U.S. COMMISSION ON CIVIL RIGHTS

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

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FRIDAY, FEBRUARY 3, 2012

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

PRESENT:

MARTIN R. CASTRO, Chairman

ABIGAIL THERNSTROM, Vice Chair

ROBERTA ACHTENBERG, Commissioner

TODD F. GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner

DAVID KLADNEY, Commissioner

MICHAEL YAKI, Commissioner

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

STAFF PRESENT:

MARGARET BUTLER, Acting Chief, OCRE

LENORE OSTROWSKY, Acting Chief, PAU

CHRISTOPHER BYRNES, Senior Attorney-Advisor

to the Office of the Staff Director

PAMELA DUNSTON, Chief, ASCD

TORRENCE MONTGOMERY

DAVID SNYDER

COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTEN

ALEC DEULL

TIM FAY

DOMINIQUE LUDVIGSON

JOHN MARTIN

RICHARD SCHMECHEL

ALISON SOMIN

T-A-B-L-E O-F C-O-N-T-E-N-T-S

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

(10:40 a.m.)

I. INTRODUCTORY REMARKS BY CHAIRMAN

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

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

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

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 would result in colloquy, will result in information that will not end up in the report.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and Politics at the Duke Law School.

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

(Whereupon, the panel was sworn.)

CHAIRMAN CASTRO: Thank you.

COMMISSIONER KLADNEY: Excuse me, Mr. Chairman.

CHAIRMAN CASTRO: Yes, sir, Mr. Kladney?

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

VICE CHAIR THERNSTROM: Thank you!

COMMISSIONER KLADNEY: You're welcome.

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

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

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

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

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

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

The main drive, just as deep background,

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

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

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

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

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

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

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

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

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

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

Yet what the statute, what the amendments

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN CASTRO: Thank you, Professor Levitt.

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

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

PROFESSOR LEVITT: Thank you.

CHAIRMAN CASTRO: You're welcome.

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

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

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

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

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

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

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

of minority voters.

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

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

What is interesting about these cases is that, in three of the four cases, part of the objection in the preclearance was that the denominator of seats was being changed in the redistricting. So we have a change in the number of seats against which the baseline for performance for minorities will be measured. The number of opportunities in terms of the number of districts was maintained, but the proportion is not. 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 floterial districts, is resulting in a reduction of minority influence in terms of opportunities to elect. I believe that these objections were instructive to the way that the Department of Justice and the D.C. Court has reacted to the Texas Redistricting Plan for Congress where we have an increase in the number of seats but not a proportional increase in the number of opportunities for minority voters, Hispanic voters in particular.

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

PROFESSOR PERSILY: And then if I am a

practitioner, it depends who my client is.

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

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

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

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

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

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

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

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

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

The *Reno v. Bossier Parish* Fix, which

received comparably little attention is, in many ways, should have maybe received more attention, given the number of preclearance denials in the pre-Bossier Parish period which actually were based on discriminatory purpose. And so while we have, as I will say in a second, very few preclearance denials even since the 2006 reauthorization, the 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. And there are several instances including the *Texas* redistricting case where the DOJ is taking the position that there is a discriminatory purpose underlying that plan.

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

be much different than previous cycles in the way that DOJ has been denying preclearance. The one exception might be the fact that we have a new purpose prong now after the reinstatement of the pre-*Reno v. Bossier Parish* standards. So in the period following *Reno v. Bossier Parish*, obviously there wouldn't have been preclearance denials based on discriminatory purpose. But when 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.

So let me talk as a lawyer.

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN CASTRO: Thank you, Professor Persily.

Professor Charles, you have the floor.

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

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

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

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

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

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

The Department has explained that it will

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

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

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

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

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

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

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

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

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 maintains the current ability to elect or diminishes the ability to elect. This is a manageable and predictable inquiry.

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

Additionally, the pre-*Georgia v. Ashcroft*

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

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

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

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

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

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

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

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

III. PANEL I: QUESTIONS FROM COMMISSIONERS AND STAFF DIRECTOR

The Chair recognizes Commissioner Kirsanow.

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

PROFESSOR PERSILY: Whoa, whoa, whoa, whoa.

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

PROFESSOR PERSILY: Well again, it is not

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

COMMISSIONER KIRSANOW: And how is that determination made?

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

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

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

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

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

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

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

COMMISSIONER YAKI: Is that on Amazon?

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

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

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

(Laughter.)

VICE CHAIR THERNSTROM: No, no.

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

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

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

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

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

protective baseline.

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

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

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

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

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

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

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

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

PROFESSOR LEVITT: I have suppositions but I don't really have data and this goes in part to something that Professor Gaddie mentioned, that simultaneous submission seems to be working. And I guess I would dispute that, because I don't know what it is supposed to achieve. So simultaneous submission, those 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. That is, it seems to me the Department of Justice, as other witnesses have said, had been preclearing plans at about the same rate that they have in the past. And we don't know the counter factual of whether they would be preclearing these same plans, even if they didn't also go to court.

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

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

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

And so I think the main impact is it takes longer and it tends to be more expensive. It is not clear whether it is driving the Department of Justice to any particular result, or whether it is driving the Department of Justice to any result any faster. I do know that in 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.

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

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

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

COMMISSIONER ACHTENBERG: Thank you.

CHAIRMAN CASTRO: Professor Persily.

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

The reason that these states are going to court is because they think they are more likely to get preclearance there than they would with the DOJ. And so as well that it does accelerate the process for them so that 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. I mean I don't think there is any -- I mean, as you say, what do you think is going on; that is what they think is going on.

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

their lawyers wouldn't be advising them that way.

CHAIRMAN CASTRO: The chair recognizes the Vice Chair.

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

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

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

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

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

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

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

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

PROFESSOR LEVITT: If I may?

CHAIRMAN CASTRO: Professor Levitt, then Professor Persily.

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

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

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

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

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

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

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

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

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

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

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

Brooklyn, it is becoming more difficult to

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN CASTRO: Professor Charles and then Professor Gaddie.

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

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

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

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

CHAIRMAN CASTRO: Professor Gaddie?

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

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

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

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

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

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

CHAIRMAN CASTRO: Commissioner Heriot.

COMMISSIONER HERIOT: Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

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

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

PROFESSOR LEVITT: No.

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

PROFESSOR LEVITT: Not by much.

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

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

CHAIRMAN CASTRO: Commissioner, I'm afraid

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

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

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

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

CHAIRMAN CASTRO: Commissioner Gaziano.

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

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

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

I want to read a statement by Professor Samuel --

(Chorus of Issacharoff.)

COMMISSIONER GAZIANO: -- Issacharoff -- Thank you.

(Laughter.)

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

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

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

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

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

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

COMMISSIONER GAZIANO: You are venturing in dangerous territory.

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

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

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

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

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

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

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

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

of law.

CHAIRMAN CASTRO: Professor Charles.

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

CHAIRMAN CASTRO: Professor Charles?

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

If we saw that evidence, if I saw that

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

COMMISSIONER GAZIANO: Right.

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

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

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

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

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

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

VICE CHAIR THERNSTROM: You shouldn't.

CHAIRMAN CASTRO: I know. I know.

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

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

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

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

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

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

VICE CHAIR THERNSTROM: Right.

PROFESSOR PERSILY: 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. Which leads many in the civil

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

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

abstract --

VICE CHAIR THERNSTROM: Over time.

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

CHAIRMAN CASTRO: Professor Levitt.

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

(Laughter.)

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

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

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

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

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

His point in that case was that the 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 very much conscious of intentionally moving minorities around, as others suggested, in order to further their own incumbencies. And that, unfortunately, as Commissioner Heriot suggested, that may not be something that is going away. And so you may well see attention to that.

You see some of that in the current *Texas*

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

CHAIRMAN CASTRO: Ms. Tolhurst?

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

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

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

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

manageable.

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

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

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

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

Now, are they being careful because of litigation? Maybe. But they may also be careful because 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.

CHAIRMAN CASTRO: Professor Persily?

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

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

So there is an evidentiary question and

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

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

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

time.

So as Professor Charles mentioned, it is much easier to make an assessment based on the intent to retrogress standard. You 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 sort of *Arlington Heights*-standard evidence that Professor Persily mentioned.

CHAIRMAN CASTRO: Commissioner Achtenberg.

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

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

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, as Dr. Thernstrom previously noted.

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

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

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

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

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

COMMISSIONER ACHTENBERG: Thank you.

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I actually wrote a column about this last

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

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

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

CHAIRMAN CASTRO: Very briefly.

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

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

CHAIRMAN CASTRO: Well, at this point, it

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

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

(Whereupon, at 12:30 p.m. a lunch recess was taken.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

PANEL II: SECTION 5 OF THE VOTING RIGHTS ACT

POST-CENSUS REDISTRICTING

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

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

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

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

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

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

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

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

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

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

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

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

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

(Chorus of yeses.)

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

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

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

Of course, our purpose this time around

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

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

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

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

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

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

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

We didn't expect that the DOJ would say okay, we're going to tell you how to draw every district, but we do need some additional guidance. And I think you can see in terms of the *Texas* case that the guidance kind of came after, the cart came after the horse, or the horse came after the cart so to speak, in that it 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.

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

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

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

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

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

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

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

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

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

While we have filed challenges to the

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

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

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

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

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

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

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

They had questions going to members of the

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

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

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

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

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

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

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

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

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

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

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

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

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 civil -- the Rules of Civil Procedure allow the United States. And there are two voter I.D. submissions that kind of illustrate the point.

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

Another reason for seeking judicial preclearance is procedural. In the administrative process, US 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. When Ms. Lewis points to leading questions, the ability of US DOJ to elicit that evidence in court through leading questions is questionable.

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.

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

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

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

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

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

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

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

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

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

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

What I'd like to do today is sort of jump right in and read some of the written testimony I've submitted. I think that will provide the highlights. So, what I would like to do is to suggest two themes that 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 those jurisdictions, have been able to rely on a very substantial accumulation of Section 5 redistricting experience.

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

includes Justice Department redistricting standards which, while adjusted by some intervening changes in case law and statutory law, nonetheless substantially mirror the standards the Department has 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 before, covered states and localities have properly understood and applied the Section 5 prohibitions on discriminatory purpose and effect in enacting their new plans for the first theme.

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

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 redistricting actions and outcomes that trigger concerns from the Justice Department, and from the minority community, and civil rights organizations.

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

In the context of redistricting reviews, it also has been the law -- it 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 was first 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.

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

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

Likewise, with regard to discriminatory purpose, it was three redistricting cycles ago, in its 1982 decision in *Busbee v. Smith* that the D.C. District Court made clear that a redistricting plan that is non-retrogressive 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 Supreme Court's subsequent summary affirmance of that District Court decision, *Busbee*, was particularly important to the Justice Department'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.

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

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

As mentioned, there also are three important Justice Department documents that 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 specific substantive standards that the

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

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

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

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

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

This pattern, we believe, leads us to conclude that at least with regard to the redistricting plans that the Department thus far has rendered determinations on, the 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.

This, perhaps, is not surprising given the number of redistricting cycles that have been undertaken, as I described, 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.

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

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

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

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

jurisdictions to discriminate against minority citizens in the electoral process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a gloss on this question a little bit.

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

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

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

MS. LEWIS: Well, Dr. Persily mentioned

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

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

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

depends on the state.

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

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

CHAIRMAN CASTRO: The Chair recognizes Commissioner Achtenberg.

COMMISSIONER ACHTENBERG: Mr. Posner, I was

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

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

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

difficult to untangle things. And, indeed, there isn't -- 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.

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

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

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

So, I don't think -- obviously, as a factual matter those things can be intertwined because of certain minority groups, in 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.

COMMISSIONER ACHTENBERG: Thank you.

CHAIRMAN CASTRO: The Chair recognizes Ms. Tolhurst.

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

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

MS. TOLHURST: Even more so.

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

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

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

COMMISSIONER GAZIANO: I would yield to

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

CHAIRMAN CASTRO: Is Commissioner Yaki on the phone?

(No response.)

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

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

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

One question I'll direct partly to you and

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

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

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

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

COMMISSIONER GAZIANO: So, you sought that. Okay.

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

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

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

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

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

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

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

CHAIRMAN CASTRO: The Chair recognizes Vice Chair Thernstrom.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VICE CHAIR THERNSTROM: Sure. There are no

white Democrats --

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

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

VICE CHAIR THERNSTROM: Well, I never would

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

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

VICE CHAIR THERNSTROM: Yes.

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

VICE CHAIR THERNSTROM: Absolutely.

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

VICE CHAIR THERNSTROM: Absolutely.

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

analysis?

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

COMMISSIONER ACHTENBERG: Was it the Congressional plan?

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

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

COMMISSIONER ACHTENBERG: Thank you.

CHAIRMAN CASTRO: Commissioner Kladney.

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

standard, and what is it?

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

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

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

COMMISSIONER KLADNEY: Not much of a problem.

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

COMMISSIONER KLADNEY: To be told later?

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

COMMISSIONER KLADNEY: All right. Ms. Lewis?

MS. LEWIS: I think from my perspective, Commissioner, what I was talking about in terms of the cart and the horse is that -- and there 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. And all I was saying is it might be helpful to know what that is while you're drawing your maps rather than after the fact.

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

I will say that I think that it might be

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

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

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

them as having no foundation.

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

MS. LEWIS: Excuse me?

COMMISSIONER KLADNEY: Perk people up, litigation.

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

(Laughter.)

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

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

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

CHAIRMAN CASTRO: Is there anyone else who--

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

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

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

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

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

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

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

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

plan be precleared?

CHAIRMAN CASTRO: Commissioner Kladney.

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

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

COMMISSIONER KLADNEY: Well --

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

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

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

politics, politicians know the answer to that question.

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

MS. LEWIS: Yes.

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

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

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

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

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

MS. LEWIS: I'm sorry?

COMMISSIONER KLADNEY: Outside of that one question.

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

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

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

requests, but I just think there were times where if we knew that they wanted information on A, B, and C, we could have done that all at once. And we have to rely on the Secretary of State's office to develop the queries and run them instead 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.

COMMISSIONER KLADNEY: Mr. Park, same thing.

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

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

CHAIRMAN CASTRO: The Chair recognizes Ms. Tolhurst.

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

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

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

VICE CHAIR THERNSTROM: For Section 2 purposes.

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

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

MR. POSNER: I think it all keys back to

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

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

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

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

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

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

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

VICE CHAIR THERNSTROM: It is being ignored.

MR. McDONALD: I'm sorry?

VICE CHAIR THERNSTROM: It is being ignored.

CHAIRMAN CASTRO: The Chair recognizes Commissioner Kirsanow.

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

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

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

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

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

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

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

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

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

COMMISSIONER KIRSANOW: Okay.

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

COMMISSIONER KIRSANOW: Right.

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

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

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

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

COMMISSIONER KIRSANOW: To delegate?

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

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

COMMISSIONER KIRSANOW: Mr. Park.

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

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

CHAIRMAN CASTRO: The Chair recognizes Commissioner Achtenberg.

COMMISSIONER ACHTENBERG: Thank you, Mr. Chairman.

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

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

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

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

CHAIRMAN CASTRO: The Chair recognizes Vice Chair Thernstrom.

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

MR. POSNER: Yes.

CHAIRMAN CASTRO: Any other questions? Any other questions?

(No response.)

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

VICE CHAIR THERNSTROM: We all want to go home.

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

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

MS. OSTROWSKY: Publiccomments@USCCR.gov.

CHAIRMAN CASTRO: Publiccomments@USCCR.gov. It is now exactly 3:00, and this meeting of the U.S. Commission on Civil Rights is now adjourned. Thank

you.

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