


City Attorneys and  
The Voting Rights Act

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**What needs to be precleared?**

- Any standard, practice, or procedure relating to voting that is different than what was in effect on the coverage date or whatever the existing practice is as it was lawfully altered after the coverage date.




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### What is a standard, practice, or procedure affecting voting?

- Just about anything that relates to voting
  - Change in qualification or eligibility for voting
  - Change affecting the casting or counting of votes or concerning publicity for or assistance in voting
  - Change with respect to the use of a language other than English in any aspect of the electoral process
  - Change in the boundaries of precincts or the location of polling places


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### What is a standard, practice, or procedure affecting voting?

- Just about anything that relates to voting
  - Change in the constituency of an elected official
    - Annexation
    - Deannexation
    - Redistricting
    - Incorporation
    - Dissolution
  - Change for at-large to single-member districts or vice versa


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**What is a standard, practice, or procedure affecting voting?**

- Just about anything that relates to voting
  - Change in determining the outcome of an election—e.g., changing from a plurality to a majority-vote requirement
  - Change in the term of office
  - Change from election to appointment
  - Creation or elimination of an office
  - Change in method of offering issues and propositions for approval by referendum

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**What is a standard, practice, or procedure affecting voting?**

- Just about anything that relates to voting
  - Change affecting the ability of persons to participate in campaigns or other election activity
  - Change transferring responsibility for conducting elections
  - Change in the entrance to a polling place
  - Change in the type of ballot or election system (e.g., optical scan, paper ballot, computer touch screen)

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**What is a standard, practice, or procedure affecting voting?**

- Just about anything that relates to voting
    - Contracting with another entity to conduct all or part of the election process
  - Cancelling an election
  - Any special election such as a bond election, charter amendment election, election to fill a vacancy, initiative or recall.



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**What about recurrent practices that occur at regular intervals?**

- A recurrent practice, once precleared, does not have to be submitted again.
  - Special elections always have to be precleared.



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**What is the coverage date?**


- Any change in an election practice from how it existed on the coverage date must be precleared.
  - In Texas, the coverage date is November 1, 1972. Practices as they existed on that date are the baseline or benchmark
  - Once a change occurs and is precleared, it becomes the new benchmark.
  - Generally, the benchmark will be something different from the practice on November 1, 1972, because there would have been changes since that time.

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**What is the standard for preclearance?**

- The change must have neither the **purpose or effect** of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

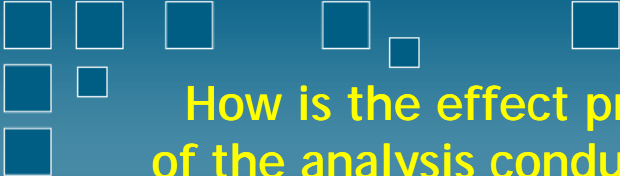
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## How does the DOJ determine discriminatory purpose?

- The Department relies on the standards established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)
  - Impact of the decision
  - Historical background of the decision
  - Sequence of events leading to the decision
  - Whether the decision departs from the normal practice
  - Contemporaneous statements and viewpoints held by the decision makers

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## How is the effect prong of the analysis conducted?

- Most cases are decided under the effect standard
- The key is whether the change is retrogressive
  - Does it make the minority group worse off than before the change
- It is necessary to compare the change against the benchmark

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## What if the current practice was not precleared?

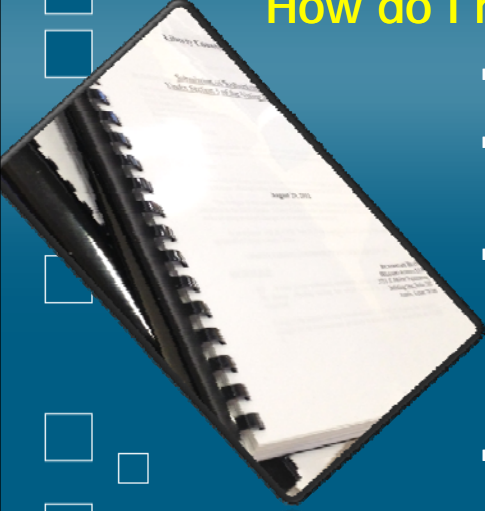
- An unprecleared practice cannot be a benchmark
- The Department will look for the last precleared practice.
- It may be necessary to preclear all the former unprecleared practices
- This occasionally occurs with annexations

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## Do I have to seek preclearance from DOJ?

- It is possible instead to seek a declaratory judgment from the U.S. District Court for the District of Columbia sitting as a three-judge court
- Cities almost never choose this option as it is much slower and much more expensive

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## How do I make a submission?

- In writing
- Generally in letter form with exhibits
- Generally addresses specific issues set out in the regulations—28 CFR §§ 51.27 and 51.28.
- All or part of a submission may be made on magnetic media

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## Who has the burden of proof under section 5?

- The submitting authority has the burden of proof

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## How long does it take to get an answer from DOJ?

- DOJ is required to object, if at all, within 60 days
- It typically takes all or almost all of that time
- It can ask, in writing, for additional information, which starts a new 60-day clock once the additional information is submitted.

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## What if I don't have 60 days?

- You can ask for expedited consideration
- Highlight the request and explain why it's necessary
- DOJ doesn't always give expedited consideration
- Sometimes it is impossible to get preclearance in time
- Preclearance has a retroactive effect

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**What typically happens during the preclearance process?**

- The file is assigned a number and assigned to a non-attorney analyst
- The analyst reviews the file and may call members of the council or minority members of the community
- The analyst's work will be reviewed by a supervising attorney and perhaps one or more senior attorneys

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U.S. Department of Justice  
Civil Rights Division

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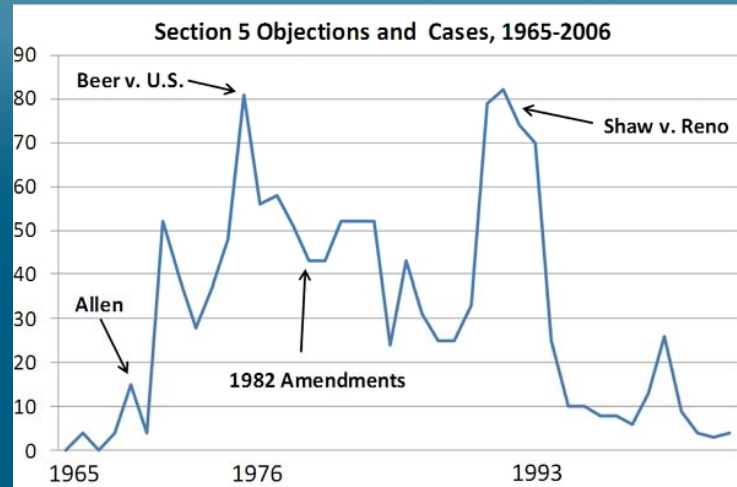
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Dear Mr. Heath:

TCH:RSB:MSR:AAO:par  
DJ 166-012-3  
2012-5853

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## How often does DOJ object?



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## What about non-election-related changes that are part of an action containing election changes?

- While election-related changes cannot be implemented until precleared, there is no such restriction on changes that do not affect the electoral process

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**What about non-election-related changes that are part of an action containing election changes?**


- Annexations, for example, may be implemented insofar as taxes, regulations, etc., are concerned, but people newly annexed will not be able to vote or run for office prior to preclearance

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**What about non-election-related changes that are part of an action containing election changes?**

- State statute requires cities to seek preclearance of annexations at the earliest possible time, TEX. LOC. GOV'T CODE, § 43.906(a), and relaxes waiting periods for boundary changes due to annexation that would normally apply to redistricting.


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**What is the earliest time I can seek preclearance?**

- The change must be formally adopted before it can be submitted to DOJ
- There is an exception for changes requiring approval by referendum, by a state or federal court, or by a federal agency so long as the change is not subject to alteration.
- Charter amendments and initiated ordinances, for example can be submitted on their substance at the same time the special election at which they will be presented is submitted.

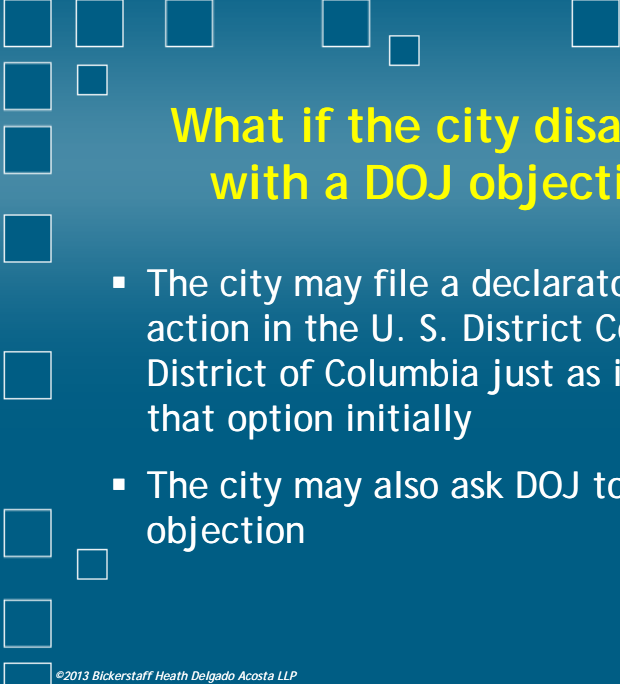
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**When might I have to preclear a court order?**

- If a federal court orders an election change as, for example, a change from an at-large election system to a single-member district system and the change reflects policy choices of the governmental body, it must be precleared.
- In voting rights cases, once liability is found, the court is to give the governmental body the first opportunity to propose a remedy, so it is common for such remedies to require preclearance.

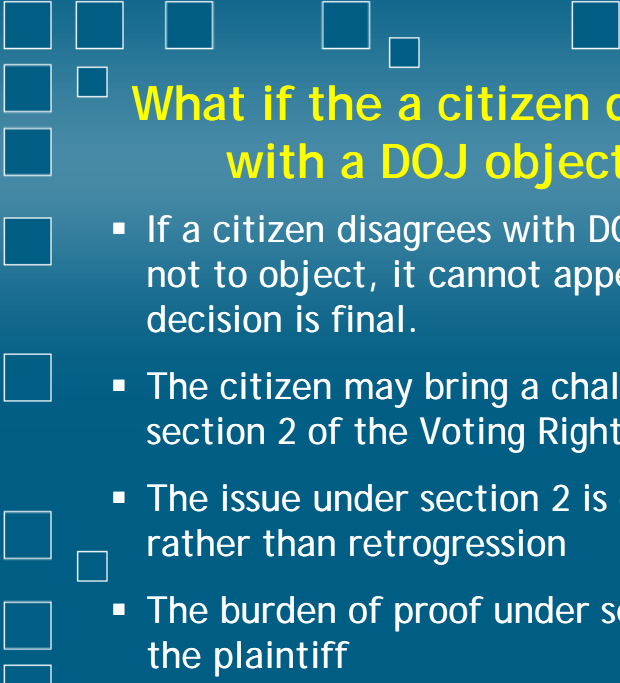
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## What if the city disagrees with a DOJ objection?

- The city may file a declaratory judgment action in the U. S. District Court of the District of Columbia just as if it had chosen that option initially
- The city may also ask DOJ to reconsider its objection

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## What if the a citizen disagrees with a DOJ objection?

- If a citizen disagrees with DOJ's decision not to object, it cannot appeal. DOJ's decision is final.
- The citizen may bring a challenge under section 2 of the Voting Rights Act.
- The issue under section 2 is discrimination rather than retrogression
- The burden of proof under section 2 is on the plaintiff

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**What if the city implements an election change without seeking or obtaining preclearance?**

- The city may be subject to a section 5 enforcement action.
- The action may be brought in a local federal court
- The local court will sit as a three-judge court with any appeal directly to the Supreme Court

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**What if the city implements an election change without seeking or obtaining preclearance?**

- The court may consider only three questions
    - Is the change required to be precleared
    - Was it precleared
    - If not, what remedy is appropriate in order to ensure it is precleared
- In section 5 enforcement actions, the questions are so simple that it is often hard for governmental bodies to win
- Governmental bodies generally will be required to pay the plaintiffs' attorneys fees

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**What is the future of section 5?**  


- Section 5 is being challenged in *Shelby County, Ala. v. Holder*, No. 12-96, in the U.S. Supreme Court with argument scheduled February 27
- It is likely there will be a ruling by June
- Most observers think Chief Justice Roberts and Justice Kennedy will be the swing votes


   
  
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**What is the future of section 5?**  


- The issue is whether the coverage formulas used to bring covered states within the coverage of section 5 are no longer valid 40+ years later.
- Justice Kennedy may be concerned that the states are treated differently under the Act with some states required to seek preclearance and some not required to do so.

   
  
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## What is the future of section 5?

- Many observers believe it is likely that the Court will invalidate section 5
- Most felt the Court would overturn section 5 in *Northwest Austin Municipal Utility District No. One v. Holder* in 2009, but it did not do so.

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