U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

April 25, 1990

Honorable Michael J. Bowers
Attorney General
State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Dear Mr. Attorney General:

This refers to the following matters which are before the United States Attorney General for review under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, with respect to the State of Georgia:

1. the January 2, 1990, request for reconsideration of the June 16, 1989, objection to the establishment of 48 additional superior court judgeships, the specification of the date on which the first full term of office commenced for each new judgeship, and the creation of two additional superior court circuits and the district attorney positions to serve those circuits;

2. the January 2, 1990, submission of five additional superior court judgeships created in 1989, and the specification of the date on which the first full term of office commences for each judgeship; and

3. the April 3, 1990, submission of five additional superior court judgeships created in 1990, and the specification of the date on which the first full term of office commences for each judgeship.

On March 2, 1990, we received the information necessary to complete our review of the reconsideration request and to complete the January 2, 1990, submission.

The changes now before the Attorney General for Section 5 review date back to 1967 and involve a far-reaching expansion of the superior court system undertaken over a period of twenty-three years. This includes over one-third of the system's 148 elective judgeships, and involves 30 of the 45 superior court

circuits in the state. Thus, while we have been fully cognizant of the state's request for expedited review, the comprehensive nature of these submissions, as well as the importance of the changes to the state and its minority citizens, has required a considerable amount of time for us to give the kind of careful consideration due a submission of such proportions.

At the outset, we note that the expansion of the superior court system occasioned by the establishment of the additional judicial positions must be analyzed in the context of the method utilized to elect the judges. City of Lockhart v. United States, 460 U.S. 125, 131-132 (1983). See also McCain v. Lybrand, 465 U.S. 236, 255 n.27 (1984). In Georgia, superior court judges are elected at large within each circuit. A majority vote requirement exists in both the primary and general elections, and candidates must run for a designated position which precludes voters from using the technique of single-shot voting. According to the 1980 Census, only one circuit (the Atlanta Circuit) is majority black in population, and no circuit is majority black in voting age population. In addition, our information is that incumbency plays an important role in the electoral process for the superior court in that incumbents rarely are defeated. We understand that for about three-fourths of the current judges such incumbency was first established by their having been appointed to the bench.

We note further that most interracial judicial elections have occurred in the Atlanta Circuit, and these elections appear generally to exhibit a pattern of polarized voting. See also Busbee v. Smith, 549 F. Supp. 494, 499 (D.D.C. 1982), sum. aff'd, 459 U.S. 1166 (1983). No black ever has defeated a white incumbent superior court judge and, while black incumbents on the superior court also have been elected, they have never faced opposition. Only five blacks ever have served on the superior court in this circuit; three obtained gubernatorial appointments and two gained their seats in contests in which no incumbent was running (a circumstance which appears rarely to occur in superior court elections). The result is that only three of the eleven sitting judges are black although the circuit is 51 percent black in population.

Outside the Atlanta Circuit, only three blacks ever have served on the superior court, and these three all initially were appointed to the bench. Two of the three were then opposed in subsequent elections, and both elections appear to have been characterized by polarized voting. In addition, since there are few judicial elections to analyze outside the Atlanta Circuit, it is appropriate to consider contests for other elected offices in these circuits. Our review of a broad range of evidence in this regard indicates that polarized voting generally prevails in all

of the superior court circuits now under review and there is a consistent lack of minority electoral success in at-large elections. Thus, it appears that, in the totality of the circumstances, black voters in these circuits have a limited opportunity to elect their preferred candidates, even when blacks enjoy the advantages of incumbency by initially having been appointed to the bench.

Two features which are of particular import in the superior court electoral system are the majority vote and designated post requirements. It is well recognized that these requirements, acting in tandem, tend to minimize black voting strength in an at-large system. See, e.g., City of Rome v. United States, 446 U.S. 156 (1980). Indeed, there is substantial information indicating that the majority vote requirement was adopted in 1964 by the state precisely for that invidious purpose; the designated post requirement was adopted in the same legislation. The state has advanced no persuasive nonracial reason for continuing the use of these features, especially since there appear to be alternative methods for electing superior court judges which would not similarly minimize and submerge black voting strength.

In addition, the state has not shown how its interests are served by circuitwide elections in many of the circuits now at issue where the at-large election feature is in apparent violation of Section 2 of the Voting Rights Act. Thornburg v. Gingles, 478 U.S. 30 (1986). While a state may have more flexibility under Section 2 in justifying the at-large election of judges than it does with respect to other elected officials, we look to the submitting authority to proffer persuasive justifications. Here, it has not done so.

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, and preclearance also must be denied where a clear violation of Section 2 is found to exist. See Georgia v. United States, 411 U.S. 526 (1973); Procedures for the Administration of Section 5 (28 C.F.R. 51.52 and 51.55(b)). In this connection, we in particular cannot ignore the substantial information which has come to our attention suggestive of the racially discriminatory purpose underlying the adoption of a major feature of the present system - the majority vote requirement and, possibly, the designated post as well. As the Supreme Court has noted, "an official action, ..., taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the [Voting Rights Act]." City of Richmond v. United States, 422 U.S. 358, 378 (1975).

In light of these considerations, therefore, I cannot conclude, as I must under the Voting Rights Act, that the state has carried its burden of showing that the expansion of an

electoral system, which includes the restrictive majority vote and designated post features, through the additional judgeships under review here meets the preclearance standards. Accordingly, on behalf of the Attorney General I must decline to withdraw the June 16, 1989, objection to the 48 additional judgeships and the related changes concerning the dates on which terms of office commenced, and also must object to the ten judgeships established in 1989 and 1990, and the dates on which terms of office are to commence.

With respect to the creation of two additional circuits (Alcovy and Houston) and the district attorney positions therefor, our analysis indicates that these changes have met the preclearance standards. Accordingly, on behalf of the Attorney General, the objection to these changes is withdrawn.

As you are aware, the state retains the right under Section 5 to seek a declaratory judgment from the United States District Court for the District of Columbia that the changes for which Section 5 clearance has been denied do not deny or abridge the right to vote on account of race or color. However, until a declaratory judgment is obtained or the objection is withdrawn, these changes continue to be legally unenforceable. 28 C.F.R. 51.10. In that regard, we would underscore the Court's observation in Brooks v. State Board of Elections, C.A. No. CV288-146 (S.D. Ga.), that the objection in no way implicates the validity of the actions taken by the judges who have been serving in the unprecleared judgeships. Memorandum Opinion and Order, at 21-22 (Dec. 1, 1989). We are fully aware of the importance of the additional judgeships at issue to the proper functioning of the Georgia judicial system, and we will continue to work with the court and the parties in Brooks to assure that those needs are met consistent with the requirements of Section 5.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the State of Georgia plans to take regarding these matters. If you have any questions concerning this letter, you may feel free to telephone Mark A. Posner, an attorney in the Voting Section (202-724-8388).

Because the status of the submitted changes is at issue in Brooks v. State Board of Elections, we are providing a copy of this letter to the court in that case.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable Phyllis A. Kravitch
United States Circuit Judge

Honorable B. Avant Edenfield
United States District Judge

Honorable Dudley H. Bowen, Jr.
United States District Judge

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

August 30, 1993

Honorable Michael J. Bowers
Attorney General
State of Georgia
40 Capitol Square, S.W.
132 Judicial Building
Atlanta, Georgia 30334

Dear Mr. Attorney General:

This refers to the voting changes occasioned by the settlement agreement and proposed consent decree in Brooks v. Georgia State Board of Elections, No. CV288-146 (S.D. Ga.), that would change the State of Georgia's current system of electing supreme court, court of appeals, superior court and state court judges on an at-large basis with designated posts and a majority vote requirement to a system of gubernatorial appointments and retention elections, as well as to the submission of voting changes occasioned by 40 statutes pertaining to various state courts set forth in Attachment A and the request for reconsideration of the objections interposed by the Department on June 16, 1989, April 25, 1990, June 7, 1991, and October 1, 1991, to the addition of 60 superior court judgeships and one state court judgeship, specified in Attachment B. We received these submissions pursuant to Section 5 of the Voting Rights Act of 1965 and the request for reconsideration on April 2, 1993. Your responses to our June 1, 1993, request for additional information were received on June 29 and July 1, 1993. Since that time, the state has provided additional supplemental information on several occasions in response to questions arising subsequent to our June 1, 1993, written request for additional information.

This also refers to Acts 1181 and 1382 (1992) which create additional judicial positions, to be elected at large by majority vote for designated posts, and the implementation schedules therefor in the Dougherty and Griffin Circuits of the superior court. These changes were submitted to the Attorney General on

June 1, 1992. Information responsive to our July 31, 1992, request for additional information was received on April 2, June 29, July 1, and August 11, 1993.

This also refers to the voting changes occasioned by Act 225 (1993) relating to the Gwinnett County state court, which was submitted to the Attorney General on May 17, 1993; and Acts 377 and 183 (1993) relating to the Brooks and McIntosh County state courts, which were submitted to the Attorney General on May 19, 1993. Supplemental information relating to these changes was received on June 29, July 1, and August 11 and 12, 1993. This also refers to Act 914 (1988) relating to the Clayton County state court, which was submitted to the Attorney General on August 12, 1993; and Acts 660 (1971), 1115 (1978), 401 (1979), 425 (1981), 875 (1982), 432 (1983), 347 (1984), 828 (1984), 360 (1987), 1004 (1988), 931 (1988), and 176 (1989) relating to the Cobb County state court, which were submitted to the Attorney General on August 13, 1993. The specific voting changes occasioned by all state laws referenced in this paragraph are set out in Attachment A.

Finally this refers to Acts 362 (1983) and 625 (1987) relating to the Gwinnett County state court, which were submitted to the Attorney General on April 2, 1993. Our analysis indicates that the voting changes occasioned by these two state acts received the requisite preclearance on May 25, 1990. Accordingly, no further determination as to these changes by the Attorney General is required or appropriate under Section 5. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.35).

We have carefully considered the information you have provided, as well as information from other interested parties and from the cases of Brooks v. Georgia State Board of Elections, supra, State of Georgia v. Reno, No. 90-2065 (D.D.C.), and United States v. State of Georgia, C.A. No. 1:90-cv-1749-RCF (N.D. Ga.), which have been pending for several years. The submitted changes to appointment/retention election systems for selecting judges are actions that the state has agreed to take as part of a settlement agreement and proposed consent decree in the Brooks v. Georgia State Board of Elections litigation, which provides that the changes in method of selection are conditioned upon "the State of Georgia receiving preclearance with regard to the addition of all judgeships created by statutes enacted by the General Assembly."

As a preliminary matter, we note that questions have been raised concerning the authority under state law of the Governor and Attorney General of Georgia to implement the voting changes embodied in the settlement agreement and proposed consent decree. See Cheeks v. Miller, C.A. No. E-03952, and Ehrhart v. Miller, C.A. No. E-03833, (August 6, 1992) vacated on other grounds, Cheeks v. Miller, and Ehrhart v. Miller, 262 Ga. 687, 425 S.E.2d 278 (1993). We have reviewed these changes based on your representation as the state's chief legal officer that there is such authority, and we are unaware of any explicit state law provision to the contrary.

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, a submitted change shall not be precleared if its implementation would lead to a clear violation of amended Section 2 of the Voting Rights Act. See 28 C.F.R. 51.55. The submitted settlement agreement and proposed consent decree would effect a comprehensive change in the selection of judges serving on four "levels" of the Georgia state bench, including the Georgia superior courts.

We have previously found that, under the current election system, black voters in the 30 circuits to which objections have been interposed "have a limited opportunity to elect their preferred candidates, even when blacks enjoy the advantages of incumbency by initially having been appointed to the bench." We also have concluded previously that "there is substantial information indicating that the majority vote requirement was adopted in 1964 by the state precisely for [the] invidious purpose" of minimizing black voting strength in at-large elections such as those for superior court judgeships. We have noted that the designated post requirement used in superior court elections was adopted in the same legislation as this suspect majority vote requirement.

The state's long history of discrimination, including discrimination in legal education and the legal profession, has a substantial and continuing impact on the state's current system of selecting judges. For example, as of 1991, the average superior court judge had more than 28 years of legal experience, which means that the average superior court judge would have entered law school in 1960, at a time when the University of Georgia still refused to admit black students. The continuing effects of this discriminatory history are further evidenced by the fact that, today, only nine black judges sit on the superior court bench (out of 145) and only seven black judges sit on the

state court bench (out of 86). This situation, however, does reflect a substantial improvement in the last two years, as seven of the sixteen black superior and state court judges have been appointed to the bench by Governor Miller since 1991. The unique circumstances relating to Georgia's judicial selection system thus provide a firm evidentiary basis on which to construct a remedial program such as the one which is before us.

The proposed change in method of selection addresses the discriminatory impact of (and possible discriminatory motivation for) the current judicial selection system by providing for minority input on the state's Judicial Nominating Commission and by using the gubernatorial appointment power to ensure that, by December 31, 1994, 25 of the judges serving on the superior court bench (approximately 15 percent) will be black. In addition, under the settlement agreement and proposed consent decree, the state is obligated to appoint five additional black judges to the superior or state court bench by the end of 1994. These affirmative provisions of the settlement agreement and proposed consent decree resulted from extensive review, discussion, and negotiation with the Brooks plaintiffs under the guidance of United States District Judge Anthony Alaimo. A number of details concerning implementation of the settlement agreement and proposed consent decree have yet to be resolved, and in a number of areas, Judge Alaimo may be called upon to exercise his discretion to resolve certain issues. Thus, there may be some future changes in the consent decree that will affect voting and thus trigger Section 5 review. But with regard to the change to a system of gubernatorial appointments and retention elections in the state supreme court, court of appeal, superior courts, and state courts, we conclude that under the unique circumstances present here, the state has met its burden of proof under Section 5. Therefore, the Attorney General does not interpose any objection to the changes in the method of selecting judges for the state supreme court, the court of appeals, the superior courts and the state courts.

We also have reviewed our Section 5 objections specified in Attachment B, in response to your request for reconsideration based upon the changes in method of selection contemplated by the settlement agreement and proposed consent decree in Brooks. In light of these changed circumstances we have concluded that the concerns we previously entertained in the listed circuits and state court have been addressed. Accordingly, pursuant to Section 51.48(c) of the Procedures for the Administration of Section 5 (28 C.F.R.), the objections interposed to the voting changes identified in Attachment B will be withdrawn upon

approval of the proposed consent decree in Brooks by the United State District Court. In this regard, we note that future changes affecting judicial elections in the Georgia appellate, superior, and state courts, including the creation of new judicial positions, changes in candidate qualifications, or changes in the procedures for retention elections, will be subject to Section 5 review in light of the then-existing circumstances.

With regard to the voting changes specified in Attachment A, and the changes occasioned by Acts 1181 and 1382 (1992) relating to the Dougherty and Griffin Circuits of the superior court, we note that by this letter a new system for selecting judges in the Georgia superior and state courts has received Section 5 preclearance. The Attorney General, therefore, does not interpose any objection to these changes. However, we note that the changes precleared by this letter now constitute the judicial selection system for the Georgia state courts which is legally enforceable under Section 5. Therefore, failure to implement these changes would constitute a voting change subject to review under Section 5. With regard to all of these submitted changes, including the changes in the method of selecting the supreme court, courts of appeals, superior court, and state court judges, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See 28 C.F.R. 51.41.

Finally, we should note that in reviewing the submitted changes under Section 5 we have not evaluated allegations received during the course of our review to the effect that implementation of certain aspects of the proposed consent decree may occasion an illegal "racial classification." City of Richmond v. J.A. Croson Company, 488 U.S. 469, 499 (1989). As you know, similar contentions have been raised in the Brooks case and we expect they will be addressed in the course of the court's review of the proposed consent decree in that case.

If you have any questions concerning this letter, you should call J. Gerald Hebert (202-307-6292) or Donna M. Murphy (202-514-6153) of our staff.

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

cc: Jonathan Weintraub, Esq.
Gwinnett County Attorney

Carol Calloway, Esq.
Assistant County Attorney
Cobb County

David Walbert, Esq.
Walbert and Hermann

Laughlin McDonald, Esq.
Kathleen Wilde, Esq.
American Civil Liberties Union

ATTACHMENT A
(State Court Changes)

State Court	Act No.	Unprecleared Changes
Brooks	377 (1993)	create court establish office - 1 judge implementation schedule
Chatham	931 (1976)	second judgeship at large method of election designated posts implementation schedule
Chattooga	819 (1972)	referendum to abolish court abolition of state court
	475 (1983)	create court establish office - 1 judge establish office - solicitor implementation schedule referendum election candidate qualifications terms of office
Cherokee & Forsyth	802 (1974)	create court establish office - 1 judge establish office - 1 solicitor implementation schedule candidate qualifications terms of office
Clayton	229 (1979)	second judgeship at-large method of election implementation schedule
	914 (1988)	third judgeship implementation schedule
Cobb	660 (1971)	establish 1 solicitor position majority vote requirement term of office candidate qualifications compensation implementation schedule
	853 (1974)	third state ct. judgeship designated posts implementation schedule
	840 (1978)	fourth state ct. judgeship implementation schedule

ATTACHMENT A
(Continued)

State Court	Act No.	Unprecleared Changes
Cobb (cont'd)	1115 (1978)	establish two elected magistrates at-large method of election designated posts majority vote requirement candidate qualifications implementation schedule
	401 (1979) 425 (1981) 875 (1982) 432 (1983)	increase magistrate compensation
	869 (1982)	fifth state ct. judgeship implementation schedule
	828 (1984)	consolidation of traffic court w/ state court (5 state court judges; 2 assoc. judges (formerly magistrates)) compensation for assoc. judges
	347 (1984) 1004 (1988)	increase compensation for assoc. judges
	360 (1987) 931 (1988) 176 (1989)	increase solicitor compensation
Dekalb	1184 (1976)	third judgeship implementation schedule
	758 (1985)	fourth judgeship implementation schedule
	524 (1987)	fifth judgeship implementation schedule
Dougherty	1333 (1974)	change city court to state court compensation for judge
Floyd	1262 (1972)	referendum to abolish court
Fulton	1004 (1976)	create court (from existing civil and criminal courts; former civil and criminal court judges become state court judges) eighth judgeship implementation schedule

ATTACHMENT A
(Continued)

State Court	Act No.	Unprecleared Changes
Gwinnett	425 (1977)	"re-create" court establish office - 1 judge establish office - 1 solicitor candidate qualifications term of office implementation schedule
	225 (1993)	fourth judgeship implementation schedule
Hall	204 (1971)	vacancy procedure (special election) compensation
Houston	40 (1975)	create court establish office - 1 judge establish office - 1 solicitor establish office - 1 clerk candidate qualifications term of office vacancy procedures implementation schedule
Jeff Davis	1296 (1984)	create court establish office - 1 judge establish office - 1 solicitor term of office (solicitor) implementation schedule
Johnson	777 (1984)	abolish court
Laurens	781 (1980)	abolish court
McIntosh	183 (1993)	create court establish office - 1 judge establish office - 1 solicitor implementation schedule
Muscogee	269 (1987)	second judgeship at large method of election implementation schedule
Rockdale	539 (1987)	create court establish office - 1 judge implementation schedule

ATTACHMENT A
(Continued)

State Court	Act No.	Unprecleared Changes
Tift	195 (1971)	create court establish office - 1 judge establish office - 1 solicitor establish office - 1 clerk terms of office candidate qualifications vacancy procedure (spec. election implementation schedule
Troup	1278 (1976)	qualifications for judge

ATTACHMENT B
(Previously Interposed Objections)

Circuit	Act No.	Unprecleared Changes
Alapaha	340 (1977)	second judgeship
Alcovy	849 (1972)	first judgeship
	1082 (1978)	second judgeship
Atlanta	802 (1971)	tenth judgeship
	850 (1974)	eleventh judgeship
	845 (1984)	twelfth judgeship
	332 (1989)	thirteenth judgeship
	1113 (1990)	fourteenth judgeship
	25 (1991)	fifteenth judgeship
Atlantic	810 (1971)	second judgeship
	860 (1982)	third judgeship
	329 (1989)	fourth judgeship
Augusta	457 (1971)	fourth judgeship
	1336 (1986)	fifth judgeship
	1107 (1990)	sixth judgeship
Brunswick	101 (1967)	second judgeship
	1078 (1980)	third judgeship
	743 (1987)	fourth judgeship
Chattahoochee	616 (1969)	third judgeship
	336 (1977)	fourth judgeship
	331 (1989)	fifth judgeship
Cordele	1209 (1980)	second judgeship
Coweta	849 (1974)	second judgeship
	1350 (1980)	third judgeship
	1108 (1990)	fourth judgeship
Dougherty	858 (1974)	second judgeship
Dublin	725 (1980)	second judgeship
Eastern	515 (1979)	fourth judgeship
	330 (1989)	fifth judgeship
	27 (1991)	sixth judgeship
Flint	503 (1975)	second judgeship
	1112 (1990)	third judgeship
Griffin	293 (1977)	second judgeship
	315 (1987)	third judgeship
Houston	303 (1969)	first judgeship
as amended by Act 587 (1971)		
	851 (1984)	second judgeship
Macon	772 (1981)	fourth judgeship
Middle	244 (1977)	second judgeship
Northern	247 (1977)	second judgeship
Ocmulgee	746 (1968)	second judgeship
	479 (1979)	third judgeship
	1113 (1990)	fourth judgeship
Oconee	1108 (1976)	second judgeship
Ogeechee	1076 (1978)	second judgeship
Pataula	124 (1981)	second judgeship
South Georgia	1017 (1978)	second judgeship

ATTACHMENT B
(Continued)

Circuit	Act No.	Unprecleared Changes
Southern	183 (1969)	second judgeship
	115 (1975)	third judgeship
	328 (1989)	fourth judgeship
Southwestern	101 (1981)	second judgeship
Stone Mountain	100 (1967)	fifth judgeship
	1194 (1972)	sixth & seventh judgeships
	1339 (1986)	eighth judgeship
	911 (1988)	ninth judgeship
Tifton	978 (1980)	second judgeship
Toombs	123 (1981)	second judgeship
Waycross	857 (1974)	second judgeship
	107 (1981)	third judgeship
Western	996 (1976)	second judgeship

State Ct.	Act No.	Unprecleared Changes
Athens - Clarke Cty.	28 (1990)	second judgeship establish office - 1 clerk implementation schedules compensation