DEPARTMENT OF JUSTICE

Office of the Assistant Attorney General, Civil Rights Division; Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c

AGENCY: Department of Justice.

ACTION: Notice.

SUMMARY: The Attorney General has delegated responsibility and authority for determinations under Section 5 of the Voting Rights Act to the Assistant Attorney General, Civil Rights Division, who finds that, in view of recent judicial decisions, it is appropriate to issue guidance concerning the review of redistricting plans submitted to the Attorney General for preclearance pursuant to Section 5 of the Voting Rights Act.

FOR FURTHER INFORMATION CONTACT: Joseph D. Rich, Acting Chief, Voting Section, Civil Rights Division, United States Department of Justice, Washington, D.C. 20530, (202) 514–6018.

SUPPLEMENTARY INFORMATION: Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, requires jurisdictions covered by the Act's special provisions to obtain a determination from either the Attorney General or the United States District Court for the District of Columbia that any change affecting voting, which they seek to enforce, does not have a discriminatory purpose and will not have a discriminatory effect.

Beginning in April 2001, these jurisdictions will begin to seek preclearance of redistricting plans based on the 2000 Census. Based on past experience, the overwhelming majority of the covered jurisdiction will submit their redistricting plan to the Attorney General. As part of the Department's preparation for the upcoming redistricting cycle, Departmental representatives conducted a nation-wide outreach campaign to inform as many of the interested parties as possible of the manner in which it will analyze redistricting plans under section 5. Many of the contacts, both governmental entities and interested private citizens and groups, expressed the view that, in view of recent judicial decisions, it would be helpful for the Department to issue some general guidance in this area. These requests coincided with the Attorney General's view that, by identifying, in general terms, the Department's analytical approach, such guidance would serve a useful law enforcement purpose. This guidance is not legally binding; rather, it is intended only to provide assistance to entities and persons affected by the preclearance requirements of section 5. Approved OMB No. 1190–001 (expires December 31, 2001).

Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, as Amended, 42 U.S.C. 1973c

Following release of the 2000 Census data, the Department of Justice expects to receive several thousand submissions of redistricting plans pursuant to the preclearance provisions in Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. The Civil Rights Division has received numerous requests for guidance concerning the procedures and standards that will be applied during review of these redistricting plans. Many of the requests relate to the role of the 2000 Census data in the Section 5 review process and to the Supreme Court's decisions in *Shaw* v. *Reno,* 509 U.S. 630 (1993), and later related cases.

The ''Procedures for the Administration of Section 5 of the Voting Rights Act,'' 28 CFR Part 51, provide detailed information about the Section 5 review process. Copies of these Procedures are available upon request and through the Voting Section Web Site (*http://www.usdoj.gov/crt/voting*). This document is meant to provide additional guidance with regard to current issues of interest. Citations to judicial decisions are provided to assist the reader but are not intended to be comprehensive. The following discussion provides supplemental guidance concerning the following topics:

- The scope of Section 5 review;
- The Section 5 ''benchmark'';
- how the benchmark plan is compared with the proposed plan;
- The considerations leading to the decision to interpose a Section 5 retrogression objection;
- racially discriminatory purpose under Section 5; and
- The use of 2000 Census data and other information during Section 5 review.

The Scope of Section 5

The Supreme Court has held that under Section 5, a covered jurisdiction has the burden of establishing that a proposed redistricting plan does not have the purpose or effect of worsening the position of minority voters when compared to that jurisdiction's ''benchmark'' plan. *Reno* v. *Bossier Parish School Board,* 120 S. Ct. 866, 871–72 (2000). If the jurisdiction fails to show the absence of such purpose or effect, then Section 5 preclearance will be denied by the Department of Justice or the District Court for the District of Columbia.

The decision in the *Bossier Parish School Board* case addressed the scope of Section 5 review. Redistricting plans that are not retrogressive in purpose or effect must be precleared, even if they violate other provisions of the Voting Rights Act or the Constitution. The Department of Justice may not deny Section 5 preclearance on the grounds that a redistricting plan violates the one-person one-vote principle, on the grounds that it violates *Shaw* v. *Reno,* or on the grounds that it violates Section 2 of the Voting Rights Act. Therefore, jurisdictions should not regard Section 5 preclearance of a redistricting plan as preventing subsequent legal challenges to that plan by the Department of Justice. In addition, private plaintiffs may initiate litigation, claiming either constitutional or statutory violations.

Benchmark Plans

The last legally enforceable redistricting plan in force for a Section 5 covered jurisdiction is the ''benchmark'' against which a new plan is compared. *See* 28 CFR 51.54(b)(1). Generally, the most recent plan to have received Section 5 preclearance (or have been drawn by a federal court) is the last legally enforceable redistricting plan for Section 5 purposes. When a jurisdiction has received Section 5 preclearance for a new redistricting plan, or a federal court has drawn a new plan and ordered it into effect, that plan replaces the last legally enforceable plan as the Section 5 benchmark. *See McDanie*l v. *Sanchez,* 452 U.S. 130 (1981); *Texas* v. *United States,* 785 F. Supp. 201 (D.D.C. 1992); *Mississippi* v. *Smith,* 541 F. Supp. 1329, 1333 (D.D.C. 1982), appeal dismissed, 461 U.S. 912 (1983).

In *Abrams* v. *Johnson,* 521 U.S. 74 (1997), the Supreme Court held that a redistricting plan found to be unconstitutional under the principles of *Shaw* v. *Reno* and its progeny could not serve as the Section 5 benchmark. Therefore, a redistricting plan drawn to replace a plan found by a federal court to violate *Shaw* v. *Reno* will be compared with the last legally enforceable plan predating the unconstitutional plan. Absent such a finding of unconstitutionality under *Shaw* by a federal court, the last legally enforceable plan will serve as the benchmark for Section 5 review. Therefore, a jurisdiction is not required to address the constitutionality of its benchmark plan when submitting a redistricting plan and the question of whether the benchmark plan is constitutional will not be considered

during the Department's Section 5 review.

Comparison of Plans

When the Department of Justice receives a Section 5 redistricting submission, several basic steps are taken to ensure a complete review. After the ''benchmark'' districting plan is identified, the staff inputs the boundaries of the benchmark and proposed plans into the Civil Rights Division's geographic information system. Then, using the most recent decennial census data, population data are calculated for each of the districts in the benchmark and proposed plans.

Division staff then analyzes the proposed plan to determine whether it will reduce minority voting strength when compared to the benchmark plan, considering all of the relevant, available information. Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any retrogression analysis, our review and analysis will be greatly facilitated by inclusion of additional demographic and election data in the submission. *See* 28 CFR 51.28(a). For example, census population data may not reflect significant differences in group voting behavior.[1] Therefore, election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an assessment of the actual effect of a redistricting plan. This information is used to compare minority voting strength in the benchmark plan as a whole with minority voting strength in the proposed plan as a whole.

The Section 5 Procedures identify a number of factors that are considered in deciding whether or not a redistricting plan has a retrogressive purpose or effect. These factors include whether minority voting strength is reduced by the proposed redistricting; whether minority concentrations are fragmented among different districts; whether minorities are overconcentrated in one or more districts; whether available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered; whether the proposed plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and, whether the plan is inconsistent with the jurisdiction's stated redistricting standards. *See* 28 CFR 51.59; *see also* 28 CFR 51.56–51.58.

A proposed plan is retrogressive under the Section 5 ''effect'' prong if its net effect would be to reduce minority voters'' ''effective exercise of the electoral franchise'' when compared to the benchmark plan. *See Beer* v. *United States,* 425 U.S. 130, 141 (1976). The effective exercise of the electoral franchise usually is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice. The presence of racially polarized voting is an important factor considered by the Department of Justice in assessing minority voting strength. A proposed redistricting plan ordinarily will occasion an objection by the Department of Justice if the plan reduces minority voting strength relative to the benchmark plan and a fairly-drawn alternative plan could ameliorate or prevent that retrogression.

Alternatives to Retrogressive Plans

If a retrogressive redistricting plan is submitted, the jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn. In analyzing this issue, the Department takes into account constitutional principles as discussed below, the residential segregation and distribution of the minority population within the jurisdiction, demographic changes since the previous redistricting, the physical geography of the jurisdiction, the jurisdiction's historical redistricting practices, political boundaries such as cities and counties, and state redistricting requirements.

In considering whether less-retrogressive alternative plans are available, the Department of Justice looks to plans that were actually considered or drawn by the submitting jurisdiction, as well as alternative plans presented or made known to the submitting jurisdiction by interested citizens or others. In addition, the Department may develop illustrative alternative plans for use in its analysis, taking into consideration the jurisdiction's redistricting principles. If it is determined that a reasonable alternative plan exists that is non-retrogressive or less retrogressive than the submitted plan, the Department will interpose an objection.

Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person one-vote principle. *See* 52 FR 488 (Jan. 6, 1987). Similarly, preventing retrogression under Section 5 does not require jurisdictions to violate *Shaw* v. *Reno* and related cases.

The one-person one-vote issue arises most commonly where substantial demographic changes have occurred in some, but not all, parts of a jurisdiction. Generally, a plan for congressional redistricting that would require a greater overall population deviation than the submitted plan is not considered a reasonable alternative by the Department. For state legislative and local redistricting, a plan that would require overall population deviations greater than 10 percent is not considered a reasonable alternative.

In assessing whether a less retrogressive alternative plan can reasonably be drawn, the geographic compactness of a jurisdiction's minority population will be a factor in the Department's analysis. This analysis will include a review of the submitting jurisdiction's historical redistricting practices and district configurations to determine whether the alternative plan would (a) abandon those practices and (b) require highly unusual features to link together widely separated minority concentrations.

At the same time, compliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria. For example, criteria which require the jurisdiction to make the least change to existing district boundaries, follow county, city, or precinct boundaries, protect incumbents, preserve partisan balance, or in some cases, require a certain level of compactness of district boundaries may need to give way to some degree to avoid retrogression. In evaluating alternative plans, the Department of Justice relies upon plans that make the least departure from a jurisdiction's stated redistricting criteria needed to prevent retrogression.

Prohibited Purpose

In those instances in which a plan is found to have a retrogressive effect, as well as in those cases in which a proposed plan is alleged to have a retrogressive effect but a functional analysis does not yield clear conclusions about the plan's effect, the Department of Justice will closely examine the process by which the plan

[1] For example, within a particular jurisdiction there may be large differences between the rates of turnout among minority populations in different areas. Thus, a redistricting plan may result in a significant, objectionable reduction of effective minority voting strength if it changes district boundaries to substitute poorly-participating minority populations (for example, migrant worker housing or institutional populations) for active minority voters, even though the minority percentages for the benchmark and proposed plans are similar when measured by Census population data.

was adopted to ascertain whether the plan was intended to reduce minority voting strength. This examination may include consideration of whether there is a purpose to retrogress in the future even though there is no retrogression at the time of the submission. If the jurisdiction has not provided sufficient evidence to demonstrate that the plan was not intended to reduce minority voting strength, either now or in the future, the proposed redistricting plan is subject to a Section 5 objection.

The 2000 Census

The most current population data are used to measure both the benchmark plan and the proposed redistricting plan. *See* 28 CFR 51.54(b)(2) (Department of Justice considers ''the conditions existing at the time of the submission.''); *City of Rome* v. *United States,* 446 U.S. 156, 186 (1980) (''most current available population data'' to be used for measuring effect of annexations); *Reno* v. *Bossier Parish School Board,* 120 S. Ct. at 874 (''In § 5 preclearance proceedings * * * the baseline is the status quo that is proposed to be changed: If the change 'abridges the right to vote' relative to the status quo, preclearance is denied * * *'').

For redistricting after the 2000 Census, the Department of Justice will, consistent with past practice, evaluate redistricting submissions using the 2000 Census population data released by the Bureau of the Census for redistricting pursuant to Public Law 94–171, 13 U.S.C. 141(c). Thus, our analysis of the effect of proposed redistricting plans includes a review and assessment of the Public Law 94–171 population data, even if those data are not included in the submission or were not used by the jurisdiction in drawing the plan. The failure to use the Public Law 94–171 population data in redistricting does not, by itself, constitute a reason for denial of preclearance. However, unless other population data can be shown to be more accurate and reliable than the Public Law 94–171 data, the Department of Justice will consider the Public Law 94–171 data to measure the total population and voting age population within a jurisdiction for purposes of its Section 5 analysis.

The 2000 Census Public Law 94–171 data for the first time will include counts of persons who have identified themselves as members of more than one racial category. This decision reflects the October 30, 1997 decision by the Office of Management and Budget [OMB] to incorporate multiple-race reporting into the federal statistical system. *See* 62 FR 58782–58790. On March 9, 2000, OMB issued Bulletin No. 00–02 addressing ''Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Enforcement.'' Part II of that Bulletin describes how such responses will be allocated for use in civil rights monitoring and enforcement.

For voting rights enforcement purposes, the Department of Justice will be guided by Part II of the Bulletin in its use of Census data. The following is an example, based on the data from the 1998 Dress Rehearsal Census in Columbia, South Carolina, of how such data will be allocated by the Department when analyzing redistricting submissions.

Total population		662,140
Non-Hispanic	649,413	(98.1%)
White	374,291	(56.5%)
Black or African American	262,384	(39.6%)
Asian	6,161	(0.9%)
American Indian/Alaska Native	2,995	(0.5%)
Native Hawaiian or Other Pacific Uslander	375	(0.0%)
Some other race	882	(0.1%)
Other Multiple-Race (where more than one minority race is listed)	2,330	(0.4%)
Hispanic	12,727	(1.9%)

Pursuant to Part II of OMB Bulletin 00–02, any multiple-race response that included white and one of the five other race categories was allocated to the minority race listed in the response. Thus, the numbers above for Black/African American, Asian, American Indian/Alaska Native, Native Hawaiian or Other Pacific Islander and Some other race reflect the total of the single race responses and the multiple-race responses in which the minority race and white race were listed. For example, for the Black/African American category, there were 261,142 single race responses and 1,242 multiple-race responses in which the races listed were White and Black/African American. This adds up to the total calculated above of 262,384.

The Other Multiple-Race category is comprised of all multiple-race responses where there is more than one minority race listed. The number above (2,330) reflects the total number of responses of forty two such categories in the Columbia data where at least one response was indicated. In our analysis, we will examine this multiple-race data and if it appears that any one of these categories has significant numbers of responses (for example, if the Black/African American and American Indian/Alaska Native category, alone, indicates a significant number of responses), those responses will be allocated alternatively to each of the component single-race categories for analysis, as indicated in Part II of the OMB Bulletin. It is important to note that current research indicates that multiple-race responses are expected to be small. This is especially true with respect to multiple-race categories with two or more minority races. For example, in the Columbia data, the largest such groups are only 0.1 percent (American Indian/Alaska Native and Black/African/American; and Asian and Black/African American). In light of this, the impact of such multiple-race responses on the Department of Justice's analysis of census data pursuant to its responsibilities under the Voting Rights Act is expected to be minimal.

As in the past, the Department will analyze Hispanic voters as a separate group for purposes of enforcement of the Voting Rights Act. If there are significant numbers of responses which report Hispanics and one or more minority races (for example, Hispanics who list their race as Black/African-American), those responses will be allocated alternatively to the Hispanic category and the minority race category.

Dated: January 11, 2001.

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