U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

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NOV 08 1991

Dear Mr. Boyd:

This refers to Act No. 90-294, which creates the 40th Judicial Circuit and redistricts the existing 18th Judicial Circuit, reassigns the circuit judges of the 18th Circuit to either the 18th or the 40th Circuits, provides for a district attorney in the new 40th Circuit, and provides the implementation schedule for those changes; Act No. 90-474, which creates a second circuit judgeship in the 39th Judicial Circuit and the implementation schedule for that change; and Act No. 90-539, which creates a fourth circuit judgeship in the 20th Judicial Circuit and the implementation schedule for that change for the State of Alabama, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your response to our request for additional information on September 9, 1991.

With regard to the changes occasioned by Act Nos. 90-294 and 90-474, the Attorney General does not interpose any objection. However, we note that the failure of the Attorney General to object does not bar subsequent judicial action to enjoin enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

With regard to the changes occasioned by Act No. 90-539, we are unable to reach a similar conclusion. As a matter of background, we note that on April 27, 1987, the State of Alabama obtained preclearance under Section 5 for more than fifty voting changes affecting the expansion of the state's judicial system since November 1, 1964, including certain changes affecting the 20th Judicial Circuit that is comprised of Henry and Houston

Counties. The state also obtained preclearance of additional changes affecting the expansion of the state's judicial system on January 15, 1988, and September 11, 1989. Thus, while we are mindful of these earlier preclearances of other changes similar to the one now before us relating to the 20th Circuit, we undertake our present analysis in the light of additional information that has come to our attention since the time of our earlier analyses.

As you are aware, private plaintiffs have alleged that the system for electing judges in some judicial circuits and districts in Alabama, including the 20th Circuit, violates Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and that the state has continued to maintain the at-large, numbered post electoral system with the knowledge that this election method minimizes minority electoral opportunities. SCLC v. Evans, Civ. Action No. 88-D-462-N (M.D. Ala.). In the upcoming trial of that case, the United States, which is participating as amicus curiae, will present expert testimony to show that the state has maintained the at-large, numbered post system, at least in part, for racially discriminatory reasons.

Our analysis of the at-large, numbered post electoral system and the context in which it has operated in the 20th Circuit is further informed by a number of factors. For example, we note that in the 20th Circuit, which has a 25 percent black population, no black persons have served as circuit court or district court judges. In addition, an expert retained by the plaintiffs in SCLC has found that voting in the 20th Circuit has been characterized by extreme racial bloc voting. Notwithstanding the evidence of racially polarized voting, black voters in Henry and Houston Counties have been able to elect candidates of their choice to county governing bodies when, as the result of litigation, alternatives to the at-large electoral system were implemented. See, e.g., Diggs v. Henry County, C.A. No.85-V-1331-S (M.D. Ala. Nov. 12, 1985); United States v. Houston County Commission, C.A. No. 85-H-946-S (S.D. Ala. 1985); Dillard v. Crenshaw County et al., C.A. No. 87-T-1234-N (M.D. Ala.). Thus, there would appear to be alternatives for electing the four circuit judges in this circuit that would afford black voters with an equal opportunity to participate in the electoral process and to elect judicial candidates of their choice, although single-member districts may not necessarily be the only remedial alternative available to the State.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has no discriminatory purpose or effect. See Georgia v. United States, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52. In satisfying its burden, the submitting authority must demonstrate that the choices underlying the proposed change are not tainted, even in part, by an invidious racial purpose; it is insufficient simply to establish that there are some legitimate, nondiscriminatory reasons for the voting change. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977); City of Rome v. United States, 446 U.S. 156, 172 (1980); Busbee v. Smith, 549 F. Supp. 494, 516-17 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983). While we do not in any way question the State's need for creating a new judgeship position for the 20th Circuit, we do find ourselves unable to conclude that the State has carried its burden of showing the absence of the proscribed purpose in creating that position through expansion of an existing system for electing candidates to the circuit court which our analysis shows to be violative of Section 2 of the Voting Rights Act. See e.g., 28 C.F.R. 51.55(b). Therefore, on behalf of the Attorney General, I must interpose an objection to the electoral changes occasioned by Act No. 90-539.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgement from the United States District Court for the District of Columbia that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the proposed changes continue to be legally unenforceable. Clark v. Roemer, 59 U.S.L.W. 4583 (U.S. June 3, 1991); 28 C.F.R. 51.10 and 51.45.

Because the submitted changes occasioned by Act No. 90-539 are at issue in SCLC v. Evans, supra, we are providing a copy of this letter to the court in that case.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Alabama plans to take concerning this matter. If you have any questions, you should call Mark Posner (202-307-1388), an attorney in the Voting Section.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable Truman Hobbs
United States District Judge