U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

APR 14 1994

The Honorable Jimmy Evans
Attorney General
State of Alabama
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

Dear Mr. Attorney General:

This refers to the State of Alabama's submission to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, of the following voting changes:

1. Act No. 602 (1969), which provided for two additional associate justice positions on the supreme court, the initial appointment of persons to the new positions, and a change in the method of staggering terms; Act No. 987 (1969), which provided for the creation of the court of civil appeals and the court of criminal appeals each with three members elected at large (in partisan elections, with a majority vote requirement in the primary, and with numbered positions), six-year terms of office, staggered terms for the court of civil appeals and concurrent terms for the court of criminal appeals, and the appointment of the initial judges for the courts; Act No. 75 (1971), which provided for two additional positions on the court of criminal appeals, the initial appointment of persons to the new positions, and a change to staggered terms; and Act No. 346 (1993), which provides for two additional positions on the court of civil appeals and a change in the method of staggering terms;

2. The provisions of the initial proposed consent judgment in White v. State of Alabama, CV 94-T-94-N (M.D. Ala.); and

3. The revised proposed consent judgment in White v. State of Alabama, as amended on April 14, 1994, which provides for two additional positions on the court of criminal appeals and the court of civil appeals, the method for initially filling those positions by appointment, a conditional change in the method of selecting supreme court associate justices in certain years from election to appointment and the appointment method, a conditional increase in the number of supreme court associate justices (up to two) and the method of initially filling those positions by appointment, the procedure for eliminating any additional associate justice positions created pursuant to the judgment, and the appointment method of filling vacancies on the appellate courts in certain circumstances.

We received your submission of the revised proposed consent judgment, as amended, on April 14, 1994, and the submission of that proposal is directly related to, and recommences the 60-day review period for, the previously pending changes enacted by the legislative acts enumerated in paragraph 1. Procedures for the Administration of Section 5 (28 C.F.R. 51.39). In addition, by a letter of April 7, 1994, the state withdrew its Section 5 submission of the changes accomplished by the initial proposed consent judgment in White. Accordingly, no determination by the Attorney General is required concerning that matter. 28 C.F.R. 51.25(a).

We have considered carefully the information you have provided, as well as information from other interested persons. 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); see also 28 C.F.R. 51.52. In addition, the Section 5 Procedures (28 C.F.R. 51.55(b)(2)) require that preclearance be withheld where a change presents a clear violation of the results standard incorporated in Section 2 of the Voting Rights Act, 42 U.S.C. 1973. Where the submitted changes involve additional elective positions, those changes must be reviewed in light of the method by which the positions will be elected.

According to the 1990 Census, Alabama has a total population of 4,040,587 persons, of whom 25 percent are black. Black persons constitute 23 percent of the state's voting age population. The black population is concentrated in the state's three largest cities -- Birmingham, Mobile, and Montgomery -- and in a region known as the Black Belt which extends horizontally across the south-central portion of the state.

As of November 1, 1964, when the state became covered under Section 5, the state supreme court was composed of an elected chief justice and six elected associate justices. We now are called upon to review the state's establishment in 1969 of two additional associate justice positions in the context of an at-large method of election, which includes a majority vote requirement in the partisan primary and numbered positions when more than one position for the court is on the ballot.

On November 1, 1964, the state appellate system included one elected intermediate court of appeals. Before us for Section 5 review is the abolishment of that court in 1969 and its replacement by the court of civil appeals and the court of criminal appeals, each elected at large, with the majority vote requirement in the primary, numbered positions, and staggered terms.

The voting changes occasioned by the proposed revised consent judgment in White v. State of Alabama also are before us for Section 5 review. In White, plaintiffs challenge under Section 2 of the Voting Rights Act, 42 U.S.C. 1973, the at-large method of electing the three appellate courts. The goal of the settlement's remedial provisions

> is to serve the compelling state interest in remedying the past and present effects of racial discrimination and current electoral conditions, which inhibit members of the plaintiff class [of all black resident citizens and electors] in electing candidates of their choice to the appellate courts of the State of Alabama. The provisions are intended as a flexible means of providing class members a meaningful and equal opportunity to elect candidates of their choice to judgeships on the Alabama Courts of Civil and Criminal Appeals and the Alabama Supreme Court. In addition, the provisions are intended to serve the beneficial goal of enhancing racial diversity in the membership of those courts.

Proposed Final Judgment, ¶ 4.

The proposed consent judgment does not make a permanent change in the at-large method of electing the state's appellate courts. Instead, its goals are to be accomplished through the establishment of an alternative appointment process for the appellate courts which is to be invoked in certain specific circumstances. The appointments are to made by the governor, which is the current practice when vacancies occur (and which is the practice when new appellate court judgeships are filled before the first election). However, under the proposed judgment, the governor would select the appointees from a list of

candidates proposed by a nominating commission created by the judgment. The commission is to be composed of two members selected to represent the plaintiff class, one selected by the Alabama Lawyers Association, one selected by the Alabama State Bar Association, and one selected by the other four (if they are unable to agree then the fifth is selected by the black caucus in the state legislature). Any qualified attorney in the State of Alabama may apply to the nominating commission.

Each intermediate appellate court is to be expanded to seven members with the initial judges to be appointed in 1996 pursuant to the procedure outlined above, and the positions thereafter would be elected pursuant to the existing system. In addition, vacancies thereafter would be subject to the special appointment procedure in certain defined circumstances. For associate justice positions on the supreme court, the special appointment procedure would be invoked in certain circumstances if a vacancy arises, if an associate justice decides not to seek re-election in the years 1996, 1998, and/or 2000, or if an additional associate justice position is established in 1998 and/or 2000. The overall goal of the proposed judgment is that, by the year 2001, at least two members of the plaintiff class or persons appointed through the special appointment procedure will be serving on each appellate court. Thereafter, if a vacancy arises on an appellate court and there are fewer than two such persons serving on that court, the governor's existing authority to appoint an interim justice or judge would be modified to require that the appointee be selected from a list proposed by the special nominating commission. The special appointment procedures provided for in the proposed judgment would terminate upon the completion of four, six-year judicial election cycles following the 1994 election, unless extended by the court in White. In addition, during the term of the judgment, plaintiffs may seek further relief or the state may seek to terminate the judgment based upon circumstances specified in the judgment.

In analyzing these matters, we begin by reviewing the legislatively enacted changes without reference to the provisions of the revised consent judgment. The consent judgment is provisional in that it still awaits review by the court in White. In addition, our conclusions with respect to the legislative changes will then inform our judgment as to the necessity and adequacy of the proposed consent judgment changes.

There currently is one black person, the Honorable Ralph Cook, serving on the nine-member supreme court. He was appointed by the governor in 1993 after the first black person to serve on that court, the Honorable Oscar Adams, retired in mid-term. Justice Cook is up for election for the first time this year. Justice Adams also gained his position initially by appointment

(in 1980) and was elected in 1982 and 1988. No other black persons have run for positions on the supreme court. No black persons have been appointed to either the court of civil appeals (which currently has three members) or the court of criminal appeals (which currently has five members), and no black persons have run for these courts without the benefit of being an appointed incumbent.

Elections at all levels in the state generally are characterized by racially polarized voting. We have repeatedly found this to be the case in past Section 5 reviews, most recently on a statewide basis in interposing an objection, on March 27, 1992, to the state's 1992 congressional redistricting plan. As reflected in the stipulations filed by the plaintiffs and defendants in White as an attachment to the proposed consent judgment, courts also have found polarized voting in numerous Section 2 and Fourteenth Amendment dilution lawsuits. Most black elected officials in the state are elected from black majority districts.

Our analysis indicates that polarized voting extends to judicial elections. In 1991 and 1993, the Attorney General interposed Section 5 objections to the establishment of additional circuit court judgeships in four circuits based on the conclusion that the at-large method of electing these judgeships, in the context of polarized voting and other electoral factors, denied black voters an equal opportunity to elect candidates of their choice. In SCLC v. Evans, 785 F. Supp. 1469 (M.D. Ala. 1992), vacated, No. 92-6257 (11th Cir. Feb. 28, 1994), reh'g en banc granted, 1994 Westlaw 93271 (11th Cir. Mar. 23, 1994), a Section 2 challenge to the at-large system for Alabama trial court judges, plaintiffs' expert presented convincing evidence of polarized voting in black-white election contests in the challenged circuits.

As noted, only one black person has faced election for the appellate courts, the Honorable Oscar Adams. Our analysis indicates that, in the 1982 runoff, he narrowly defeated a white opponent in a racially polarized election that was marked by racial campaign appeals. In 1988, he faced opposition only in the general election, and, like all other Democratic appellate court candidates in modern history, he was elected. Our analysis indicates that black candidates have not run for the courts of appeals, and no other black candidate has run for the supreme court, because of the perception among potential black candidates and black political leaders that running as a nonincumbent would be a futile exercise under the existing at-large system. See Westwego Citizens for Better Govern. v. Westwego, 872 F.2d 1201, 1208-1209 & n.9 (5th Cir. 1989) (courts should consider the possibility that black candidates "'don't run because they can't win'" in evaluating dilution evidence).

There are a number of other electoral factors relevant to an evaluation of the existing at-large election system. Black voters suffer from a history of discrimination in education, employment, and other areas which has created a significant disparity between the socioeconomic status of the state's black and white citizens. This disparity in turn inhibits the ability of black voters to participate on an equal basis in state elections. Black voters also have been the victims of a history of discrimination in voting, which has continued past the adoption of the Voting Rights Act to the present day. The use of a majority vote requirement and numbered positions enhances the discriminatory nature of the at-large system.

Also relevant are the circumstances that have inhibited or burdened potential black appellate court candidates. The state has a recent history of racial discrimination in legal education. In addition, campaigns for an appellate court position require the financial means to campaign on a statewide basis and, we understand, potentially may cost hundreds of thousands of dollars.

Alternative election systems exist that would fairly reflect black voting strength in the state. For example, with respect to the proposed five-member courts of appeals, the black population is sufficiently large and geographically concentrated that, in a fairly drawn single-member district plan, blacks would constitute a majority of the voting age population in one district. Similarly, with respect to the supreme court, a fairly drawn districting plan would include two associate justice districts in which blacks would constitute a majority of the voting age population.

Accordingly, without the proposed consent judgment, the voting changes enacted by the submitted legislative acts are not entitled to Section 5 preclearance.

The settlement is predicated on the view that, in appellate court elections, incumbency (through election or appointment) provides substantial benefits to candidates. In that regard, seven of the 17 present members of the appellate courts initially obtained their positions through a gubernatorial appointment. Since 1968 there have been 26 appointments to the appellate courts but only two have been of black lawyers. Thus, it is asserted that black voters (who historically have favored black candidates as their candidates of choice) will gain an equal opportunity to elect candidates of their choice by temporarily establishing the above-described structured appointment system. Once the appointments occur, it further is asserted that the electoral factors that render the at-large election system discriminatory will be diminished such that, in future elections, black voters will be able to elect candidates of their choice in a manner reflective of their voting strength in the state.

Our analysis leads us to conclude that the state has met its burden of demonstrating that the changes occasioned by the revised proposed consent judgment (as amended on April 14, 1994) do not have the purpose or effect of minimizing black voting strength. Nor do they present a clear violation of Section 2 of the Act. Accordingly, the Attorney General does not interpose any objection to the changes occasioned by the revised proposed consent judgment. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar any litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine these changes if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. 28 C.F.R. 51.41 and 51.43.

However, although the consent judgment changes are ripe for review under Section 5, McDaniel v. Sanchez, 452 U.S. 130 (1981), 28 C.F.R. 51.22, the contingent nature of these changes precludes them from providing a basis for preclearing the legislatively enacted changes at this time. Accordingly, on the behalf of the Attorney General, I must interpose an objection to the changes for the supreme court occasioned by Act No. 602 (1969) in the context of the existing at-large method of electing the court, and I must interpose an objection to the changes for the courts of criminal and civil appeals occasioned by Act Nos. 987 (1969), 75 (1971), and 346 (1993) in the context of the at-large method of electing these courts. Should the court in White grant final approval to the proposed judgment, the state at that time should seek reconsideration of this objection and the Attorney General would be prepared to grant the requisite preclearance. 28 C.F.R. 51.45. Of course, under Section 5 the state also has the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the legislative changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.

Finally, we note that the Section 5 court in White is poised to address the question whether injunctive relief should be granted based on the unprecleared status of appellate court judgeships that are up for election this year. See Clark v. Roemer, 111 S. Ct. 2096 (1991). The proposed consent judgment contemplates that elections will go forward this year under the at-large election system. We understand that the court will seek to conduct its review of the proposed judgment at the earliest possible time. In these exceptional circumstances, where the Attorney General has precleared the changes occasioned by the proposed judgment and is prepared to preclear the legislative changes if the court grants its approval to the judgment, we believe that it would be appropriate to defer granting injunctive relief and thus allow the primary election for the unprecleared

positions to be conducted. Should the court not approve the judgment before this year's general election, the issue of granting injunctive relief should be revisited. We will be present at the oral argument to be held tomorrow, April 15, in White to respond to any questions the court may have in this regard.

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. Because of the pendency of this matter before the court in White, we are sending by facsimile transmission copies of this letter to the court and counsel of record.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

DEC 13 1994

Marc Givhan, Esq.
Deputy Attorney General
State of Alabama
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

Dear Mr. Givhan:

This refers to the State of Alabama's request that the Attorney General reconsider and withdraw the April 14, 1994, objection interposed under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the voting changes for the state supreme court and the courts of criminal and civil appeals occasioned by Act Nos. 602 (1969), 987 (1969), 75 (1971), and 346 (1993). We received your request for reconsideration on October 14, 1994.

As you are aware, in the April 14 determination letter, the Attorney General granted Section 5 preclearance to the changes affecting the state appellate courts occasioned by the proposed consent judgment (as revised on April 14, 1994) in White v. State of Alabama, CV 94-T-94-N (M.D. Ala.) (preclearance was granted to subsequent revisions to the consent agreement on September 20, 1994). The Attorney General further indicated in the April 14 letter that the proposed consent judgment would remedy the concerns with the legislatively enacted changes but since implementation of the consent judgment was contingent on judicial approval, it did not provide a basis for preclearing the legislatively enacted changes at that time. Finally, the state was advised that "[s]hould the court in White grant final approval to the proposed judgment, the state at that time should seek reconsideration of this objection and the Attorney General would be prepared to grant the requisite preclearance."

On October 6, 1994, the district court in White approved the consent judgment. The district court's ruling has been appealed to the Eleventh Circuit.

The state's reconsideration request is based solely on the approval of the consent judgment by the district court. However, the fact that the judgment now has been appealed means that the judicial approval process is not yet final. In these circumstances, it would not be appropriate to withdraw the objection and, accordingly, on behalf of the Attorney General, I must decline to do so at this time.

We recognize the paramount interest of the state and the United States in avoiding disruption of the administration of justice in Alabama. By declining to withdraw the objection at this stage in the judicial process, we do nothing to affect the status of the consent judgment or the status of the legislatively enacted changes. In light of the district court's approval of the consent judgment and the Attorney General's continuing commitment to preclear the legislatively enacted changes at such time as the judgment obtains final judicial approval, there has been no change to the "extreme circumstance" cited by the Section 5 court in White as the basis for denying injunctive relief, in its order of April 15, 1994.

Should you have any questions about this matter, please telephone Special Section 5 Counsel Mark Posner of the Voting Section, at (202) 307-1388.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division