Voting Rights Act prohibits states and localities from engaging in practices such as vote dilution that would deny or abridge voting rights based on race, color, or membership in a language minority group.<sup>17</sup> Finally, some states and localities must comply with Section 5 of the Voting Rights Act’s preclearance requirement.

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<sup>10</sup> See U.S. CONST. art. I, § 2.

<sup>11</sup> See *id.*

<sup>12</sup> See Appendix at p. 167.

<sup>13</sup> However, the population of Louisiana decreased as a share of the nation’s total population.

<sup>14</sup> See Appendix; see also, e.g., Carol Morello & Dan Keating, *Census Offers New Proof that Hispanic, Asian Growth Skyrocketed in Past Decade*, WASH. POST (Mar. 24, 2011), [http://www.washingtonpost.com/local/new-census-portrait-hispanics-and-asians-skyrocketed-over-past-decade/2011/03/23/ABpKDQOB\\_story.html](http://www.washingtonpost.com/local/new-census-portrait-hispanics-and-asians-skyrocketed-over-past-decade/2011/03/23/ABpKDQOB_story.html).

<sup>15</sup> See generally *Wesberry v. Sanders*, 376 U.S. 1 (1964) (holding that apportionment of congressional districts so that single congressman represented two to three times as many voters as were represented by each of congressmen from other districts violated Art. I, s 2, of the U.S. Constitution); *Reynolds v. Sims*, 377 U.S. 533 (1964) (finding that

Section 5 requires certain jurisdictions to submit proposed voting changes—including redistricting plans—for federal review, known as preclearance. The jurisdictions must seek preclearance via a judicial proceeding in the U.S. District Court for the District of Columbia or through an administrative process at the Department of Justice.

The VRA only imposes the preclearance requirement on certain jurisdictions, referred to as covered jurisdictions, that have been identified by a statutory formula: the jurisdiction maintained a “test or device” as a prerequisite for voting on November 1, 1964, November 1, 1968, or November 1, 1972, and less than half of the jurisdiction’s voting-age population was registered to vote or voted in the 1964, 1968, or 1972 presidential elections.<sup>18</sup> Most of the jurisdictions covered by the statute are located in the Deep South. Currently, nine states are fully covered by Section 5; five states contain scattered counties that are covered, though the states are not fully covered; and two states contain covered townships, though the states are otherwise not covered (see table 1). States that are not fully covered, but contain covered counties or townships, must submit statewide redistricting maps for preclearance.

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legislatively proposed plans for apportionment of seats in Alabama Legislature invalid under the Equal Protection Clause because apportionment was not based on population and was lacking rationality); *Avery v. Midland County, Tex.*, 390 U.S. 474 (1968) (applying “one person, one vote” principle to voting district for local elections).

See generally Aaron Blake, Congressional Redistricting: State by State, WASH. POST (Jan. 26, 2011), <http://www.washingtonpost.com/wp-srv/special/politics/redistricting-scorecard> (addressing redistricting plans in all 50 states and likely impact on the 2012 elections).

<sup>16</sup> See *Bush v. Vera*, 517 U.S. 952, 958–59, 962–64 (1996) (plurality opinion); *Shaw v. Reno*, 509 U.S. 630 (1993).

<sup>17</sup> See 42 U.S.C. § 1973b(a)(1)(B).

<sup>18</sup> See *id.* § 1973b(b).

Table 1

**Covered Jurisdictions**

Fully Covered States	Alabama
	Alaska
	Arizona
	Georgia
	Louisiana
	Mississippi
	South Carolina
	Texas
	Virginia
States that include covered counties	California
	Florida
	New York
	North Carolina
	South Dakota
States that include covered townships	Michigan
	New Hampshire

Source: 28 C.F.R. §51, Appendix

To obtain preclearance, each jurisdiction must show that its proposed voting changes will have neither the purpose nor the effect of denying or abridging the right to vote on the basis of race, color, or membership in a language minority group.<sup>19</sup> The burden of proof rests with the covered jurisdictions.<sup>20</sup> States and localities cannot implement their proposed voting changes until they receive federal preclearance.<sup>21</sup>

<sup>19</sup> See *id.* For further discussion of the ‘effect’ and ‘purpose’ standard, see *infra* Chapter 4.

<sup>20</sup> See *id.*; 28 C.F.R. § 51.52.

<sup>21</sup> See *id.*; 28 C.F.R. § 51.10.

Although covered jurisdictions have the option of seeking either judicial or administrative preclearance, until recently they seldom sought preclearance in federal district court.<sup>22</sup> Instead, the overwhelming majority of jurisdictions have sought administrative preclearance of their voting changes both in 2011 and throughout the history of the Voting Rights Act.

The DOJ Civil Rights Division's Voting Section handles the Department's preclearance work.<sup>23</sup> The DOJ has 60 days from receipt of a submission to determine whether the jurisdiction showed that its proposal has neither a discriminatory purpose nor effect.<sup>24</sup> The DOJ makes its determination based on information submitted by the covered jurisdiction, information provided by interested third-party individuals or groups and the results of a DOJ-conducted investigation.<sup>25</sup> If the Department determines that the jurisdiction did not meet its burden under Section 5, it interposes an objection; the objection consists of a letter to the jurisdiction's representative, signed by the Assistant Attorney General for Civil Rights, which informs the jurisdiction of DOJ's decision and describes its reasoning.<sup>26</sup> If the Department preclears the submission, it sends a letter to the jurisdiction's representative stating that DOJ declines to interpose an objection.<sup>27</sup>

The DOJ has produced two guidance documents to assist covered jurisdictions with Section 5 compliance. On February 9, 2011, the Department released its Guidance Concerning Redistricting under Section 5 of the Voting Rights Act, which, though not legally binding, provides an overview of the legal standards that DOJ uses to enforce Section 5.<sup>28</sup> In addition, on April 15, 2011, DOJ revised its regulations regarding its administrative-preclearance

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<sup>22</sup> For further discussion of judicial preclearance and the recent increase in jurisdictions' pursuit of that option, see *infra* Chapter 5.

<sup>23</sup> As of May 11, 2011, the Voting Section staffed 41 career employees—8 attorneys, 24 professional staff, and 9 clerical staff—on administrative review of preclearance submissions. Letter from Thomas E. Perez, Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Kimberly A. Tolhurst, Acting Gen. Counsel, U.S. Comm'n on Civil Rights, at 5 (Feb. 17, 2012) [hereinafter DOJ Interrogatory Response]. The Voting Section also staffed 45 career employees—33 attorneys, 7 professional staff, and 5 clerical staff—on litigation matters. *Id.*

<sup>24</sup> See 42 U.S.C. § 1973c; 28 C.F.R. § 51.9. A submission will be deemed precleared if DOJ fails to complete its analysis within 60 days. See *id.* § 51.42.

<sup>25</sup> See 28 C.F.R. § 51.53.

<sup>26</sup> See *id.* § 51.44.

<sup>27</sup> See *id.* § 51.41.

<sup>28</sup> DOJ Guidance, *supra* note 7. The DOJ's 2011 guidance updated its prior guidance issued in 2001. See Office of the Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, Notice, Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, 66 Fed. Reg. 5412 (Jan. 18, 2001).

procedures.<sup>29</sup> The procedure revisions were subject to a notice-and-comment rulemaking procedure.<sup>30</sup>

By the end of 2011, DOJ had received 1,007 redistricting submissions for administrative preclearance.<sup>31</sup> It interposed objections to two of those submissions.<sup>32</sup> The DOJ also participated in 13 lawsuits at the U.S. District Court for the District of Columbia where covered jurisdictions elected to seek judicial preclearance in addition to, or in lieu of, administrative preclearance.<sup>33</sup> In the litigation initiated by Texas, DOJ took the position that two of Texas's statewide redistricting plans did not comply with Section 5.<sup>34</sup>

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<sup>29</sup> See 28 C.F.R. § 51.1 *et seq.* The Department's preclearance procedures were last amended in 1987. See Office of the Atty. Gen., Dep't of Justice, Final Rule, Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486 (Jan. 6, 1987).

<sup>30</sup> See DOJ Preclearance Procedures Final Rule, *supra* note 8; Notice of Proposed Rulemaking, Revision of the Procedures for the Administration of Section 5 of the Voting Rights Act, Civ. Rights Div., U.S. Dep't of Justice, 75 Fed. Reg. 33,205 (June 11, 2010).

<sup>31</sup> DOJ Interrogatory Response, *supra* note 23, at 10–11.

<sup>32</sup> *Id.* at 7–8.

<sup>33</sup> *Id.* at 10–11.

<sup>34</sup> See U.S. Post-Trial Brief, *Texas v. United States*, No. 11-cv-1303 (D.D.C. filed Feb. 6, 2012) [hereinafter DOJ Post-Trial Brief]; U.S. Mem. Opp. Summary Judgment, *Texas v. United States*, No. 11-cv-1303 (D.D.C. filed Oct. 25, 2011) [hereinafter DOJ Summary Judgment Brief].



## Chapter 3. TRENDS IN DOJ'S 2011-2012 REDISTRICTING CYCLE

### Statistical Trends

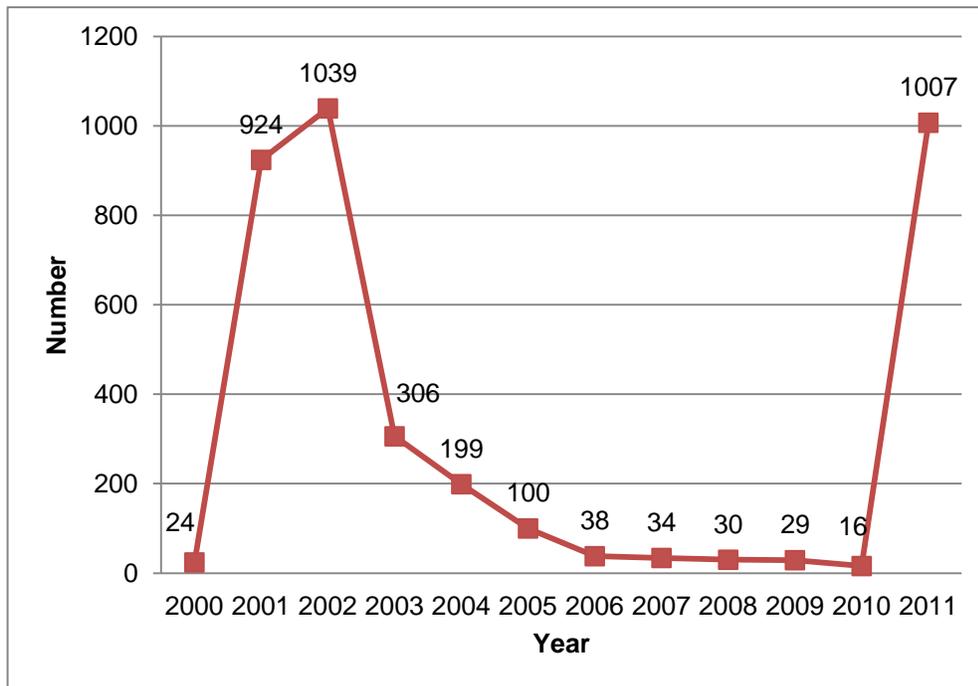
#### Submission and Objection Rates

As shown in Figure 1, DOJ received 1,007 submissions that included a redistricting plan in 2011. Figure 1 also highlights the fact that DOJ received an enormous number of redistricting plans in 2001 and 2002 following the previous census, 924 and 1,039 respectively.

Typically, DOJ receives most of its redistricting submissions in the first two years following a decennial census. This trend is evident in Figure 1 which shows that, after the peak in 2001 and 2002, the number of submissions dropped to about 300 in 2003 and decreased further thereafter to fewer than 40 per year in 2006 to 2010.

Figure 1

**Redistricting Submissions DOJ Received By Year, 2000 to 2011**

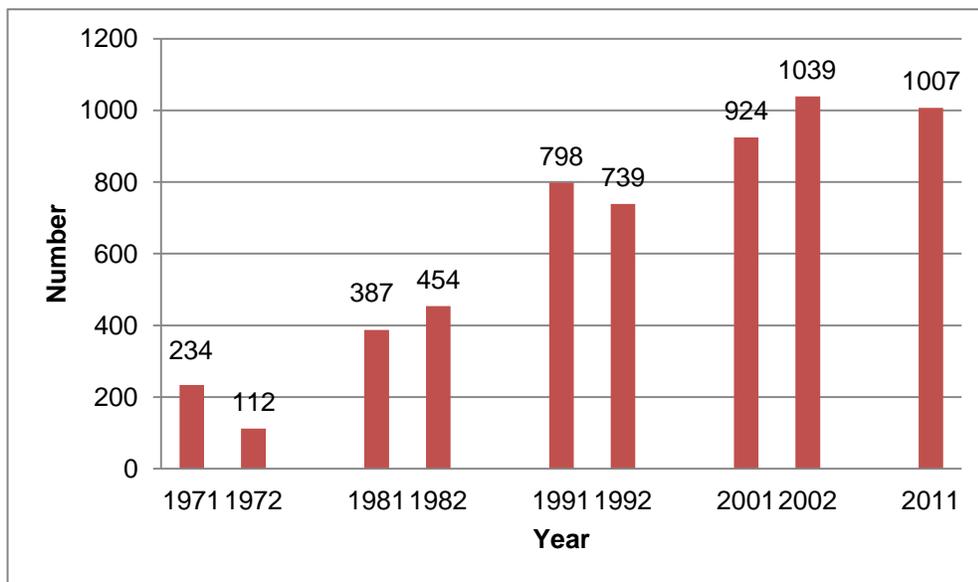


Source: Letter from Thomas E. Perez, Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Kimberly A. Tolhurst, Acting Gen. Counsel, U.S. Comm'n on Civil Rights, at 10–11, Feb. 17, 2012 (DOJ Interrogatory Response); U.S. Dep't of Justice, Civil Rights Div., Voting Section, "Number of Changes by Change Type Aug. 6, 1965 to June 30, 2004," Response to U.S. Comm'n on Civil Rights Document Request, Aug. 13, 2004.

Figure 2 shows the number of submissions DOJ received in the two years following each census since the preclearance requirement was first legislated. The chart reveals marked increases in the number of redistricting submissions DOJ received with each passing decade. The Voting Section received 234 and 112 redistricting submissions in 1971 and 1972, 387 and 454 in 1981 and 1982, 798 and 739 in 1991 and 1992, and 924 and 1,039 in 2001 and 2002. This historical trend suggests that, although DOJ's 2012 submission data was not available at the time of this report's publication, the Department may be on track to receive the most redistricting submissions since the passage of the Voting Rights Act.

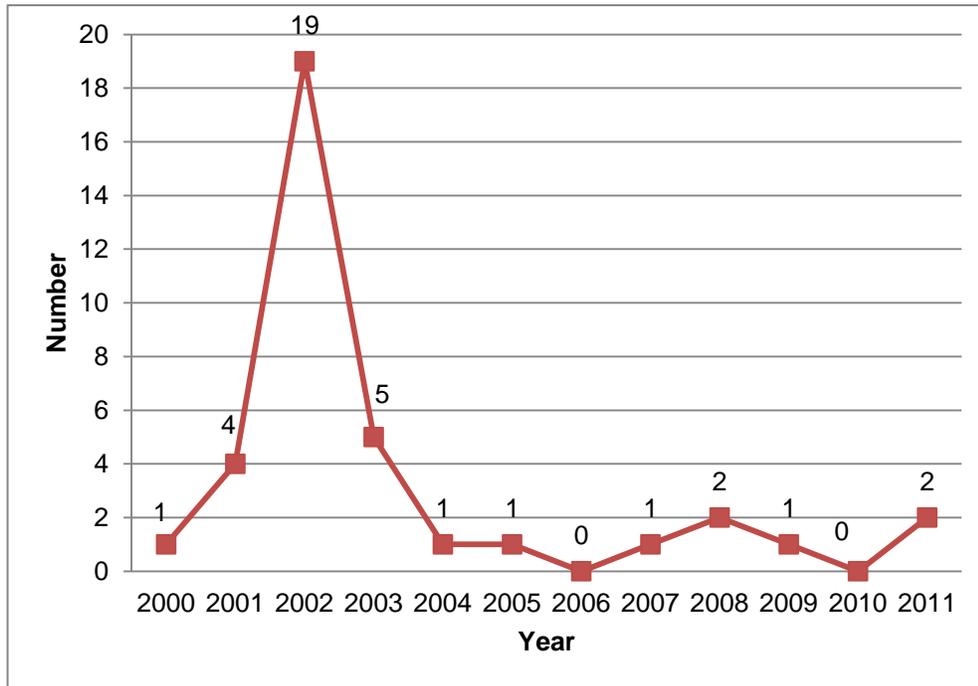
*Figure 2*

**Redistricting Submissions DOJ Received in the Immediate Post-Census Years for the Decades 1970 to 2010**



Source: Letter from Thomas E. Perez, Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Kimberly A. Tolhurst, Acting Gen. Counsel, U.S. Comm'n on Civil Rights, at 10–11, Feb. 17, 2012 (DOJ Interrogatory Response); U.S. Dep't of Justice, Civil Rights Div., Voting Section, "Number of Changes by Change Type Aug. 6, 1965 to June 30, 2004," Response to U.S. Comm'n on Civil Rights Document Request, Aug. 13, 2004.

Figure 3

**DOJ's Redistricting Objections By Year, 2000 to 2011**

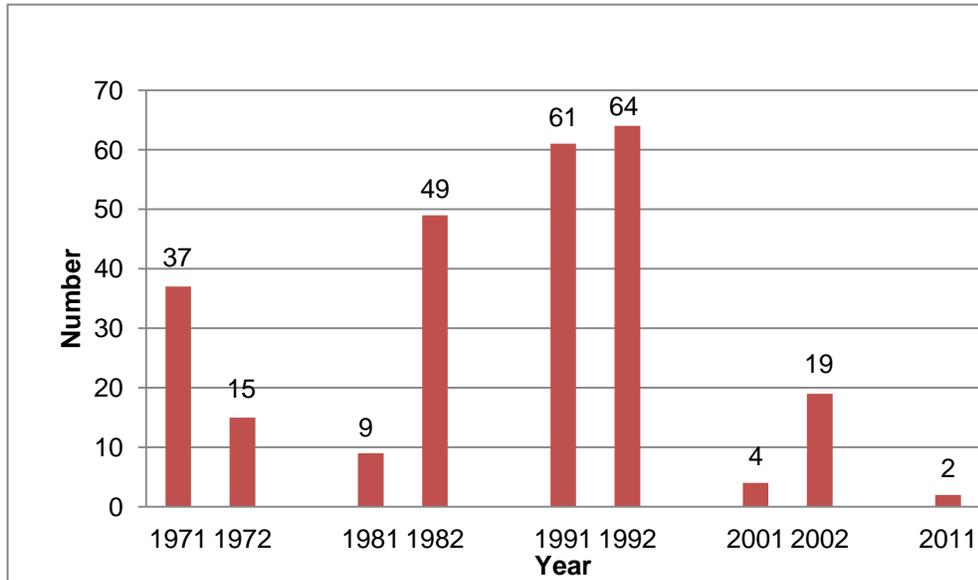
Source: Compiled by U.S. Comm'n on Civil Rights from U.S. Dep't of Justice, Section 5 Objection Determinations, [http://www.justice.gov/crt/about/vot/sec\\_5/obj\\_activ.php](http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php) (last visited Mar. 8, 2012).

The DOJ's Voting Section issues relatively few objections to submitted redistricting plans. As Figure 3 indicates, DOJ interposed four objections in 2001, 19 in 2002, and five in 2003. In the remaining years, starting in 2000 and including 2011, DOJ's objections numbered zero to two per year. In contrast, DOJ had many more objections in earlier decades.

Figure 4 shows the Voting Section's objections to redistricting plans in the first two post-census years of earlier decades. In 1971 and 1972, DOJ objected to 37 and 15 submissions, respectively; in 1981 and 1982, it interposed objections to nine and 49 submissions, respectively; and in 1991 and 1992, it objected to 61 and 64 submissions, respectively.

Figure 4

### DOJ's Objections to Redistricting Plans in the Immediate Post-Census Years for the Decades 1970 to 2010



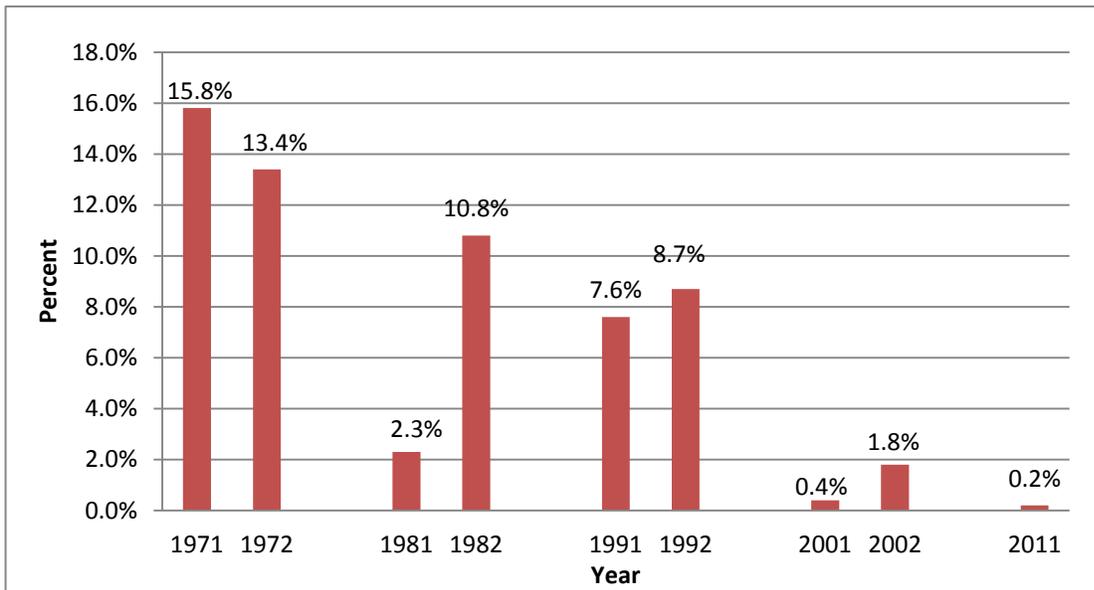
Source: Compiled by U.S. Comm'n on Civil Rights from U.S. Dep't of Justice, Civil Rights Div., Voting Section, "Objections by Change Type Aug. 6, 1965 to June 30, 2004," Response to U.S. Comm'n on Civil Rights Document Request, Aug. 13, 2004; U.S. Dep't of Justice, Section 5 Objection Determinations, [http://www.justice.gov/crt/about/vot/sec\\_5/obj\\_activ.php](http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php) (last visited Mar. 8, 2012).

Figure 5 shows the number of plans that triggered DOJ objections as a percentage of all redistricting submissions. In 1971 and 1972, DOJ interposed objections in 15.8 and 13.4 percent of redistricting submissions, respectively. In 1981 and 1982, DOJ interposed objections in 2.3 and 10.8 percent of redistricting submissions. In 1991 and 1992, DOJ interposed objections in 7.6 and 8.7 percent of redistricting submissions, respectively. Since then, DOJ's rate of objections has diminished to 0.4 and 1.8 percent in 2001 and 2002, respectively, and 0.2 percent in 2011.

Without data from 2012, one cannot determine whether the number or rate of DOJ's objections has increased, decreased, or remained constant since the 2001-2002 redistricting cycle. However, the relatively constant rate of objections between 2001 (0.4 percent) and 2011 (0.2 percent) indicates that the overall objection rate for the 2011-2012 redistricting cycle may remain constant, if not decrease, when compared to 2000. Regardless, the low number and rate of redistricting objections in 2011 indicate a major decrease in the past decade when compared to the 1990s (see Figures 4 and 5).

Figure 5

**Percent of Redistricting Submissions to Which DOJ Objected in the Immediate Post-Census Years for the Decades 1970 to 2010**



Source: Compiled by U.S. Comm'n on Civil Rights from Letter from Thomas E. Perez, Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Kimberly A. Tolhurst, Acting Gen. Counsel, U.S. Comm'n on Civil Rights, at 10–11, Feb. 17, 2012 (DOJ Interrogatory Response); U.S. Dep't of Justice, Civil Rights Div., Voting Section, "Number of Changes by Change Type Aug. 6, 1965 to June 30, 2004," Response to U.S. Comm'n on Civil Rights Document Request, Aug. 13, 2004; U.S. Dep't of Justice, Civil Rights Div., Voting Section, "Objections by Change Type Aug. 6, 1965 to June 30, 2004," Response to U.S. Comm'n on Civil Rights Document Request, Aug. 13, 2004; U.S. Dep't of Justice, Section 5 Objection Determinations, [http://www.justice.gov/crt/about/vot/sec\\_5/obj\\_activ.php](http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php) (last visited Mar. 8, 2012).

In this study, the Commission sought data from DOJ on how quickly the Voting Section processes redistricting-plan submissions. Such data might show whether DOJ's preclearance process and issuance of objections have quickened or slowed over time, and the effects of administrative tools that DOJ uses to increase<sup>35</sup> or decrease<sup>36</sup> its deadline for processing a given request. The Department, however, was unable to provide such data for analysis because it does not track aggregate data regarding how quickly it processes preclearance submissions.<sup>37</sup>

### Expedited Consideration

Legislation and DOJ regulations allow covered jurisdictions to request expedited consideration of their submissions. A covered jurisdiction may seek expedited consideration when it is "required under State law or local ordinance or [the State] otherwise finds it necessary to implement a change within the 60-day period following submission."<sup>38</sup> The DOJ "will attempt to make a decision by the date requested" when the jurisdiction "demonstrates good cause" for expedition.<sup>39</sup>

Although DOJ's regulations do not elaborate on how the Department defines "good cause," DOJ explained to the Commission that it "makes every effort to accommodate requests for expedited consideration ... particularly where litigation is involved and/or the exigency is outside the control of the jurisdiction."<sup>40</sup> The DOJ warned, however, that "[g]iven the number of requests for expedited consideration, it is not always possible to accommodate all such requests, especially if the information provided in a submission is incomplete or there are concerns about whether the submission meets the Section 5 standard."<sup>41</sup>

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<sup>35</sup> For a discussion of data regarding DOJ's expedited-consideration process, see *infra* pp.16–25.

<sup>36</sup> For a discussion of data regarding DOJ's time-period-recalculation process, see *infra* pp.25–27.

<sup>37</sup> See DOJ Interrogatory Response, *supra* note 23, at 12, 14–16, 18.

<sup>38</sup> 28 C.F.R. § 51.34(a); see also 42 U.S.C. § 1973c(a).

<sup>39</sup> 28 C.F.R. § 51.34(b); see also 42 U.S.C. § 1973c(a).

<sup>40</sup> DOJ Interrogatory Response, *supra* note 23, at 6.

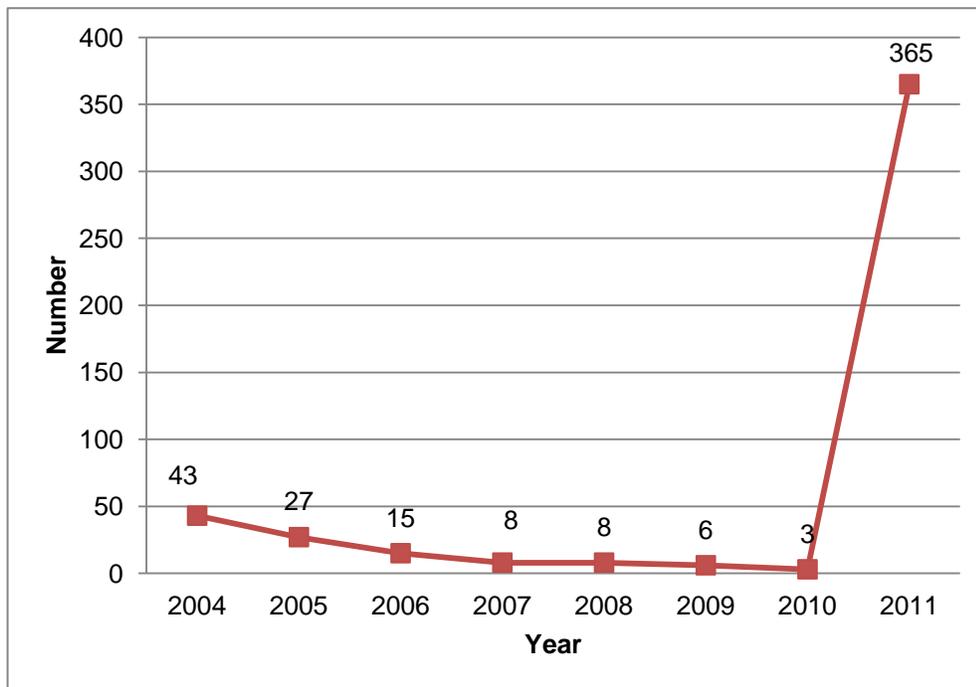
<sup>41</sup> *Id.*

As shown in Figure 6, 365 jurisdictions requested expedited consideration of their redistricting plans in 2011. Although this was a marked increase compared to the years 2004 through 2010 when submitters sought expedited processing at a rate of three to 43 requests per year, the spike in 2011 was likely because 2011 was the only year in this timeframe that immediately followed a new decennial census.

Figure 7 shows that 36.2 percent of DOJ's redistricting submissions sought expedited consideration in 2011. Between 2004 and 2010, the proportion of submitters seeking expedited consideration ranged from a high of 39.5 percent in 2006 to a low of 18.8 percent in 2010. Thus, in 2011, jurisdictions requested expedition at a higher rate than in the previous four years.<sup>42</sup>

Figure 6

**Redistricting Submissions Seeking Expedited Consideration By Year, 2004 to 2011**



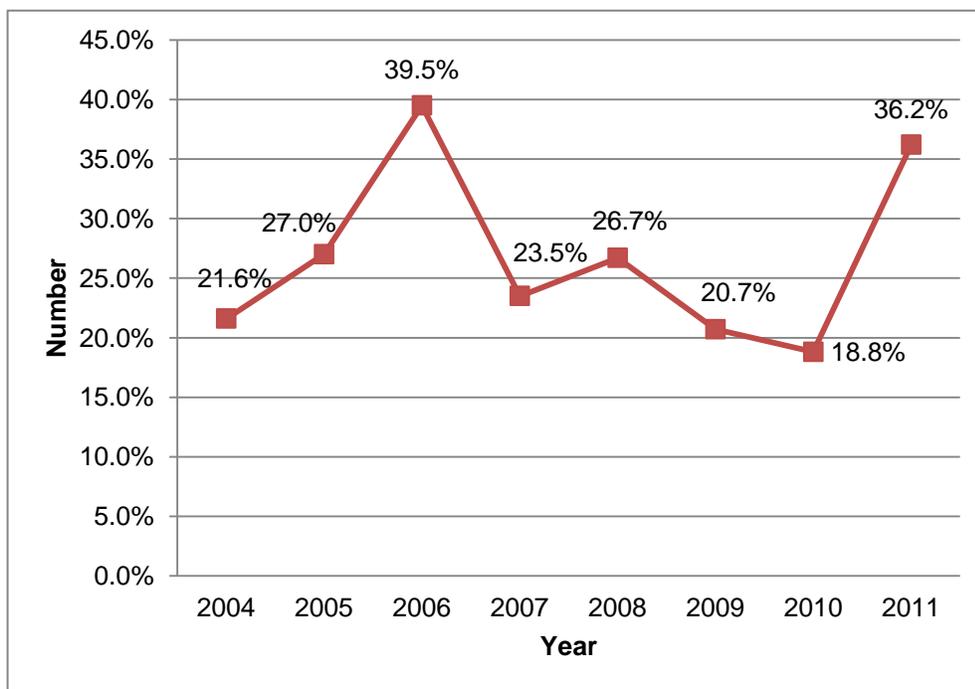
Source: Letter from Thomas E. Perez, Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Kimberly A. Tolhurst, Acting Gen. Counsel, U.S. Comm'n on Civil Rights, at 13, Feb. 17, 2012 (DOJ Interrogatory Response).

<sup>42</sup> 2004 was the first year for which DOJ provided the Commission with data on requests for expedited consideration.

It is not possible to evaluate the effects of DOJ's expedited-consideration process without additional information. Although DOJ tracks the number of requests for expedited consideration that it receives, it does not monitor how often it grants those requests.<sup>43</sup> Nor does DOJ keep aggregated data on how long it takes to process submissions that include requests for expedited consideration.<sup>44</sup> For these reasons, it is not possible to quantify how often DOJ grants requests for expedited consideration or the speed at which DOJ processes such submissions.

Figure 7

**Percent of Redistricting Submissions With Jurisdictions Seeking Expedited Consideration By Year, 2004 to 2011**



Source: Compiled by U.S. Comm'n on Civil Rights from Letter from Thomas E. Perez, Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Kimberly A. Tolhurst, Acting Gen. Counsel, U.S. Comm'n on Civil Rights, at 10–11, 13, Feb. 17, 2012 (DOJ Interrogatory Response).

<sup>43</sup> See *id.* at 13.

<sup>44</sup> See *id.* at 14. The DOJ informed the Commission that “[i]n particular exigent circumstances, the Department has granted preclearance in less than 24 hours to submissions where requested.” *Id.* at 6. Although laudable, the Department did not provide the Commission with sufficient information to assess whether such instances are indicative of its overall program.

### Requests for Additional Information

As DOJ processes administrative preclearance submissions, it often requests additional information from the submitting jurisdictions. According to DOJ's regulations, it may seek additional information either orally or in writing.<sup>45</sup> In either case, DOJ officials may request information "necessary for the evaluation of the submission" when they believe that the jurisdiction's initial submission is incomplete.<sup>46</sup> When the agency makes a written request, it may suspend the 60-day time period that it has to make an administrative determination, and it may begin a new 60-day time period upon the receipt of the additional information from the jurisdiction.<sup>47</sup> The DOJ also makes its written requests public.<sup>48</sup> Conversely, oral requests are less formal: they do not suspend the 60-day time period and do not require public notice.<sup>49</sup>

In 2011, DOJ issued written requests for additional information regarding 32 redistricting submissions (see Figure 8). These requests were relatively rare, constituting just 3.2 percent of all redistricting submissions (see Figure 9). Figure 8 reveals that for many years the Voting Section issued fewer than 6 written requests for additional information. However, following the 2000 census, the Voting Section issued 31 and 101 formal requests in 2001 and 2002, respectively.

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<sup>45</sup> Prior to 2011, DOJ's regulations did not reference oral requests for additional information, however, the DOJ amended its regulations in 2011 to account for the longstanding practice. See DOJ Preclearance Procedures Final Rule, *supra* note 8, at 21,241.

<sup>46</sup> 28 C.F.R. §§ 51.37(a)(1), (b)(1); see also DOJ Interrogatory Response, *supra* note 23, at 7 ("In general, during the administrative preclearance process, the Department seeks to obtain from covered jurisdictions the information needed to complete the submission and to establish whether the jurisdiction can meet its burden of proof under Section 5.").

<sup>47</sup> 28 C.F.R. § 51.37(b)(3). For additional discussion, please see *infra* pp.25–27.

<sup>48</sup> *Id.* § 51.37(b)(6).

<sup>49</sup> See *id.* § 51.37(a). The DOJ does provide notice if information submitted in response to an oral request results in the DOJ starting a new 60-day time period for processing the submission. See *id.* § 51.37(a)(3)–(4).

Figure 9 also shows DOJ's requests for additional information as a percentage of all redistricting submissions each year since 2000. It does not establish a conclusive trend or consistent year-to-year rate—perhaps because of the scarcity of both redistricting submissions and written requests in most years.<sup>50</sup>

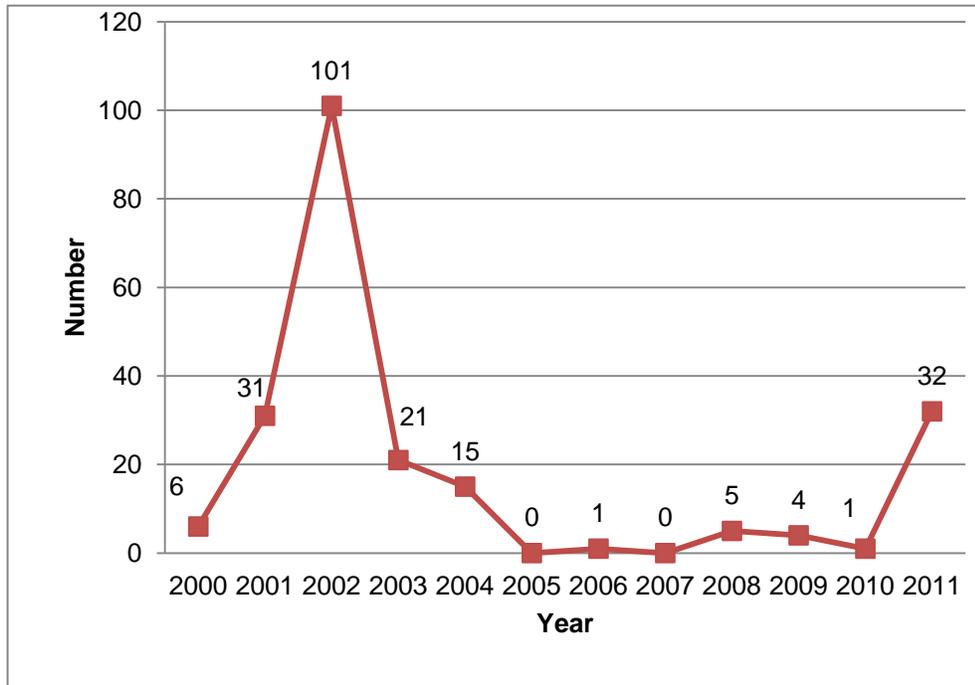
Figures 10 and 11 show the percentage that DOJ's written requests comprise of all redistricting submissions for the post-census years of 1991 and 1992. They reveal that DOJ requested additional information in 18.2 and 13.5 percent of submissions in those years (from Figure 11), comprising 145 of 798 and 100 of 739 plans, respectively (from Figures 10 and 2). In short, the Voting Rights Section's rate of written requests for additional information in 2011 appears to be on par with its 2001 effort in the same period following the 2000 census. But both years represented a major decrease in the rate of requests compared with the 1991-1992 redistricting cycle.

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<sup>50</sup> Notably, DOJ formally requested additional information in the highest proportions of plans in years with few submissions (e.g., 25.0 percent requests in 2000, 16.7 percent in 2008, and 13.8 percent in 2009 from 24, 30, and 29 plans, the latter as shown in figure 1). In years in which DOJ received more than 100 submissions, it asked for additional information in less than 10 percent of the submissions, notably only 3.4 and 3.2 percent in 2001 and 2011 (with 924 and 1,007 plans respectively).

Figure 8

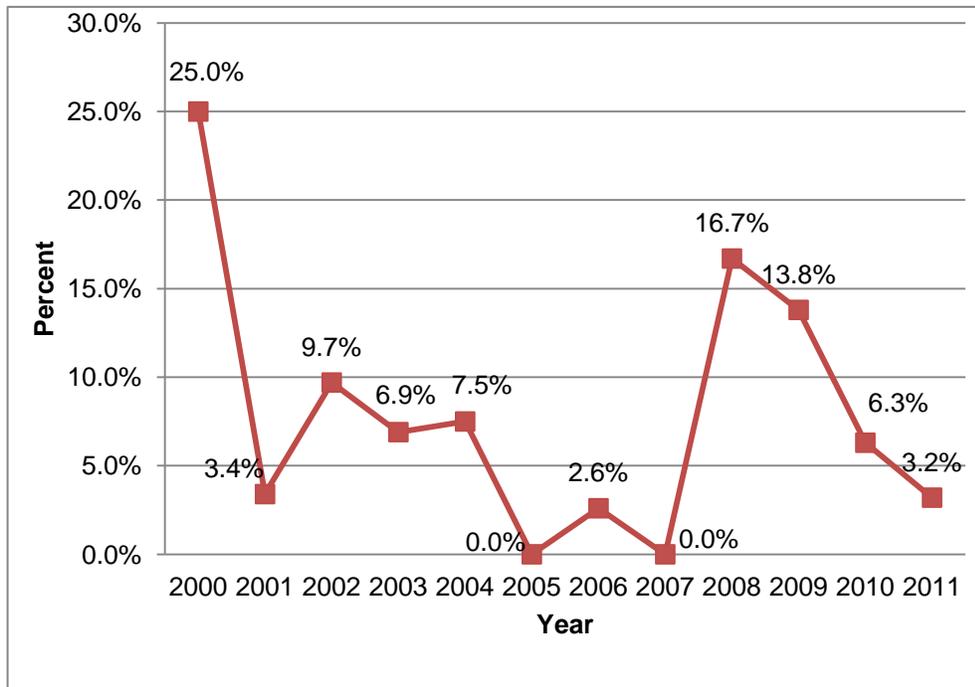
**DOJ's Written Requests for Additional Information Regarding Redistricting Submissions  
By Year, 2000 to 2011**



Source: Letter from Thomas E. Perez, Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Kimberly A. Tolhurst, Acting Gen. Counsel, U.S. Comm'n on Civil Rights, at 15, Feb. 17, 2012 (DOJ Interrogatory Response); U.S. Dep't of Justice, Civil Rights Div., Voting Section, "Requests for Additional Information [Changes] July 1, 1982 to June 30, 2004," Response to U.S. Comm'n on Civil Rights Document Request (Aug. 13, 2004).

Figure 9

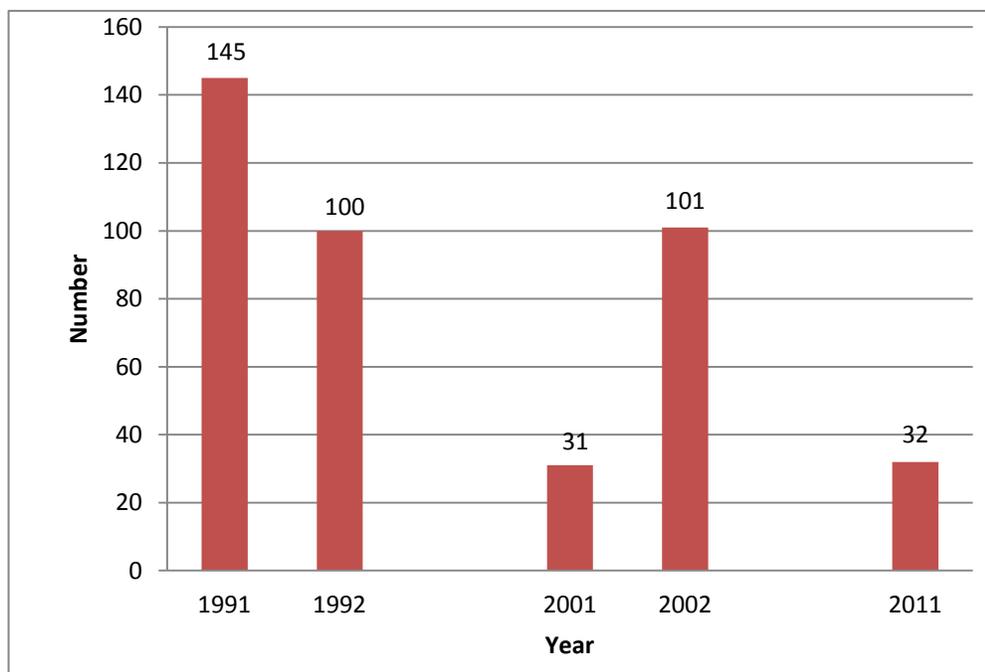
**Percent of Redistricting Submissions with DOJ Written Requests for Additional Information By Year, 2000 to 2011**



Source: Compiled by U.S. Comm'n on Civil Rights from Letter from Thomas E. Perez, Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Kimberly A. Tolhurst, Acting Gen. Counsel, U.S. Comm'n on Civil Rights, at 10–11, 15, Feb. 17, 2012 (DOJ Interrogatory Response); U.S. Dep't of Justice, Civil Rights Div., Voting Section, "Requests for Additional Information [Changes] July 1, 1982 to June 30, 2004," Response to U.S. Comm'n on Civil Rights Document Request, Aug. 13, 2004; U.S. Dep't of Justice, Civil Rights Div., Voting Section, "Number of Changes by Change Type Aug. 6, 1965 to June 30, 2004," Response to U.S. Comm'n on Civil Rights Document Request ( Aug. 13, 2004).

Figure 10

**DOJ's Written Requests for Additional Information Regarding Redistricting Submissions in the Immediate Post-Census Years for the Decades 1990 to 2010**



Source: Letter from Thomas E. Perez, Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Kimberly A. Tolhurst, Acting Gen. Counsel, U.S. Comm'n on Civil Rights at 15, Feb. 17, 2012 (DOJ Interrogatory Response); U.S. Dep't of Justice, Civil Rights Div., Voting Section, "Requests for Additional Information [Changes] July 1, 1982 to June 30, 2004," Response to U.S. Comm'n on Civil Rights Document Request ( Aug. 13, 2004).

Because the Justice Department does not track data regarding its oral requests for additional information, one cannot determine the extent to which DOJ uses this tool. Anecdotal evidence, however, points to extensive use of oral requests. For instance, during the course of the 2011 preclearance of Georgia's three statewide redistricting plans, the state received oral requests on nine separate dates, seeking a total of 47 items.<sup>51</sup> Alabama<sup>52</sup> and Louisiana<sup>53</sup> also reported to the Commission that they received oral requests during this cycle.

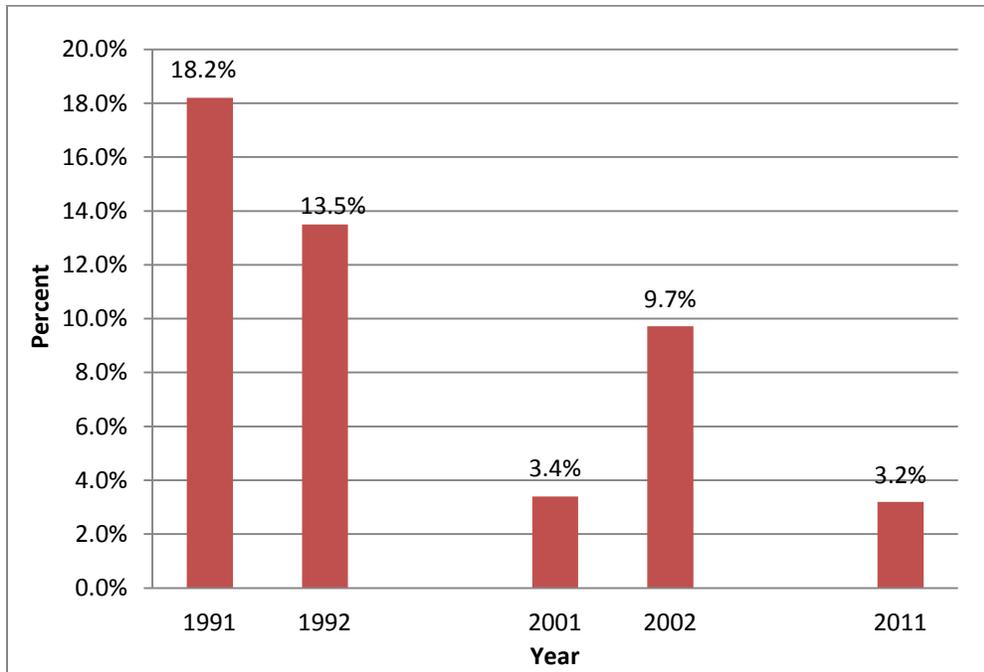
<sup>51</sup> See Georgia Response to U.S. Comm'n on Civil Rights Information Request at 14–18 (Jan. 13, 2012) [hereinafter Georgia Discovery Response]. The DOJ issued no written requests to Georgia in the 2011 redistricting cycle.

<sup>52</sup> See Alabama Response to U.S. Comm'n on Civil Rights Information Request at 3 [hereinafter Alabama Discovery Response].

<sup>53</sup> See Louisiana Response to U.S. Comm'n on Civil Rights Information Request at 2 [hereinafter Louisiana Discovery Response].

Figure 11

**Percent of Redistricting Submissions with DOJ Written Requests for Additional Information in the Immediate Post-Census Years for the Decades 1990 to 2010**



Source: Compiled by U.S. Comm'n on Civil Rights from Letter from Thomas E. Perez, Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Kimberly A. Tolhurst, Acting Gen. Counsel, U.S. Comm'n on Civil Rights at 10-11, 15 (Feb. 17, 2012) (DOJ Interrogatory Response); U.S. Dep't of Justice, Civil Rights Div., Voting Section, "Requests for Additional Information [Changes] July 1, 1982 to June 30, 2004," Response to U.S. Comm'n on Civil Rights Document Request (Aug. 13, 2004); U.S. Dep't of Justice, Civil Rights Div., Voting Section, "Number of Changes by Change Type Aug. 6, 1965 to June 30, 2004," Response to U.S. Comm'n on Civil Rights Document Request (Aug. 13, 2004).

### Recalculation of the 60-Day Period

The overwhelming majority of DOJ's administrative preclearance determinations take place within 60 days of DOJ's receipt of the submission.<sup>54</sup> Nevertheless, DOJ may begin a second 60-day period if it receives new information that "materially supplements" a pending submission, or if it receives a subsequent related submission that "cannot be independently considered."<sup>55</sup> In practice, DOJ can receive such supplemental information based on the jurisdiction's own initiative or in response to DOJ's oral or written requests for additional information.<sup>56</sup>

The Department rarely decides to recalculate the 60-day period for determining administrative preclearance of redistricting plans. The DOJ only did so in four instances in 2011, which constituted 0.4 percent of its total redistricting submissions. (See Figures 12 and 13) Between 2004 and 2010, DOJ recalculated the deadline for analyzing redistricting plans for zero to twelve submissions per year. Except for 2008 (with 0 extensions), the percentages of plans with recalculated periods ranged between 3.4 percent and 11.8 percent for these years—proportions much higher than the (albeit still low) 2011 rate.

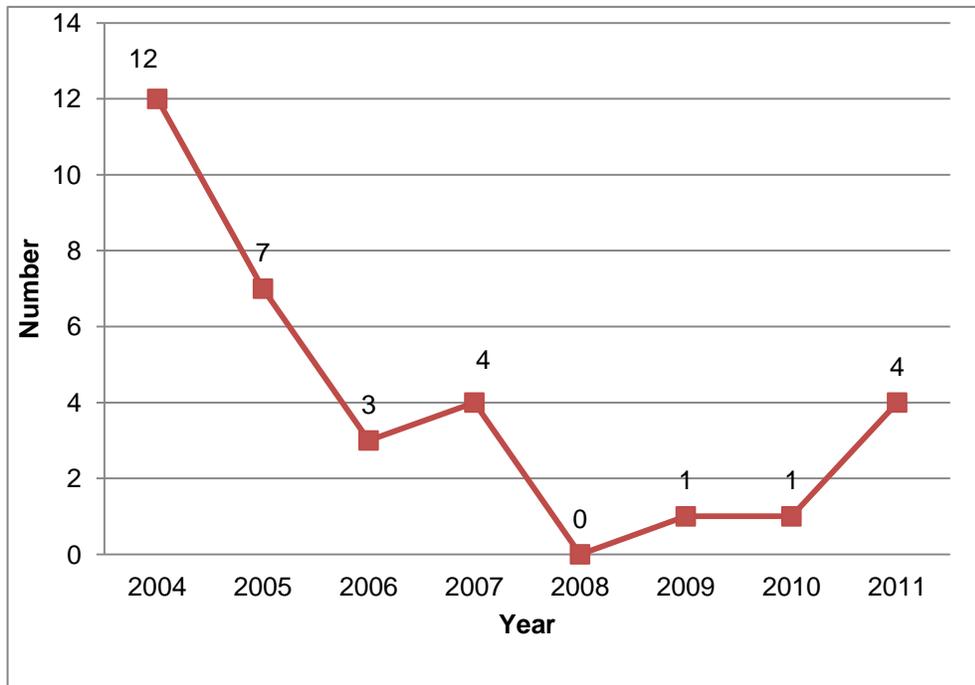
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<sup>54</sup> See generally 28 C.F.R. § 51.42 (providing that a completed submission is deemed precleared if DOJ does not respond within the 60-day period).

<sup>55</sup> *Id.* § 51.39.

<sup>56</sup> *Id.* § 51.37.

Figure 12

**DOJ's Recalculation of the 60-Day Review Period for Redistricting Submissions by Year, 2004 to 2011**

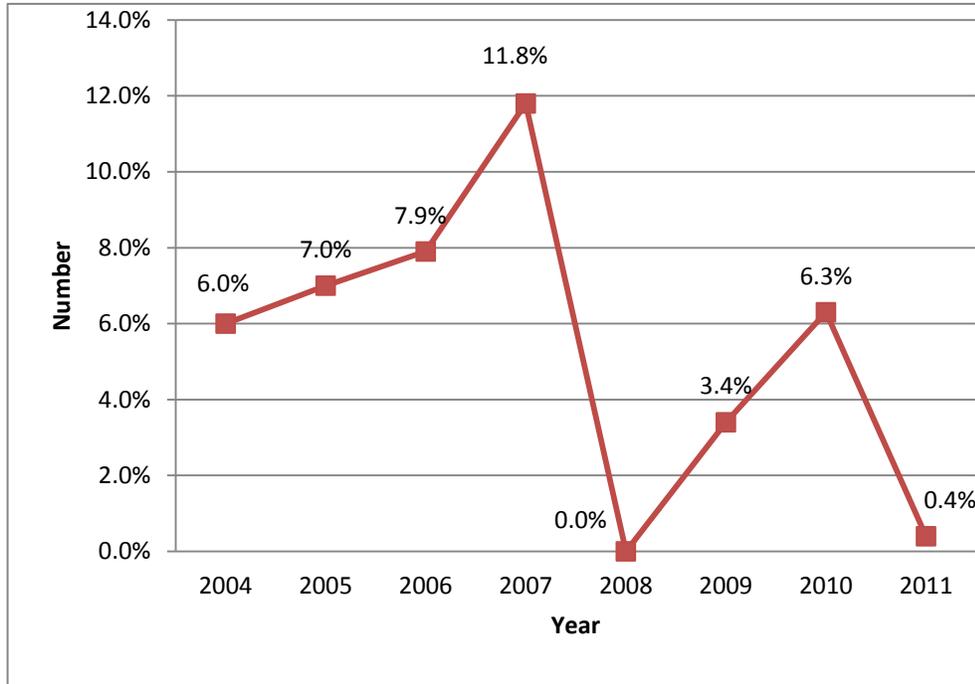
Source: Letter from Thomas E. Perez, Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Kimberly A. Tolhurst, Acting Gen. Counsel, U.S. Comm'n on Civil Rights at 16–17, 15 (Feb. 17, 2012) (DOJ Interrogatory Response).

It is not possible to break down how DOJ decides to recalculate the 60-day period because the Department does not track data on whether its determination is based on the receipt of supplemental information in a pending submission—either on the jurisdiction's own initiative or in response to a DOJ request for information—or on receipt of a related submission.<sup>57</sup> In addition, because DOJ does not keep aggregated data regarding how long it takes to make preclearance decisions, it is not possible to assess the extent to which recalculation of the 60-day period delays DOJ's preclearance determinations.

<sup>57</sup> DOJ Interrogatory Response, *supra* note 23, at 17.

Figure 13

**Percent of Redistricting Submissions With DOJ Recalculating the 60-Day Review Period  
By Year, 2004 to 2011**



Source: Compiled by U.S. Comm'n on Civil Rights from Letter from Thomas E. Perez, Asst. Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Kimberly A. Tolhurst, Acting Gen. Counsel, U.S. Comm'n on Civil Rights at 10–11, 16–17 (Feb. 17, 2012) (DOJ Interrogatory Response).

### Additional Observations

Despite a fairly limited data set, the Commission was able to observe important recent trends in DOJ's administrative preclearance process, including a widespread approval of redistricting plans. Additionally, the Commission learned of a number of concerns emerging from the covered states, including allegations of vague DOJ guidance and difficulties in the submission and investigation process.

### Extremely High Preclearance Rates

The current cycle marks the first decennial redistricting cycle in which Democrats led the Justice Department since the Voting Rights Act was first enacted. Nevertheless, Republican-controlled states do not appear to be at a disadvantage in the current process. For example, by the end of 2011, nine states had submitted 26 statewide redistricting plans to DOJ for administrative preclearance (see table 2). As indicated in table 2, DOJ precleared every single plan submitted. Of those, six states' redistricting processes, producing 18 redistricting plans, were entirely controlled by Republican state legislators.<sup>58</sup> One state in particular, North Carolina, submitted a Congressional redistricting plan that is predicted to replace three of the state's seven Congressional Democrats with Republicans.<sup>59</sup> In fact, the only statewide plans that DOJ challenged in 2011 were Texas's House and Congressional redistricting plans, submitted to federal court for judicial preclearance. This cycle also marked the first time in history that Georgia and Louisiana received full administrative preclearance on the first attempt.<sup>60</sup>

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<sup>58</sup> See generally Aaron Blake, *Congressional Redistricting: State by State*, WASH. POST (Jan. 26, 2011), .

<sup>59</sup> See *id.*

<sup>60</sup> See, e.g., Briefing Before the U.S. Comm'n on Civil Rights, Wash., D.C., Feb. 3, 2012, transcript at 95:23–96:1, available at [\[\[link\]\]](#) [hereinafter Briefing Transcript] (Lewis Testimony); REDISTRICTINGONLINE.ORG, *Ladies and Gentlemen, "We've Been Pre-Cleared;" DOJ Pre-Clears Louisiana House Map* (June 21, 2011), <http://redistrictingonline.org/nblahousepreclear062111.html>.

Table 2

**Statewide Redistricting Plans Submitted to DOJ for Administrative Preclearance in 2011**

State	Date Filed	Redistricting Plans	Outcome
Alabama*	Sept. 21, 2011	Congressional**	Precleared Nov. 21, 2011
		Board of Education**	
Alaska	Aug. 9, 2011	House	Precleared Oct. 11, 2011
		Senate	
California	Nov. 16, 2011	Congressional	Precleared Jan. 17, 2012
		Assembly	
		Senate	
		Board of Equalization	
Georgia*	Oct. 24, 2011	Congressional**	Precleared Dec. 23, 2011
		House**	
		Senate**	
Louisiana*	June 2, 2011	Congressional	Precleared Aug. 1, 2011
	Apr. 21, 2011	House**	Precleared June 20, 2011
	Apr. 28, 2011	Senate	Precleared June 28, 2011
	June 7, 2011	Board of Education	Precleared Aug. 8, 2011
	May 31, 2011	Public Service Commission	Precleared Aug. 1, 2011
North Carolina*	Sept. 2, 2011	Congressional**	Precleared Nov. 1, 2011
		House**	
		Senate**	
South Carolina*	Aug. 31, 2011	Congressional**	Precleared Oct. 28, 2011
	July 27, 2011	House**	Precleared Oct. 11, 2011
	Aug. 9, 2011	Senate**	Precleared Nov. 14, 2011
South Dakota*	Nov. 22, 2011	House	Precleared Jan. 19, 2012
		Senate	
Virginia	May 11, 2011	House of Delegates**	Precleared June 17, 2011
		Senate**	

\*State's redistricting process was entirely controlled by Republican state legislators.

\*\*State concurrently sought judicial preclearance in DDC.

Source: Compiled by U.S. Comm'n on Civil Rights from U.S. Dep't of Justice, Notices of Section 5 Activity Under Voting Rights Act of 1965, as Amended, <http://www.justice.gov/crt/about/vot/notices/noticepg.php> (last visited Mar. 6, 2012); U.S. Dep't of Justice, Status of Statewide Redistricting Plans, [http://www.justice.gov/crt/about/vot/sec\\_5/statewides.php](http://www.justice.gov/crt/about/vot/sec_5/statewides.php) (last visited Mar. 6, 2012); *Justice Department OKs BESE Remap*, The Advocate, Aug. 9, 2011, <http://theadvocate.com/news/545478-70/justice-department-oks-bese-remap.html> (last visited Aug. 9, 2011); Aaron Blake, *Congressional Redistricting: State by State*, WASH. POST (Jan. 26, 2011), <http://www.washingtonpost.com/wp-srv/special/politics/redistricting-scorecard>.

Furthermore, the current Justice Department's bases for redistricting objections appear to be consistent with the bases used during the prior administration. Professor Nathaniel Persily of Columbia Law School explained to the Commission at its briefing that "the practices of the DOJ either since 2006 or since 2008 do not seem, at first blush, to be systematically different than those of earlier years,"<sup>61</sup> with the caveat that DOJ has produced relatively few objections to analyze.

Professor Keith Gaddie of the University of Oklahoma reached a similar conclusion based on his examination of publicly-available evidence. He observed that "compared to the past, [DOJ's preclearance process] appears to be apolitical. It appears to be fair. It appears to be consistent. ... [I]t is, compared to the past, a much more neutral process."<sup>62</sup>

He explained:

If you look across cases, the nature of the tests that are used, standards that are used, the nature of the objections that are levied are remarkably consistent. And we have had a change in presidential administration at that time. We have had a change in political control of many of these states in that time ....<sup>63</sup>

Gaddie continued:

The nature of the environment, the implementation of the Act has been consistent with the change in presidential administrations since *Georgia v. Ashcroft*. The larger chatter that we hear, and we all hear it, we don't hear this round. You know, in fact, we are amazed at how relatively conservative this Justice Department has been in implementing Section 5.<sup>64</sup>

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<sup>61</sup> Statement of Prof. Nathaniel Persily, Columbia Law School, at 18, *available at* <http://www.eusccr.com/Nathaniel%20Persily,%20Columbia%20Law%20School.pdf> [hereinafter Persily Statement]; *see also* Briefing Transcript, *supra* note 60, at 27:1–3 (Persily Testimony) ("[F]rom my look at it, it does not seem to be much different than previous cycles in the way that DOJ has been denying preclearance."); *but cf. id.* at 27:9–11 (Persily) ("[W]hen you have an N of 20 and an N maybe of 4 with redistricting plans, there isn't a whole lot you as a political scientist can do.").

<sup>62</sup> Briefing Transcript, *supra* note 60, at 84:16–24 (Gaddie Testimony).

<sup>63</sup> *Id.* at 83:6–12.

<sup>64</sup> *Id.* at 84:9–15.

### State Critiques

In the course of its study, the Commission sought input from states regarding their experiences with DOJ in the preclearance process. The Commission issued requests for information to 10 states that qualify as covered jurisdictions and received full or partial responses from seven. In addition, the Commission invited Georgia and Alabama's outside counsel to testify at the Commission's briefing. Although the Commission did not receive sufficient responses from states to identify trends or definitive institutional infirmities, several states did provide critiques of the process.

### Clarity of DOJ's Guidance

Although some states reported that they found DOJ's guidance to be "helpful"<sup>65</sup> or "satisfactory,"<sup>66</sup> several states commented to the Commission that they had difficulty following DOJ's guidance due to a lack of clarity.

For example, John Park, Alabama's outside counsel, criticized DOJ's holistic approach to preclearance for a lack of predictability. He explained, "To a covered jurisdiction, [DOJ's] description of the process sounds like 'we at USDOJ know preclearance when we see it.' As a participant in an election law blog put it, the law should set clear standards and provide guidance to the covered jurisdictions, not rely on a squishy 'holistic' analysis."<sup>67</sup>

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<sup>65</sup> See Arizona Response to U.S. Comm'n on Civil Rights Information Request at 5 [hereinafter Arizona Discovery Response].

<sup>66</sup> See Virginia Response to U.S. Comm'n on Civil Rights Information Request at 4 [hereinafter Virginia Discovery Response].

<sup>67</sup> Statement of John J. Park Jr., Strickland Brockington Lewis LLP, in connection with the briefing on Section 5 issues before the U.S. Commission on Civil Rights at 10, *available at* <http://www.eusccr.com/John%20J.%20Park%20Jr.,%20Strickland%20Brockington%20Lewis%20LLP.pdf> [hereinafter Park Statement] (responding to a statement by Asst. Atty. Gen. Thomas Perez to *Roll Call* that "[t]here's no magic numerical formula" to preclearance, and that preclearance is "a very holistic analysis that involves looking at prior elections, voting age data, things of that matter." See also Shira Toeplitz & Joshua Miller, *DOJ Redistricting Point Man: No Magic Formula*, ROLL CALL (Oct. 11, 2011), [http://www.rollcall.com/issues/57\\_39/DOJ-Redistricting-Point-Man-No-Magic-Formula-209319-1.html](http://www.rollcall.com/issues/57_39/DOJ-Redistricting-Point-Man-No-Magic-Formula-209319-1.html)).

In its responses to Commission interrogatories, Texas put it more bluntly, writing,

DOJ's Section 5 guidelines provide no concrete standards by which a state can independently and accurately judge whether a proposed plan would be precleared by DOJ. The guidelines are essentially useless to a jurisdiction seeking a reliable understanding of its obligations under the law.<sup>68</sup>

Texas further responded that:

In their most recent iteration, the guidelines are essentially a carte blanche for DOJ to conduct a subjective preclearance review process. It is fair to say that the lack of specificity in the 2011 guidelines were a factor in the State's determination to seek judicial, rather than administrative, preclearance.<sup>69</sup>

Similarly, Georgia reported that it "did not find [DOJ's] Section 5 guidelines especially helpful,"<sup>70</sup> averring that "the guidelines from the DOJ often lack the sort of concrete guidance that would make compliance straightforward."<sup>71</sup> Anne Lewis, Georgia's outside counsel, told the Commission that "the amount of real guidance that the state was able to draw from the two DOJ publications was limited. The guidelines lacked any sort of clear directives that a covered jurisdiction might use to ensure compliance."<sup>72</sup> She explained further at the Commission's briefing, "[I]t was a document that appeared to be written by lawyers .... So, at the end of the day it had a lot of pages but not necessarily a lot of direction for [Georgia] General Assembly members who are trying to pass plans for their state legislative and Congressional districts."<sup>73</sup> Georgia suggested that DOJ "specify the method by which it determines whether plans have a discriminatory effect or purpose so that jurisdictions can replicate the DOJ's analysis."<sup>74</sup>

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<sup>68</sup> Texas Response to U.S. Comm'n on Civil Rights Information Request at 3 [hereinafter Texas Discovery Response].

<sup>69</sup> *Id.* at 4.

<sup>70</sup> Georgia Discovery Response, *supra* note 51, at 20.

<sup>71</sup> *Id.* at 13.

<sup>72</sup> See Statement of Anne W. Lewis, Strickland Brockington Lewis, at 7, available at <http://www.eusccr.com/Anne%20W.%20Lewis,%20Strickland%20Brockington%20Lewis%20LLP.pdf> [hereinafter Lewis Statement] ("Although it is certainly understandable that the DOJ cannot provide specific direction on specific districts or even plans, it does seem that more detailed standards could be used.").

<sup>73</sup> Briefing Transcript, *supra* note 60, at 98:3–9 (Lewis Testimony).

<sup>74</sup> Georgia Discovery Response, *supra* note 51, at 20.

In the course of its preclearance litigation in federal district court, Texas expressed particular concern with the clarity of the functional analysis that DOJ uses to determine the presence of discriminatory effect.<sup>75</sup> It said that DOJ's guidelines "do not answer specific legal questions concerning which elections should factor into the 'functional analysis' of electoral behavior or how States should interpret election results in order to preserve statewide minority voting strength."<sup>76</sup> Texas further alleged that DOJ "only revealed their methodologies after Texas filed suit."<sup>77</sup>

At the Commission's briefing, Ms. Lewis echoed Texas's critique, alleging that DOJ applied legal standards during the Texas litigation that it had not outlined in its guidance, and actually developed those standards during the course of litigation. According to Ms. Lewis, DOJ had 'put the cart before the horse': "[A]fter Texas sought preclearance from the District Court for its plans, the DOJ argued for a standard to be applied to those plans that is not set forth in either the guidance or its final rules. Section 5 is an extreme intrusion into the affairs of a covered jurisdiction and the standards for compliance surely must be more settled than one announced in litigation after the fact."<sup>78</sup>

Mark Posner, from the Lawyers' Committee for Civil Rights Under Law—an intervening party in the Texas litigation—disagreed with Ms. Lewis's assessment of the functional-analysis standard used in the Texas preclearance trial. He explained:

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<sup>75</sup> For further discussion of the discriminatory-effect standard and DOJ's functional analysis, see *infra* Chapter 4.

<sup>76</sup> Texas Trial Brief at 3, *Texas v. United States*, No. 11-cv-1303 (D.D.C. filed Feb. 6, 2012) [hereinafter Texas Trial Brief].

<sup>77</sup> *Id.* at 6 n.3.

<sup>78</sup> Lewis Statement, *supra* note 72, at 7; see also Briefing Transcript, *supra* note 60, at 98:16–20 (Lewis Testimony) ("[I]t appears that the Texas standard was sort of being built along the way. And that's difficult for Section 5 states, and especially for the lawyers who are trying to give advice to the Section 5 states about how to comply."); *id.* at 143:19–23 (Lewis Testimony) ("[T]here is a guidance from the DOJ. There is the renewal, there are final rules; yet, nothing specific for states to follow. Although, by the time of the Texas case the DOJ did seem to develop some specificity."); Georgia Discovery Response, *supra* note 51, at 13 ("[A]fter Texas filed its declaratory judgment action for preclearance this year, the DOJ argued for a standard to be applied to Texas that is not set forth in the DOJ's guidance.").

[I]f you compare the factors that the [trial] court ... identified as the appropriate standards to apply to the trial of that matter to the redistricting plans adopted by the State of Texas, those factors closely track the standards identified by the Justice Department in its [guidance]. So, with all due respect to Ms. Lewis, I don't think there was any cart and horse problem . . . in that case . . . or if there was any cart or horse it was the court following what the Justice Department had done in prior cases.<sup>79</sup>

In addition, with respect to Section 5's purpose standard, Professor Persily observed, "It is doubtful that the Department could give any greater direction than [its guidance on the purpose standard]. The inherently contingent purpose inquiry necessarily implies considerable DOJ discretion as to when inferences can be made concerning what went into the minds of those who drew the lines."<sup>80</sup>

### Conduct of Investigation

In addition to commenting on the clarity of DOJ's guidance, Georgia also criticized several administrative aspects of DOJ's preclearance process. For instance, it critiqued the quantity of DOJ's oral requests for information after the initial receipt of the state's submissions. It noted that on nine dates DOJ issued a total of 47 distinct requests for additional information.<sup>81</sup> Georgia's outside counsel, Anne Lewis, commented to the Commission that the Department's multiple rounds of requests were inefficient and could have been streamlined. She testified, "[i]f the Department had known up front [that] we need this information, we could have run a lot of data requests at the same time rather than have to run them over and over again."<sup>82</sup> John Park, outside counsel for Alabama, echoed this sentiment, suggesting that DOJ could collect some data directly from the Census Bureau, rather than ask for the data from states, as the states seek the data from the Census Bureau to comply with the request.<sup>83</sup>

<sup>79</sup> Briefing Transcript, *supra* note 60, at 115:25–116:10 (Posner Testimony).

<sup>80</sup> Persily Statement, *supra* note 61, at 13.

<sup>81</sup> Georgia Discovery Response, *supra* note 51, at 14–18.

<sup>82</sup> See Briefing Transcript, *supra* note 60, at 102:20–23 (Lewis Testimony); see also Georgia Discovery Response, *supra* note 51, at 19 ("[T]he DOJ asked for certain election information which must be obtained from the Secretary of State's office. Later, the DOJ wanted additional information which could have been obtained at the same time as the prior request but instead a new query had to be run."); Briefing Transcript, *supra* note 60, at 150:18–25 (Lewis Testimony) ("[T]here were times where if we knew that they wanted information on A, B, and C, we could have done that all at once. . . . [I]nstead of finding out okay, we want A. Now we need B, now we need C. We could have done that all at once, and a three-week process would have become a one-week process.").

<sup>83</sup> Briefing Transcript, *supra* note 60, at 151:21–152:6 (Park Testimony).

Georgia also noted several technical difficulties that it had with the submission and supplementation of its preclearance submission. For instance, the state said that DOJ staff uses an in-house redistricting software to perform its analysis, rather than Maptitude, the commercial software most commonly used by states.<sup>84</sup> Georgia explained that DOJ's different software, combined with what it described as an "unfamiliar[ity] with some of the methods of storing election data and GIS concepts," made it more challenging for the state to respond to data requests.<sup>85</sup> Georgia also commented that DOJ's email system has difficulty receiving the amount of data that DOJ requests.

Finally, Ms. Lewis expressed concern regarding DOJ's method of questioning state witnesses during interviews—a method she characterized as guiding witnesses in a certain direction.<sup>86</sup> In particular, she believed that DOJ analysts and attorneys asked leading questions, and she criticized their method of asking some questions multiple times.<sup>87</sup>

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<sup>84</sup> Georgia Discovery Response, *supra* note 51, at 19; *see also* Briefing Transcript, *supra* note 60, at 101:20–102:4 (Lewis Testimony).

<sup>85</sup> Georgia Discovery Response, *supra* note 51, at 19.

<sup>86</sup> *See* Briefing Transcript, *supra* note 60, at 144:1–2.

<sup>87</sup> *See* Briefing Transcript, *supra* note 60, at 102:11–24 (Lewis Testimony); *id.* at 143:21–144:18 (Lewis Testimony); *id.* at 146:1–148:19 (Lewis Testimony); Lewis Statement, *supra* note 72, at 13–14.



## Chapter 4. ENFORCEMENT STANDARDS

### Discriminatory Effect

Section 5 requires covered jurisdictions to show that their proposed voting changes have no discriminatory effect. For nearly 40 years it has been understood by both the Justice Department and courts that the ‘effect’ standard prohibits retrogression. Retrogressive effect is calculated by comparing the proposed voting change to what is known as the benchmark—the voting standard, practice, or procedures “in force or effect” when DOJ receives the submission.<sup>88</sup> If the proposal decreases minorities’ ability to elect their preferred candidate of choice, compared to the benchmark, then the proposal is retrogressive and cannot be precleared.

### Background

The retrogressive-effect standard was first defined by the Supreme Court in 1976 in *Beer v. United States*.<sup>89</sup> There, the Court explained that the purpose of Section 5 is “to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>90</sup> To this end, the Court concluded that “legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the ‘effect’ of diluting or abridging the right to vote on account of race within the meaning of § 5.”<sup>91</sup> Since that time, both DOJ and courts have understood Section 5’s prohibition of retrogressive effect as a bar on decreasing minority communities’ ability to elect a candidate of their choice.<sup>92</sup>

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<sup>88</sup> 28 C.F.R. § 51.54(c).

<sup>89</sup> 425 U.S. 130, 139 (1976) (holding “A legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise cannot violate § 5 unless the new apportionment itself so discriminates racially as to violate the constitution.”).

<sup>90</sup> *Id.* at 141.

<sup>91</sup> *Id.*

<sup>92</sup> *See, e.g., Bush v. Vera*, 517 U.S. 952, 983 (1996) (“Nonretrogression ... mandates that the minority’s opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State’s actions.”) (emphasis omitted) (plurality opinion); *cf. Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) (“The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.”).

In 2003, however, the Supreme Court articulated a more expansive understanding of retrogressive effect with respect to redistricting plans. In *Georgia v. Ashcroft*,<sup>93</sup> a case involving Georgia’s redistricting after the 2000 census, the Court determined that retrogressive effect did not solely focus on minority communities’ “ability to elect” candidates of choice. Rather, *Ashcroft* directed DOJ and the Federal District Court for the District of Columbia to consider the totality of the circumstances, holding that “any assessment of the retrogression of a minority group’s effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group’s opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan.”<sup>94</sup> The Court concluded that the ability to elect a candidate of choice “cannot be dispositive or exclusive.”<sup>95</sup>

To implement this broader view of the “effect” prong, the *Ashcroft* court described three kinds of districts: “safe” districts, “coalition” districts, and “influence” districts. The Court said that a state may protect minorities’ ability to elect candidates of choice by creating either “safe” districts or a greater number of districts made of “coalitions of voters who together will help to achieve the electoral aspirations of the minority group.”<sup>96</sup> In coalition districts “it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.”<sup>97</sup> The Court also offered that states may satisfy the nonretrogression test by enhancing political participation through “influence districts,” where a minority group “may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.”<sup>98</sup> Thus, under *Ashcroft*, even where a jurisdiction proposed fewer safe districts than existed under its benchmark plan, the jurisdiction had the flexibility to balance this decrease with additional coalition districts or districts in which minority groups maintained influence if not control.

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<sup>93</sup> 539 U.S. 461 (2003).

<sup>94</sup> *Id.* at 479–80.

<sup>95</sup> *Id.* at 480.

<sup>96</sup> *Id.* at 481.

<sup>97</sup> *Id.* at 480.

<sup>98</sup> *Id.* at 482.

When Congress reauthorized Section 5 in 2006, both houses of Congress roundly criticized the *Ashcroft* decision and indicated a clear intent to reject it. The House Judiciary Committee stated in the House Report on the VRARA that the majority opinion in *Ashcroft* “turns Section 5 on its head,” concluding that “leaving the [*Ashcroft*] standard in place would encourage States to spread minority voters under the guise of ‘influence’ and would effectively shut minority voters out of the political process.”<sup>99</sup> Likewise, the Senate Judiciary released a post-enactment<sup>100</sup> Senate Report on the VRARA that criticized the *Ashcroft* standard for being “unworkable” and for “potentially open[ing] the door to increased substitution of partisan interests for the ability of minorities to elect their preferred candidate of choice.”<sup>101</sup>

Rejecting the more expansive *Ashcroft* approach to discriminatory effect, Congress added a new section (d) to the statute, stating that the purpose of the effect standard “is to protect the ability of such citizens to elect their preferred candidates of choice.”<sup>102</sup> The House Committee’s Report stated that the new section (d) was intended to “make[] clear that Congress explicitly rejects all that logically follows from [the Court’s statement] that ‘[i]n assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice. While this factor is an important one in the Section 5 retrogression inquiry, it cannot be dispositive.’”<sup>103</sup> The Senate Committee concurred: “[A]s the House Committee Report makes clear, the bill ‘rejects’ the Supreme Court’s interpretation of [S]ection 5 in *Georgia v. Ashcroft*, and establishes that the purpose of [S]ection 5’s protection of minority voters is, in the words of the bill, to ‘protect the ability of such citizens to elect their preferred candidates of choice.’”<sup>104</sup>

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<sup>99</sup> H.R. Rep. No. 109-478, at 69–70 (2006).

<sup>100</sup> Because the Senate Judiciary Committee’s report on the VRARA was issued *after* the Senate voted to approve the VRARA, it does not generally receive the same weight as the House Report in discussions of Congress’s legislative intent. For further discussion, see *infra* p. 41.

<sup>101</sup> S. Rep. No. 109-295, at 18, 20 (2006); see also Briefing Transcript, *supra* note 60, at 113:9–13 (Posner Testimony) (“Congress’ action in 2006 in reversing [*Georgia v. Ashcroft*] and going back to the pre-*Ashcroft* standard . . . avoided the confusion that would have occurred if *Ashcroft*’s multi-standard test had been applied in the current round of redistricting.”).

<sup>102</sup> 42 U.S.C. § 1973c(d).

<sup>103</sup> H.R. Rep. No. 109-478, at 71 (quoting *Beer v. U.S.*, 425 U.S. 480 (1976)).

<sup>104</sup> S. Rep. No. 109-295, at 21.

Both houses of Congress agreed that they intended the revised language to restore the *Beer* standard. The House Committee asserted that the statute’s revision was “intended to restore” the effect prong to the standard that preclearance should be denied when a change “diminishes the ability of minority groups to elect their candidates of choice.”<sup>105</sup> According to the House, Congress inserted the word “preferred” before “candidate” to “make[] clear that the purpose of Section 5 is to protect the electoral power of minority groups to elect candidates that the minority community desires to be their elected representative.”<sup>106</sup> The Senate Committee also stated that “the bill would replace the ambiguous standard set by the Supreme Court in *Georgia v. Ashcroft* with the workable standard in *Beer*,” and that “[t]his would promote the Act’s original purpose, provide predictability to all involved, and reduce wasteful litigation.”<sup>107</sup>

Nevertheless, while both the House and Senate clearly intended to overturn *Ashcroft*’s discussion of influence districts, and to restore the *Beer* standard’s emphasis on protecting minority groups’ “ability to elect their candidate of choice,” Congress left ambiguous how exactly it defined groups’ “ability to elect their candidate of choice,” and how it intended the new statute to be implemented. As Professor Guy-Uriel Charles of Duke Law School explained to the Commission at its briefing, “[t]hough Congress fully intended to restore the status quo *ante Georgia v. Ashcroft*, ... [it] did not provide sufficient guidance on the substantive standard. Namely, how does one determine the racial groups’ or language minorities’ preferred candidate of choice?”<sup>108</sup>

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<sup>105</sup> H.R. Rep. No. 109-478, at 71.

<sup>106</sup> *Id.*

<sup>107</sup> S. Rep. No. 109-295, at 21.

<sup>108</sup> Briefing Transcript, *supra* note 60, at 36:8–13 (Charles Testimony); *see also id.* at 25:5–8 (Persily Testimony) (“The reauthorized VRA overturns *Georgia v. Ashcroft* but it doesn’t settle the controversies as to what an ability to elect district is.”); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174 (2007).

For example, the House and Senate Reports provided contradictory guidance as to how to understand the post-VRARA status of so-called “coalition” districts: The House Report stated that coalition districts continued to be protected under Section 5, and the Senate Report said that they did not. Specifically, the House Report said that “[v]oting changes that leave a minority group less able to elect a preferred candidate of choice, either directly *or when coalesced with other voters*, cannot be precleared under Section 5.”<sup>109</sup> The Senate Report, meanwhile, said instead that the new statutory language was limited to “naturally occurring” legislative districts and “would *not* lock into place coalition or influence districts . . . .”<sup>110</sup>

It should be noted that, although the discrepancies between House and Senate Reports point to some disputes over statutory interpretation that are worth highlighting, the Senate Report “carrie[s] little weight as a piece of legislative history or evidence of legislative intent.”<sup>111</sup> Because the Senate Judiciary Committee issued its report on the VRARA *after* the Senate voted to approve the VRARA, it was not considered at the time Congress enacted the statute.<sup>112</sup>

### Revised Procedures and Guidance

In the winter and spring of 2011, DOJ issued revised procedures and guidance that addressed, in part, the newly-revised ‘effect’ standard.

<sup>109</sup> H.R. Rep. No. 109-478, at 71 (emphasis added).

<sup>110</sup> S. Rep. No. 109-295, at 21; *see also id.* (“This legislation definitively is not intended to preserve or ensure the successful election of candidates of any political party, even if that party’s candidates generally are supported by members of minority groups. The Voting Rights Act was intended to enhance voting power, not to serve as a one-way ratchet in favor of partisan interests.”); *id.* at 20–21 (“By focusing solely on the protection of naturally occurring legislative districts with a majority of minority voters, the reauthorization bill ensures that minority voters will not be forced to trade away solidly majority-minority districts for ambiguous concepts like ‘influence’ *or ‘coalitional.’*”) (emphasis added).

<sup>111</sup> Memorandum Opinion at 35-36 n.30, *Texas v. United States*, No. 11-1303, slip op. (DDC Dec. 22, 2011) [hereinafter DDC Summary Judgment Opinion].

<sup>112</sup> *See id.*; Briefing Transcript, *supra* note 60, at 154:7–21 (McDonald Testimony).

DOJ's revised guidance, issued on February 9, 2011, went into greater detail regarding the new 'effect' standard. For instance, it provided an explicit citation to the *Beer* standard, that a proposed plan is retrogressive where it reduces minority voters' "effective exercise of the electoral franchise . . . ." <sup>113</sup> The DOJ further explained that in 2006 "Congress clarified that [the *Beer* standard] means the jurisdiction must establish that its proposed redistricting plan will not have the effect of 'diminishing the ability of any citizens of the United States' because of race, color, or membership in a language minority group defined in the Act, 'to elect their preferred candidate of choice.'" <sup>114</sup> It continued, "[i]n analyzing redistricting plans, the Department will follow the congressional directive of ensuring that the ability of such citizens to elect their preferred candidates of choice is protected." <sup>115</sup> Notably, DOJ's guidance did not address Congress's ambiguity with respect to coalition districts.

The DOJ further explained that it determines whether a minority group has an ability to elect—and whether that ability to elect retrogresses—through a functional analysis of both the benchmark and proposed plan:

In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district . . . [c]ensus data alone may not provide sufficient indicia of electoral behavior to make the requisite determination. Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact on the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change. <sup>116</sup>

The new guidance retained its advice from 2001 that "additional demographic and election data in the submission is often helpful in making the requisite Section 5 determination," including data regarding election history and voting patterns, voter registration, and voter turnout.

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<sup>113</sup> See DOJ Guidance, *supra* note 7, at 7471.

<sup>114</sup> *Id.* (quoting 42 U.S.C. §§ 1973c(b),(d)).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

DOJ's revised preclearance procedures, issued April 15, 2011, contained several updates to reflect the new statute's description of the 'effect' standard. For instance, the new regulations added a definition for "protection of the ability to elect" that mirrored the new statutory language: "Any change affecting voting that has the purpose of or will have the effect of diminishing the ability of any citizen of the United States on account of race, color, or membership in a language minority group to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of Section 5, 42 U.S.C. 1973c."<sup>117</sup> The procedures also accounted for the new statutory language adopted by Congress and homogenized the terminology used throughout the regulation.<sup>118</sup>

### DOJ Enforcement

Between Congress's revisions to Section 5 in 2006 and December 31, 2011, DOJ only objected to five redistricting plans due to discriminatory effect. Those plans included a 2007 method-of-election and redistricting submission for the City of Fayetteville, NC's city council,<sup>119</sup> a 2008 annexation and redistricting submission for the City of Calera, AL,<sup>120</sup> a 2009 redistricting plan for Lowndes County, GA's county commission,<sup>121</sup> a 2011 redistricting plan for East Feliciana Parish, LA,<sup>122</sup> and a 2011 redistricting plan for Amite County, MS's board of supervisor and election commissioner districts.<sup>123</sup> Only two of those administrative objections were issued during the 2011-2012 redistricting cycle. DOJ also challenged Texas's state house and congressional redistricting plans in federal court when Texas sought judicial preclearance.<sup>124</sup>

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<sup>117</sup> 28 C.F.R. § 51.54(d).

<sup>118</sup> See *id.*, §§ 51.1, 51.10, 51.11, 51.44, 51.48(b), 51.48(c), 51.52(a), 51.52(b), 51.52(c), 51.54, 51.55(a).

<sup>119</sup> See Letter from Wan J. Kim, Asst. Atty. Gen., to Michael Crowell, Esq., Tharrington Smith (June 25, 2007), available at [http://www.justice.gov/crt/about/vot/sec\\_5/pdfs/l\\_062507.php](http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_062507.php).

<sup>120</sup> See Letter from Grace Chung Baker, Acting Asst. Atty. Gen., to Dan Head, Esq., Wallace, Ellis, Fowler & Head (Aug. 25, 2008), [http://www.justice.gov/crt/about/vot/sec\\_5/pdfs/l\\_082508.php](http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_082508.php).

<sup>121</sup> See Letter from Thomas E. Perez, Asst. Atty. Gen., to Walter G. Elliot, Esq., Elliott, Blackburn, Barnes & Gooding (Nov. 30, 2009), [http://www.justice.gov/crt/about/vot/sec\\_5/pdfs/l\\_113009.php](http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_113009.php) [hereinafter Lowndes County Objection].

<sup>122</sup> See Letter from Thomas E. Perez, Asst. Atty. Gen., to Nancy P. Jensen, Garnet Innovations (Oct. 3, 2011), [http://www.justice.gov/crt/about/vot/sec\\_5/pdfs/l\\_100311.php](http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_100311.php) [hereinafter Feliciana Parish Objection].

<sup>123</sup> See Letter from Thomas E. Perez, Asst. Atty. Gen., to Tommie S. Cardin, Esq., Butler, Snow, O'Mara, Stevens, & Cannada (Oct. 4, 2011), [http://www.justice.gov/crt/about/vot/sec\\_5/pdfs/l\\_100411.php](http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_100411.php) [hereinafter Amite County Objection].

<sup>124</sup> See DOJ Post-Trial Brief, *supra* note 34.

Although each objection is unique and fact-specific, and the small sample size of objections makes it impossible to determine conclusive trends, three themes can be gleaned regarding DOJ's enforcement of Section 5's 'effect' standard since 2006. First, DOJ engages in the functional analysis described in its guidelines. Second, DOJ has taken the position that Section 5 prohibits retrogression of coalition/crossover districts, where minority groups coalesce with other minority groups or a non-minority population to establish an ability to elect their candidates of choice. Third, DOJ believes that Section 5 prohibits proportional retrogression.

### Functional Analysis

The hallmark of DOJ's enforcement of the discriminatory-effect standard is the so-called functional analysis that it describes in its guidance. The DOJ promoted its use of functional analysis in its summary-judgment pleadings in the Texas preclearance litigation.<sup>125</sup> It reasoned:

[D]etermining whether a minority group has the "ability to elect" a candidate of choice under Section 5 is not as simple as looking at a discrete set of population figures. "The legal standard is not total population, voting age population, voting age citizen population or registration, but the ability to elect. The Supreme Court repeatedly has declined to elevate any of these factual measures to a magic parameter."<sup>126</sup>

In response to Texas's initial reliance on population statistics to demonstrate a lack of retrogressive effect, DOJ countered that "population is just the starting point under Section 5 to determine whether existing electoral power of a minority population has been diminished," and that there exists no legal precedent to support the state's approach.<sup>127</sup>

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<sup>125</sup> See generally Persily Statement, *supra* note 61, at 30–32 (advocating that demographics and bright-line minority population percentages alone were insufficient to determine whether minority citizens have the ability to elect their favored candidates due to the danger of strategically including ineligible minority voters in demographic breakdowns or substituting low-turnout minority voters in the place of those more likely to turn out).

<sup>126</sup> DOJ Summary Judgment Brief, *supra* note 34, at 4 (quoting *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 79 (D.D.C. 2002) (three-judge court), *vacated on other grounds*, 539 U.S. 461 (2003) (citing *Johnson v. DeGrandy*, 512 U.S. 997, 1017 n.14 (1994)).

<sup>127</sup> *Id.* at 5-6.

The district court largely agreed with DOJ’s legal arguments, asserting in its summary-judgment decision that a multifactor retrogression analysis “is part and parcel of discerning whether minority voters will be *effective* in their exercise of the electoral franchise. Because the statutory watchword is ‘ability to elect,’ data that pertains to actual minority citizen voting strength must be analyzed for each relevant district.”<sup>128</sup> The court highlighted a non-exhaustive list of factors to determine whether ability-to-elect exists. Those factors include: the existence of cohesive voting among minorities and racially-polarized voting;<sup>129</sup> population statistics;<sup>130</sup> and minority-voter registration, minority-voter turnout, election history, and minority/majority voting behaviors.<sup>131</sup> According to the court, other factors relevant to the inquiry could include:

[T]he number of registered minority voters in redrawn districts; population shifts between or among redrawn districts that diminish or enhance the ability of a significant, organized group of minority voters to elect their candidate of choice; an assessment of voter turnout in a proposed district; to the extent discernible, consideration of future election patterns with respect to a minority preferred candidate; and new ability districts that would offset any lost ability district.<sup>132</sup>

The court noted that its analysis “shares many factors” with DOJ’s guidance, even if it is not identical.<sup>133</sup> It also disagreed with the proposition that DOJ’s guidance is “elusive and expensive” and noted that the 2011 Guidance “is consistent with the guidance DOJ has been using to assess retrogressive effect for the past two decades.”<sup>134</sup>

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<sup>128</sup> DDC Summary Judgment Opinion, *supra* note 111, at 31.

<sup>129</sup> *Id.* at 28–29.

<sup>130</sup> *Id.* at 29–30.

<sup>131</sup> *Id.* at 30–32. The court noted retrogressive-effect analysis may not require an assessment of voting patterns where a district has “a minority voting majority of sixty-five percent (or more).” *Id.* at 29–30.

<sup>132</sup> *Id.* at 32.

<sup>133</sup> *See* DDC Summary Judgment Opinion, *supra* note 122, at 33.

<sup>134</sup> *Id.* at 33 & n.26.

An example of DOJ's functional analysis in the Texas case is its evaluation of Texas's proposed House District 117. Both DOJ and Texas agreed that the district was a Hispanic ability-to-elect district in Texas's benchmark plan. Texas maintained that the district remained an ability-to-elect district in its proposed plan because the district contained a Hispanic citizen voting-age population of 63.8 percent, and a combined black and Hispanic citizen voting-age population of 68.4 percent.<sup>135</sup> The DOJ, however, rejected this calculus; while maintaining a high overall Hispanic population, Texas swapped a portion of the benchmark district's Hispanic community for a poorer, low-turnout Hispanic community.<sup>136</sup> As a result, "the district changed politically," reducing the likelihood that Hispanic citizens would succeed in electing their candidate of choice.<sup>137</sup> According to DOJ, "the State used subtle yet discernible methods [in crafting the district] to maintain a Hispanic population majority, thus giving the illusion of Hispanic electoral control when no opportunity exists."<sup>138</sup> DOJ maintained that analysis of voter turnout data was critical to determine whether Hispanics' ability to elect was real or an "illusion."

The DOJ also demonstrated its functional analysis in its October 2011 objection to Amite County, MS's redistricting plan for board of supervisor and election commissioner districts. The county was composed of five single-member districts, of which two qualified as African-American ability-to-elect districts. The county reduced the black population in one of the districts, District 3, eliminating that district's ability to elect; the county claimed that its map did not regress because a third district, District 5, now had a demographic profile that was similar to District 3 in the benchmark plan.<sup>139</sup>

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<sup>135</sup> See Texas Trial Brief, *supra* note 76, at 11.

<sup>136</sup> See DOJ Post-Trial Brief, *supra* note 34, at 9–10.

<sup>137</sup> See *id.* at 10.

<sup>138</sup> *Id.* at 9.

<sup>139</sup> See Amite County Objection, *supra* note 123, at 1–2.

In its objection letter, however, DOJ explained that its analysis “is not based on census numbers in isolation,” as DOJ “look[s] to the voting history in both the county and in the district at issue.”<sup>140</sup> Upon reviewing this data, DOJ determined that “black voters in proposed District 5 turnout to vote at lower levels and exhibit lower levels of electoral cohesiveness than is present in benchmark District 3.”<sup>141</sup> It also noted that “there has been a nearly complete lack of any minority political activity for the past two and a half decades in the area that would comprise proposed District 5.”<sup>142</sup> As such, “potential candidates for elective office as well as the necessary accompanying support structure for a campaign are not currently present in this area and would need to be developed.”<sup>143</sup> The DOJ concluded that, because District 3 already had such a support structure, replacing District 3 with District 5 “would have a negative impact on the ability of minority voters to participate in the political process.”<sup>144</sup>

Several panelists at the Commission’s briefing described DOJ’s functional analysis as straightforward and predictable. Professor Guy-Uriel Charles, for instance, described DOJ’s application of the retrogressive-effect standard as “fairly conventional.” He explained in his written testimony:

The Department applies the standard to essentially preserve either majority-minority districts or districts that are not strictly majority-minority districts because a racial minority does not constitute more than 50 [percent] of the district but were performing districts—the districts enable [sic] the racial group to elect its candidate of choice—under the benchmark plan.<sup>145</sup>

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<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Statement of Prof. Guy-Uriel E. Charles, Duke Law School, at 6, [http://www.eusccr.com/Guy-Uriel%20E.%20Charles,%20Duke%20Law%20School%20\(Revised\).pdf](http://www.eusccr.com/Guy-Uriel%20E.%20Charles,%20Duke%20Law%20School%20(Revised).pdf) [hereinafter Charles Statement].

He continued at the briefing:

The Department presumably uses the benchmark plan to identify performing districts from majority-minority districts. This approach enables the Department to easily apply the ability-to-elect standard. The Department can look at the benchmark plan and ascertain whether the racial group in question has been able to elect its candidates of choice in the relevant district or districts. The Department has then to ascertain whether the proposed plan maintained the current ability to elect or diminishes the ability to elect. This is a manageable and predictable inquiry.<sup>146</sup>

Some DOJ critics, however, have disagreed with the view that the functional analysis is straightforward. Texas, for example, took issue with DOJ's functional analysis during its preclearance litigation in federal district court. The state alleged that DOJ's guidelines on functional analysis "do not answer specific legal questions concerning which elections should factor into the 'functional analysis' of electoral behavior or how States should interpret election results in order to preserve statewide minority voting strength."<sup>147</sup> Indeed, during oral argument regarding a motion for summary judgment, Texas's attorney called the functional analysis a "black box."

[DOJ] point[s] to the black box and they say don't do that . . . as if this were the Clean Water Act, they said don't have pollution in your water. Okay, what kind of pollution? Well, pollution. How many parts per billion? We'll let you know when you send it in to us. We'll do a functional analysis.<sup>148</sup>

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<sup>146</sup> Briefing Transcript, *supra* note 60, at 30:4–15 (Charles Testimony); *see also* Persily Statement, *supra* note 61, at 14 ("The [DOJ's] retrogression inquiry, while entailing a totality-of-the-circumstances type of analysis to estimate the ability to elect minority-preferred candidates, also entails a straightforward mathematical analysis in which the DOJ tallies up the number of ability-to-elect districts in the proposed plan and makes sure it equals or exceeds the number in the benchmark plan.").

<sup>147</sup> Texas Trial Brief, *supra* note 76, at 3.

<sup>148</sup> Transcript of Motion Hearing at 51:21–52:2, *Texas v. United States*, No. 11-1303 (D.D.C. Nov. 2, 2011).

Regardless, Texas said that states should enjoy “wide latitude” to select their own methodology.<sup>149</sup> In particular, Texas sought to use a functional analysis that relied on more statewide elections (compared to DOJ’s partial use of local contests) and lent greater weight toward recent elections.<sup>150</sup> It also advocated for a “statewide” functional analysis that measured the likelihood of success of minority candidates of choice, by “degree,” across all districts.<sup>151</sup> According to Texas, measurement by degree provides a more accurate picture of minorities’ ability to elect a candidate of choice:

A district where the minority candidate of choice prevailed in 6 of 10 statewide election contests is not the same as a district where the minority candidate of choice won all 10 statewide elections. By the same token, there is no reason to obscure the distinction between a district where the minority candidate of choice won 4 of 10 statewide contests and a district where the minority-preferred candidate was unsuccessful in all 10 statewide races.<sup>152</sup>

Texas argued that its statewide approach is superior to DOJ’s district-by-district approach, because it characterizes each district as ability-to-elect or not, and then compares the total number of ability-to-elect districts in the benchmark and proposed plans. According to Texas:

That blunt technique ignores gradations in minority abilities to elect and gives States no credit for improving electoral performance in districts that stay above or below the ability-to-elect cutoff. The method also fails to dock any points where Texas reduces the performance of districts but does not cross the Defendants’ imaginary line between ability and no-ability. The relevant question is the *total* number of minority electoral successes. A binary, yes-or-no categorization of districts will offer a less reliable answer to that inquiry.<sup>153</sup>

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<sup>149</sup> Texas Trial Brief, *supra* note 76, at 3; *see also id.* (“Though so-called ‘influence districts’ no longer present a viable option to avoid retrogression, 42 U.S.C. § 1973c(a), [Section] 5 still ‘does not dictate that a State must pick’ one method of redistricting. Instead, States retain ‘the flexibility to choose one theory of effective representation over the other.’”) (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 480, 482 (2003)).

<sup>150</sup> *See* Texas Trial Brief, at 3–5.

<sup>151</sup> *See id.* at 5–7.

<sup>152</sup> *Id.* at 6.

<sup>153</sup> *Id.*

The DOJ countered that Texas’ proposed functional analysis—a “novel theory”—would “reward the State for packing districts that already provide an ability to elect or provide for ‘influence districts’ by giving credit for marginally improving performance in a district where minority voters cannot usually elect candidates of choice.”<sup>154</sup> The DOJ also said that Texas’ approach was legally unsupported because the 2006 VRA revisions “repudiated any approach that would aggregate minority influence within and across districts that minority voters did not actually have the ability to control.”<sup>155</sup> Finally, DOJ criticized the state’s decision to ignore local elections, stating that legal precedent has found those elections to be “the most probative and relevant contests when assessing racially polarized voting.”<sup>156</sup>

### Coalition/Crossover Districts

An analysis of DOJ’s objections also shows that DOJ takes the position that Section 5 protects coalition and crossover districts from retrogression, despite Congress’s arguable ambiguity on the subject. Professor Nathaniel Persily described the dispute over coalition and crossover districts at the Commission’s briefing. He said that “Republicans interpret the retrogression standard to be limited to the protection of ‘naturally occurring majority minority districts,’” such that a district is not subject to protection where its minority community does not constitute a majority.<sup>157</sup> For Democrats, however, “no such bright line exists. The ‘ability to elect’ [instead] depends on a myriad of factors ....”<sup>158</sup>

The DOJ articulated its view on coalition and crossover districts in its summary judgment pleadings in the Texas litigation. The Department explained:

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<sup>154</sup> DOJ Post-Trial Brief, *supra* note 34, at 2–3.

<sup>155</sup> *Id.* at 3.

<sup>156</sup> *Id.*

<sup>157</sup> Persily Statement, *supra* note 61, at 9.

<sup>158</sup> *Id.*; *see also* Lewis Statement at 72, at 7–3 (describing a dispute between Democrats and Republicans in the Georgia legislature regarding whether Section 5 requires covered jurisdictions to create coalition/crossover districts).

The text of Section 5, as amended by Congress just five years ago, is broad enough to protect [coalition districts]. By its terms, Section 5 protects any citizens against the adoption of voting changes that have the purpose or effect of denying or abridging their right to vote “on account of race or color.” This broad protection is not limited to those voting changes adversely affecting individuals of a single race only. For example, the adoption of a “Whites-only” primary would simultaneously deny the voting rights of both Blacks and Hispanics (and, indeed, individuals of any other race), and could be challenged by either, or both in concert.<sup>159</sup>

The DOJ then cited the VRARA House Report for its reading of the statute’s new language:

The House Report on the 2006 amendments, which the Supreme Court has regarded as authoritative, *see Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) (citing the report repeatedly), explains that, under the new language, “[v]oting changes that leave a minority group less able to elect a preferred candidate of choice, *either directly or when coalesced with other voters*, cannot be precleared under Section 5.” H.R. Rep. No. 109-478, at 712 (2006) (emphasis added). Thus, Congress expected the amended Section 5 to protect coalition districts, *i.e.*, those in which minority citizens of more than one racial group are able to elect a preferred candidate of choice when they coalesce.<sup>160</sup>

The DOJ concluded:

In our view, the text and legislative history of Section 5 of the Voting Rights Act, including the 2006 amendments, stand as the clearest expression of Congressional intent on this issue. Congress plainly contemplated the protection of districts where minority voters are electorally cohesive under Section 5. Even without benefit of such a clear statement of congressional intent, most circuits have reached a similar view with respect to Section 2.<sup>161</sup>

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<sup>159</sup> DOJ Summary Judgment Brief, *supra* note 34, at 14.

<sup>160</sup> *Id.* at 14-15; *see also id.* at 15-18 (describing the case law regarding Section 5’s protection of coalition districts).

<sup>161</sup> *Id.* at 18.

The district court agreed with DOJ's legal position, concluding that Section 5 protects preexisting coalition and crossover districts. It held that, "[s]ince coalition and crossover districts provide minority groups the ability to elect a preferred candidate, they must be recognized as ability districts in a Section 5 analysis of a benchmark plan. Coalition and crossover districts that continue unchanged into a proposed plan must be counted as well."<sup>162</sup>

The court also rejected Texas's contention that Congress overturned *Georgia v. Ashcroft's* use of coalition districts as having "no support in the text of the Amendments themselves and misread[ing] the legislative history."<sup>163</sup>

Nevertheless, Texas claimed during the course of its preclearance litigation that Section 5 does not protect coalition districts and urged the court to reconsider its holding. In particular, Texas relied on a sentence in the Supreme Court's subsequent decision in *Perry v. Perez*,<sup>164</sup> a parallel dispute over interim redistricting maps created by a local federal court in Texas while DDC conducted judicial preclearance. The Supreme Court, commenting on an ambiguous section of the lower court's decision that could indicate the intentional creation of a coalition district, said, "[i]f the District Court did set out to create a minority coalition district, rather than drawing a district that simply reflected population growth, it had no basis for doing so. Cf. *Bartlett v. Strickland*, 556 U.S. 1, 13–15 (2009) (plurality opinion)."<sup>165</sup> According to Texas, *Perez* extended the Court's holding in *Bartlett v. Strickland*—that Section 2 of the VRA does not protect coalition districts—to Section 5 as well.<sup>166</sup>

DOJ has acted to protect coalition/crossover districts under Section 5 in two instances in the current redistricting cycle. In both examples, DOJ interpreted Section 5 to prohibit retrogression of preexisting coalition/crossover districts. Notably, neither instance addressed whether Section 5 requires the creation of *new* coalition/crossover districts.

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<sup>162</sup> DDC Summary Judgment Opinion, *supra* note 111, at 36.

<sup>163</sup> *Id.* at 35; *see also id.* at 35–36 n.30 (rejecting Texas's reliance on the VRARA Senate Report as evidence of legislative history).

<sup>164</sup> *Perry v. Perez*, slip op., 565 U.S. \_\_\_ (2012).

<sup>165</sup> *Id.* slip op. at 10.

<sup>166</sup> *See* Texas Trial Brief, *supra* note 76, at 8 ("Following *Perez*, a district court ... has no remedial authority under § 2 or § 5 to draw districts composed of either minority-majority or minority-minority coalitions. ... In light of *Perez*, this Court should reconsider its decision concerning coalition districts.") (citation omitted).

In the Texas dispute, DOJ took the position that Section 5 required the state to protect House District 149; the Department determined that House District 149 was an ability-to-elect district because 61 percent of the district's citizen voting-age population consisted of a coalition of Hispanic, African-American and Asian-American voters that have voted cohesively to elect a minority-preferred candidate.<sup>167</sup> Texas had eliminated that district in its proposed plan.<sup>168</sup>

In another example, in October 2011, DOJ objected to a police-jury redistricting plan from East Feliciana Parish, LA based on crossover-voting analysis. DOJ determined that a district that was approximately 53 percent black had “a consistent level of crossover voting by white persons for black-preferred candidates,” as well as persistent racial bloc voting. The DOJ rejected the parish's proposal, which would have lowered the percentage of African Americans in the district. Based on DOJ's analysis, “black voters in the proposed district [would] no longer have the ability to elect a candidate of choice to office.”<sup>169</sup>

### Proportional Retrogression

Finally, DOJ has objected to redistricting proposals where the covered jurisdiction does not increase the number of ability-to-elect districts when the number of seats in an electoral body expands, thus decreasing the proportion of influence that minority groups have overall. As Professor Keith Gaddie explained at the Commission's briefing, the scenario occurs when “[t]he number of opportunities in terms of the number of districts [are] maintained, but the proportion is not.”<sup>170</sup> This fact pattern has arisen in two distinct scenarios: when the representative body expands at the jurisdiction's own volition; and when the expansion is non-discretionary, such as because of Congressional reapportionment.

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<sup>167</sup> DOJ Post-Trial Brief, *supra* note 34, at 10–11.

<sup>168</sup> *Id.* at 10.

<sup>169</sup> Feliciana Parish Objection, *supra* note 122, at 2.

<sup>170</sup> Briefing Transcript, *supra* note 60, at 17:7–9 (Gaddie Testimony) (“So when we see objections occurring, it is in part because the change in the denominator of seats often through the use of either at-large or flotal districts, is resulting in a reduction of minority influence in terms of opportunities to elect.”).

The DOJ addressed proportional retrogression due to discretionary expansion of an elected body in its 2009 Lowndes County, GA objection: DOJ challenged the county’s proposal to expand a three-member commission to five members by adding two new single-member districts. The new districts would have each covered half the county, overlapping the current districts. The DOJ calculated that, although African Americans currently have the ability to elect one of the county’s three commissioners, they would not be able to elect either of the commissioners in the new districts—thus reducing the proportion of commissioners elected by the African-American community from 1:3 to 1:5. Even though the proposal would retain the old ability-to-elect district, DOJ concluded that the plan “places black voters in a worse electoral position than under the benchmark plan” and was therefore retrogressive.<sup>171</sup>

The DOJ followed a different line of analysis where congressional reapportionment caused an increase in the number of elected officials that was outside the jurisdiction’s control. This issue arose in the Texas preclearance litigation,<sup>172</sup> where DOJ confronted a scenario in which Texas was apportioned four new congressional seats, fueled mostly by growth of the state’s Hispanic population.

The DOJ took the position that, by failing to increase the number of Hispanic ability-to-elect districts, Texas’s congressional redistricting plan constituted unlawful retrogression. According to DOJ, when “the number of seats available for election” increases, the appropriate inquiry “is whether the proposed plan is ‘more dilutive’ than the plan it replaces. Such a plan necessarily ‘increase[s] the degree of discrimination against a minority population’ and is therefore not entitled to preclearance.”<sup>173</sup> DOJ explained:

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<sup>171</sup> Lowndes County Objection, *supra* note 121, at 2.

<sup>172</sup> See generally Persily Statement, *supra* note 61, at 33–34 (explaining that a decreasing share of ability districts over the total number of districts could provide circumstantial evidence of a discriminatory purpose if reapportionment led to increased congressional districts due to increasing minority populations without any new majority-minority districts being created).

<sup>173</sup> DOJ Post-Trial Brief, *supra* note 34, at 14–15.

One gauge of whether the degree of discrimination has increased is to assess the gap between the actual number of minority ability districts and the number of districts that would be roughly proportional to the minority share of the citizen voting age population. The degree of discrimination increases if this gap widens.<sup>174</sup>

Based on this metric, DOJ concluded that Texas’s “gap” widened. Were Texas to allot districts proportionally, then Texas’s Hispanic community—which represents 39.3 percent of the state’s population—would have 13 ability-to-elect districts in the 32-seat benchmark plan and 14 ability-to-elect districts in the 36-seat proposed plan. According to DOJ, because both the benchmark plan and the proposed plan included 10 ability-to-elect districts, the “representation gap” increased from three to four seats, and thus constituted retrogression.<sup>175</sup> Notably, to the Commission’s knowledge, this was the first time such a factual scenario has ever existed in a covered jurisdiction.

Texas criticized DOJ’s analysis, responding that Section 5 imposes no such requirement. “A [redistricting] plan preserves minority voting strength so long as it assures the ability to elect an equal or greater number of minority-preferred candidates,”<sup>176</sup> Texas reasoned. As such, “Section 5 does not require a jurisdiction to increase the expected number of minority-preferred electoral victories to account for relative increases in minority populations.”<sup>177</sup> According to Texas, “maintaining the same number of ability-to-elect districts,” as it did, “is not retrogressive. That is so irrespective of minority population growth.”<sup>178</sup>

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<sup>174</sup> *Id.* at 15 (citations omitted). The DOJ believes that its proportional-retrogression metric is consistent with *Abrams v. Johnson*, 521 U.S. 74, 97 (1997), which held that the nonretrogression principle forbids any decrease in the proportion of ability-to-elect seats. *See id.* at 14-15.

<sup>175</sup> *See id.* at 16.

<sup>176</sup> Texas Trial Brief, *supra* note 76, at 2 (citing *Abrams v. Johnson*, 521 U.S. 74, 97-98 (1997)).

<sup>177</sup> *Id.* (citing *Abrams*, 521 U.S. at 97-98; 42 U.S.C. § 1973(b) (“Nothing in [the Voting Rights Act] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”))

<sup>178</sup> *Id.* at 16 (citing *Abrams*, 521 U.S. at 97-98; DDC Summary Judgment Opinion, *supra* note 111, at 139).

## Discriminatory Purpose

Section 5 requires covered jurisdictions to show that their proposed voting changes, including redistricting plans, do not have any discriminatory purpose. DOJ and courts begin their analysis with the framework established by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.<sup>179</sup> *Arlington Heights* provides a non-exhaustive list of factors to consider when determining the existence of unlawful discriminatory purpose. The factors include the impact of a government decision on minority groups; the decision's historical background; the sequence of events leading up to the decision; any departure from normal procedures in the decision-making process; and the legislative or administrative history of the decision.<sup>180</sup> Using these, and sometimes other, factors to analyze evidence, DOJ and courts determine whether a covered jurisdiction has met its burden to show that it did not draft its redistricting plan with unlawful discriminatory intent.

### Background

The Supreme Court first addressed Section 5's discriminatory-purpose standard in an annexation case in 1975, *City of Richmond v. United States*. It explained that “[a]n official action . . . taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the Statute. Section 5 forbids voting changes taken with the purpose of denying the vote on the grounds of race or color.”<sup>181</sup> The Court drew a distinction between the effect prong and the purpose prong, noting that the purpose prong can be violated even where there is no discriminatory effect.<sup>182</sup>

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<sup>179</sup> 429 U.S. 252 (1977).

<sup>180</sup> *See id.* at 266–68; DOJ Guidance, *supra* note 7, at 7471.

<sup>181</sup> *City of Richmond v. U.S.*, 422 U.S. 358, 378 (1975).

<sup>182</sup> *See id.*; *City of Pleasant Grove v. U.S.*, 479 U.S. 462, 472 n.11 (1987) (rejecting the argument “that a covered jurisdiction can short-circuit a purpose inquiry under § 5 by arguing that the intended result was not impermissible under an objective effects inquiry. . . . We rejected such reasoning in *City of Richmond* . . .”); *see also Beer v. United States*, 425 U.S. 130, 141 (1975) (“an ameliorative new legislative apportionment [such as the one at issue in *Beer* that had no discriminatory effect] cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.”); Payton McCrary et al., *The End of Preclearance as We Know It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 284 (2006) (interpreting the reference in *Beer* to discrimination that would “violate the Constitution” to be a reference to the purpose standard).

For several decades, the Justice Department and courts understood Section 5's discriminatory-purpose standard to prohibit any discriminatory purpose, regardless of the discriminatory effect. This standard proved to be expansive. For instance, in 1978, in *Wilkes County, GA v. United States*,<sup>183</sup> the trial court found discriminatory purpose where the jurisdiction selected a voting change to at-large elections that minimized minority voting strength but did not provide reasoning for rejecting alternative options that did not have that effect. The court explained:

[T]he record demonstrates that alternate options for satisfying one person, one vote standards were available and the record does not demonstrate the reason for selecting the at-large method over other options. Such is particularly true in this case since it appears that the at-large method would retain black voting strength at a minimum level while alternate options would enhance black voting strength.<sup>184</sup>

In the 1983 case, *Busbee v. Smith*,<sup>185</sup> the trial court rejected a Georgia congressional redistricting plan that caused no retrogression—it even increased the African-American population in one of its districts—but was “designed to minimize black voting strength to the extent possible.”<sup>186</sup> The court noted, for example, that the plan’s architect told his colleagues, “I don’t want to draw n\*\*\*\*\* districts.”<sup>187</sup>

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<sup>183</sup> 450 F. Supp. 1171 (D.D.C.), *aff'd*, 439 U.S. 999 (1978).

<sup>184</sup> *See id.* at 1178 (citing *City of Richmond* at 378).

<sup>185</sup> 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

<sup>186</sup> *Id.* at 518.

<sup>187</sup> *Id.* at 501; *see also id.* at 516 (“Simply demonstrating that a plan increases black voting strength does not entitle the State to the declaratory relief it seeks; the State must also demonstrate the absence of a discriminatory purpose.”) (citing *City of Richmond*); *id.* at 518 (“The Court’s decision does not require the State of Georgia to maximize minority voting strength in the Atlanta area. The State is free to draw the districts pursuant to whatever criteria it deems appropriate so long as the effect is not racially discriminatory and so long as a racially discriminatory purpose is absent from the process. [The map] is being denied Section 5 preclearance because State officials successfully implemented a scheme designed to minimize black voting strength to the extent possible; the plan drawing process was not free of racially discriminatory purpose.”).

In order to determine whether a jurisdiction's conduct involved discriminatory purpose, DOJ<sup>188</sup> and courts<sup>189</sup> used factors developed by the Supreme Court in *Arlington Heights* a 1977 case that addressed intent in the context of housing discrimination. According to *Arlington Heights*, “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”<sup>190</sup> Factors include: (1) the impact of a government decision on minority groups; (2) the decision's historical background; (3) the sequence of events leading up to the decision; (4) any departure from normal procedures in the decision-making process; and (5) the legislative or administrative history of the decision.<sup>191</sup> The Supreme Court ultimately approved the use of the so-called *Arlington Heights* factors in Section 5 cases.<sup>192</sup>

The DOJ's use of the purpose standard increased over time, and by the 1990s nearly half of DOJ's redistricting objections were based solely on intent.<sup>193</sup> By that time, controversy surrounded how DOJ enforced Section 5's purpose prong. John Dunne, the Assistant Attorney General for Civil Rights from 1990 to 1993, explained DOJ's understanding of the purpose standard during his tenure:

A discriminatory purpose means a design or desire to restrict a minority group's voting strength, that is, the ability of that group to elect candidates of its choice, below the level that minority might otherwise have enjoyed....

[D]iscriminatory purpose does not mean the intentional adoption of a plan that gives a minority group control of less than a proportional or maximum number of districts. A minority group is not automatically entitled to a proportional redistricting plan. Disparate effects alone, even when they are totally foreseen, do not equal discriminatory purpose under Section [5] ....

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<sup>188</sup> See DOJ Interrogatory Response, *supra* note 23, at 3 (“The Department has relied upon *Arlington Heights* in voting rights cases for several decades.”).

<sup>189</sup> See, e.g., *Busbee*, 549 F. Supp. at 516–18.

<sup>190</sup> *Id.* at 266.

<sup>191</sup> See *id.* at 266–68; DOJ Guidance, *supra* note 7, at 7471.

<sup>192</sup> See *Reno v. Bossier Parish Sch. Bd. (Bossier I)*, 520 U.S. 471, 488–89 (1997) (“In conducting this inquiry, courts should look to our decision in *Arlington Heights* for guidance. There, we set forth a framework for analyzing ‘whether invidious discriminatory purpose was a motivating factor’ in a government body’s decisionmaking. In addition to serving as the framework for examining discriminatory purpose in cases brought under the Equal Protection Clause for over two decades, ... the *Arlington Heights* framework has also been used, at least in part, to evaluate purpose in our previous § 5 cases.”) (citations omitted); see also *United Jewish Orgs. Of Williamsburgh v. Carey*, 430 U.S. 144, 177–78 n.6 (1977) (Brennan, J., concurring) (citing *Arlington Heights*).

<sup>193</sup> See Payton McCrary et al., *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 299 (2006).

Disparate effects, however, do need to be explained in a Section [5] submission so that we can be sure that the state has satisfied its burden of proving the absence of racially discriminatory purpose.<sup>194</sup>

Critics, however, accused DOJ of engaging in an explicit policy of objecting to redistricting maps that did not maximize the number of possible majority-minority districts.<sup>195</sup> This controversy came to a head in the 1995 Supreme Court case *Miller v. Johnson*.<sup>196</sup> In that case, the Supreme Court criticized the alleged requirement that Georgia maximize its number of majority-minority districts to obtain preclearance,<sup>197</sup> even as DOJ denied that such a policy existed.<sup>198</sup> The Court rejected as “insupportable” DOJ’s objection where Georgia asserted that it did not maximize the number of majority-minority districts due to other redistricting principles.<sup>199</sup> The Court stated:

Instead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts. Although the Government now disavows having had that policy ... and seems to concede its impropriety ..., the District Court’s well-documented factual finding was that the Department did adopt a maximization policy and followed it in objecting to Georgia’s first two plans.<sup>200</sup>

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<sup>194</sup> John R. Dunne, Remarks at National Conference of State Legislators (Aug. 13, 1991), *quoted in* MAURICE T. CUNNINGHAM, *MAXIMIZATION WHATEVER THE COST: RACE, REDISTRICTING AND THE DEPARTMENT OF JUSTICE* 74 (2001); *see also* Mark A. Posner, *The Real Story Behind the Justice Department’s Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 *DUKE J. CONST. L. & PUB. POL’Y* 79, 145 (2006) (“[W]here a plan substantially minimized minority voting strength [even without retrogression], and that minimization was not required by adherence to traditional race neutral districting principles, the jurisdiction bore the burden of demonstrating through specific evidence that discriminatory purpose did not play a role in the selection of the districting lines.”).

<sup>195</sup> *See, e.g.*, Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now a Murky Mess*, 5 *GEO. J. L. & PUB. POL’Y* 41 (2007).

<sup>196</sup> 515 U.S. 900 (1995).

<sup>197</sup> *See id.* at 916–20, 23–27.

<sup>198</sup> *Id.* at 924–25.

<sup>199</sup> *Id.* at 924.

<sup>200</sup> *Id.* at 924–25 (citations omitted).

Finally, in 2000, the Supreme Court narrowed the scope of Section 5's purpose standard in *Reno v. Bossier Parish Sch. Bd. (Bossier II)*.<sup>201</sup> The Court held that 'purpose' is solely limited to *intent to retrogress*.<sup>202</sup> The Court reasoned that treating 'purpose' and 'effect' differently "is simply an untenable construction of [Section 5's] text, in effect recasting the phrase 'does not have the purpose and will not have the effect of x' to read 'does not have the purpose of y and will not have the effect of x.'" As we have in the past, we refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying."<sup>203</sup>

After *Bossier II*, the only conduct that could conceivably violate Section 5's purpose prong, without simultaneously violating the effect prong, would be the case of an "incompetent retrogressor" that attempted to retrogress but failed in the endeavor.<sup>204</sup> This significantly limited the scope of conduct to which DOJ or DDC could object, and at least one study has attributed the Court's decision to a decrease in the volume of subsequent DOJ objections.<sup>205</sup>

Congress took issue with the *Bossier II* standard when it reauthorized the Voting Rights Act in 2006, and it revised Section 5 to overturn the *Bossier II* decision and return to the pre-*Bossier II* 'purpose' standard. The House Judiciary Committee explained in the VRARA House Report that the revisions:

. . . . make clear that Congress rejects the Supreme Court's holding in *Reno v. Bossier Parish*, by making clear that, contrary to that decision, 'retrogression' is not the only violation of voting rights the preclearance procedures protect against, and that a voting rule change motivated by any discriminatory purpose also cannot be precleared.<sup>206</sup>

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<sup>201</sup> 528 U.S. 320 (2000).

<sup>202</sup> *Id.* at 328 ("When considered in light of our longstanding interpretation of the 'effect' prong of § 5 in its application to vote-dilution claims, the language of § 5 leads to the conclusion that the 'purpose' prong of § 5 covers only retrogressive dilution.").

<sup>203</sup> *Id.* at 329. Notably, the Court concluded that *City of Richmond* solely applied to annexations. *Id.* at 331–32.

<sup>204</sup> *See id.* at 332.

<sup>205</sup> *See McCrary et al., supra* note 193, at 299, 313–15 ("the effect of redefining purpose under Section 5 as extending only so far as an 'intent to retrogress' was potentially to reduce the number of objections substantially from the level found in the 1990s").

<sup>206</sup> H.R. Rep. 109-478, at 93 (2006).

Specifically, Congress inserted a new definition of “purpose,” explicitly stating that it “shall include *any* discriminatory purpose.”<sup>207</sup> The House Report stated that, “by clarifying that any voting change motivated by any discriminatory purpose is prohibited under Section 5, the Committee seeks to ensure that the ‘purpose’ prong remains a vital element to ensuring that Section 5 remains effective.”<sup>208</sup>

Congress also replaced the statute’s main standard (“does not have the purpose and will not have the effect”) with new language (“neither has the purpose nor will have the effect”); according to the House Report, this revision was intended to “make[] clear that both prongs must be satisfied before a voting change must be precleared.”<sup>209</sup>

The House Judiciary Committee also encouraged the already-common practice of using the *Arlington Heights* factors to determine whether discriminatory purpose exists. The House Report concluded that the factors “provide an adequate framework for determining whether voting changes submitted for preclearance were motivated by a discriminatory purpose .... In weighing each of these factors, the Committee believes that a proper and fair determination may be made as to whether a voting change was motivated by a discriminatory intent.”<sup>210</sup>

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<sup>207</sup> 42 U.S.C. § 1973c(c) (emphasis added).

<sup>208</sup> H.R. Rep. 109-478, at 68 (2006).

<sup>209</sup> *Id.* at 65 n.168.

<sup>210</sup> *Id.* at 68.

The Senate Judiciary Committee also weighed in on the meaning of the new statutory language.<sup>211</sup> It stated in the Senate VRARA Report that the new discriminatory-purpose standard only limits states from engaging in practices with an unconstitutional racially-discriminatory purpose.<sup>212</sup> It also asserted that the revised statute does not require protection of crossover districts,<sup>213</sup> nor does it “permit a finding of discriminatory purpose that is based, in whole or in part, on a failure to adopt the optimal or maximum number of majority-minority districts or compact minority opportunity districts.”<sup>214</sup>

### Revised Procedures and Guidance

The DOJ’s revised procedures and guidance, issued in 2011, implemented the newly-revised purpose standard, and provided insight into how DOJ understood the new statute.

In addition to revising its procedures to account for the new statutory language and provide consistent terminology throughout,<sup>215</sup> DOJ included a new definition for discriminatory purpose:

A change affecting voting is considered to have a discriminatory purpose under [S]ection 5 if it is enacted or sought to be administered with any purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The term ‘purpose’ in [S]ection 5 includes any discriminatory purpose. 42 U.S.C. 1973c. The Attorney General’s evaluation of discriminatory purpose under [S]ection 5 is guided by the analysis in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).<sup>216</sup>

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<sup>211</sup> As discussed *supra* pp. 41, because the Senate VRARA Report was released *after* Congress voted to approve the VRARA, it does not generally receive significant weight as evidence of Congress’s legislative intent.

<sup>212</sup> See S. Rep. 109-210, at 16 (2006) (“The federal government should not be giving its seal of approval to practices that violate the Constitution. Under this amendment, which forbids voting changes motivated by ‘any discriminatory purpose,’ it will not do so.”).

<sup>213</sup> *Id.* at 17–18 (“The adopted language does not prevent a state official from declining to combine a group of minority voters with a group of white voters who tend to support the same parties and candidates in a district where candidates supported by minorities will reliably prevail.”).

<sup>214</sup> *Id.* at 18.

<sup>215</sup> See 28 C.F.R. §§ 51.1, 51.10, 51.11, 51.44, 51.48(b), 51.48(c), 51.52(a), 51.52(b), 51.52(c), 51.54, 51.55(a).

<sup>216</sup> *Id.* § 51.54(a).

The DOJ also amended the list of factors it considers in its discriminatory-purpose analysis to incorporate the *Arlington Heights* decision. The new list now includes: (1) whether the action’s impact “bears more heavily on one race than another;” (2) “the historical background of the decision;” (3) “the specific sequence of events leading up to the decision;” (4) “whether there are departures from the normal procedural sequence;” (5) “whether there are substantive departures from the normal factors considered;” and (6) the “legislative or administrative history, including contemporaneous statements made by the decision makers.”<sup>217</sup>

Finally, the revised procedures stated that “[a] jurisdiction’s failure to adopt the maximum possible number of majority-minority districts may not be the sole basis for determining that a jurisdiction was motivated by a discriminatory purpose.”<sup>218</sup> Notably, DOJ’s procedures do not address the Senate Report’s assertion that such failure may not be used “in whole *or part*.”<sup>219</sup> Theoretically, a jurisdiction’s failure to maximize the number of majority-minority districts can be part of DOJ’s overall calculus.

The DOJ’s 2011 guidance largely mirrored its procedures, but with greater detail. For example, it addressed the 2006 amendments to the VRA, noting that “the term ‘purpose’ in Section 5 includes ‘any discriminatory purpose,’ and is not limited to a purpose to retrogress, as was the case after the Supreme Court’s decision in [*Bossier II*].”<sup>220</sup> The DOJ explained that “[d]irect evidence detailing a discriminatory purpose may be gleaned from the public statements of members of the adopting body or others who may have played a significant role in the process.”<sup>221</sup> It also said that it will evaluate “whether there are instances where the invidious element may be missing, but the underlying motivation is nonetheless intentionally discriminatory.”<sup>222</sup> As an analogy, the new guidance referenced an example provided by Ninth Circuit Judge Kozinski in *Garza and United States v. County of Los Angeles*:

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<sup>217</sup> *Id.* § 51.57(e).

<sup>218</sup> *See id.* § 51.59(b).

<sup>219</sup> *See* S. Rep. 109-295, at 18 (emphasis added).

<sup>220</sup> DOJ Guidance, *supra* note 7, at 7471.

<sup>221</sup> *Id.* (citing *Busbee v. Smith*, 549 F. Supp. 494, 508 (D.D.C. 1982)).

<sup>222</sup> *Id.*

“Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose, further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don’t matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.”<sup>223</sup>

According to DOJ, its analysis of circumstantial evidence will be guided by the “illustrative, but not exhaustive” *Arlington Heights* factors.<sup>224</sup> Finally, DOJ maintained that “[t]he single fact that a jurisdiction’s proposed redistricting plan does not contain the maximum possible number of districts in which minority group members are a majority of the population or have the ability to elect candidates of choice to office, does not mandate that the Attorney General interpose an objection based on a failure to demonstrate the absence of a discriminatory purpose.”<sup>225</sup>

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<sup>223</sup> *Id.* (quoting *Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part), *cert. denied*, 498 U.S. 1028 (1991)).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

## DOJ Enforcement

Between Congress's revision to Section 5 in 2006 and December 31, 2011, DOJ only objected to five redistricting plans due to discriminatory purpose. Those submissions were a 2008 method-of-election and redistricting submission from Charles Mix County, SD,<sup>226</sup> a 2008 annexation and redistricting submission for the City of Calera, AL,<sup>227</sup> a 2009 redistricting plan for Lowndes County, GA's county commission,<sup>228</sup> a 2011 redistricting plan for East Feliciana Parish, LA,<sup>229</sup> and a 2011 redistricting plan for Amite County, MS's board of supervisor and election commissioner districts.<sup>230</sup> DOJ also challenged Texas's state house and congressional redistricting plans in federal court when Texas sought judicial preclearance.<sup>231</sup> Notably, only the Charles Mix County objection was based solely on discriminatory intent; DOJ's other objections and its challenge to the Texas plans were also based on the redistricting plans' discriminatory effect.

As with discriminatory effect,<sup>232</sup> the sample size of intent-based objections is too small to determine any conclusive trends. Purpose inquiries, in particular, are inherently fact-specific, and uniquely tailored to circumstances on the ground. Nevertheless, analysis of DOJ's objections brings two issues to light. First and foremost, DOJ's overall approach to the revised purpose standard appears to be relatively conservative, as its objections tend to be justifiable under the pre-2006 purpose-to-retrogress standard. Second, in light of polarized voting and current political-party alignment, the purpose inquiry necessarily raises difficult questions regarding the distinction between unlawful intent to discriminate based on race, ethnicity, or language minority status, and legal intent to discriminate based on partisan political affiliation.

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<sup>226</sup> See Letter from Grace Chung Baker, Acting Asst. Atty. Gen'l, to Sara Frankenstein, Gunderson, Palmer, Goodsell & Nelson, Feb. 11, 2008, available at [http://www.justice.gov/crt/about/vot/sec\\_5/pdfs/1\\_021108.php](http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_021108.php) [hereinafter Charles Mix County Objection].

<sup>227</sup> See Letter from Grace Chung Baker, Acting Asst. Atty. Gen'l, to Dan Head, Esq., Wallace, Ellis, Fowler & Head, Aug. 25, 2008, available at [http://www.justice.gov/crt/about/vot/sec\\_5/pdfs/1\\_082508.php](http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_082508.php).

<sup>228</sup> See Lowndes County Objection, *supra* note 121.

<sup>229</sup> See Feliciana Parish Objection, *supra* note 122.

<sup>230</sup> See Amite County Objection, *supra* note 123.

<sup>231</sup> See DOJ Post-Trial Brief, *supra* note 34.

<sup>232</sup> See *supra* p. 43.

### DOJ's Conservative Approach

At the Commission's briefing, Professor Guy-Uriel Charles of Duke Law School concluded that, even though Congress amended Section 5 to overturn the *Bossier II* purpose-to-retrogress standard, most of the Department's objections can be understood as being based on the *Bossier II* standard.<sup>233</sup> Indeed, most of DOJ's objections explicitly based their determinations, at least in part, on jurisdictions' intent to retrogress.

For example, the 2008 Charles Mix County objection challenged a South Dakota county's proposal to expand its county commission from three to five members, timed immediately after the election of the first Native American to the Commission. In addition to noting the impact that the proposed plan would have on Native Americans, and the history of discrimination against Native Americans in the county, DOJ concluded that "the historical background and the sequence of events leading to these voting changes also support an inference of intentional retrogression of Native American voting strength by the county."<sup>234</sup>

Similarly, DOJ's 2009 Lowndes County, GA objection blocked a proposal to expand a three-member commission to five members by adding two new single-member districts.<sup>235</sup> According to DOJ, because the plan's retrogressive impact was easily avoidable, and because the county deviated from its own redistricting criteria to draft the plan, it could not determine "that the county ha[d] met its burden of showing that the proposed plan was not adopted, at least in part, with the purpose of making minority voters worse off."<sup>236</sup>

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<sup>233</sup> See Briefing Transcript, *supra* note 60, at 32:15–18 (Charles Testimony); *id.* at 32:14–16 (Charles Testimony) ("It seems that the reversal of *Bossier II* really matters less in practice as it does in theory."); *id.* at 78:15–80:5 (Charles Testimony).

<sup>234</sup> Charles Mix County Objection, *supra* note 226, at 2.

<sup>235</sup> For additional discussion, see *supra* p. 54.

<sup>236</sup> Lowndes County Objection, *supra* note 121, at 2.

The DOJ made a similar determination in its 2011 Feliciana Parish objection, which stopped a redistricting plan that would have reduced the African-American population in a crossover ability-to-elect district.<sup>237</sup> The DOJ took issue with the Parish's decision to move a new community into the district; as part of its purpose analysis, it stated that "[t]here appears to be little, if any, dispute that combining the [new] area into [the district] is tantamount to choosing to reduce minority voting strength."<sup>238</sup> DOJ also concluded that the Parish's rationale for its redistricting decision was pretextual, as the proffered goal (preventing district under-population) was not actually achieved by the redistricting proposal and, in any event, could have been met through other means that maintained minority voting strength. The DOJ concluded that the Parish's actions "constitute credible evidence that [the district's] configuration in the proposed plan was driven by a belief that minority voters have the ability to elect a candidate of choice in the district under the benchmark, and that ability should be eliminated under the proposed plan."<sup>239</sup>

Finally, DOJ's 2011 objection to Amite County, MS's redistricting plan challenged the county's decision to reduce the African-American population in one of its districts.<sup>240</sup> Again, DOJ concluded, in part, that the county's plan "was motivated by a desire to reduce the minority population and minority voting strength in [a district that was likely to elect an African-American candidate of choice]."<sup>241</sup>

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<sup>237</sup> For additional discussion, see *supra* p. 53.

<sup>238</sup> Feliciana Parish Objection, *supra* note 122, at 3.

<sup>239</sup> *Id.* at 4.

<sup>240</sup> For additional discussion, see *supra* p. 46.

<sup>241</sup> Amite County Objection, *supra* note 123, at 3.

The DOJ made a retrogressive-intent argument in the Texas preclearance litigation as well. Based on its analysis of Texas's proposed maps and discovery, DOJ concluded that "Texas consciously drew boundary lines to eliminate the ability of minority voters to elect their preferred candidates using a variety of techniques."<sup>242</sup> The DOJ reached this conclusion due to the state's alleged practices of "substituting low-turnout Hispanic voters for those more likely to turn out and splitting precincts to draw boundaries using racial data."<sup>243</sup> In particular, DOJ uncovered evidence that an attorney on the Texas House Speaker's staff suggested the use of metrics to increase a district's Hispanic population while keeping turnout low.<sup>244</sup>

The DOJ's apparent retrogressive-intent approach is notable given the potential breadth of the "any discriminatory purpose" standard<sup>245</sup> and the controversies surrounding DOJ's use of the 'purpose' standard in the 1980s and 1990s.<sup>246</sup> Indeed, it appears that, unlike the application of the 'purpose' standard alleged in *Miller v. Johnson*<sup>247</sup> in 1995, DOJ has not been requiring covered jurisdictions to maximize the number of ability-to-elect districts available. For instance, DOJ precleared a state house of representatives redistricting plan submitted by Louisiana that could have included an additional African-American ability-to-elect district,<sup>248</sup> and it did so over the objections of several civil rights groups.<sup>249</sup>

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<sup>242</sup> DOJ Post-Trial Brief, *supra* note 34, at 23.

<sup>243</sup> *Id.*

<sup>244</sup> *See id.* at 21.

<sup>245</sup> *See, e.g.*, Briefing Transcript, *supra* note 60, at 26:8–13 (Persily Testimony) ("[T]he purpose prong of the Voting Rights Act is a very powerful tool the DOJ can use because the burden of proof is on the jurisdiction to show that a redistricting plan or other voting law is passed without a discriminatory purpose."); Persily Statement, *supra* note 61, at 10–11 ("[E]valuations of purpose ... necessarily entail the exercise of considerable discretion. Factors that appear discriminatory to some will not appear so to others, and different decisionmakers will provide different evaluations of the balance of factors suggesting discriminatory purpose.").

<sup>246</sup> *See, e.g.*, Briefing Transcript, *supra* note 60, at 74:6–9 (Statement by Vice Chair Thernstrom) ("[In the] 1980s, particularly 1990s ... the purpose standard was used to deny preclearance to anything that walked and talked, as it were. I mean, everything in sight.").

<sup>247</sup> 515 U.S. 900 (1995); *see also supra* p. 59 (discussion of *Miller*).

<sup>248</sup> *See* Letter from Thomas E. Perez, Asst. Atty. Gen., to Jason Torchinsky, Esq., Holtzman Vogel (June 20, 2011) (preclearing the submission); Sandhya Somashekhar, *Louisiana Redistricting Case Seen as Crucial Test of Voting Rights Act*, WASH. POST (June 4, 2011), [http://www.washingtonpost.com/politics/louisiana-redistricting-case-seen-as-crucial-test-of-voting-rights-act/2011/05/25/AGCKT1IH\\_story.html](http://www.washingtonpost.com/politics/louisiana-redistricting-case-seen-as-crucial-test-of-voting-rights-act/2011/05/25/AGCKT1IH_story.html).

<sup>249</sup> *See* Comment Under Section 5 of the Voting Rights Act, Letter from John Payton, President & Director-Counsel, NAACP Legal Defense and Education Fund, Inc. *et al.*, to Chris Herren, Chief, Voting Section, Civil Rights Division, U.S. Department of Justice, May 13, 2011, *available at* [http://www.naacpldf.org/files/case\\_issue/DOJ%20Comment%20Letter--State%20House%20Map.pdf](http://www.naacpldf.org/files/case_issue/DOJ%20Comment%20Letter--State%20House%20Map.pdf) (last visited Feb. 16, 2012).

Panelists at the Commission’s briefing noted several implications of DOJ’s application of the new purpose standard. According to Professor Charles, DOJ’s approach may be “a matter of practicalities.”<sup>250</sup> He commented that “it is so much easier to administer this purpose to retrogress than it is to try to ferret out a broader sense of discriminatory purpose, except for where you can find it, which is often difficult to do.”<sup>251</sup> Professor Justin Levitt of Loyola Law School, Los Angeles concurred, explaining that “it is much easier to make an assessment based on the intent to retrogress standard.”<sup>252</sup> He reasoned that, particularly in the context of administrative, rather than judicial, preclearance, “[y]ou just have less evidence that you need. You have less evidence before you. When the litigation process continues and there is more opportunity to gain evidence, then you might have more access to the [*Arlington Heights* standard].”<sup>253</sup>

Professor Charles also stated that, as applied, “the Department has likely insulated [the purpose inquiry] from constitutional challenge” because “the Department has essentially anchored its guidelines for understanding discriminatory purpose squarely in standard equal protection doctrine.”<sup>254</sup>

### Race versus Partisanship

Determinations of discriminatory purpose can be difficult where voters’ race, ethnicity, or membership in a language minority group tends to correlate with political preference.<sup>255</sup> Whereas Section 5 prohibits discrimination based on the former, partisan gerrymandering is both legal and a common practice by each major political party. This dynamic came to a head in the Texas preclearance litigation.

<sup>250</sup> Briefing Transcript, *supra* note 60, at 33:5–6 (Charles Testimony).

<sup>251</sup> *Id.* at 80:13–16 (Charles Testimony); *see also* Charles Statement, *supra* note 145, at 5:

[D]iscriminatory purpose is notoriously difficult to ascertain and discover. State actors are extremely sophisticated in their ability to mask invidious intent. It is rare in this day and age to find explicit discriminatory statements by state actors. Moreover, given the multiple pretexts available in a redistricting context, it is the most uncouth government official who will reveal true intentional discriminatory intent. Thus, notwithstanding the fact that the burden is on the covered jurisdiction to show that the proposed change is not animated by a discriminatory purpose, it will not be easy for the Department to ferret out evidence of discriminatory purpose writ large.

<sup>252</sup> Briefing Transcript, *supra* note 60, at 82:9–11 (Levitt Testimony).

<sup>253</sup> *Id.* at 82:11–26 (Levitt Testimony).

<sup>254</sup> Charles Statement, *supra* note 145, at 5.

<sup>255</sup> *See, e.g.*, Persily Statement, *supra* note 61, at 11 (“When race and party preference among voters are highly correlated, it can be difficult to disentangle racially discriminatory and partisan purposes.”).

As part of its argument, DOJ alleged that Texas used partisanship as a “pretext” for discriminatory purpose. As its main example, DOJ asserted that Texas’s practice of splitting voting precincts in its House and Congressional redistricting maps disproportionately impacted minorities. At a sub-district level, partisan data is not available, though racial data is. The DOJ reasoned that “[w]ith no partisan data available below the precinct level, the statistically significant racial skew to the 518 split precincts in the proposed Congressional plan and the 412 split precincts in the proposed House plan are ‘unexplainable on grounds other than race.’”<sup>256</sup>

At the Commission’s briefing, Professor Persily described DOJ’s position slightly differently:

The DOJ argues that racial discrimination in aid of a partisan goal (e.g. maximizing a party’s seats) is evidence of discriminatory purpose. In particular, the DOJ argues that the line drawers used racial data to make inferences of political affiliation when party data were not available. Discriminating against Democrats would be one thing, under this view, but it is quite another to employ racial data as a means to that end and therefore knowingly to discriminate against minorities en route to discriminating on the basis of party. In other words, finding racial discriminatory animus is not the beginning and end of [S]ection 5’s purpose inquiry if racial considerations fed into decisions that otherwise would have been wholly legitimate.<sup>257</sup>

Texas, meanwhile, disagreed that it drafted its redistricting plans with an unlawful discriminatory purpose. As the state’s attorney, John M. Hughes, explained in closing arguments at trial:

[W]hat’s prohibited is impermissible racially driven, purposely racial decisions, that’s what’s prohibited. A decision based on partisanship is not based on race, and it’s not evidence of race based decision-making or race based discrimination just because somebody makes a political decision knowing that it will have consequences on a set of voters that happen to be of a certain race or ethnicity.<sup>258</sup>

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<sup>256</sup> DOJ Post-Trial Brief, *supra* note 34, at 27.

<sup>257</sup> Persily Statement, *supra* note 61, at 35–36.

<sup>258</sup> Transcript of Bench Trial, A.M. Session, at 103:16–22, *Texas v. United States*, No. CA 11-1303 (D.D.C. Jan. 31, 2012).

Texas explained in its pleadings that the goal of the state officials in drafting redistricting plans was “partisan, not racial,” and aimed at protecting incumbents.<sup>259</sup> Texas reasoned, “Any disparate impact resulting from political redistricting decisions is incidental. That is, the State action is ‘in spite of,’ not ‘because of’ the known, ‘adverse effects upon an identifiable group.’”<sup>260</sup> With respect to precinct splitting in particular, Texas also stated that it split precincts for permissible reasons such as “member requests for particular geographies, maintaining communities of interest, complying with the one-person-one-vote rule, and avoiding retrogression under § 5.”<sup>261</sup>

At the Commission’s briefing, Mark Posner, of the Lawyers’ Committee for Civil Rights Under Law, described his view on how to steer the difficult terrain at issue:

[I]t can sometimes be difficult to untangle things. . . . I don’t think jurisdictions act in one single unified purpose. There may be a variety of purposes, and it’s been well established under Section 5 that Section 5 preclearance may not be granted if discriminatory purpose is even one of the purposes underlying that. . . . [T]he important thing is that it’s not whether one party is going to be helped or not. It’s a question of what is the impact on minority voters. . . . [O]bviously, as a factual matter [race and politics] can be intertwined because of certain minority groups, and certain places do vote for one party and not the other, but you have to do your best to look at the facts and see what the impact is on minorities, not Democrats or Republicans. And then make the judgment call after that.<sup>262</sup>

Professor Levitt also described his view of the dynamic between race and politics:

[T]he pursuit of incumbency can sometimes run roughshod over minority rights, particularly where those who are conducting redistricting are concerned about the level of minority support for opponents and therefore act intentionally taking action based on minority status, not because they have animus against the minorities in question but [rather they are] intentionally moving minorities around [sic] . . . in order to further their own incumbencies.<sup>263</sup>

<sup>259</sup> See Texas Trial Brief, *supra* note 76, at 20–21, 25–26.

<sup>260</sup> *Id.* at 19 (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

<sup>261</sup> *Id.* at 27.

<sup>262</sup> Briefing Transcript, *supra* note 60, at 129:10–130:22 (Posner Testimony).

<sup>263</sup> *Id.* at 78:19–79:3 (Levitt Testimony); see also *id.* at 77:3–78.6 (Levitt Testimony) (describing Judge Kozinski’s dissent in *Garza v. County of Los Angeles*); cf. DOJ Guidance, *supra* note 7, at 7471.



## Chapter 5. PRECLEARANCE BY FEDERAL DISTRICT COURT

Covered jurisdictions have the option to seek judicial preclearance in the federal district court for the District of Columbia (DDC) either in addition to, or in lieu of, seeking administrative preclearance from DOJ. The VRA provides that:

A state engaging in redistricting “may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure.”<sup>264</sup>

As shown in table 3, in 2011, 11 covered jurisdictions—eight states and three Texas counties—sought judicial preclearance for 25 redistricting plans. Of those, 21 were statewide plans<sup>265</sup> and four were county-wide redistricting plans. Eighteen of the 25 plans were submitted simultaneously to DDC for judicial preclearance and the Justice Department for administrative preclearance. The other 7 plans—the statewide plans of Texas and Michigan—were submitted only to the district court.

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<sup>264</sup>42 U.S.C. § 1973c(a).

<sup>265</sup> See also Statement of Prof. Justin Levitt, Loyola Law School, Los Angeles, at 7, available at <http://www.eusccr.com/Justin%20Levitt,%20Loyola%20Law%20School,%20Los%20Angeles.pdf> [hereinafter Levitt Statement] (“[T]his appears to be a strategy weighted heavily toward statewide plans: of the 33 statewide plans submitted last year, 21 were submitted either exclusively or concurrently to the court.”) (internal citations omitted).

Table 3

## Lawsuits Seeking Judicial Preclearance of Redistricting Plans in 2011

Lawsuit	Date Filed	Redistricting Plans	Outcome	
<i>Louisiana House of Representatives v. United States</i> , No. 11-cv-770*	Apr. 21, 2011	House	Dismissed** June 21, 2011	
<i>Virginia v. Holder</i> , No.11-cv-885*	May 19, 2011	House of Delegates Senate	Dismissed** June 20, 2011	
<i>Texas v. United States</i> , No. 11-cv-1303	July 19, 2011	Congressional House Senate	Pending as of approval of this report	
		Board of Education		Precleared by DDC Sept. 22, 2011
<i>Harrell v. United States</i> (South Carolina), No. 11-cv-1454*	Aug. 9, 2011	House	Dismissed** Oct. 13, 2011	
<i>Harrell v. United States</i> (South Carolina), No. 11-cv-1566*	Aug. 30, 2011	Congressional	Dismissed** Oct. 13, 2011	
<i>North Carolina v. Holder</i> , No. 11-cv-1592*	Sept. 2, 2011	Congressional House Senate	Dismissed** Nov. 8, 2011	
<i>Alabama v. Holder</i> , No. 11-cv-1628*	Sept. 9, 2011	Congressional Board of Education	Dismissed** Nov. 21, 2011	
<i>Nueces County, TX v. Holder</i> , No. 11-cv-1784*	Oct. 6, 2011	Commissioners Court Justice of the Peace/Constables	Dismissed** Mar. 21, 2012	
<i>Georgia v. Holder</i> , No. 11-cv-1788*	Oct. 6, 2011	Congressional House Senate	Dismissed** Jan. 3, 2012	
<i>McConnell v. United States</i> (South Carolina), No. 11-cv-1794*	Oct. 7, 2011	Senate	Dismissed** Nov. 15, 2011	
<i>Williamson County, TX v. United States</i> , No. 11-cv-1836*	Oct. 17, 2011	Commissioners Court, Justice of the Peace/Constables	Dismissed** Dec. 22, 2011	
<i>Galveston County, TX v. United States</i> , No. 11-cv-1837*	Oct. 17, 2011	Commissioners Court	Dismissed** Mar. 26, 2012	
<i>Michigan v. United States</i> , No. 11-cv-1939	Nov. 3, 2011	Congressional House Senate	Precleared by DDC Feb. 28, 2012	

Source: Compiled from DOJ Discovery Response at 10, DOJ Discovery Response, Record Production at 868-71; publicly available pleadings.

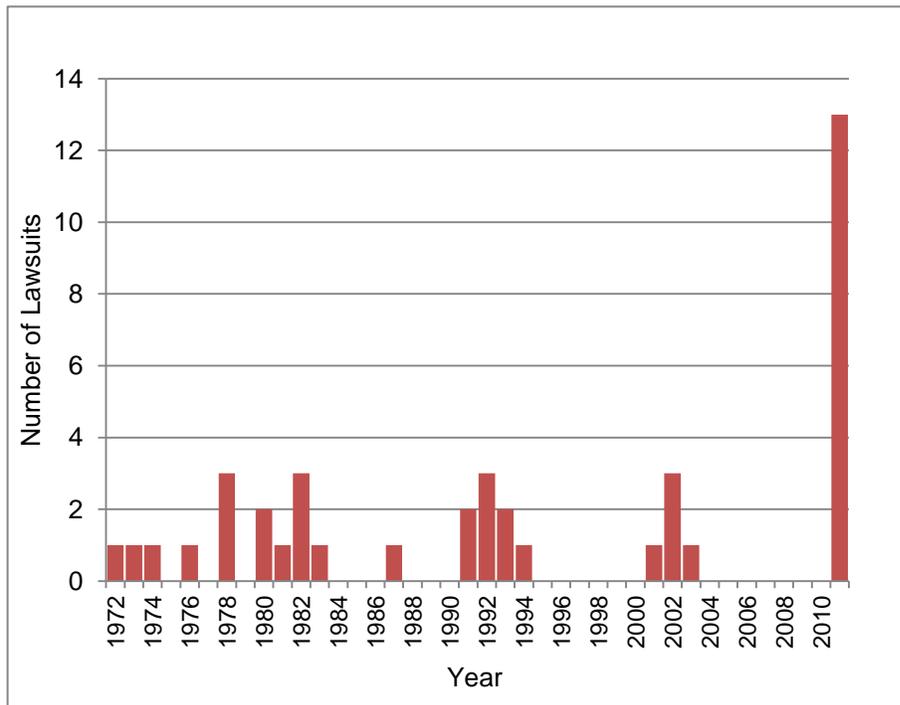
\*Jurisdiction concurrently sought administrative preclearance from the DOJ

\*\* Lawsuit dismissed because the DOJ granted administrative preclearance

The quantity of DDC filings in 2011 is remarkable when compared to the rate of judicial preclearance in past redistricting cycles. As Loyola Law School Associate Professor Justin Levitt observed, “[t]he rate of court submissions, and particularly the rate of submissions either exclusively to the courts or before administrative decisions have been rendered, is unprecedented.”<sup>266</sup> Historically, the vast majority of jurisdictions have elected to seek preclearance through DOJ, and have not exercised the judicial option. Indeed, as depicted in Figure 14, between 1972 and 2010, covered jurisdictions only filed 28 total lawsuits seeking judicial preclearance of their redistricting plans. Figure 14 also highlights the fact that before 2010, no more than three lawsuits were filed. In 2011, 13 such lawsuits were filed.

Figure 14

**Lawsuits Seeking Judicial Preclearance of Redistricting Plans**



Source: DOJ Discovery, Record Production, at 857-72

<sup>266</sup> *Id* (internal citations omitted).

The question arises: what is responsible for the marked rise in DDC filings? Possible reasons include: timing, the more open and extensive discovery that attends a DDC proceeding, a belief that simultaneous filing might improve a state's odds of receiving DOJ preclearance and a belief that DOJ was not likely to pre-clear certain states.

## Timing

Observers and individuals representing states in the redistricting process have observed that, for some, a simultaneous filing may be a hedge against time. As Columbia Law School Professor Nathaniel Persily noted at the Commission's briefing, "it does accelerate the process for them in the event they were to get an adverse decision from the DOJ, then at least they have already started filing in court as well."<sup>267</sup>

Anne Lewis, an attorney who worked with the state of Georgia in its 2011-2012 redistricting cycle filings, told the Commission that, for Georgia, "[t]he primary consideration was one of timing."<sup>268</sup> She elaborated:

Based on past experience, Georgia predicted that an administrative submission would likely result in more than 4 months elapsing between the submission and a decision from the DOJ. First, there would be a number of requests for more information from the DOJ, which, in turn, would result in a delay. The DOJ was not likely to issue a determination within the first 60 days but would likely take another 60 days, as is its right under the statute. A period estimated to be more than 120 days from when the state could reasonably expect to make a submission, i.e., October 1, was unworkable from an election schedule perspective. Furthermore, if the DOJ rejected the plans after the legislature had ended its 2012 session, it would have to come back into a 2012 special session to redraw the plans.<sup>269</sup>

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<sup>267</sup> Briefing Transcript, *supra* note 60, at 50:15–18 (Persily Testimony).

<sup>268</sup> Lewis Statement, *supra* note 72, at 10.

<sup>269</sup> *Id.* at 11.

Ms. Lewis further explained:

[I]f the DOJ indicated that it would object to preclearance, although that decision would not be appealable, the State could still seek preclearance from the District Court. By filing the suit simultaneously with the administrative submission, the time for the DOJ to answer was already running. If administrative preclearance could not be obtained, the state could pursue the already-pending litigation and still hope to meet the stringent timeline necessary to hold elections on time.<sup>270</sup>

According to John Park, an attorney who assisted Alabama with its preclearance process, Alabama sought judicial preclearance for the same reasons:

One reason to pursue judicial preclearance is to shorten time required .... If DOJ balks in the process, the covered jurisdiction is already in court and can proceed with that judicial preclearance effort. At least 60 days are saved. The jurisdiction doesn't need to draft a complaint, file it, serve the Department of Justice, and then wait 60 days for the Department of Justice to appear, which the ... [Federal] Rules of Civil Procedure allow the United States.<sup>271</sup>

In addition to Georgia and Alabama, Virginia also reported to the Commission that they sought judicial preclearance to finalize their redistricting maps more quickly.<sup>272</sup>

Although concurrent DDC filings may have served some covered jurisdictions well with respect to timing, the judicial route does not appear to have accelerated preclearance for Michigan, which chose to pursue judicial preclearance at DDC instead of administrative preclearance at DOJ. Michigan submitted its redistricting maps to DDC on November 2, 2011 and received judicial preclearance on February 28, 2012, nearly four months later.<sup>273</sup> The DOJ did not challenge Michigan's redistricting plans, and instead consented to judicial preclearance on January 12, 2012.<sup>274</sup> Thus, had Michigan submitted its plans to DOJ for administrative preclearance, DOJ may have precleared its proposal, and perhaps would have done so more quickly than DDC.<sup>275</sup>

<sup>270</sup> *Id.* at 12.

<sup>271</sup> Briefing Transcript, *supra* note 60, at 106:5–15 (Park Testimony).

<sup>272</sup> See Virginia Discovery Response, *supra* note 66, at 5.

<sup>273</sup> See Order, *Michigan v. United States*, No. 1:11-cv-1938 (D.D.C. filed Feb. 28, 2012).

<sup>274</sup> See Notice of Consent by United States, *Michigan v. United States*, No. 1:11-cv-1938 (D.D.C. filed Jan. 12, 2012).

<sup>275</sup> See Briefing Transcript, *supra* note 60, at 48:12–22 (Levitt Testimony).

Texas also elected to forgo administrative preclearance for its four statewide redistricting plans. Texas filed its complaint seeking judicial preclearance from DDC on July 19, 2011.<sup>276</sup> The DOJ ultimately challenged the state's Congressional and House plans at DDC—which would tend to indicate that the state likely saved time on these maps by not first pursuing administrative preclearance with DOJ. However, although DOJ did not challenge the preclearance of Texas's Senate redistricting plans, several third-party intervenors joined the suit and did challenge that plan's preclearance; as a result, the DDC held a trial on the Senate plan rather than preclearing when DOJ declined to challenge it.<sup>277</sup> Had Texas submitted its Senate plan for administrative preclearance, DOJ may have precleared the plan much sooner, given that it did not challenge the Senate plan when it had an opportunity to do so in DDC.

### More Open and Extensive Discovery

The evidence-gathering process is more open and extensive in district court than in an administrative review by DOJ. For instance, in the administrative process, states do not have the opportunity to cross-examine DOJ witnesses, and DOJ can use information gathered from confidential informants as the basis for its determination. This is not the case in DDC, however, where the Federal Rules of Evidence and the Federal Rules of Civil Procedure apply.<sup>278</sup> As such, states may favor the opportunity to have access to the evidence assessed under the framework of a federal court proceeding.

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<sup>276</sup> See Complaint, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. filed July 19, 2011).

<sup>277</sup> See DDC Summary Judgment Opinion, *supra* note 111. DOJ also chose not to challenge the state's Board of Education redistricting plan, which the DDC precleared on September 22, 2011. See Order, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. filed Sept. 22, 2011).

<sup>278</sup> Compare, e.g., 28 C.F.R. § 51.29(d) (providing confidentiality for individuals or entities that submit information to DOJ) with FED. R. CIV. PRO. 43(a) (requiring witnesses' testimony in open court).

Mr. Park suggested that:

Given that [DOJ] and the DC courts will consider the same question of discriminatory purpose, a covered jurisdiction might still prefer to be in front of a three-judge court to proceeding administratively. Even if the covered jurisdiction will have to disprove the discriminatory purpose claim, USDOJ and any intervenors will have to offer admissible, relevant evidence from witnesses who will be subject to cross examination to support their position. The administrative process does not provide for such fact-finding. In addition, more covered jurisdictions are likely to conclude that the independent federal judiciary is a more neutral arbiter to make the decision as opposed to the permanent bureaucracy and the political leaders of the Civil Rights Division, whose power and budget are enhanced by a broader reading of Section 5 that covers more and more state decisions.<sup>279</sup>

He further observed:

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

In contrast, the judicial preclearance process is, even if the covered jurisdiction bears the burden of proof, DOJ has to prove -- support its case with competent admissible evidence.<sup>280</sup>

Mr. Park also noted:

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

And the 2006 statutory change heightens the importance of the public proceeding. First, we don't have a lot of experience with how it's going to be applied in the redistricting. We just don't know, so there's an advantage to airing it all out in court. And if a covered jurisdiction is to be said to have discriminated, even where a redistricting plan does not retrogress, that should be done in a public proceeding so the covered jurisdiction can see and respond to the evidence against it.<sup>281</sup>

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<sup>279</sup> Park Statement, *supra* note 67, at 8.

<sup>280</sup> Briefing Transcript, *supra* note 60, at 107:1–13 (Park Testimony).

<sup>281</sup> *Id.* at 107:17–108:9 (Park Testimony).

Judicial preclearance also has the effect of involving a more expansive evidentiary record than administrative preclearance. Professor Levitt explained:

[I]n the court process at least when there is, when the matter proceeds farther along toward trial, much more evidence is obtained. The administrative preclearance process is a shortened process with a relatively limited array of evidence. And in the *Texas* case now going to court, you see a lot more evidence about the process as a whole that will reveal more about Texas' redistricting decision than the administrative process would.<sup>282</sup>

Although some covered jurisdictions may view the expansive discovery process as a net benefit, it also creates the risk that DOJ will uncover evidence of discriminatory effect or intent that it would not otherwise find in the shortened administrative process. Professor Levitt noted, for example, that DOJ appeared to focus more on the 'any retrogressive purpose' standard in the Texas litigation than in its administrative-preclearance objection letters. "One of the reasons [for this] may simply be time. . . . When the litigation process continues and there is more opportunity to gain evidence, then you might have more access to the . . . *Arlington Heights* standard . . . ."<sup>283</sup>

### Belief That Simultaneous Filing Increases Odds of Preclearance

Some have posited that covered jurisdictions may pursue simultaneous administrative and judicial preclearance out of a belief that this practice will improve the chances of gaining administrative preclearance by DOJ. Under this theory, DOJ is more likely to preclear the redistricting plan to avoid having to challenge the plan in court or defend the constitutional merits of the statute itself.<sup>284</sup> It is true that states filing with both DOJ and in district court during the 2011-2012 redistricting cycle have been met with substantial success in the administrative process. As University of Oklahoma Professor R. Keith Gaddie observed:

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<sup>282</sup> *Id.* at 49:13–21 (Levitt Testimony).

<sup>283</sup> *Id.* at 82:5–16 (Levitt Testimony).

<sup>284</sup> See, e.g., Will Oremus, *Twilight of the Voting Rights Act*, SLATE (Mar. 1, 2012), [http://www.slate.com/articles/news\\_and\\_politics/politics/2012/03/voting\\_rights\\_act\\_is\\_obama\\_letting\\_the\\_civil\\_rights\\_law\\_die\\_before\\_the\\_supreme\\_court\\_kills\\_it\\_single.html#pagebreak\\_anchor\\_2](http://www.slate.com/articles/news_and_politics/politics/2012/03/voting_rights_act_is_obama_letting_the_civil_rights_law_die_before_the_supreme_court_kills_it_single.html#pagebreak_anchor_2) (last visited Mar. 2, 2012)

Simultaneous submission is working for the states pursuing it. Seven of eight states have successfully submitted eighteen maps; three have been rejected; and three await preclearance. Among the successful states, Louisiana for the first time successfully precleared a state house map on the initial effort, and Georgia for the first time successfully precleared all of her maps on initial submission.<sup>285</sup>

However, there is no evidence that a causal connection exists between simultaneous submission and preclearance. In fact, DOJ preclearance numbers for the 2011-2012 redistricting cycle are substantially similar to those from cycles during which states were not generally pursuing the district court route. Professor Levitt explained:

[T]hose jurisdictions that have simultaneously submitted, yes, the vast majority of them have had their plans precleared. But I have no idea whether there is any causal relation whatsoever ... the Department of Justice ... had been preclearing plans at about the same rate that they have in the past. And we don't know the counterfactual of whether they would be preclearing these same plans, even if they didn't also go to court.<sup>286</sup>

### Belief That DOJ Was Unlikely to Preclear Certain States

Some believe that the rate of DDC filings has increased due to the perception that a Democrat-led DOJ would be unlikely to preclear Republican states' redistricting maps that were perceived to disadvantage Democratic candidates. In early 2011, Heritage Foundation fellow and former Counsel to the Assistant Attorney General for Civil Rights Hans von Spakovsky predicted that, while Democratic-drawn plans would receive preclearance by DOJ, Republican-drawn plans would "run into a buzz saw of Voting Section opposition based not on the legal standards set forth under Section 5, but on whether the Section's lawyers think the plan will hurt or help Democratic candidates."<sup>287</sup> Mr. von Spakovsky went on to suggest that:

Republican-controlled legislatures that have drawn up redistricting plans that Democrats don't like would be foolish to submit those plans to the Civil Rights Division for administrative review. Instead, they should go straight to the federal district court in D.C., the alternative procedure set forth in the Voting Rights Act.<sup>288</sup>

<sup>285</sup> Statement of Prof. Ronald Keith Gaddie, Univ. of Okla., at 5, available at <http://www.eusccr.com/R.%20Keith%20Gaddie,%20University%20of%20Oklahoma.pdf> (emphasis omitted).

<sup>286</sup> Briefing Transcript, *supra* note 60, at 48:2–11 (Levitt Testimony).

<sup>287</sup> Hans A. von Spakovsky, *Abusing the Voting Rights Act*, NAT'L REV ONLINE (Feb. 23, 2011), <http://www.nationalreview.com/articles/260303/abusing-voting-rights-act-hans-von-spakovsky>.

<sup>288</sup> *Id.*

In practice, the feared denials of preclearance for Republican states have not come to pass; in fact, as described *supra* Chapter 3, DOJ has precleared an overwhelming majority of redistricting plans. The DOJ precleared all 26 statewide redistricting plans submitted for administrative preclearance in 2011, and 18 of those plans were developed in redistricting processes entirely controlled by Republican state legislators.

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Whatever combination of factors that led to the increase in DDC filings, it is a trend that may seriously impact the work of the Department. As Professor Levitt observed:

[T]he markedly increased rate of concurrent submissions to both the court and to the Department of Justice is a notable development. In particular, if the rate continues to grow, it may eventually raise concerns about resource deployment, since the Department of Justice must simultaneously process the administrative submission and respond to the declaratory judgment litigation.<sup>289</sup>

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<sup>289</sup> Levitt Statement, *supra* note 265, at 8–9.

## STATEMENTS OF COMMISSIONERS

### Statement of Chairman Martin R. Castro and Commissioner Roberta Achtenberg

August 3, 2012

The U.S. Commission on Civil Rights (hereinafter “the Commission”) has served a historic role in the furtherance of voting rights in America since its establishment in 1957. The Commission travelled to Alabama for its very first hearing, back in 1958, and there heard concerns about racial discrimination in access to the polls. Indeed, the Commission’s early investigations and extensive reports helped create the foundation upon which the seminal Voting Rights Act of 1965 was built and upon which its reauthorizations have rested.

Despite the many successes of the Voting Rights Act, concerns about the continuing negative impact of bias regarding race, color, and language-minority status upon the right to vote persist. Section 5 of the Voting Rights Act, as discussed in detail in the body of the Commission’s Report, requires its covered jurisdictions to receive approval of proposed changes to voting plans from either the Voting Rights Section of the Civil Rights Division of the U.S. Department of Justice (hereinafter “DOJ”) or the U.S. District Court for the District of Columbia. Such preclearance requests have historically spiked following the federal decennial census. Given the recency of the 2010 census and in anticipation of the rise in preclearance requests, the Commission undertook a relevant and timely examination of the enforcement of Section 5 of the Voting Rights Act by DOJ in its 2012 Statutory Report.<sup>290</sup>

The Commission’s investigation generated a voluminous record of evidence from DOJ, from jurisdictions subject to the preclearance requirement of Section 5, from civil rights organizations, and from a philosophically diverse array of scholars in the preclearance arena. The uncontroverted sum total of this information demonstrates that, from 2009 through the May 2012 close of the Commission’s record in this inquiry, DOJ enforced Section 5 of the Voting Rights Act in a manner which is more transparent and apolitical than has been the case in recent years.

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<sup>290</sup> We thank the Commission’s staff members who worked diligently on the development of the investigation, the execution of our February 12, 2012 briefing, and the preparation of our Report in this matter.

The Commission's study revealed that, beginning no later than 2009, DOJ significantly improved its communication with covered jurisdictions regarding the substance of the few objections that it has interposed to redistricting plans. Recent examples of DOJ objection letters are transparent in that they clearly describe, with specificity, the internal consideration which led the agency to object to a jurisdiction's proposed voting changes.<sup>291</sup>

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<sup>291</sup> As read into the Commission's record by Chairman Martin R. Castro on July 6, 2012 as proposed findings of the Commission's final Report in this matter:

As stated at pages 26 through 29 of the Commission's May 8<sup>th</sup>, 2012 draft report with original footnotes included, [...] in recent years, the Justice Department has greatly improved the quality and clarity of the objection letters that it issues when it declines to pre-clear a voting change. In particular, DOJ's objection letters since 2009 have begun to provide distinct and discrete analysis with respect to each legal standard that it invokes.

Historically, DOJ's objection letters have contained inconsistent structure, boilerplate language, and varying degrees of specificity. For instance, the Department's objection letters did not always explicitly state which Section 5 standard the voting change violated, *i.e.*, whether the objection was caused by the jurisdiction's failure to show that its proposal has no discriminatory effect, discriminatory purpose, or both. This lack of clarity and consistency made it difficult for covered jurisdictions and the public to fully understand DOJ's reasoning in a given objection. [original footnote: *Cf. Payton McCrary et al., The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 292-95 & nn. 84, 91 (2006).]

For example, on May 5, 2006, the Justice Department objected to a proposal by North Harris Montgomery Community College District, in Texas, to reduce its number of polling places and early voting locations. The objection letter briefly described the impact that the proposal would have, including its disparate impact on minority voters, concluding, "The assignment of voters to these 12 sites is remarkably uneven: the site with the smallest proportion of minority voters will serve 6,500 voters, while the most heavily minority site (79 percent black and Hispanic) will serve over 67,000 voters." [original footnote: Letter from Wan J. Kim, Asst. Atty. Gen., to Renee Smith Byas, Vice Chancellor and General Counsel, North Harris Montgomery Community College District, May 5, 2006, *available at* [http://www.justice.gov/crt/about/vot/sec\\_5/ltr/l\\_050506.php](http://www.justice.gov/crt/about/vot/sec_5/ltr/l_050506.php).] It then provided the following boilerplate:

Section 5 provides that the submitting authority has the burden of establishing that the proposed changes will not have a retrogressive effect on minority voters to participate in the political process and elect candidates of their choice, and that the proposed changes were not adopted with such a discriminatory purpose. We cannot conclude that the statutory burden has been met in this instance. Accordingly, [the Assistant Attorney General] must, on behalf of the Attorney General, interpose an objection to the proposed changes. [original footnote: *Id.* at 2.]

DOJ's factual analysis implied that the proposed change had a discriminatory effect; however, DOJ provided no explicit factual analysis that would typically indicate a finding of discriminatory purpose. Regardless, in its description of its legal determination, DOJ referenced both the effect and purpose standards, without specifying which standard it invoked to block the voting change. This was either unnecessary or inadequate: if DOJ did not believe that the proposal had a discriminatory purpose, there was no need to cite that standard in its conclusion; if DOJ believed that the proposal may have had a discriminatory purpose, it provided no analysis to support that conclusion. The DOJ belied this confusion by never explicitly stating that the proposal would have a "retrogressive effect"—assuming that was the legal theory underlying the objection—and by never providing citations for the legal standards that it invoked.

In a more recent example, on March 24, 2009, DOJ objected to Gonzales County, TX's change to its Spanish-language election procedures. The Department found that it "[could not] conclude that the county had sustained its burden of showing that the proposed change does not have a retrogressive effect or a discriminatory purpose." [original footnote: Letter from Loretta King, Acting Asst. Atty. Gen., to Robert T. Bass, Allison, Bass & Assoc., *et al.*, Mar. 24, 2009, available at [http://www.justice.gov/crt/about/vot/sec\\_5/ltr/l\\_032409.php](http://www.justice.gov/crt/about/vot/sec_5/ltr/l_032409.php).]. In its analysis, DOJ explained that, compared to its previously-precleared procedures, fewer election documents were available in Spanish, the county assigned fewer bilingual election workers, and some of the county's election documents were translated inadequately. The Department also noted, in response to the county's claim that it had difficulty finding bilingual election workers, that minority individuals and organizations had offered to assist the county with meeting federal requirements. Despite concluding that the county did not meet its burden with respect to either the discriminatory-effect or discriminatory-purpose standards, the letter never explained which facts indicated a failure to meet the burden for which standard. Although the objection's unfavorable comparisons to the county's prior procedures clearly implied that the voting change would have a discriminatory effect, DOJ never explicitly engaged in discriminatory-purpose analysis. As a result, it is difficult, if not impossible, to determine from the face of the letter whether DOJ actually based its objection on alleged discriminatory purpose.

By May 2009, however, DOJ appeared to have addressed the inadequacies of its past objection letters. Beginning with an objection on May 29 of that year to a voter-verification program proposed by the State of Georgia, [original footnote: Letter from Loretta King, Acting Asst. Atty. Gen., to Thurbert E. Baker, Georgia Attorney General, May 29, 2009, available at [http://www.justice.gov/crt/about/vot/sec\\_5/ltr/l\\_052909.php](http://www.justice.gov/crt/about/vot/sec_5/ltr/l_052909.php).] DOJ's objection letters evidenced increased clarity, took on a new structure, and included new boilerplate language. Since that time, DOJ's objections have included clear and concise descriptions of the applicable legal standards that they invoke, with citations. More importantly, they have provided distinct and discrete analyses with respect to each legal standard. When DOJ believes a proposal has a discriminatory effect, the letter concludes, explicitly, that it has a retrogressive effect; when DOJ believes a proposal has a discriminatory purpose, DOJ provides clear discriminatory-purpose analysis with a citation to the factors set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*. [original footnote: 49 U.S. 252 (1977). For discussion of the *Arlington Heights* factors, see *infra* pp. [ ]]. [omission in original].

For example, on March 12, 2010, DOJ again objected to Gonzales County, TX's Spanish-language election procedures. Once again, the Department determined that the changes had both discriminatory effect and discriminatory purpose. This time, however, DOJ included an explicit legal conclusion with its analysis of each component of the county's proposal. For instance, after describing the alleged inadequacies of the

When DOJ clearly explains the bases for the conclusions it reaches in its efforts to enforce Section 5 of the Voting Rights Act, the jurisdictions that are subject to the preclearance requirement can better respond in a manner calculated to remedy any barriers to preclearance. We laud DOJ's work toward more transparent communication with those most directly involved with its Section 5 enforcement work.

The Commission's record also amply demonstrates that the current DOJ, the first in a Democratic Presidential administration to preside over a decennial redistricting process under Section 5, is enforcing Section 5 of the Voting Rights Act in an even-handed, apolitical manner. As noted in the Commission's Report, panelist and University of Oklahoma Professor Keith Gaddie

reached a similar conclusion based on his examination of publicly-available evidence. He observed that "compared to the past, [DOJ's preclearance process] appears to be apolitical. It appears to be fair. It appears to be consistent. ... [I]t is, compared to the past, a much more neutral process." [original footnote: Briefing Transcript, *supra* note, at 84:3-11 (Gaddie Testimony).].

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county's proposed policy for translating election materials, the letter concluded that the county failed to show its proposal "will not have a retrogressive effect when compared to the benchmark ..." [original footnote: Letter from Thomas E. Perez, Asst. Atty. Gen., to Robert T. Bass, Allison, Bass & Assoc., Mar. 12, 2010, at 3, *available at* [http://www.justice.gov/crt/about/vot/sec\\_5/tr/1\\_031210.php](http://www.justice.gov/crt/about/vot/sec_5/tr/1_031210.php).] At the conclusion of its discussion of the county's bilingual poll-worker assignment policy, DOJ found, again, that the county did not show that its proposal "will not have a retrogressive effect." [original footnote: *Id.* at 4.]. The objection letter then provided its analysis of the proposal's discriminatory purpose; DOJ set out this analysis as a separate section of the letter, and concluded, explicitly, that the county did not show that its proposal "was not motivated, at least, in part, by discriminatory purpose. *Arlington Heights*, 429 U.S. at 266-68." [original footnote: *Id.* at 5.] Thus, the Department's 2010 Gonzales County objection letter had no ambiguity: it said why DOJ objected to the county's voting changes and how DOJ reached that conclusion.

U.S. Commission on Civil Rights, Business Meeting unedited transcript, July 6, 2012, pp. 79 – 84.

He explained:

If you look across cases, the nature of the tests that are used, standards that are used, the nature of the objections that are levied are remarkably consistent. And we have had a change in presidential administration at that time. We have had a change in political control of many of these states in that time ... [original footnote: *Id.* at 82:19-25.].

Gaddie continued:

The nature of the environment, the implementation of the Act has been consistent with the change in presidential administrations since *Georgia v. Ashcroft*. The larger chatter that we hear, and we all hear it, we don't hear this round. You know, in fact, we are amazed at how relatively conservative this Justice Department has been in implementing Section 5. [original footnote: *Id.* at 83:21-84:2.].<sup>292</sup>

By way of example, Republican-governed states covered by Section 5 did not suffer any handicap in DOJ's recent preclearance practice. Particularly noteworthy in historical context is the fact that "[t]his cycle also marked the first time in history that Georgia and Louisiana received full administrative preclearance on the first attempt."<sup>293</sup>

Further, DOJ interposed objection to only two out of 1,007 redistricting plans submitted for preclearance in 2011. Both this raw number and the percentage of all plans submitted that it represents (0.02%) are much lower than they were in the years immediately following prior federal censuses. Additionally, the bases for those objections look to be in line with reasoning used under the most recent Republican Presidential administration.<sup>294</sup>

Importantly, DOJ analyzes the "discriminatory purpose" prong of its preclearance decisions<sup>295</sup> in a reasonably conservative manner.<sup>296</sup> Although the 2006 amendments to the Voting Rights Act ostensibly allow it to take a less cautious approach, DOJ has continued to use an intent-to-regress

<sup>292</sup> U.S. Commission on Civil Rights, "Redistricting and the 2010 Census: Enforcing Section 5 of the Voting Rights Act," Report p. 30.

<sup>293</sup> *Id.* at 28. Footnote in original: "See, e.g., Briefing Before the U.S. Comm'n on Civil Rights, Wash., D.C., Feb. 3, 2012, transcript at 95:23-96:1, available at <http://www.eusccr.com/VRA%20Briefing%20Transcript%20-%20FINAL.pdf> [hereinafter Briefing Transcript] (Lewis Testimony); REDISTRICTINGONLINE.ORG, *Ladies and Gentlemen, "We've Been Pre-Cleared;" DOJ Pre-Clears Louisiana House Map*, June 21, 2011, <http://redistrictingonline.org/nblahousepreclear062111.html> (last visited Feb. 27, 2012)."

<sup>294</sup> *Id.* at 30.

<sup>295</sup> As noted and discussed in the Commission's Report, "Section 5 requires covered jurisdictions to show that their proposed voting changes, including redistricting plans, do not have any discriminatory purpose." *Id.* at 56.

<sup>296</sup> *Id.* at 65.

standard<sup>297</sup> when assessing the possible presence of discriminatory purpose in redistricting plans proffered to it for preclearance.<sup>298</sup> DOJ has recently, through issuance of revised procedures and guidance, notified covered jurisdictions that they will not necessarily be required to maximize the possible number of ability-to-elect districts.<sup>299</sup> Given the perceived generality that most African Americans who have registered to vote have done so as Democrats, by refraining from requiring maximization of ability-to-elect districts, DOJ is arguably foregoing the potential opportunity to force creation of additional (or at least likely) “safe” districts for the Democratic Party.

The commitment evidenced by DOJ to fair and neutral enforcement of the preclearance process and standards of Section 5 of the Voting Rights Act is successful and commendable. We respect the integrity required to stay above the partisan fray. It is certainly our hope that DOJ will continue to enforce Section 5 of the Voting Rights Act in a manner which is as transparent and depoliticized as the spirit of the law requires and as the voting public deserves.

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<sup>297</sup> For a detailed discussion of the history and importance of retrogression in Section 5 enforcement, *see id.* at 37-55.

<sup>298</sup> *Id.* at 68.

<sup>299</sup> *Id.* at 41-43. For a detailed discussion of the history and importance of the ability of relevant minorities in covered jurisdictions to elect their preferred candidate of choice under the rubric of Section 5 enforcement, *see id.* at 37-55.

## Statement of Vice Chair Abigail Thernstrom

August 5, 2012

This statement is confined to a single point: Ann Lewis and John Park were right to argue that the DOJ guidelines upon which jurisdictions are expected to rely in drawing districting maps are not actually helpful. Lewis, in her prepared statement of February 3, 2012 (p. 7) asserted that the guidelines lack “any sort of clear directives that a covered jurisdiction might use to ensure compliance.” A few pages later (p. 10), she noted that the *Arlington Heights* test for discriminatory purpose that the DOJ specifically cites as determinative is “somewhat curious,” since it implies that purpose is determined by “impact.”

In a similar vein, John Park’s prepared testimony quoted the Assistant Attorney General for Civil Rights, Thomas Perez, as saying “We’re trying to demystify the [preclearance] process.” Perez had gone on to say: “There’s no magical numerical formula.” (p. 10.) The “process is “a very holistic [one] that involves looking at prior elections, voting age data, things of that matter.” It was not, in Park’s view, a very illuminating statement. “To a covered jurisdiction,” he writes, “that description . . . sounds like ‘we at USDOJ know preclearance when we see it.’”<sup>300</sup>

This was not a new problem. Jurisdictions had long worked mostly in the dark in trying to draw districting maps that would meet with DOJ approval. The language of the statute itself (as well as congressional explanations when the act was revised) always constituted very bare bones. The statute did not identify key terms and the Supreme Court decisions interpreting the language were few and far between. Thus, questions fundamental to democratic government have been, and continue to be, decided by political appointees, career attorneys, and other voting section staff.

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<sup>300</sup> Other witnesses disagreed. For instance, the Commission report quotes Professor Nathaniel Persily as arguing: “It is doubtful that the Department could give any greater direction than [its guidance on the purpose standard]. The inherently contingent purpose inquiry necessarily implies considerable DOJ discretion as to when inferences can be made concerning what went into the minds of those who drew the lines.” (Report, p. 34.)

Regulations written to guide DOJ in its enforcement decisions – “Procedures for the Attorney General’s Administration of section 5” – were first published in 1971, with updated versions issued in 1981 and 1987, and – after a lapse of twenty-four years – most recently on August 15, 2011. They were given an additional life of 25 years.<sup>301</sup>

The 2011 guidelines are an interpretation of the latest version of the Voting Rights Act – the 2006 VRARA. Depending on their use by the D.C. district court and the Justice Department itself, they are likely to shape the political landscape in ways few Americans understand. In general, revised regulations buried in the *Federal Register* implementing a statute attract little public notice. Yet, as historian Hugh Davis Graham once wrote, “out of such bureaucratic boilerplate . . . can come fundamental shifts in public policy.”<sup>302</sup> That has certainly been true in the history of the 1965 Voting Rights Act.

Following in the footsteps of the 2006 House report accompanying the passage of the VRARA, the 2011 guidelines, in their most important section, state: “The Attorney General’s evaluation of discriminatory purpose under section 5 is guided by the analysis in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*”<sup>303</sup> That 1977 decision had nothing to do with voting rights; it was a Fourteenth Amendment ruling involving a rezoning request from a nonprofit development corporation planning to build a racially integrated housing complex. But it had the crucial and regrettable effect of blurring the difference between discriminatory intent and impact.<sup>304</sup>

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<sup>301</sup> U.S. Department of Justice, “Procedures for the Attorney General’s Administration of section 5,” 28 C.F.R. § 51.

<sup>302</sup> Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy* (New York: Oxford University Press, 1990), 343.

<sup>303</sup> The Guidelines (28 C.F.R. § 51.4) also defined discriminatory “effect,” reiterating the *Beer* “retrogression” test, in keeping with the 2006 amendments that superseded *Ashcroft*. The 2003 Supreme Court decision had allowed districting plans that sacrificed safe minority constituencies in the interest of shoring up Democratic Party strength by spreading black voters more thinly. “The power to influence the electoral process is not limited to winning elections,” Justice Sandra Day O’Connor had explained in a concurrence. 539 U.S. 461, 482 (2003).

<sup>304</sup> 429 U.S. 252, 266. “Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action -- whether it “bears more heavily on one race than another,” *Washington v. Davis, supra*, at 242 - may provide an important starting point.”

In relying on *Arlington Heights*, the guidelines state, DOJ would consider the disparate racial impact of a redrawn electoral map (or other modification in election procedure); the history of the proposed change; and departures from normal districting or other practices.

The guilty-until-proven-innocent section 5 test demanding that jurisdictions prove a negative was always difficult to meet. With *Arlington Heights* as the framework to use in judging discriminatory intent, states and their political subdivisions seeking preclearance had to assume the burden of demonstrating an absence of all possibly relevant circumstantial evidence, including disparate impact. As suggested above, the list gave DOJ a free hand to define the various criteria as it pleased in particular contexts and to weigh one factor more heavily than another – without explanation – when it so chose.

The *Arlington Heights* checklist was preceded by a short list of other factors the Attorney General might consider in enforcing section 5: whether a “reasonable and legitimate justification for the change exists”; the extent to which the jurisdiction has followed “objective guidelines and fair and conventional procedures”; whether “members of racial and language minority groups [had] an opportunity to participate in the decision to make the change”; and the degree to which their concerns were taken into account. It was a recycled list from 1987 section 5 regulations and provided little real guidance, since too many terms (as noted above) were open to varying interpretations.<sup>305</sup>

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<sup>305</sup> In 1971 the Department of Justice had issued its first guidelines to help states understand the process. (Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. 51 [1971]). They listed the type of electoral changes covered by section 5, the address to which submissions should be sent, the required contents of those submissions, the right of private individuals to comment on proposed changes, and the speed with which the department was expected to act.

Jurisdictions were additionally informed that the burden of proving an absence of discriminatory purpose or effect was on the jurisdiction; that a submission to the attorney general did not affect the right of the jurisdiction to bring suit in the D.C. court; that no administrative or legislative changes in electoral procedure could be implemented without prior federal approval (although those changes could not be reviewed prior to their actual enactment); and that submissions were expected to include relevant material of a demographic, geographic, or historical nature. Furthermore, they were told, any individual or group could forward relevant information to the attorney general concerning the proposed voting procedure and could request confidentiality, although the department would maintain a registry of interested individuals and groups. After an objection, a jurisdiction could request reconsideration in light of new information.

For all this seeming comprehensiveness, the guidelines were mute on the most important questions. There was no mention of the criteria used in judging submissions. Localities were told only that these standards would not

There were two additional lists, one of “background factors” and one that focused specifically on considerations related to submitted districting plans. In deciding whether a jurisdiction’s electoral changes had either a discriminatory purpose or effect, the Attorney General was directed to look at: the extent to which minorities had been denied an equal opportunity to participate meaningfully in the political process; the level of racial polarization in voting and segregation in political activity; the impact of “present or past discrimination” on political participation.

And finally, in judging districting maps, DOJ was to consider the impact of malapportionment on minority voting rights; the degree to which the new lines reduced minority voting strength; the packing and cracking of residentially concentrated minority voters; the availability of alternative plans that would meet the jurisdiction’s legitimate interests; departures from objective redistricting criteria, indifference to compactness and continuity, as well as disregard for natural or artificial boundaries; and inconsistency with the jurisdiction’s stated redistricting standards.<sup>306</sup>

The lists cover the waterfront, it might seem. From one perspective, nothing was left out. On the other hand, nothing of much significance was included either. The specificity of that list of factors was deceptive. What was the measure of an impact that bore more heavily on one race than another? What aspect of the historical background would indicate invidious intent? Certainly few public officials in the twenty-first century would express racist sentiments for the record. But the detailed examination of the legal standards articulated in *Arlington Heights* –

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differ from those employed by the D.C. court. The district court, which frequently fashioned its own law, should not have been the decisive authority, however. “In light of the limited number of section 5 cases, the Attorney General can only ‘guess’ what the [D.C.] court would do with any particular case,” one scholar noted. Supreme Court decisions were few and far between and thus provided little guidance.

In May 1985, the Justice Department finally sent new guidelines out for comment. While they were not officially adopted until January 1987, for the first time the department outlined its criteria in assessing preclearance submissions. But the list of criteria was completely at odds with the retrogression standard set by the Court in *Beer*, and many of the terms in the list were undefined and open to a wide variety of interpretations. For instance, changes in voting procedures were supposed to be “reasonable and legitimate.” As political scientist Timothy O’Rourke aptly remarked, the new guidelines read like a criminal statute that states, “Among the things you may be arrested for are . . .” (Timothy O’Rourke, telephone conversation, July 1, 1985, quoted in Thernstrom, *Whose Votes Count?* 162.) In other words, the proposed guidelines provided no guidance. But they did make clear the means that the Department of Justice had developed to circumvent the Supreme Court’s retrogression standard as articulated in *Beer*—and just how far the department had wandered from the limited before-and-after comparison that was, in theory, at the heart of section 5.

<sup>306</sup> *Id.*

pulled from the housing into the voting rights context – was important. *Arlington Heights* was a 1977 Fourteenth Amendment decision; widespread housing discrimination in that era lent clarity to questions of racial animus that was gone thirty-four years later. Moreover, housing and voting rights are quite different arenas. Seeming racial animus in the housing market is more difficult to eradicate than electoral discrimination, particularly because considerations of race and class overlap in the residential choices that families make.

The other lists of relevant factors in the guidelines have the same flaw. What are “reasonable and legitimate” reasons for a change in voting procedure? When do minority groups have a sufficient “opportunity to participate” in the map drawing process? What is the measure of excessive minority-voter concentration? And so forth. Perhaps to answer critics (like myself) who have complained that the vision that ran through the enforcement of section 5 (from the early 1980s to the Supreme Court’s decision in *Bossier II* in 2000) was racial fairness as defined by proportional racial representation, the guidelines do contain the following seemingly specific disclaimer: “A jurisdiction’s failure to adopt the maximum possible number of majority minority districts may not be the **sole** basis for determining that a jurisdiction was motivated by a discriminatory purpose.” [Emphasis added.]<sup>307</sup> The disclaimer is meaningless. In denying preclearance, DOJ attorneys never suggest that one – and only one – reason drove their decision. In fact, the language in objection letters was historically and remains today often exceedingly vague – claims of some of the Commission’s witnesses to the contrary notwithstanding.<sup>308</sup>

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<sup>307</sup> 28 C.F.R. § 51.59.

<sup>308</sup> In the 1980s, when I was examining the internal files of the voting section of the DOJ civil rights division, letters of objection contained a standard sentence: “Under these circumstances we are unable to conclude, as we must under the Voting Rights Act, that the submitted plan does not have the purpose and will not have the effect of abridging the right to vote . . .” [A jurisdiction had no way of knowing what sort of evidence contributed to what finding. The material in the internal files that I found was extensively quoted in *Whose Votes Count?* and had been written up in a “Memo on Submissions to the Department of Justice Involving Redistricting,” U.S. Commission on Civil Rights, on file with Harvard University Press but which I could not find in my own files. Other scholars have made basically the same point. See, e.g., Hiroshi Montomura, “Preclearance under Section 5 of the Voting Rights Act,” *North Carolina Law Review*, 61 (January 1983). Such boilerplate language is still used today. A Texas Tribune story on September 20, 2011 noted that “in legal boilerplate, the Justice Department lawyers questioned the legality of the maps for the Texas House and for the state’s congressional seats, saying they ‘deny that the proposed

Judicial decisions can never be as vague as boilerplate objection letters sent to jurisdictions by the DOJ. And towards the end of December 2011 the D.C. district court did weigh in on the question of how section 5 should be interpreted in light of the 2006 statutory amendments and the 2011 guidelines. The case was *Texas v. Holder*, and the question was the racial fairness of the congressional and state legislative districting maps drawn by the state legislature.<sup>309</sup> Texas has experienced a population surge of more than four million people, two thirds of whom were Hispanic.<sup>310</sup> As a consequence the state gained four new congressional seats whose lines, along with those drawn for state legislative elections, had to be precleared. The constitutionality of section 5 has not been explicitly raised, but it is lurking between the lines.

In November 2011, the district court denied summary judgment to Texas on the ground that the state failed to engage in what the court called a “multi-factored” analysis in determining whether an election district provides minority voters with the “ability to elect” the candidates of their choice.<sup>311</sup> Texas, it asserted, had relied too heavily on demographic data – the size of the black or Hispanic population in the districts in question.<sup>312</sup> An examination of voting age population in a district can start the inquiry, but then additional factors must be examined as the guidelines indicated.

In the 2006 amendments, the court said, “Congress sought to make clear that it was not enough that a districting plan gave minority voters ‘influence.’”<sup>313</sup> On the other hand, section 5

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Congressional plan, as compared with the benchmark, maintains or increases the ability of minority voters to elect their candidate of choice in each district protected by Section 5.’ The Justice Department used the same language with regard to the plan for the 150 Texas House districts.” <http://www.texastribune.org/texas-redistricting/redistricting/justice-texas-maps-undermine-minority-vote/>

<sup>309</sup> *Texas v. Holder*, Civil Action 11-1303, (DDC. 12-22-11), 13. The U.S. was prepared to preclear the state Senate districts, but not those for the state House or Congress. Various intervenors had argued that the senate lines also adversely affected Hispanic voting rights.

<sup>310</sup> *Id.* at 19.

<sup>311</sup> *Id.* at 14. The “multifaceted approach” that the court urged included such criteria as: the size of a district’s minority population considering citizenship rates; voting-age population and voter registration; the extent of racially polarized voting; the presence of electoral coalitions involving minority voters; the role of incumbency in past elections; factors that affect turnout rates by race; and recent electoral trends.

<sup>312</sup> *Id.* at 13-14.

<sup>313</sup> *Id.* at 35

protections “are not limited to districts where a single minority group has the ability to elect its candidate of choice, but extend to districts where one group of minority voters has joined with voters of a different racial or language background to elect the minority voters’ candidate of choice.”<sup>314</sup> In other words, coalition districts can count for “ability to elect” purposes; indeed an effective coalition can include whites.<sup>315</sup>

The court implied that a coalition of different ethnic or racial groups counted as an “ability to elect” district only where it had been repeatedly successful in electing a candidate of choice.<sup>316</sup> In jurisdictions with such a “working coalition,” the various groups that had joined together shared common political values and priorities, the court evidently assumed.<sup>317</sup> Perhaps it was a legitimate assumption in specific historical contexts, but, for the most part, it ignored the reality that blacks and Hispanics – to say nothing of whites and Asians – are not one happy family. When the Voting Rights Act was passed, America was a nation in black and white. And in much civil rights literature, it was assumed that members of minority groups were fungible – that all non-white Americans had the same interests.<sup>318</sup> In today’s multiethnic society, it is a woefully out-of-date assumption, and inter-ethnic tension is well documented in many settings. In Los

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<sup>314</sup> *Id.* p. 15. The opinion cited language in the House Report accompanying the 2006 Amendments explaining that Section 5 protects minorities’ ability to elect candidates of choice either “directly or coalesced with other voters.” U.S. Mem. at 14 (quoting H.R. REP. NO. 109-478, at 46).

<sup>315</sup> *Id.* at 35. The court confined its point to “coalition and crossover districts that continue unchanged into a proposed plan . . .” *Id.* at 36-37:” would demonstrate that the minority voters in that district had, and would continue to have, an ability to elect their preferred candidates. New crossover-coalition districts, however, may amount to influence districts that Congress rejected in the VRARA.”

<sup>316</sup> *Id.* at 36-37. “Our recognition that crossover and coalition districts are ability districts in a benchmark plan is rooted in the fact that there must be discrete data, by way of election returns, to confirm the existence of a voting coalition’s electoral power.” For example, “evidence that a coalition had historical success in electing its candidates of choice would demonstrate that the minority voters in that district had, and would continue to have, an ability to elect their preferred candidates.”

<sup>317</sup> Successful coalition districts are those in which the blacks and Hispanic vote has “combined” to elect candidates of choice – a definition of a coalition that would seem to assume the two groups shared common values. *Id.* at 22.

<sup>318</sup> Perhaps the best examples of this misguided notion come from school desegregation cases. For instance in *Keyes v. School District No 1, Denver, Colo.*, 413 U.S. 197 (1973), the Supreme Court concluded that “the District Court erred in separating Negroes and Hispanics for purposes of defining a ‘segregated’ school.” There is agreement, the Court continued, though of different origins, Negroes and Hispanics in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanics included in the category ‘segregated’ schools.” In the case of voting rights, the 1975 amendments equated black disfranchisement in the Jim Crow South with Latinos deprived of bilingual ballots in justifying the extension of the protections provided by section 5 to the latter group.

Angeles, for instance, Hispanics (now a near majority) have been leapfrogging over blacks who are a mere 10 percent of the city's population.<sup>319</sup> The city once had a black mayor, but a Hispanic now holds the office, and blacks are not likely to take it back, given the demographics.

Changes in election procedure, including districting plans, could only be precleared if found to be free of discriminatory purpose or effect. Establishing evidence of discriminatory purpose, the D.C. court in its 2011 Texas redistricting decision held, required a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available."<sup>320</sup> The court offered no definition of "sensitive inquiry," but did say that the measure of discriminatory purpose should not be confined to a diminution in the ability to elect a candidate of choice; any and all evidence of invidious intent could be used in judging electoral discrimination, as Congress and the Justice Department had made clear in its revision and interpretation of the statute, relying on *Arlington Heights* to provide the proper framework.<sup>321</sup> One form that circumstantial evidence might take is the failure of a jurisdiction to ensure minority office holding in proportion to the minority population by drawing, in the case of Texas, a sufficient number of safe Hispanic seats to guarantee proportional representation. In other words, the court reasoned, while the statute does not demand safe minority seats in proportion to the minority population, a districting plan in which the number of safe minority constituencies falls short of proportionality suggests intentional electoral exclusion.<sup>322</sup> The opinion reads like an attempt to silence section 5 critics while embracing the vision of racial fairness to which the civil rights community was deeply committed.

If jurisdictions read the court's opinion with care, they will conclude that – as in earlier times – a failure to draw as many majority-minority districts as possible will likely defeat a districting plan on grounds of discriminatory intent. But explanations other than racial animus can explain a disproportionately low number of minorities elected to office. Is the jurisdiction one in which other evidence suggests whites are still committed to the idea that politics should be reserved for

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<sup>319</sup> U.S. Census, "State and County Quick Facts."

<sup>320</sup> *Texas v. Holder*, Civil Action 11-1303, (DDC. 12-22-11), 11.

<sup>321</sup> See discussion of the House Report's reliance on *Arlington Heights*, *supra*.

<sup>322</sup> "Although Texas' alleged failure to account for the significant increase of the Hispanic population in the State does not establish retrogression, it is relevant to the Court's evaluation of whether the Congressional Plan was enacted with discriminatory *purpose*." (Italic mine.) Memorandum opinion, *Texas v. United States*, at 39.

whites? It's not easy to find such settings any more. America has moved on; 43 percent of white voters went for Barack Obama in 2008, which should have been no surprise, given the change in racial attitudes reflected in numerous polls.<sup>323</sup>

The measure of discriminatory effect is “retrogression,” reduced political power from that which minorities had before the proposed change in electoral procedure or practice. “Although the Supreme Court has never outlined all factors relevant to this inquiry, it has emphasized that retrogression analysis ‘is often complex in practice to determine,’ the D.C. court said.

The lower court's list of factors relevant to a finding of discriminatory effect contained an element I had not seen before: “population shifts between or among redrawn districts.”<sup>324</sup> It was a welcome addition to a list that has taken many forms over the years. The enforcement of the preclearance provision depends upon information about the size and special distribution of protected minority groups. In the almost half-century since the VRA was first signed into law, the nation's racial demography has been transformed, raising difficult questions about the definition of districting maps in which members of all groups have an opportunity to elect the candidates of their choice. When the act was initially passed in 1965, the population of the United States was overwhelmingly white. For all practical purposes, the U.S. was a biracial society; almost everyone was regarded as either black or white. Since then, the nation's racial composition has changed dramatically, and will continue to change rapidly well into the future. We have become a multi-racial nation.

Although Congress rested its reauthorization of section 5 in 2006 on what it considered extensive research into continuing discrimination, it failed to grapple with the complex implications of this demographic revolution. That failure added to the difficulties jurisdictions faced in trying to meet the section 5 standards for an acceptable districting or other electoral change.

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<sup>323</sup> See, e.g. Pew Research Center poll conducted by Gallup but released by Pew February 7, 2007. In 2003, 92 percent of Americans expressed willingness to vote for a black president; only six percent said they would not. <http://pewresearch.org/pubs/408/can-you-trust-what-the-polls-say-about-obamas-electoral-prospects>. These results squared with other polls, also reported by Pew.

<sup>324</sup> “We conclude that the type of factors relevant to this complex inquiry may include the number of registered minority voters in redrawn districts; population shifts between or among redrawn districts that diminish or enhance the ability of a significant, organized group of minority voters to elect their candidate of choice . . .” Memorandum opinion, *Texas v. Holder*, at 32.

In addition, with a projected growth of Asians and Hispanics in the coming decades, majority-black districts, specifically, are likely to become an endangered species; by 2030, when section 5 is nearing the end of its current extension, blacks are expected to make up less than a third of the total number of voters for whom ability to elect districts must be drawn.<sup>325</sup> Moreover, the building blocks for assembling majority-black electoral districts have been steadily eroded by the strong trend towards residential integration, particularly in the South, where segregation levels have dropped far more than elsewhere. Long a laggard in racial change, the South is now in the vanguard.

Not only have African Americans moved to the suburbs in very large numbers; most have settled in racially mixed neighborhoods as is evident from the steep declines in the segregation indexes that have accompanied rising black suburbanization. Moreover, their neighbors now include large numbers of people who have entered the United States as a result of the major liberalization of immigration law in the same year as the passage of the Voting Rights Act. The shift from a biracial to a multiracial society has occurred in the South as well as elsewhere.<sup>326</sup> With a high degree of mixing at the neighborhood level, it will be extraordinarily hard to piece together “ability to elect” districts in which one group is a decisive majority. More black incumbents or aspiring black politicians will find themselves in settings in which African-American voters are only a plurality. Coalitions will form, but they will not count for section 5 purposes unless there has been a history of their effectiveness in electing minority candidates of choice, if the standards set out in the D.C. court are accepted by the Supreme Court and the Justice Department as well – another source of confusion for jurisdictions drawing maps to conform to the law.

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<sup>325</sup> In 2030, according to the most recent Census Bureau projections [given in note 97 above] 43.8 percent of the U.S. population will be made up of groups with special protections under the VRA. The black population then is expected to be 13.1 percent of the national total. Hispanics, Asian Americans, Native Hawaiians and Pacific Islanders, and American Indians will by then be 30.7 percent of the total population.

<sup>326</sup> These are the southern states that have attracted the largest numbers of Hispanic immigrants and internal black migrants in recent years; U.S. Bureau of the Census, *Statistical Abstract of the United States:2011*, Table 18: “Resident Population by Race, Hispanic Origin, and State: 2009.”

At its inception, the Voting Rights Act stood on very firm constitutional ground; it was pure antidiscrimination legislation designed to enforce basic Fifteenth Amendment rights. A clear principle justified its original enactment: Citizens should not be judged by the color of their skin when states determine eligibility to vote. That clarity could not be sustained over time. In part the problem is the difficulty that “plaintiffs and defendants, pundits and policymakers, judges and justices” are having in finding their footing in a racial context so very different than that in which the statute had been enforced for most of its life. In following its own recently issued guidelines, the Justice Department may not soon start down untraveled roads, recognizing the waning of American racism. But administrations come and go, new people take charge of civil rights enforcement at DOJ, new judges are appointed, and the racial zeitgeist continues to change. Today’s interpretation of the language of the guidelines is not likely to remain the definitive understanding of the demands of preclearance. Section 5 is set to expire in 2031; long before that date, the “Procedures for the Attorney General’s Administration of section five,” most recently issued in April 2011, will surely be altered in ways we cannot yet foresee. We know only this: The American racial landscape is fluid, and the law does respond to change.



## Statement of Commissioner Gaziano, With Whom Commissioners Kirsanow and Heriot Concur

In 2009, eight justices of the Supreme Court expressed serious doubt about the constitutionality of section 5 of the Voting Rights Act; the remaining justice thought it was flatly unconstitutional. For reasons that were never fully explained, and over our repeated objections, the Commission majority instructed our professional staff, expert witnesses, and commissioners that it would be out of order for any of us to address that constitutional issue.<sup>327</sup> And according to our colleagues in the majority, an inquiry into the burdens imposed by section 5 was even out of order because that was “code” for the constitutional issue. Suffice it to say that Commissioners Kirsanow, Heriot and I do not talk in code. We are quite willing to say outright that it was a serious mistake to issue a report on the enforcement of section 5 without a thorough discussion of the pressing issue of its constitutionality. It was also a mistake to report on section 5 without addressing the burdens it imposes on covered states and local governments.

Although the Commission’s effort to exclude the constitutional issue has been relatively effective until this point, some academic and other witnesses of differing ideological stripes found it impossible to discuss the operation of the current preclearance regime without at least briefly mentioning that it was probably affected by the looming constitutional challenges to it. Instead of admitting error in trying to exclude that type of testimony, the Commission majority doubled down on its gag order. It defeated an amendment by Commissioner Heriot that would have added a short footnote to Chapter 3 of this report acknowledging that the constitutional doubt about the reauthorization of sections 4(b) and 5 might be affecting how DOJ was implementing it.<sup>328</sup>

Despite those errors, which are still somewhat baffling, we trust the majority will not attempt to stop publication of this dissent. The Constitution provides that we take an oath to support it.<sup>329</sup> That oath at least strongly counsels that we reflect on the constitutionality of the provisions we were studying when that issue is seriously in doubt. Even if we have no duty to study the

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<sup>327</sup> The principal motions, proposed amendments, votes, and exchanges are set forth below.

<sup>328</sup> See *infra* note 337 and accompanying text.

<sup>329</sup> U.S. CONST. art. VI, cl. 3.

constitutional issue, it is a paramount, threshold issue that our Commission—of all federal entities—should have addressed. At least we do so here.

Further, we think the Commission majority’s attempt to prevent a discussion of the constitutionality of the current preclearance provisions is symptomatic of a larger problem—and an additional reason why the Supreme Court ultimately must hear the challenges to sections 4(b) and 5, and hopefully sooner rather than later. The unanimous Supreme Court’s unmistakable message in 2009 that these provisions were constitutionally problematic was a polite invitation to elected and appointed political officials to fix any constitutional defects. Congress’s and our Commission’s refusal to even consider the matter should communicate a strong message to the Court that: (1) it must decide the issue directly, and (2) further delay will serve no good purpose.

### **A Relevant Historical Example (1950-1954)**

When Heman Sweatt’s challenge to the University of Texas School of Law’s racially discriminatory admissions policy made its way to the Supreme Court, his appellate lawyers (a team which included Thurgood Marshall) sought two forms of relief: (1) that the high court overturn the separate-but-equal doctrine of *Plessy v. Ferguson*, and (2) that the Court strike down the law school’s admissions policy even under *Plessy*. The Supreme Court accepted the second argument, which whittled away at the *Plessy* doctrine but left the rest temporarily in place. Chief Justice Vinson wrote that the Court should decide the constitutional question in that case “as narrowly as possible” and thus explained that “much of the excellent research and detailed argument presented is unnecessary to [the case’s] disposition.” *Sweatt v. Painter*, 339 U.S. 629, 631 (1950).

Whether the particular exercise of “constitutional avoidance” was appropriate in *Sweatt v. Painter* is an interesting historical question, but the decision had two predictable effects in the years immediately following its issuance in 1950. The first is that it put all educated citizens on notice, if they had not been previously, that the *Plessy* edifice was under assault and might be living on borrowed time. A challenge would come to the Supreme Court in which the justices could not sidestep the central issue. The mountain of factual research and arguments against the

odious system of segregation would then be relevant to the disposition of a constitutional case. And when the Court characterized that research as “excellent,” it signaled that the justices would not summarily dismiss it.

The other effect, especially for those who wanted to maintain the system of state-enforced segregation or were responsible for maintaining it, was to consider steps to make the discriminatory system more equal in fact, rather than in surface appearance only. The Court’s rationale in *Sweatt* was that Texas’s new law school for black students was inadequate under the Equal Protection Clause. The Court discussed the number of full-time and part-time professors at each law school, the number of books in the respective law libraries, the moot court facilities, scholarships, and even the Order of the Coif affiliation. In sum, it was a much more exacting factual inquiry than previously undertaken by the Court. Moreover, the opinion stated plainly that the mere existence of a separate law school “overlooks realities” relating to the “indiscriminate imposition of inequalities.”

Thus, officials charged with defending any system of segregated schools during the period between *Sweatt* and *Brown v. Board of Education* in 1954 had an additional incentive to try to change the facts that would be presented in a future court challenge. Many did make some changes in an attempt to prevent a ruling overturning *Plessy*.<sup>330</sup> Those efforts to make separate systems more equal were ultimately judged to be inherently flawed. Our point here is not that such attempts were sufficient (they certainly were not), but that both supporters and opponents of school segregation would have been foolish to ignore *Sweatt* and proceed with business as usual. Few did ignore it; they knew that the Supreme Court would increasingly scrutinize whether segregation policies were in fact equal—and eventually, if separate systems were always unconstitutional.

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<sup>330</sup> See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE* 334 (2004) (“A former Justice of the [United States] Supreme Court, [Governor] Byrnes understood very well the trend of the Court’s decisions on racial matters. . . . Under Byrnes’s insistence, the state legislature passed the most ambitious school program in South Carolina’s history. It provided for school-building under the bond program, state operation of school transportation, and higher teachers’ salaries paid on an equal basis to both races.”); Charles C. Bolton, *Mississippi’s School Equalization Program, 1945-1954: “A Last Gasp to Try to Maintain a Segregated Educational System,”* J. OF S. HIST. 66(4): 781-814 (2000) (“Others saw the full funding of the 1953 educational program as a preemptive strike against pending federal intervention in their affairs. Most members of the Recess Education Committee reasoned that “[t]he fact that Mississippi has made an honest attempt to remedy an inequitable situation may have a psychological influence upon the United States Supreme Court in its decision in the segregation cases.”).

### **The Supreme Court’s Invitation and Warning Concerning Preclearance (2009-2012)**

In its ruling in *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009), a unanimous Supreme Court, save Justice Thomas (who wanted to go further and strike down section 5), gave an even starker warning than it did in *Sweatt* that reauthorization of, and amendments to, sections 4(b) and 5 of the Voting Rights Act in 2006 were constitutionally problematic. Employing its constitutional avoidance practice again, the Court read the bail-out provision in the Voting Rights Act (VRA) more broadly than the Department of Justice thought possible and allowed the challenger in that case to avoid the VRA’s preclearance requirements. But the unanimous Court explained in some detail that section 5 and its decades-old coverage formula raised at least serious constitutional concerns.

The *Northwest Austin* Court flatly stated that the reauthorization of section 5’s “preclearance requirements and its coverage formula raise serious constitutional questions.” *Id.* at 204. The Court noted the “extraordinary” nature of section 5 “otherwise unfamiliar to our federal system.” *Id.* at 211. It “goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C.” *Id.* at 202.

The Court then pointed to the “current burdens” on states and the corresponding “federalism concerns” with section 5 and its coverage formula. *Id.* at 203. The Act “differentiates between the States, despite our historic tradition that all States enjoy equal sovereignty.” *Id.* (quotation marks omitted). Though distinctions among states are sometimes allowed, “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” Yet “[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance.” The coverage formula is “now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.” *Id.* “[C]onditions,” the Court found, “have unquestionably improved. Things have changed in the South.” *Id.* at 202.

Adding to these concerns was the Court’s repeated warning that “[r]ace cannot be the predominant factor in redistricting under [*Miller v. Johnson*, 515 U.S. 900 (1995)]. Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5.” *Id.* (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring)). Thus the “tension between [VRA sections] 2 and 5 must persist in covered jurisdictions and not elsewhere,” a further departure from the equal sovereignty principle. *Id.* at 203.

The Supreme Court’s action in 2009 was not the only legal development of note. For over two years, two high-profile cases to invalidate section 5 have been working their way through the federal courts to the Supreme Court. All commissioners were aware of these cases, either because they kept up on major civil rights developments or because I made them aware of them.<sup>331</sup> The parties in those cases have now petitioned the Supreme Court for review, which is likely to act on the petitions this fall. Whether the Court takes one or both of these cases or a later one is unknown, but the Commission’s “hear no evil, see no evil, speak no evil” approach to whether the preclearance provisions are constitutional is an additional reason why the Supreme Court should act—and why it ought to act as soon as practicable.

A powerful argument advanced by both Shelby County and the Kinston petitioners for the Supreme Court to take their cases and decide the issue this term is the refusal of politically elected and appointed officials to reconsider the constitutional problems relating to the reauthorization of sections 4(b) and 5 identified in *Northwest Austin*. As Shelby County explained in its petition: “[I]n the more than three years after *Northwest Austin*, Congress held not one hearing, proposed not one bill, and amended not one law in response to the concern that

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<sup>331</sup> The complaints in *Shelby County v. Holder* and the City of Kinston, North Carolina case—*LaRoque v. Holder* (now captioned *Nix v. Holder*)—were both filed in April 2010 in the District Court for the District of Columbia. See *Shelby County v. Holder*, 811 F. Supp.2d 424 (D.D.C. Sept. 21, 2011), *affirmed by*, 679 F.3d 848 (D.C. Cir. May 18, 2012), *petition for cert. filed* (U.S. July 20, 2012) (No. 12-96); *LaRoque v. Holder*, 755 F. Supp.2d 156 (D.D.C. Dec. 20, 2010), *rev’d in part, vacated in part by*, 650 F.3d 777 (D.C. Cir. July 8, 2011), *on remand to*, 831 F. Supp.2d 183 (D.D.C. Dec. 22, 2011), *vacated and remanded by*, 679 F.3d 905 (D.C. Cir. May 18, 2012), *petition for cert. filed*, *Nix v. Holder* (U.S. July 20, 2012) (No. 12-81). The lawsuit filings and litigation developments received widespread media coverage. See, e.g., Campbell Robertson, *Judge Rejects Challenge to Voting Rights Law by County in Alabama*, N.Y. TIMES, Sept. 22, 2011; *SCOTUS: Topping the List of ’12 Battlegrounds*, THE HOTLINE, May 10, 2011; Linda Greenhouse, *Is Anyone Watching?*, N.Y. TIMES, Feb. 23, 2011. Even if some commissioners were previously unaware of these developments, two of us mentioned these cases when the proposed course of study was debated. See Tr. at 10 (July 15, 2011).

Sections 5 and 4(b) cannot be constitutionally justified based on the record compiled in 2006.” Cert. Petition at 21. At least Congress can claim it was busy with other matters. In contrast, our Commission could think of no more important statutory provisions to study this past year. It made the preclearance provisions the focus of our annual, statutorily-required enforcement review, but then it actively forbade Commission staff and expert witnesses from addressing their potential or real constitutional defects.

Perhaps it was naïve for the Supreme Court to expect Members of Congress to re-examine the constitutional mistake they made in 2006 because the same climate of political risk (generated, in part, by predictable race-baiting tactics) still prevails. Moreover, members of both political parties and their supporters understand that the preclearance provisions have tended in the past to heighten the racially and politically ghettoized districts drawn under the VRA that create more safe seats for incumbents to hold—and unfortunately decreased the incentive for politicians to appeal to cross-over voters. At least in the past, this result served the partisan and ideological interests of Members from both major parties, even if it tended to increase intra- and inter-party polarization and made certain minority groups increasingly reliant on only one party.<sup>332</sup> There may be reason to think that the two-way street that has previously advantaged incumbents in both parties may have become more of a one-way ratchet under the amendments to section 5,<sup>333</sup>

<sup>332</sup> See ABIGAIL THERNSTROM, *VOTING RIGHTS AND WRONGS* 211 (2009) (“For different reasons, Republicans and Democrats both see the Voting Rights Act with its mandate for race-conscious districting as beneficial to their parties’ interests.”); *id.* at 219 (“Racial gerrymandering that creates both majority-minority districts and “safe” Republican . . . districts reduces the number of competitive races and contributes to a balkanized electorate.”) (quoting Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 WASH. U. J.L. & POL’Y 71, 90 (2006)); Todd Gaziano, *What a Tangled Web We Weave . . .*, LIBRARY OF LAW & LIBERTY, Feb. 24, 2012:

A potent mixture of fear and political self-interest fueled the continued renewal of section 5, in which Congress refused to change the coverage formula to determine which states would wear those badges of infamy for up to 65 years after the supposed emergency began. The demagogic claims in minority neighborhoods that blacks’ voting rights would ‘expire’ if section 5 was not renewed convinced many politicians that the well of rational discourse was poisoned. Members of Congress also learned that the new VRA, with its results and effects tests, advantaged incumbents from both parties. It led to a number of ‘safe’ Democratic minority districts, which ‘bleached’ the surrounding districts to make safe seats for Republicans. Sadly, the protected incumbents in each party had little need to appeal to cross-over voters.

<sup>333</sup> Section 5(b) now prohibits any redistricting change that has the “effect of diminishing the ability of any citizens . . . on account of race or color . . . to elect their preferred candidates of choice.” At least one congressional witness in 2006 tried to explain how this “preferred candidates of choice” amendment would tend to advantage Democrats because “Democrats are almost always minorities’ preferred candidates of choice and, therefore, [5(b)] would prohibit diminishing the ability to elect Democratic candidates, whether they are minority or non-minority.” *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry Before the*

but it is unclear that many current Members of Congress have considered this possible future effect, or if so, whether it is enough to overcome the political inertia of the old regime even among the Republican members who are disadvantaged.

Yet the U.S. Commission on Civil Rights was created for the very purpose of studying and reporting on politically sensitive racial issues—the ones that Congress or the President might have reason to avoid. The Commission also has a special historical connection and statutory command to study voting and election issues. For its early work exposing the denial of minority voting rights in the Jim Crow South in the late 1950s and early 1960s, it was dubbed the “conscience of the nation,”<sup>334</sup> and it was duly credited with helping create the factual predicate for enactment of the Voting Rights Act of 1965.<sup>335</sup> The Commission’s current organic charter recognizes this special historic role and expressly provides our authority to study “deprivations . . . of the right of citizens of the United States to vote and have votes counted” whether by reason of inclusion in a protected class or as a result of “any pattern or practice of fraud.” 42 U.S.C. § 1975a (a)(1).

Despite this unique history and congressional intent that the Commission study the tough civil rights issues, especially those that touch on voting, the record we detail below shows that the majority of our fellow commissioners sought to avoid an examination of the most pressing issue related to section 5 that was the subject of the Commission’s year-long study.

Thus, it is necessary here to explain the efforts we made to raise the constitutional issue and to express our views on the constitutional issue that others were prevented from analyzing. Regardless of our own views, however, the refusal of the Commission majority to examine the constitutional issues reinforces the argument that no political institution will. This suggests the Supreme Court should take one or both of the pending cases and decide the constitutional questions without further delay.

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*Subcomm. on the Constitution, Senate Judiciary Comm.*, 109th Cong. (July 13, 2006) (statement of Michael A. Carvin).

<sup>334</sup> See, e.g., Andrew Goldstein, *Can the U.S. Commission on Civil Rights Be Saved?*, TIME, Feb. 9, 2002 (“In the 1960s the U.S. Commission on Civil Rights was hailed as ‘the conscience of the nation.’”).

<sup>335</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 309 & n.5 (1966).

### **Exclusion of Constitutional Issues in the Commission's Report**

The foregoing explains why, if the Commission was interested in studying the current operation of section 5, it should have encouraged, or at least permitted, testimony and study on whether those provisions were constitutional. To be clear, the Commission need not direct staff and witnesses to focus on constitutional issues that are well-settled and beyond dispute by any commissioner, although even then we should not try to block expert witnesses from including a constitutional analysis if they believe constitutional issues are in play. But when there is a serious dispute about the constitutionality of a civil rights law the Commission wants to study (especially when a recent, unanimous Supreme Court declared there is at least grave doubt about its constitutionality), the Commission should not ignore the dispute or ban a discussion of it.

And even if the majority was unwilling to address the constitutional issues head on, the Commission should have honestly grappled with the fact that current enforcement decisions are likely being affected by those in DOJ who are also trying to defend the constitutionality of section 5 in court and by state officials who threaten to bring constitutional challenges if they don't prevail on certain issues administratively. Instead, the Commission's report attempts to examine whether DOJ's current arrangement of the section 5 deckchairs works for passengers on the Titanic. It is especially odd to limit the study to this surface question after section 5 hit the constitutional iceberg and is taking on water, without at least acknowledging that the crew's current deck chair arrangement might be affected by the tilting ship and the hundreds of distraught passengers scrambling for the remaining lifeboats.

The majority's constrained focus was baked in to its original design, even if we were slow to realize the majority intended to completely prohibit any examination of the constitutional issue. The proposed concept paper stated: "The briefing would address 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 VRA, and concerns that may come to light regarding specific jurisdictions' redistricting plans." Yet, the proposal had an odd and unexplained limitation in a footnote: "Issues such as the constitutionality of Section 5 and the 'bailout' provision are outside the scope of this proposal."

Speaking in favor of her written proposal, Vice Chair Thernstrom said “there are a number of suits that are already being contemplated under the Voting Rights Act . . . . I mean, this is a very hot issue.” Tr. at 8 (July 15, 2011). Initially, I spoke in support of the proposal but wanted an opportunity to offer amendments to it if it were approved and sought a clarification whether those supporting the study intended to include a review of the pending constitutional challenges to section 5, namely, the *Shelby County* and *Kinston* cases. *Id.* at 9-11. In a strange colloquy with the Vice Chair, Chairman Castro first confirmed that the study proposal did not include consideration of the constitutional challenges and then stated that he would oppose all amendments to the concept paper that would govern our investigation. *Id.* at 11-13. The Chairman also announced that he would oppose any amendments to it at future meetings. *Id.* at 11. That was an unusual position to take, especially at that moment when we hadn’t even chosen which of six possible research projects to undertake, but his position prevailed.

After a discussion of other possible topics, the Commission adopted the enforcement report project on the operation of section 5 of the VRA, as reflected in the draft concept paper, with five commissioners voting yes: Castro, Thernstrom, Achtenberg, Titus, and Yaki. We voted no, in part because of the artificial limitations in the concept paper and the unusual process by which it was debated and adopted. Yet, even then, we did not understand that the “concept paper,” which provides direction to our career staff, and thus serves as an instruction to them of what to pursue or not pursue, would purport to bind commissioners and independent witnesses from discussing the constitutional issues necessarily implicated by the operation of section 5.

At a later meeting, I questioned the Commission’s practice of always privileging federal government witnesses on their own panel, instead of placing them on the same panel as witnesses representing the states. I said I was “almost bemused that states, which are coequal sovereigns, and in this case have a potential claim that the U.S. Government is unconstitutionally impinging on their sovereignty[,] are put in at the end, and thrown in with a bunch of stakeholders . . . .” Tr. at 30 (Nov. 18, 2011). In response, one commissioner wanted to “make sure that we are not sneaking in the back door the question we are not addressing in this briefing, which is the constitutionality of Section 5.” Tr. at 31-32.

I replied that commissioners had taken an oath to support the Constitution, which I believe may obligate us to consider a constitutional question when the Supreme Court “indicated that it has grave constitutional doubt” about what the Commission was studying. Tr. at 32. Moreover, I explained that the practical question of how section 5 is working is inextricably tied to whether it is “congruent and proportional” to the discrimination forbidden by the Fifteenth Amendment, especially where officials “have to implement a statute to avoid grave constitutional doubt somewhat differently than one where there’s a constitutional doubt.” Tr. at 32. Chairman Castro responded that if constitutional questions were raised at the briefing, “those questions will be ruled out of order.”

At the January 13, 2012 meeting, Commissioner Heriot noted that it was impossible to keep the constitutionality question out of the briefing because “the argument for the unconstitutionality here is based on undue burden which is exactly the issue that we are investigating here. So, you really can’t separate the two issues.” Tr. at 17. As noted above, the concept paper said that the briefing would examine DOJ’s “efforts with regard to Section 5 preclearance, including . . . *concerns that may come to light* regarding specific jurisdictions’ redistricting plans” (emphasis supplied). Yet even the burden of section 5 on the states was rebuffed as being outside the scope of the concept paper. Tr. at 18-19. One colleague in the majority asserted that the burden of section 5 was “just code words” for the constitutional inquiry, and thus, the Commission could not study the issue. *Id.* Thus, the majority further limited its inquiry. It would study concerns that might surface *for DOJ*, but not the states.

When he opened the Commission’s public briefing on February 3, 2012, Chairman Castro emphasized that the constitutional question was not germane, directing Commission staff not to include it in this report:

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

Of course, commissioners will ask what they wish and if they choose to use their limited time to ask questions that are not germane, that [] will result in information that will not end up in the report.

Tr. at 4-5. I began my questioning by stating that even though the constitutional question is “both logically and necessarily included within the framework of what we accepted,” I would follow the chairman’s “erroneous interpretation under protest.” Tr. at 66-67. Yet several panelists of differing ideological backgrounds could not avoid mentioning the constitutional issues. Their professional reputation required them to acknowledge that the “constitutional overhang” of pending constitutional challenges affects DOJ’s enforcement decisions, at least in some matters.

### **The Constitutional Overhang of *Northwest Austin***

The Supreme Court’s decision in *Northwest Austin* is the Sword of Damocles that hangs over federal officials and influences their behavior. Whenever DOJ denies a request to preclear a state or local election law change, there is a chance that the affected entity will challenge the constitutionality of the preclearance regime, and this could be the vehicle by which the Supreme Court strikes down section 5. Several panelists agreed, and none argued to the contrary, that DOJ takes this risk into account when deciding whether to preclear. Professor Nathaniel Persily, though limited in what he would say by the Chairman’s admonishment, said at the briefing:

Let’s also in this spirit of bearing honestly what is happening in this process, while I won’t talk about the constitutionality of Section 5, it is casting a big shadow over what DOJ is doing. So obviously the specter of a declaring of Section 5 to be unconstitutional is something that DOJ is well aware of. And so each preclearance submission and denial is fraught with the possibility that it becomes the next case that goes up. So I mean, that is obviously what is going on here.

Tr. at 74.<sup>336</sup> Jack Park, who worked as outside counsel to the Alabama Attorney General’s office during the latest state-wide redistricting submission to DOJ, described the overhang this way: “[T]he overhang of the constitutional challenges can act as a restraint on those who might use Section 5 as a way of challenging state statutes that they disagree with on political rather than racial grounds.” Report at 82 (quoting Tr. at 107). Further, Professor Guy-Uriel Charles told the Commission that DOJ uses the intent-to-retrogress standard to insulate its section 5 decisions “from constitutional challenge,” “notwithstanding Congress’ amendment of Section 5 to expand the discriminatory purpose inquiry beyond the purpose to retrogress.” Written Testimony at 5 (Feb. 3, 2012). Thus, according to Professor Charles, DOJ has narrowly read an amendment to section 5 out of concern over constitutional challenges.

Despite the testimony provided by Commission witnesses that DOJ might be pulling its punches somewhat in its current interpretations and preclearance decisions, the litigants currently seeking Supreme Court review argue that DOJ is not “judiciously exercising its statutory authority in order to avoid confrontation.” *Shelby County Cert. Pet.* at 21. Instead, they claim, “DOJ’s actions have magnified the burdens and inequities of the modern preclearance regime.” *Id.* at 21-22. Their examples showing lack of restraint include DOJ’s refusal to preclear the Texas and South Carolina voter identification laws, as well as DOJ’s refusal to preclear Florida’s reduction of early voting from 14 days to 8 days, “when states such as Connecticut, Rhode Island, and Pennsylvania have no early voting at all.” *Id.* at 19-20.

The precise impact of the constitutional overhang is hard for us to evaluate, especially since the Commission successfully prevented us from pursuing discovery or witnesses that would have illuminated that question. It is possible that DOJ is pulling its punches in some respects, especially as reflected in the somewhat artificial measures examined by the Commission staff in the body of this report, but is still exceeding or abusing its statutory power in other respects, such as the Ahab-like challenges to state voter ID laws notwithstanding the Supreme Court’s approval of Indiana’s voter ID law in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), and similar federal court approval of Georgia’s voter ID law. At a minimum, it is erroneous to

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<sup>336</sup> In his written testimony, Professor Persily also explained: “As the DOJ navigates the political minefield of the preclearance process during the high-stakes 2011 redistricting process, the Supreme Court is looking over its shoulder, threatening to declare section 5 unconstitutional.” Written Test. at 5 (Feb. 3, 2012).

equate preclearing dozens of politically uncontested redistricting changes in small jurisdictions with DOJ's refusal to preclear Texas's state-wide redistricting plan.

In any event, it is hard to imagine the "constitutional overhang" is not influencing behavior, including the number of states that are not waiting for an administrative preclearance decision before proceeding simultaneously in court. It's the equivalent of pretending *Sweatt* had no impact on those defending the separate-but-equal doctrine of *Plessy*. Nevertheless, given Chairman Castro's orders and rulings, the Commission's career staff did not include an analysis of that issue in the proposed or final report, except passing references in one sentence of Jack Park's testimony on page 75, and briefly in the context of the simultaneous filing issue on page 76.

Accordingly, without conceding how the clearance rate should be characterized, Commissioner Heriot proposed to insert the following footnote in chapter 3 regarding the report's statement that DOJ's rate of preclearing statewide redistricting plans this cycle was "high."<sup>337</sup>

The high approval rates may be related to the Supreme Court's decision in [*Northwest Austin*], in which the Court stated that Section 5 raises "serious constitutional concerns" but declined to resolve these concerns until some future case. High approval rates reduce the number of opportunities for the Court to resolve the issue.

With the three of us voting in favor, the proposed footnote was rejected on a vote of 4-3, with one abstention. Ignoring the consensus from the witness testimony, our fellow commissioners were steadfast in their refusal to acknowledge the Supreme Court's constitutional concern over section 5 or any impact that might have on any enforcement actions.

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<sup>337</sup> We first objected to the report's characterization regarding the preclearance rate of these districts for two reasons: (1) the combination of statewide redistricting applications with much smaller jurisdictions was highly misleading, see Figures 1-5, and (2) with respect to statewide plans, there was no comparison of historical rates of statewide or congressional redistricting whatsoever that would allow anyone to conclude the current rate was "high" relative to any other period. Nevertheless, the majority rejected all amendments to the final report I offered to lessen the misleading nature of the characterization and let the facts speak for themselves.

### Why VRA Sections 4(b) and 5 are Unconstitutional

Only a brief discussion of the constitutional problems with the continued reauthorization of Section 4(b) and amendments to Section 5 is necessary here. A more detailed explication is contained in the briefs filed in the U.S. Court of Appeals for the D.C. Circuit and the pending petitions for certiorari filed with the Supreme Court by Shelby County and the Kinston petitioners. *See supra* note 331. In sum, however, there is no substantial evidence that VRA sections 4(b) and 5 are necessary to enforce the voting protections guaranteed in the Fourteenth and Fifteenth Amendments any longer, and there is considerable reason to conclude that their continued existence, particularly in their amended form, violate those guarantees.

The Voting Rights Act of 1965 had three main parts. The first and most important protection is contained in section 2, which essentially restated the antidiscrimination command of the 15th Amendment. Section 2 provided that a state could not “deny or abridge the right of any citizen of the United States to vote on account of race or color.” Courts eventually held that Section 2 also created a private cause of action to enforce it, although that question remained open for more than fifteen years.<sup>338</sup> Both the federal government and private plaintiffs can now secure injunctions under section 2 stopping proposed or recently enacted voting or election changes upon the traditional equitable showing. Neither Shelby County nor the Kinston plaintiffs challenge the constitutionality of this foundational provision. It is obviously constitutional. Section 2 has since been amended to prohibit any state practice that even unintentionally “results in a denial or abridgement” of voting rights. 42 U.S.C. § 1973(a). Some interpretations of this results test could present constitutional problems, but those could be avoided with savings constructions by the executive branch or by the courts.

The second significant part of the VRA is found in sections 3 and 4(a). Section 3(b) authorized courts to prohibit literacy tests or other such devices upon a finding that the test had been used to exclude minority voters. This again did not change the substantive law, since such tests would have been illegal under the 15th Amendment. Section 4(a) was a little different because it was

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<sup>338</sup> Compare *City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980) (“Assuming, for present purposes, that there exists a private right of action to enforce [Section 2], it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.”) (citations omitted) with *Thornburg v. Gingles*, 478 U.S. 30 (1986) (partially successful section 2 case brought by black voters).

prophylactic. It banned literacy tests in certain jurisdictions determined by a coverage formula. Prophylactic measures that ban facially nondiscriminatory policies face higher judicial scrutiny, but at the time there was abundant evidence of abuse of literacy tests by officials in the South. In 1975, Congress amended these protections by comprehensively banning literacy tests, poll taxes, and other similar ballot access restrictions. 42 U.S.C. §§ 1973b, 1973h. I am aware of no one who wishes to undo this.

All in all, it was highly misleading (to put it mildly) when racial charlatans assert that the failure of Congress to renew the preclearance provisions of section 5 would “take away” minority voting rights. It would do nothing with respect to their fundamental voting rights, which are protected by the 15th Amendment as well as the traditional statutory protections of the VRA. It would not even affect the prophylactic prohibitions in section 4(a).

The third major element of the VRA was the truly extraordinary preclearance provisions in section 5 that amounted to a limited federal receivership for covered jurisdictions. Section 5 required that a change to “any voting qualification . . . or standard, practice, or procedure” must be pre-approved by either the Department of Justice or the U.S. District Court of the District of Columbia in order for the change to go into effect.

Section 5 and its coverage formula in section 4(b) were originally temporary, emergency provisions that were only effective for five years. The original formula of section 4(b) provided that a jurisdiction was covered if it met two criteria: (1) the use of a literacy test or other such device, and (2) total voter turnout below 50 percent in the 1964 presidential election. The coverage formula was expanded somewhat in 1970 (adding 1968 election data) and 1975 (adding 1972 election data), but was not updated in the 1982 or 2006 reauthorizations. The coverage formula in 2006 is still based on voter turnout rates from 1964, 1968, and 1972. Thus, voter participation rates from 1964 still dictate coverage for many jurisdictions, regardless of what happened in 1968 and 1972, and certain new states (Arizona, Alaska, and Texas) and counties and townships in California, New York, Florida, South Dakota, Michigan, and New Hampshire are now covered by virtue of the later amendments. By 2006, the voting data that dictates

coverage for many jurisdictions was 42 years old, and will be 67 years old in 2031, when the coverage formula is set to be reconsidered again.<sup>339</sup>

Although jurisdictions in theory can seek a “bailout” from coverage, it is extremely costly (both monetarily, and in many cases, politically) to even pursue that option, with little chance of success. Justice Thomas described the arduous objective and *subjective* requirements that any jurisdiction must meet to bail out of coverage.<sup>340</sup> And while the Supreme Court’s opinion in

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<sup>339</sup> To put that timeframe in perspective, consider Alaska, which became a fully covered state in 1975, that will by 2031 have been under section 5’s federal receivership for 57 of 72 years of its existence as a state of supposed equal dignity.

<sup>340</sup> *Northwest Austin*, 557 U.S. at 214-15 (Thomas, J., concurring in part and dissenting in part):

To obtain bailout a covered jurisdiction must satisfy numerous objective criteria. It must show that during the previous 10 years: (A) no “test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color”; (B) “no final judgment of any court of the United States . . . has determined that denials or abridgments of the right to vote on account of race or color have occurred anywhere in the territory of” the covered jurisdiction; (C) “no Federal examiners or observers . . . have been assigned to” the covered jurisdiction; (D) the covered jurisdiction has fully complied with § 5; and (E) “the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under [§ 5].” §§ 1973b(a)(1)(A)-(E). The jurisdiction also has the burden of presenting “evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation.” § 1973b(a)(2).

These extensive requirements may be difficult to satisfy, see Brief for Georgia Governor Sonny Purdue as *Amicus Curiae* 20–26, but at least they are objective. The covered jurisdiction seeking bailout must also meet subjective criteria: it must “(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected [under the Act]; and (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.” §§ 1973b(a)(1)(F)(i)-(iii).

As a result, a covered jurisdiction meeting each of the objective conditions could nonetheless be denied bailout because it has not, in the subjective view of the United States District Court for the District of Columbia, engaged in sufficiently “constructive efforts” to expand voting opportunities, § 1973b(a)(1)(F)(iii).

*Northwest Austin* at least makes that long-shot available for additional small jurisdictions, it remains nearly impossible for a covered state to bail out of coverage because those requirements must be satisfied for it and all its political subdivisions.<sup>341</sup>

Section 5's stark intrusion on state sovereignty was fully justified in 1965 to combat "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). Congress concluded that it was targeting a "unique problem" that traditional remedies could not then overcome: "case-by-case litigation was inadequate to combat [the organized massive resistance to federal authority] because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered." *Id.* at 328.

There is no evidence today of resistance in any state to the right to vote that would render traditional legal and equitable remedies inadequate. Indeed, the Supreme Court noted in *Northwest Austin*, "[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." 557 U.S. at 202. Yet the continuing federal receivership by DOJ over some states and not others is based on 38-48 year-old election data. That is especially problematic in upholding the equal dignity of each state, and it is a growing temptation for abuse by the executive branch of the federal government.

The Fifteenth Amendment combined with Section 2 is more than adequate today to remedy a denial or abridgement of the right to vote, and there is no convincing reason to think otherwise. As discussed above, it was unclear for more than fifteen years after 1965 whether section 2 created a private right of action by which private parties and civil rights organizations could supplement the Department of Justice's efforts. Moreover, the number of obstructionist officials in some states may have exceeded the number of judges in those same states committed to enforcing the VRA. It is now well-settled that such private individuals and organizations can monitor legislative or administrative changes, identify potential or alleged problems, and sue if their preferred positions are not accepted.

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<sup>341</sup> See *id.* at 214-215 and 211 (majority opinion) (noting that as of 2009, only 17 of 12,000 covered subdivisions had successfully bailed out of section 5 coverage); 42 U.S.C. § 1973b(a)(1)(A-F).

Plaintiffs may obtain a preliminary injunction and temporary restraining orders in a section 2 lawsuit to stop any policy or practice that may cause irreparable harm, which Judge Williams noted in his dissent in the *Shelby County* case includes a denial of voting rights during the pendency of litigation. At the Commission's briefing, Laughlin McDonald, Director of the Voting Rights Project at the American Civil Liberties Union, acknowledged that preliminary injunctions are available and that he has sought them to stop upcoming elections. Tr. at 133.<sup>342</sup> Attorneys' fees also are available for prevailing parties as an added incentive for them to bring meritorious suits. Today there are more public-interest legal organizations dedicated to protecting civil rights and more judges at all levels of government who may be trusted to fairly adjudicate section 2 claims than in 1965, when Congress trusted only the Attorney General or judges in the District of Columbia to enforce the VRA's preclearance provisions.

A common refrain, "that matters would be worse" in the covered jurisdiction than they are now without the preclearance provisions, proves too much. That claim could never be disproven and would justify an extension of sections 4(b) and 5 in perpetuity. As Judge Williams wrote:

[T]he imputed deterrence . . . is plainly unquantifiable. If we assume that it has played a role, how much should we inflate the covered states' figures to account for it, and which covered states? Given much weight, the supposed deterrent effect would justify continued VRA renewals out to the crack of doom. Indeed, *Northwest Austin's* insistence that "current burdens . . . must be justified by current needs," . . . would mean little if § 5's supposed deterrent effect were enough to justify the current scheme.

*Shelby County v. Holder*, 679 F.3d 848, 898 (D.C. Cir. May 18, 2012) (Williams, J. dissenting). The number of section 2 lawsuits *filed* is also meaningless and subject to manipulation. One possible comparison, though still crude, *might* be between *successful* section 2 challenges in covered and non-covered jurisdictions, which shows no significant differences, and even then,

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<sup>342</sup> Mr. McDonald expressed frustration that his requests for injunctions were not granted in a case brought against Lexington County, South Carolina, Tr. at 133, but that is hardly a sound argument for an automatic stay of all elections at the whim of a federal bureaucrat in Washington. Mr. McDonald apparently has no difficulty having his requests for injunctive relief heard by a federal judge.

ignores that several covered jurisdictions have a markedly better record than the worst non-covered jurisdictions. Comparisons between states based on the number of elected minority officials, the minority voter participation rate (which in some covered jurisdictions exceeds the rate of white voters), and other relevant factors cut strongly against section 4(b)'s renewal and disprove the myth that covered jurisdictions are deserving of continued receivership status. They also put the lie to Congress's flimsy excuse that "secondary barriers" somehow are as effective as those used during the Jim Crow era and its immediate aftermath.

In short, the conditions that justified section 5 in 1965 are no longer present across any state. But even if they did exist in some large area of the country, including in some of the currently covered jurisdictions, courts retain the power under section 3(a) to "bail in" any state or political subdivision and appoint a federal examiner to protect voting rights under the court's supervision. The attempt to justify a coverage formula until 2031 that is based on the lowest voter turnout in any of three presidential elections conducted in 1964, 1968, and 1972 crumbles under any serious analysis of current conditions.

For a prophylactic statute similar to the preclearance provisions to be valid, there must be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). If Congress is to maintain an extraordinary measure like section 5, it needs to carefully study whether the *current* measure is congruent and proportional to the *current* Fifteenth Amendment violations it is seeking to remedy in the covered states. Congress demonstrably failed to do this when it reauthorized the VRA's temporary provisions in 2006. Indeed, the Supreme Court underestimated the problem when it wrote that the Act's "coverage formula is based on data that [was] more than 35 years old," since data from the 1964 presidential election still governs many states, which is now 48 years old.

Since covered states are now often indistinguishable from non-covered states in minority registration and voting rates, as well as other relevant criteria, a remedy that applies only to the covered states simply cannot be justified, even if the trigger were not 48 years old. There is no

good reason today why certain states and not others must continue to wear a badge of infamy for 67 years that presumes any change in their law is discriminatory until proven otherwise.<sup>343</sup>

The Voting Rights Act is one of the most important and effective statutes ever enacted by Congress. It's time that its substantive protections stand on their own, and the five-year, "emergency" provisions be allowed to retire in peace.

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<sup>343</sup> There is also an additional argument, raised by Shelby County and the Kinston petitioners before the Supreme Court, that the 2006 amendments to section 5 require states and the DOJ to engage in a level of race-conscious action that independently violates the Fourteenth and Fifteenth Amendments. This is an extremely important argument that should not be considered less persuasive by reason of our omission of it here.

## Statement of Commissioner Kirsanow, With Whom Commissioner Gaziano and Commissioner Heriot Concur

### Introduction

Allow me to point out the elephant in the room—an elephant called *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009).<sup>344</sup> It may go a long way toward explaining why the Department of Justice would be unusually willing to approve at least some of the redistricting plans in the current reapportionment/redistricting cycle.

In *Northwest Austin*, the plaintiff utility district agreed that Section 5’s preclearance process had been justified by the exigent circumstances of 1965. It made two alternative arguments, however, that it should not be governed by that process—(1) that the Voting Rights Act, properly interpreted, allows it to apply for an exemption and; (2) that, given that the exigent circumstances of 1965 have passed, the preclearance process has become an unconstitutional intrusion on the authority of state and local governments.

The Supreme Court decided that the plaintiff was indeed entitled to apply for exemption. It was therefore unnecessary to decide on the constitutionality of Section 5. Chief Justice Roberts, writing for the eight-member majority, nevertheless acknowledged that the Act “now raises serious constitutional concerns.” Section 5, which “authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial ‘federalism costs,’” he wrote. *Id.* at 202. The Court thus sent a clear message that Section 5’s days may be numbered. When a case that squarely presents the issue of Section 5’s constitutionality reaches the Court, it may—at least as it is currently configured—decide that the preclearance process no longer can be justified. The only dissent came from Justice Thomas, who wrote that the constitutionality issue should be resolved against Section 5 immediately.

It is unlikely that any of this was viewed as good news by the Voting Section of the Civil Rights Division of the U.S. Department of Justice. Presumably, most of the staff members there favor

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<sup>344</sup> The report mentions *Northwest Austin* only once—on page 51. The case is not explained in any way except to state that it is cited in the House Report on the 2006 Amendments to the VRA.

the preclearance process or else they would not have accepted jobs there to administer it. At a minimum, the preclearance process puts food on their table. It is not in their interest, therefore, to create opportunities for the Supreme Court to declare the process unconstitutional. By approving the proposals put forth by most jurisdictions, their conduct avoided creating those opportunities. The alternative was to set up a lawsuit that Voting Section staff members were probably not keen to have before the Court's present members.

Two panelists at our briefing with very different perspectives on the issues agreed on this. For example, Columbia University law professor Nathaniel Persily testified in connection with the Department of Justice's high rates of approval of redistricting proposals:

Let's also in the spirit of bearing honestly what is happening in this process, while I won't talk about the constitutionality of Section 5, it is casting a big shadow over what DOJ is doing. So obviously the specter of a declaring of Section 5 to be unconstitutional is something that DOJ is well aware of. And so each preclearance submission and denial is fraught with the possibility that it becomes the next case that goes up. So I mean, that is obviously what is going on here.

Briefing Tr. at 74 (Feb. 3, 2012).<sup>345</sup>

Similarly, John Park, outside counsel for the State of Alabama, testified:

[T]he overhang of the constitutional challenges can act as a restraint on those who might use Section 5 as a way of challenging state statutes that they disagree with on political rather than racial grounds.

Briefing Tr. at 106 (Feb. 3, 2012).

No one took issue with these views at the briefing. For reasons we cannot wholly explain, however, a majority of our fellow Commissioners are disinclined to acknowledge this obvious point. At a meeting of the Commission on July 6, 2012, Commissioner Heriot offered an amendment to the report, which she proposed to include as a footnote to Chapter 3, Section 4:

The high approval rates may be related to the Supreme Court's decision in *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009), in which the Court stated that Section 5 raises "serious constitutional concerns" but declined to resolve these concerns until some future case. High

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<sup>345</sup> See also Written Testimony of Professor Nathaniel Persily Before the U.S. Commission on Civil Rights at 5 (Feb. 3, 2012) ("As the DOJ navigates the political minefield of the preclearance process during the highstakes 2011 redistricting process, the Supreme Court is looking over its shoulder, threatening to declare section 5 unconstitutional.").

approval rates reduce the number of opportunities for the Court to resolve the issue. [Citations to Testimony in the Record omitted].

This motion was defeated. Meeting Tr. at 50 (July 6, 2012).

Note that the proposal stated only that the high approval rates of redistricting plans in the current cycle “may be” related to the *Northwest Austin* case. It did not assert that this is the only possible interpretation of the facts as we currently understand them. While I personally regard it to be a very likely contributing factor to these rates, the proposed footnote simply invited the reader to consider the possibility.

I don’t wish to overstate this point. The fact is that when contrasted with earlier decades, the approval rates for the current cycle and the 2001-2002 cycle are only barely different. The Bush Administration objected to 4 out of 924 redistricting submissions in 2001. Similarly, the Obama Administration objected to 2 out of 1007 in 2011.<sup>346</sup> For this report, the Commission did not look at 2012 data, since the year had not even gotten started when it cut off discovery. I therefore have no idea how the Bush Administration’s objection to 19 out of 1039 in 2002 will compare to the Obama Administration’s objections for 2012. But some commentators expected the objection rates in the current cycle to be much higher than they were.<sup>347</sup> The possibility that *Northwest Austin* may have had a large effect therefore cannot be eliminated.<sup>348</sup>

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<sup>346</sup> Even this may overstate the difference. By my count the Obama Administration objected to 3 proposals, not 2. See Letter of October 3, 2011 from Assistant Attorney General Thomas E. Perez to C. Robert Heath (objecting to Galveston, Texas proposal for at large seats on its city council). The inclusion of the Galveston case would make the rates as close to equal as anyone could expect. By contrast, 52 objections out of 346 submissions were made in the 1971-1972 cycle, 58 objections out of 841 were made in 1981-1982 and 125 out of 1537 were made in 1991-1992. Rep. at 17-18.

<sup>347</sup> See Hans A. von Spakovsky, *Abusing the Voting Rights Act*, NATIONAL REVIEW ONLINE (Feb. 23, 2011, 12:00 AM), <http://www.nationalreview.com/articles/260303/abusing-voting-rights-act-hans-von-spakovsky?pg=1>.

<sup>348</sup> An alternative theory that would be consistent with von Spakovsky’s prediction might be that jurisdictions that were concerned that his prediction might come true took his advice to seek preclearance in court or filed simultaneously in court and with DOJ in order to discourage DOJ from dragging its heels or unfairly objecting. It is possible that this approach had the intended effect and DOJ precleared the submissions in order to avoid going through the judicial preclearance process. Our report correctly points out that the Commission has no particular evidence that filing simultaneously increased the chances of a prompt positive resolution, since the rates of approval during this cycle are only marginally different from what they were in the 2001-2002 cycle in which judicial and dual submission were uncommon. However, the Commission also has no particular evidence that filing simultaneously did not increase the chances of a prompt positive resolution. It is worth pointing out that one wouldn’t expect to find such evidence given the kind of investigation the Commission conducted. Therefore, the report cannot speak to the issue of whether filing simultaneously in court and with DOJ could have affected the preclearance rate.

I could readily understand if my colleagues wanted to avoid all speculation about the motivations of Department of Justice staff members in our report and wanted to stick to the numbers. I would have preferred that for this report too. But my colleagues have been campaigning for the inclusion of their own far more speculative and partisan reason as *the* explanation while refusing to include a far more modest possible explanation. Commissioner Heriot's amendment was offered defensively. Prior to that same meeting, Chairman Castro and Commissioners Achtenberg and Yaki jointly proposed that the following finding be added to the report:

Comprehensive evidence demonstrate that, from 2009 through the May 2012 close of the Commission's record in this inquiry, DOJ enforced Section 5 in manner which appears, overall, to be more transparent and apolitical than was the case in recent years.

Meeting Tr. at 78 (July 6, 2012).

As part of the same amendment proposal, those same Commission members also proposed the following addition:

It appears that the Justice Department's enforcement of Section 5 has not been politicized with respect to redistricting preclearance this cycle. This is notable given the allegations of politicization that accompanied the redistricting cycles following the 1990 and 2000 censuses, and well as predictions of politicization made by some DOJ critics prior to the beginning of the current cycle. The current DOJ, the first in a Democratic Presidential administration to preside over a decennial redistricting process under VRA Section 5, granted administrative preclearance to all plans submitted to it by Republican-governed states in 2011. [Citations and paragraph break omitted.]

I am not sure what "comprehensive evidence" my colleagues are talking about. Apart from the Department of Justice's potentially self-serving letters announcing disapproval of particular redistricting plans, the Commission has no evidence as to why the Department of Justice approved or denied any particular plan in this or any other cycle—not a jot.<sup>349</sup> All the

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<sup>349</sup> Presumably my colleagues are attempting to rely on the curious testimony of political scientist Ronald Keith Gaddie. Gaddie testified that his opinion was "based upon examination of very limited evidence," which he identified as the "objection letters that have been issued since 2006." Gaddie stated that from what he could detect in these six letters, which the Commission had requested him to examine, the process appears to be fair and consistent. "There may be other evidence that we are not privy to that might demonstrate otherwise . . . ," he admitted. Several comments are in order here. First, if the theory is correct that *Northwest Austin* and a strategic desire to avoid Supreme Court adjudication explains the high rates of plan approval, looking for evidence of politicized conduct in the objection letters is looking in precisely the wrong place. The politicized activity under that theory is that some redistricting proposals were approved that should have been rejected under the decisionmakers' best judgment as to what the law requires. Examining the objection letters wouldn't reveal that

Commission knows is that approval rates in the most recent cycle were higher than in previous cycles—though only slightly higher than in the 2001-2002 cycle. I believe that the best window we have into the motivations for these high rates is the constitutional overhang created by the *Northwest Austin* case. But I am certainly willing to acknowledge that other interpretations are possible.<sup>350</sup> What I cannot countenance is a conclusion that “comprehensive evidence” demonstrates that the Obama Administration’s Department of Justice is or appears to be more “apolitical” than the previous administration.<sup>351</sup> If Department of Justice is lying low in order to

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problem. To help decide whether the theory is correct, one would need to look at proposal case files that were *approved*, not simply those that were not.

Gaddie seems inclined to equate “politicization” in this context with disagreement. He points to the fact that during the Bush administration, evidence of disagreements between the political appointees and career staff sometimes leaked out to the press. This appears to be his point of comparison between the two administrations. As we explain further, given that the typical career staff member is well left of center, it is not surprising they would have more conflicts with Presidential appointees during a Republican administration than during a Democratic one. It does not necessarily show that either side of the disagreement is acting inappropriately or that if one side is conducting itself inappropriately, which side that is. See Subpart A, *infra* at 127-130. But every parent knows how this story goes: If the children are bickering in the rumpus room, it is probably best to go check on them. But it is when they are being so quiet that a pin could drop that you need to get in there as fast as you can. So it is with government bureaucracies.

<sup>350</sup> For example, another plausible explanation for the high approval rates is that states have become accustomed to the legal standards under which redistricting plans are judged and have learned how to put together proposals that will be approved. This is consistent with the evidence in Figure 5 that approval rates were also extremely high in the last election cycle (2001-2002)—almost as high as they have been during this cycle. In contrast, approval rates were much higher in each of the three previous cycles (1971-1972) (1981-1982) and (1991-1992). See *supra* at 15.

A more particularized variation on that theory would be that early in the 2001-2002 cycle, some states took the position the State of Georgia took in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). The State of Georgia’s position in that litigation contended that there are many ways to comply with the Voting Rights Act’s requirements and that maintaining majority-minority districts was only one of these ways. Although that position was adopted by the Court in its decision, Congress in re-authorizing and amending the Voting Rights Act disapproved of *Georgia v. Ashcroft*’s flexible approach to compliance and focused attention back on majority-minority districts. The disadvantage of Congress’s approach is that it is more rigid; the advantage is that it is more difficult to manipulate and simpler to understand and thus comply with. It is therefore less likely to produce redistricting submissions that will be objected to. In a sense, this would be consistent with my colleagues’ theory that the process has become “apolitical” after a history of “politicization.” But it is inconsistent with their theory insofar as they imply that the reason for the change is the change in administrations. The suggestion here would be that the 2006 Amendments make the law less susceptible to disagreement over applicable standards.

<sup>351</sup> My colleagues seem to believe that the fact that the Department of Justice approved redistricting proposals put forward by Republican-dominated legislatures is a sign that we may assume that all is well. Alas, the politics behind Section 5 are not so simple. Aggressive interpretations of Section 5 tend to be favored by left-leaning civil rights activists, a group that is well-represented at the Civil Rights Division, both among the political appointees and the career staff. Sometimes their interpretation of the law benefits Republicans more than it does Democrats. Just as politics makes strange bedfellows, so does redistricting.

It is not my position that earlier administrations have been uniformly free from politicization in the interpretation and enforcement of this aspect of the Voting Rights Act. For example, we are persuaded by our colleague Vice Chair Abigail Thernstrom that an alliance during the 1991-1992 cycle between Republicans and civil rights activists in promoting majority-minority districts worked to the disadvantage of Democrats in elections. See ABIGAIL THERNSTROM, *VOTING RIGHTS AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS*, 111-112 (2009). But there is a huge distance between that and the assertion that the current administration is not politicized while the one it replaced was.

avoid putting the issue of Section 5's constitutionality before the Supreme Court, such a motivation is not best characterized as apolitical.<sup>352</sup>

We therefore voted against our colleagues' proposed amendment to the final Commission Report at our July 6, 2012 meeting. Among our reasons are these: (1) The proposal implicitly defines "politicized" in a manner that is misleading and tendentious; (2) Under any fair definition of the term, we have no direct evidence one way or the other about whether the decisions made by the Civil Rights Division in connection with redistricting were "politicized," much less whether it was more or less so than under previous administrations; (3) *Northwest Austin* gave the Voting Section an incentive to avoid rejecting redistricting proposals and such a motivation would be, at least under some definitions of the word, "politicized"; and (4) Under any fair definition of "politicized" there is plenty of evidence of politicized decisionmaking in recent years by the Civil Rights Division in areas outside of redistricting plans, so it would not be unfair to want to scrutinize its decisionmaking in the redistricting area far more critically than the Commission has done before declaring it "apolitical."<sup>353</sup>

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<sup>352</sup> Perhaps the Voting Section decisionmakers are simply trying to protect their jobs. If so, perhaps that would be better described as self-interested decision-making (though I suppose calling it "politicized" would not necessarily be inaccurate). In any event, a self-interested decision is arguably worse than a politicized one. Perhaps, on the other hand, they are motivated by the belief that it is in the interest of electing more Democrats for the Voting Section to maintain a low profile for a while until new appointees to the Court move it in a different direction. That would clearly be a politicized decision. Or perhaps they have some other, less objectionable motivation. All I can say is that I cannot agree that a decision not to bring a case because it might lead to a Supreme Court decision to which the decisionmakers would object can be safely characterized as apolitical.

<sup>353</sup> During the course of preparing the Commission's 2010 enforcement report, the Commission adduced evidence that DOJ's dismissal of the voter intimidation lawsuit against the New Black Panther Party may have been politically motivated. Indeed, on July 23, 2012, U.S. District Court Judge Reggie Walton suggested that Assistant Attorney General for Civil Rights Thomas Perez may have rendered false testimony to the Commission regarding whether political appointees were involved in the decision to dismiss. DOJ has also lodged several challenges to state voter identification requirements, which challenges are suspected by many knowledgeable observers to have more political than legal merit, especially since the Supreme Court rejected the challenge to Indiana's voter ID law under the Equal Protection Clause, *see Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), and the Eleventh Circuit approved Georgia's voter ID law, *see Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11<sup>th</sup> Cir. 2009). Indeed, no legal challenge against any state voter ID law has yet prevailed, which raises questions about the Attorney General's hyperbolic, and racially loaded, statement that the Texas voter ID laws constitutes a "poll tax," a claim that even his own Civil Rights Division did not make against the Texas law.

**A. Our Colleagues are Implicitly Offering Definitions of “Apolitical,” “Politicized” and “Politicization” that are Themselves Tendentious and Politicized.**

I am concerned that our colleagues’ proposed amendment to the final Report did not provide definitions of “apolitical,” “politicized,” or “politicization,” yet they toss these words around casually. These words generate a lot of heat but not much light, in large part because few people seem to agree on what they mean. To me, a legal action is “politicized” if it was made for the short-term political gain of the actor’s political party or ideological allies rather than in keeping with what the law demands of the actor (when the law is simple and clear) and/or rather than focusing on the long-term integrity of the law and public policy (when the law vests some level of policy discretion on the part of the actor). For example, if the Alaska redistricting plan were approved (or rejected) because it made it more likely that the state legislature would contain more progressives (or more conservatives) rather than because it is a legitimate exercise of the state’s discretion under the VRA, that would be a politicized decision. On the other hand, a decision is “apolitical” if (1) it is not made for the short-term political gain of the actor’s political party or ideological allies and (2) it is not informed by the actor’s ideological viewpoint in matters of law and governance. I readily concede that other definitions may be just as good or better.<sup>354</sup>

Note, however, that I have no direct evidence on why Voting Section officials made the particular decisions they did and that it is impossible for me to even form an opinion without a massive investment in understanding the intricacies of each decision. There are very few people in the country with both the quantitative skills and the inside knowledge necessary to figure out which decisions were politicized and which were not. The Commission hasn’t scratched the surface. It didn’t even ask the Department of Justice to explain why Voting Section officials made particular decisions. At this point, I cannot say whether the redistricting decisions made in the last few years were more politicized, less politicized or about the same. And I respectfully submit that neither Chairman Castro, Commissioner Achtenberg, Commissioner Yaki, nor any other present or former member of our staff can do so either.

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<sup>354</sup> Note that under my definition a decision on a matter of public policy may be neither “politicized” nor “apolitical.” I believe this is in keeping with the generally negative connotation of “politicized.” A decision may involve policy discretion and may be informed by one’s general political philosophy and yet not be “politicized” under our use of the word. A “political” judgment is not necessarily a “politicized” decision. Government officials must make policy judgments every day that are in some sense of the word “political” rather than “apolitical” and yet are wholly appropriate.

My colleagues are almost certainly using the lazy man's definition of "politicized" instead. Under this view, a decision is "politicized" if it was made by someone appointed by the President over the objections of the career staff. Such a definition is itself tendentious and (under more thoughtful definitions of "politicized") politicized. Under it, if the career staff is unhappy, a decision is "politicized." If they are extremely unhappy and leak their unhappiness to the press, a decision is "extremely politicized."

Two things about this approach to the concept of politicization should be noted. First, it is rooted in an anti-democratic ideology. The Constitution vests all executive power in one President of the United States, who appoints officers to assist him or her in the fulfillment of those duties. It vests no policymaking in the hands of unelected career employees.<sup>355</sup> When the two conflict on a matter of discretion or judgment, it is the discretion or judgment of the President and his or her appointees who must prevail unless and until the good people of the United States vote him or her out of there.

Second, it is a definition of "politicized" that is rigged against Republicans and conservatives. With the possible exception of the military, the large majority of career employees are Democrats and/or left of center.<sup>356</sup> More recent research shows this to be especially so—even

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<sup>355</sup> Under our system, it is a violation of the law to consider an applicant's political ideology in selecting employees for most government jobs. This works well for jobs that do not involve policy-making. A letter carrier, a food preparer or an information technology expert can be a flesh-eating monarchist and it won't interfere with his or her ability to do the job one bit. It works less well for positions that involve even small amounts of policymaking. Unfortunately, some people like to argue this one both ways. On the one hand, they argue that it is a violation of the law to consider a job applicant's political ideology at the hiring stage. On the other hand, once a job applicant is hired, they argue that his or her policy judgment should be deferred to by political appointees (i.e. officials whose policymaking judgment has been vetted by the person who has been duly elected as President and his or her advisors). Such an argument is not just profoundly anti-democratic, it is anti-accountability. Some of those who make it are simply being naïve. That is why it always bears repeating that the fact that an employee is a career civil servant does not mean he or she has no political ideology; it means that he or she was hired without any inquiry into that political ideology. Career employees may be massively outside the mainstream or they may not be. But their judgments may not trump those of the President or his appointees.

<sup>356</sup> See, e.g., Stanley Rothman and S. Robert Lichter, *How Liberal are Bureaucrats?*, REGULATION 16 (November/December 1983).

wildly so—at the Civil Rights Division.<sup>357</sup> It is hardly surprising that career employees at the Civil Rights Division are overruled by political employees more often in Republican administrations than in Democratic administrations. That’s because they disagree with each other more often. But that completely avoids the question of which side, if either, is acting in a “politicized” (our definition) manner.

People with different views on big-picture political issues are going to have different views on matters of legal interpretation and public policy. Whether they realize or not, many of these disagreements are entirely in good faith on the part of both sides. That is not to say that they are always in good faith. Sometimes political appointees and/or career employees twist the law to fit their ideologies.<sup>358</sup> Sometimes political appointees and/or career employees make politicized decisions. But the key is that you can’t tell which side of the ideological divide is misbehaving (if indeed either side is misbehaving) simply by the fact that the two sides disagree.

Indeed, I will go one important step further. When political appointees and career employees disagree, the two sides may sometimes function as a check on each other. Neither side dares to act boldly in an inappropriate direction, because the other is looking over its shoulder. It’s when the two sides are ideologically and politically allied that you most have to worry. The worst excesses of government misbehavior tend to come when the two sides (political appointees and

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<sup>357</sup> See J. Christian Adams, Richard Pollock, and Hans von Spakovsky, *Every Single One*, PJMEDIA (Aug. 8, 2011–Sept. 19, 2011), <http://pjmedia.com/every-single-one-pj-medias-investigation-of-justice-department-hiring-practices/>; J. Christian Adams, *Reviewing the Resumes: The Politicized Hiring of Eric Holder’s Voting Section*, PJMEDIA (Aug. 9, 2011, 12:00 AM), <http://pjmedia.com/blog/reviewing-the-resumes-the-politicized-hiring-of-eric-holder’s-voting-section/>; David Steinberg, PJMEDIA, *‘Every Single One’ Fallout: Justice Dept. in Turmoil From PJMedia Series* (Sept. 26, 2011, 12:00 AM), <http://pjmedia.com/blog/‘every-single-one’-fallout-justice-dept-in-turmoil-from-pjmedia-series/>; Caroline May, *Former Officials Call for an Investigation into Hiring at DOJ*, THE DAILY CALLER (August 29, 2011, 11:59 AM), <http://dailycaller.com/2011/08/29/former-officials-call-for-investigation-into-political-hiring-at-doj/>. Using a Freedom of Information Act request, Adams and von Spakovsky obtained the resumes of all career attorneys hired by the Department of Justice’s Civil Rights Division during Attorney General Eric Holder’s tenure as head of DOJ. Adams’ and von Spakovsky’s review of the resumes revealed that all 113 new hires had ideologically far-left resumes, and not one new hire had a conservative or apolitical resume.

<sup>358</sup> For example, suppose Congress were to pass a law forbidding discrimination on the basis of sexual orientation in the military. If political appointees and/or career employees were to use this law to require preferential treatment for gay job applicants despite knowledge that neither the text of the statute nor the intent of Congress lie in that direction, because they believe that such a requirement should have been made part of the law and would have been in the best interests of the nation, they are not acting in good faith. Whether one calls such actions “politicized decisions” or simply “ideologically-driven power grabs” does not in the end make a huge difference. I’m inclined to think that it is worth it to make a distinction between short-term political jockeying and long-term efforts to impose one’s ideological views on a legal system that is not rooted in such views. But both are clearly misconduct.

career employees) are engaged in a love fest with each other. During Republican administrations, this may be more likely to happen at the Pentagon. During Democratic administration, the Civil Rights Division at the Department of Justice is among the places it is more likely to happen. Savvy voters know that it is when you don't hear about conflict emanating from a government agency—when everything seems to be going swimmingly—that the time to worry has arrived.

To sum up, a definition of “politicized” that focuses on whether appointed officials are overruling career employees is focusing on the wrong things and is systematically biased against the political party and ideological viewpoint that is less well-represented in the bureaucracy.

### **B. The Commission Has No Way of Knowing Whether DOJ Applied an Apolitical Standard When Evaluating Redistricting Proposals.**

One modern reality is that computers make the drawing of political boundaries more complicated than it has ever been before. There is almost no limit to what can be done if the officials drawing the boundaries are willing to allow bizarrely shaped districts. A state can draw boundaries to protect incumbents—whether Democrats or Republicans. It can draw boundaries to maximize the number of Democrats who will be elected or maximize the number of Republicans. It can maximize the likelihood that legislators will be elected who regard rural issues as their special concern; or it can do the same for urban issues. It can maximize the number of districts that will be dominated by particular racial groups, religious groups, or socio-economic classes. It can group growers and ranchers together or it can split them apart. It can punish a disfavored incumbent by placing his home in a district in which he must compete against another incumbent. It can reward a favored aspiring politician with a custom-fitted district. It can produce districts that will almost certainly elect a pro-union representative or a pro-aerospace industry representative.

To be sure, all these strategies have costs. A political map designed to protect all incumbents will be easy to push through the political approval process, but it ensures that the legislature will be polarized, because the Democratic districts will be very Democratic and the Republican districts will be very Republican. Redistricting schemes that are designed to maximize the total number of seats held by one party or the other are risky, since they require that the members of the dominant party be spread thinly in some districts. In a bad year for that party, it can lose big.

Creating a district likely to produce a “Mr./Ms. Aerospace Industry” or “Mr./Ms. Union” may produce representatives from contiguous districts who have less reason to care about those interests than they would otherwise have.

When state authorities engage in such strategies, they do not usually advertise them to the public. Political insiders may know, because they have been told explicitly or because they can infer the truth from tidbits of information. Astute political observers with knowledge of local politics and access to some of the data may be able to reverse engineer the process to determine what is going on beneath the surface. Or in some cases the motivations of the boundary drawers may be obvious with just a small amount of publicly available information. We here at the Commission are neither political insiders nor astute political observers with knowledge of local politics. We have neither pored over the newly drawn political maps nor crunched the data ourselves. We have not attempted to coax the why and wherefores out of the insiders who drew the maps.

In order for DOJ staff members to assess redistricting plans as part of their preclearance duties, they would have to examine each re-districting plan closely. We on the other hand have no way for knowing what motivates their decisions in any particular case. Were they mechanically applying a “no retrogression” rule for majority-minority districts and defining “majority-minority districts” in exactly the same way as the state authorities in each case? Did they pull their punches on account of *Northwest Austin*? If so, why? Anyone who thinks he or she can answer those questions based on the record before us is incorrect.

**C. *Northwest Austin* gave the Voting Section an incentive to avoid rejecting redistricting proposals and such a motivation would be, at least under some definitions of the word, “politicized.”**

According to one panelist, Columbia law professor Nathaniel Persily, the controversy over Section’s 5 constitutionality in *Northwest Austin* is not just “casting a big shadow over what DOJ is doing,” it is leading “many in the civil rights community to say well [DOJ is] being too timid.” No one denies that that traditional civil rights advocates who Professor Persily calls “the civil rights community” tend to favor a more aggressive interpretation of what the Voting Rights Act requires.

However, this faction's displeasure with DOJ's actions does not mean that DOJ is interpreting the Voting Rights Act apolitically or correctly. If civil rights advocates believe they are entitled to a whole pie, but under the statute they are only entitled to half a pie, they will be unhappy even if DOJ provides three-quarters of a pie. Simply arguing that DOJ has moderated its behavior—and even if DOJ has moderated its behavior—does not mean that DOJ's behavior is correct. If DOJ was 180 degrees off-course, and is now only 90 degrees off-course, it is still off-course. This is particularly true if DOJ is simply on its good behavior now, and will pursue more aggressive policies once it believes the threat to Section 5's constitutionality has passed.<sup>359</sup>

**D. The Voting Section's Behavior in Other Cases Raises Doubt that it is Truly Apolitical.**

As I have noted above, it is impossible to know with any certainty why the Voting Section has approved certain redistricting proposals. However, the Voting Section's behavior in other cases suggests that the Voting Section is quite politicized. For instance, in 2009 DOJ denied preclearance to a voting change in the city of Kinston, North Carolina, which would have ushered in nonpartisan elections. DOJ concluded that the change would have the effect of making it more difficult for African Americans to elect candidates of their choice because (1) black-preferred candidates require some white cross-over votes and (2) those candidates needed the "Democratic" label in order to obtain those white cross-over votes. Remarkably, two and a half years later, after the case had already proceeded through a substantial amount of litigation, DOJ suddenly announced that it was withdrawing its objection to the proposed voting change. The opposing parties, who have filed a petition for a writ of certiorari, contend that DOJ withdrew its objection in order to avoid an opportunity for Section 5 to be declared unconstitutional. If these suspicions are correct, this was a politicized decision regardless of whether the underlying rationale was an ideological commitment to Section 5 or a humbler desire not to put oneself out of a job. If the suspicions are incorrect, the obvious question is why

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<sup>359</sup> To take the pie metaphor further: If the statute requires that a particular faction be given half the pie, and DOJ gives it only a quarter of the pie, because it does not wish the Supreme Court to have the opportunity to find the statute unconstitutional and hence stop giving away pie altogether, that decision may still be politicized. The statute either is or is not constitutional. DOJ's job is to enforce the statute as written, defend the statute in Court if it is questioned, and leave the decision over its constitutionality to the Court.

DOJ insisted on dragging petitioners through costly litigation for two and a half years before suddenly changing its position.<sup>360</sup>

The Kinston case is not alone in raising concerns about left-leaning politicization at DOJ. DOJ's actions in the New Black Panther Party case raised substantial concerns that the Department, or at least many of the political appointees and supervisors in the Civil Rights Division, was opposed to enforcing the Voting Rights Act in a race-neutral manner.<sup>361</sup> These concerns gained additional credence following U.S. District Judge Reggie Walton's suggestion that Assistant Attorney General Thomas Perez may have provided false testimony to the Commission regarding whether political appointees were involved in the decision to dismiss the case.<sup>362</sup> DOJ's repeated opposition to state laws requiring voter identification, most recently in Florida and Pennsylvania, also raise questions about whether the Department is truly apolitical.<sup>363</sup> In short, the information contained in this report gives no basis for determining whether or not DOJ is politicized. Furthermore, the Voting Section's recent record of hiring only attorneys with far-left resumes and inexplicably abandoning or pursuing various cases gives serious reason to worry that DOJ in general, and the Voting Section in particular, are indeed politicized in favor of leftist causes.

#### **E. It is Misleading to Characterize DOJ as Apolitical Based on Preclearance Approval Numbers Alone.**

One of the most misleading aspects of the report is its reliance on the number of approvals alone, rather than examining the types of approvals. The data provided by DOJ contains no indication of what types of political bodies were applying for preclearance. For instance, there is a vast

<sup>360</sup> *LaRoque v. Holder*, 755 F. Supp.2d 156 (D.D.C. Dec. 20, 2010), *rev'd in part, vacated in part by*, 650 F.3d 777 (D.C. Cir. July 8, 2011), *on remand to*, 831 F. Supp.2d 183 (D.D.C. Dec. 22, 2011), *vacated and remanded by*, 679 F.3d 905 (D.C. Cir. May 18, 2012), *petition for cert. filed*, *Nix v. Holder* (U.S. July 20, 2012) (No. 12-81).

<sup>361</sup> U.S. COMMISSION ON CIVIL RIGHTS, *Race-Neutral Enforcement of the Law? The U.S. Department of Justice and the New Black Panther Party Case: An Interim Report*, [http://www.usccr.gov/NBPH/USCCR\\_NBPP\\_report.pdf](http://www.usccr.gov/NBPH/USCCR_NBPP_report.pdf) [hereinafter *Race-Neutral Enforcement*].

<sup>362</sup> *Judicial Watch v. U.S. Dep't of Justice*, 2012 WL 2989945, at \*7 (D.D.C. July 23, 2012).

<sup>363</sup> The Editors, *Voter ID Is Not Jim Crow*, NATIONAL REVIEW ONLINE (Dec. 16, 2011, 4:00 AM), <http://www.nationalreview.com/articles/285835/voter-id-not-jim-crow-editors>; CBS/AP, *Justice Department Sues Florida Over Voter Purge*, CBSNEWS.COM (June 11, 2012, 7:55 PM), [http://www.cbsnews.com/8301-250\\_162-57450812/justice-dept-sues-florida-over-voter-purge/](http://www.cbsnews.com/8301-250_162-57450812/justice-dept-sues-florida-over-voter-purge/); Tony Romeo, *U.S. Dept. of Justice Evaluating Legality of Pennsylvania Voter ID Law*, CBS PHILLY (July 24, 2012, 11:37 AM) <http://philadelphia.cbslocal.com/2012/07/24/us-dept-of-justice-evaluating-legality-of-pennsylvania-voter-id-law/>.

difference between these two scenarios: 1) granting preclearance to 1,005 water districts and denying preclearance to two congressional redistricting proposals; 2) granting preclearance to 990 water districts and fifteen congressional redistricting proposals and denying preclearance to two water districts. It would be necessary to know what redistricting approvals were approved and disapproved in order to determine whether DOJ behaved apolitically.

Most notably, relying solely on the numbers ignores the fact that the Department opposed Texas' attempt to receive preclearance in federal court. DOJ only objected to two requests for administrative preclearance out of 1,007, but it actively opposed Texas' attempt to gain judicial preclearance.<sup>364</sup> There is a vast difference between denying preclearance to a water district or a county and opposing preclearance for an entire state. For obvious reasons, opposing preclearance for an entire state has far more serious repercussions, both in regard to the number of citizens affected and in regard to the rights affected. Opposing a state's revised redistricting plan should only be undertaken after serious deliberation, given the federalism and constitutional concerns that arise with such intervention. Brushing over DOJ's opposition to Texas' redistricting plan attempts to bury the most prominent and contentious preclearance decision under a mountain of data.

Additionally, there are questions regarding whether DOJ's opposition to the Texas redistricting plan was politically motivated, as both the proposed redistricting plan and the plan that was already in place both contained nine majority-minority districts. The existing plan, by definition, had been approved by DOJ, which raises questions as to why DOJ would oppose a plan that contains the exact same number of majority-minority districts.<sup>365</sup>

## Conclusion

In short, *Northwest Austin* provides the simplest explanation for why DOJ may presently be surprisingly willing to preclear some proposed redistricting plans. It is quite possible that DOJ is simply displaying its best behavior now in hopes that the Supreme Court will decline to strike down Section 5. This possibility was alluded to by multiple experts who spoke at the

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<sup>364</sup> *Race-Neutral Enforcement*, *supra* note 361, at 10.

<sup>365</sup> Hans von Spakovsky, *Texas Redistricting Déjà Vu*, NATIONAL REVIEW ONLINE (September 20, 2011, Sept. 20, 2011, 9:44 PM), <http://www.nationalreview.com/corner/277850/texas-redistricting-d-j-vu-hans-von-spakovsky>.

Commission's briefing regarding Section 5. Yet our fellow Commissioners would not allow the report to include even the slightest hint that *Northwest Austin* and attendant questions about the continued viability of Section 5 might account for DOJ's apparent present docility.

We must also reiterate that DOJ may or may not be preclearing proposed redistricting plans in an apolitical manner. The data DOJ provided the Commission gives no basis for claiming that DOJ is or is not behaving apolitically. Skepticism is more than warranted when one considers DOJ's strenuous opposition to Texas' attempt to receive judicial preclearance and other seemingly politicized decisions.



## Statement of Commissioner Michael Yaki and Commissioner David Kladney

In this Report, the Commission had the opportunity to utilize clear, undisputable facts to sustain a finding that there is no evidence of politicization in the current redistricting process by DOJ. It is important enough to restate: our career staff, in its thorough and impartial review of data and testimony presented to the Commission, found no evidence of politicization in the Department of Justice review and enforcement of Section 5 of the Voting Rights Act.

Unfortunately due to the extreme politicization of this body, the conservative wing of the Commission -- no doubt deeply disturbed that their most cherished conclusion and talking point against continuing vitality of the Voting Rights Act was eviscerated --refused to provide a single vote to sustain this report's single most important conclusion:

“It appears that the Justice Department’s enforcement of Section 5 has not been politicized with respect to redistricting preclearance this cycle. This is notable given the allegations of politicization that accompanied the redistricting cycles following the 1990 and 2000 censuses, as well as predictions of politicization made by some DOJ critics prior to the beginning of the current cycle.” (emphasis added)

Those are the words of the Commission’s career staff that conducted the research and drafted this report and which appeared in the original draft. However, due to the objections of my Republican-appointed colleagues who comprise half the Commission’s current membership, this language was deleted from the main body for the final draft and a similarly worded finding reporting the lack of politicization was also blocked from the final draft. Efforts to restore the language, given the split in the Commission, proved futile.

Yet, even the desperate attempts by the conservatives cannot silence the inevitable conclusion that the numbers speak for themselves. As this report notes, even though this decennial redistricting cycle is the first since enactment of the Voting Rights Act in which Democratic political appointees led the Department of Justice:

“Nevertheless, Republican-controlled states do not appear to be at a disadvantage in the current process. For example, by the end of 2011, nine states had submitted 26 statewide redistricting plans to DOJ for administrative preclearance (see table 2). As indicated in table 2, DOJ precleared every single plan. Of those, six states’ redistricting processes, producing 18 redistricting plans, were entirely controlled by Republican state legislators. One state in particular, North

Carolina, submitted a Congressional redistricting plan that is predicted to replace three of the state's seven Congressional Democrats with Republicans. In fact, the only statewide plans that DOJ challenged in 2011 were Texas's House and Congressional redistricting plans, submitted to federal court for judicial preclearance. This cycle also marked the first time in history that Georgia and Louisiana received full administrative preclearance on the first attempt. ”

My colleagues may argue that the Commission did not probe DOJ decision-making in individual cases for political influence on career staff, and they may be correct in stating that we don't know to what degree these decisions might have been guided by the agency's political leadership. But speculation in motives is for all practical purposes irrelevant, for we have clear and unambiguous evidence that the results under current Civil Rights Division leadership have been evenhanded. Actions speak louder than words. The proportion of statewide plans administratively precleared by DOJ is indicative of a process that works as it should, in contrast to the conflicting excuses my colleagues present to explain away DOJ's preclearance rate this cycle.

This evidence flatly contradicts inflammatory rhetoric and slanted speculation this past winter by several conservative civil rights commentators about politicization in redistricting, and those critics have since changed their tune. But, such baseless attacks on the integrity of the Civil Rights Division by disgruntled critics continues. Efforts by Attorney General Holder and Assistant Attorney General for Civil Rights Thomas Perez to rebuild the Civil Rights Division in the public after the very real politicization under the Bush administration have been hampered by these unfounded allegations. Our Commission even aided such efforts under its previous leadership. But, giving cover to such baseless, negative criticisms must end.

There is room to improve the performance of DOJ's Civil Rights Division, and it is the duty of the U.S. Commission on Civil Rights to be an independent, objective watchdog of all government civil rights action and enforcement. But our independence places an equal responsibility on us, as Commissioners, to recognize both failures and successes. In this instance, the evidence clearly supports the even-handedness of their Section 5 redistricting work, and that is an accomplishment that all Americans can be proud of.

## REBUTTALS OF COMMISSIONERS

### Rebuttal Statement of Commissioner Kirsanow, With Whom Vice-Chair Thernstrom, Commissioner Gaziano, and Commissioner Heriot Concur

#### A. Rebuttal to Statement of Chairman Martin R. Castro and Commissioner Roberta Achtenberg

In their August 3 statement, Chairman Castro and Commissioner Achtenberg state that DOJ has “enforced Section 5 of the Voting Rights Act in a manner which is more transparent and apolitical than has been the case in recent years.”<sup>366</sup> As I discussed in my initial statement, the evidence the Commission obtained for this enforcement report cannot support the contention that DOJ is enforcing Section 5 in a more transparent and apolitical manner.

In support of their argument that DOJ is enforcing Section 5 in a more transparent and apolitical manner, Chairman Castro and Commissioner Achtenberg write:

The Commission’s study revealed that, beginning no later than 2009, DOJ significantly improved its communication with covered jurisdictions regarding the substance of the few objections that it has interposed to redistricting plans. Recent examples of DOJ objection letters are transparent in that they clearly describe, with specificity, the internal consideration which led the agency to object to a jurisdiction’s proposed voting changes.<sup>367</sup>

This statement conflates redistricting plans with proposed voting changes in general. The cited letters do not concern proposed redistricting plans.<sup>368</sup> One objection letter concerns Spanish-language election procedures and another concerns a voter-verification program.<sup>369</sup> It is impossible to draw any conclusions regarding DOJ’s preclearance of redistricting plans from its objection letters regarding Spanish-language election procedures and voter-verification programs.

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<sup>366</sup> Statement of Chairman Martin R. Castro and Commissioner Roberta Achtenberg at 83.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.* at note 291.

<sup>369</sup> *Id.*

Not only do these letters fail to support my colleagues' position, but they should not even have been included in the draft report. When this enforcement report was approved, my colleagues insisted that it be limited to the issue of redistricting. As noted above, the letters at issue do not concern redistricting. Further undermining the contention that the four letters mentioned above constitute some sort of conclusive proof of transparency and apolitical decisionmaking, the Commission actually received a total of 61 objection letters from DOJ. Some of the pre-2009 objection letters were quite specific, and some of the post-2009 objection letters were vague. There is no conclusive trend toward increased specificity in post-2009 objection letters.

Cherry-picking four objection letters that are not on point cannot demonstrate that DOJ's communication regarding redistricting improved during the Obama Administration. Basing an entire section of the report on a mere four letters out of a total of 61 gave the reader a misleading impression of the evidence as a whole. Once the Commission's career staff realized that the four letters were outside the scope of the enforcement report and constituted too small a sample from which to infer a trend, they appropriately struck the sections of the draft report that were based on these letters.

Chairman Castro and Commissioner Achtenberg also attempt to rely on the testimony of Keith Gaddie to support their argument that DOJ is enforcing the redistricting process in an apolitical manner.<sup>370</sup> As I noted in my initial statement, Gaddie's testimony is unhelpful in determining whether the Obama Administration's DOJ has been preclearing redistricting plans in an apolitical manner. Gaddie examined six objection letters that were issued from 2006-2009. The first two years of that period were during the Bush Administration, and therefore the three letters that were issued during those years shed no light on the conduct of the Obama Administration.<sup>371</sup> Because half of the letters Gaddie examined were not issued by the administration whose behavior is under discussion, it is difficult to draw any meaningful conclusions from his analysis of the six letters. And surely no one would argue that three letters is a sufficient sample on which to base a conclusion about DOJ's behavior.

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<sup>370</sup> *Id.* at 86-87.

<sup>371</sup> Statement of Commissioner Kirsanow, With Whom Commissioner Gaziano Concurr, at note 349.

Our colleagues also argue that “Republican-governed states covered by Section 5 did not suffer any handicap in DOJ’s recent preclearance practice.”<sup>372</sup> Some states did successfully obtain administrative preclearance, and perhaps that was due at least in part to either an explicit or implicit threat to challenge the constitutionality of section 5 if their redistricting changes were not approved. Our colleagues also cite a seemingly impressive low number of objections to proposed redistricting plans—two out of 1,007, but those figures are highly misleading for almost any purpose and especially cannot show a lack of politicization.<sup>373</sup>

As I noted in my initial statement, however, a closer review of the information reveals several important omissions which make it impossible for commissioners to accurately judge whether DOJ behaved apolitically when approving redistricting submissions.<sup>374</sup> When DOJ provided the data indicating that they only objected to two proposed redistricting plans out of 1,007, they did not indicate what types of redistricting plans were included. Therefore, the 1,007 redistricting plans can contain anything from water districts to congressional redistricting plans. Relying on the raw numbers sheds little light on the political importance of the redistricting submissions that were rejected. Neither I, nor my colleagues, nor Commission staff know what political entities were included in the 1,007 submissions. If 1,004 of those redistricting plans were of no political interest, and the three redistricting plans to which DOJ objected were of political interest and the objection was politicized, the DOJ redistricting preclearance process would rightly be termed “politicized.”<sup>375</sup>

As I also noted in my initial statement, focusing on the 1,004 administrative preclearance approvals ignores the most obvious counterexample to claims that DOJ is behaving in an apolitical manner: the Texas redistricting maps.<sup>376</sup> Although Texas maintained the same number of congressional minority opportunity-to-elect districts, the state rightly believed that DOJ would

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<sup>372</sup> Statement of Chairman Martin R. Castro and Commissioner Roberta Achtenberg at 87.

<sup>373</sup> Additionally, as I noted in my statement, DOJ actually objected to three redistricting proposals, not two. Statement of Commissioner Kirsanow, With Whom Commissioner Gaziano Concurr, at note 346.

<sup>374</sup> Statement of Commissioner Kirsanow, With Whom Commissioner Gaziano Concurr, at 133--134.

<sup>375</sup> *Id.* at 127 (“To me, a legal action is ‘politicized’ if it was made for the short-term political gain of the actor’s political party or ideological allies rather than in keeping with what the law demands of the actor (when the law is simple and clear) and/or rather than focusing on the long-term integrity of the law and public policy (when the law vests some level of policy discretion on the part of the actor.”).

<sup>376</sup> See David Wasserman, *DOJ Offers Voting-Rights Challenge to Texas Map*, NATIONAL JOURNAL DAILY, Sept. 20, 2011.

not preclear its redistricting plan. Texas therefore sought judicial preclearance, and as expected was opposed by DOJ.

DOJ's decision to oppose Texas' congressional redistricting plan may or may not have been politicized. Texas likely would argue that it was, and DOJ would likely argue the opposite. Without insight into the inner workings of DOJ, the Commission can offer no informed opinion on the matter. However, if DOJ's opposition to the Texas congressional redistricting plan was politicized, that decision would be of far greater importance than DOJ's approval of 1,004 plans from unknown political entities. Therefore, treating DOJ's opposition to the Texas redistricting plan as barely a blip in an overwhelming record of DOJ approvals distorts the evidence regarding DOJ politicization.

#### **B. Rebuttal to Statement of Commissioner Michael Yaki and Commissioner David Kladney**

Commissioners Yaki and Kladney devote nearly all of their statement to the lament that the report failed to conclude that the Holder Justice Department's Section 5 redistricting decisions are transparent and non-political, in contrast to the previous administration, and that the Commission did not make this finding. My statement at pages 130 to 134 explains why the evidence adduced by the Commission fails to support such a finding. Nor does the evidence cited by Commissioners Yaki and Kladney in their statement.

Commissioners Yaki and Kladney begin by citing two sentences from the draft report, later deleted by Commission staff, asserting that it "appears" DOJ "has not been politicized with respect to redistricting preclearance this cycle." "This is notable," their statement continues, "given the allegations of politicization that accompanied the redistricting cycles following the 1990 and 2000 censuses, as well as the predictions of politicization made by some DOJ critics prior to the beginning of the current cycle." The above sentences gloss over complicated allegations; the two citations for this position in the draft report were not remotely sufficient authority for them, if they supported them at all. After commissioners were provided an opportunity to comment on the draft report, it became abundantly clear that the claims about the post-1990 and 2000 redistricting cycles and the accompanying short citations were highly misleading—at best. Thus, senior staff at that Commission responsible for making sure no

unsubstantiated claims are made in the report sent to the Commissioners for a final vote deleted them.

Because Commissioners Yaki and Kladney still cling to those discredited claims, however, a brief review of the evidence they rely on in the draft report and elsewhere is warranted. The draft report cited two articles, one by Vice Chair Thernstrom and the other by Mark Posner of the Lawyers' Committee for Civil Rights Under Law, as authority regarding the post-1990 and 2000 redistricting cycles. Thernstrom's article criticized the Bush 41 DOJ for acceding to the wishes of "civil rights advocacy groups" such as the ACLU, NAACP, and MALDEF, by following a policy of maximizing the number of minority districts by any means.<sup>377</sup> This policy purportedly benefited both the above-mentioned liberal advocacy groups and the Republican Party in the South by concentrating black voters in "max-black" districts, while surrounding areas would have more white voters and would be more likely to vote GOP. The draft report was not entirely off the mark in describing Thernstrom's criticism of DOJ following the 1990 census—although they did mischaracterize her article in other respects (especially with regard to actions following the 2002 census).

Meanwhile, Mark Posner's article disagreed with Thernstrom's criticism of the Bush 41 DOJ. He found nothing wrong with its Section 5 policies and did not conclude that redistricting decisions were taken to benefit the Republican Party.<sup>378</sup> Thus, instead of supporting the proposition that particular DOJ decisions were politicized in early 1990s as the citation implied, the two authorities strongly disagreed on that point.

With regard to post-2000 actions, Thernstrom criticized a memo written by career attorneys at DOJ in 2003 objecting to a Texas redistricting plan as "ideologically driven" with "highly dubious assumptions about racial identity and minority representation," but she criticized the memo as being *too favorable to Democrats*.<sup>379</sup> She did not criticize then-Attorney General

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<sup>377</sup> Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 GEO. J. L. & PUB. POL'Y 41, 61-65 (2007).

<sup>378</sup> Mark A. Posner, White Paper, *The Politicization of Justice Department Decisionmaking Under Section 5 of the Voting Rights Act: Is It a Problem and What Should Congress Do?*, 12-13, American Constitution Society for Law and Policy (Jan. 2006).

<sup>379</sup> Thernstrom, *supra* note 377, at 59-61.

Ashcroft's disagreement with the memo and approval of the Texas plan. This was not an allegation of Republican politicization. Posner, however, found this episode to constitute evidence of politicization because political appointees overrode career staff, a definition of politicization I criticize in my statement on pages 127-130.<sup>380</sup>

Thus, Thernstrom criticized the Bush 41 administration but not the Bush 43 administration, while Posner did the opposite. Based on the footnote, a reader would likely wrongly assume that both Thernstrom and Posner made similar allegations of politicization relating to both the post-1990 and 2000 cycles. In fact, the authors made polar opposite claims with regard to both cycles—and for somewhat more complex reasons than the simplistic citation captured. In short, one of the few citations of authority offered in the draft report for the conclusion Commissioners Yaki and Kladney approve offers them no support at all.

As for whether DOJ has made politicized decisions during the current redistricting cycle, there are two confounding factors. The first is that, as Commissioner Gaziano explains in his statement on pages 111-113 and I also explain earlier in this statement at 139-141, DOJ may well be making its redistricting decisions with an eye to avoiding constitutional challenges in court. Second, the states seeking redistricting approval may have adjusted their plans knowing that a Democratic administration would make the decisions. These and other complex factors are ignored by our colleagues who wish to interpret a few isolated facts through simplistic partisan labels.

We do have rather striking evidence, however, that every single attorney hired by the Obama administration in the DOJ Civil Rights Division's Voting Section comes from liberal or left-wing backgrounds, as do all the other attorneys hired in the Civil Rights Division.<sup>381</sup> And the Commission's thorough enforcement report on DOJ's dismissal of most of its case against the New Black Panther Party, after the case was effectively won, showed that the Holder DOJ has

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<sup>380</sup> Posner, *supra* note 378, at 14.

<sup>381</sup> See Hans A. von Spakovsky, *Every Single One: The Politicized Hiring of Eric Holder's Voting Section*, PJ MEDIA, Aug. 8, 2011, and remaining articles in the *Every Single One* series.

not always made voting rights decisions in a race-neutral manner.<sup>382</sup> Indeed, several witnesses provided sworn testimony with startling detail that many supervisors in the Civil Rights Division, and especially in its Voting Section, vehemently argued that the civil rights laws *should not* be enforced in a race-neutral manner, but rather in an ideologically-driven manner. For the most part, the high-level supervisors and political appointees accused of having such results-oriented and racist views of the law refused the Commission's subpoenas to testify and refute the sworn allegations. This 18-month long investigation by the Commission provides much more direct evidence of long-standing, ideologically-driven (and possibly partisan) decision making in the Civil Rights Division that is the opposite of what Commissioners Yaki and Kladney assert.

Further, the current administration has been overly aggressive in Section 5 enforcement with regard to non-redistricting voting changes. DOJ refused to preclear Texas's and South Carolina's voter ID laws, which are similar to the Indiana voter ID law upheld by the Supreme Court in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), even though Texas and South Carolina have higher minority registration and voting rates, and more black elected officials, than Indiana.<sup>383</sup> Although eighteen states do not offer any in-person early voting, "DOJ has refused to preclear a Florida law that merely changes the times at which early voting may be offered while preserving the same number of early voting hours."<sup>384</sup>

Perhaps the most blatant example of overly aggressive enforcement is the Kinston, North Carolina case, where the City of Kinston approved a referendum to change from partisan to non-partisan local elections, a common practice in many localities across the country. DOJ refused to preclear "on the rather paternalistic theory that minority candidates would receive fewer

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<sup>382</sup> See U.S. Commission on Civil Rights, *Race Neutral Enforcement of the Law?: The U.S. Department of Justice and the New Black Panther Party Litigation* (Jan. 2011); see also Jerry Markon and Krissah Thompson, *Dispute Over New Black Panthers Case Causes Deep Divisions*, WASH. POST, Oct. 22, 2010 (confirming that many attorneys in DOJ's Voting Section believe that the Voting Rights Act only protects minorities). For a critique of the DOJ Inspector General report from July 2008 investigating claims of politicized hiring and personnel decisions, see Hans A. von Spakovsky, *Revenge of the Liberal Bureaucrats: A new report on Bush administration hiring practices at Justice*, WEEKLY STANDARD, Jan. 22, 2009.

<sup>383</sup> Brief of Former Dep't of Justice Officials as *Amici Curiae* in Support of Petitioner at 17, *Shelby County v. Holder*, No. 12-96 (U.S. filed Aug. 23, 2012) (citing *Shelby County v. Holder*, 679 F.3d 848, 902 (D.C. Cir. 2012) (Williams, J., dissenting).

<sup>384</sup> *Id.* at 18.

‘crossover’ votes if they could not identify themselves as Democrats.”<sup>385</sup> DOJ finally withdrew its objection and attempted to moot the case after “nearly three years of litigation” and “on the eve of a second trip to the D.C. Circuit.”<sup>386</sup> A petition for certiorari has been filed with the Supreme Court. *See Nix v. Holder*, No. 12-81 (U.S. filed July 20, 2012).

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<sup>385</sup> *Id.* (citing *Laroque v. Holder*, 679 F.3d 905, 907 (D.C. Cir. 2012)).

<sup>386</sup> Brief of Former Dep’t of Justice Officials, *supra* note 383, at 18.

## Rebuttal of Commissioners Kladney & Yaki to the Statements of Commissioners Gaziano & Kirsanow

For ease of reference to the reader, this rebuttal shall address each Commissioner's statement in turn and shall address the errors found therein roughly in the order in which they are presented by each author.

### Rebuttal of the Statement of Commissioner Gaziano

- *In 2009, eight justices of the Supreme Court expressed serious doubt about the constitutionality of section 5 of the Voting Rights Act; the remaining justice thought it was flatly unconstitutional.*<sup>387</sup>

Commissioner Gaziano presumably did not directly quote *NAMUDNO v. Holder*<sup>388</sup> for the simple reason that the majority opinion is much more ambiguous than how Commissioners Gaziano, Heriot and Kirsanow repeatedly present it.

The majority opinion notes that aspects of the VRA raise “constitutional concerns”<sup>389</sup> and “serious constitutional questions.”<sup>390</sup> The majority opinion also notes that Section 5 is an “extraordinary”<sup>391</sup> piece of legislation and that we “are now a very different Nation”<sup>392</sup> than when Section 5 was first enacted. All that being said, the oral argument transcript for *NAMUDNO* makes it clear that several Justices have no doubt that Section 5 is constitutional. For instance, after acknowledging progress on race relations since 1964, Justice Souter added, “But to say that [circumstances] have radically changed to the point that this becomes an unconstitutional section 5 exercise within Congress's judgment just seems to me to -- to deny the

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<sup>387</sup> Statement of Commissioner Gaziano at 101. See also, *Id* at 102 (“The unanimous Supreme Court’s unmistakable message in 2009 that these provisions were constitutionally problematic...”); 104 (“[A] unanimous Supreme Court, save Justice Thomas...”); *Id* (“But the unanimous Court explained in some detail that section 5 and its decades-old coverage formula raised at least serious constitutional concerns.”); *Id* (“The *Northwest Austin* Court flatly stated that the reauthorization of section 5’s ‘preclearance requirements and its coverage formula raise serious constitutional questions.’”); *Id* at 108 (“[A] recent, unanimous Supreme Court declared there is at least grave doubt about its constitutionality”); *Id* at 110 (“[W]hen the Supreme Court ‘indicated that it has grave constitutional doubt’...”); *Id* at 111 (“The Supreme Court’s decision in *Northwest Austin* is the Sword of Damocles ...”); *Id* at 113 (quoting Commissioner Heriot: “[I]n which the Court stated that Section 5 raises ‘serious constitutional concerns’...”); *Id* at 113 (“steadfast in their refusal to acknowledge the Supreme Court’s constitutional concern over section 5...”); Statement of Commissioner Kirsanow at 121 (“The Court thus sent a clear message that Section 5’s days may be numbered.”); *Id* at 122-123 (quoting Commissioner Heriot: “[I]n which the Court stated that Section 5 raises ‘serious constitutional concerns’...”).

<sup>388</sup> 557 U.S. 193 (2009).

<sup>389</sup> *Id* at 203.

<sup>390</sup> *Id* at 205.

<sup>391</sup> *Id* at 211.

<sup>392</sup> *Id*.

empirical reality.”<sup>393</sup> Justices Breyer<sup>394</sup> and Ginsburg<sup>395</sup> also made remarks during oral argument that were indicative of their continued support for Section 5.

Without the claim that a unanimous Supreme Court had “serious doubt” about Section 5, much of the rest of Commissioner Gaziano’s statement falls apart. If there is not a unanimous court with its sights set on Section 5, then there is no basis to think that a “constitutional overhang” is guiding the preclearance decisions of a fearful DOJ. If the Supreme Court is not poised to strike down Section 5, there is no need to invite panelists to our briefing who are willing to reiterate Commissioner Gaziano’s “serious doubts.”

The “serious dispute about the constitutionality” of Section 5 largely consists of Commissioner Gaziano, his colleagues, and their allies echoing talking points about a misrepresentation of *NAMUDNO*, and then quoting each other and inviting each other to repeat the same talking points in different venues. His pique over the focus of this year’s enforcement investigation seems largely due to the fact that he was unable to get someone invited to our briefing to misconstrue *NAMUDNO*,<sup>396</sup> which would then allowed the would-be panelist to hype his appearance before the Commission, have other members of the Section 5 constitutionality echo

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<sup>393</sup> *NAMUDNO* Oral Argument Transcript (April 29, 2009) at 16. See also, *Id* at 25 (Breyer speaking:

“What about the evidence that Justice Breyer summarized, that I alluded to? ... [T]hat is simply evidence of racial attitude and it seems to me in the real world that can be taken as evidence that if the -- if the section 5 safeguard is taken away, the pushback is going to start...[T]he pushback has never stopped.”)

<sup>394</sup> *Id* at 19-20 (Breyer lists 6 different types of evidence showing on-going racial problems).

<sup>395</sup> *Id* at 17-19 (“[I]t doesn't go from blatant overt discrimination to everything is equal .... To go after every [small discriminatory election rule change] with a section 2 lawsuit -- of the two devices, surely section 5 is more effective to smoke that out .... perhaps [state officials] wouldn't [police the conduct of localities] if the only tool in the arsenal were section 2, if everything had to be a Federal lawsuit.”)

<sup>396</sup> “I believe it was at our November meeting, Commissioner Gaziano suggested that we invite Ed [Blum] to be on that panel....[H]e takes a somewhat more conservative view of the issues that are involved in this case.” January 13, 2012 USCCR Business Meeting at 9.

At the November 18, 2011 Commission meeting, Vice Chair Thernstrom had this to say of Mr. Blum: “I do not think [Ed Blum] would be an excellent witness.... I do not think he is a scholar who knows very much about the Voting Rights Act.” November 18, 2011 USCCR Business Meeting at 38. According to the New York Times, Mr. Blum is a “self-described autodidact who has no law degree or formal scholarly background.” Morgan Smith, *One Man Standing Against Race-Based Laws*, TEXAS TRIBUNE Feb, 23, 2012, available at: [www.nytimes.com/2012/02/24/us/edward-blum-and-the-project-on-fair-representation-head-to-the-supreme-court-to-fight-race-based-laws.html?pagewanted=all](http://www.nytimes.com/2012/02/24/us/edward-blum-and-the-project-on-fair-representation-head-to-the-supreme-court-to-fight-race-based-laws.html?pagewanted=all)

chamber reference the panelist’s testimony (along with our colleagues citing the same testimony in their subsequent Commissioners’ statements), followed by the panelist or other members of the echo chamber citing the Commissioners’ statements as further evidence of “grave doubts” and “serious concerns” over Section 5’s constitutionality.<sup>397</sup>

The only purpose of inviting people to the Commission to claim that a unanimous Supreme Court has “grave doubts about Section 5 would be as part of an effort to try to persuade the wider public that Section 5 is constitutionally dubious. Commissioner Gaziano already has one organization at his disposal to pursue such an ends.<sup>398</sup> There is no need for him to also enlist the Commission on Civil Rights in that cause. We not believe the more you repeat an inaccuracy the more accurate it becomes.

- *For reasons that were never fully explained, and over our repeated objections, the Commission majority instructed our professional staff, expert witnesses, and commissioners that it would be out of order for any of us to address that constitutional issue.*<sup>399</sup>

The purpose of the Commission’s statutorily mandated annual report is to examine “Federal civil rights enforcement efforts in the United States.”<sup>400</sup> Gathering data on the Justice Department’s recent preclearance of state-wide redistricting plans and comparing those efforts to past redistricting cycles naturally fits into an examination of “Federal civil rights enforcement.”

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<sup>397</sup> For a past example of this process, see Professor Richard Sander’s amicus brief for the *Fisher v. University of Texas* case. Available at: <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/05/Brief-May-Final.pdf>. In his amicus brief, Professor Sander relies on two reports published by the USCCR, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS, Briefing Report, April 2007; ENCOURAGING MINORITY STUDENTS TO PURSUE SCIENCE, TECHNOLOGY, ENGINEERING AND MATH CAREERS, Briefing Report, October, 2010. Both briefing reports relied very heavily on testimony of Professor Sander concerning his own research.

The amicus briefs that Commissioners Gaziano, Heriot and Kirsanow prepared for the *Fisher* case also rely very heavily on the work of Professor Sander. Available at: <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/11/111017-pm2-Final-Fisher-Formatted.pdf>; <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/05/120524-Fisher-Merits-Amicus.pdf>.

<sup>398</sup> Hans von Spakovsky, *The Bailout Bait and Switch: DOJ’s Last-Ditch Attempt to Rescuse Section 5 of the Voting Rights Act*, HERITAGE FOUNDATION, Apr. 18, 2011. Available at: <http://www.heritage.org/research/reports/2011/04/the-bailout-bait-and-switch-doj-s-last-ditch-attempt-to-rescue-section-5-of-the-voting-rights-act> (“In its Northwest Austin Municipal Utility District Number One v. Holder (NAMUDNO) decision, the Supreme Court of the United States cast grave doubt on the constitutionality of the Voting Rights Act’s Section 5.”)

<sup>399</sup> Statement of Commissioner Gaziano at 101.

<sup>400</sup> 42 USC 1975a(c)(1).

Speculative and abstract discussions of Con Law are better suited for law review articles, white papers and amicus briefs. The Commissioners who approved the concept paper as written thought that focusing on the nuts & bolts of the preclearance process provided something of special value to the readers of our report—certainly more than a tired rehashing of dubious advocacy of the type produced by the sort of panelist whom Commissioner Gaziano wished to invite to the briefing.

- *It was also a mistake to report on section 5 without addressing the burdens it imposes on covered states and local governments.*<sup>401</sup>

Inasmuch as the report focused on state-wide redistricting plans (a limitation partly necessitated by the Commission’s reduced staffing levels), the purported burden of Section 5 on local governments was beyond the scope of the report. As far as the purported burden on state governments is concerned, Commissioner Gaziano has apparently forgotten or prefers not to recall, that the Commission sought discovery from covered jurisdictions and invited representatives from covered states to testify at our February briefing. Perhaps these accounts of their experiences with the preclearance process did not match the degree of burdensomeness imagined by Commissioner Gaziano, and as a result, he forgot that these state representatives did address the burden that Section 5 imposes on covered jurisdictions.

- *Instead of admitting error in trying to exclude that type of testimony, the Commission majority doubled down on its gag order. It defeated an amendment by Commissioner Heriot that would have added a short footnote to Chapter 3 of this report acknowledging that the constitutional doubt about the reauthorization of sections 4(b) and 5 might affect how DOJ was implementing it.*<sup>402</sup>

Commissioner Gaziano considers it an error for the majority of the Commission to fail to include mention of speculations about DOJ’s apparent fear that the Supreme Court harbors “serious doubt” about Section 5’s constitutionality (never mind that “serious doubt” is a misreading of

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<sup>401</sup> Statement of Commissioner Gaziano at 101.

<sup>402</sup> Statement of Commissioner Gaziano at 101.

*NAMUDNO*, as discussed above). It would be an error, rather, to include such speculation. The reason being: any objection to a preclearance submission of any sort provides the opportunity for litigants, such as Ed Blum, to challenge the constitutionality of Section 5. Since DOJ has in fact objected to some preclearance submissions since *NAMUDNO*, it is illogical to assert that DOJ is pre-clearing other submissions so as not to provide anyone the opportunity to challenge Section 5's constitutionality.

- *The Constitution provides that we take an oath to support it. That oath at least strongly counsels that we reflect on the constitutionality of the provisions we were studying when that issue is seriously in doubt.*<sup>403</sup>

Nearly 500 members of Congress—all of whom swore an oath to uphold the Constitution—voted to reauthorize Section 5 in 2006. Following that, scores of Justice Department officials and Federal judges—all of whom also swore an oath to uphold the Constitution—have enforced Section 5. What are we to make of the fact apparently only Commissioner Gaziano (and Justice Clarence Thomas) have concluded that it is their sworn duty to doubt the constitutionality of Section 5. Would that Diogenes of Sinope had lived to meet Commissioner Gaziano.

- *Further, we think the Commission majority's attempt to prevent a discussion of the constitutionality of the current preclearance provisions is symptomatic of a larger problem—and an additional reason why the Supreme Court ultimately must hear the challenges to sections 4(b) and 5, and hopefully sooner rather than later. The unanimous Supreme Court's unmistakable message in 2009 that these provisions were constitutionally problematic was a polite invitation to elected and appointed political officials to fix any constitutional defects. Congress's and our Commission's refusal to even consider the matter should communicate a strong message to the Court that: (1) it must act, and (2) further delay will serve no good purpose.*<sup>404</sup>

[...]

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<sup>403</sup> Statement of Commissioner Gaziano at 101-101.

<sup>404</sup> Statement of Commissioner Gaziano at 102.

*Whether the Court takes one or both of these cases or a later one is unknown, but the Commission’s “hear no evil, see no evil, speak no evil” approach to whether the preclearance provisions are constitutional is an additional reason why the Supreme Court must act—and why it ought to act as soon as practicable.<sup>405</sup>*

It is difficult to see how the Commission’s decision to focus on the nuts & bolts of the preclearance process necessitates the Supreme Court to grant cert to a constitutional challenge of the VRA. If even one Justice of the Supreme Court is moved to grant to cert on any VRA case as a result of the manner in which the Commission selected its annual enforcement report topic, we sincerely hope that the Justice will do us the kindness of publicly noting that it was because of us that cert was granted...

- *In its ruling in Northwest Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009), a unanimous Supreme Court, save Justice Thomas (who wanted to go further and strike down section 5) gave an even starker warning than it did in Sweatt that reauthorization of, and amendments to, sections 4(b) and 5 of the Voting Rights Act in 2006 were constitutionally problematic. Employing its constitutional avoidance practice again, the Court read the bail-out provision in the Voting Rights Act (VRA) more broadly than the Department of Justice thought possible and allowed the challenger in that case to avoid the VRA’s preclearance requirements. But the unanimous Court explained in some detail that section 5 and its decades-old coverage formula raised at least serious constitutional concerns.<sup>406</sup>*

“Questions” are not the same as “concerns” which are not the same as “doubts.” Throughout his statement, Commissioner Gaziano muddles or blurs these distinctions. Commissioner Gaziano’s comparison of *NAMUDNO* to *Sweatt* could charitably be described as “inapt.” Commissioner Gaziano is correct that *Sweatt* served as a shot across the bow. The gist of what the *Sweatt* Court was saying was, “‘Separate but equal’ might be constitutional, but only if conditions were truly equal—which isn’t the case between Texas’s segregated law schools.”

<sup>405</sup> Statement of Commissioner Gaziano at 105.

<sup>406</sup> Statement of Commissioner Gaziano at 104.

As mentioned above, at least three justices (Breyer, Ginsburg and Souter), based on their statements at oral argument, clearly believe that there is evidence (including evidence upon which Congress relied on during the 2006 VRA reauthorization) of extraordinary circumstances in the covered jurisdictions that justified the extraordinary measures of Section 5. If those three justices were correct about the factual basis for the continued constitutionality of Section 5—and we believe that they were and are correct—then their take on *NAMUDNO* is the mirror image of the facts in *Sweatt*. Instead of the facts undermining the law (as was the case in *Sweatt*), the facts (evidence of continued racial/ethnic discrimination in covered jurisdictions) supports the constitutionality of Section 5.

- *Jack Park, who worked as outside counsel to the Alabama Attorney General’s office during the latest state-wide redistricting submission to DOJ, described the overhang this way: “{T}he overhang of the constitutional challenges **can** act as a restraint on those who **might** use Section 5 as a way of challenging state statutes that they disagree with on political rather than racial grounds.” (Citations omitted, emphasis added)<sup>407</sup>*

Since challenging state statutes on the racial grounds authorized by the VRA can still result in a constitutional challenge, it is not clear what sort of check the alleged “constitutional overhang” provides against misuse of Section 5. The purpose of these assertions seems to mainly be to insinuate that officials at DOJ, in their heart of hearts, would like to challenge state statutes on political grounds. If it turns out that DOJ’s preclearance activities evince no politicization (as has been the case so far this redistricting cycle), a critic of the administration or Section 5 can still say, “Okay, sure, there’s no evidence of politicization, but that’s only because ‘the constitutional overhang’ kept them on the straight and narrow...” Since adherence to the letter and spirit of the law is no guarantee of avoiding constitutional challenge, it does not seem warranted to assume DOJ officials harbor thwarted ill intent.

- *Further, Professor Guy-Uriel Charles told the Commission that DOJ uses the intent-to-retrogress standard to insulate its section 5 decisions “from constitutional challenge,” “notwithstanding Congress’ amendment of Section 5 to expand the discriminatory purpose inquiry beyond the purpose to retrogress.” Thus, according to Professor Charles, DOJ has misread an amendment to section 5 out of concern over constitutional challenges.<sup>408</sup> (Citations omitted)*

<sup>407</sup> Statement of Commissioner Gaziano at 112.

<sup>408</sup> Statement of Commissioner Gaziano at 112.

The point Professor Charles was making is that when possible, DOJ considers it prudent to stay on familiar territory when conducting its purpose inquiry on a pre-clearance submission. This does not mean either that DOJ fails to understand that Congress broadened the scope of the purpose inquiry or that DOJ believes the broader purpose prong is unconstitutional. Rather, it is simpler for DOJ to litigate purpose-to-retrogress claims in the face of almost inevitable constitutional challenges. Commissioner Gaziano's misinterpretation of the testimony of Professor Charles seems to be the result of our colleague hearing what he wanted to hear (DOJ is evil), rather than what the words can support on their own.

- *The precise impact of the constitutional overhang is hard for us to evaluate, especially since the Commission successfully prevented us from pursuing discovery or witnesses that would have illuminated that question. It is possible that DOJ is pulling its punches in some respects, especially as reflected in the somewhat artificial measures examined by the Commission staff in the body of this report, but is still exceeding or abusing its statutory power in other respects, such as the Ahab-like challenges to state voter ID laws notwithstanding the Supreme Court's approval of Indiana's voter ID law in *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008), and similar federal court approval of Georgia's voter ID law. At a minimum, it is erroneous to equate preclearing dozens of politically uncontested redistricting changes in small jurisdictions with DOJ's refusal to preclear Texas's state-wide redistricting plan.*<sup>409</sup>

The only Ahab-like behavior is Commissioner Gaziano's vendetta against the Justice Department, previously debunked by Commissioner Yaki.<sup>410</sup> Having failed to harpoon Attorney General Holder<sup>411</sup> during his protracted effort to try to prove that the Obama Administration

<sup>409</sup> Statement of Commissioner Gaziano at 112-113.

<sup>410</sup> See, U.S. COMMISSION ON CIVIL RIGHTS, *Race-Neutral Enforcement of the Law? The U.S. Department of Justice and the New Black Panther Party Litigation: An Interim Report* (Dissent of Commissioners Melendez & Yaki; Rebuttal of Commissioner Yaki).

<sup>411</sup> "This doesn't have to do with the Black Panthers; this has to do with their fantasies about how they could use this issue to topple the [Obama] administration," said Thernstrom, who said members of the commission voiced their political aims "in the initial discussions" of the Panther case last year. "My fellow conservatives on the commission had this wild notion they could bring Eric Holder down and really damage the president." Ben Smith, A Conservative Dismisses Right-wing Black Panther "Fantasies," POLITICO, July 19 2010, available at: [www.politico.com/news/stories/0710/39861.html](http://www.politico.com/news/stories/0710/39861.html)

is in league with a black separatist hate group,<sup>412</sup> Commissioner Gaziano is now forced to resort to **baseless speculation** as to why DOJ administratively precleared nearly all redistricting submissions; or to pretend as though he does not understand how the unsuccessful facial challenge to the voter ID law in *Crawford* does not preclude other legal challenges to different voter ID laws.<sup>413</sup>

### Rebuttal of the Statement of Commissioner Kirsanow

- *[NAMUDNO] may go a long way toward explaining why the Department of Justice would be unusually willing to approve at least some of the redistricting plans in the current reapportionment/redistricting cycle.*<sup>414</sup>

Or it may go a short way toward explaining ALL approvals or it may not explain ANY approvals. The truth is that this is unknowable. The beauty of baseless speculation is that you can insinuate as you like without having to commit to any particular interpretation or present a compelling account to causality.

- *Presumably, most of the staff members [at DOJ] favor the preclearance process or else they would not have accepted jobs there to administer it. At a minimum, the preclearance process puts food on their table.*<sup>415</sup>

It is not clear why Commissioner Kirsanow felt the need to gratuitously impugn the motives of DOJ staff, rather than simply sticking with his first presumption. Perhaps his familiarity with

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<sup>412</sup> Southern Poverty Law Center, Intelligence Files, *New Black Panther Party*, available at: [www.splcenter.org/get-informed/intelligence-files/groups/new-black-panther-party](http://www.splcenter.org/get-informed/intelligence-files/groups/new-black-panther-party), (“The New Black Panther Party is a virulently racist and anti-Semitic organization whose leaders have encouraged violence against whites, Jews and law enforcement officers.”)

<sup>413</sup> Or, that preclearance objections to some voter ID laws do not indicate a monomaniacal opposition by DOJ to all voter ID laws. See, Emily Schultheis, *Justice Dept. Clears Virginia Voter ID Law*, POLITICO, AUG. 20, 2012, available at: [www.politico.com/blogs/burns-haberman/2012/08/justice-dept-clears-virginia-voter-id-law-132633.html](http://www.politico.com/blogs/burns-haberman/2012/08/justice-dept-clears-virginia-voter-id-law-132633.html).

<sup>414</sup> Statement of Commissioner Kirsanow at 121.

<sup>415</sup> Statement of Commissioner Kirsanow at 122. See also, Id at 126 FN 352 (“Perhaps the Voting Section decisionmakers are simply trying to protect their jobs.”); Id at 132 (“or a humbler desire not to put oneself out of a job.”)

former DOJ Voting Section personnel who go on to make careers as DOJ critics has led him to believe that there are people who work at DOJ for pecuniary or other reasons.<sup>416</sup> Or perhaps it is from observing that some our colleagues on this Commission may use their position to push a personal agenda that assists in putting food on their tables.

- [From the testimony of Professor Persily:] “*And so each preclearance submission and denial is fraught with the possibility that it becomes the next case that goes up. So I mean, that is obviously what is going on here.*”<sup>417</sup>

Professor Persily is correct that every objection to a preclearance submission has the possibility of being the grounds to challenge the constitutionality of Section 5. As a result, it is understandable that the decision to object to a submission may cause some anxiety. Since the staff at DOJ—despite their possible anxiety—continue to exercise their prerogative to object to submissions they conclude have run afoul of Section 5, it is difficult to understand the point Commissioner Kirsanow is trying to make. All it takes is one single objection to create a case that can go up to the Supreme Court. After the first objection, whether there are two or two-thousand subsequent objections does not make much of a difference.

- *Note that the proposal stated only that the high approval rates of redistricting plans in the current cycle “may be” related to the Northwest Austin case. It did not assert that this is the only possible interpretation of the facts as we currently understand them. While we personally regard it to be a very likely contributing factor to these rates, the proposed footnote simply invited the reader to consider the possibility.*<sup>418</sup>

It is also **possible** that DOJ **may** decide whether to approve preclearance submissions by flipping a coin or by reading tea leaves. We have no proof that these procedures are actually used by DOJ, but we would like to simply invite the reader to consider their possibility.

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<sup>416</sup> See, e.g., Amicus Brief by Hans von Spakovsky, J. Christian Adams, et al., on behalf of Shelby Co., Alabama, available at: <http://electionlawblog.org/wp-content/uploads/POFR-Shelby-Co-cert-stage-amicus-former-DOJ-Bancroft.pdf> (“This Court has rarely mentioned Section 5 of the Voting Rights Act . . . in recent years without mentioning in the same breath the serious constitutional issues raised by that provision.”)

<sup>417</sup> Statement of Commissioner Kirsanow at 111.

<sup>418</sup> Id at 123.

- *The possibility that Northwest Austin may have had a large effect therefore cannot be eliminated.*<sup>419</sup>

If one discards Occam's Razor and/or presumes the staff at DOJ is conspiring to enforce the law in illegitimate ways, it is impossible to eliminate any explanation for why the Justice Department does what it does.

- *Apart from the Department of Justice's potentially self-serving letters announcing approval or disapproval of particular redistricting plans, the Commission has no evidence as to why the Department of Justice approved or denied any particular plan in this or any other cycle—not a jot.*<sup>420</sup>

Aside from the secret diaries of DOJ officials in which they admit to acting in bad faith, I am not sure what sort of evidence would ever satisfy Commissioner Kirsanow as to whether the DOJ is lying or not in any of its public letters objecting to or approving preclearance. Normally, baring additional evidence that wrongdoing is occurring or evidence of a radical departure from past practice, it would be reasonable for a member of the public or for the Commission to follow a presumption of regularity concerning preclearance activities.

If in recent years the rate of objections dropped to zero or spiked, a heightened skepticism on the part of our colleagues would be warranted. Since the current cycle of preclearance submissions has greatly resembled the preclearance rates of past cycles and the explanations DOJ has provided for preclearing or objecting to submissions are plausible, we think it best to employ Occam's Razor and assume that DOJ means what it says and says what it means.

We suppose that in a way it is “self-serving” of DOJ to preclear redistricting plans that lack a discriminatory purpose or a retrogressive impact, but what is the alternative? Would Commissioner Kirsanow prefer DOJ to do or say things that are transparently false or self-defeating, so the Department can avoid engaging “potentially self-serving” actions?

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<sup>419</sup> Id at 123.

<sup>420</sup> Statement of Commissioner Kirsanow at 124.

- *My colleagues seem to believe that the fact that the Department of Justice approved redistricting proposals put forward by Republican-dominated legislatures is a sign that we may assume that all is well.*<sup>421</sup>

There is a simple explanation for why some Commissioners (and presumably the Commission's career staff) high-lighted DOJ's approval rate of submissions from Republican-dominated legislatures:

Here's my prediction. Democratic-drawn redistricting plans will nearly always be rubber stamped by this Justice Department, unless local black or Hispanic Democrats don't like how their white Democratic colleagues have sliced the pie. Republican-drawn plans, meanwhile, will run into a buzz saw of Voting Section opposition based not on the legal standards set forth under Section 5, but on whether the Section's lawyers think the plan will hurt or help Democratic candidates.<sup>422</sup>

Although Mr. von Spakovsky doesn't explain what a "buzz saw of...opposition" is, the context of the phrase puts it in opposition to a rubber stamp. As noted in this report however:

[T]he feared denials of preclearance for Republican states have not come to pass; in fact, as described *supra* Chapter 3, DOJ has precleared an overwhelming majority of redistricting plans. The DOJ precleared all 26 statewide redistricting plans submitted for administrative preclearance in 2011, and 18 of those plans were developed in redistricting processes entirely controlled by Republican state legislators.<sup>423</sup>

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<sup>421</sup> Id at 125 FN 351.

<sup>422</sup> Hans A. von Spakovsky, *Abusing the Voting Rights Act*, HERITAGE FOUNDATION, Feb. 23, 2011, available at: [www.nationalreview.com/blogs/print/260303](http://www.nationalreview.com/blogs/print/260303)

<sup>423</sup> At 75. Additionally, 2011 marked the first time since the passage of the VRA that Georgia and Louisiana received full administrative preclearance on their initial submission to DOJ. Id at 28.

If a 100% rate of administrative preclearance is the product of “a buzz saw of ...opposition,” what sort of treatment did the “rubber-stamped” redistricting maps receive? A 110% rate of preclearance?<sup>424</sup>

- *During the course of preparing the Commission’s 2010 enforcement report, the Commission adduced evidence that DOJ’s dismissal of the voter intimidation lawsuit against the New Black Panther Party may have been politically motivated.*<sup>425</sup>

As mentioned above, the Commission’s 2010 enforcement report--allegedly about the handling of the voter intimidation lawsuit against the New Black Panther Party—was itself merely a politically motivated stunt.<sup>426</sup>

- *Indeed, on July 23, 2012, U.S. District Court Judge Reggie Walton suggested that Assistant Attorney General for Civil Rights Thomas Perez may have rendered false testimony to the Commission regarding whether political appointees were involved in the decision to dismiss.*<sup>427</sup>

It was unfortunate that Judge Walton was willing to suggest that Assistant Attorney General for Civil Rights Perez perjured himself before the Commission without any facts to support such a strong claim. In his testimony before the Commission, AAG Perez stated that the decision to

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<sup>424</sup> As noted before [[cite in Yaki/Kladney statement], not only was Mr. von Spakovsky completely wrong about DOJ’s handling of Republican-controlled state legislatures, the only state that took his advice and skipped administrative preclearance entirely, Texas, wound up worse off than if they had sought administrative preclearance.

At the start of the trial, DOJ indicated that they had no objection to the state senate map (although some intervenors claimed it was retrogressive). Had Texas first submitted the state senate map for administrative approval, it would have been approved by the Department and not subject to review by the DDC. Instead, this happened:

The United States has not objected to this plan.... Nevertheless, we deny preclearance because Texas failed to carry its burden to show that it acted without discriminatory purpose in the face of largely un rebutted defense evidence and clear on-the-ground evidence of “cracking” minority communities of interest in [Senate District] 10. Thus, we conclude that the Texas legislature redrew the boundaries for SD 10 with discriminatory intent.

*Texas v. Holder*, Civil Action No. 11-1303 (Aug. 28, 2012) at 43.

So much for going “straight to federal court” instead of “foolishly” submitting plans to the Civil Rights Division... Hans von Spakovsky, *Abusing the Voting Rights Act*, supra note 34.

<sup>425</sup> Statement of Commissioner Kirsanow at 126 FN 353.

<sup>426</sup> See, comments from Vice Chair Thernstrom, supra note 411.

<sup>427</sup> Statement of Commissioner Kirsanow at 126 FN 353.

dismiss part of the NBPP lawsuit was made by career staff members Steve Rosenbaum and Loretta King.<sup>428</sup> The FOIAed documents in Judge Walton case—and the March 17, 2011 Office of Professional Responsibility (“OPR”) report<sup>429</sup> on the NBPP case—indicate that political appointees were apprised of the disposition of the case.

Being told what decisions are being made is not the same as making those decisions.

Based on the evidence available to Judge Walton or Commissioner Kirsanow, there is no clear evidence that AAG Perez falsely testified under oath to Commission. Rather, the OPR report concludes that the manner in which the NBPP case was disposed was consistent with the testimony of AAG Perez.<sup>430</sup>

- *My Colleagues are Implicitly Offering Definitions of “Apolitical,” “Politicized” and “Politicization” that are Themselves Tendentious and Politicized.*<sup>431</sup>

Even were one to concede for the sake of argument that Commissioner Kirsanow is correct that some of his colleagues were defining terms in a “tendentious” and “politicized” way, it strikes me that it is better to be tendentious and politicized, than to be tendentious, politicized AND pedantic.

- *DOJ’s actions in the New Black Panther Party case raised substantial concerns that the Department, or at least many of the political appointees and supervisors in the Civil Rights Division, was opposed to enforcing the Voting Rights Act in a race-neutral manner.*<sup>432</sup>

<sup>428</sup> See, May 14, 2010 Hearing Before the U.S. Commission on Civil Rights, at 23, 62, 79 (Testimony of Thomas E. Perez), available at [http://www.usccr.gov/NBPH/05-14-2010\\_NBPPhearing.pdf](http://www.usccr.gov/NBPH/05-14-2010_NBPPhearing.pdf)

<sup>429</sup> DOJ OFFICE OF PROFESSIONAL RESPONSIBILITY, *Investigation of Dismissal of Defendants in US v. NBPP*, Mar. 17, 2011, available at: [democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/OPR%20Report.pdf](http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/OPR%20Report.pdf)

<sup>430</sup> Id at 2. (“Based on the results of our investigation, we concluded that Perrelli, Hirsch, King, and Rosenbaum did not commit professional misconduct or exercise poor judgment, but rather acted appropriately in the exercise of their supervisory duties. We found that King, as the decision maker, conferred with and obtained the advice of Rosenbaum and Hirsch, as well as that of Voting Section attorneys Christopher Coates and Robert Popper. The Associate Attorney General was kept apprised of developments in the decision-making process. We concluded that King’s decision to dismiss three of the four defendants and to seek more narrowly-tailored injunctive relief against Samir Shabazz was based on a good faith assessment of the law and facts of the case and had a reasonable basis. We found no evidence that partisan politics was a motivating factor in reaching the decision. We further concluded that the decision to initiate the NBPP case was based upon a good-faith assessment of the facts and the law. We found no evidence that partisan politics was a motivating factor in authorizing the suit against the four defendants.”)

<sup>431</sup> Statement of Commissioner Kirsanow at 127.

<sup>432</sup> Statement of Commissioner Kirsanow at 133.

It is rather embarrassing to try to support a proposition by means of a document that, for all intents and purposes, was a lengthy opinion piece authored by the same people who are subsequently using that document to prop up the proposition.

It is the equivalent of stating: “It has been said that Commissioner Kladney’s dazzling intellect is nearly as striking as his rugged good-looks.”<sup>433</sup>

- *These concerns gained additional credence following U.S. District Judge Reggie Walton’s suggestion...*<sup>434</sup>

An easily-corrected inaccuracy does not lend credence to any proposition—nor does repeating the inaccuracy over and over again.<sup>435</sup> This is merely a sad effort to get a bit more mileage out of the broken down NBPP non-troversy.

- *DOJ’s repeated opposition to state laws requiring voter identification, most recently in Florida and Pennsylvania, also raise questions about whether the Department is truly apolitical.*<sup>436</sup>

And presumably DOJ’s subsequent approval of Virginia’s voter ID law was also politicized.<sup>437</sup> Perhaps DOJ approved Virginia’s voter ID law to confound its critics who cite DOJ’s opposition to voter ID in other states as proof of DOJ’s politicization. Devious!!

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<sup>433</sup> Rebuttal of Commissioner Kladney/Yaki at 161 (“Commissioner Kladney’s dazzling intellect is nearly as striking as his rugged good-looks.”).

<sup>434</sup> Statement of Commissioner Kirsanow at 133.

<sup>435</sup> See also, supra note 387.

<sup>436</sup> Statement of Commissioner Kirsanow at 133.

<sup>437</sup> See supra note 413.

Or perhaps the Justice Department examines the different effects that different variations of different laws have in different states, and approves or opposes individual laws based on their individual effects...

- *[R]elying solely on the numbers ignores the fact that the Department opposed Texas' attempt to receive preclearance in federal court. DOJ only objected to two requests for administrative preclearance out of 1,007, but it actively opposed Texas' attempt to gain judicial preclearance.... Brushing over DOJ's opposition to Texas' redistricting plan attempts to bury the most prominent and contentious preclearance decision under a mountain of data.*<sup>438</sup>

As mentioned above, DOJ was actually willing to preclear the Texas state senate map. Texas, however, prevented DOJ from preclearing the state senate map, because the state chose to entirely forego administrative preclearance of its Congressional and state legislative maps. Additionally, the DDC, in its opinion denying summary judgment for Texas's preclearance submission, makes plain that it is Texas and not DOJ which is departing from well-established rules governing retrogression analysis and the burden of production that Section 5 imposes on the covered jurisdiction.<sup>439</sup>

The August 28, 2012 DDC opinion, which finds **intentional discrimination** in the Texas maps, vindicates DOJ's decision to oppose the Congressional and state house maps. The DDC's opinion also confirms Justice Souter's observation during the *NAMUDNO* oral argument that, "[Race relations] may be better. But to say that they have radically changed to the point that [Section 5 becomes unconstitutional] just seems to me to—to deny the empirical reality."<sup>440</sup>

Although it is true that the numbers do not tell the whole story, they are an important part of the story. Because the objections numbers did not turn out the way that Commissioner Kirsanow expected, it seems like he want to ignore this important metric.

<sup>438</sup>Statement of Commissioner Kirsanow at 134.

<sup>439</sup>*Texas v. Holder*, Civil Action No. 11-1303 (Aug. 28, 2012) at 25 ("Texas has been able to provide no authority to support its reliance on a single-factor test, and we decline to depart from the clear guidance of the Supreme Court's Section 5 precedent that assessing retrogression is a multifaceted, fact-specific inquiry.."); See also, *Id* at 33 ("The 2011 Guidance is consistent with the guidance DOJ has been issuing to assess retrogressive effect for the past two decades.")

<sup>440</sup>*Supra* note 7.

Our colleagues' willingness to brush over DOJ's lack of opposition to the Texas state senate plan and Texas's failure to follow well-established redistricting norms, only obscures the nuanced approach that DOJ has taken in handling its Section 5 obligations this redistricting cycle.

- *Additionally, there are questions regarding whether DOJ's opposition to the Texas redistricting plan was politically motivated, as both the proposed redistricting plan and the plan that was already in place both contained nine majority-minority districts. The existing plan, by definition, had been approved by DOJ, which raises questions as to why DOJ would oppose a plan that contains the exact same number of majority-minority districts.*<sup>441</sup>

We know that Commissioner Kirsanow is a very busy man, so we will give him the benefit of the doubt and assume that he relied on Mr. von Spakovsky for his analysis of the Texas redistricting. If he had more time, we trust that our colleague would have done his own review of *LULAC v. Perry*<sup>442</sup> and the December, 2011 DDC opinion rejecting Texas's motion for summary judgment.

At the same we must fault him a bit for relying on someone whose scholarship on voting rights issues could at best be highly dubious.<sup>443</sup>

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<sup>441</sup> Statement of Commissioner Kirsanow at 134.

<sup>442</sup> *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

<sup>443</sup> "I've written to von Spakovsky and to the President of the Heritage Foundation asking for a copy of the Grand Jury report. It does not appear to be available anywhere. .... It might be that Mr. von Spakovsky has the only existing copy of the report. I've heard from two other people who have asked von Spakovsky or Heritage for the report, but who have received no response."

"As I wrote to Edwin Feulner, president of Heritage, in an email on Friday: 'To this point I have not yet heard a response to my request for the report from Mr. von Spakovsky. It is important as we engage in scholarship that the sources we rely upon are available for other researchers to validate. I very much hope you will make the report relied upon by Mr. von Spakovsky available to me. It does not appear to be available through any other sources.'"

Rick Hasen, *Voter Impersonation Fraud and the Importance of Sharing Data*, ELECTION LAW BLOG, June 20, 2011, available at <http://electionlawblog.org/?p=19393>.

"This is the report I tried to get from Hans von Spakovsky and the Heritage Foundation with no success. von Spakovsky had relied on the grand jury report in an effort to justify voter identification requirements .... It is not clear to me why von Spakovsky did not respond to requests to turn over the grand jury report because the report contains the only apparently successful effort in the last 40 years of which I'm aware to actually affect election results through impersonation fraud. Perhaps the reason is that the way in which the fraud was done almost certainly could not happen today, thanks to basic safeguards put in place by election officials."

Rick Hasen, *1984 New York Grand Jury Report on Voter Fraud Now Available*, ELECTION LAW BLOG, June 23, 2011, available at: [electionlawblog.org/?p=19560](http://electionlawblog.org/?p=19560).

In *LULAC v. Perry*, a majority of the U.S. Supreme Court found that Texas's unprecedented mid-decennial redistricting twice violated Section 2 of the VRA. In both instances, the Texas legislature did so by drawing Congressional districts that discriminated against Latinos. In the case of the proposed Cong. District 23, the Court found that the new district boundaries reduced the voting-age Latino population below 50% (even though the over-all Latino population in the district remained above 50%).

In proposed Cong. District 25, the Texas Legislature created a majority-Latino district, but did so by combining two dissimilar Latino communities (one near Austin, the other near the Mexico-border). The Court held that neither District 23 nor District 25 were affectively majority-minority districts.

Reading the article by Mr. von Spakovsky that Commissioner Kirsanow cites,<sup>444</sup> one gets no sense of the legal infirmities of the 2003 Texas Congressional redistricting. Instead, Mr. von Spakovsky brags about the DOJ political appointees who precleared the 2003 map and then skips ahead to 2010—jumping over the 2006 *LULAC v. Perry* decision.<sup>445</sup>

Intellectual honesty—if not basic decency—should have compelled Mr. von Spakovsky to note that the map the G.W. Bush DOJ precleared was subsequently found to be racially discriminatory by the U.S. Supreme Court. This glaring omission suggests that Mr. von Spakovsky either has a weak grasp of voting rights law, is afraid to acknowledge his failure—or that he is merely a propagandist.

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<sup>444</sup> Hans von Spakovsky, *Texas Redistricting Déjà Vu*, THE CORNER, Sept. 20, 2011, available at: <http://www.nationalreview.com/corner/277850/texas-redistricting-d-j-vu-hans-von-spakovsky>.

<sup>445</sup> E.g., Id (“When Texas put together its new congressional redistricting plan in 2003, the plan preserved the status quo with six Hispanic districts ... But that wasn’t good enough for the liberal, fiercely partisan lawyers who predominate the career civil service positions in the Voting Section of the Civil Rights Division ... Fortunately, in 2003, the political appointees running the Civil Rights Division actually understood the applicable law and the Section 5 legal standard. They rejected the [career lawyers’] memorandum’s obviously wrong recommendation to object. That was then; this is now.”).

The problem with the 2011 Texas maps, noted by the three-judge DDC panel, is that despite *LULAC*, Texas continues to maintain that percentage of voting-age citizens is the only factor that matters in a retrogression analysis. The DDC notes that *LULAC* explicitly rejects this position: “It may be possible for a citizen voting-age majority to lack real electoral opportunity,”<sup>446</sup> and further notes that multi-factor Section 5 retrogression analyses have been embodied in DOJ preclearance guidance memoranda since 1987.<sup>447</sup>

In drawing up its new legislative and Congressional districts, the Texas legislature and governor chose to ignore both two decades of DOJ guidance memos and a very recent Supreme Court decision in which the state was the defendant.<sup>448</sup> The fact that the Texas legislature has now been found to have **purposefully** discriminated against its citizens is deeply disappointing, but sadly, not so surprising.

If our colleagues are concerned about crass politicization of Section 5, Texas is a truly great example, just not in the way that they or Mr. von Spakovsky maintain.

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<sup>446</sup> *Texas v. Holder*, Civil Action No. 11-1303 (Aug. 28, 2012) at 25 (quoting *LULAC v. Perry*).

<sup>447</sup> *Id.* at 33.

<sup>448</sup> Furthermore, the *LULAC* case discussed at length, the very same legal and factual issues affecting minority-majority Congressional districts in 2003 that were bedeviling those same Congressional districts in 2011!



## APPENDIX: CENSUS DATA FROM COVERED JURISDICTIONS

Table A.1

Covered Jurisdictions with changes in population, congressional representatives, and people per congressional representative, 2000 to 2010

State	Resident Population <sup>1</sup>		Percent Change	Changes in Seats, 2010	Representatives in 2010	People per representative <sup>1</sup>		Section 5 coverage
	2000	2010				2000	2010	
Alabama	4,447,100	4,779,736	7.5	0	7	637,304	686,140	Full
Alaska	626,932	710,231	13.3	0	1	628,933	721,523	Full
Arizona	5,130,632	6,392,017	24.6	1	9	642,585	712,522	Full
Georgia	8,186,453	9,687,653	18.3	1	14	631,306	694,826	Full
Louisiana	4,468,976	4,533,372	1.4	-1	6	640,039	758,994	Full
Mississippi	2,844,658	2,967,297	4.3	0	4	713,232	744,560	Full
South Carolina	4,012,012	4,625,364	15.3	1	7	670,844	663,711	Full
Texas	20,851,820	25,145,561	20.6	4	36	653,250	701,901	Full
Virginia	7,078,515	8,001,024	13.0	0	11	645,518	730,703	Full
California	33,871,648	37,253,956	10.0	0	53	640,204	704,566	Some counties
Florida	15,982,378	18,801,310	17.6	2	27	641,156	700,029	Some counties
New York	18,976,457	19,378,102	2.1	-2	27	655,344	719,298	Some counties
North Carolina	8,049,313	9,535,483	18.5	0	13	620,590	735,829	Some counties
South Dakota	754,844	814,180	7.9	0	1	756,874	819,761	Some counties
Michigan	9,938,444	9,883,640	-0.6	-1	14	663,722	707,973	Select Townships
New Hampshire	1,235,786	1,316,470	6.5	0	2	619,208	660,723	Select Townships
<b>United States</b>	<b>281,421,906</b>	<b>308,745,538</b>	<b>9.7</b>			<b>646,952</b>	<b>710,767</b>	

<sup>1</sup>The resident population differs from the apportionment numbers used to calculate the people per representative in that the former includes those living in the District of Columbia in the U.S. total, and the latter counts overseas federal employees and their dependents in their home states.

Compiled by the U.S. Commission on Civil Rights using United States Census Bureau, The Hispanic Population: 2010, 2010 Census Briefs, by Sharon R. Ennis, Merarys Rios-Vargas, & Nora G. Albert, C2010BR-04, May 2011, Table 2, p. 6; and other sources.

Table A.2

## Changes in Minority Population in Covered Jurisdictions, 2000 to 2010

State	Minority Population				Changes in Seats, 2010	Section 5 coverage
	2000	2010	Percent minority in 2010 population	Percent Change		
Alabama	1,321,281	1,575,334	33.0	19.2	0	Full
Alaska	203,144	254,911	35.9	25.5	0	Full
Arizona	1,856,374	2,696,370	42.2	45.2	1	Full
Georgia	3,057,792	4,273,733	44.1	39.8	1	Full
Louisiana	1,674,585	1,798,488	39.7	7.4	-1	Full
Mississippi	1,116,750	1,245,010	42.0	11.5	0	Full
South Carolina	1,359,721	1,662,624	35.9	22.3	1	Full
Texas	9,918,507	13,748,216	54.7	38.6	4	Full
Virginia	2,112,878	2,814,574	35.2	33.2	0	Full
California	18,054,858	22,297,703	59.9	23.5	0	Some counties
Florida	5,523,869	7,916,588	42.1	43.3	2	Some counties
New York	7,215,476	8,073,855	41.7	11.9	-2	Some counties
North Carolina	2,402,158	3,311,488	34.7	37.9	0	Some counties
South Dakota	90,259	124,678	15.3	38.1	0	Some counties
Michigan	2,131,753	2,313,701	23.4	8.5	-1	Select Townships
New Hampshire	60,534	101,420	7.7	67.5	0	Select Townships
<b>United States</b>	<b>86,869,132</b>	<b>111,927,986</b>	<b>36.3</b>	<b>28.8</b>		

Compiled by the U.S. Commission on Civil Rights using United States Census Bureau, *Overview of Race and Hispanic Origin: 2010*, 2010 Census Briefs, by Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, C2010BR-02, March 2011, Table 11, p. 18; and other sources.

Table A.3

Changes in Black Population (i.e., Black or African American alone) in Covered Jurisdictions, 2000 to 2010

State	Black or African American (Alone) Population				Changes in Seats, 2010	Section 5 coverage
	2000	2010	Percent Black in 2010 population	Percent Change		
Alabama	1,155,930	1,251,311	26.2	8.3	0	Full
Alaska	21,787	23,263	3.3	6.8	0	Full
Arizona	158,873	259,008	4.1	63.0	1	Full
Georgia	2,349,542	2,950,435	30.5	25.6	1	Full
Louisiana	1,451,944	1,452,396	32.0	0.0	-1	Full
Mississippi	1,033,809	1,098,385	37.0	6.2	0	Full
South Carolina	1,185,216	1,290,684	27.9	8.9	1	Full
Texas	2,404,566	2,979,598	11.8	23.9	4	Full
Virginia	1,390,293	1,551,399	19.4	11.6	0	Full
California	2,263,882	2,299,072	6.2	1.6	0	Some counties
Florida	2,335,505	2,999,862	16.0	28.4	2	Some counties
New York	3,014,385	3,073,800	15.9	2.0	-2	Some counties
North Carolina	1,737,545	2,048,628	21.5	17.9	0	Some counties
South Dakota	4,685	10,207	1.3	117.9	0	Some counties
Michigan	1,412,742	1,400,362	14.2	-0.9	-1	Select Townships
New Hampshire	9,035	15,035	1.1	66.4	0	Select Townships
<b>United States</b>	<b>34,658,190</b>	<b>38,929,319</b>	<b>12.6</b>	<b>12.3</b>		

Compiled by the U.S. Commission on Civil Rights using United States Census Bureau, *The Black Population: 2010*, 2010 Census Briefs, by Sonya Rastogi, Tallese D. Johnson, Elizabeth M. Hoeffel, and Malcom P. Drewery, Jr., C2010BR-11, September 2011, Table 5, p. 8; and other sources.

Table A.4

Changes in Hispanic or Latino Population in Covered Jurisdictions, 2000 to 2010

State	Hispanic or Latino Population				Changes in Seats, 2010	Section 5 coverage
	2000	2010	Percent Hispanic in 2010 population	Percent Change		
Alabama	75,830	185,602	3.9	144.8	0	Full
Alaska	25,852	39,249	5.5	51.8	0	Full
Arizona	1,295,617	1,895,149	29.6	46.3	1	Full
Georgia	435,227	853,689	8.8	96.1	1	Full
Louisiana	107,738	192,560	4.2	78.7	-1	Full
Mississippi	39,569	81,481	2.7	105.9	0	Full
South Carolina	95,076	235,682	5.1	147.9	1	Full
Texas	6,669,666	9,460,921	37.6	41.8	4	Full
Virginia	329,540	631,825	7.9	91.7	0	Full
California	10,966,556	14,013,719	37.6	27.8	0	Some counties
Florida	2,682,715	4,223,806	22.5	57.4	2	Some counties
New York	2,867,583	3,416,922	17.6	19.2	-2	Some counties
North Carolina	378,963	800,120	8.4	111.1	0	Some counties
South Dakota	10,903	22,119	2.7	102.9	0	Some counties
Michigan	323,877	436,358	4.4	34.7	-1	Select Townships
New Hampshire	20,489	36,704	2.8	79.1	0	Select Townships
<b>United States</b>	<b>35,305,818</b>	<b>50,477,594</b>	<b>16.3</b>	<b>43.0</b>		

Compiled by the U.S. Commission on Civil Rights using United States Census Bureau, *The Hispanic Population: 2010*, 2010 Census Briefs, by Sharon R. Ennis, Merarys Rios-Vargas, & Nora G. Albert, C2010BR-04, May 2011, Table 2, p. 6; and other sources.

Table A.5

Changes in Non-Hispanic White Population (i.e., White alone) in Covered Jurisdictions, 2000 to 2010

State	Non-Hispanic White (Alone) Population				Changes in Seats, 2010	Section 5 coverage
	2000	2010	Percent White in 2010 population	Percent Change		
Alabama	3,125,819	3,204,402	67.0%	2.5	0	Full
Alaska	423,788	455,320	64.1%	7.4	0	Full
Arizona	3,274,258	3,695,647	57.8%	12.9	1	Full
Georgia	5,128,661	5,413,920	55.9%	5.6	1	Full
Louisiana	2,794,391	2,734,884	60.3%	-2.1	-1	Full
Mississippi	1,727,908	1,722,287	58.0%	-0.3	0	Full
South Carolina	2,652,291	2,962,740	64.1%	11.7	1	Full
Texas	10,933,313	11,397,345	45.3%	4.2	4	Full
Virginia	4,965,637	5,186,450	64.8%	4.4	0	Full
California	15,816,790	14,956,253	40.1%	-5.4	0	Some counties
Florida	10,458,509	10,884,722	57.9%	4.1	2	Some counties
New York	11,760,981	11,304,247	58.3%	-3.9	-2	Some counties
North Carolina	5,647,155	6,223,995	65.3%	10.2	0	Some counties
South Dakota	664,585	689,502	84.7%	3.7	0	Some counties
Michigan	7,806,691	7,569,939	76.6%	-3.0	-1	Select Townships
New Hampshire	1,175,252	1,215,050	92.3%	3.4	0	Select Townships
<b>United States</b>	<b>194,552,774</b>	<b>196,817,552</b>	<b>63.7%</b>	<b>1.2</b>		

Compiled by the U.S. Commission on Civil Rights using United States Census Bureau, *The White Population: 2010*, 2010 Census Briefs, by Lindsay Hixson, Bradford B. Hepler, and Myoung Ouk Kim, C2010BR-05, September 2011, Table 4, p. 8; and other sources.

Table A.6

Changes in Asian Population (i.e., Asian alone) in Covered Jurisdictions, 2000 to 2010

State	Asian (Alone) Population				Changes in Seats, 2010	Section 5 coverage
	2000	2010	Percent Asian in 2010 population	Percent Change		
Alabama	31,346	53,595	1.1	71.0	0	Full
Alaska	25,116	38,135	5.4	51.8	0	Full
Arizona	92,236	176,695	2.8	91.6	1	Full
Georgia	173,170	314,467	3.2	81.6	1	Full
Louisiana	54,758	70,132	1.5	28.1	-1	Full
Mississippi	18,626	25,742	0.9	38.2	0	Full
South Carolina	36,014	59,051	1.3	64.0	1	Full
Texas	562,319	964,596	3.8	71.5	4	Full
Virginia	261,025	439,890	5.5	68.5	0	Full
California	3,697,513	4,861,007	13.0	31.5	0	Some counties
Florida	266,256	454,821	2.4	70.8	2	Some counties
New York	1,044,976	1,420,244	7.3	35.9	-2	Some counties
North Carolina	113,689	208,962	2.2	83.8	0	Some counties
South Dakota	4,378	7,610	0.9	73.8	0	Some counties
Michigan	176,510	238,199	2.4	34.9	-1	Select Townships
New Hampshire	15,931	28,407	2.2	78.3	0	Select Townships
<b>United States</b>	<b>10,242,998</b>	<b>14,674,252</b>	<b>4.8</b>	<b>43.3</b>		

Compiled by the U.S. Commission on Civil Rights using Proximity, "Census 2010 & GeoDemographic Analysis: Census 2010 P.L. 94-171 Redistricting Data", [http://proximityone.com/cen2010\\_pl94171.htm](http://proximityone.com/cen2010_pl94171.htm), (last accessed Jan. 10, 2012); and other sources.

Table A.7

Changes in Native Hawaiian and Other Pacific Islander Population (i.e., Native Hawaiian and Other Pacific Islander alone) in Covered Jurisdictions, 2000 to 2010

State	Nat. Hawaiian & Other PI (Alone) Population				Changes in Seats, 2010	Section 5 coverage
	2000	2010	Percent Nat. Hawaiian & PI in 2010 population	Percent Change		
Alabama	1,409	3,057	0.1	117.0	0	Full
Alaska	3,309	7,409	1.0	123.9	0	Full
Arizona	6,733	12,648	0.2	87.9	1	Full
Georgia	4,246	6,799	0.1	60.1	1	Full
Louisiana	1,240	1,963	0.0	58.3	-1	Full
Mississippi	667	1,187	0.0	78.0	0	Full
South Carolina	1,628	2,706	0.1	66.2	1	Full
Texas	14,434	21,656	0.1	50.0	4	Full
Virginia	3,946	5,980	0.1	51.5	0	Full
California	116,961	144,386	0.4	23.4	0	Some counties
Florida	8,625	12,286	0.1	42.4	2	Some counties
New York	8,818	8,766	0.0	-0.6	-2	Some counties
North Carolina	3,983	6,604	0.1	65.8	0	Some counties
South Dakota	261	394	0.0	51.0	0	Some counties
Michigan	2,692	2,604	0.0	-3.3	-1	Select Townships
New Hampshire	371	384	0.0	3.5	0	Select Townships
<b>United States</b>	<b>398,835</b>	<b>540,013</b>	<b>0.2</b>	<b>35.4</b>		

Compiled by the U.S. Commission on Civil Rights using Proximity, "Census 2010 & GeoDemographic Analysis: Census 2010 P.L. 94-171 Redistricting Data", [http://proximityone.com/cen2010\\_pl94171.htm](http://proximityone.com/cen2010_pl94171.htm), (last accessed Jan. 10, 2012); and other sources.

Table A.8

Changes in American Indian and Alaskan Native Population (i.e., American Indian or Alaskan Native alone) in Covered Jurisdictions, 2000 to 2010

State	Amer. Ind. & Alaskan Nat. (Alone) Population				Changes in Seats, 2010	Section 5 coverage
	2000	2010	Percent Amer. Ind. Or Alaskan Nat. in 2010 population	Percent Change		
Alabama	22,430	28,218	0.6	25.8	0	Full
Alaska	98,043	104,871	14.8	7.0	0	Full
Arizona	255,879	296,529	4.6	15.9	1	Full
Georgia	21,737	32,151	0.3	47.9	1	Full
Louisiana	25,477	30,579	0.7	20.0	-1	Full
Mississippi	11,652	15,030	0.5	29.0	0	Full
South Carolina	13,718	19,524	0.4	42.3	1	Full
Texas	118,362	170,972	0.7	44.4	4	Full
Virginia	21,172	29,225	0.4	38.0	0	Full
California	333,346	362,801	1.0	8.8	0	Some counties
Florida	53,541	71,458	0.4	33.5	2	Some counties
New York	82,461	106,906	0.6	29.6	-2	Some counties
North Carolina	99,551	122,110	1.3	22.7	0	Some counties
South Dakota	62,283	71,817	8.8	15.3	0	Some counties
Michigan	58,479	62,007	0.6	6.0	-1	Select Townships
New Hampshire	2,964	3,150	0.2	6.3	0	Select Townships
<b>United States</b>	<b>2,475,956</b>	<b>2,932,248</b>	<b>0.9</b>	<b>18.4</b>	<b>12</b>	

Compiled by the U.S. Commission on Civil Rights using Proximity, "Census 2010 & GeoDemographic Analysis: Census 2010 P.L. 94-171 Redistricting Data", [http://proximityone.com/cen2010\\_pl94171.htm](http://proximityone.com/cen2010_pl94171.htm), (last accessed Jan. 10, 2012); and other sources.

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