U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

November 12, 1991

Honorable John Hannah, Jr.
Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to Chapter No. 899 (1991), which provides the 1991 redistricting plan for the House of Representatives of the State of Texas, 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 September 12, 1991; supplemental information was received on September 17 and 23, October 29, and November 1, 4, and 8, 1991.

We have carefully considered the information you have provided, as well as Census data and information and comments from other interested persons. At the outset, we note that the state waited nearly three months before seeking the requisite preclearance under Section 5 for the House redistricting plan. Although we have found that your initial submission was not complete, in an effort to expedite our review, as you requested, we have sought additional information informally and we are providing a determination within the 60-day period following your initial submission.

The Voting Rights Act requires that the submitting authority demonstrate that the proposed change neither has a discriminatory purpose nor a discriminatory effect. 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, preclearance may not be obtained if implementation of the change would clearly violate Section 2 of the Act. 28 C.F.R. 51.55. In the case of a statewide redistricting, Section 5 requires us not only to review the overall impact of the plan on minority voters, but also to understand the reasons for and the impact of each of the legislative choices that were made in adopting the particular plan.

In making these judgments, we apply the legal rules and precedents established by the federal courts and our published administrative guidelines. See, e.g., 28 C.F.R. 51.52(a), 51.55, 51.56. For example, we cannot preclear those portions of a plan where the legislature has deferred to the interests of incumbents

while refusing to accommodate the community of interest shared by insular minorities. See, e.g., Garza v. Los Angeles County, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991); Ketchum v. Byrne, 740 F.2d 1398, 1408-09 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). Such concerns are frequently related to the unnecessary fragmentation of minority communities or the needless packing of minority constituents into a minimal number of districts in which they can expect to elect candidates of their choice. See 28 C.F.R. 51.59. We endeavor to evaluate these issues in the context of the demographic changes which compelled the particular jurisdiction's need to redistrict (id.). Finally, our entire review is guided by the principle that the Act insures fair election opportunities and does not require that any jurisdiction attempt to guarantee racially or ethnically proportional results.

Turning now to the instant submission, the state House is composed of 150 members elected from single-member districts. Accordingly, the House plan required redistricting decisions at a substantially different scale than in Texas' other statewide plans currently undergoing Section 5 review, which contain far fewer districts. In addition, the House plan was adopted several months earlier than those other statewide redistricting plans.

In terms of the state's demography, one of the most significant changes in the past decade has been the increase in the Hispanic population. From 1980 to 1990, the Hispanic share of the state's population increased from about 21 percent to 26 percent while the black share of the population remained at about 12 percent. For statewide redistricting purposes, significant Hispanic population concentrations are located in south and southwest Texas and in the urban areas of San Antonio (Bexar County), Houston (Harris County), Dallas (Dallas County) and Fort Worth (Tarrant County). There are significant black population concentrations in Houston, Dallas and Fort Worth.

There are 20 Hispanic and 13 black state representatives at this time. Most have been elected from districts in which potential minority voters predominate. Nineteen of the 20 Hispanic representatives serve districts that are over 50 percent Hispanic in voting age population and over 40 percent Hispanic in voter registration. Of the 13 black representatives, eight serve districts that are over 50 percent black in voting age population; the remainder serve districts in which the combined black plus Hispanic voting age populations comprise at least 46 percent of the district. This election history, court findings in voting rights cases, and other information in your submission have led us to examine the 1991 redistricting plan in light of the pattern of racially polarized voting that appears generally to characterize legislative elections in the state.

In addition, your submission notes that both the current and the proposed House plans are drawn (in part) by assigning a whole number of districts to the larger urban counties. Thus, the plans essentially include severable "sub-districting plans" within the overall plan.

With this background in mind, our analysis shows that the proposed Texas House redistricting plan exhibits a pattern of districting decisions that appears to minimize Hispanic voting strength through packing or fragmenting Hispanic population concentrations unnecessarily.

El Paso County, one of the most populous and heavily Hispanic counties in the state, was apportioned five districts. Two of the districts are well over 80 percent Hispanic in voting age population and Hispanics have chosen to be represented by Hispanic legislators. Because of demographic changes in the past decade, it appears that an effective Hispanic registration majority was emerging in the district located between those two districts, which currently has a white incumbent. The plan, however, reduces that district's Hispanic registration by about four percentage points. The state has offered no adequate explanation for this approach as alternatives were available that would not reduce the Hispanic population in this district.

In south Texas (the area south and southwest of Bexar County, and north of Cameron and Hidalgo Counties), the state chose to draw the district lines generally in an east-west manner. This has the effect of overconcentrating Hispanics in the southernmost districts. At the same time, the two districts (31 and 44) in the northern portion of this area have white voting age population and registration majorities. We understand that it is generally recognized that a north-south configuration would produce an additional district with a significant electoral opportunity for minority voters, and it appears that this option was rejected in large part to protect white incumbent legislators. Similarly, while five districts in Cameron and Hidalgo Counties have substantial Hispanic populations, the Hispanic share of the voting age population and registration in the one district with a white incumbent was reduced. It appears that the asserted interest in keeping the City of Harlingen entirely within this district could have been satisfied without the proposed reduction in the Hispanic share of the population in the district.

In Bexar County, the state decided to increase the number of districts from ten to eleven. While the Hispanic share of the county's population has increased from about 47 percent to almost 50 percent, the plan appears to reduce Hispanic voting strength by packing Hispanics in District 118, which is over 77 percent Hispanic in voting age population, while reducing unnecessarily

the Hispanic share of the voting age population in adjoining District 117 (from 54.8% to 50.9%). Particularly given the fact that last decade one of the state's House redistricting plans for Bexar County suffered from the same defect of packing districts with Hispanic population, Terrazas v. Clements, 537 F. Supp. 514, 541-542 (N.D. Tex. 1982), the state has not adequately explained this proposed configuration.

In Dallas County, the decision apparently was made late in the legislative process to reduce from 17 to 16 the number of districts apportioned to the county. The proposed plan includes five districts in which blacks and Hispanics combined comprise over 60 percent of the voting age population. In four of those districts blacks comprise between 46 and 55 percent of the voting age population and in the fifth district Hispanics comprise 57 percent of the voting age population. The plan appears fairly to reflect black voting strength in the county. For Hispanics, however, we are unable to reach the same conclusion. Our analysis indicates that the plan fragments the growing Hispanic population concentrations in the City of Dallas resulting in a significant reduction in the electoral opportunities for Hispanics in the existing district in that area. This fragmentation does not appear to have been necessary to create other districts in which Hispanics or blacks would have the potential to elect their chosen representatives. Indeed, it appears that the legislature was aware that relatively compact districts may be centered on the Hispanic concentrations, thus, more fairly recognizing the fast growing Hispanic population in Dallas County without adversely affecting the four districts with substantial black populations.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained with regard to the redistricting here under review. Therefore, on behalf of the Attorney General, I must object to the 1991 redistricting plan for the State House of Representatives because of the concerns relating to the proposed configurations for the areas discussed above.

Of course, as provided by 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 1991 House redistricting plan has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group and, as you are aware, the State of Texas has filed a lawsuit in which it appears to seek such relief. Texas v. United States, No. 91-2383 (PMW U.S.C.A., SS, MB) (D.D.C.). In addition, the state may request that the Attorney General reconsider the objection.

Until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the 1991 redistricting

plan for the State House of Representatives continues 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. In this regard, you should be aware that the opening of candidate qualifying pursuant to the 1991 plan would constitute a prohibited implementation of this plan. South Carolina v. United States, 585 F. Supp. 418 (D.D.C. 1984); Busbee v. Smith, 549 F. Supp. 494, 497 n.1 (D.D.C. 1982). As we recently informed the court in the pending District of Columbia litigation, we will seek an order enjoining any such illegal implementation of the plan. In addition, in view of that pending litigation, the state may not seek authorization from a state or federal court in Texas or acquiesce in an order from such a court for use of this plan absent preclearance. South Carolina v. United States, 589 F. Supp. 757 (D.D.C. 1984).

We understand that the current schedule calls for candidate qualifying to begin on December 3, 1991, for a primary election on March 10, 1992, and a general election on November 3, 1992. We believe that sufficient time remains for the state to make the necessary adjustments to the submitted plan and to obtain Section 5 preclearance for the plan so that the election may proceed on schedule under a plan that meets the requirements of federal law. Should the state decide to seek to adopt a new plan, our staff remains available to discuss further the nature of our concerns with the submitted plan; if a new plan is adopted and administrative review is sought, we are prepared to respond on an expedited basis.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas plans to take concerning this matter. If you have any questions, you should call Steven H. Rosenbaum, Deputy Chief of the Voting Section at (202) 307-3143.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division