LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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August 10, 2010

T. Christian Herren, Jr.
Chief, Voting Section
Civil Rights Division
United States Department of Justice
Room 7254-NWB
1800 G Street, NW
Washington, DC 20006

RE: Notice of Proposed Rulemaking to Revise the Procedures for the Administration of Section 5 of the Voting Rights Act, CRT Docket No. 109, AG Order No. 3161-2010

Dear Mr. Herren:

The Lawyers' Committee for Civil Rights Under Law, joined by the NAACP Legal Defense and Educational Fund, submits the following comments regarding the Department of Justice's June 11, 2010 Notice of Proposed Rulemaking, in which the Department proposes to revise the Attorney General's Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. Part 51.

We have carefully considered the Department's proposals and have prepared a detailed set of comments which we hope will be helpful to you. The Lawyers' Committee and LDF together have a long history of efforts to promote vigorous enforcement of Section 5 by the Justice Department and the federal courts. Both organizations also played a leading role in Congress' reauthorization of Section 5 in 2006, and subsequently have fought to defend in court the constitutionality of the Section 5 reauthorization. In addition, the attorneys in the Lawyers' Committee's Voting Rights Project and in LDF's Political Participation Group are particularly knowledgeable and have many years of expertise regarding the substance and historical operation of the Section 5 administrative preclearance process.

Overall, we believe that the great majority of the revisions proposed by the Justice Department fully conform with Section 5, pertinent Supreme Court rulings, and the Justice Department's historical practices in administering the preclearance requirement, and are appropriate, useful, and beneficial. The revisions will assist covered jurisdictions in complying with Section 5, and also will assist interested citizens and organizations in submitting comments to the Department regarding preclearance submissions of significant and controversial voting changes. The Justice Department's prior practice has been to update the Section 5 Procedures following Congress' extension of and amendments to Section 5, and the Department's current proposal is entirely consistent with that. The proposed revisions also are timely since covered jurisdictions and interested organizations and citizens now are actively preparing for the Attorney General's review of the redistricting plans that covered jurisdictions soon will be adopting as a result of the 2010 Census.

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Our review also indicates that there are several proposed amendments to the Section 5 Procedures which should be clarified or modified. Furthermore, there are several issues which the Department did not address in the proposed revisions which we believe should be addressed. In particular, the Department did not include provisions incorporating or responding to several important Supreme Court Section 5 rulings issued since the last comprehensive adoption of amendments to the Section 5 Procedures in 1987.

Our specific comments are set forth below, in three sections. The first section highlights the numerous revisions the Department has proposed which we strongly endorse and which we believe should be adopted in the final rulemaking action. The second section identifies and discusses the provisions which we believe need to be clarified or modified. The third section sets out the additional provisions we propose the Department include in the final revisions.

1. Proposed Revisions Which Should Be Included in the Final Rulemaking

As noted, the Department of Justice has proposed numerous revisions to the Section 5 Procedures which we fully endorse. That there are a relatively large number of needed revisions is not surprising given that it has been over 23 years since the Department last conducted a comprehensive review of the Section 5 Procedures. During this time, the Supreme Court has issued many significant Section 5 rulings, Congress has clarified the nature and scope of the preclearance requirement, the Department has gained greater experience in processing Section 5 submissions, and the Department's ability to use electronic means to process submissions has grown substantially.

The most significant of these proposed revisions include the following (set forth in the order in which they appear in the Section 5 Procedures):

- The description of who may seek Section 5 bailout would be amended to reflect the Supreme Court's holding in *Northwest Austin Municipal Utility District No. 1 v. Holder,* 129 S.Ct. 2504 (2009) (§ 51.5).

- The procedures that covered jurisdictions must follow to make preclearance submissions to the Attorney General would be clarified to specify that the 60-day review period begins when a submission is received either by the Civil Rights Division's Voting Section or by the Office of the Assistant Attorney General for Civil Rights (in the latter instance, so long as the submission is properly marked as a Section 5 submission), so that it is understood that the review period does not begin when a submission is received by other offices or divisions of the Justice Department (§ 51.9).

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- The definition of what is a covered voting change would be clarified by specifying that, under the Supreme Court's ruling in *NAACP v. Hampton County Election Commission,* 470 U.S. 166 (1985), the determination of whether a change has the requisite "potential for discrimination" is based on whether the generic category of changes to which the change belongs has a potential for discrimination (as opposed to whether the particular change itself is potentially discriminatory) (§ 51.12).

- The definition of what is a covered voting change further would be clarified by specifying that Section 5 applies to voting changes enacted or to be administered by any coordinate branch of state or local government, in accordance with Supreme Court precedent (§ 51.12).

- The list of examples of Section 5 changes would be amended to include changes in the authority of a state or local official to enact or implement voting changes (such as a transfer of authority to enact redistricting plans), and the *de jure* or de *facto* elimination of an elected official's office through a transfer of authority, in accord with the Supreme Court's decision in *Presley v. Etowah County Commission,* 502 U.S. 491 (1992) (§ 51.13).[1]

- The timing of submissions of voting changes that also are subject to federal court approval would be clarified to specify that Section 5 review should occur prior to court review of the changes. In addition, Section 5's application to federal court ordered changes which are not subject to preclearance at their inception would be clarified to specify that such changes subsequently will become subject to preclearance if the affected jurisdiction acts in such a manner as to demonstrate that the changes reflect its policy choices (§ 51.18).

- The procedures that covered jurisdictions must follow to make Section 5 submissions would be updated to reflect current computer practices, and the use of electronic methods to make submissions and to provide additional submission information to the Justice Department; in addition, the manner in which the Attorney General may transmit submission responses to submitting authorities would be updated (§§ 51.20, 51.24, 51.28, 51.9).

- The specification of the circumstances in which the Attorney General will not make a substantive determination on a submission would be amended to reflect the Attorney General's current practices (§§ 51.22, 51.35).

- The submission procedures would be clarified to specify that each submission should include a statement specifically identifying each submitted change, so that the Attorney General is properly apprised of the voting changes for which preclearance is being sought (§ 51.27).

[1] The proposed revisions refer only to the elimination of an elected official's office where that office's authority is transferred to an appointed official, however, an elected official's office also may be eliminated by a transfer of authority to different elected official.

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- The authority of the Attorney General to not disclose the identity of outside commenters would be clarified (§ 51.29).

- The authority of the Attorney General to make oral requests to submitting authorities for additional information would be made explicit, recognizing the Attorney General's longstanding and well-accepted practice. In addition, also in accord with the Attorney General's longstanding practices the Section 5 Procedures would be amended to specify that the making of an oral request for information does not suspend the running of the 60-day review period, that the making of an oral request for information does not affect the Attorney General's authority to subsequently make a written request for additional information, and that the time period in which the Attorney General may make a written request for additional information is not extended by either the making of an oral request or the receipt of information pursuant to an oral request (§ 51.37).[2]

- The procedures governing the Attorney General's reconsideration of Section 5 objections would be clarified to specify that it is the practice of the Attorney General to make reconsideration determinations within a 60-day period following a reconsideration request, however, Section 5 objections remain in force unless and until they are specifically withdrawn or a declaratory judgment is obtained from the District Court for the District of Columbia (given that the reconsideration procedure was established by the Attorney General by regulation and is not provided for by Section 5, and thus the Section 5 60-day review requirement does not apply to it) (§ 51.48).

- The substantive standards used by the Attorney General to make Section 5 determinations would be amended to: a) specify that Section 5 discriminatory purpose means any discriminatory purpose relating to voting, as provided by the 2006 amendments to Section 5 (§ 51.54); b) specify that changes that have the purpose or effect of diminishing the ability of minority persons to elect their preferred candidates denies or abridges the right to vote within the meaning of Section 5, as provided by the 2006 amendments to Section 5 (§ 51.54); c) specify that the Attorney General will be guided by the decisional factors set forth by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (§§ 51.54. 51.57); and d) delete the decisional factor that the Attorney General will consider "[t]he extent to which minorities have been denied an equal opportunity to influence elections and the decisionmaking of elected officials in the jurisdiction," as provided by the 2006 amendments to Section 5 (§ 51.58).

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[2] In specifying that the making of an oral request does not affect the 60-day review period, the proposed revisions mistakenly note that after an oral request is made "the Attorney General will proceed to make a determination within the initial 60-day period." However, as other provisions in the proposed revisions make clear, the fact that an oral request is made does not preclude the Attorney General from relying on other authority in the Section 5 Procedures to re-start or suspend the running of the initial 60-day period, or to conclude that it would be inappropriate to render a substantive determination on a submitted provision.

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2. Proposed Revisions Which Should Be Deleted or Clarified

The Notice of Proposed Rulemaking includes a few proposed revisions which are not fully consistent with Section 5 caselaw and/or the existing Section 5 Procedures and the Attorney General's longstanding practices, and thus should be clarified, as set forth below.

a. The Attorney General proposes to clarify what constitutes a change in a voting practice or procedure by amending § 51.2 to read as follows:

> *Change affecting voting* or *change* means any voting qualification, prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on the date used to determine coverage under section 4(b) or from the existing standard, practice, or procedure if it was subsequently altered and precleared under section 5. In assessing whether a change has a discriminatory purpose or effect, the comparison shall be with the standard, practice, or procedure in effect on the date used to determine coverage under section 4(b) or the most recent precleared standard, practice, or procedure. Some examples of changes affecting voting are given in § 51.13.

We agree that it is important that the Attorney General address this issue by amending § 51.2. As presently worded, § 51.2 indicates that the Attorney General determines whether or not a change has occurred solely by comparing a jurisdiction's putative new practice or procedure to the practice or procedure the jurisdiction used on the date it became covered by Section 5. However, the Attorney General's consistent historical practice has been to take into account the fact that covered jurisdictions typically make numerous voting changes subsequent to being covered. The Attorney General's practice, accordingly, is to determine whether or not a change has occurred by comparing the putative new practice or procedure to the most recent past iteration of that practice or procedure which was precleared or otherwise is legally enforceable under Section 5 (i.e., most typically, the existing practice or procedure). This is consistent with existing § 51.12, which specifies that Section 5 applies when a covered jurisdiction "returns to a prior practice or procedure," and with § 51.54(b), which specifies that the benchmark for determining whether or not a submitted provision is retrogressive is the most recent past iteration of the practice or procedure which was precleared or otherwise is legally enforceable under Section 5.

The problem with the proposed revision to § 51.2 is that, in specifying the circumstances in which the existing practice or procedure is used as the baseline, the Attorney General omitted that, even if the existing practice was not precleared, it still will be used as the baseline if it is otherwise legally enforceable under Section 5. Thus, the proposed revision is inconsistent with existing Department practice, and with existing §§

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51.12 and 51.54(b).[3] The proposed revision of § 51.2 also is awkwardly worded with regard to its reference to the existing standard, practice, or procedure having been "subsequently altered."

To address these concerns, we propose that § 51.2 be amended to read as follows:[4]

> *Change affecting voting* or *change* means any voting qualification, prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect at the time of the submission, except that if the existing standard, practice, or procedure was not in force or effect on the date used to determine coverage under section 4(b) and is not otherwise legally enforceable under section 5, it cannot serve as the baseline and, instead, the comparison shall be with the last legally enforceable standard, practice, or procedure in force or effect in the jurisdiction.

b. The Attorney General proposes to amend § 51.18 to state that federal courts have the authority, in "emergencies," to order a covered jurisdiction to implement, "on an emergency interim basis," a voting change which is subject to preclearance but which has not been precleared. We believe this revision, as written, is overbroad and should be modified.[5]

At a minimum, the Justice Department should make clear that any judicial authority to order an "emergency interim" use of an unprecleared voting change is inapplicable to Section 5 enforcement actions. In this context, the Supreme Court has gone no further than to note the possibility that, under highly unusual circumstances, a federal court might decline to issue injunctive relief to preclude implementation of a covered voting change without preclearance. *Clark v. Roemer*, 500 U.S. 646, 654-55 (1991). The Supreme Court has neither endorsed nor even contemplated the possibility that a Section 5 enforcement court could order the implementation of an unprecleared

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[3] For example, if a covered jurisdiction elected its governing body using at-large elections on its coverage date, then was ordered by a federal court to change to district elections to remedy a violation of Section 2 of the Voting Rights Act (which change was not subject to preclearance under *McDaniel v. Sanchez,* 452 U.S. 130 (1981)), and then sought to return to at-large elections, the Attorney General clearly would view this as a covered change from
district elections. But, this alteration would not be considered a "change" under the terms of the proposed revision to § 51.2.

[4] Our proposal tracks the language of existing § 51.54(b).

[5] Current § 51.18(c) does not specify that courts have this authority and, instead, simply sets forth how the Section 5 preclearance process would address a situation where a federal court concluded that it had the authority to order an unprecleared voting change into effect on an emergency interim basis. This is consistent with the purpose and design of the Section 5 Procedures, which address the operation of the preclearance process and do not seek to define the authority of the federal courts.

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change, and has emphasized the limited jurisdiction and correspondingly limited injunctive authority of such courts. *Lopez v. Monterey County*, 519 U.S. 9 (1996).[6]

At most, it may be that the Section 5 Procedures should, as they do now, specify how Section 5 would address a situation where a federal court concluded that, to remedy a one-person/one-vote (or other constitutional) violation, it was necessary to order the emergency interim use of a voting change subject to preclearance but not precleared. In this regard, it may be helpful for the Section 5 Procedures to be revised to more clearly indicate that, if and when a jurisdiction needs to immediately implement a covered voting change to remedy a constitutional violation, the ordinary approach should be for the jurisdiction to seek expedited preclearance pursuant to § 51.34.[7]

c. There is one aspect of the Attorney General's proposed revisions concerning oral requests to submitting authorities for additional information which appears to be problematic and should be clarified. As written, the revisions appear to leave open the possibility that the Attorney General might rely on a submitting authority's written response to an oral request to re-start the 60-day review period in a manner that would be inconsistent with the Attorney General's longstanding practices and the procedures governing the making of written additional information requests. Specifically, the revised procedures seemingly would not preclude the Attorney General from re-starting the 60-day review period based on written responses to seriatim oral requests, or a written response to an oral request which is received after a new 60-day period is commenced by the Attorney General's receipt of a complete response to a written request for additional information (§ 51.37). Re-starting the 60-day period based on responses to a second or subsequent oral request would run counter to the existing rule that responses to a second or subsequent written request do not affect the 60-day period, as would re-starting the 60-day period based on the receipt of information pursuant to an oral request after the response to a written request for information is complete. *See also Garcia v. Uvalde County*, 455 F. Supp. 101 (W.D,. Tex.), *aff'd mem.*, 439 U.S. 1059 (1978). These concerns may be addressed by specifying that the Attorney General reserves the authority to re-start the 60-day review period in response to written responses to the first oral

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[6] Similarly, it seems highly doubtful that a court seeking to remedy a Section 2 violation, or any other statutory violation, has the authority to order the "emergency interim" use of an unprecleared voting change. There is no apparent reason why remedying the violation of one statute should, in turn, enable a court to overturn the requirements of another statute, even temporarily.

[7] We also are uncertain why the Attorney General proposes to amend § 51.18 to alter the basic standard governing the circumstances in which Section 5 applies to voting changes which require approval from a federal court. In *McDaniel*, the Supreme Court held that Section 5 applies "whenever a covered jurisdiction submits [to a federal court] a proposal reflecting the policy choices of the elected representatives of the people." 452 U.S. at 153. Mirroring this holding, § 51.18(a) currently specifies that such changes are covered "to the extent that they reflect the policy choices of the submitting authority." The Attorney General proposes to instead specify that Section 5 does not apply "only where the Federal court prepared the change," which is a standard potentially inconsistent with the holding in *McDaniel* and would introduce uncertainty into a currently well-established area of Section 5 law. The proposed revision also is perplexing given that the Attorney General apparently would continue to use the "reflect the policy choices" standard in subsections (c) and (d) of revised § 51.18.

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request made in a submission, and that responses to an oral request do not affect the running of the 60-day period once a written request for information is made.

d. The Attorney General proposes to add a new § 51.59(b) to specify that, in reviewing redistricting plans, a finding of "discriminatory purpose may not be based solely on a jurisdiction's failure to adopt the maximum number of majority-minority districts." We agree that it is important that the Attorney General make clear that a jurisdiction's failure to maximize minority electoral opportunity does not, in and of itself, provide a basis for the Attorney General to interpose a Section 5 objection. However, we believe that the manner in which this is stated in proposed § 51.59(b) may be confusing and perhaps result in unintended and unproductive disputes.

We accordingly propose the following alternative language be added to the Section 5 Procedures:[8]

> A covered jurisdiction's decision not to maximize minority electoral opportunity when enacting or seeking to administer a voting change does not, in and of itself, provide a basis on which the Attorney General may find the presence of a discriminatory purpose. The Attorney General will, however, consider the electoral opportunity provided by a voting change, in conjunction with other factors, including those set forth in §§ 51.57, 51.58, 51.59, and 51.60, in determining whether a jurisdiction has demonstrated the absence of discriminatory purpose.

We believe that this formulation will avoid jurisdictions, commenters, and the Attorney General becoming enmeshed in efforts to parse the meaning of the word "solely." In addition, this formulation makes clear that the Attorney General may properly consider a jurisdiction's failure to draw what nominally might be termed the "maximum" number of majority-minority districts when the minority population is sufficiently large and geographically compact that this "maximum" number of majority-minority districts may be drawn using neutral districting principles.

3. Recommendations for Additional Provisions

Lastly, there are several new provisions which we believe the Attorney General should include in the Section 5 Procedures. These provisions reflect or respond to Congress' 2006 amendments to Section 5 and to Supreme Court rulings issued since the Section 5 Procedures last were generally revised in 1987. These additional provisions are as follows:

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[8] We suggest that this new provision be placed in §51.58 rather than § 51.59 since the maximization issue relates generally to representation questions, and is not limited to the review of redistricting plans.

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Issue	Relevant Precedent	Proposed Provision	Notes
1. Changes affecting voting which covered jurisdictions enact or seek to administer to comply with federal legislation	*Young v. Fordice*, 520 U.S. 273 (1997)	"Changes affecting voting which submitting authorities adopt or seek to administer in an effort to comply with federal legislation are subject to the preclearance requirement of section 5 to the extent that they reflect the policy choices of the submitting authority, except if that federal legislation explicitly excludes such changes from section 5 coverage."	---
2. Definition of retrogression as to voting changes affecting representation	2006 amendments to Section 5, & *Bartlett v. Strickland*, 129 S.Ct. 1231 (2009)	"In determining whether a voting change affecting representation (e.g., a redistricting, electoral system change, or annexation) is retrogressive, the Attorney General will examine whether the change would make minority persons worse off with regard to their ability to elect their preferred candidates of choice. This requires a functional analysis of the electoral circumstances present in the jurisdiction, and does not encompass the use of any predetermined or fixed demographic percentages in assessing minority electoral opportunity."	The first sentence conforms with the 2006 amendments. The second sentence makes clear that the holding in *Bartlett* is limited to the application of Section 2 of the VRA.

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3. Specification of the retrogression benchmark in redistricting reviews with reference to the constitutionality of the existing redistricting plan	*Abrams v. Johnson,* 521 U.S. 74 (1997)	"If a federal court has found the existing redistricting plan unconstitutional under the principles of *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny, the plan cannot serve as the benchmark and the comparison will be with the most recent preceding plan in effect that is legally enforceable under section 5. The constitutionality of the existing plan otherwise will not affect whether it may serve as the benchmark, and the Attorney General will not conduct an independent inquiry into whether the existing plan is unconstitutional when identifying the benchmark plan."	This carries forward the rule specified by the Attorney General in "Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 66 Fed. Reg. 5412 (2001).
4. The role of constitutional restraints in the Section 5 analysis of redistricting plans	*Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny	Add the following decisional factor regarding the review of submitted redistricting plans (§ 51.59): "The extent to which alternative plans comply with the one-person, one-vote requirement and the principles of *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny."	Ditto .

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4. Conclusion

For these reasons, the Lawyers' Committee for Civil Rights Under Law and the NAACP Legal Defense and Educational Fund support the proposed revisions to the Attorney General's Procedures for the Administration of Section 5 contained in the June 11, 2010 Notice of Proposed Rulemaking, subject to the alterations and additions discussed above. We appreciate the opportunity to offer these comments, and look forward to the Attorney General's issuance of the final rule.

Sincerely,

Mark A. Posner
Senior Counsel
Lawyers' Committee for
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Kristen Clarke
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