U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 17 1991

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

Dear Mr. Attorney General:

This refers to Act Nos. 22, 25, 26, and 27 (1991), which provide respectively for the establishment of an additional judgeship in the Rockdale, Atlanta, Blue Ridge and Gwinnett, and Eastern Judicial Circuits, and specify the date on which the first full term of office for each new judgeship is to commence, for the Superior Court of the State of Georgia. We received your submissions on April 8 and April 16, 1991.

We have considered carefully the information you have provided, as well as information received from other interested persons, our prior Section 5 reviews of superior court changes, and the pending Section 5 declaratory judgment action filed by the State of Georgia in the United States District Court for the District of Columbia. State of Georgia v. Thornburgh, C.A. No. 90-2065. With respect to the changes for the Rockdale, Blue Ridge, and Gwinnett Judicial Circuits, the Attorney General does not interpose any objection to the specified changes. However, 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 the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

With respect to the changes for the Atlanta and Eastern Judicial Circuits, however, we cannot reach a similar conclusion. As you know, on April 25, 1990, the Attorney General declined to withdraw the June 16, 1989, objection to the establishment of 48 additional superior court judgeships including three in the Atlanta Circuit and one in the Eastern Circuit; on the same date,

the Attorney General interposed an objection to ten subsequently created judgeships including two in the Atlanta Circuit and one in the Eastern Circuit. As set forth in our April 25, 1990, decision letter, we found that the State was proposing to expand an electoral system which, in the context of racially polarized voting patterns and the majority vote and designated post features, operated to deny to black voters an equal opportunity to participate in the electoral process and to elect candidates of their choice to office. This was especially true in view of evidence that the majority vote requirement had been adopted for the purpose of minimizing black voting strength. Subsequently, the state filed its declaratory judgment action seeking Section 5 clearance from the District of Columbia Court, and the United States, as defendant, is opposing that request.

Our review of the instant changes for the Atlanta and Eastern Circuits indicates that they are subject to the same concerns that led to the prior objections. While we are mindful of the fact that the State of Georgia disagrees with those objections, the State has offered nothing to show that the instant changes present any new or distinct preclearance issues. Accordingly, here as there I cannot conclude, as I must under the Voting Rights Act, that the state has carried its burden of showing that this additional expansion of the superior court electoral system in these two circuits meets the Section 5 preclearance standards. See Georgia v. United States, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52 and 51.55(b). Therefore, on behalf of the Attorney General, I must object to the additional judgeships for the Atlanta and Eastern Circuits and the specification of the date on which the relevant first terms of office begin.

As you know, under Section 5 the State of Georgia may seek preclearance for the proposed changes by filing a declaratory judgment action in the United States District Court for the District of Columbia, and also retains the right to 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 submitted changes for the Atlanta and Eastern Circuits continue to be legally unenforceable. Brooks v. State Board of Elections, C.A. No. CV 288-146 (S.D. Ga. Dec. 1, 1989), sum. aff'd, 111 S.Ct. 288 (1990); see also 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 Georgia plans to take concerning this matter. If you have any questions, please call Mark A. Posner, an attorney in the Voting Section, at (202) 307-1388.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

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