U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

May 31, 1994

The Honorable Ronald Kirk
Secretary of State
Elections Division
P. O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to the following acts of the State of Texas, which create judgeships to be elected at large by designated position with a majority vote requirement and which were submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c:

Chapter 318 (1993), which creates a fifteenth county criminal court at law judgeship in Harris County, and

Chapter 653 (1993), which creates a third county court at law judgeship in Fort Bend County.

As to Chapter 318, we received your partial responses to our September 14, 1993, request for additional information on March 31, April 1, and May 11, 12, and 19, 1994. As to Chapter 653, we received your partial responses to our September 14, 1993, request for additional information on March 29, and May 2, 5, 10 and 19, 1994.

We have given careful consideration to the information you have provided, as well as 1990 Census data, comments received from interested persons, and information contained in the state's earlier submission of the creation of additional judicial district courts in other Texas counties and the record in relevant judicial decisions.

In Harris County, Hispanic persons constitute 22.9 percent of the total population and 20.2 percent of the voting age population. Black persons comprise 18.7 percent of the county's total population and 17.8 percent of the voting age population. Our review of Harris County's electoral history indicates that each of those minority groups is politically cohesive and that county elections are characterized by racially and ethnically polarized voting patterns.

In Fort Bend County, black persons constitute 20.3 percent of the total population and 19.2 percent of the voting age population. Hispanic persons constitute 19.5 percent of the county's total population and 17.9 percent of the voting age population. Our review of Fort Bend County's electoral history indicates that, at least in general elections, black and Hispanic voters are politically cohesive and that county elections are characterized by racially and ethnically polarized voting patterns.

The use of separate courts for election of judges of the courts at issue functions as a numbered post requirement and has the effect of eliminating the ability of minority voters to utilize single-shot voting. We further note that nomination for such judgeships is subject to the general requirement in Texas law that a successful candidate must obtain a majority of the votes cast in a party primary. Numerous federal court decisions have chronicled instances where at-large elections, numbered post requirements, and the runoff system have been adopted in Texas with clearly discriminatory motives, and where their use has produced the intended discriminatory results.

We have analyzed the state's decisions to expand the at-large election systems in Harris County and in Fort Bend County against this backdrop. We recognize that the state has asserted that it has an interest in adding the proposed judgeships in order to relieve overcrowded court dockets. However, the state has not shown that serving that interest need be tied to expanding the existing at-large method of electing the judges.

Prior to the state's adoption of the changes at issue in these submissions, the Attorney General had interposed an objection to the expansion of the at-large system in the creation of nine district court judgeships in the state. In our November 5, 1990, objection letter, we noted that a review of legislative discussions in 1989 revealed that it was commonly understood among Texas legislators that the election of district court

judges at large and by numbered post, subject to a runoff requirement, has a racially discriminatory impact. Legislative hearings in March and April of 1993 confirm the widespread view among Texas legislators that the method of electing district court judges in Texas dilutes minority voting strength.

The method of electing county criminal court and county court at law judges is virtually the same as the method of electing district court judges. Thus, it appears that in creating the courts at issue here, the state was aware that the method of electing the proposed judgeships would have a racially discriminatory impact. Nonetheless, in each case, the state decided to use this election scheme rather than an alternative method of selecting judges that would be fair to racial and ethnic minorities.

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. 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 light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the creation of Harris County Criminal Court at Law No. 15 and the creation of Fort Bend County Court at Law No. 3.

In reaching our decision, we are not unmindful of the recent decision of the United States Court of Appeals for the Fifth Circuit in League of United Latin American Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) (en banc), cert. denied, 114 S. Ct. 878 (1994), which held that the method of electing district court judges in Harris and eight other Texas counties does not violate Section 2 of the Voting Rights Act. It appears, however, that the LULAC plaintiffs litigated only a narrow issue of intent; and they did not raise that issue in the court of appeals (LULAC, 999 F.2d at 838 and n. 3). In any event, the trial in LULAC took place in 1989, several years prior to enactment of the submitted voting changes. Thus, the circumstances leading to adoption of these changes, entailing maintenance and expansion of at-large systems for electing county criminal court and court at law judges, were not addressed at that trial.

Moreover, the LULAC decisions do not affect the legal standards to be applied when jurisdictions seek preclearance of voting changes under Section 5. See, e.g., City of Richmond v. United States, 422 U.S. 358, 373-374 n.6. (1975). Thus, in light

of our conclusion that the state has failed to meet its burden of showing that the changes under submission are not designed to dilute minority voting strength, it is unnecessary to reach the question of whether use of the at-large election system with numbered posts and a majority vote requirement would violate Section 2 of the Voting Rights Act. See 28 C.F.R. 51.55.

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, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objections. See 28 C.F.R. 51.45. However, as to each of these changes, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, creation of the court in question continues to be legally unenforceable. See Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Texas intends to take concerning these matters. If you have any questions, you should call George Schneider (202-307-3153), an attorney in the Voting Section.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division