EXHIBIT I

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Part XV

Department of Justice

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

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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 McDaniel 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.

\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.

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

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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 Sec. 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.

Bill Lann Lee,

Assistant Attorney General, Civil Rights Division.

[FR Doc. 01-1488 Filed 1-17-01; 8:45 am]

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OMB BULLETIN NO. 00-02 - Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement

March 9, 2000

OMB BULLETIN NO. 00-02

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement

1. Purpose: This Bulletin establishes guidance for agencies that collect or use aggregate data on race. It also establishes guidance for the allocation of multiple race responses for use in civil rights monitoring and enforcement.

2. Background: The Office of Management and Budget (OMB) announced revisions to the standards for classification of Federal data on race and ethnicity in a Federal Register Notice of October 30, 1997 (62 FR 58782-58790). Revisions to these standards followed a lengthy process that included considerable public involvement and active participation from more than 30 Federal agencies. The revised standards require, among other things, that agencies offer individuals the opportunity to select one or more races when reporting information on race in Federal data collections. The five minimum race categories are American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White.

   Census 2000 will be the first nationwide implementation of the revised standards. Data from Census 2000 will capture more accurately the increasing diversity of the Nation's population. Results from Census 2000 will display the full range of single and multiple race reporting by the American people.

   As the revised standards for collecting and presenting data are implemented, we must ensure that we maintain our ability to monitor compliance with laws that offer protections for those who historically have experienced discrimination. In addition, we must minimize reporting burden for institutions such as schools and businesses that report aggregate data on race to Federal agencies.

   In response to requests from agencies responsible for monitoring and enforcing civil rights laws, OMB has led an interagency group to develop guidance. This guidance addresses the collection of aggregate data when agencies request information from businesses, schools, and other entities. The guidance also addresses the allocation by agencies of responses, whether individual or aggregate, for use in civil rights monitoring and enforcement.

3. Guidance for aggregation and allocation of multiple race responses for use in civil rights monitoring and enforcement: The attached guidance is designed to be straightforward and easy to implement. It provides consistency across agencies responsible for enforcing civil rights laws, and does not preclude the use of more detailed data if an agency chooses to do so. The guidance does not involve methods that require either fractional or double counting of individuals, or arbitrary allocation of responses to one minority group versus another.

4. Implementation process: OMB will continue to work closely with the enforcement agencies and the civil rights community to assess these methods as they are implemented over the next few years and to consider the need for future modifications. The guidance provided in this Bulletin will be reflected in the Provisional Guidance on the Implementation of the 1997 Standards for Federal Data on Race and Ethnicity that will be available from OMB later this year.

5. Inquiries: Inquiries concerning the information in this Bulletin should be directed to Katherine K. Wallman, Chief Statistician (202-395-3093).

Jacob J. Lew
Director

Attachment

Guidance on Aggregation and Allocation of Multiple Race Responses
for Use in Civil Rights Monitoring and Enforcement

I. Aggregation Guidance: Census 2000 will provide 63 categories of data on the population by race; these data will be available by April 1, 2001, at the national, state, local, and census tract levels. Data collected by Federal enforcement agencies often are provided by businesses and institutions in aggregate form. To facilitate agency efforts to work with data on race, an aggregation method is presented below. This method keeps intact the five single race categories, and includes the four double race combinations most frequently reported in recent studies. The method also provides for the collection of information on any multiple race combinations that comprise more than one percent of the population of interest. Based on data from Census 2000, responsible agencies will determine which additional combinations meet the one percent threshold for the relevant jurisdictions. A balance category is provided to report those individual responses that are not included in (1) one of the five single race categories or four double race combinations or (2) other combinations that represent more than one percent of the population in a jurisdiction. The following example illustrates this guidance.

1	American Indian or Alaska Native
2	Asian
3	Black or African American
4	Native Hawaiian or Other Pacific Islander
5	White
6	American Indian or Alaska Native and White
7	Asian and White
8	Black or African American and White
9	American Indian or Alaska Native and Black or African American
10	> 1 percent: Fill in if applicable[(1)]_____
11	> 1 percent: Fill in if applicable_____
12	Balance of individuals reporting more than one race
13	Total

II. Allocation Guidance: Federal agencies will use the following rules to allocate multiple race responses for use in civil rights monitoring and enforcement.

- Responses in the five single race categories are not allocated.
- Responses that combine one minority race and white are allocated to the minority race.
- Responses that include two or more minority races are allocated as follows:
    - If the enforcement action is in response to a complaint, allocate to the race that the complainant alleges the discrimination was based on.
    - If the enforcement action requires assessing disparate impact or discriminatory patterns, analyze the patterns based on alternative allocations to each of the minority groups.

Allocation for enforcement purposes should not be confused with various allocation methods under consideration for "bridging" to past data collections as described in OMB's Provisional Guidance on the Implementation of the 1997 Standards for Federal Data on Race and Ethnicity. These bridging methods would take advantage of information being gleaned from Census 2000 and other experimental work being carried out by the statistical agencies. The principal purpose of allocation for bridging is to conduct trend or time series analysis.

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1. Based on Census 2000 data, agencies will determine the race combinations that meet the one percent threshold. For example, in Hawaii there may well be combinations of race groups that meet this threshold such as Native Hawaiian or Other Pacific Islander and Asian, or Native Hawaiian or Other Pacific Islander and White, or Native Hawaiian or Other Pacific Islander and Asian and White.

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Part III

Department of Justice

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice

DEPARTMENT OF JUSTICE

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice

AGENCY: Office of the Assistant Attorney General, Civil Rights Division, 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 legislation and judicial decisions, it is appropriate to issue guidance concerning the review of redistricting plans submitted to the Attorney General for review pursuant to Section 5 of the Voting Rights Act.

FOR FURTHER INFORMATION CONTACT: T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Division, United States Department of Justice, Washington, DC 20530, (202) 514–1416.

SUPPLEMENTARY INFORMATION: Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, requires jurisdictions identified in Section 4 of the Act 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 2011, these covered jurisdictions will begin to seek review under Section 5 of the Voting Rights Act of redistricting plans based on the 2010 Census. Based on past experience, the overwhelming majority of the covered jurisdictions will submit their redistricting plans to the Attorney General. This guidance is not legally binding; rather, it is intended only to provide assistance to jurisdictions covered by the preclearance requirements of Section 5.

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

Following release of the 2010 Census data, the Department of Justice expects to receive several thousand submissions of redistricting plans for review pursuant to Section 5 of the Voting Rights Act. The Civil Rights Division has received numerous requests for guidance similar to that it issued prior to the 2000 Census redistricting cycle concerning the procedures and standards that will be applied during review of these redistricting plans. 67 FR 5411 (January 18, 2001). In addition, in 2006, Congress reauthorized the Section 5 review requirement and refined its definition of some substantive standards for compliance with Section 5. In view of these developments, issuing revised guidance is appropriate.

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;
- Analysis of Plans (discriminatory purpose and retrogressive effect);
- Alternatives to Retrogressive Plans; and
- Use of 2010 Census Data.

The Scope of Section 5 Review

Under Section 5, a covered jurisdiction has the burden of establishing that a proposed redistricting plan "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in [Section 4(f)(2) of the Act]" (i.e., membership in a language minority group defined in the Act). 42 U.S.C 1973c(a). A plan has a discriminatory effect under the statute if, when compared to the benchmark plan, the submitting jurisdiction cannot establish that it does not result in a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States,* 425 U.S. 125, 141 (1976).

If the proposed redistricting plan is submitted to the Department of Justice for administrative review, and the Attorney General determines that the jurisdiction has failed to show the absence of any discriminatory purpose or retrogressive effect of denying or abridging the right to vote on account of race, color or membership in a language minority group defined in the Act, the Attorney General will interpose an objection. If, in the alternative, the jurisdiction seeks a declaratory judgment from the United States District Court for the District of Columbia, that court will utilize the identical standard to determine whether to grant the request; i.e., whether the jurisdiction has established that the plan is free from discriminatory purpose or retrogressive effect. Absent administrative preclearance from the Attorney General or a successful declaratory judgment action in the district court, the jurisdiction may not implement its proposed redistricting plan.

The Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person one-vote principle, on the grounds that it violates *Shaw* v. *Reno,* 509 U.S. 630 (1993), or on the grounds that it violates Section 2 of the Voting Rights Act. The same standard applies in a declaratory judgment action. Therefore, jurisdictions should not regard a determination of compliance with Section 5 as preventing subsequent legal challenges to that plan under other statutes by the Department of Justice or by private plaintiffs. 42 U.S.C. 1973c(a); 28 CFR 51.49.

The Section 5 "Benchmark"

As noted, under Section 5, a jurisdiction's proposed redistricting plan is compared to the "benchmark" plan to determine whether the use of the new plan would result in a retrogressive effect. The "benchmark" against which a new plan is compared is the last legally enforceable redistricting plan in force or effect. *Riley* v. *Kennedy,* 553 U.S. 406 (2008); 28 CFR 51.54(b)(1). Generally, the most recent plan to have received Section 5 preclearance or to 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. *McDaniel* 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).

A plan found to be unconstitutional by a Federal court under the principles of *Shaw* v. *Reno* and its progeny cannot serve as the Section 5 benchmark, *Abrams* v. *Johnson,* 521 U.S. 74 (1997), and in such circumstances, the benchmark for Section 5 purposes will be 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, the question of whether the

benchmark plan is constitutional will not be considered during the Department's Section 5 review.

Analysis of Plans

As noted above, there are two necessary components to the analysis of whether a proposed redistricting plan meets the Section 5 standard. The first is a determination that the jurisdiction has met its burden of establishing that the plan was adopted free of any discriminatory purpose. The second is a determination that the jurisdiction has met its burden of establishing that the proposed plan will not have a retrogressive effect.

Discriminatory Purpose

Section 5 precludes implementation of a change affecting voting that has the purpose of denying or abridging the right to vote on account of race or color, or membership in a language minority group defined in the Act. The 2006 amendments provide that the term "purpose" in Section 5 includes "any discriminatory purpose," and is not limited to a purpose to retrogress, as was the case after the Supreme Court's decision in *Reno* v. *Bossier Parish* ("*Bossier II*), 528 U.S. 320 (2000). The Department will examine the circumstances surrounding the submitting authority's adoption of a submitted voting change, such as a redistricting plan, to determine whether direct or circumstantial evidence exists of any discriminatory purpose of denying or abridging the right to vote on account of race or color, or membership in a language minority group defined in the Act.

Direct evidence detailing a discriminatory purpose may be gleaned from the public statements of members of the adopting body or others who may have played a significant role in the process. *Busbee* v. *Smith,* 549 F. Supp. 494, 508 (D.D.C. 1982), *aff'd,* 459 U.S. 1166 (1983). The Department will also evaluate whether there are instances where the invidious element may be missing, but the underlying motivation is nonetheless intentionally discriminatory. In the *Garza* case, Judge Kozinski provided the clearest example:

> Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

Garza and United States v. *County of Los Angeles,* 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part), *cert. denied,* 498 U.S. 1028 (1991).

In determining whether there is sufficient circumstantial evidence to conclude that the jurisdiction has not established the absence of the prohibited discriminatory purpose, the Attorney General will be guided by the Supreme Court's illustrative, but not exhaustive, list of those "subjects for proper inquiry in determining whether racially discriminatory intent existed," outlined in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 268 (1977). In that case, the Court, noting that such an undertaking presupposes a "sensitive inquiry," identified certain areas to be reviewed in making this determination: (1) The impact of the decision; (2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; (3) the sequence of events leading up to the decision; (4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and (5) contemporaneous statements and viewpoints held by the decision-makers. *Id.* at 266–68.

The single fact that a jurisdiction's proposed redistricting plan does not contain the maximum possible number of districts in which minority group members are a majority of the population or have the ability to elect candidates of choice to office, does not mandate that the Attorney General interpose an objection based on a failure to demonstrate the absence of a discriminatory purpose. Rather, the Attorney General will base the determination on a review of the plan in its entirety.

Retrogressive Effect

An analysis of whether the jurisdiction has met its burden of establishing that the proposed plan would not result in a discriminatory or "retrogressive" effect starts with a basic comparison of the benchmark and proposed plans at issue, using updated census data in each. Thus, the Voting Section staff loads the boundaries of the benchmark and proposed plans into the Civil Rights Division's geographic information system [GIS]. Population data are then calculated for each district in the benchmark and the proposed plans using the most recent decennial census data.

A proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters' "effective exercise of the electoral franchise" when compared to the benchmark plan. *Beer* v. *United States* at 141. In 2006, Congress clarified that this means the jurisdiction must establish that its proposed redistricting plan will not have the effect of "diminishing the ability of any citizens of the United States" because of race, color, or membership in a language minority group defined in the Act, "to elect their preferred candidate of choice." 42 U.S.C. 1973c(b) & (d). In analyzing redistricting plans, the Department will follow the congressional directive of ensuring that the ability of such citizens to elect their preferred candidates of choice is protected. That ability to elect either exists or it does not in any particular circumstance.

In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. As noted above, census data alone may not provide sufficient indicia of electoral behavior to make the requisite determination. Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact on the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change.

Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any Section 5 analysis, additional demographic and election data in the submission is often helpful in making the requisite Section 5 determination. 28 CFR 51.28(a). For example, census population data may not reflect significant differences in group voting behavior. 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.

The Section 5 Procedures contain the factors that the courts have considered in deciding whether or not a redistricting plan complies with Section 5. 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 alternative plans satisfying the jurisdiction's legitimate governmental interests exist, and whether they 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. 28 CFR 51.56–59.

Alternatives to Retrogressive Plans

There may be circumstances in which the jurisdiction asserts that, because of shifts in population or other significant changes since the last redistricting (*e.g.,* residential segregation and demographic distribution of the population within the jurisdiction, the physical geography of the jurisdiction, the jurisdiction's historical redistricting practices, political boundaries, such as cities or counties, and/or state redistricting requirements), retrogression is unavoidable. In those circumstances, the submitting jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn.

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 Attorney General will interpose an objection.

Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle. 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 significantly greater overall population deviations is not considered a reasonable alternative.

In assessing whether a less retrogressive 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 that require the jurisdiction to make the least possible change to existing district boundaries, to 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 or illustrative plans, the Department of Justice relies upon plans that make the least departure from a jurisdiction's stated redistricting criteria needed to prevent retrogression.

The Use of 2010 Census Data

The most current population data are used to measure both the benchmark plan and the proposed redistricting plan. 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,* 528 U.S. 320, 334 (2000) ("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 2010 Census, the Department of Justice will, consistent with past practice, evaluate redistricting submissions using the 2010 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 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 interposing an objection. However, unless other population data used can be shown to be more accurate and reliable than the Public Law 94–171 data, the Attorney General 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.

As in 2000, the 2010 Census Public Law 94–171 data will include counts of persons who have identified themselves as members of more than one racial category. This reflects the October 30, 1997, decision by the Office of Management and Budget [OMB] to incorporate multiple-race reporting into the Federal statistical system. 62 FR 58782–58790. Likewise, 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 census responses will be allocated by Federal executive agencies for use in civil rights monitoring and enforcement.

The Department will follow both aggregation methods defined in Part II of the Bulletin. The Department's initial review of a plan will be based upon allocating any multiple-item response that includes white and one of the five other race categories identified in the response. Thus, the total numbers 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 responses in which an individual selected a minority race and white race.

The Department will then move to the second step in its application of the census data to the plan by reviewing the other multiple-race category, which is comprised of all multiple-race responses consisting of more than one minority race. Where there are significant numbers of such responses, we will, as required by both the OMB guidance and judicial opinions, allocate these responses on an iterative basis to each of the component single-race categories for analysis. *Georgia* v. *Ashcroft,* 539 U.S. 461, 473, n.1 (2003).

As in the past, the Department will analyze Latino voters as a separate group for purposes of enforcement of the Voting Rights Act. If there are significant numbers of responses which

report Latino and one or more minority races (for example, Latinos who list their race as Black/African-American), those responses will be allocated alternatively to the Latino category and the minority race category.

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