U.S. Department of Justice

Civil Rights Division

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

December 23, 1991

David R. Boyd, Esq.
Balch & Bingham
P. O. Box 78
Montgomery, Alabama 36101

Dear Mr. Boyd:

This refers to Act No. 91-558, which creates a second district court judgeship in Marshall County, and the implementation schedule for that change; and Act No. 91-640, which creates a 25th circuit judgeship in the Tenth Circuit for the Bessemer Division, an eighth circuit judgeship in the 15th Circuit, and a third circuit judgeship in the 19th Circuit, and the implementation schedule for those changes 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 initial submission on October 24, 1991; supplemental information was received on November 4 and 5, 1991.

With regard to the changes occasioned by Act No. 91-558 and 91-640, to the extent that the latter statute provides for the creation of a third circuit court judgeship in the 19th Circuit, 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).

We are unable to reach a similar conclusion with regard to the changes occasioned by Act No. 91-640 pertaining to the creation of an additional circuit judgeship in the 10th Circuit and in the 15th Circuit. As you are aware, private plaintiffs in pending litigation have alleged that the system for electing

judges in some judicial circuits and districts in Alabama, including the 10th and the 15th Circuits, 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.). The trial in that case, in which the United States is participating as amicus curiae, was conducted on December 2-11, 1991, and the court has requested that post-trial briefs be filed by January 15, 1992.

Our analysis of the at-large, numbered post electoral system and the context in which it has operated in the 10th and 15th Circuits is based upon a number of factors, including evidence at trial. For example, expert testimony was presented to show that the state has maintained the at-large, numbered post system, at least in part, for racially discriminatory reasons. Expert testimony also was presented concerning the presence of racially polarized voting in both the 10th and 15th Circuits. We note that in the 10th Circuit (Jefferson County), which has a 35 percent black population based upon the 1990 Census, only three of the twenty four circuit judges are black, the third having been only recently appointed by the governor. None of the eleven district court judges are black. Similarly, in the 15th Circuit (Montgomery County), which has a 41.6 percent black population, only one of the seven circuit judges is black and none of the three district court judges is black.

Notwithstanding the evidence of racially polarized voting, black voters in both Jefferson and Montgomery Counties have been able to elect candidates of their choice to local governing bodies when alternatives to the at-large electoral system have been implemented. See, e.g., Taylor v. Jefferson County, CA-84-C-1730-S (N.D. Ala. Oct. 31, 1985) (consent decree requiring 5 single-member districts); Hendrix v. McKinney, 460 F. Supp. 626 (M.D. Ala. 1978). Furthermore, evidence presented at the trial demonstrates that the black population in both the 10th and 15th Circuits is sufficiently large and geographically compact to permit the creation of single-member districts, subdistricts or smaller multimember districts, some of which would have effective black voting age majorities. Thus, there appear to be readily discernible alternative methods of electing the twenty four circuit judges in the 10th Circuit and the seven circuit judges in the 15th Circuit that would afford black voters with an equal opportunity to participate in the electoral process and to elect judicial candidates of their choice.

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 the new judgeship positions for the 10th and 15th Circuits, we do find ourselves unable to conclude that the state has carried its burden of showing the absence of the proscribed purpose in creating those positions 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. 91-640 insofar as they pertain to the 10th and the 15th Circuits.

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 some of the submitted changes occasioned by Act No. 91-640 pertain to judicial circuits 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 Sandra S. Coleman (202-307-3718), a Deputy Section Chief in the Voting Section.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable Truman Hobbs
United States District Judge