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Decisionmaking Under Section 5
of the Voting Rights Act:
Is it a Problem and What Should Congress Do?**

By Mark A. Posner

January 2006

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The Politicization of Justice Department Decisionmaking Under Section 5 of the Voting Rights Act: Is it a Problem and What Should Congress Do?

Mark A. Posner*

I. INTRODUCTION

This year, Congress is expected to decide whether to reauthorize what is widely considered to be one of the most effective civil rights statutes enacted in the modern era, Section 5 of the Voting Rights Act of 1965.¹ Section 5, which currently will expire in August 2007, requires particular states and localities (principally, but not entirely, in the South) to obtain federal approval (“preclearance”) whenever they enact or seek to administer a change in any aspect of their election law or procedure. To obtain preclearance, a covered jurisdiction must demonstrate to either the United States District Court for the District of Columbia or the Attorney General that the voting change is not discriminatory in purpose or effect, and this federal approval must be obtained before the change may be implemented.

In considering the reauthorization question, Congress will be confronted with fundamental and controversial issues relating to both public policy and constitutional law. These issues arise from the threshold reauthorization decision itself and from a second tier of decisions regarding the length of the renewal, the scope of the Section 5 nondiscrimination test, and the nature and scope of the Section 5 coverage provisions. Congress has taken some initial steps in the legislative process, by gathering information through oversight hearings held in October and November 2005 (conducted by a subcommittee of the House Judiciary Committee), and private individuals and groups have been working to formulate their positions and are gearing up to lobby Congress. The reauthorization issues also have been discussed at numerous conferences and have been the subject of scholarly writings.

One issue that recently has come to the fore, as a result of articles published in the Washington Post and other newspapers, is the degree to which Justice Department enforcement of Section 5 has been corrupted by decisionmaking based not on a good faith application of the law to the facts of individual preclearance requests, but instead on partisan political interests. The articles have been the subject of much comment, and Congress may hold an oversight hearing on the issue. However, despite the current controversy and the fact that the politicization concern also has been raised intermittently in the past, the debate about potential Justice Department politicization often is anecdotal in nature with a heavy dose of speculation about the Department’s motives and with political charges flowing back and forth, but with little analysis of the issue.

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¹ 42 U.S.C. § 1973c.

Accordingly, it is both useful and timely to now take a hard look at the politicization question: to what extent is there a potential danger of political decisionmaking by the Justice Department in ruling on Section 5 preclearance requests, to what extent has any such danger become a reality and, most importantly, how should Congress respond, if at all, in considering whether and in what manner to reauthorize the statute? For example, if politicization of Section 5 enforcement is a longstanding and severe problem, or if the potential for political decisionmaking by the Justice Department is overwhelmingly acute, Congress likely would need to consider enacting a substantial redesign of the Section 5 decisionmaking process or, if that is insufficient, might need to consider imposing substantive restrictions on Section 5 or even contemplate not reauthorizing the statute. On the other hand, if the problem is more modest in scope, Congress could consider enacting a limited modification to the Section 5 decisionmaking process or could seek to reinforce existing procedures that may discourage political decisionmaking. Or if, in the end, politicization is found to be only a minor concern, perhaps no congressional action is required at all. In considering potential amendments, Congress also must pay heed to any unintended negative consequences that any amendment might have on the operation of Section 5.

Based on the analysis set forth below, it appears that there is a real and significant, but at the same time, limited concern that the Justice Department's Section 5 decisionmaking has in the past, and may potentially in the future, be guided by political considerations. Congress, therefore, should act to address this problem as part of the Section 5 reauthorization legislation. The remedy, however, should be narrowly drawn and should leave the historical Section 5 decisionmaking process largely intact.

Specifically, Congress should enact a statutory underpinning for the procedures historically used by the Justice Department to guard against political decisionmaking. These procedures grant significant authority and responsibility to the Department's career staff which, in turn, places a major constraint on any desire or tendency of the Department's political staff to decide submissions based on political considerations. These procedures, however, are based on custom and are not prescribed by statute or regulation, and there is concern that the Bush Justice Department may now be manipulating or undermining them.

Second, Congress should consider expanding, to a limited degree, the circumstances in which a Justice Department Section 5 decision may be "appealed" to a federal court. This would allow minority citizens of a jurisdiction that has obtained Justice Department preclearance to contest in court, in certain instances, the Department's preclearance decision (mirroring the current right of covered jurisdictions to pursue a preclearance lawsuit following a Justice Department denial of preclearance). Any such change, however, risks upsetting the delicate balance of interests reflected in the current Section 5 regime, and therefore requires further study before concluding that such a change should be enacted.

II. OVERVIEW OF THE SECTION 5 REMEDY

In 1965, Congress enacted the Voting Rights Act to “banish the blight of racial discrimination in voting, which [had] infected the electoral process in parts of our country for nearly a century”² following the ratification of the Fifteen Amendment to the Constitution. Congress adopted the Section 5 preclearance remedy to ensure that jurisdictions with a history of voting discrimination could not devise and enforce new rules to perpetuate discrimination in response to the other discrimination remedies included in the Voting Rights Act, and in response to the efforts of black citizens to gain an equal electoral opportunity. Section 5 originally was enacted for a five-year term, and was reauthorized in 1970, 1975, and 1982.

Section 5 is perhaps the most powerful and unique civil rights remedy enacted by Congress in the modern era. The statute owes both its power and its uniqueness, as well as its controversial nature, to the fact that it reverses one of the core principles of our federal system of government, that state and local enactments are presumed lawful under the Constitution and federal law unless and until a federal court rules otherwise. Under Section 5, whenever a covered state or local government “enacts or seek to administer” a change in a voting standard, practice, or procedure, the change is presumed to be potentially discriminatory, and may not be implemented unless and until preclearance is obtained.

Currently, Section 5 applies to eight states in their entirety (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas), to substantial portions of three states (New York, North Carolina, and Virginia), and to small portions of five other states (California, Florida, Michigan, New Hampshire, and South Dakota). The 1970 and 1975 amendments expanded the statutory test for determining which jurisdictions automatically are subject to Section 5; the 1975 expansion was particularly significant as it resulted in the State of Texas becoming covered (Texas has accounted for about a third of all preclearance requests since 1975). The 1982 amendment altered the test for determining the circumstances in which covered jurisdictions may “bail out” from coverage.

Section 5 covers any and all changes in election-related procedures that covered jurisdictions enact or seek to administer. This includes redistrictings, annexations and deannexations (to the extent they alter voting constituencies), election method changes, changes in the size of an elected body, other changes in the number of elected officials, voting eligibility and registration rules, polling place procedures and locations, absentee and early-voting procedures and locations, candidate eligibility requirements and qualification procedures, and changes in the powers and duties of elected officials that relate to the administration of elections or the authority to enact voting changes.

To obtain preclearance, covered jurisdictions must either make a submission to the Justice Department or file a declaratory judgment action in the District Court for the

² South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

District of Columbia, and demonstrate that their voting changes do not have the purpose and will not have the effect of discriminating “on the basis of race or color.” Jurisdictions covered pursuant to the 1975 amendment also must demonstrate that their voting changes do not discriminate “on the basis of language minority status” – i.e., that they do not discriminate against Hispanics, Asians, American Indians, or Alaskan Natives. Covered jurisdictions have the burden of proof both in submissions to the Attorney General and in preclearance lawsuits. The Attorney General is the statutory defendant in preclearance lawsuits, and affected persons may intervene permissively.³ No non-Section 5 claims (such as a one-person, one-vote claim) may be joined to a Section 5 lawsuit (by the jurisdiction, the Attorney General, or any intervenors).

The decision whether to seek preclearance of a particular voting change from the district court or the Justice Department is the covered jurisdiction’s. If the jurisdiction seeks preclearance from the Justice Department and the Department disapproves (“objects”), the jurisdiction still may seek judicial preclearance from the district court. Such lawsuits are heard “de novo,” meaning that the case is decided exactly the same as if the jurisdiction had exercised its statutory right to file immediately for a declaratory judgment and bypass the administrative preclearance mechanism.⁴ On the other hand, Justice Department approvals are not subject to legal review, either in a de novo Section 5 lawsuit or in a traditional appeal pursuant to the Administrative Procedure Act.⁵

Preclearance of a voting change by either the Justice Department or the District of Columbia District Court returns the change to the legal status it would have had if the Section 5 remedy did not exist. Accordingly, following preclearance, a jurisdiction may implement its change and persons who oppose the change may file suit in a local federal or state court contending that the change violates the Constitution, federal law (other than Section 5), the state constitution, or state law.

III. SECTION 5 REAUTHORIZATION

As noted, Section 5 reauthorization raises significant issues of policy and constitutional law. The bottom-line question Congress must answer is whether reauthorization is appropriate based on the amount of voting discrimination that continues to occur in the Section 5 jurisdictions and, in addition, any increase in discrimination that might occur if Section 5 was allowed to sunset and the deterrence that

³ In appropriate circumstances, citizen intervenors may recover their attorney’s fees from the jurisdiction that filed the preclearance lawsuit. 42 U.S.C. § 1973l(e).

⁴ In other words, the issue before the court is whether the voting change satisfies the Section 5 nondiscrimination standard, not whether the Justice Department’s objection was supported by the information presented to or obtained by the Department during its administrative review.

⁵ 5 U.S.C. § 701 et seq. For ease of discussion, this White Paper refers to decisions by the Justice Department to preclear a voting change as a preclearance approval. This is not technically correct to the extent it suggests that preclearance represents an affirmative stamp of approval by the Department. Section 5 specifies that the Department may either object or not object to submitted changes, and a decision to not interpose an objection simply indicates that the change does not violate the Section 5 nondiscrimination standard.

flows from the statute is lost. If—as I believe it should—Congress decides to reauthorize Section 5, Congress will need to decide on the term of the renewal; whether to legislatively reverse any or all of three recent Supreme Court decisions that reinterpreted, and substantially limited the scope of, the Section 5 nondiscrimination standard⁶; whether the test that determines geographic coverage should be amended given the passage of time since its enactment; whether the standards and procedures governing “bail out” from coverage should be amended; and whether to continue the requirement that all types of voting changes are subject to preclearance given the fact that certain types of changes almost never are denied preclearance. In addition, Congress may need to consider the manner in which the Justice Department has carried out its preclearance decisionmaking responsibility.

For several reasons, these policy issues also have constitutional significance. Since 1966, when the Supreme Court first upheld the constitutionality of Section 5,⁷ the Court has recognized that, by altering the relationship between the federal government and certain state and local governments, Section 5 has a significant federalism cost. This cost arises, moreover, in a sensitive area of federal-state relations – the determinations made by states and localities as to how they will govern themselves. The federalism question persuaded only one Justice in 1966 to conclude that Section 5 is unconstitutional.⁸ But since then federalism has become a major concern of a majority of the Justices, with respect to Section 5 in particular and with respect to federal-state relations in general.⁹ As part of the Court’s new federalism holdings, the Court also has significantly narrowed the authority of Congress to enact remedial legislation pursuant to the Fourteenth Amendment, specifying that “[t]here must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹⁰ On the other side of this constitutional cost-benefit analysis, the enforcement of Section 5 and the other provisions of the Voting Rights Act has substantially moderated the nature and scope of the voting discrimination problems that exist in the Section 5 jurisdictions.

⁶ *Georgia v. Ashcroft*, 539 U.S.461 (2003) (redefining and diluting the Section 5 effect standard); *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (redefining and severely limiting the Section 5 purpose standard); *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997) (restricting the preclearance test by precluding denials based on violations of the results standard of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as well as violation of other provisions of the Act).

⁷ *South Carolina v. Katzenbach*, *supra*. The Court reaffirmed this ruling in *City of Rome v. United States*, 446 U.S. 156 (1980). See also *Lopez v. Monterey County*, 525 U.S. 266 (1999).

⁸ *South Carolina v. Katzenbach*, 383 U.S. at 355 (Black, J., concurring and dissenting).

⁹ With respect to Section 5, see *Reno v. Bossier Parish School Board*, 528 U.S. at 336 (Section 5 raises “substantial” federal costs” which, if exacerbated, could perhaps raise concerns about its constitutionality); *Miller v. Johnson*, 515 U.S. 900, 926-927 (1995) (same). With respect to federalism concerns in general, see, e.g., *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001) (Americans With Disabilities Act held unconstitutional insofar as it authorized money damages against states for violations of Title I of the Act); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act held unconstitutional insofar as it authorized money damages against states).

¹⁰ *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

Accordingly, if Section 5 is reauthorized, it is widely expected that a constitutional challenge to the reauthorization will reach the Supreme Court. All of the decisions made by Congress on the policy issues outlined above potentially will play a role in the Supreme Court's decision, as the Court weighs the record made by Congress in favor of reauthorization, the means chosen for implementing a continuing preclearance requirement, Section 5's federalism cost, and the scope of congressional power to enact civil rights legislation.

IV. THE PRECLEARANCE PROCESS

A. The Justice Department's Role Vis-à-Vis the District Court

In practice, Section 5 jurisdictions almost always choose to seek preclearance from the Justice Department, and rarely seek preclearance by filing suit in the District of Columbia District Court. Since 1965, the Department has reviewed over 435,000 voting changes while only sixty-eight declaratory judgment actions have been filed. The Department has objected to about 3,100 voting changes and the district court has denied preclearance in eleven lawsuits (most preclearance lawsuits have been dismissed without a final determination on the merits).

Jurisdictions choose the Justice Department route to preclearance because it is substantially faster, simpler, and cheaper. As discussed below, the Department's preclearance process is time-limited and is more informal than litigation. Many submissions are made by administrative personnel and not by attorneys. Litigation is expensive, and even if the Department concedes preclearance when it files its Answer to a declaratory judgment lawsuit, that brief litigation likely would be more expensive than submitting the change to the Department and obtaining preclearance in that fashion. In addition, the high rate of success enjoyed by the Department in declaratory judgment actions, at least prior to 1995, likely discouraged jurisdictions from filing suit, even after an objection by the Department.¹¹

B. The Justice Department's Administrative Preclearance Process

1. The statutory requirement of expeditious review.

Congress created the Justice Department preclearance mechanism to "provide covered jurisdictions with an expeditious alternative to declaratory judgment actions."¹² Congress recognized that Section 5 jurisdictions have a strong interest in promptly implementing their validly enacted voting changes, and that Section 5's prohibition on implementing unprecleared changes would result in unacceptable delays in implementing new voting laws and procedures unless jurisdictions were provided with a means for

¹¹ Prior to 1995, the Department prevailed in eleven of the fourteen cases in which preclearance was granted or denied (where the Department contested preclearance). Since 1995, however, the Department has batted zero for five in such cases.

¹² *Morris v. Gressette*, 432 U.S. 491, 504 (1977).

obtaining relatively speedy preclearance. As initially drafted, the Voting Rights Act provided only for preclearance lawsuits, but Congress understood that litigation can be time consuming as well as costly. Since the Attorney General was to be the statutory defendant in the preclearance lawsuits, the obvious way to short-circuit litigation was to allow jurisdictions to go straight to the Attorney General and request preclearance. If the Attorney General granted preclearance, that would be the equivalent of the Attorney General consenting to judgment in a Section 5 lawsuit, and thus the preclearance process would be concluded. If the Attorney General denied preclearance, the jurisdiction would then need to return to seeking preclearance through litigation or, by not filing suit, would concede the finality of the conditional Section 5 prohibition on implementing the particular change.

To implement this statutory intent, Congress specified in Section 5 that Justice Department preclearance reviews must be completed within sixty days of the Department's receipt of a preclearance request. Because of the centrality of this requirement to the administrative review process, Congress further specified that if the Department does not interpose an objection within this time period, the submitted change is automatically precleared.¹³

2. Review procedures established by the Justice Department.

Congress has not enacted any other requirements or guidelines with regard to the administrative review process and, in the absence of such direction, the Justice Department has established detailed procedures for conducting administrative reviews. The Department initially established these procedures in the late 1960s and early 1970s, and they have remained largely unchanged since then. The administrative preclearance process is described in part in interpretative regulations promulgated by the Department (first adopted in 1971 and amended several times thereafter, and known as the Procedures for the Administration of Section 5¹⁴), and also is reflected in certain unwritten standard operating procedures that date back to the late 1960s and early 1970s.

a. Relationship between the political and career staff.

Since 1965, the Attorney General has delegated his statutory responsibility for making preclearance decisions to the Presidentially-appointed Assistant Attorney General for Civil Rights.¹⁵ The Assistant Attorney General ("AAG"), in turn, has relied heavily on Civil Rights Division career staff, located in the Division's Voting Section.

¹³ By regulation, the Department has specified that the sixty-day review period may be re-started in certain limited circumstances, where a jurisdiction provides written information materially supplementing a submission or makes a second submission of a change that is directly related to the change that is pending review. 28 C.F.R. § 51.39. The Department also may make a written request for additional information during the initial sixty-day period, and the sixty-day period in which the decision must be made then begins when the jurisdiction provides all available information requested. 28 C.F.R. § 51.37.

¹⁴ 28 C.F.R. Part 51.

¹⁵ 28 C.F.R. § 51.3.

As a matter of custom, Voting Section staff conduct all preclearance investigations, and prepare a written analysis for each submission that examines the facts, applies the law to the facts, and makes a recommendation for how the Department should respond to the submission (preclear, object, request additional written information from the jurisdiction, or conclude that the preclearance request is not ripe or is moot). Recently, however, the Bush Administration apparently has prohibited the career staff from making recommendations whether to preclear or object, though it is unclear exactly what this means (whether the staff merely is prohibited from expressing its bottom-line recommendation or is more fundamentally limited in its ability to reach factual and legal conclusions in the underlying analyses).

Traditionally, the sole aim of the career staff has been to utilize its experience and expertise to enforce Section 5 so as to fulfill the congressional mandate of remedying racial and ethnic discrimination in voting. While the career staff has been criticized by some as being overzealous on occasion in pursuing this goal,¹⁶ there historically have been few if any allegations that the career staff ever has sought to advance a partisan political agenda. The Bush Administration, however, has aggressively sought to re-make the Civil Rights Division's career staff by moving long-time leaders out through early-retirement and by removing the career staff from having any role in hiring new attorneys into the Division. These actions, when implemented over a period of years, have the potential to significantly undercut the independent, nonpartisan status of the Division's career staff in general and the Voting Section's staff in particular.

When the Voting Section concludes that an objection is warranted, a detailed and lengthy memorandum is forwarded to the AAG that reflects the work of several levels of staff within the Section (including one or more line attorneys and/or civil rights analysts, a mid-level career supervisor, and the Section Chief, who also is a career attorney). If the line staff person and/or the mid-level supervisor conclude that an objection is warranted but the Section Chief disagrees (which is unusual), the longstanding practice has been for the objection analysis nonetheless to be forwarded to the AAG for decision, though this practice may have been ended by the recent order precluding staff recommendations.¹⁷

When Section personnel unanimously conclude that a change should be precleared, the preclearance approval typically is issued by the Section Chief or a mid-level supervisor on behalf of the Chief.¹⁸ In such cases, the AAG is consulted or the

¹⁶ In particular, the Supreme Court has accused the Justice Department staff of wrongly using a maximization standard in reviewing redistricting plans in the early 1990s. *Miller v. Johnson*, *supra*, 515 U.S. at 926. For a contrary view, see Mark A. Posner, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act*, in *RACE AND REDISTRICTING IN THE 1990S* 80 (Bernard Grofman, ed., 1998); Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing?"*, 14 *CARDOZO L. REV.* 1237, 1265-1267 (1993).

¹⁷ It is extremely rare for a line staffer and a mid-level supervisor to recommend preclearance and for the Section Chief to recommend an objection.

¹⁸ The Department's regulations authorize the Chief of the Voting Section to act on behalf of the AAG in making Section 5 decisions, except with respect to objections and decisions whether to withdraw an objection or not. 28 C.F.R. § 51.3.

submission is forwarded to the AAG for decision only where the change is of great significance (e.g., a statewide redistricting) or otherwise is particularly controversial.

This partnership between the career staff and the Assistant Attorney General (and his political aides) historically has worked extraordinarily well. AAGs in both Democratic and Republican Administrations have had great respect for, and have been substantially guided by, the knowledge and expertise of the career staff. Historically, in both Democratic and Republican Administrations, the AAG almost always has interposed an objection when that action is recommended by both the Section Chief and the Section staff (as noted, almost all objection recommendations go to the AAG with a unanimous Voting Section recommendation). Though the AAG sometimes may modify the scope of the recommended objection or disagree in part with the Section's reasoning, it is rare for the AAG to completely reject a unanimous staff recommendation and preclear the submitted change. When the Section Chief has disagreed with a staff recommendation to object, the AAG typically has sided with the Chief and precleared the change. There does not appear to be any instance in which the Voting Section unanimously recommended preclearance and the AAG interposed an objection.

b. Receipt and investigation of submissions.

Because the Justice Department must review submitted changes within a limited time period, the Department utilizes a relatively informal process for conducting the Section 5 reviews. As specified in the Procedures for the Administration of Section 5, jurisdictions initiate the administrative process by sending a letter to the Voting Section identifying the voting changes at issue and providing certain background data and documentation. The Section then conducts a factual investigation by examining the written information provided by the jurisdiction and requesting additional written information from the jurisdiction when appropriate, reviewing any written information provided by others, speaking on the telephone with the jurisdiction's representatives and with minority contacts and other interested citizens, occasionally conducting an in-person meeting in Washington, D.C. with the jurisdiction's representatives or separately with other interested individuals, and considering information on file with the Section (such as census data or information located in old submission files).

The Department does not conduct formal or informal hearings, does not require or encourage the presentation of testimony under oath through affidavits or declarations, and does not have the authority to subpoena documents. The Department also does not apply the Federal Rules of Evidence to the information received during the course of its reviews.

c. Limited transparency.

The Justice Department's decisionmaking process is limited in its transparency, and to a great extent can seem like a black box to the outside world. As a matter of custom, objections are announced in a public letter written to the submitting jurisdiction which describes the basis for the objection in a summary manner, without providing any

detailed exposition of the Justice Department's factual and legal analyses. The Department almost never provides an explanation for its determination to preclear a submitted voting change; these decisions almost always are announced by the Department in a form letter that simply identifies the submitted change and states that an objection is not being interposed. The analytic portions of memoranda written within the Voting Section and the AAG's Office are considered confidential, and only rarely reach the public eye.

The career staff, of course, is much more knowledgeable about the reasons underlying the Department's preclearance decisions. As indicated, the staff makes the great majority of these decisions, and where the decision is made by the AAG, the staff prepares the memoranda that usually form the basis for the AAG's decisions. In addition, if the AAG has concerns about a Voting Section recommendation, he may hold a meeting with Section staff or speak by telephone with them, and he and/or his assistants may provide written feedback to the Section. However, there could be cases where the career staff is not fully aware of the reasons for an AAG decision, if the AAG were to reject a Section recommendation but not provide any explanation to the staff or provide an explanation that is incomplete or disingenuous.

C. The Unreviewability of Justice Department Preclearance Determinations

As noted, private citizens currently may not contest in court a Justice Department preclearance approval decision, either by seeking to litigate whether the voting change satisfies the Section 5 nondiscrimination test or by seeking judicial review of the Justice Department's decision. Section 5 itself does not provide for any such judicial contest, and in *Morris v. Gressette* the Supreme Court held that preclearance approvals are not subject to review pursuant to the Administrative Procedure Act ("APA"), which generally grants aggrieved citizens the right to obtain judicial review of federal agency decisions. By its terms, the APA does not apply when "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."¹⁹ Although Section 5 does not include an express preclusion, the Supreme Court held that nonreviewability should be inferred because APA reviews would extend the time period during which jurisdictions would be barred from implementing their voting changes, and thus would be inconsistent with Congress' intent that covered jurisdictions be able to obtain an expeditious administrative determination regarding the enforceability of their voting changes.

Congress' apparent reasoning when it created the Justice Department preclearance mechanism also may provide some insight into why it did not provide for judicial review of the Attorney General's preclearance approvals. Since the Attorney General was to be the sole statutory defendant in preclearance litigation and since courts generally defer to a defendant's decision not to contest a plaintiff's claims, Congress may have concluded that Justice Department administrative approvals should be accorded the same deference.

¹⁹ 5 U.S.C. § 701(a).

A potential difficulty with this logic is that a decision by the Attorney General in a preclearance lawsuit to concede preclearance is subject to review by the district court if a concern arose that the concession was politically motivated or otherwise was not supported by any reasonable interpretation of the law and the facts. APA-based judicial review of administrative approvals could have been viewed as the corresponding way in which to guard against an improper concession by the Attorney General in the administrative context. But the Court did not see it that way, and to the extent that the Justice Department has lived up to the trust placed in it, there would be little reason to revisit the judicial review issue now.²⁰

V. THE POLITICIZATION QUESTION

A. Background

Political decisionmaking is an inherent concern under Section 5, given that the statute requires a Justice Department political appointee to approve or disapprove changes in voting standards, practices, and procedures that, in particular instances, may affect who wins and loses elections. The concern is most acute when states seek Justice Department preclearance for congressional redistrictings, and also is notably present when state legislative redistrictings and other statewide changes are submitted for administrative review. Congressional redistrictings may directly affect the national political fortunes of the party in control of the Justice Department, and state legislative redistrictings and other statewide changes may substantially impact federal elections and, for other reasons, may have sufficient visibility to be of concern to politicians and party operatives in Washington, D.C. On the other hand, changes made at the local level, by particular counties, cities, towns, school districts, and special districts, are generally unlikely to be of political interest in Washington, D.C. Overall, it must be emphasized, the great majority of the voting changes submitted to the Justice Department are very ordinary in nature and raise no political flags.

The extent to which the Justice Department is presented with the opportunity or temptation to engage in political decisionmaking has risen significantly since Section 5 was enacted. In 1965, most of the covered jurisdictions (those located in the South) almost exclusively elected Democrats to office, which substantially limited the degree to which voting changes had a partisan angle. As the Republican Party has gained strength in the South, first in federal elections and then in state and local elections, the number of partisan-significant voting changes enacted by covered jurisdictions has increased.

²⁰ It might be argued that the “defendant may concede liability” justification for not providing for judicial review of Justice Department preclearance approvals also is problematic because private citizens may intervene as defendants in preclearance lawsuits and thus their views may impose an additional limit on the extent to which Justice Department concessions will control the outcome of preclearance litigation. However, intervention is permissive only, and the district court has not allowed private citizens to intervene as defendants to oppose preclearance when, at the outset, the Justice Department concedes that the court should preclear the voting changes at issue. Accordingly, the role that private citizens play in preclearance lawsuits is not inconsistent with disallowing judicial review of Justice Department preclearance approvals.

Perhaps the most frequent allegation of political decisionmaking by the Justice Department has been that the Republican AAG in the 1980s and the Republican AAG in 1991 and 1992 objected to statewide plans in order to create additional Republican districts by forcing the creation of additional majority-minority districts.²¹ Persons alleging this wrongdoing have taken particular aim at the objections issued in 1991 and 1992, when the Republicans had become a much greater political force in elections for the offices subject to statewide redistrictings, and when the Justice Department aggressively used the purpose prong of the Section 5 nondiscrimination standard to object to a large number of plans. This particular allegation generally has not been made with regard to the reviews of post-2000 statewide redistrictings, since Supreme Court decisions in the mid to late 1990s and in 2000 substantially reduced the authority of the Department to interpose objections and the Department in fact has interposed only a few objections to these plans.

B. The Extent to Which Politicization Has Occurred

1. The historical experience.

Although political decisionmaking by the Justice Department may be an inherent concern under Section 5, the totality of the evidence strongly indicates that this concern rarely has become a reality. Up until recently, political considerations have rarely played a role in the Department's preclearance determinations.

This was the conclusion of James Turner, a career attorney who served as a top assistant to both Republican and Democratic AAGs from the 1970s to his retirement in the mid-1990s. Turner was responsible for reviewing the work of the Voting Section for much of that time, and also served as the Acting AAG at the beginning of the Reagan, Bush I, and Clinton Administrations. In an article published in 1992, Turner stated that “[w]ith a few possible exceptions, political considerations have not entered into the application of the provisions of the Voting Rights Act in any national administration.”²²

This conclusion is supported by particular enforcement actions taken by the Justice Department. For example, after the Democrats took control of the Justice Department in 1993, the Department continued to follow the same approach in interposing objections to redistricting plans, including statewide plans, that the Republican AAG had followed in 1991 and 1992, thus indicating that the 1991 and 1992 approach was not politically driven.²³ In addition, it has been noted that during the first Bush Administration, the

²¹ Since minority voters typically vote overwhelmingly for Democrats, drawing additional majority-minority districts can result in concentrating Democratic voters in a smaller number of districts which, in turn, can result in the creation of additional Republican-controlled districts. The Republican Party aggressively promoted this redistricting strategy beginning generally in the post-1980 redistricting cycle.

²² James P. Turner, *A Case-Specific Approach to Implementing the Voting Rights Act*, in *CONTROVERSIES IN MINORITY VOTING* 296, 299 (Bernard Grofman & Chandler Davidson, eds., 1992).

²³ See Posner, *supra* note 16.

Justice Department undertook several significant actions to enforce the Voting Rights Act that were contrary to the interests of the Republican Party.²⁴

The key institutional bulwark in the Justice Department against political decisionmaking has been the bottom-up Section 5 review process. As described above, this process has effectively channeled the AAG toward making decisions based on the law and the facts, and not based on political considerations. The Department's adherence to this process is perhaps the most important indicator that decisions have been free of political motivation as well as constituting one of the most important reasons this has occurred.

At bottom, allegations of politicization almost always have involved nothing more than a claim that a correlation between the political party in control of the Justice Department and the political party benefited by a particular preclearance decision is evidence of a causal relationship between the two. The limited transparency of the Department's Section 5 decisionmaking also has bred suspicion. But these allegations rarely have been supported by any real evidence of political manipulation.²⁵

2. *Recent revelations of political decisionmaking.*

Recent revelations, however, regarding actions of the Bush Justice Department strongly suggest that the historical pattern has been broken and that the inherent danger of political decisionmaking has indeed become a reality. This conclusion is based not simply on the existence of Justice Department decisionmaking that has favored Republican Party interests, but on significant procedural and substantive irregularities that accompanied these decisions that indicate that the correspondence between the decisionmaker's partisan identity and the partisan result is more than mere coincidence. Specifically, the politicization concern focuses on the Justice Department's responses to three of the most notable changes it has reviewed since 2001.

First, in 2002, the Department delayed ruling on a request by the State of Mississippi for preclearance of its congressional redistricting plan, which resulted in the implementation of a competing plan adopted by a federal district court (at the urging of the state Republican Party) that was substantially more favorable to the Republicans. The state legislature had failed to enact a new plan following the 2000 Census and a state court had stepped into the breach and ordered a new plan into effect, which the state then submitted for preclearance. Meanwhile, the federal district court also developed a plan and ruled that its plan would go into effect if the state court plan was not precleared by a date certain, which is what occurred when the Justice Department delayed ruling on the plan.²⁶

²⁴ Grofman, *supra* note 16, at 1254-1256 .

²⁵ Of course, the limited transparency also makes it difficult for critics to prove their allegations of political machinations.

²⁶ Voting changes adopted by state courts in covered jurisdictions are subject to Section 5 preclearance, *Branch v. Smith*, 538 U.S. 254 (2003), but plans ordered by federal district courts, which do not reflect the policy choices of

The delay occurred when the Justice Department sent a highly unusual request to the State for additional information. The request did not address the merits of the state court plan – a plan which apparently did not raise any discrimination concerns – but instead dealt with a related change that Mississippi also had submitted regarding the authority of the state trial court to order a new plan into effect in the absence of a plan enacted by the state legislature. The Department’s request was procedurally irregular, since it involved the political staff overriding a recommendation by the career staff to preclear the changes. The request also was substantively suspect because the Department’s request represented a search for information that, while technically relevant to the submitted changes, had no real substantive significance. This is because it is extremely unlikely that there was any basis for interposing an objection to the state court’s new legal authority to remedy one-person, one-vote violations since this judicial authority is not discriminatory on its face, and since the Department was fully empowered to address any present or future application of this authority that violated Section 5 by denying preclearance to the resulting redistricting plan.²⁷

Next, in 2003, the Justice Department approved the State of Texas’ controversial, second post-2000 congressional redistricting plan, adopted at the urging of then House Majority Leader Tom DeLay. The plan resulted in the election of five additional Republican congressmen from Texas in the 2004 elections. When the plan was submitted to the Justice Department, a large team of Voting Section career staff (including the Section Chief, a deputy chief, four attorneys, a statistician, and a civil rights analyst) unanimously recommended that an objection be interposed. The AAG’s decision to overrule this recommendation represents one of the rare instances in which political leaders within the Department have rejected a unanimous staff recommendation, and was made in the face of the staff’s conclusion that the plan failed muster under all parts of the Supreme Court’s test for discriminatory effect and did not present a close preclearance question.

Most recently, in 2005, the Justice Department approved a Georgia law requiring voters to present a government-issued picture identification in order to vote at the polls on election day. This enactment is one of the leading examples of legislation advocated by a number of Republicans across the country that takes aim at alleged problems of fraudulent voting on election day but which would erect barriers to voting that have a disparate impact on groups that typically vote Democratic, including minority voters. Voting Section staff prepared a detailed and comprehensive memorandum analyzing the information provided by the state and other interested parties, and concluded that the change would have a discriminatory effect on minority voters (the Section Chief

the covered jurisdiction, are not subject to preclearance. *McDaniel v. Sanchez*, 452 U.S. 130 (1981). The plan ordered by the federal court in Mississippi was not proposed by the State and thus did not require Section 5 preclearance.

²⁷ In *Branch v. Smith*, *supra*, the Supreme Court concluded that the additional information request was not frivolous or unwarranted, but this conclusion was reached in the context of a challenge to the Justice Department’s legal discretion to send the additional information request to Mississippi, and was based merely on the Court’s observation that the information requested was facially relevant to the changes submitted for review.

apparently disagreed). Nonetheless, the memorandum was not forwarded to the AAG for his consideration, contrary to the longstanding and uniform practice within the Department.²⁸

The revelation that the Justice Department is now precluding career staff from making Section 5 recommendations raises further questions about the Justice Department's commitment to nonpolitical decisionmaking. Although it is unclear exactly what the change means in practice, the thrust of the change is clear – the work of the career staff is suspect and the influence of the career staff is to be minimized, while the ability of the political staff to control the decisionmaking from the top down is something that should be promoted.

VI. CONGRESSIONAL RESPONSE TO THE POLITICIZATION CONCERN

A. Introduction

In these circumstances, Congress may best promote nonpolitical decisionmaking by the Justice Department by enacting narrowly drawn changes to the Voting Rights Act. Specifically, Congress should reinforce the salutary bottom-up decisionmaking process historically used by the Department, and should consider authorizing judicial review of preclearance approvals in limited circumstances.

The evidence of Justice Department politicization does not support performing any radical surgery on Section 5. There is no suggestion that the Department's preclearance process is so pervasively corrupted that Section 5 should not be reauthorized, or that particular types of changes should be exempted from coverage or the administrative preclearance authority should be transferred to some other federal agency.

B. Recommendations for Action

1. Protecting the Justice Department decisionmaking process.

Congress should amend the Voting Rights Act to restore and reinforce the historical Justice Department decisionmaking process by requiring that all administrative

²⁸ It should be noted that while partisan motivations appear to explain the Justice Department's decisions in these three high profile submissions, it does not appear that the recent significant reduction in the overall number of Justice Department objections is attributable to partisan (or ideologically driven) decisionmaking. The reduction actually began in the late 1990s, under the Clinton Administration, and appears to be the result of several other factors. Beginning in the late 1990s, a series of district court and Supreme Court decisions substantially limited the nature and scope of the Section 5 discrimination inquiry (particularly the Supreme Court's second decision in *Bossier Parish School Board v. Reno*, which, for all intents and purposes, read the Section 5 purpose test out of the statute). In addition, beginning in the 1980s, there was a wholesale movement among local jurisdictions covered by Section 5 to switch from at-large to district-based election systems, spurred by Congress' amendment to Section 2 of the Voting Rights Act in 1982 establishing a results test for challenging at-large systems. A significant percentage of the Department's Section 5 objections historically have been directed at election changes that generally are discriminatory only in the context of at-large elections (majority vote requirements, anti-single-shot voting provisions, and annexations).

preclearance decisions be made pursuant to reviews conducted by career staff within the Civil Rights Division, which reviews should be required to include a factual investigation and analysis, a legal analysis that applies the law of Section 5 to the facts, and a recommendation for how the Department should respond to the submitted voting change. In addition, the AAG should be required to set forth a reasonably detailed, written explanation of any decision to take an action different from the action recommended by the career staff. These requirements would be fleshed out through implementing regulations promulgated by the Department.

By enacting such an amendment, Congress would take an important step toward restoring the balance between the authority of the career and political staffs, while continuing to recognize that the ultimate responsibility for Section 5 decisions must reside with a presidential appointee confirmed by the Senate. Although the proposed requirements might ordinarily be viewed as undue congressional micromanagement of a federal agency, they represent a reasonable and moderate response to the specific concerns present with regard to the Justice Department's administration of the preclearance requirement. The extent to which this amendment would in fact resolve the politicization problem ultimately would depend, however, on the willingness of the political staff to listen to and be guided by the analyses and recommendations of the career staff, and the willingness of the political staff to maintain a career staff which is independent and nonpartisan.²⁹

2. Judicial review of Justice Department preclearance approvals.

Because even a reinforced Justice Department decisionmaking process cannot ensure nonpolitical outcomes, it is appropriate to reconsider whether private citizens should be able to contest the Department's preclearance approvals in court. Judicial review would allow a politically motivated approval to be revisited, and would deter the Department from engaging in politicized decisionmaking.

If judicial intervention is to be allowed, aggrieved citizens should be authorized to obtain a *de novo* review by the District of Columbia District Court of the disputed voting change rather than an APA review of the Justice Department's approval decision. A *de novo* review would focus the inquiry on the real issue – whether or not the disputed voting change satisfies the Section 5 nondiscrimination test – rather than on the essentially irrelevant question of whether the Justice Department acted correctly or not. The APA model, moreover, is a bad fit for Section 5. It does not provide a practical basis for identifying politically-driven decisions, and the remedy would be to return the preclearance question back to the Justice Department. In addition, the administrative deference concerns that largely animate the APA are of limited applicability given the

²⁹ An additional check on any tendency to engage in partisan political decisionmaking might be to require that at least certain categories of internal Justice Department analyses be made public. Currently, these analyses are considered confidential because of the concern that this public disclosure would inhibit the free flow of information between the career and political staffs. Although this essay does not recommend any change in this regard, Congress still may wish to revisit the transparency question in reviewing the Department's decisionmaking procedures.

Justice Department’s unique role as a half-way stop on the road to litigation, and not as a traditional, final administrative decisionmaker.

The *de novo* consideration would be initiated by aggrieved citizens filing a “reverse” declaratory judgment action which, in substance, would replicate a preclearance lawsuit filed by a covered jurisdiction. The nondiscrimination standard would be the same (i.e., the standard specified by Section 5), the covered jurisdiction would retain the risk of nonpersuasion (although it would be the defendant and not the plaintiff), the decisionmaker would be the same (the District Court for the District of Columbia), the parties would continue to be precluded from litigating non-Section 5 claims as part of the declaratory judgment action, and, as provided by current law, the private plaintiffs would be entitled to obtain attorney’s fees if they qualify as the prevailing party in the lawsuit. The Attorney General would participate as a defendant (but could, pursuant to the Federal Rules of Civil Procedure, request to be realigned as a plaintiff if, during the pendency of the suit, the Department concluded that preclearance should be denied).³⁰

If Congress were to authorize reverse declaratory judgment actions, it seems likely that only a relatively small number would be filed. The overwhelming majority of covered voting changes are not controversial, and among those that present a colorable discrimination issue, lawsuits would be filed only from among the small percentage of changes that present such an issue and are precleared by the Justice Department.

Nonetheless, because the new procedure would create an additional structural hurdle to covered jurisdictions obtaining preclearance, there is reason to be concerned that it potentially could tip the Supreme Court toward ruling a Section 5 reauthorization unconstitutional. As noted, the Court has expressed substantial misgivings recently with the federalism cost exacted by Section 5, and there is significant concern that the Court may respond to a Section 5 extension by concluding that the statute’s benefits no longer justify its cost. Increasing Section 5’s severity is therefore a potentially risky endeavor.

It is essential, therefore, that any judicial review authorization be strictly limited. To that end, the following restrictions should be considered. First and most importantly, the affected jurisdiction should be free to implement its voting change immediately following preclearance by the Justice Department, and the prohibition on implementing unprecleared changes should not be extended by the filing of a reverse declaratory judgment action (or the pendency of the time period in which such an action could be filed). The Supreme Court’s decision in *Morris v. Gressette* makes it clear that the availability of expeditious preclearance rulings is central to the Section 5 scheme, and that degrading this feature would substantially increase the severity of the Section 5 remedy. Plaintiffs still could seek to preclude implementation by requesting a preliminary injunction pursuant to the Federal Rules of Civil Procedure.

³⁰ It might be argued that the ability of private plaintiffs to file a lawsuit in a local federal or state court following a Justice Department preclearance decision provides a sufficient remedy for a politically-driven Justice Department decision. However, that litigation would involve a different legal standard, a different allocation of the burden of proof, and a different court than what would occur in a “reverse” Section 5 declaratory judgment action.

Secondly, strong consideration should be given to limiting judicial review of Justice Department approvals to statewide redistrictings and other statewide changes. This would cover, to a very substantial extent, the types of changes that could be expected to possibly result in a politically-motivated Justice Department decision. Including local changes would provide only a small amount of additional security against politicized decisionmaking, and potentially would impose a significant financial burden on local jurisdictions that are required to litigate preclearance in D.C. and forego reliance on the relatively cheap administrative preclearance mechanism.

Lastly, if judicial review is to be authorized, aggrieved citizens should be required to file suit within a relatively short period of time after the Justice Department preclears the change.

A judicial review mechanism that is limited in this fashion could provide a further valuable check on the inherent danger of politicized decisionmaking by the Justice Department, while not significantly altering the balance of interests reflected in the current Section 5 scheme. Congress, therefore, should closely examine whether such a mechanism should be added to the Voting Rights Act.

VII. CONCLUSION

For the reasons set forth in this White Paper, Congress should respond to the problem of politically motivated decisionmaking by the Justice Department by enacting narrowly tailored changes to the Section 5 decisionmaking process as part of a Section 5 reauthorization.