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"Redistricting and the 2010 Census: Enforcing Section 5 of the Voting Rights Act"

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Chairperson Castro, Vice Chairperson Thernstrom, and distinguished Commissioners, my name is Mark Posner. I am a Senior Counsel in the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law. On behalf of the Lawyers' Committee, I would like to thank the Commission for inviting me to participate in this briefing, and for the opportunity to offer our thoughts regarding the application of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to redistricting plans adopted by Section 5 covered jurisdictions following the 2010 Census.[1]

1. Background and Introduction

The decennial redrawing of districts for the election of state and local officials is one of the most consequential types of voting changes subject to review under Section 5. In the context of racially polarized voting, it is well understood that the racial composition of a jurisdiction's election districts typically will determine whether minority voters have an opportunity to elect their preferred candidates to office.

The review of redistricting plans has been an integral and central part of the Justice Department's administration of the preclearance requirement.[2]

[1] The Lawyers' Committee for Civil Rights Under Law was established in 1963 as a nonpartisan, nonprofit organization at the request of President John F. Kennedy. The Lawyers' Committee's mission is to involve the private bar in providing legal services to address racial discrimination and to secure, through the rule of law, equal justice under law. For four decades, the Lawyers' Committee has been at the forefront of the legal struggle to achieve voting equality and protect advances in voting rights for racial and ethnic minorities and other traditionally disenfranchised groups.

[2] The Supreme Court ruled that redistricting plans are covered by Section 5 in 1973, in *Georgia v. United States*, 411 U.S. 526, 531 (1973). Prior to that, in its very first decision construing the scope of Section 5, the Court held, in *Allen v. State Board of Elections*, 393 U.S. 544, 565-66 (1969), that voting changes which potentially may dilute minority voting strength are subject to Section 5 review, and thus the review of redistricting plans has been a part of Section 5 from the beginning.

Since 1965, covered jurisdictions have submitted over 11,000 redistricting plans to the Department.[3] The Department has interposed objections to over 500 plans.[4] By any way of looking at things, this clearly is a very large number of plans which the Department has determined were discriminatory, and the adoption of nondiscriminatory plans following these objections has had an enormous bearing on minority voters' opportunities to elect candidates of their choice at all levels of state and local government.[5]

With regard to the Justice Department's application of Section 5 to the post-2010 redistricting plans, I suggest that two themes have governed the adoption of plans and the Justice Department's determinations, at least up to this point in the current redistricting cycle. The first may be summarized by the words "accumulation" and "continuity." That is, when sitting down to draw their new plans following the 2010 Census, covered jurisdictions – as well as the minority residents of these jurisdictions – have been able to rely upon a very substantial accumulation of Section 5 redistricting experience. In addition, they have been able to rely upon a well-established body of Section 5 law which includes Justice Department redistricting standards which, while adjusted by some intervening changes in caselaw and statutory law, nonetheless substantially mirror the standards the Department applied in past Section 5 redistricting rounds. The second theme, which is the direct result of the first, may be summarized by the words "deterrence" and "adjustment." That is, it appears that, more than ever before, covered states and localities have properly understood and applied the Section 5 prohibitions on discriminatory purpose and effect in enacting their new plans.

2. Accumulation and Continuity

The Justice Department and most Section 5 jurisdictions currently are in their fifth round of post-census redistrictings since Section 5 was enacted in 1965.[6] This, in and of itself,

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[3] The Justice Department reports that, from 1965 through March 2011, it received submissions of 10,491 redistricting plans. U.S. Dep't of Justice, Section 5 Changes By Type and Year, at http://www.justice.gov/crt/about/vot/sec_5/ changes.php. Professor Justin Levitt, in his testimony submitted to the Commission for this briefing, reports that his review of weekly Section 5 submission listings published by the Department indicates that the Department received a total of over 1,100 plans in 2011.

[4] 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. of Const. Law & Pub. Policy 79, 105 (2006). Since 1965, redistrictings have been the third most-frequent type of change to which the Department has interposed objections, after annexations and election method changes. *Id.*

[5] A complete listing of Section 5 objections for all voting change types may be found on the Justice Department's website. http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php. In addition, a searchable index of all objections has been constructed by the Lawyers' Committee, and is available at http://www.lawyerscommittee.org/projects/section_5/. The index allows the user to search by the type of change that was objected to, and thus allows the user to search specifically for past redistricting objections.

[6] Three Section 5 states, Alaska, Arizona, and Texas, are covered for changes enacted after November 1, 1972 (since they became subject to Section 5 pursuant to the 1975 amendments to the Voting Rights Act), and so many of their post-1970 plans likely were not subject to Section 5 review (although nine of Arizona's 15 counties were separately covered for changes enacted after November 1, 1964 or November 1, 1968 prior the entire state becoming covered as of November 1, 1972). 28 C.F.R. Pt. 51 App.

indicates that covered jurisdictions and these jurisdictions' minority residents now have a very substantial body of experience and law to draw upon as to the manner in which the U.S. District Court for the District of Columbia, and its statutory surrogate, the United States Attorney General, apply Section 5 to redistricting plans.[7]

This accumulation of experience is, in part, an accumulation of personal and jurisdiction-specific experience. In other words, state legislators, county and city and school board officials, state and local attorneys, and map-drawing experts and consultants now have been around the block on redistricting issues on numerous occasions. They know the types of plan redistricting actions and outcomes that trigger concerns from the Justice Department, and from the minority community and civil rights organizations.

Discriminatory effect: The Section 5 prohibition on voting changes that have a discriminatory "effect" has long been interpreted to mean "retrogression," dating back to the Supreme Court's 1976 decision in *Beer v. United States*.[8] Accordingly, the Justice Department and the covered jurisdictions now are into their fourth redistricting cycle in which this standard is being applied.

In the context of redistricting reviews, it also has long been the law that retrogression is defined by the concept of "ability to elect," i.e., covered jurisdictions may not adopt plans which, when viewed in their totality, diminish the ability of minority voters to elect candidates of their choice. This standard first was set forth by the Supreme Court in its decision in *Beer*, and, for all intents and purposes, has been the standard applied in every redistricting cycle since then.[9] This

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[7] In conducting his administrative review of voting changes under Section 5, the Attorney General serves as a surrogate for the DC District Court, and "make[s] the same determination that would be made by the court in an action for a declaratory judgment under Section 5." 28 C.F.R. § 51.52(a).

The initial 1970s round of post-census redistrictings began this iterative process in a somewhat modest manner, when about 400 plans were submitted for review between 1971 and 1974. The subsequent redistricting rounds have involved a much larger number of plans: about 1,500 were submitted in the 1980s (from 1981 through 1984); about 2,700 plans were submitted in the 1990s (from 1991 through 1994); and about 2,800 were submitted following the 2000 Census (2001 through 2004). U.S. Dep't of Justice, Section 5 Changes By Type and Year, at http://www.justice.gov/crt/ about/vot/sec_5/ changes.php.

There likely are several reasons why the number of submitted plans increased significantly from the 1970s to the 1980s, and again from the 1980s to the 1990s. As noted, the Supreme Court explicitly ruled in 1973 that redistrictings are covered, so there may have been some failure to submit plans in the 1970s. In addition, Texas became covered as a result of the 1975 amendments to the Voting Rights Act, which produced a very substantial increase in the overall number of Section 5 submissions, including redistricting plans. Also, starting in the 1970s, and continuing into the 1980s and the early 1990s, a large number of covered jurisdictions switched from at-large to district methods of election, which in turn increased the number of redistricting plans subject to review.

[8] 425 U.S. 125, 141.

[9] In *Beer*, the Supreme Court stated that the Section 5 "effect" test focuses on "the ability of minority groups to participate in the political process *and* to elect their choices to office." 425 U.S. at 141 (emphasis added). Thus, the Court determined that the redistricting plan at issue in that case was not retrogressive since it allowed one to two minorities to be elected whereas the old plan did not allow any to be elected. *Id.* at 141-42. *See also Texas v. United States*, 2011 U.S. Dist LEXIS 147585, at 45 (D.D.C. Dec. 22, 2011) (noting that the "'ability to elect' standard [was] promulgated by the Supreme Court in *Beer*); Dep't of Justice Guidance Concerning Redistricting and

is the case notwithstanding the temporary detour the Supreme Court undertook in 2003 in its decision in *Georgia v. Ashcroft*.[10] In that case, the Court held that the retrogression test, as applied to redistrictings, requires a complex and confusing weighing of four different methods for potentially assessing the validity of a particular redistricting plan: the number of "ability to elect" districts; the number of purported "influence" districts; minority legislators' influence in the internal workings of the legislative body at issue; and the extent to which minority officials supported the adopted plan.[11] That ruling, however, had relatively little impact on the post-2000 redistricting cycle since almost all of the post-2000 plans already had been adopted and precleared by the time the Supreme Court ruled.[12] In 2006, Congress amended Section 5 to clarify that retrogression should be measured by means of the pre-*Ashcroft* "ability to elect" standard, specifying that Section 5 "protect[s] the ability of [minority] citizens to elect their preferred candidates of choice."[13] Congress' action thus avoided the confusion that would have ensued if the *Ashcroft* multi-factor standard had been applied in the current round of redistrictings.[14]

Discriminatory purpose: The Section 5 prohibition on voting changes that have not been shown to be free of a racially discriminatory "purpose" has been (along with the Section 5 "effect" test) part of Section 5 since the original 1965 enactment.[15] Three redistricting cycles ago, in the 1982 decision in *Busbee v. Smith*,[16] the D.C. District Court made clear that a redistricting plan that is nonretrogressive nonetheless may not pass muster under Section 5 if it was motivated, in whole or in part, by a purpose to minimize minority voting strength. The

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Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001) ("The effective exercise of the electoral franchise usually is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice."); *City of Rome v. United States*, 446 U.S. 145, 183-84 (1980) (the new election system was retrogressive because it "significantly decreased the opportunity for . . . a Negro candidate [to be elected].")

[10] 539 U.S. 461.

[11] *Id*. at 482-84.

[12] In 2001 and 2002, the Justice Department received submissions of about 2,100 redistricting plans. In contract, it received only 400 in 2003 and 241 in 2004. U.S. Dep't of Justice, Section 5 Changes By Type and Year, at http://www.justice.gov/crt/ about/vot/sec_5/ changes.php.

[13] Pub.. L. No. 109-246, 120 Stat. 577, 580-811 (2006) *codified at* 42 U.S.C. § 1973c(d). *See Texas v. United States*, *supra* at 45 ("Congress sought to restore the "ability to elect" standard promulgated by the Supreme Court in *Beer*," citing the House Report for the 2006 amendments).

[14] As recently explained by United States District Judge Bates of the DC District Court, "[i] reauthorizing the Act in 2006, Congress expressed concern that the Georgia v. Ashcroft framework had introduced 'substantial uncertainty' into the administration of a statute that was 'specifically intended to block persistent and shifting efforts to limit the effectiveness of minority political participation.'" *Shelby County v. Holder*, 2011 U.S. Dist. LEXIS 107305 (D.D.C. Sep. 21, 2011), at 35-35, *quoting* H.R. Rep. No. 109-478 (2006), at 70, *appeal filed*, no. 11-5256 (Sep. 23, 2011).

[15] Pub. L. No. 89-110, 79 Stat. 437, 439 (1965).

[16] 549 F. Supp. 494, *aff'd mem.*, 459 U.S. 1166 (1983).

Supreme Court's subsequent summary affirmance of the district court's decision in *Busbee* was important to the Department of Justice's application of Section 5, as Georgia's appeal to the Supreme Court specifically presented the legal question whether a non-retrogressive redistricting plan could violate the Section 5 purpose test.[17]

The Supreme Court changed this standard in 2000, in its ruling in *Reno v. Bossier Parish School Board*.[18] The Court held in that case that Section 5 discriminatory purpose is limited to a purpose to retrogress. That definition of discriminatory purpose governed the post-2000 redistricting cycle. But in its 2006 amendments to the Voting Rights Act, Congress restored the pre-*Bossier Parish* "purpose" standard, specifying that "the term 'purpose' . . . shall include any discriminatory purpose."[19] Thus, the current redistricting cycle is again governed by the same "purpose" test applied in the pre-2000 redistricting reviews.[20]

Purpose and effect: Three important Justice Department documents also have guided redistricting reviews. In 1987, the Department amended the Attorney General's Procedures for the Administration of Section 5 to include, for the first time, a comprehensive and detailed explication of the substantive standards the Department considers in making its preclearance decisions, including decisions regarding redistricting plans.[21] The Department also prefaced its promulgation of these standards with a discussion of the manner in which it conducts retrogression analyses.[22] In 2001, the Department issued a further guidance document regarding

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[17] It also has long been recognized that important indicia of discriminatory purpose in the context of redistrictings include the fragmenting of concentrated minority populations and the packing of minority voters into districts with high minority population percentages. *See generally Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993); 28 C.F.R. § 51.57.

[18] 528 U.S. 320.

[19] Pub.. L. No. 109-246, 120 Stat. 577, 581 (2006) *codified at* 42 U.S.C. § 1973c(c). *See Texas v. United States*, *supra* at 19 (noting that, "[a]ccording to the House Report [for the 2006 Amendments], Congress intended to restore the pre-*Bossier II* discriminatory purpose standard").

[20] Another series of changes regarding the application of Section 5 to redistricting plans dealt with whether the Justice Department was authorized to interpose an objection where a voting change did not have a discriminatory purpose or retrogressive effect, but violated the "equal opportunity" test that Congress amended into Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, in 1982. The Justice Department first relied on Section 2, at least in part, for a Section 5 objection in 1983 and, as part of its 1987 amendments to the Section 5 Procedures, specified that a clear violation of Section 2 would bar the granting of preclearance. In 1997, however, the Supreme Court held that Section 2 does not provide a basis for withholding preclearance. *Reno v. Bossier Parish School Board*, 520 U.S. 471, 480. In practice, these alterations in the preclearance standards had little effect on the application of Section 5 to redistricting plans since only a very minimal number of redistricting objections were based exclusively on Section 2 grounds. *See* Posner, *supra* note 3, at 145-46.

[21] 28 C.F.R. Pt. 51, Subpt. F.

[22] 52 Fed. Reg. 486 (Jan. 6, 1987).

Section 5 and redistrictings,[23] and then updated that document with a new guidance document in 2011.[24]

In sum, Section 5 jurisdictions, and the minority residents of these jurisdictions, are benefiting in the current redistricting cycle from a significant and long-standing continuity in the manner in which the Justice Department has applied Section 5 to redistricting plans. Recently, this continuity was specifically noted with approval by the D.C. District Court in its December 22, 2011 opinion denying summary judgment to the State of Texas, in a case regarding the State's request for preclearance of its plans for the state house, state senate, and Congress.

In that opinion, the court rejected Texas' claim "that the United States' analysis of retrogression . . . is elusive and expensive."[25] The court explained that, in actuality, there has been both continuity and clarity in the Justice Department's preclearance standards: "The 2011 Guidance is consistent with the guidance DOJ has been using to assess retrogressive effect for the past two decades."[26] The court further explained that, in the 2001 Guidance and in the preface to the 1987 amendments to the Section 5 Procedures, "the Department of Justice (in different administrations and under different Attorneys General) listed factors exceedingly similar, if not identical, to the ones that the Department of Justice currently asserts are relevant to a Section 5 retrogression analysis."[27] Moreover, the factors the court identified for assessing "ability to elect" in that case closely track the standards identified by the Justice Department.[28]

In issuing its opinion, the DC District Court also relied heavily on a brief submitted jointly by seven groups of intervenors who are opposing preclearance of Texas' plans.[29] That brief – which was authored primarily by the Lawyers' Committee – set forth the Section 5 standards and analyses that generally have governed redistricting reviews through numerous redistricting cycles and which govern redistricting reviews today. Rather than repeating that discussion, I have attached that brief to my testimony for the Commission's benefit.

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[23] Dep't of Justice Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412 (Jan. 18, 2001).

[24] Dep't of Justice Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 470 (Feb. 9, 2011).

[25] *Texas v. United States*, *supra* at 60.

[26] *Id.*

[27] *Id.* at 60 n. 26.

[28] *Id.* at 50-58.

[29] At oral argument on Texas' summary judgment motion, both District Judge Collyer and District Judge Howell specifically referenced the brief and indicated that it had been of great assistance to the court.

3. Deterrence and Adjustment

Thus far in the current redistricting cycle, the Justice Department has opposed preclearance of two statewide plans (the Texas plans for its state house and for Congress). It also has interposed Section 5 objections to two local plans.

Notably, compared to past redistricting cycles, a larger proportion of the covered states have sought preclearance for their statewide redistricting plans from the DC District Court, either by simultaneously filing both a Section 5 declaratory judgment action and an administrative preclearance request or by filing only in the district court. These lawsuits, which in some instances included claims asserting Section 5's unconstitutionality, suggest a continuing or even heightened hostility to Section 5. However, there is no indication that the Justice Department analyzed these court-submitted plans any differently than the statewide plans submitted solely for administrative review; indeed, as indicated, the two statewide plans which the Department has opposed were submitted for preclearance using the judicial preclearance method.

In assessing the record, thus far, of Justice Department post-2010 redistricting objections and declaratory judgment opposition actions, it is important to note, at the outset, that they reflect and are part of a continuing pattern that dates back to the 1970s. The redistricting objection numbers for the past redistricting cycles are as follows: in the 1970s (1971 to 1974), there were approximately 60 redistricting objections; in the 1980s (April 1981 through June 1985), there were approximately 115; in the 1990s (April 1991 through June 1995), there were approximately 185; and in the 2000s (2001 through June 2005), there were approximately 30.[30] Accordingly, there was a steady increase in the number of redistricting objections during the first three redistricting cycles, and there has been a steady decrease during the two most recent cycles.

This pattern, together with the "accumulation and continuity" described above, leads me to conclude that, at least with regard to the redistricting plans that the Justice Department thus far has rendered determinations on, almost all Section 5 jurisdictions have adjusted their map-drawing to fit within the well-established Section 5 parameters, and have been deterred from enacting discriminatory plans.[31] This perhaps is not surprising given the number of redistricting cycles that have been undertaken subject to the preclearance framework, and the generally consistent manner in which Section 5 has been interpreted and applied. Indeed, during the hearings that preceded Congress' 2006 reauthorization of Section 5, one of the major points made to Congress was that Section 5's deterrent effect has become a significant reason why Section 5 remains an effective and still-necessary remedy for voting discrimination.[32]

I recognize that some commentators may suggest that deterrence is not required because, it is asserted, the Section 5 jurisdictions no longer present a heightened risk of enacting

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[30] Posner, *supra* note 5, at 110; "Voting Rights Enforcement & Reauthorization," U.S. Comm'n on Civil Rights (May 2006), at 39.

[31] This conclusion must be qualified by the fact that there still remain numerous post-2010 redistricting plans to be reviewed by the Justice Department. In addition, it should be noted it also remains to be seen whether any of the precleared plans are successfully challenged in suits filed under Section 2 of the Voting Rights Act.

[32] *Shelby County v. Holder*, *supra*, at 200-04, 224.

discriminatory voting changes. However, the record before Congress in 2006, which was exhaustively cataloged and analyzed by District Judge Bates in the *Shelby County* case, amply demonstrates the continued need for Section 5 review in the covered jurisdictions. I therefore strongly believe that Section 5's deterrent effect is the most plausible explanation for the limited number of objections thus far in the post-2010 redistricting cycle.

4. Conclusion

For the reasons outlined above, the Lawyers' Committee believes that the application of Section 5 of the Voting Rights Act in the current redistricting cycle, as it thus far has played out, may best be understood in terms of the twin themes of "accumulation and continuity," and "deterrence and adjustment." I would like to again thank the Civil Rights Commission – both its members and its staff – for the opportunity to participate in this important briefing, and I would be happy to answer any questions that the Commissioners may have.