U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General — *Washington, D.C. 20035*

November 16, 1993

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

Dear Ms. Oswald:

This refers to Act No. 93-882 (1993), which creates a sixth judicial position in the Sixth Judicial Circuit to be elected at large by numbered post with a majority vote requirement and provides an implementation schedule therefor 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 submission on September 17, 1993; supplemental information was received on September 20, 1993.

We have considered carefully the information you have provided, as well as 1990 Census data, comments received from interested parties, and information contained in the state's earlier submissions of the creation of additional judicial positions in other judicial circuits and the record and decision in SCLC v. Evans, 785 F. Supp. 1469 (M.D. Ala. 1992), appeal docketed, No. 92-6257 (11th Cir.). In the Sixth Judicial Circuit, which is coterminous with Tuscaloosa County, black persons constitute 26 percent of the population and 23 percent of the voting age population. Our review of the election analyses and other evidence in the SCLC case leads us to conclude that voting in interracial contests in Tuscaloosa County is characterized by racial polarization. In addition, it appears that potential candidates of choice of black voters may have been deterred from running for the circuit court due in part to this polarization and the existing at-large election system. Indeed, prior to a recent appointment to the bench, no black person had served as a circuit court judge in the Sixth Circuit.

In contrast, black voters in Tuscaloosa County have been able to elect candidates of their choice to county governing bodies when, as the result of voting rights litigation, the county has implemented alternatives to an at-large electoral system. See, e.g., Thomas v. Tuscaloosa County, C.A. CV 84-P-1041-W (N.D. Ala. March 14, 1985) (consent decree); Dillard v. Crenshaw County, C.A. No. 87-T-1234-N (M.D. Ala.). Thus, there are available alternatives for electing circuit judges that would afford black voters an equal opportunity to participate in the electoral process and to elect judicial candidates of their choice.

We have analyzed the state's decision to expand the at-large election system in the Sixth Judicial Circuit against this backdrop. We recognize that the state has asserted that it has an interest in adding a sixth judgeship to the Sixth Circuit in order to relieve an overcrowded court docket. However, serving that interest need not be tied to expanding the at-large method of electing Sixth Circuit judges, which has not provided black voters an equal opportunity to participate in the process and to elect judges, as opposed to an alternative election system that would fairly recognize black voting strength. Under Section 5, 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).

Prior to the state's adoption of the change at issue here, the Attorney General had interposed Section 5 objections to similar expansions of the at-large systems in other judicial circuits in the state. On November 8 and December 23, 1991, the Attorney General interposed objections to the creation of additional judicial positions, to be elected at large by numbered post and majority vote, in the Tenth (Jefferson County), Fifteenth (Montgomery County), and Twentieth (Henry and Houston Counties) Judicial Circuits. On May 26, 1992, after considering the state's request for reconsideration based, in part, upon an examination of the SCLC case, the Attorney General declined to withdraw either of the earlier objections.

The SCLC case involves a challenge brought under Section 2 of the Voting Rights Act, 42 U.S.C. 1973, by private plaintiffs to Alabama's system for electing circuit court and district court judges in certain areas of the state, including the Sixth Circuit, at issue here, as well as the Tenth, Fifteenth and Twentieth Circuits, at issue in our prior Section 5 determinations noted above. The district court's ruling that the challenged at-large system does not violate Section 2 is currently on appeal before the United States Court of Appeals for the Eleventh Circuit. As an initial matter, the United States is not a party in the SCLC litigation and is not bound by decisions in private Section 2 litigation in determining whether Section 5 preclearance requirements have been met. See, e.g., City of Richmond v. United States, 422 U.S. 358, 373-374 n.6. (1975).

Moreover, the reasoning of the district court's opinion in the SCLC decision appears to be at odds with the Eleventh Circuit's recent opinion in Nipper v. Smith, 1 F.3d 1171 (11th Cir. 1993). For example, the district court in SCLC found that voting in the Sixth Circuit was not racially polarized, relying primarily on elections involving only white candidates. By contrast, the Eleventh Circuit held in Nipper that such reliance is misplaced when elections involving interracial contests show "pervasive polarization." 1 F.3d at 1180. In addition, the Nipper decision holds that using the percentage of black lawyers as a basis for determining minority electoral success, as the district court did in SCLC, improperly discounts the "history of racial discrimination and the exclusion of black citizens from access to legal education." 1 F.3d at 1183.

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 the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In addition, a submitted change may not be precleared if its implementation would lead to a clear violation of Section 2. See 28 C.F.R. 51.55(b). In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the proposed expansion of the existing at-large, numbered-post, majority-vote system for electing candidates to the Sixth Judicial Circuit meets the preclearance requirements. Therefore, on behalf of the Attorney General, I must object to the submitted changes.

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 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 additional judicial position for the Sixth Circuit continues to be legally unenforceable. Clark v. Roemer, 111 S. Ct. 2096 (1991); 28 C.F.R. 51.10 and 51.45.

Because the proposed implementation schedule is directly related to the objected-to change, the Attorney General will make no determination with respect to that change at this time. 28 C.F.R. 51.22(b).

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 Donna M. Murphy (202-514-6153), an attorney in the Voting Section.

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division