U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 10, 1992

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

Dear Mr. Secretary:

This refers to House Bill No. 2 (1992), which concerns the 1992 primary and general elections and provides for the consolidation of election precincts, nomination of candidates by political party executive committees in the event that a different redistricting plan for either house of the legislature is used for the general election than was used for the primary election, an alternative date for the state and presidential primary election, a candidate filing period for state Senate for such primary, and the rescheduling of deadlines and modification of procedures consistent with the alternative primary date, 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 January 10, 1992.

We have carefully considered the information you have provided, as well as information and comments from other interested persons. With regard to the provision authorizing the consolidation of election precincts for the 1992 primary and general elections only (H.B. 2, § 3), the Attorney General does not interpose any objection to the specified change. However, we note that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41). We also note that the provision for the consolidation of election precincts is viewed as enabling legislation. Therefore, any changes affecting voting, such as the actual consolidation of specific election precincts, which you or others may seek to implement pursuant to this Act would be subject to Section 5 review. See 28 C.F.R. 51.15.

Another provision of H.B. 2, Section 8, addresses the possibility that the 1992 general election for "either house of the legislature" may be held under a redistricting plan different than the plan used for the 1992 primary election. If that circumstance were to occur, Section 8 provides: "if a political party has no nominee for a particular office under the new plan, the political party's appropriate executive committee may nominate a candidate to appear on the general election ballot for that office." Because neither your submission nor the text of this provision explains fully the operation of this provision, we have sought informally to obtain such clarification from the state but have obtained no official, written clarification in response to our inquiries.

It appears that the legislation contemplates that there would not be a new primary election if the state obtained authorization for holding the 1992 general election under a redistricting plan other than the state House and state Senate plans used for today's primary election pursuant to the orders of the three-judge federal court in Terrazas v. Slagle, Nos. 91-CA-425 and 426 (W.D. Tex. Dec. 24, 1991). Instead of a new primary, it appears that the political party nominee for the general election would be either the person chosen in the primary from the comparable district under the court's plan or the person chosen by the party executive committee.

The state has not explained adequately why it would seek to deprive voters of the opportunity to select political party nominees in a new primary if a new redistricting plan for the state House or state Senate is authorized for use in the general election. The effect of such a decision on minority voting strength could be analyzed thoroughly in the context of a specific redistricting plan. The state, however, has chosen to seek Section 5 preclearance for Section 8 now, despite the contingent nature of the provision and regardless of the specific plan that may be involved.

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 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 with regard to Section 8 of H.B. 2. Therefore, on behalf of the Attorney General, I must object to the voting changes effected by Section 8.

Of course, as provided by Section 5, the state has the right to seek a declaratory judgment granting preclearance for the submitted change effected by Section 8 from the United States District Court for the District of Columbia. The state also 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 provisions of Section 8 of H.B. 2 continue to be legally unenforceable. Clark v. Roemer, 111 S.Ct. 2096 (1991); 28 C.F.R. 51.10 and 51.46.

Finally, the provisions of Sections 2, 5, 6 and 7 of H.B. 2 are, by their terms, contingent on the authorization for the state to use the legislatively enacted state Senate redistricting plan (i.e., Senate Bill No. 1 (1992)) for the primary election. The state, however, has been ordered to hold primary elections on March 10, 1992, under the state Senate redistricting plan drawn by the court in Terrazas v. Slagle, No. 91-CA-426 (W.D. Tex.) and has been unsuccessful in its attempts to stay those orders or to obtain authorization to use the S.B. 1 redistricting plan. Nor has the state obtained the requisite preclearance under Section 5 for the S.B. 1 plan. Accordingly, no determination by the Attorney General is required or appropriate concerning these matters. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.25 and 51.35).

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