MEMORANDUM BY J. GERALD HEBERT, FORMER CHIEF, U.S. DEPARTMENT OF JUSTICE, VOTING RIGHTS SECTION, ON VOTING RIGHTS ACT SECTION 5 PRECLEARANCE OF THE PROPOSAL SWITCH TO NON-PARTISAN ELECTIONS IN NEW YORK CITY

AUGUST 24, 2003

LAW OFFICES OF J. Gerald Hebert
J. Gerald Hebert, P.C. Attorney at Law

5019 Waple Lane ? Alexandria, VA 22304 ? (703) 567-5873 ? (fax)(703) 567-5876 ? website: www.voterlaw.com

MEMORANDUM

To: Anthony Crowell

From: J. Gerald Hebert

Subject: Section 5 Preclearance of Switch to Non-Partisan Elections

Date: August 24, 2003

This is to provide you with a legal analysis of the possible change from partisan to non-partisan elections for all elective offices in NYC. I have limited the scope of this memorandum to those issues arising under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. There are other legal issues implicated by this change, such as the possible effect on the rights of political parties discussed in such cases as *Eu*. I have included some explanation of the *Eu* decision so that commission members can have a working knowledge of that decision and the holding of the Court.

The Section 5 (Preclearance) Legal Standard

In general, New York City will be required to obtain Section 5 preclearance of any changes it makes to the method of electing any of the city offices. A switch from partisan to non-partisan elections is change within the meaning of Section 5 that must be precleared. To obtain preclearance of any change, the City is required to show that any changes it proposes are free of a retrogressive purpose or retrogressive effect. *Reno* v. *Bossier Parish School Board*, and *Georgia v. Ashcroft*. In other words, to obtain preclearance, NYC would have to show that its change to nonpartisan elections is not intended to make minority voters worse off than they were under the current partisan election scheme, and that the proposed change to non-partisan elections will not have the effect of making minority voters worse off than they are under the current electoral system.

Preclearance

In the past, the City and the Charter Review Commission have usually sought preclearance in a two-step process. First, it submits the holding of a referendum on the proposed changes to the city charter to the Department of Justice for Section 5 preclearance. The Department of Justice has sixty days to make its Section 5 determination from the time it receives a complete submission from the City. See 42 U.S.C. 1973c. During this initial preclearance process, the Department of justice would review the merits of any changes that would be voted on in the referendum.

Once preclearance is obtained for the holding of the referendum, the election may then be conducted. If the charter revisions are approved in the referendum, whatever changes are approved by the voters that relate to voting or elections must then be submitted for preclearance review under the Voting Rights Act.

If the City pursues the two-step preclearance process, as it has done in the recent past, then it would simply submit to DOJ for preclearance the holding of a referendum on a possible change to nonpartisan elections now; and then, if the referendum passes, the City would then submit the "merits" of the change to nonpartisan elections. Under this two-step preclearance process, the election results under the referendum, the publicity surrounding the referendum, and any election day issues that might arise, would be relevant information to DOJ in assessing whether to grant Section 5 preclearance to the proposed change on the merits.[1]

Assessing the "Merits" of the Change to Nonpartisan Elections

The election process for city offices in New York has been historically a partisan one. Candidates compete in partisan primary elections for the nomination of their party, and the successful nominees then compete in a general election where the party label or affiliation is attached to each candidate's name. This is the "benchmark" system for the City against which the change to nonpartisan elections will be compared. For this reason, success of minority-preferred candidacies under this system must be considered and measured against the likely success minority-supported candidates would have under a non-partisan system. Studies conducted for the City thus far show that, insofar as citywide offices are concerned, party affiliation has not been a necessary or critical factor for minority-preferred candidates to be elected to city offices. In fact, the use of nonpartisan elections would actually improve the chances of minority-preferred candidates because they would have an easier time of making it to the general election ballot, something that has proven difficult in partisan elections.

Election studies in NYC have also shown that the voting patterns of blacks and Hispanics tend to lack cohesion in partisan primary elections. Indeed, it has been over a decade (*i.e.*, 1989) where blacks and Hispanics in NYC voted together for a candidate of choice in a primary election for citywide office. This lack of cohesion in primaries is critical, because it tends to show that the benchmark system in NYC is not all that strong. Indeed, because minority voters tend to coalesce behind candidates in general elections, the switch to nonpartisan elections would be an ameliorative change in their political effectiveness.

[1] The DOJ Regulations provide, in part that: "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." 28 C.F.R. § 51.28(f). Thus, the extent to which minority voters turned out in the referendum and how they voted would be deemed by DOJ to be relevant since it tends to show "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." *Id*.

Dr. Lichtman's analyses from 2002, which he has now updated and reissued, shows the following: in NYC, about half of the white voters vote Democrat; blacks tend to be overwhelmingly Democratic; and Hispanics are strongly Democratic. What this means is that whites are the dominant voting group in Democratic primaries. According to Dr. Lichtman, this means that whites comprise anywhere from 43-45% of the electorate in a Democratic primary. Since blacks and Hispanics do not tend to vote cohesively in such elections, minority voters do not gain any special advantage or benefits from having a partisan primary. Indeed, it has proven to be an insuperable barrier to their electoral success.

Conversely, blacks and Hispanics tend to vote cohesively in general elections. It would appear the presence of a nonpartisan election may enable minority-preferred candidates to emerge onto the general election ballot more easily than under the partisan primary scheme that is in place now. Moreover, a candidate could still tout party credentials/endorsement in a nonpartisan, general election. Even the absence of a party label or designation on the general election ballot would not be critical because the place where minority-preferred candidates have suffered their biggest hurdle is in the Democratic primary, not the general election. The switch to nonpartisan elections would ease their ability make it on to the general election ballot. Indeed, Dr. Lichtman has cited the fact that a switch to nonpartisan elections will likely increase the field of candidates in primaries, making it quite possible that minority-preferred candidates could emerge from those elections to make it onto the general election ballot.

It is also important to the Section 5 analysis to examine how candidates under the current system make it onto the primary election ballot. Under the current scheme, if a person desires to run in the Democratic Party primary, that candidate must file the requisite number of signatures but only from those voters eligible to vote in that election (*i.e.*, Democrats). This allows party insiders to have a real advantage. Some have said that such rules allow the political parties to act as gatekeepers in deciding who may run. The benchmark scheme, therefore, would be improved from the standpoint of opening up the political process if the switch to nonpartisan elections also incorporated a change in the candidate signature requirements. If changes also are made to the candidate qualifying procedures (*e.g.*, permitting voters to sign petitions of any candidate even if that person is running with the endorsement or affiliation of a party), then the switch could significantly enhance, not retrogress, the ability of minority-preferred candidates to run for city office.

Section 5 Law

The recent decision in *Georgia v. Ashcroft*, 123 S. Ct. 2498 (U.S., June 27 2003), regarding how to define retrogression under Section 5 of the Voting Rights Act, is of great import in assessing the change from partisan to nonpartisan elections in NYC. In *Georgia v. Ashcroft*, the Supreme Court examined a state senate redistricting plan to determine if the plan was retrogressive to the State's black population.

A lower court had held Georgia's plan to be retrogressive. The Supreme Court vacated the lower court's ruling on the grounds that it had improperly applied the retrogression standard.

In reaching its decision, the Court established for the first time some important factors for courts and DOJ to consider in measuring retrogression. To begin with, "[t]o determine the meaning of 'retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise,' *Beer v. United States, supra*, at 141, the entire statewide plan must first be examined as a whole[.]" What this means, according to the Court, is that in assessing a new proposal under Section 5, "the diminution of a minority group's effective exercise of the electoral franchise violates §5 only if the [covered jurisdiction] cannot show that the gains in the plan as a whole offset the loss in a particular district." Thus, in any submission NYC makes to DOJ under the Voting Rights Act, the City's proposal *in toto* will be examined to assess the entire nonpartisan election scheme. In that way, even if some advantages to partisan primaries are perceived, the City's switch to nonpartisan elections would still be entitled to preclearance if it can be shown that "the gains in the plan as a whole offset the loss" in other aspects of the proposal.

The Supreme Court's *Georgia v. Ashcroft* decision also made clear that a "totality of circumstances" approach should be employed in measuring retrogression under Section 5: "All of the relevant circumstances must be examined, such as minority voters' ability to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a non-retrogressive plan." Thus, the very issues that Dr. Lichtman has studied in the past in assessing a possible change to nonpartisan elections in NYC, are deemed under *Georgia v. Ashcroft* to be of critical importance in the retrogression analysis.

For NYC, the critical question under Section 5 will be to examine the extent to which the change to nonpartisan elections will affect the ability of minority voters to participate in the political process. As the Court said in *Georgia v. Ashcroft*: "[T]he other highly relevant factor in a retrogression inquiry [is] the extent to which a new plan changes the minority group's opportunity to participate in the political process[.]" It is clear that the City will be afforded great flexibility in deciding how best to achieve and protect minority voting rights in choosing its election scheme. In *Georgia*, the Court made it clear that "Section 5 does not dictate that the [covered jurisdiction] must pick one of these [ ] methods over the other. *Id.*

There have been numerous instances (at least 150) in which the Department of Justice has precleared changes to non-partisan elections over the last couple of decades. My search of DOJ records has revealed only one instance in which the change from partisan to nonpartisan elections was deemed objectionable by the Department of Justice. A preclearance objection would follow only in those instances in which minority voters are made worse off by the proposed change. Such retrogression would likely occur where the elimination of the partisan primary and party nomination would eliminate a political advantage that minority supported candidates enjoyed. From the information I

have reviewed in the analysis of this issue by Dr. Lichtman, no such advantage exists and an objection to a change to nonpartisan elections would seem unlikely.

Free Speech and Associational Rights Under the U.S. Constitution

A decision that must be considered in assessing the change from partisan to non-partisan elections is *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). In *Eu*, the Supreme Court held that certain provisions of the California Election Code violated the United States Constitution. The provisions at issue in *Eu* barred the governing bodies of political parties from endorsing candidates in party primaries, and dictated the organization, leadership and composition of those governing bodies. California's Election Code intruded deeply into the internal affairs of the political parties. It regulated the size of central committees, set forth rules on how party committee officials would be selected, regulated the rotation of party chairs, and even specified the times and places of committee meetings, to name just a few.

As a general proposition, the Government (state and local governments included) have broad powers to regulate the time, place and manner of elections. But if a state or local government burdens the rights of political parties or its members, it can "survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest." *Eu, supra*.

The Court in *Eu* struck down the ban on primary endorsements by governing bodies of political parties because it directly hindered the ability of the party to spread its message and limited the information that voters could obtain about candidates and campaign issues. Because partisan political organizations enjoy freedom of association rights under the First and Fourteenth Amendments, see *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), California's decision to bar political parties from endorsing candidates or opposing candidates burdened their freedom of speech and association. To be constitutional, California had to show a compelling state interest that was narrowly tailored, and it was unable to do so. An interest in "stable government" and "party stability" was deemed insufficient, as was the interest in protecting primary voters "from confusing and undue influence."

The Supreme Court has not yet had occasion to rule on the issue of whether a ban on party endorsements in nonpartisan primaries violates the First Amendment. While the Ninth Circuit struck down such a ban in *Renne v. Geary*, 911 F. 2d 280 (9th Cir. 1990), the Supreme Court reversed that decision on procedural grounds. *Renne v. Geary*, 501 U.S. 312 (1991).

CONCLUSION

For the reasons set forth above, it is my legal opinion that the switch to nonpartisan elections for city offices would gain Section 5 preclearance.