Civil Rights Division

Louisiana obj

Office of the Assistant Attorney General

Washington, D.C. 20530

September 23, 1988

Kenneth C. DeJean, Esq.
Chief Counsel
P. O. Box 44005
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This refers to Act 23, H.B. No. 315 (1970), which provides for an additional judgeship in the 22nd Judicial District and a special election therefor; Act 801, S.B. No. 270 (1987), which creates an additional judgeship for each of the three judicial districts in the Third Circuit Court of Appeals and an additional circuitwide judgeship in the Second Circuit Court of Appeals, and provides special elections therefor; and Act 200, H. B. No. 451, (1988), which changes the special election date under Act 801 (1987), for the State of Louisiana 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 the information to complete your submission of Act 23 on August 23, 1988 and of Acts 801 and 200 on August 19, 1988. In accordance with your request, expedited consideration has been given these submissions pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.34).

This also refers to our letters of August 31, September 4, September 14, and September 29, 1987, which requested additional information concerning the voting changes relating to other judicial election districts as identified on Attachment A for the State of Louisiana, submitted to the Attorney General on July 1, 2, 6 and 31, 1987, pursuant to Section 5. Our records indicate that we have not received your response with regard to these matters.

We have considered carefully the information you have provided, as well as information from the Census and other interested parties. In addition, we have reviewed the findings of the federal district court in Clark v. Roemer, No. 86-435-A (M.D. La., orders of August 10, 15, and 31, 1988), dealing with the election of judges in the State of Louisiana. We note the court's finding that the existing at-large method of election, with

designated posts and a majority vote requirement, results in a violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, in the Second and Third Circuits, including each of their election subdistricts, and in each of the other judicial districts identified in Attachment A. The court did not, however, make a discrete finding of a Section 2 violation regarding the existing election system in the 22nd Judicial District. However, the court found that elections throughout the State of Louisiana and in each of its judicial districts were characterized by racially polarized voting.

With regard to the instant changes in the Second and Third Circuits and those identified in Attachment A, the state is seeking to add elective judgeship positions under an election system that has been found to violate Section 2 of the Voting Rights Act. Likewise, with regard to the proposed redistricting of the 10th Judicial District, the resulting election method for the district is one which the court has found to violate Section 2. Thus, in the circumstances existing in Louisiana, these proposed judgeship positions and the submitted boundary line change cannot be implemented except in the context of a racially discriminatory election method.

With regard to the adoption of designated posts in the First Circuit, we note that the black proportion of the population in each of the three districts within the First Circuit is at a level that would permit black voters an opportunity to elect a candidate of their choice, absent anti-single-shot voting devices. In the context of racially polarized voting that exists in the area, the imposition of designated posts, which prevents minority voters from utilizing the technique of single-shot voting, effects a retrogression in the position of minority voters within the meaning of Beer v. United States, 425 U.S. 130, 146 (1976) even aside from the court's finding in Clark that the implemented election system in Districts 2 and 3 of the First Circuit, including the use of the unprecleared numbered posts, violates Section 2 of the Voting Rights Act.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has no discriminatory purpose or effect. See Georgia v. United States, 411 U.S. 526 (1973); see also 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 of the Voting Rights Act. See 28 C.F.R. 51.55(b). In light of these principles and the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the changes under Act 801 (1987) and Act 200 (1988), the proposed designated posts in the First Circuit, the proposed redistricting of the 10th Judicial District, and the other changes enumerated in Attachment A meet the Act's preclearance requirements. Therefore, on behalf of the Attorney General, I must object to the implementation of those changes.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. In addition, Section 51.45 of the guidelines permits you 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 effect of the objection by the Attorney General is to make the implementation of the changes under Act 801 (9187) and Act 200 and the changes identified in Attachment A legally unenforceable. See also 28 C.F.R. 51.10.

With regard to the proposed change in the 22nd Judicial District, the Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an objection comes to his attention during the remainder of the sixty-day review period. See also 28 C.F.R. 51.41 and 51.43.

In interposing no objection to the additional judgeship in the 22nd Judicial District, we are not unmindful that the late submission of a proposed remedial single-member districting plan likely prevented the court from making a specific finding of a Section 2 violation in the 22nd Judicial District, based on the court's criteria for issuing its amended findings of fact. We note also that the court in Clark, although not finding a discrete Section 2 violation in the 22nd Judicial District or in other challenged districts in which voting changes are pending our review, did find that the state's election method for judges produced a systemic violation of Section 2. In addition, and as noted earlier, the court recognized the existence of racial bloc voting in judicial elections throughout the state, including those in the 22nd Judicial District, and it is well recognized generally that the use of a majority vote requirement and anti-single-shot provisions, such as numbered posts, enhances the opportunity to discriminate against minority voters in an at-large electoral system characterized by racially polarized voting. Thornburg v. Gingles, 478 U.S. 30, 45 (1986) (citing S. Rep. No. 417, 97th Cong. 2d Sess. 28-29); see also City of Rome v. United States, 446 U.S. 156, 184 & n.19 (1980) (citing U.S. Comm'n on Civil Rights, The Voting Rights Act: Ten Years After 206-07 (1975)). In these circumstances, our review has raised concerns that the existing election method in the 22nd Judicial District, as well as in other multi-member judicial districts, may indeed violate Section 2, and

attorneys in our Voting Section will continue to look at these issues to determine whether further action of that nature may be appropriate.

Finally, our understanding of the court's decision in Clark is that the state may hold scheduled elections on October 1 for any judicial position that pre-dates the Voting Rights Act or that has received the requisite Section 5 preclearance. The court has, however, directed the state to fashion a remedy consistent with the court's findings. As we read those findings, preclearance of the additional judgeship in the 22nd Judicial District, or in any other district challenged in Clark, does not relieve the state of its responsibility to consider appropriate remedial adjustments in those districts, where such action is necessary to afford black voters an opportunity to participate on an equal basis with white voters and to elect candidates of their choice. Such adjustments may include not only the use of single-member districts but such other corrective measures as the use of limited or cumulative voting schemes and the elimination of restrictive election features, such as anti-single-shot voting devices and the majority vote requirement, that impede minority participation.

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 Louisiana plans to take regarding these matters. If you have any questions concerning this letter, you may feel free to call Lora L. Tredway, Section 5 Attorney-Reviewer in the Voting Section (202-724-8290).

Because the status of the submitted changes is at issue in Clark v. Roemer, supra, we are providing a copy of this letter to the court in that case.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc: Honorable John V. Parker
United States Chief District Judge

ATTACHMENT A

Judicial District Court Districts	Voting Changes
1st	Act 117 (1973), which creates an additional judgeship and a special election therefor
4th	Act 480 (1970), which creates an additional judgeship position
6th	Act 515 (1974), which creates an additional judgeship and a special election therefor
9th	Act 158 (1971), which creates an additional judgeship
	Act 19 (1974), which creates an additional judgeship and a special election therefor
	Act 515 (1974), which creates an additional judgeship and a special election therefor
10th	Act 635 (1979), which redistricts the boundaries of the district
14th	Act 40 (1967), which creates an additional judgeship and a special election therefor
	Act 332 (1975), which creates an additional judgeship and a special election therefor
	Act 322 (1980), which creates an additional judgeship
15th	Act 360 (1970), which creates an additional judgeship and a special election therefor
	Act 43 (1976), which creates an additional judgeship
	Act 322 (1980), which creates an additional judgeship

Judicial District Court Districts	Voting Changes
16th	Act 104 (1968), which creates an additional judgeship and a special election therefor
18th	Act 86 (1968), which creates an additional judgeship and a special election therefor
20th	Act 34 (1981), which creates an additional judgeship
21st	Act 9 (1974), which creates an additional judgeship and a special election therefor
23rd	Act 464 (1968), which creates an additional judgeship and a special election therefor
24th	Act 78 (1968), which creates an additional judgeship and a special election therefor
	Act 674 (1968), which creates an additional judgeship
	Act 503 (1974), which creates two additional judgeships and the special elections therefor
27th	Act 158 (1971), which creates an additional judgeship and a special election therefor
29th	Act 94 (1970), which creates an additional judgeship
Orleans Parish Criminal District Court	Act 236 (1972), which creates an additional judgeship and a magistrate
	Act 143 (1975), which creates five additional judges and decreases terms from 12 to 6 years
Orleans Parish Civil District Court	Act 129 (1975), which creates five additional judgeships and decreases terms from 12 to 6 years

Circuit Courts of Appeals	Voting Changes
First Circuit, Districts 1, 2, and 3	Act 305 (1975), which adopts designated posts (divisions) for all judgeships
First Circuit, Districts 2 and 3	Act 114 (1975), which creates an additional judgeship in each district and special election therefor and provides an implementation schedule
Second Circuit	Act 114 (1975), which creates an additional circuitwide judgeship
Third Circuit	Act 114 (1975), which creates an additional circuitwide judgeship

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

SEP 17 1990

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
State of Louisiana
P. O. Box 94125
Baton Rouge, Louisiana 70804-9125

Dear Ms. Rougeou:

This refers to your request that the Attorney General reconsider and withdraw the September 23, 1988, and May 12, 1989, objections under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the voting changes identified in Attachment A for the State of Louisiana. We received your requests on June 19 and 26 and August 10, 1990; supplemental information was received July 12 and 17, 1990.

This also refers to the voting changes identified in Attachment B for the State of Louisiana, submitted to the Attorney General pursuant to Section 5. We received your submission of Act 8 (1990) on June 19, 1990; supplemental information concerning those changes was received June 26 and July 12 and 17, 1990. We received the information to complete your submission of the remaining changes identified in Attachment B on July 17, 1990.

At the outset we begin with a recitation of some of the events which have preceded our review of all the voting changes which are before us today because those events play an important part in our consideration of these matters. You may recall that in 1987, we sent the State a number of letters requesting information concerning numerous voting changes within judicial election circuits and districts in Louisiana, including a request that the State respond to allegations that the method of electing trial and appellate court judges discriminated against minority voters. The State, however, failed to respond to our requests.

Meanwhile, in 1988, the court in Clark v. Edwards--a suit brought in 1986 by private plaintiffs challenging the method of electing judges in Louisiana--found that the method of electing trial and appellate court judges produced a "systemic" violation of Section 2 of the Voting Rights Act. By the time of the court's 1988 decision, the State still had not supplied us with the additional information we needed to analyze the voting changes in judicial circuits and districts then pending before us. Consequently, we used the record and findings from the Clark lawsuit to analyze the voting changes that were then pending before us for Section 5 review. On September 23, 1988, an objection was interposed under Section 5 of the Voting Rights Act.

In 1989, the State again submitted voting changes to us for Section 5 review and, there again, sought Section 5 preclearance of voting changes in judicial circuits and districts that had been found by the court in Clark to be racially discriminatory or had otherwise been the subject of the Section 5 objection interposed in 1988. Thus, on May 12, 1989, a Section 5 objection was interposed to the implementation of those changes.

Later that year, in the summer of 1989, the State adopted a new election scheme, intended to remedy both the Section 2 violations found by the Clark court and the Section 5 objections interposed by the Attorney General in 1988 and 1989. However, because the proposed system created new senior judgeship positions in an apparent effort to accommodate and protect incumbent judges who might otherwise lose their seats if a racially fair election scheme were put in place, it required the approval of the voters in a state-wide referendum. As you know, that proposed scheme was disapproved by the voters in a November 1989 referendum.

Remedial proceedings in the Clark lawsuit were held earlier this year and those proceedings culminated in additional findings from the court. Clark v. Roemer, No. 86-435 (M.D. La., Orders of June 12 and July 6, 1990). On the basis of those findings alone, the State now seeks reconsideration of the previously interposed objections, as well as Section 5 preclearance of other voting changes which were either never before the court in the Clark litigation or were otherwise not before that court in the same circumstances as they are before us under Section 5. These include the 10th, 24th, 26th and 40th Judicial Districts, and the 2nd and 3rd Circuit Courts of Appeal. With regard to these judgeship positions and the proposed method of election therefor, we find the Clark decision to be inapposite because it pertains to factual circumstances in a judicial district different from the judicial district now before us for Section 5 review.

In that regard, we note that the differing factual circumstances are not insignificant. For example, one aspect of the Clark litigation involved a challenge to the method of electing judges in the 26th District. Because the State had not

obtained Section 5 preclearance of the creation of a fifth judgeship in that District, the court in Clark examined the evidence in the context of four existing judgeships. Because the State has submitted to us a proposal to add a fifth judgeship to the 26th District, however, we are reviewing the method of electing judges in that district as it would exist if five judges were being elected. This distinction is critical because the Clark court found that a sample single-member district drawn in that District by private plaintiffs did not satisfy the requirement under Thornburg v. Gingles, 478 U.S. 30 (1986), that the minority group be shown to be sufficiently large and geographically compact to constitute a majority in a single-member district. As a result, though the at-large multimember structure in the 26th District now has been found by the court in Clark not to violate Section 2 because of that finding, the court properly made no determination with regard to the method of election if five judges were to be elected from that district.

Another example of how the facts and circumstances before us differ from those which were before the court in Clark is in the 2nd Circuit Court of Appeal. In the 2nd Circuit, the claims before the Clark court involved a challenge to a mixed election system for seven judges, in which one judge was elected at large circuitwide and six judges were elected from three double-member districts. We, however, are reviewing the creation of additional judgeship positions for the 2nd Circuit in the context of proposed changes to the electoral structure: first, to an interim scheme of one circuitwide position, one double-member district and two triple-member districts; and, second, to an election scheme that subsequently will be comprised of three triple-member districts with at-large elections by designated posts, staggered terms, and majority vote. Similarly, as to the 3rd Circuit, the Clark litigation involved a challenge to a scheme of three at-large circuitwide positions and three double-member districts, while we have been asked to assess the creation of additional judgeship positions in the context of an electoral structure that provides for three at-large circuitwide positions and three triple-member districts.

The fact, then, that the Clark court has vacated some of its findings as to a violation under Section 2 does not in and of itself afford a basis for withdrawing the objection under Section 5 to the voting changes involved. Indeed, during our reconsideration of the objected-to voting changes and our review of the additional voting changes that you have submitted, you have provided us with additional information concerning the voting changes and judicial districts at issue by incorporating information contained in certain Section 5 submissions that you made in 1989 and in response to our requests during the current review period. Much of the information does not appear to have been before the court in the Clark case. For example, in analyzing voting patterns to determine whether black voters are politically cohesive and whether whites vote sufficiently as a bloc usually to defeat the choice of black voters, the court in

several instances did not have the benefit of any data concerning parishwide election contests or data by parish for contests involving a number of parishes. We have analyzed such data, and our analysis indicates a significant degree of racially polarized voting in the districts at issue. Also, we have been able to analyze information that was not before the court concerning the racial identity of federally-registered voters, as well as demographic and voting information concerning modifications to alternative election schemes that demonstrate the geographical concentration of black persons in certain judicial districts.

Nor can we overlook the fact that in the face of findings of a systemic Section 2 violation by the Clark court in 1988, and notwithstanding the interposition of far-reaching Section 5 objections in 1988 and 1989, the State has failed to adopt a racially fair election system for its trial and appellate court judges even though the Clark court has given the State ample opportunity to do so. While, as noted above, the State did propose a new election scheme in 1989, it did so in a way which was intended also to protect incumbent judges. It is also particularly telling that there is nothing in Louisiana law we are aware of which would prevent the State from simply adopting a racially fair election scheme without incorporating referendum requiring provisions such as that connected with the earlier proposal aimed at current officeholders. Thus, the State's failure and refusal to adopt any remedial measures without also seeking to protect incumbents, the vast majority of whom are white, would appear to be elevating the State's concern for protecting white incumbents over the vindication of minority voting rights.

It is also significant that in several judicial districts, the State has available to it any number of alternative election schemes in which black voters clearly would have the opportunity to elect candidates of their choice. Yet, the State has not adopted any of these alternatives. For example, with regard to the proposed redistricting of the 10th District, we note that the State proposes to carve out one parish in order to create a new single-member judicial district, the 39th District, which has a 36.4 percent black population. The State thus chose to divide the 10th District in a manner that created one majority-white, single-member district, even though a single-member judicial district could be created which would have a substantial black-majority population. While we are cognizant that the proposed boundary lines apparently are based on parishes as the basic building blocks, these lines are not jurisdictional in nature but serve merely to outline the boundaries of the districts for election purposes. Accordingly, strict adherence to this criterion results in the dilution of a cohesive black population within the proposed new districts. Moreover, the State has deviated from this criterion in devising the districts of the 5th Circuit Court of Appeal which, inexplicably, the state has chosen not to do with regard to the proposed 10th and 39th Districts.

Similarly, with regard to the 2nd Circuit Court of Appeal, which has a 34.2 percent black population, there are alternatives for electing the proposed nine judges in which black voters would have a realistic opportunity to elect candidates of their choice. Also, with regard to the 3rd Circuit Court of Appeal, which has a 23.7 percent black population, available alternatives for the proposed twelve judges would afford black voters the opportunity to elect candidates of their choice. As noted in our 1988 objection letter, such remedial alternatives would not necessarily require the State to draw single-member districts in every instance since, in a number of areas, the State could retain the multimember system utilizing limited or cumulative voting and abandoning the use of the racially discriminatory features such as numbered posts and majority vote which enhance dilution in those circuits.

In 1988, the Clark court admonished the State to "revise the [judicial election] system- to cast about for alternative procedures under which black voters would have a better chance to elect judicial candidates of their choice." Clark v. Edwards, 725 F. Supp. 285 (M.D. La. 1988). So too, in 1988, we informed the State that it had a responsibility to consider appropriate remedial adjustments to afford black voters an opportunity to participate on an equal basis with white voters and to elect candidates of their choice. Notwithstanding these suggestions, the State has steadfastly adhered to the racially discriminatory multimember scheme and has resisted efforts in the Clark case to create single-member districts. Yet, as noted earlier, single-member districts are not the only available remedy. Indeed, our September 23, 1988 letter expressly observed that other corrective measure were available to the State, such "as the use of limited or cumulative voting schemes and the elimination of restrictive election features, such as anti-single shot voting devices and the majority vote requirement, that impede minority participation." The State has chosen not to avail itself of such remedial options.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has no discriminatory purpose or effect. See Georgia v. United States, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52. In satisfying its burden, 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, supra, at 172; Busbee v. Smith, 549 F. Supp. 494, 516-17 (D.D.C. 1982); aff'd, 459 U.S. 1166 (1983). While we do not in any way question the State's need for or purpose in creating new judgeship positions, we do find ourselves unable to conclude that the State has carried its burden of showing the absence of the proscribed purpose in its insistence on maintaining and expanding the existing dilutive

system for electing candidates to those positions, a system that has been found by the court, or our analysis, to be violative of Section 2 of the Voting Rights Act. See, e.g., 28 C.F.R. 51.55(b). Therefore, on behalf of the Attorney General, I must continue the objection to the implementation of the changes enumerated in Attachment A and object to the changes enumerated in Attachment B.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the changes do not have the purpose and will not have the effect or result of denying or abridging the right to vote on account of race or color. In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objections. However, until the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the effect of the objections by the Attorney General is to continue the legal unenforceability of the changes identified in Attachments A and B. See also 28 C.F.R. 51.10.

Because this matter remains pending before the court in Clark, we are sending a copy of this letter to the court and counsel of record in that case.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable John V. Parker
Chief Judge, United States District Court

Michael M. Rubin, Esq.
Fred J. Cassibry, Esq.
Robert G. Pugh, Esq.
Kenneth C. DeJean, Esq.
John N. Kennedy, Esq.
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Harry Rosenberg, Esq.
Ernest L. Johnson, Esq.
Robert B. McDuff, Esq.
Ulysses Gene Thibodeaux, Esq.

ATTACHMENT A

Judicial District Court Districts	Objected-to Voting Changes
6th	Act 515 (1974), which creates an additional judgeship and a special election therefor
10th	Act 635 (1979), which redistricts the boundaries of the district
16th	Act 104 (1968), which creates an additional judgeship and a special election therefor
	Act 56 (1984), which creates an additional judgeship (Division G)
20th	Act 34 (1981), which creates an additional judgeship
21st	Act 9 (1974), which creates an additional judgeship and a special election therefor
	Act 56 (1984), which creates an additional judgeship (Division F)
23rd	Act 464 (1968), which creates an additional judgeship and a special election therefor
24th	Act 78 (1968), which creates an additional judgeship and a special election therefor
	Act 674 (1968), which creates an additional judgeship
	Act 503 (1974), which creates two additional judgeships and the special elections therefor
27th	Act 158 (1971), which creates an additional judgeship and a special election therefor
29th	Act 94 (1970), which creates an additional judgeship
	Act 56 (1984), which recodifies the additional judgeship under Act 94 (1970)

Circuit Courts of Appeal	Objected-to Voting Changes
First Circuit, Districts 2 and 3	Act 114 (1975), which creates an additional judgeship in each district and special election therefor and provides an implementation schedule
Second Circuit	Act 114 (1975), which creates an additional circuitwide judgeship
	Act 801 (1987), which creates an additional circuitwide judgeship and special election therefor
Third Circuit	Act 114 (1975), which creates an additional circuitwide judgeship
Third Circuit, Districts 1, 2, and 3	Act 801 (1987), which creates an additional judgeship in each district and special elections therefor
	Act 200 (1987), which changes the special election dates under Act 801 (1987)

ATTACHMENT B

Judicial Districts	Voting Changes
24th	Act 8 (1990), which creates an additional (sixteenth) judgeship
26th	Act 174 (1989), which creates an additional judgeship
40th	Sections 3(A) and 3(B) of Act 611 (1989) and Act 608 (1989)), which create an additional judgeship position (Division C)
2nd Circuit, Court of Appeal	Act 8 (1990), which creates a ninth judgeship position to be elected by designated Division C in 2nd Circuit District 3; provides for a change in method of election for 2nd Circuit judges from two elected at-large circuitwide and two elected from each district by designated divisions to three elected from each district by designated divisions, except as specified for the incumbent in the at-large position to be converted to the Division C position of Second Circuit District 2; provides that the judgeship position created by Act 801 (1987) will be elected as the designated Division C position from 2nd Circuit District 1; and provides an implementation schedule therefor