Civil Rights Division

Deputy Assistant Attorney General

Washington, D.C. 20530

April 1, 1997

The Honorable John W. Drummond
President Pro Tempore of the
South Carolina Senate
Attn: Mark Packman
Dickstein, Shapiro, Morin, & Oshinsky
2101 L Street, N.W.
Washington, D.C. 20037-1526

Dear Mr. Drummond:

This refers to Act No. R.2 (1997), insofar as it provides for the 1997 redistricting plan for the South Carolina Senate, 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 submission on February 19, 1997; the most recent supplemental information concerning your submission was received on March 25, 1997.

We have carefully considered the information you have provided, as well as Census data and information and comments from other interested persons. 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 Procedures for the Administration of Section 5, 28 C.F.R. 51.52. In Beer v. United States, the Supreme Court made clear that a voting change which diminishes "the ability of minority groups to participate in the political process and to elect their choices to office" is retrogressive and should not be precleared under Section 5. 425 U.S. 130, 141 (1976), quoting H.R. Rep. No. 94-196, p.60 (1975).

The appropriate benchmark used to determine whether a voting change makes minority voters worse off is "the voting practice or procedure in effect at the time of the submission," so long as the existing voting practice is legally enforceable under Section 5. See Procedures for the Administration of Section 5, 28 C.F.R. 51.54(b). We recognize that there may be a need to reduce minority voting strength to some extent in order to comply with the order in Smith v. Beasley, 946 F. Supp. 1174 (D.S.C. 1996), and revisions tailored to address those problems would not be unlawful under Section 5. Thus, in the circumstances of this submission, the senate redistricting plan embodied in Act No. 49 (1995), modified to address the constitutional infirmities in that plan identified by the court, constitutes the appropriate benchmark for measuring retrogression.

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. The submitted plan provides for nine districts with black voting age population majorities. The 1995 plan provides for eleven such districts. In its submission of Act No. R.2, the state acknowledges that the submitted plan reduces the black population significantly in senate Districts 29 and 37. Under the submitted plan, District 29 is reduced from 56.2 percent black in voting age population to 41.5 percent. District 37 is reduced from 55.5 percent black in voting age population to 42.6 percent. Thus, under the submitted plan, both districts no longer have black voting age population majorities. In the context of the racially polarized voting patterns that the court found to exist, see Smith, 946 F. Supp. at 1202, these reductions will significantly hinder black voters' electoral opportunities in these districts.

The state justifies these substantial reductions by asserting that they were necessary to comply with the court's order in Smith. The Smith court held that senate Districts 29, 34, and 37 were drawn with race as the predominant factor and that the state had not met the strict scrutiny test with respect to any of these districts. Thus, the court concluded that the districts violate the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, as interpreted by the Supreme Court in Shaw v. Reno, 509 U.S. 630 (1993), Miller v. Johnson, 115 S.Ct. 2475 (1995), and subsequent Supreme Court rulings construing those cases.

As noted above, a reduction in minority voting strength that is required by the United States Constitution does not violate Section 5. Indeed, we have long applied this principle in the context of voting changes made by jurisdictions in order to comply with the constitutional one-person, one-vote requirement. See Fed. Reg. 488 (Jan. 6, 1987). This same principle applies to the Equal Protection holdings of the Supreme Court since Shaw. Those holdings apply to the circumstances presented by the submission pending before us. Thus, each of the significant reductions in minority voting strength proposed by the state must be evaluated in light of the Smith decision and the particular circumstances surrounding the altered districts.

Applying these principles, we have concluded that the state has met its burden under Section 5 with respect to all but one district in the 1997 senate redistricting plan. However, with respect to District 37, we have concluded that the state has not met its burden of demonstrating that the significant reduction in black voting strength was necessary for the state to comply with the Smith court's order.

From our analysis of the geography and demographics of the area in and around the proposed District 37, it appears that there are alternative configurations that would minimize the reduction in black voting strength in District 37. Our review of the minority population concentration in this region also reveals that there were choices available to the state that would substantially address the Smith court's constitutional concerns and not significantly diminish black voting strength in neighboring senate districts.

In addition to our own analysis, we also have reviewed the alternate approach to devising districts in this area as reflected in the 1995 senate staff plan. We were not provided with sufficiently detailed data to fully analyze the senate's contentions that the staff plan does not adequately remedy the Smith court's concerns. Nevertheless, the staff plan does inform the retrogression analysis by illustrating that the inclusion of compact black population areas in neighboring Williamsburg and Dorchester Counties is one way of minimizing the diminution of black voting strength in District 37 resulting from removing population from the City of Georgetown that was in the e- district.

Further, as the state is aware, counsel for the citizen defendant-intervenors has developed and submitted an illustrative plan that includes a reasonably compact majority black District 37 that does not diminish black voting strength to the degree seen in the senate's proposed plan and does not reduce black voting strength significantly in neighboring majority black districts. That plan also would appear to substantially address the Smith court's concerns.

We have given careful consideration to the state's arguments with respect to both the 1995 staff plan and the defendant-intervenors' plan. Of course, we do not suggest here that the state must adopt either of those plans or any other particular plan. However, the illustration of the ability to create a compact district that minimizes the reduction in black voting strength precludes us from concluding that the state has met its burden of demonstrating that the significant retrogression in District 37 was necessary to address the Smith court's constitutional concerns.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state has sustained its burden of proving that as to the proposed District 37, the plan does not result in "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise" that is not required to bring the senate districts in compliance with the Equal Protection Clause of the Fourteenth Amendment. See Beer, 425 U.S. at 141. Accordingly, on behalf of the Attorney General, I must object to the 1997 redistricting plan for the South Carolina Senate.

In addition, preclearance may not be granted if implementation of the change would clearly violate Section 2 of the Act, 42 U.S.C. 1973. 28 C.F.R. 51.55. An examination of the election data for primary and general elections from 1988 through 1996 reveals the existence of legally significant racial bloc voting patterns in the District 37 area. Moreover, the Smith court found that racially polarized voting is present in all the challenged senate districts, including the District 37 area. See Smith, 946 F. Supp. at 1202. Further, as described supra, there is a compact majority black population in this area such that an additional senate district with a black voting age population majority can be created.

These factors clearly demonstrate the existence of the preconditions for a Section 2 violation under Thornburg v. Gingles, 478 U.S. 30 (1986). Additionally, the long history of official discrimination in South Carolina affecting black citizens' right to vote is undisputed, and as the Smith court found, substantial socioeconomic disparities between black citizens and white citizens persist. See Smith, 946 F. Supp. at 1203. Further, election data indicate that voter participation levels among blacks continue to lag behind those of whites in this part of the state.

Accordingly, I must also, on behalf of the Attorney General, object to the 1997 redistricting plan for the South Carolina Senate on the ground that it represents a clear violation of Section 2 of the Voting Rights Act.

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 change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia is obtained, the proposed 1997 state senate redistricting plan continues to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 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 South Carolina plans to take concerning this matter. If you have any questions, you should call Rebecca Wertz (202/514-6342), Deputy Chief of the Voting Section.

With regard to the special election schedule, we are continuing our review of this voting change and expect to make a determination on this matter by April 21, 1997.

Because the redistricting of the South Carolina Senate is at issue in Smith v. Beasley, Civil Action No. 3:95-3235-0 (D.S.C.)(three-judge court), we are providing a copy of this determination letter to the court.

Sincerely,

Isabelle Katz Pinzler
Acting Assistant Attorney General
Civil Rights Division

cc: Counsel of Record

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

May 14, 1997

The Honorable John W. Drummond
President Pro Tempore of the
South Carolina Senate
Attn: Mark Packman, Esq.
Dickstein, Shapiro, Morin, & Oshinsky
2101 L Street, N.W.
Washington, D.C. 20037-1526

Dear Mr. Drummond:

This refers to your request that the Attorney General reconsider and withdraw the April 1, 1997 objection interposed under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to the 1997 redistricting plan for the South Carolina Senate. We received your request on April 14, 1997.

We have reconsidered our earlier determination in this matter based on the information and arguments you have advanced in support of your request, along with the other information in our files and comments received from other interested persons. The senate bases its request for reconsideration primarily on the arguments set out in the senate's Memorandum in Support of the Motion to Adopt the 1997 Proposed Plan as an Interim Plan, submitted to the court in Smith v. Beasley, 3-95-3235-0 (D.S.C.), on April 14, 1997. That Memorandum incorporates essentially three arguments: (1) the Attorney General utilized the wrong benchmark in her retrogression analysis; (2) neither the 1995 staff plan nor the ACLU's illustrative plan provides an appropriate remedy for the constitutional violation identified in Smith, and thus the Attorney General erred in using these plans as part of her analysis; and (3) it is impermissible for the Attorney General to base an objection on a clear violation of Section 2.

The April 1 objection letter explained the analysis used to evaluate possible retrogression under the 1997 senate redistricting plan. Ordinarily, a proposed redistricting plan is compared to the plan that was "in effect" at the time of the submission to determine whether the change has reduced minority voting strength in a significant way. Such a reduction is termed "retrogressive" and violates Section 5. See Beer v. United States, 425 U.S. 130, 141 (1976). In circumstances such as those presented here, where certain districts in the last plan "in effect" have been found to be the result of an unconstitutional racial gerrymander, our analysis goes a step further. We must look to determine whether the reduction in black voting strength effected by the proposed remedial plan was necessary to cure the constitutional infirmities found in the existing plan. If the diminution of black voters' electoral opportunities is necessary to satisfy the Constitution, that reduction does not violate the principles of Section 5 and would not be retrogressive. However, Section 5 prohibits the state from abridging minority voting strength more than is necessary to cure the unconstitutionality.

The senate argues that the benchmark should be the state's 1984 redistricting plan. However, to use a plan from the prior decade to gauge the degree to which black voters would be "worse off" under the 1997 plan than they are now would ignore the legitimate gains in electoral opportunity by minority voters reflected in plans implemented since that time, including the existing plan (most aspects of which suffer no constitutional defects). Such an approach would contravene the very purpose of Section 5 and would not be necessary to serve the goal of requiring states to tailor their remedial efforts to curing courts' findings of unconstitutionality. In contrast, the retrogression analysis employed by the Attorney General strikes the necessary balance between the state's obligations to follow the constitutional principles enunciated in Shaw v. Reno (and the subsequent Supreme Court rulings construing it) and the Voting Rights Act's mandate to ensure that minority voters do not suffer avoidable retrogression in their ability to participate in the political process and to elect their choices to office.

The proposed plan, as set out in Act No. R.2 (1997), would have resulted in a significant reduction in black voting strength in the two majority black senate districts that were altered. In your February 19, 1997 submission, you contended that these significant reductions were necessary to remedy the court's constitutional concerns. With regard to the reduction of black population levels in Senate District 29, the state satisfied its Section 5 burden. However, with regard to Senate District 37, we concluded that the state failed to sustain its burden of demonstrating that the 13 percentage point reduction in black

voting age population was necessary for the state to comply with the Smith court's order.

The state asserts that neither the ACLU illustrative plan nor the 1995 staff plan provides an appropriate remedy for the constitutional violation identified in Smith. As clearly stated in the April 1 objection letter, the reference to the ACLU's illustrative plan was not intended to suggest that the state must adopt that plan as a remedy. Rather, the illustrative plan served the analytical purpose of demonstrating one way to configure the districts to include a reasonably compact District 37 that appears to cure the constitutional infirmities identified by the Smith court while not effecting so significant a reduction in black voting strength in that district.

It may be true that aspects of the approach taken in this alternative plan may not satisfy all of the senate's political goals or other redistricting preferences and the state, of course, remains free to apply its legitimate criteria (e.g., the senate's stated concerns over the population deviations in the ACLU plan likely could be alleviated if it chooses not to keep as many VTD's whole). Nevertheless, the senate's criticisms of this illustrative plan do not undermine our conclusion that the senate has not carried its burden of showing that the reduction in black voting strength in District 37 was necessary to address the Smith court's order. As to the 1995 staff plan, we reiterate that it served the limited role of demonstrating that the effect of removing the City of Georgetown from District 37 (to comply with the court's order) could have been minimized by including compact black population areas in Williamsburg and Dorchester Counties in District 37.

The state also argues that the objection should be withdrawn because it is impermissible for the Attorney General to base an objection under Section 5 on a conclusion that the proposed plan represents a clear violation of Section 2. That legal question was recently resolved by the Supreme Court. In Reno v. Bossier Parish School Board, ___ U.S. ___, 1997 WL 235097 (May 12, 1997), the Court held that preclearance under Section 5 may not be denied solely on the basis that the jurisdiction's new voting "qualification, prerequisite, standard, practice, or procedure" violates Section 2 of the Voting Rights Act. In light of the Bossier Parish ruling, we no longer base the objection to the 1997 plan on the conclusion that the proposed plan constitutes a clear violation of Section 2.

In light of these considerations, I remain unable to conclude that the state has sustained its burden of proving that as to the proposed District 37 the plan does not result in "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise" that is not required to bring the senate districts in compliance with the Equal Protection Clause of the Fourteenth Amendment. See Beer v. United States, 425 U.S. at 141. Thus, the state has not demonstrated that the proposed plan neither has a discriminatory purpose nor a discriminatory effect. See Georgia v. United States, 411 U.S. 526 (1973); Procedures for the Administration of Section 5, 28 C.F.R. 51.52. Therefore, on behalf of the Attorney General, I must decline to withdraw the objection to the 1997 redistricting plan for the South Carolina Senate.

As we previously advised, you may seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. Until such a judgment is rendered by that court, the objection by the Attorney General remains in effect and the proposed change continues to be legally unenforceable. See Lopez v. Monterey Co., California, 117 S.Ct. 340 (1996); Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10, 51.11, and 51.48(c) and (d).

Since the Section 5 status of the 1997 redistricting plan for the South Carolina Senate is before the court in Smith v. Beasley, C.A. No. 95-3235:0 (D.S.C.), we are providing a copy of this letter to the court and counsel of record in that case. To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the state plans to take concerning this matter.

Sincerely,

Isabelle Katz Pinzler
Acting Assistant Attorney General
Civil Rights Division

cc: The Honorable Robert F. Chapman
The Honorable Matthew J. Perry
The Honorable Joseph Anderson, Jr.

Counsel of Record