



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

May 9, 2012

Ms. Kimberly A. Tolhurst
Acting General Counsel
U.S. Commission on Civil Rights
624 Ninth Street, NW
Washington, D.C. 20425

Dear Ms. Tolhurst:

This responds to your letter requesting comment on the U.S. Civil Rights Commission's initial draft report titled "Redistricting and the 2010 Census: Enforcing Section 5 of the Voting Rights Act." Thank you for the opportunity to review the draft report.

We note that the draft report we were provided did not include three chapters that were indicated on the table of contents, including Chapter 1 (Introduction), Chapter 6 (Findings and Recommendations), and the Statements of Commissioners. Our comments are therefore limited to those portions of the draft report that we received.

As an initial matter, we agree with your conclusion that there is no evidence of politicized decisionmaking in the Department's enforcement of Section 5 of the Voting Rights Act during this redistricting cycle, and that the Department's preclearance process in this cycle has been apolitical, neutral, and fair. *See* Draft Report 29-32, 77. As the Attorney General and Assistant Attorney General for Civil Rights have both emphasized in numerous public statements, the Department is committed to a thorough and independent review of the facts and the applicable law with regard to each Section 5 submission. Our procedures make clear that because Section 5 provides for submission of a voting change to the Attorney General as an alternative to seeking a declaratory judgment from the U.S. District Court for the District of Columbia, 42 U.S.C. § 1973c(a), the Attorney General endeavors in every case to make the same determination that would be made by the court. 28 C.F.R. §§ 51.52(a); 51.56. The results of the Department's determinations during this redistricting cycle demonstrate that this guidance has been carefully followed.

In addition, with regard to the analytical approach used by the Department to identify retrogression, we agree with the characterization provided by several witnesses at the Commission's briefing that the Department's approach is "straightforward and predictable." Draft Report 46. Although two states, including Texas and Georgia, advised the Commission of

their view that the Department's redistricting guidance did not clearly define prohibited retrogression, *see* Draft Report 33-35, we note that a three-judge federal court recently rejected this argument in the judicial preclearance litigation regarding Texas's 2011 redistricting maps:

Texas argues that the United States' analysis of retrogression, reflected in the 2011 DOJ Guidance, is elusive and expensive. We disagree. . . . The 2011 Guidance is consistent with the guidance DOJ has been issuing to assess retrogressive effect for the past two decades. Covered jurisdictions, including Texas, have been able to preclear voting plans under its various iterations. Thus, despite Texas' arguments to the contrary, this Court is hard-pressed to find that a multi-factored test – dependent on population analyses and other factors – is too new, too expensive, or too complex for covered jurisdictions to follow.

Texas v. United States, No. 11-cv-1303, 2011 WL 6440006, at *18 (D.D.C. Dec. 22, 2011) (three-judge court) (footnotes omitted).

We separately note, as we previously advised the Commission, that the decision to conduct a study of post-2010 Census redistricting in the middle of the redistricting cycle understates not only the volume of post-Census redistricting activity, but also the extent to which Section 5 plays a critical and necessary role in identifying discriminatory practices and preventing those practices from taking effect. For example, the Commission's draft report notes that the Department received 1007 redistricting submissions in calendar year 2011, but omits the 545 redistricting submissions received in calendar year 2012 to date (through May 8, 2012). *See* Draft Report 12 & fig. 2. As another example, the draft report concludes that between July 2006 and the end of 2011, the Department objected in its administrative review to five redistricting plans, with two of those administrative objections occurring in the post-2010 Census redistricting cycle, and two additional objections arising in litigation. *See* Draft Report 14, 43. By choosing to conduct a mid-cycle study, the Commission's draft report omits the additional six redistricting objections that the Department has interposed in calendar year 2012 to date.¹

Finally, to the extent that the level of objection activity is intended as one measure of Section 5's role in blocking discriminatory practices before they take effect, we note that there are many additional measures not addressed in the Commission's draft report. *See, e.g., Shelby County v. Holder*, 811 F. Supp. 2d 424, 465-92 (D.D.C. 2011). Among others, Section 5 plays a critical deterrent role in ensuring that discriminatory practices are either abandoned or never adopted, *see id.* at 490-92, and the evidence submitted to the Commission as part of its study makes clear that covered jurisdictions do routinely consider the obligation to comply with Section 5 in the course of developing their redistricting plans. *See, e.g., Georgia's Response to*

¹ These include objections to the redistricting plans for the commissioners court for Nueces County, Texas (Feb. 7, 2012, Submission No. 2011-3992); commissioners court for Galveston County, Texas (Mar. 5, 2012, Submission No. 2011-4317); justices of the peace / constable precincts for Galveston County, Texas (Mar. 5, 2012, Submission No. 2011-4374); board of commissioners for Greene County, Georgia (Apr. 13, 2012, Submission No. 2011-4687); board of education for Greene County, Georgia (Apr. 13, 2012, Submission No. 2011-4779); and board of aldermembers for Natchez, Mississippi (Apr. 30, 2012, Submission No. 2011-5368).

the Commission's Information Requests 19 (Jan. 13, 2012) ("The State carefully consulted the DOJ's Section 5 guidelines for direction when preparing the draft [congressional and legislative redistricting] plans.").

We appreciate your offer to append this response to the final published version of the Commission's report, and we hope this additional information is helpful to the Commission's inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Colangelo". The signature is fluid and cursive, with the first name "Matthew" and last name "Colangelo" clearly distinguishable.

Matthew Colangelo
Deputy Assistant Attorney General