Redistricting: The Section 5 Submission to Justice

Benjamin E. Griffith, Esquire
Griffith & Griffith, Cleveland, Mississippi
Bolivar County Board Attorney

Presented at the
2002 Midwinter Continuing Legal Education Seminar
of the
Mississippi Association of County Board Attorneys

January 8, 2002
Clarion Hotel & Conference Center, Jackson, Mississippi
REDISTRICTING:
The Section 5 Submission to Justice

Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended

28 C.F.R. Part 51

Subpart A: General Provisions

Subpart B: Procedures

Subpart C: Contents of Submissions
Subpart A -- General Provisions

Purpose
Definitions
Delegation of authority
Termination of coverage (bailout)
Political subunits
Political parties
Section 3 coverage
Computation of time
Requirement of action for declaratory judgment or submission to the Attorney General
Right to bring suit
Scope of requirement
Examples of changes
Recurrent practices
Enabling legislation and contingent or nonuniform requirements
Distinction between changes in procedure and changes in substance
Special elections
Court-ordered changes
Request for notification concerning voting litigation
51.9 Computation of time.

(a) The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting.

(b) Except as specified in SS 51.37, 51.39 and 51.42, the 60-day period shall commence upon receipt by the Department of Justice of a submission.

(c) The 60-day period shall mean 60 calendar days, with the day of receipt of the submission not counted. If the final day of the period should fall on a Saturday, Sunday, any day designated as a holiday by the President or Congress of the United States, or any other day that is not a day of regular business for the Department of Justice, the Attorney General shall have until the close of the next full business day in which to interpose an objection. The date of the Attorney General’s response shall be the date on which it is mailed to the submitting authority.

51.10 Requirement of action for declaratory judgment or submission to the Attorney General.

“Section 5 requires that, prior to enforcement of any change affecting voting, the jurisdiction that has enacted or seeks to administer the change must either: (a) Obtain a judicial determination from the U. S. District Court for the District of Columbia that denial or abridgement of the right to vote on account of race, color, or membership in a language minority group is not the purpose and will not be the effect of the change or (b) make to the Attorney General a proper submission of the change to which no objection is interposed. It is unlawful to enforce a change affecting voting without obtaining preclearance under Section 5. The obligation to obtain such preclearance is not relieved by unlawful enforcement. [52 FR 2648, Jan. 23, 1987]”

51.12 Scope of Preclearance requirement

“Any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement.”
51.13 Examples of changes.

Changes affecting voting include, but are not limited to, the following examples:

(a) Any change in qualifications or eligibility for voting.

(b) Any change concerning registration, balloting and the counting of votes and any change concerning publicity for or assistance in registration or voting.

(c) Any change with respect to the use of a language other than English in any aspect of the electoral process.

(d) Any change in the boundaries of voting precincts or in the location of polling places.

(e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, de-annexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections).

(f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).

(g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.

(h) Any change in the eligibility and qualification procedures for independent candidates.

(i) Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices).

(j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum

(k) Any change affecting the right or ability of persons to participate in political campaigns which is affected by a jurisdiction subject to the requirement of Section 5.
Subpart B -- Procedures for Submission to the Attorney General

Form of submissions
Time of submissions
Premature submissions
Party and jurisdiction responsible for making submissions
Address for submissions
Withdrawal of submissions

Subpart C -- Contents of Submissions

General
Required contents
Supplemental contents
51.26 General

A.) Source of any information contained in a submission should be identified.

B.) Where an estimate is provided in lieu of more reliable statistics, the submission should identify the name, position, and qualifications of the person responsible for the estimate and should briefly describe the basis for the estimate.

C.) Submissions should be no longer than is necessary for the presentation of the appropriate information and materials.

D.) Attorney General will not accept for review any submission that fails to describe the subject change in sufficient particularity to satisfy the minimum requirements of § 51.27 (c).

E.) Submitting authority that desires the Attorney General to consider any information by reference by stating the date and subject matter of the earlier submission and identifying the relevant information.

F.) Where information requested by this subpart is relevant by not known or available, or is not applicable, the submission should so state.
51.27 Required Contents

A.) Copy of any ordinance, enactment, or regulation embodying a change affecting voting.

B.) A copy of any ordinance, enactment, order, or regulation embodying the voting practice that is proposed to be repealed, amended, or otherwise changed.

C.) If the change affecting voting either is not readily apparent on the fact of the documents, provided under paragraphs (a) and (b) of this section or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting.

D.) The name, title, address, and telephone number of the person making the submission.

E.) The name of the submitting authority and the name of the jurisdiction responsible for the change, if different.

F.) If the submission is not from a State or county, the name of the county and State in which the submitting authority is located.

G.) Identification of the person or body responsible for making the change and the mode of decision (e.g., act of State legislature, ordinance of city council, administrative decision by registrar).

H.) Statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change.

I.) Date of adoption of the change affecting voting.

J.) Date on which the change is to take effect.

K.) Statement that the change has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

L.) Where the change will affect less than the entire jurisdiction, an explanation of the scope of the change.

M.) Statement of the reasons for the change.

N.) Statement of the anticipated effect of the change on members of racial or language minority groups.
O.) Statement identifying any past or pending litigation concerning the change or related voting practices.

P.) Statement that the prior practice has been precleared (with the date) or is not subject to the preclearance requirement and a statement that the procedure for the adoption of the change has been precleared (with the date) or is not subject to the preclearance requirement, or an explanation of why such statements cannot be made.

Q.) Redistricting and annexations: the items listed under §51.28(a)(1) and (b)(1); for annexations only: the items listed under §51.28(c)(3).

R.) Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change. Such information may include items listed in §51.28 and is most likely to be needed with respect to redistrictings, annexations, and other complex changes. In the interest of time such information should be furnished with the initial submission relating to voting changes of this type. When such information is required, but not provided, the Attorney General shall notify the submitting authority in the manner provided in §51.37.
51.28 Supplemental Contents

A.) Demographic information.

1.) Total and voting age population of the affected area before and after the change, by race and language group. If such information is contained in publications of the U. S. Bureau of the Census, reference to the appropriate volume and table is sufficient.

2.) Number of registered voters for affected area by voting precinct before and after the change, by race and language group.

3.) Any estimates of population, by race and language group, made in connection with the adoption of the change.

4.) Demographic data provided on magnetic media shall be based upon the Bureau of the Census Public Law 94-171 file unique block identity code of state, county, tract, and block.

5.) Demographic data on magnetic media that are provided in conjunction with a redistricting shall be contained in a table of equivalencies giving the census block to district assignments in the following format:

 I.) Each census block record (including those with zero population) will be followed by one or more additional fields indicating the district assignment for the census block in one or more plans.

 II.) All district assignments in the plan fields shall be right justified and blanks filled if the assignment is less than four characters.

 III.) The file structure shall be as follows:

<table>
<thead>
<tr>
<th>Field</th>
<th>PL94-171 ref. name</th>
<th>Length</th>
<th>Data Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>State</td>
<td>STATEFP</td>
<td>2</td>
<td>Numeric</td>
</tr>
<tr>
<td>county</td>
<td>CNTY</td>
<td>3</td>
<td>Numeric</td>
</tr>
<tr>
<td>tract</td>
<td>TRACT/BNA</td>
<td>6</td>
<td>Alpha/Numeric</td>
</tr>
<tr>
<td>block</td>
<td>BLCK</td>
<td>4</td>
<td>Alpha/Numeric</td>
</tr>
<tr>
<td>plan 1 District</td>
<td>User supplied</td>
<td>4</td>
<td>Alpha/Numeric</td>
</tr>
<tr>
<td>plan 2 District</td>
<td>User supplied</td>
<td>4</td>
<td>Alpha/Numeric</td>
</tr>
<tr>
<td>plan 3 District</td>
<td>etc</td>
<td>....</td>
<td></td>
</tr>
<tr>
<td>plan 4 District</td>
<td>User supplied</td>
<td>4</td>
<td>Alpha/Numeric</td>
</tr>
</tbody>
</table>
IV.) State and county shall be identified using the Federal Information Processing Standards (FIPS-55) code.

V.) Census tracts shall be left justified, and census blocks shall be left justified and blanks filled if less than four characters.

VI.) In addition to the information identified in §51.20(c) through (e), the documentation file accompanying the block level equivalency file shall contain the following information:

a.) The file structure.

b.) The total number of plans.

c.) For each plan field, an identification of the plan (e.g., state senate, congressional, county board, city council, school board) and its status or nature (e.g., plan currently in effect, adopted plan, alternative plan and sponsors).

d.) The number of districts in each plan field.

e.) Whether the plan field contains a complete or partial plan.

f.) Any additional information the jurisdiction deems relevant such as bill number, date of adoption, etc., and a listing of any modifications the submitting authority has made that alter the structure of the TIGER/line geographic file.

B.) Maps. Where any change is made that revises the constituency that elects any office or affects the boundaries of any geographic unit or unites defined or employed for voting purposes (e.g., redistricting, annexation, change from district to at-large elections) or that changes voting precinct boundaries, polling place locations, or voter registration sites, maps in duplicate or the area to be affected, containing the following information:

1.) The prior and new boundaries of the voting unit or units.

2.) The prior and new boundaries of voting precincts.

3.) The location of racial and language minority groups.

4.) Any natural boundaries or geographical features that influenced the selection of boundaries of the prior or new units.

5.) The location of prior and new polling places.

6.) The location of prior and new voter registration sites.
C.) Election returns. Where a change may affect the electoral influence of a racial or language minority group, returns of primary and general elections conducted by or in the jurisdiction, containing the following information:

1.) The name of each candidate.

2.) The race or language group of each candidate.

3.) The position sought by each candidate.

4.) The number of votes received by each candidate, by voting precinct.

5.) The outcome of each contest.

6.) The number of registered voters, by race and language group, for each voting precinct for which election returns are furnished. Information with respect to elections held during the last ten years will normally be sufficient.

7.) Election related data containing any of the information described above that are provided on magnetic media shall conform to the requirements of §51.20(b) through (e). Election related data that cannot be accurately presented in terms of census blocks may be identified by county and by precinct.

D.) Publicity and participation. For submissions involving controversial or potentially controversial changes, evidence of public notice, of the opportunity for the public to be heard and of the opportunity for interested parties to participate in the decision to adopt the proposed change and an account of the extent to which such participation, especially by minority group members, in fact took place. Examples of materials demonstrating public notice or participation include:

1.) Copies of newspaper articles discussing the proposed change.

2.) Copies of public notices that describe the proposed change and invite public comment or participation in hearings and statements regarding where such public notices appeared (e.g., newspaper, radio, television, posted in public buildings, sent to identified individuals or groups).

3.) Minutes or accounts of public hearings concerning the proposed change.

4.) Statements, speeches, and other public communications concerning the proposed change.

5.) Copies of comments from the general public.

6.) Excerpts from legislative journals containing discussion of submitted enactment, or other materials revealing its legislative purpose.

G.) Availability of the submission.
1.) Copies of public notices that announce the submission to the Attorney General, inform the public that a complete duplicate copy of the submission is available for public inspection (e.g., at the county courthouse) and invite comments for the consideration of the Attorney General and statements regarding where such public notices appeared.

2.) Information demonstrating that the submitting authority, where a submission contains magnetic media, made the magnetic media available to be copied or, if so requested, made a hard copy of the data contained on the magnetic media available to be copied.

E.) Minority group contacts. For submission from jurisdictions having a significant minority population, the names, address, telephone numbers and organizational affiliation (if any) of racial or language minority group members residing in the jurisdiction who can be expected to be familiar with the proposed change or who have been active in the political process.
Section 5's “Purpose” and “Effect” Prongs

Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, authorizes preclearance of a proposed voting change by a covered jurisdiction if the change “does not have the purpose and will not have the same effect of denying or abridging the right to vote on account of race or color.”

Two Routes for Preclearance

A covered jurisdiction must obtain either judicial or administrative preclearance before implementing a new “voting qualification or prerequisite for voting, or standard, practice or procedure with respect to voting different from that in force and effect on Nov. 1, 1964.”

Consequences of Failure to Obtain Preclearance

If a covered jurisdiction fails to seek preclearance for a proposed voting law change, the Attorney General or a private party injured by that change can bring an action for a declaratory judgment and injunctive relief by alleging that the change is within the scope of Section 5 and that it requires preclearance.

These are referred to as Section 5 Enforcement Actions.

Section 5 Enforcement Actions

Heard by three-judge district court panels whose role is limited to consideration of three matters:

1. Whether a covered voting change has occurred;
2. If so, whether preclearance has been obtained; and
3. If not, what judicial relief is appropriate.
Beer: Non-retrogression Rule

For purposes of Section 5, the phrase “denying or abridging the right to vote on account of race or color” limits the term it qualifies, “effect,” and a Section 5 submission of a new redistricting plan must be approved if it has no retrogressive effect and if the new plan itself does not otherwise discriminate “on the basis of race or color as to violate the Constitution.”


Bossier Parish I

Section 5 does not block implementation of voting changes merely because they violate Section 2 of the VRA.

Section 2 is not incorporated into Section 5, but evidence that a redistricting plan has a dilutive impact forbidden by Section 2, even though it has a non-retrogressive effect, is not irrelevant to whether it has a retrogressive purpose forbidden by Section 5.


Bossier Parish II

Section 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but non-retrogressive purpose.

Section 5's purpose prong proscribes retrogressive intent only, and not an intent to dilute or an invidious intent more generally.

Presley v. Etowah County

Changes covered under Section 5 must have a direct relation to voting. Routine matters of governance in the form of changes in the decisionmaking authority of elected officials, creation or elimination of appointive positions and alteration of the powers of such positions, inevitably alter the relative balance of authority in some way, but such routine parts of governmental administration are not changes with respect to voting, do not have a direct relation to voting and are not covered by Section 5.


Section 5 Inapplicable

Where a covered jurisdiction does not exercise some discretion or policy choice, as where a covered jurisdiction is required by a non-covered entity to implement specific voting changes, Conner v. Johnson, 402 U.S. 690, 691 (1971), or where a state has no choice but to adopt the National Voter Registration Act’s registration system, Young v. Fordice, 520 U.S. 273, 290 (1997), Section 5's preclearance requirement does not apply. [But cf. Monroe and Lopez].

Judicially Imposed Plans vs. Plans Enacted by Legislative Body

Section 5 applies to a redistricting plan drawn by a court but incorporating or reflecting the legislative choices of the legislative body.

McDaniel v. Sanchez

“[W]henever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people - no matter what constraints have limited the choices available to them - the preclearance requirement of the Voting Rights Act is inapplicable.”

The essential characteristic of a legislative plan is the exercise of legislative judgment.

**Wise v. Lipscomb**

“[A] legislative plan adopted in response to a federal court’s invalidation of a prior plan would not be considered ‘effective as law’ until it has been submitted and received [pre]clearance under Section 5.”


**Standard for Evaluation**

A redistricting plan enacted by a legislative body is not scrutinized by the exacting standards used in evaluating a judicially imposed plan.

_Tallahassee Branch of NAACP v. Leon County_, 827 F. 2d 1436 (11th Cir. 1987).

**Helpful Contact and Information**

Website of the Civil Rights Division, Voting Section:
http://222.usdog.gov/crt/voting/sec_5/

Address for receipt of U.S. Postal Service mail and deliveries by FedEx and other overnight express services:*  

P. O. Address:**  
Chief, Voting Section  
Civil Rights Division  
Department of Justice  
P. O. Box 66128  
Washington, D.C. 20035-6128

Street Address:  
Chief, Voting Section  
Civil Rights Division  
Department of Justice  
1800 G Street, N.W., Room 7524  
Washington, D.C. 20006

*Phone No. 800-253-3931 (call before sending via overnight express service)  
**At the moment the Justice Department is not receiving regular mail deliveries and the ban on FedEx and other overnight services has just been lifted. All correspondence should be sent by FedEx or other overnight service until further notice.