

THE POLITICS OF PRECLEARANCE

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This Essay examines recent charges of political motivation against the Department of Justice and its enforcement of the Voting Rights Act. These accusations appear well-deserved, on the strength of the Department's recent handling of the Texas redistricting submission and Georgia's voting identification requirement. This Essay reaches two conclusions. First, it is clear that Congress wished to secure its understanding of the Act into the future through its preclearance requirement. Many critics of the voting rights bill worried about the degree of discretion that the legislation accorded the Attorney General. Supporters worried as well, for this degree of discretion might lead to under-enforcement of the Act. Yet Congress chose not to act on those concerns while placing the Department of Justice at the center of its voting rights revolution. By and large, this is the way that the Supreme Court has understood the Department's role. Second, the currently available data do not support the charge that politics has played a central role in the Department's enforcement of its preclearance duties. This conclusion holds true for preclearance decisions up until the Clinton years. The data are ambiguous with respect to the Justice Department of President George W. Bush.

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As you know, this Committee is deeply concerned with what appears to be a trend within the Department of Justice (“DOJ”) away from vigorous prosecution of civil rights cases.¹

The opinions and expertise of the career lawyers are valued and respected and continue to be an integral part of the internal deliberation process upon which the department heavily relies when making litigation decisions.²

INTRODUCTION

This Essay examines the alleged politicization of the Voting Rights Act of 1965, and particularly its preclearance provision, at the hands of the Justice Department.³ This issue has gained much currency in recent years, most notably in Texas. When Texas Governor Rick Perry called the legislature into special session in order to draw a new districting plan, Senate Democrats fled to a neighboring state in order to avoid a quorum. Republicans contended that the new plan was a necessary fix for a prior Democratic gerrymander, yet the facts left little doubt that Republicans were extracting as much political gain from their proposal as census numbers would allow. Lines were stretched, communities split, incumbents paired or moved away from their districts. In a constitutional world where *Vieth v. Jubelirer* is controlling law,⁴ there are very few limits on the role of politics in electoral line-drawing.

As a covered jurisdiction under Section 4 of the Voting Rights Act, however, Texas political elites were not yet in the clear. Under federal law, the state must seek preclearance for its redistricting plan from the Department of Justice (“the DOJ”). That is, within 60 days of submission, Texas had the burden of showing, to the satisfaction of the DOJ, that its plan had neither the purpose nor the effect of denying the right to vote on account of race or color. In light of the low—some might say non-existent—rate of denials, this final hurdle could not have seemed all that imposing.

And yet, in a 73-page memo, the staff in the voting section of the DOJ concluded that the “[t]he State of Texas has not met its burden in showing that the proposed congressional redistricting plan does not have

1. Letter from Arlen Specter, Chairman of the United States Senate Committee on the Judiciary, to Alberto Gonzales, United States Attorney General (Nov. 22, 2005) (on file with projectvote.org).

2. Dan Eggen, *Staff Opinions Banned in Voting Rights Cases*, WASH. POST, Dec. 10, 2005, at A03 (e-mail from Eric Holland, DOJ spokesman, to the *Washington Post*).

3. See Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 How. L.J. 785 (2006).

4. 541 U.S. 267 (2004).

a discriminatory effect.”⁵ These lawyers and analysts thus recommended that the Department interpose an objection under Section 5 of the Act. Given this recommendation, the matter should have ended until Texas offered a reworked plan.

In a surprising turn of events, however, senior officials at the DOJ overruled the staffers and approved the plan.⁶ This was very unusual for, according to Mark Posner, a former DOJ attorney, “[i]n this kind of situation, where everybody agrees at least on the staff level . . . that is a very, very strong case.”⁷ And further, “[t]he fact that everybody agreed that there were reductions in minority voting strength, and that they were significant, raises a lot of questions as to why” the plan was approved.⁸ Unlike most others, this approval by DOJ made news, as the staff memo was leaked to the press.⁹

The Texas vignette has not proven to be an isolated incident. In 2005, for example, the state of Georgia passed a voter-identification law intended to curb voter fraud.¹⁰ DOJ staffers reviewed the plan and similarly concluded that the state of Georgia failed to show that the law would not discriminate against voters of color.¹¹ Yet a day after receiving the memo, John Tanner, chief of the voting rights section, wrote a letter to the state of Georgia informing its officials that DOJ would not interpose an objection to their plan.¹²

These examples raise important questions about the Voting Rights Act and its enforcement by the DOJ. As a consequence of these types of events, commentators have focused on whether the DOJ’s enforcement of the Act is motivated in part by crass partisan aims. This is an important question and in the first Part we provide a tentative answer. Using our database of all objection letters from the DOJ to covered jurisdictions,¹³ we examine whether patterns of objections exist from each administration. The evidence is decidedly mixed and does not allow us to conclude

5. Section 5 Recommendation Memorandum from the Department of Justice (Dec. 12, 2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf>.

6. Dan Eggen, *Justice Staff Saw Texas Districting as Illegal*, WASH. POST, Dec 2, 2005, at A01.

7. *Id.* (quoting Mark Posner, longtime lawyer at the Department of Justice).

8. *Id.*

9. *Id.*

10. See David H Harris, Jr., *Georgia Photo ID Requirement: Proof Positive of the Need to Extend Section 5*, 28 N.C. CENT. L.J. 172, 172 (2006).

11. See Dan Eggen, *Criticism of Voting Law was Overruled*, WASH. POST, Nov. 17 2005, at A01.

12. *Id.*

13. See Luis Fuentes-Rohwer & Guy Uriel E. Charles, *PreClearance, Discrimination, and the Department of Justice: The Case of South Carolina*, 57 S. C. L. REV. 827 (2006); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Rethinking Section 5*, in *THE FUTURE OF THE VOTING RIGHTS ACT 38* (Epstein et al. eds., 2006).

that partisan politics—not law—played a predominant role in the preclearance process. This is true up until the mid-1990's, a time when enforcement of the preclearance requirement took a decidedly drastic drop. We attribute this drop to the Court's *Miller v. Johnson* decision, a time when the Court made amply clear both where the bounds of administrative enforcement were and how far beyond them DOJ had overstepped.¹⁴ The data for the Bush Administration continues this steep downward trend and leaves open the question of partisan enforcement by the DOJ post-2000.

In Part II we shift the inquiry. Assuming that the critics are right, and that partisan politics have played a central role in the preclearance process, we ask whether there should be cause for concern. In Part II, we contend that Congress was fully cognizant in 1965 of the costs and benefits of vesting on the Attorney General discretionary preclearance powers. Politics have been inherent in this process since its inception. Notably, the Supreme Court has given this process its considerable blessing. As we discuss in our Conclusion, the real insight of this debate lies in the lessons it imparts for communities of color. We discuss two lessons in particular. First, it is clear to us that the voting rights of communities of color under Section 5 of the Act are subject to the ebbs and flows of politics. This is part of the bargain. Yet, second, we are not altogether sure that this is a bad thing. After all, what is best for communities of color remains a matter of considerable debate and disagreement. And so, while aggressive enforcement of the statute remains a normatively attractive position in the abstract, we are not convinced that DOJ always knows what is best for communities of color.

I. THE ACT AS APPLIED: A VIEW FROM THE COVERED JURISDICTIONS

The objection letters from the DOJ to covered jurisdictions tell a poignant and powerful story about the role of the federal government under the Act. Note, first, a point we have made in our prior work: on the strength of raw data alone, it is clear that something is amiss.¹⁵ As Table 1 shows, the number of objections by decade shows a steady trajectory up until the end of the 1990's.¹⁶ Yet, in the first five years of the Bush Administration, the numbers dropped calamitously.

14. 515 U.S. 900 (1995).

15. Unless otherwise noted, all data in this Part is derived from our earlier work. See Guy Uriel E. Charles & Luis Fuentes-Rohwer, *On the Renewal of Section 5 of the VRA: Why Congress Failed Voters of Color*, in *MAKING EVERY VOTE COUNT: FEDERAL ELECTION LEGISLATION IN THE STATES* 44 (2006). See also Fuentes-Rohwer & Charles, *supra* note 13.

16. See *id.*

TABLE I
OBJECTION BY DECADE, 1965–2005

Decade	Objections
1965–69	10
1970–79	334
1980–89	360
1990–99	342
2000–05	36
Total	1,068

In fairness, this number—thirty-six objections—is only for half a decade. Yet at best, doubling the number would amount to only seventy-two objections for the entire decade, still far below previous decades.

But this is raw data, after all, and so the relevant comparison is the number of objections in relation to the number of submissions. After all, if the number of submissions is dropping sharply, the number of objections might be lower yet still commensurate to the percentages from previous years. We undertake this comparison, as displayed on Table 2. The results are not much better.

TABLE 2
OBJECTIONS AND SUBMISSIONS BY DECADE, 1970–2005

Decade	Submissions	Objections	Percentage
1970–79	221	389 ¹⁷	1.8%
1980–89	33,435	363	.01
1990–99	152,931	356	.002
2000–05	44,161	36	.0008

Note that in the early years, up until the end of the 1970’s, DOJ objected to 1.8% of all submissions. This is the highest percentage from all decades, as it should be. Congress expected that the special provisions of the Act—such as the preclearance requirement—would be in place for five years, after which the discriminatory practices would diminish considerably and the need for Section 5 would also lessen. The data supports this expectation. The decade of the 1980’s saw the number drop to 0.01%, due in great measure to the steep jump in submissions. A similar drop and justification applies to the 1990’s.

However, the pattern is very different for the Bush Administration. To be sure, submissions dropped sharply for the years after 2000, and we

17. This number represents the total number of objection letters, including objection letters to resubmissions and requests for new information.

can only conjecture as to the reasons for this drop. The drop in objections from the DOJ, however, is incommensurate to this drop in submissions as compared to previous years. Without more, it demands an explanation.

Before venturing to offer an explanation, we take one final look at the data. In Table 3, we document the number of objection letters from DOJ to covered jurisdictions as catalogued by administration. If the DOJ enforced the Act in a partisan way, we ought to see the effect of partisan enforcement in the number of objection letters interposed by the DOJ.¹⁸ More specifically, we would expect Democratic administrations to enforce the Act with great vigor, and Republican administrations much less so. Our point need not take a view of administrative enforcement comparable to the approach taken by the Bush administration in recent years. Rather, the point is that those who consistently criticize the Act or disagree with its goals can be expected to be far less solicitous in its enforcement. This posture was particularly true in the early years of the Act, and may be said to have continued into the Reagan years, a staunch supporter of states rights' and principles of federalism, much less eager in fighting racial discrimination.

TABLE 3
OBJECTION LETTERS BY ADMINISTRATION, 1965-1981

	Johnson	Nixon	Ford	Carter
	8/65-1/69	1/69-8/74	8/74-1/77	1/77-1/81
Alabama	0	11	17	7
Arizona	0	3	4	5
California	0	0	1	2
Georgia	3	30	22	27
Louisiana	0	37	7	6
Mississippi	1	25	15	15
New York	0	1	4	1
North Carolina	0	5	4	13
South Carolina	0	13	20	19
South Dakota	0	0	0	3
Texas	0	0	32	58
Virginia	0	8	3	2
Total:	4	133	129	158

The numbers tell a surprising story. In the early years of the Act, the DOJ did little by way of enforcement, unsure about the kinds of changes subject to review. This was one of the reasons offered by supporters of the Act in 1969 for extending the preclearance requirement for five years.

18. For the purposes of this Essay, we assume, all thing being equal, that a paucity of objection letters reflect a lack of support for the Act.

The numbers for the Nixon administration, however, are nothing short of staggering. Recall in this vein President Nixon’s “Southern Strategy” and his states’ rights pledge during the 1968 campaign.¹⁹ Consider also the criticism from his Attorney General, John Mitchell, during the 1969 debates over extension of the Act. On this evidence, we would expect lackadaisical support for enforcement of the preclearance requirement at best. Instead, the number of objections increased manifold and, more tellingly, they compare favorably with the numbers from the Ford and Carter administrations. Note also how, in its shortened term of office, the Ford administration objected to 129 submissions, an even higher ratio than the Carter administration.

In this vein, and as Table 4 suggests, the Reagan administration enforced the preclearance requirement with as much vigor as previous administrations. Over the course of two terms, in fact, the number of objections—306—surpassed every other administration’s. And over the course of one term, President G. H. Bush’s objections numbers were even comparatively higher. The numbers for the Clinton administration came down sharply, once his length of office is factored in, yet still remained quite respectable. In fact, as we have argued elsewhere, the real story for the 1990’s lies in explaining what happened mid-decade, when a steep decline in objections becomes quite noticeable. We offered the Court’s *Miller v. Johnson*²⁰ decision as an intervening variable that would explain this drastic drop in objections.²¹

TABLE 4
OBJECTION LETTERS BY ADMINISTRATION, 1981–2005

	Reagan	Bush	Clinton	Bush
	1/81–1/89	1/89–1/93	1/93–1/01	1/01–
Alabama	38	18	9	0
Alaska	0	0	2	0
Arizona	7	5	3	2
California	0	1	2	1
Florida	3	1	1	1
Georgia	42	22	25	4
Louisiana	18	35	37	4
Mississippi	73	46	34	1
New York	3	2	5	0
North Carolina	33	8	6	1
South Carolina	43	16	21	9

19. See STEPHEN E. AMBROSE, *NIXON: TRIUMPH OF A POLITICIAN, 1962–1972*, at 89–90 (1989).

20. 515 U.S. 900 (1995).

21. See Charles & Fuentes-Rohwer, *supra* note 13, at 842.

	Reagan	Bush	Clinton	Bush
	1/81-1/89	1/89-1/93	1/93-1/01	1/01-
South Dakota	0	0	1	0
Texas	37	44	35	4
Virginia	9	4	3	5
Total:	306	202	184	32

This data makes clear, once again, that the Bush administration is the outlier administration in the story of Section 5 enforcement. And so the real question is, how to explain it?

One explanation is *Miller* and the Supreme Court's chastening of aggressive preclearance enforcement. On this argument, objections by DOJ would show no discernible change until 1995, the year *Miller* was decided. Beginning in 1995, the numbers would show a significant drop through the rest of the decade, and into the next. Consider in this vein Table 5, which breaks down the objections for the decade of the 1990's by year.

TABLE 5
OBJECTIONS BY YEAR, 1990-2000

Year	Objections	Percent Objections	Percent Change
1990	31	9	—
1991	72	20	+132
1992	76	21	+5
1993	71	20	-7
1994	51	14	-28
1995	25	7	-51
1996	8	3	-68
1997	10	3	+25
1998	7	2	-30
1999	5	1	-29
2000	4	1	-20

These numbers tell a powerful story. From 1990 to 1994, the DOJ interposed 301 objections, which accounted for 84% of the objections for the entire decade. Yet in 1995, DOJ interposed half as many objections as the year before, and only thirty-four more objections the rest of the decade. Something is clearly amiss here. Further, notice the sharp decline in the percentage of objections from 1994 to 1996. The bottom appears to have fallen out of DOJ's perception of its role during this period, as the percent change of objections dropped 51 and 68 percent respectively.

A second prong of this argument as applied to the Bush administration looks to the *Bossier Parish II* case, decided in 2000.²² In this case, the Court concluded that the preclearance inquiry was essentially a retrogression inquiry, irrespective of any finding of discriminatory intent.²³ In other words, DOJ need only inquire whether the change under review makes matters worse for voters of color than before the change. This case is commonly noted as the reason for the dearth of objections by DOJ since the year 2000.²⁴

The argument that judicial doctrine affected the actions of DOJ and its perception about the demands of the Voting Rights Act presupposes two things: first, that the doctrine is binding on DOJ at all; and second, that the Bush DOJ would in fact be chastened by anything the Court, or any other institution, would tell it to do or not to do. On the first point, it is clear to us that the doctrine is broad enough, and accords DOJ enough discretion, as to foreclose few avenues of enforcement.²⁵ We do not take a strong view on the second point, yet cautiously observe that the Bush administration has demonstrated a penchant for asserting a strong view of its powers across the board. It would be surprising to see it take a back seat in this area, or any other, to the Court.

A second explanation points to a lack of eagerness to enforce the statute. This is the “ideological” explanation offered by many. The data show that an explanation is necessary to understand the paucity of objections. While it hard to conclude that the Act was administered in a partisan way from 1970 through 1995, that explanation remains a possibility, especially after 2000.

22. *Reno v. Bossier Parish Sch. B.*, 528 U.S. 320 (2000).

23. *Id.* at 325.

24. See Peyton McCrary, Christopher Seaman, and Richard Valelly, *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275 (2006); see also Peyton McCreary, *How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965–2005*, 57 S.C. L. REV. 785, 823 (2006) (“In the guise of making the definition of purpose under Section 5 congruent with the definition of retrogressive effect, the decision effectively minimized use of Section 5 as a weapon for protecting minority voters from discrimination.”); Meghann E. Donahue, *“The Reports of My Death are Greatly Exaggerated”: Administering Section 5 of the Voting Rights Act After Georgia v. Ashcroft*, 104 COLUM. L. REV. 1651, 1661 (2004) (“The formerly robust purpose inquiry—routinely applied by the Department, almost certainly intended by Congress, and universally interpreted as applying to unconstitutional discrimination prior to *Bossier Parish II*—has now been limited to the unlikely instance of the ‘incompetent retrogressor’: a jurisdiction that has intended—but failed—to effect a retrogression in minorities’ ‘effective exercise of the electoral franchise.’”).

25. See Fuentes-Rohwer and Charles, *supra* note 13, at 851.

II. STATUTORY INTERPRETATION IN EXECUTIVE HANDS: THE POLITICS OF THE ACT

For the remainder of this Essay, however, we assume partisan enforcement of the Act. The question for us is whether there is anything wrong with a fair amount of partisanship in section 5 enforcement. As this Part argues, to conclude that there is nothing wrong with partisan enforcement of the Act is not a radical conclusion in light of the statutory discretion at the heart of the section 5 power. Section II.A examines the normative bureaucratic tension in enforcing the Voting Rights Act between political appointees—such as the Attorney General—and the career staff at the Department of Justice. Section II.B contends that this tension was explicitly reflected during the debates over enactment and extension of the preclearance requirement. These debates underscore both the need for discretion in enforcing the statute and the level of trust placed at the hands of the Attorney General. Finally, Section II.C discusses the interpretive role played by the Attorney General in the doctrinal development of the Act. This Part concludes that the 89th Congress understood the danger of over- and under-enforcement inherent in the statutory scheme. Recent charges of ideological enforcement should not be surprising.

A. *Political Appointees and Career Staff: Tensions?*

The preclearance provision of the Voting Rights Act, Section 5, has an intrinsic yet misleading simplicity. The language of the statute could not be any more familiar to modern ears: the Attorney General must ensure that the submitted change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”²⁶ This language tracks constitutional doctrine and makes clear that Congress was simply moving the constitutional inquiry ahead, prior to implementation, and placing the DOJ—or the D.C. District Court—in charge of its enforcement.

Enforcement of the law began in earnest after the Court’s *Allen* decision in 1969. Once DOJ began to take its duties under the law seriously, lines of responsibility were quickly established.²⁷ The Attorney General soon delegated her preclearance responsibility under the statute to the Assistant Attorney General for Civil Rights—a presidential appointee—who in turn relied heavily on the advice of the career staff in the Voting Section. This staff would investigate submissions and prepare a written

26. Voting Rights Act of 1965 § 5; 42 U.S.C. § 1973b(b) (2000).

27. For the description that follows, we rely heavily on Mark A. Posner, *The Politicization of Justice Department Decisionmaking Under Section 5 of the Voting Rights Act: Is it a Problem and What Should Congress Do?*, Working Paper, American Constitution Society for Law and Policy 7–9 (January 2006).

analysis, which would include an examination of the facts and an application of the law to these facts, as well as a recommendation to the Assistant Attorney General about how the Department should respond to the submission—whether it should approve the submission, object, or ask for more information.

Given this process, the question is normative in kind: what would we expect a bureaucracy to do when interpreting the relevant body of laws? Or more specifically, what would we expect the DOJ to do when interpreting and enforcing Section 5 of the Act?²⁸ Intuition takes us in two separate directions. For the career staff, we would expect them to apply the law as they understand it and to do what the Court tells them to do. Consider in this vein the following account from the career staff at the offices of the Solicitor General and Legal Counsel. These offices “are staffed with legal generalists whose only specialty is the law, who are free of policy or programmatic responsibilities, and who are called upon to take a broader and longer view of the Constitution than other employees in the executive branch.”²⁹ This rendition applies with equal force to the Voting Section staff at the Civil Rights Division. This is also a clear message from the leaked memo from the recent Texas submission.³⁰

As for the Attorney General and the Assistant Attorney General, our expectations are clearly different. As political appointees, we would expect them to carry out the principles and goals of the administration. We would expect them, in other words, to pursue “policy or programmatic responsibilities” and to take a narrower and shorter view of the Constitution. The recent Texas and Georgia submissions appear to offer examples of this expectation.

In sum, we would expect career staff to take the long and principled view, while political appointees would take the short and ideological view. And yet, according to Mark Posner, a former career lawyer in the Civil Rights Division:

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

28. For a general discussion, see Jerry L. Mashaw, *Agency Statutory Interpretation*, in Philip Frickey, ed., *Issues in Legal Scholarship: Dynamic Statutory Interpretation* (Berkeley, CA: Berkeley Electronic Press, 2002), online: Berkeley Electronic Press <http://www.bepress.com/ils/iss3/art9>.

29. Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 704 (2005).

30. For a contrary view, see Edward Blum, Roger Clegg & Abigail Thernstrom, *Who's Playing Politics? It's the Left, not the Right, that's out of order in Texas*, NATIONAL REVIEW ONLINE (Jan 24, 2006) (last visited July 19, 2006) (“The career bureaucrats who wrote [the Texas memo]—one of whom now works for a left-leaning advocacy group—seemed to be intent on saving Texas Democratic incumbents any way they could.”).

substantially guided by, the knowledge and expertise of the career staff.³¹

This conclusion is implicitly buttressed by the data offered in the first Part. The enforcement data for the Nixon and Reagan administrations demand an explanation, and Posner's account offers as good an explanation as we have seen. This explanation hinges, of course, on the degree of discretion afforded by the statute to the Attorney General. As the next section contends, this is a question that occupied the attention of the 89th Congress. In granting the Attorney General any discretion at all, Congress confronted the issue of over- and under-enforcement.

B. Pre-clearance, Discretion, and the Department of Justice

Early discussions in Congress over the role of the Department of Justice in enforcing the preclearance requirement are scant at best. One reason for this lack of discussion on such an important issue is the fact that the initial version of the bill did not grant any preclearance authority to the Attorney General;³² covered jurisdictions were to seek preclearance in federal court in D.C. Another reason is that the bill sought to curtail the discretion of those in charge of implementing the Act by proposing "an objective standard" for establishing instances of racial discrimination.³³ This meant that the role of the DOJ would be minimal, perhaps non-existent; once the trigger kicked in, literacy tests would be banned for ten years and any new laws would need judicial preclearance.³⁴ Unsurprisingly, the bulk of the debate focused instead, *inter alia*, on the professed objectivity of this standard, as members of Congress aimed many of their questions to the Attorney General at the rationality of the trigger formula.³⁵

Scant as the evidence may be, there is *some* of it, and this Part considers it. In particular, this section examines the preclearance requirement as understood and debated by members of Congress. In doing so, it dis-

31. Posner, *supra* note 27, at 9.

32. See H.R. 6400, 89th Cong. § 8 (1965).

33. *Voting Rights Act: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 24 (1965) [hereinafter *1965 House Hearings*].

34. *Id.*

35. See, e.g., *id.* at 450 (statement of Representative Reinecke). Senator Ervin made this point often during the Senate hearings. See *Voting Rights Act: Hearings on S. 1564 Before the Senate Comm. on the Judiciary*, 89th Cong. 33 (1965) [hereinafter *1965 Senate Hearings*] ("I do not think there is necessarily any logical connection between the assumption based on these percentages and the presumption that there was a violation of the 14th Amendment."); *id.* at 272 (criticizing the coverage of the bill and branding the legislation a "cockeyed bill"); *id.* at 263 (complaining that the statutory test has no relation to the discrimination in registration); see also *id.* at 265 (contending that the triggering test is arbitrary) (statement of Senator Bloch).

cusses the preclearance provision and its application, as well as criticisms of this power. This Part concludes that Congress and the Johnson Administration understood the preclearance requirement as a backstop provision, its existence an acknowledgement of congressional limitations in the area. Congress was fully aware that Black voters needed the helpful hand of the national government and it was willing to lend this hand for ten years, as states inevitably sought to circumvent the proscriptions of the Act in a myriad of unforeseen ways. The political market in the South was clearly broken, and would continue to be so. In this vein, while the Act as a whole sought to restore this market to its proper balance, the preclearance provision may be understood as protecting this balance into the future.

1. Section 5 in Congress: 1965

According to Attorney General Katzenbach, the justification behind the preclearance requirement was quite apparent: the jurisdictions covered by the trigger formula were the same jurisdictions that have demonstrated a “desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States.”³⁶ He offered as examples the voting qualification requirements implemented by the States of Louisiana, Mississippi and Alabama following the 1964 Civil Rights Act “for no other purpose other than to perpetuate racial discrimination.”³⁷ In light of this history, he argued that these states “should be subjected to some kind of limitation as to any new legislation that [they] might propose.”³⁸ Or put another way, Assistant Attorney General Burke Marshall explained, “The procedure under Section [5] really, in a way, is a method of bringing to the attention of the Government changes in State law.”³⁹

The issue cut deeper than mere changes in the law, however. The problem was not that state laws changed periodically, for laws always do. Rather, the issue facing the administration and members of Congress was the fact that state actors hell-bent on circumventing federal anti-discrimination statutes had managed to stay ahead of the law in the past. Their ingenuity was bound to increase with the passage of the law. As Attorney General Katzenbach explained during the 1975 Senate hearings, “When we drafted this legislation, we recognized that increased black voting strength might encourage a shift in the tactics of discrimination.”⁴⁰ Or as civil rights attorney Joseph Rauh put it,

36. See *1965 House Hearings*, *supra* note 33, at 60.

37. *Id.*

38. *Id.*

39. *Id.* at 72.

40. *Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 Before Subcomm. on Const. Rights of the Senate Comm. on the Judiciary*, 94th Cong. 123 (1975) [hereinafter *1975 Senate Hearings*].

This procedure in section 5 which we are demanding and which Congress gave us because of the terror against blacks, was based on the concept that it was the only way to get action before the election . . . Until they can show not only that they do not shoot black voters any more, which I accept, and even if they want to say that they do not do a lot of things any more, they cannot say that they have not violated section 5, and that is what counts.⁴¹

Section 5 thus served as an insurance provision, designed as further protection against unknown and uncertain developments by covered jurisdictions. In the words of Representative Cramer, "What you are doing, in effect, is granting a presumption against the local community. They have to come to Washington to prove their innocence."⁴²

As with most things in life, the devil was in the details. The difficulty, the Attorney General well understood, was the fact that "[e]ven in a sense a most innocent kind of law, as our experiences have indicated time and time again, can be used."⁴³ Some matters were simple enough, such as reductions in the voting age from 21 years to 18 years, or changes in residency requirements from 12 months to 6 months.⁴⁴ In response to a question from Chairman Celler, the Attorney General conceded that states would still have to go to district court to preclear such changes, but the United States would not oppose them, "unless the United States were capable of making a case with respect to the effect of the proposed change of law. The effect would have to be one of denying the rights guaranteed by the 15th Amendment."⁴⁵ Under this standard, a change from nonregistration to registration would require a declaratory judgment,⁴⁶ or changing the hours of a registrar's office to one hour on one day, every two months.⁴⁷ Conversely, changing from paper ballots to a machine would not seem to qualify.⁴⁸ But the issue was far from simple, and some members of Congress worried that the provision as drafted might not protect Blacks into the future, in light of the ingenuity of some

41. *Id.* at 62.

42. *1965 House Hearings*, *supra* note 33, at 95.

43. *Id.* at 62.

44. *See id.* at 60.

45. *Id.*; *see id.* at 62 (stating that the change "may not likely have the effect of denying or abridging rights guaranteed by the 15th Amendment") (statement of Chairman Celler).

46. *Id.* at 62.

47. *See id.* According to the Attorney General, "There is very little opportunity under those circumstances for Negroes who have not been registered in the past to get registered." *Id.*

48. *See id.*

states,⁴⁹ while others offered amendments to the proposed language that would expand the reach of the preclearance requirement.⁵⁰

In the end, the words of Representative Mathias properly encapsulate the essence of the new law. As he argued, “[State legislators] are going to be baffled by the fact that their enactments are really put on ice, or that their State legislatures are put in trusteeship during the period under which they may be subject to this bill.”⁵¹ Critics and supporters alike agreed about this characterization. When it came to the conditions that gave rise to this legislation, however, they found much room for disagreement.

2. The Role of Discretion

Chairman Celler justified the preclearance provision on the view that “we are facing harsh conditions and we may have to have harsh laws.”⁵² The Attorney General disagreed, of course; in his view, this provision was not harsh, but “effective.”⁵³ Critics of the Act sided with Chairman Celler’s view of the law. To a person, they charged that the proposed legislation was harsh, and unfairly so. For example, critics argued that the legislation was arbitrary, unfair, and ultimately unconstitutional in singling out Southern States for punishment.⁵⁴ This section focuses on one important strand of the criticism: the level of discretion afforded the Attorney General by the Act.

The issue of discretion arose in two separate contexts. Under the original section 9(e) of the Act, a person who joined the voting lists as provided by the Act, yet was not allowed to vote, or suspected that her vote was not counted, could inform federal examiners of such allegations. The federal examiner would then notify the Attorney General, who “may forthwith apply to the district court for an order enjoining certification of the results of the election.”⁵⁵ Representative Kastanmeier wished for

49. *See id.* at 291 (“I am fearful that we may be inviting the situation where some States, ingenious as they are, local registration people and local chiefs of police, will find new ways and means of disenfranchising people if we lock ourselves into a particular definition, which is the case of the administration bill.”) (statement of Representative Lindsay).

50. *See id.* at 767 (statement of Rep. Edwards). Tellingly, Representative Edwards offered a modification to the language that would “preclude other devices which might be used to discriminate, such as changing the boundaries of voting districts or qualifications for holding offices.” *Id.*

51. *Id.* at 371.

52. *Id.* at 62.

53. *Id.*

54. For a review of these criticisms, see Luis Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act* (draft) (Sept. 5, 2005), Indiana Legal Studies Research Paper No. 34, available at <http://ssrn.com/abstract=781805>.

55. S. 1564, 89th Cong. § 9(e) (1965).

stronger language, as he complained that the Attorney General may choose not to act on the allegation if the outcome of the election will not be affected. But this was a problem from the perspective of the aggrieved voter; it was “very important . . . that a specific procedure be followed and that some relief be obtained so that they may not, thereafter, be discouraged by virtue, ultimately, of a lack of encouragement to vote.”⁵⁶ The Assistant Attorney General, Burke Marshall, responded that discretion in this area was important.⁵⁷ But Kastenmeier was not so sure: “I realize you require some discretion. However, this language (from section 9(e)) is quite open-ended as to what standards, in fact, the U.S. Attorney may apply as to the decision to institute these cases.”⁵⁸

The issue came up again during the Senate hearings. The Attorney General broached this issue himself, during an exchange with Senator Ervin about the proposed power to send examiners to covered areas to register voters. To the Senator, this would be “a drastic power which can hardly be reconciled with the federal system of government, if we still have a federal system of government.”⁵⁹ The Attorney General conceded that this “is quite a strong power.”⁶⁰ He continued:

Now, there may be better ways of accomplishing this. I do not know if there are. There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right; we, perhaps, except for the fact that some members of the committee, I think, including yourself [Sen. Ervin], have had difficulty with giving the Attorney General discretion on some of these things—perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens.⁶¹

In subsequent days, the issue of granting the Attorney General any discretion arose once more. Under the original section 5(a) of the bill, examiners would register voters if these voters applied to register within the prior 90 days yet were denied by a person acting under color of law. Under a proviso, however, the Attorney General could waive this requirement. In reference to this proviso, Senator Ervin asked a witness: “Do

56. 1965 House Hearings, *supra* note 33, at 71.

57. *Id.* at 72 (“I think, myself, Congressman, it would be a mistake to remove from the Department of Justice the decision as to whether or not it thinks a case is a good case to bring.”).

58. *Id.*

59. 1965 Senate Hearings, *supra* note 33, at 237.

60. *Id.*

61. *Id.*

you believe that the Attorney General should have an unbridled discretion without any guidelines or standards to waive the requirement of law?"⁶² The rest of this exchange is worth quoting at length:

[Witness:] With the greatest deference to the occupants of that post, sir, I believe that is excessive authority to vest in the hands of the Attorney General.

[Senator Ervin:] Is not the proud boast of our country that we have a government of laws and not of men?

[Witness:] That is the theory to which we are pledged.

[Senator Ervin:] And this bill is establishing the government of man, in this particular field?

[Witness:] Yes, sir.⁶³

To Senator Ervin, this grant of authority to the Attorney General was "excessive" because the delegation was not accompanied by any guiding standards. Without such standards, legitimate authority became raw power, to be used at will against the offending jurisdictions. In this vein, consider the words of Representative Waggoner: "The bill recognizes no reluctance to discriminate against these Southern States and make them the whipping boys for the nation."⁶⁴

Four years later, the arguments sharpened considerably. The supporters offered a similar justification: while the preclearance provision "is an extraordinary provision of the law . . . it is required by the extraordinary circumstances."⁶⁵ In response, Senator Ervin offered his old criticism of the role of the Attorney General, as forcefully as before. For example, he complained that Section 5 "subordinates the decisions of the elected representatives of the people in the States to the unreviewable whims of an executive official of the Federal Government."⁶⁶

But this time around, he had support from the Attorney General, John Mitchell. Their positions were similar and, unlike the 1965 debates, the two were far more pointed in connecting their criticism to a larger separation of powers critique. For example, Senator Ervin implied early on that Section 5 "give[s] judicial power to an executive officer."⁶⁷ A day

62. *Id.* at 651.

63. *Id.*

64. *1965 House Hearings*, *supra* note 33, at 709.

65. *Amendments to the Voting Rights Act of 1965: Hearings on S. 818, 2456, 2507 and Title IV of S. 2029 Before the Senate Subcomm. on Const. Rights, 91st Cong. 17 (1969)* [hereinafter *1969 Senate Hearings*] (Senator Mathias).

66. *Id.* at 257.

67. *Id.*; *see id.* at 199 ("I do not favor putting the power to pass on validity of laws in an executive official.").

later, he was far more direct: "The Attorney General condemns you without trial, without evidence, on the basis of failures. Then you are guilty and then you have to come and bring witnesses."⁶⁸ Time and again, Senator Ervin leveled a similar charge,⁶⁹ while also concluding that "the processes provided under which the Attorney General must make a decision are not adequate. They result in arbitrary decisions without sufficient information."⁷⁰ Senator Ervin was also troubled by the fact that the Attorney General "also happens to be a political appointee who generally has more than a little appreciation of partisan politics."⁷¹ He concluded that "there is no good reason why this enormous power should be lodged in that office."⁷²

Congress ultimately extended the special provisions of the Act for another five years. Of note, the DOJ issued its first set of procedures for administering the Voting Rights Act a year later, in 1971.⁷³ According to these procedures, "Section 5 . . . imposes on the Attorney General what is essentially a judicial function."⁷⁴ More specifically, the Attorney General must be "satisfied" that the submitted changes do not have a discriminatory purpose or effect. If she "determines" that the submitted changes have such discriminatory purpose or effect, she must interpose an objection.⁷⁵ The Supreme Court upheld this codified regulatory scheme in 1973.⁷⁶

C. Discretion and the Court: Deference?

The question of administrative discretion and the role of the Attorney General in enforcing the proscriptions of the Act has played a central role in the doctrinal development of Section 5. In the early case of *Perkins*

68. *Id.* at 86.

69. *Id.* at 224 (contending that section 5 is simply ineffective, as "determinations as to whether legislation or ordinances discriminate under section 5, properly belongs in the court").

70. *Id.* at 204; *id.* at 232 ("[H]aving lived with it I [do] not think [DOJ] was the proper place for a determination of whether statutes are or are not going to be used in a discriminatory fashion."); *id.* at 233 (complaining that the best he could do under section 5 was to "try and guess as to the effect of the legislation"); *see also id.* at 239 ("I thought [section 5] was wrong because it put into the hands of an appointed political officer of another branch of the Government the right to veto, in effect, the legislative act of a State legislature. It was wrong because it is difficult to judge a law, or a draft of a law, in a vacuum.") (Senator Hruska).

71. *Id.* at 257.

72. *Id.*

73. 28 C.F.R. § 51.1 (1972).

74. 28 C.F.R. § 51.19 (1972).

75. *Id.*

76. *See Georgia v. United States*, 411 U.S. 526, 536-39 (1973).

v. Matthews,⁷⁷ for example, the Court supported its holding that annexations and the location of polling places were subject to section 5 review by pointing to prior interpretations of the Act by the Attorney General.⁷⁸ The Court seemed to suggest that this issue was not a matter of statutory interpretation unique to the Voting Rights Act; rather, this was standing doctrine on the question of how much deference the Court would show to interpretations of a statute by the officials or agencies entrusted with its implementation.⁷⁹ In subsequent cases, however, the Court intimated that this reading of the Attorney General's power is particularly appropriate to its role under section 5.⁸⁰

The question of how much deference the Court would accord to the Attorney General's interpretations of the Act acquired great urgency at the time of *Perkins*, as the new regulations marked the beginning of greater enforcement of the preclearance requirement.⁸¹ But the Court hardly missed a step. In *Georgia v. United States*,⁸² the state of Georgia challenged the regulations on the view that the Act did not authorize the Attorney General to issue them. The Court agreed that the statute was silent on many questions at the heart of the Attorney General's duties under section 5.⁸³ Yet the Attorney General followed a reasonable path: "Rather than reading the statute to grant him unfettered discretion as to procedures, standards, and administration in this sensitive area, the Attorney General has chosen instead to formulate and publish objective ground rules."⁸⁴ So long as these regulations were reasonable, they were not beyond his authority.⁸⁵

Justice White dissented in *Georgia*, in language that bears directly on our inquiry. He questioned whether "any objection whatsoever" from the Attorney General would be enough to force the offending state into federal

77. 400 U.S. 379 (1971).

78. *See id.* at 390–91 ("Our conclusion that both the location of the polling places and municipal boundary changes come within s 5 draws further support from the interpretation followed by the Attorney General in his administration of the statute.").

79. For support, the Court cited *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("[T]his Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.").

80. *See, e.g., United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 131 (1978) ("In recognition of the Attorney General's key role in the formulation of the Act, this Court in the past has given great deference to his interpretations of it.").

81. *See, e.g., 1975 Senate Hearings, supra* note 40, at 83 ("It has been since the regulations for the administration of section 5 were put forth, I believe in September of 1971, that there has been pretty good enforcement of section 5.") (testimony of David Hunter, Attorney and Staff member, U.S. Commission on Civil Rights).

82. 411 U.S. 526 (1973).

83. *See id.* at 536.

84. *Id.*

85. *See id.*

court to defend its change in the law.⁸⁶ More particularly, he questioned whether “Congress intended to visit upon the States the consequences of such uncontrolled discretion in the Attorney General.”⁸⁷ He continued:

Surely, objections by the Attorney General would not be valid if that officer considered himself too busy to give attention to § 5 submissions and simply decided to object to all of them, to one out of 10 of them or to those filed by States with governors of a different political persuasion. Neither, I think, did Congress anticipate that the Attorney General could discharge his statutory duty by simply stating that he had not been persuaded that a proposed change in election procedures would not have the forbidden discriminatory effect.⁸⁸

Justice White understood the statute to constrain the Attorney General’s discretion far more than that. At the very least, the Attorney General must “give his careful and good-faith consideration”⁸⁹ within sixty days of submission and decide whether the proposed change had the requisite discriminatory purpose or effect. Only then may the Attorney General object to the change.

In subsequent cases, the Court held on to its broad and forgiving view of the Attorney General’s role in interpreting the Act. In *United States v. Sheffield Bd. of Comm’rs*,⁹⁰ for example, the Court used the Attorney General’s interpretation of the Act and his role in drafting the legislation for support of its holding.⁹¹ Similarly, in *Dougherty County v. White*,⁹² the Court cited the Attorney General’s “central role . . . in formulating and implementing § 5” in concluding that her interpretation of the statute “is entitled to particular deference.”⁹³ And in *N.A.A.C.P. v. Hampton County Election Comm’n*,⁹⁴ the Court reiterated its long-standing view that “the construction placed upon the Act by the Attorney General . . . is entitled to considerable deference.”⁹⁵

But, as the Court made clear five years later, this deference was not *unfettered* deference, for “the principle has its limits.”⁹⁶ The Court has of-

86. *Id.* at 542–43 (White, J., dissenting).

87. *Id.*

88. *Id.*

89. *Id.*

90. 435 U.S. 110 (1978).

91. *See id.* at 131–32.

92. 439 U.S. 32 (1978).

93. *Id.* at 39.

94. 470 U.S. 166 (1985).

95. *Id.* at 178–79; *see also* *City of Pleasant Grove v. United States*, 479 U.S. 462, 468 (1987) (explaining that “the Attorney General[’s] . . . interpretation of the Voting Rights Act is entitled to considerable deference”).

96. *Presley v. Etowah County Comm’n*, 502 U.S. 491, 508 (1992)

ferred at least three such limits in recent cases. Citing *Chevron*,⁹⁷ the Court contended in *Presley v. Etowah County Comm'n* that “[d]eference does not mean acquiescence. As in other contexts in which we defer to an administrative interpretation of a statute, we do so only if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable.”⁹⁸ One limit thus looks to congressional intent, while a second limit demands a reasonable interpretation of the relevant statute.

In another line of cases, the Court offered a third limitation. In *Shaw v. Reno*,⁹⁹ the Court subjected racial gerrymandering claims created under the purported authority of the Voting Rights Act to constitutional review. More specifically, the racially gerrymandered districts were created in response to a preclearance objection from the Attorney General. The Court concluded that these districts must be subject to strict scrutiny review.¹⁰⁰ In response, the state of Georgia contended in *Miller v. Johnson*¹⁰¹ that compliance with a preclearance mandate was a compelling state interest, a position with which a majority of the Court disagreed as a general proposition.¹⁰² In so doing, the Court offered a third limit on the Attorney General’s authority. Namely, administrative interpretations of the Act are not entitled to judicial deference when these interpretations “raise serious constitutional questions.”¹⁰³

★ ★ ★

This Part reaches two related conclusions. In 1965, through its preclearance requirement, Congress codified its understanding of the Act into the future. Many critics of the voting rights bill worried about the degree of discretion that the legislation accorded the Attorney General. Supporters worried as well, fearing that this degree of discretion might lead to under-enforcement of the Act.¹⁰⁴ Yet Congress chose not to act on those concerns while placing the DOJ at the center of its voting rights

97. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

98. 502 U.S. at 508 (quoting *Chevron U.S.A. INC.*, 467 U.S. at 842–44).

99. 509 U.S. 630 (1993).

100. *Id.* at 653.

101. 515 U.S. 900 (1995).

102. *Id.* at 922 (“We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues.”). *But see* *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2667 (2006) (Scalia, J., dissenting) (“If compliance with § 5 were not a compelling state interest, then a State could be placed in the impossible position of having to choose between compliance with § 5 and compliance with the Equal Protection Clause.”).

103. *Miller*, 515 U.S. at 923.

104. *See, e.g.*, 1965 House Hearings, *supra* note 33, at 72.

revolution. By and large, this is the way that the Supreme Court has understood the Department's role.

CONCLUSION

In his opinion for the Court in *Luther v. Borden*,¹⁰⁵ Chief Justice Taney opined, in reference to the executive power to call the militia to quell domestic insurrections: "It is said that this power in the President is dangerous to liberty, and may be abused." Nevertheless, he continued, "All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual."¹⁰⁶

Though he was not, Chief Justice Taney could have been referring to the preclearance power under the Act. Congress was fully aware of the dangers inherent in placing the preclearance power in executive hands. The power could be abused, to be sure, yet the exigencies of the task at hand demanded both flexibility and the ability to act quickly. Thus, Congress placed considerable trust in future Attorney Generals to carry out this important work. And according to Assistant Attorney General Burke Marshall, "I think that the Attorney General and I think that the United States is committed to this course of action, no matter who is Attorney General or who is President and can count on the vigorous enforcement of the act."¹⁰⁷

Contemporary debates over the role played by the DOJ in enforcing the Act must contend with this history. Enforcement of the preclearance requirement is a matter of both discretion and trust. This is an important point, particularly in reference to the political fortunes of communities of color. Section 5 was a radical proposal designed to combat years of outright neglect. Learning from its recent history with this problem, Congress chose to bypass traditional judicial remedies and processes while vesting the preclearance power on the Attorney General. This assured efficient enforcement, yet it also meant that future Attorney Generals who did not share the political vision of the 89th Congress could choose to under-enforce the equality norm embodied in Section 5. This was part of the bargain from the beginning. Concededly, this means that the voting rights of communities of color under Section 5 of the Act are subject to the ebbs and flows of politics. But we are not convinced that this is as noxious a development as some commentators believe.

The concept of a preclearance requirement presupposes a broken political market, where political actors are unable to bargain with similarly situated participants. This is no longer the world we live in. Unlike the

105. 48 U.S. 1 (1849).

106. *Id.* at 44.

107. 1965 House Hearings, *supra* note 33, at 72.

political milieu that gave rise to the act in 1965, this is a time when communities of color can do their bidding through the traditional workings of the political process. In fact, it may be said that the recent amendment and extension of the Act offer conclusive proof for this proposition.

More importantly, to take the position that the Attorney General must aggressively enforce the Voting Rights Act is to believe that the Attorney General must act as a surrogate for the voting rights of communities of color. It is also to believe that the Attorney General knows what is best for these communities. Yet, it is not always clear what is best for communities of color; what is best for communities of color in this day and age may best be determined by the political process. Take, for example, the debate of the last decade over the creation of minority majority districts. Should the DOJ pursue a policy of maximizing such districts, or should it instead encourage the creation of influence districts?¹⁰⁸ Both positions hold considerable appeal. It is not clear that we would want the DOJ pursuing one policy exclusively at the expense of another in the face of such uncertainty. Additionally, allowing enforcement of the Act to ebb and flow might reduce concern over its constitutionality where the constitutional worry is that an aggressive DOJ will always try to maximize enforcement.

The allure of Section 5 rested in great measure on the discretion it vested on the Attorney General to use its considerable power as she deemed necessary. If the price we must pay for Section 5 is occasional under-enforcement, this is a price we are willing to pay.

108. See, e.g., DAVID T. CANON, *RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS* (1999); DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS* (1997).



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TITLE: The Politics of Preclearance
SOURCE: Mich J Race Law 12 no2 Spr 2007

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