U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

January 31, 1994

Lynda K. Oswald, Esq.
Assistant Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

Dear Ms. Oswald:

This refers to Amendment 425 to the Alabama Constitution, insofar as it provides in the State of Alabama that a referendum on a local constitutional amendment may not be held unless it is first approved by the Local Constitutional Amendment Commission, 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 most recent response to our November 27, 1990, request for additional information on December 2, 1993.

We have considered carefully the information you have provided, as well as information from other interested persons. According to the 1990 Census, the State of Alabama has a total population of 4,040,587, of whom 25 percent are black. Amendment 425, adopted in 1982, provided for a change in the procedure for ratifying local amendments to the state constitution (i.e., amendments that affect only one county). Previously, local amendments and amendments of general statewide application were ratified in the same manner -- the proposed amendment initially would need to be approved by a three-fifths vote of each house of the legislature, and then be approved in a statewide referendum. Amendment 425 worked two principal changes in this procedure. First, it provides that after the legislature approves a local amendment, a referendum may not be held unless a commission known as the Local Constitutional Amendment Commission (created by Amendment 425) "unanimously approve[s]" the amendment. This Commission is composed of five state officials, the governor, lieutenant governor, attorney general, secretary of state, and speaker of the House of Representatives. Second, if the amendment proceeds to a referendum, the referendum is held only in the affected county.

In 1982, the state made a limited Section 5 submission with respect to then-proposed Amendment 425 (which was awaiting approval in the statewide referendum). The state's submission letter specified that the only change that would be occasioned by the amendment would be the change in the constituency that votes on local constitutional amendments. The submission letter made no mention of the creation of the Commission and the role that it would play in determining whether local amendment referenda are held. Accordingly, this latter change was not submitted for preclearance in 1982, and was not precleared when the Attorney General responded to the 1982 submission by granting preclearance. Clark v. Roemer, 111 S.Ct. 2096 (1991); McCain v. Lybrand, 465 U.S. 236 (1984). Nevertheless, the state proceeded to implement the Commission review procedure.

The state did not seek Section 5 preclearance for the Commission review procedure until it made the instant submission in 1990, following a 1989 request by this office that the change be submitted. The state's submission letter described the scope of the Commission's review function as follows:

> the . . . Commission may (1) approve a vote by the people of the affected county and political subdivision on a proposed constitutional amendment affecting only one county, (2) approve a statewide vote on a proposed constitutional amendment affecting only one county or (3) fail to submit the proposed constitutional amendment to the vote of the people when one or more members of the Commission do not vote in favor of the proposed amendment.

Subsequently, the Alabama Supreme Court ruled that the Commission does not possess the authority to redirect a proposed amendment to the statewide ballot, and that the sole authority of the Commission is either to approve or veto proposed local amendments. Hunt v. Decatur City School District, No. 1911844 (Aug. 27, 1993). With regard to this veto authority, the state has identified no limitation on the reasons why a single Commission member may decide to veto an amendment, and there is no indication that the Commission's review authority is limited to the relatively neutral question of whether an amendment complies with the other procedural requirements of Amendment 425 (e.g., the requirement that the amendment affect only one county).

After reviewing the state's 1990 submission, we determined that the information that had been provided was insufficient to enable us to make the requisite Section 5 determination and accordingly we wrote the state in November 1990 requesting that certain items of additional information be provided. Procedures for the Administration of Section 5 (28 C.F.R. 51.37). Since then, we have sought, with only limited success, to obtain the

requested information. The state now has asked that we proceed to make a final determination, although significant items of requested information still have not been provided (e.g., a detailed description of the process leading to the creation of the Commission, the reasons for its creation, and information as to all the local amendments that have been vetoed by the Commission).

According to the available information, a number of vetoes have been cast by the Commission against proposed local amendments that would have changed the procedure for filling vacancies in certain local offices in several majority-black counties. The state has not provided any information as to why these vetoes were cast but it does not appear that these amendments were blocked for failure to comply with other requirements of Amendment 425. On the other hand, we have received allegations that, at least in part, the vetoes were racially motivated.

Our analysis indicates that the addition of the Commission procedure to the amendment process may diminish the opportunity of black voters to obtain referenda on issues of importance to them. Without the Commission procedure, a proposed amendment proceeds to a referendum vote if the amendment is approved by the legislature. In the House and Senate, we understand that local amendments generally are approved if they meet with the approval of the local legislative delegation. The members of these delegations in turn often are legislators with respect to whom black voters have substantial influence. The Commission, on the other hand, is principally composed of officials elected in statewide elections where black voters exert less influence.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. See Georgia v. United States, 411 U.S. 526 (1973); 28 C.F.R. 51.52. In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to Amendment 425 insofar as it provides that a referendum on a local constitutional amendment may not be held unless it is first approved by the Local Constitutional Amendment Commission.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has 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 objected-to change continues to be legally unenforceable. Clark v. Roemer, supra; 28 C.F.R. 51.10 and 51.45.

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 A. Posner (202-307-1388), Special Section 5 Counsel in the Voting Section.

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division