



U. S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

September 29, 1998

The Honorable Alberto R. Gonzales  
Secretary of State  
Elections Division  
P.O. Box 12060  
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to the change in the procedures for filling certain vacancies in judicial offices from election to appointment in the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our June 1, 1998, request for additional information on July 31, 1998. Supplemental information was received on August 3 and 27, 1998.

We have carefully considered the information you have provided, as well as Census data, and information and comments from other interested persons. The state has explained that the change in filling prospective judicial vacancies occurs as a result of the state supreme court's interpretation of Texas' constitution in State of Texas ex rel. Angelini v. Hardberger, 932 S.W.2d 489 (Texas 1996). The state has indicated that it interprets the Hardberger decision to apply only to vacancies in judicial offices. Our review of the Hardberger decision under Section 5 is limited solely to that aspect of the opinion that relates to voting. See Allen v. State Board of Elections, 393 U.S. 544 (1969); Procedures for the Administration of Section 5, 28 C.F.R. 51.13. Specifically, we reviewed the proposed change from election to appointment in the procedure for filling vacancies that results from the prospective resignation of a judge. As we understand it, rather than directly electing a judge to fill a vacancy at the election that occurs between the time the resigning judge tenders his/her resignation but before he/she actually steps down, under the new procedure an interim appointment will be made by the governor, and the appointed judge will serve until the next succeeding general election.

According to the 1990 Census, the State of Texas has a total population of 16,986,510 persons, of whom 25.6 percent are Hispanic and 11.6 percent are black. The Hispanic share of the

voting age population is 22.4 percent and the black share of the voting age population is 11.0 percent. The state has fourteen court of appeals districts, three (4<sup>th</sup>, 8<sup>th</sup>, and 13<sup>th</sup>) of which have majority Hispanic population percentages (55, 56, and 63 percent Hispanic, respectively). There are no majority black court of appeals districts. Sixty eight of the state's 396 district courts are majority minority districts; of these, thirty-seven district courts have majority Hispanic voting age population percentages, but none have majority black voting age population percentages.

Our analysis indicates that under the proposed change, it is unlikely that judicial vacancies in districts with significant Hispanic voting age and/or registered voter populations will be filled in a manner that reflects the preferences of Hispanic voters commensurate with the opportunity available to those voters if the vacancy was filled by election. The governor is elected at large, by a statewide electorate in which Hispanic voters are a minority. Because the governor's constituency is substantially different than that in districts with significant Hispanic population percentages and because voting in Texas often is polarized along racial lines, voters in these districts will not have an opportunity to participate in the selection of judges under the new system similar to the opportunity they have under the current system. Moreover, there does not appear to be any mechanism or safeguard built into the judicial appointment process to allow for input from Hispanic voters, or a consistent procedure for soliciting the minority community's views with regard to potential judicial candidates.

The judicial appointment made to the fourth court of appeals district pursuant to the Hardberger decision fully demonstrates the impact of the proposed procedure on Hispanic participation opportunities. Instead of seeking input from Hispanic voters with regard to potential judicial appointees, the governor selected an Anglo appointee who had been rejected by the majority of the voters in that district in an earlier election in favor of a Hispanic candidate. Had the vacancy been filled by election, rather than by gubernatorial appointment, Hispanic voters in the fourth court of appeals district would have had an opportunity to elect a candidate of choice rather than having a judge for the past two years appointed to that seat who was not their choice. Thus, the Angelini appointment is illustrative of the effect the proposed change may have on the participation opportunities of Hispanic voters.

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); Procedures for the

Administration of Section 5, 28 C.F.R. 51.52. We recognize that the state supreme court, faced with the constitutional issues raised in the Hardberger litigation, was required to render a decision regarding the proper interpretation of state law. The state, however, has not suggested that it was prevented by the court ruling in the Hardberger litigation from providing Hispanic voters in the fourth court of appeals district meaningful input into the appointment process, which might well offset the diminution in electoral opportunity resulting from the change in vacancy filling procedure. Thus, while the state has met its burden with regard to purpose, we cannot say that the state has met its burden of showing that, in these circumstances, the change in vacancy filling procedure from election to appointment will not "lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976).

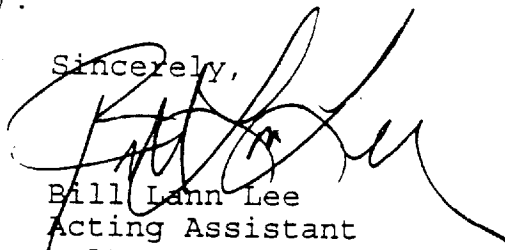
In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the change in the procedure for filling prospective judicial vacancies.

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 a discriminatory purpose nor effect. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the procedure for filling prospective judicial vacancies by gubernatorial appointment continues to be legally unenforceable. See Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

Finally, we note that the state may well be able to develop a procedure for filling prospective judicial vacancies that would satisfy the requirements of both the state constitution and the Voting Rights Act. In this regard, the objection we interpose today does not mean that the Voting Rights Act precludes the state from adopting a procedure for filling prospective judicial vacancies by gubernatorial appointment; our decision does mean, however, that in order to satisfy the Section 5 non-retrogression principle, any appointment procedure that is used must provide minority participation opportunities. Should the state decide to adopt a new procedure and to seek administrative review under Section 5, our staff stands ready 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 that the State of Texas plans to take concerning this matter. If you have any questions, you should call Zita Johnson-Betts, a Deputy Chief in the Voting Section (202-514-8690).

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Lann Lee". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Bill Lann Lee  
Acting Assistant  
Attorney General  
Civil Rights Division