Study J-1080 November 11, 1993

Memorandum 93-72

Trial Court Unification: Voting Rights Act

BACKGROUND

At the October 28-29 meeting the Commission requested further research and input from experts concerning application of the Voting Rights Act to countywide judicial elections under SCA 3. This appears to the staff to be the most intractable problem confronting us in trial court unification.

The staff has taken advantage of an offer of pro bono assistance from John E. Sparks of Brobeck, Phleger & Harrison in San Francisco, and obtained an independent analysis of the standards that would likely be applied in a challenge to countywide judicial elections under the Voting Rights Act. Mr. Sparks' memorandum is attached. Exhibit pp. 1-11.

We have sent the memorandum for comment to the two experts used by the Judicial Council in its review of this matter. They are Professor Kay Butler of South Carolina, and Mark Rosenbaum of ACLU in Los Angeles. We will include any comments they provide in a supplementary memorandum.

Also attached is a letter from Judge Robert M. Mallano, Presiding Judge of the Los Angeles County Superior Court, stating the position of the court. Exhibit p. 12. The court is opposed to SCA 3 as drafted because (1) judges who serve countywide should be elected countywide, whereas SCA 3 provides for election of unified court judges by district or branch rather than countywide; and (2) although the unified court judges should be elected countywide this will result in turmoil caused by potential Voting Rights Act violations.

SOME NUMBERS

Approximately 14% of the state trial court bench is minority, compared with 9% of the State Bar as a whole, and perhaps 7% of the bar eligible for selection to the bench. (The number of minority lawyers who have the requisite experience—10 years for superior court and 5 years for municipal or justice court—is relatively smaller than minority bar membership as a whole.) Minority

representation on the bench is approximately twice minority representation in the bar, but nowhere near minority representation in the state population (43%).

Of the 189 minority judges, 91 sit on the superior court, 95 on the municipal court, and three on the justice court. The 91 superior court judges run for election countywide; of the municipal court judges, 21 run countywide. Thus 59% of sitting minority judges now run and are elected on a countywide, rather than district, basis.

These numbers may not mean much, however, since the federal courts have applied conflicting standards. The fact that minority representation on the bench is greater than minority representation in the bar, for example, has been held relevant in one Court of Appeal case and irrelevant in another. See discussion in the Sparks memorandum at Exhibit p. 9.

Moreover, general statistics are not particularly useful for the determination of Voting Rights Act violations, which are local and fact-related. The statewide percentages of minority judges and countywide elections cannot resolve a challenge in a specific county. By way of illustration, in a recently published interview the plaintiffs' attorney in the Monterey County municipal and justice court consolidation cases comments, "The consolidation has made it virtually impossible to elect a Latino judge—even though Latinos make up 34 percent of the electorate. In those cases I think we can draw reasonably compact districts that would be supported by another recent Supreme Court decision (*Voinovich v. Quilter* (1993) 113 S Ct 1149) permitting a state legislature to create districts in which minorities are in a majority." Reuben, Voting Rights in Court, *California Lawyer* 39, 41 (November 1993).

THE SPARKS MEMORANDUM

The Sparks memorandum recites the general factors a court will consider to determine whether there is a Voting Rights Act violation. The statutory test is whether under the "totality of circumstances" there is an abridgment or denial of the right to vote on account of race or color. The Supreme Court has stated that among the total circumstances to be considered is the state's interest in linking the electoral base with the jurisdiction of the judge, balanced against such factors as bloc voting patterns, minority concentration and cohesiveness, historical election results, and other factors that may pertain to a particular county. The

Courts of Appeal have interpreted these standards inconsistently as applied to judicial elections.

The Sparks memorandum notes that under these standards powerful challenges to existing superior court election patterns could probably be brought in several counties in California. Countywide elections under trial court unification could trigger a Voting Rights Act challenge by a judge or constituency, but given the geographic dispersion of minority populations and the considerable undertaking involved to mount a Voting Rights Act case, a statewide challenge appears impractical.

The Sparks memorandum suggests that it would be quite difficult to attempt to draw electoral districts that might satisfy the Voting Rights Act. It would require an analysis of geographic racial residential patterns, voting patterns, and voting results in most counties of California. This would not only be enormously time consuming and expensive, but also impossible in the context of the current study.

The Sparks memorandum concludes that it is best to proceed with countywide electoral districts. "Given the long history of countywide election of superior court judges and the well-recognized principle that linkage of jurisdictional and electoral scopes is a politically desirable objective, it makes sense to continue that system in the consolidation plan."

As an alternative, the Sparks memorandum notes that existing electoral districts could be maintained unchanged. This could mollify a constituency that otherwise might bring a Voting Rights Act challenge. Use of existing electoral districts also could be a useful option as a fallback for any county for which preclearance of SCA 3 is required but cannot be obtained. There is no assurance that existing electoral districts satisfy the Voting Rights Act, but at least adoption of SCA 3 would not trigger a Voting Rights Act violation if existing districts are preserved.

CONCLUSION

The independent analysis by Mr. Sparks arrives at the same basic conclusion concerning the effect of the Voting Rights Act as the 1993 Judicial Council Report—countywide judicial elections under trial court unification are subject to challenge, but so are countywide judicial elections right now, as are districtwide judicial elections right now. The standards to be applied in a Voting Rights Act

challenge are contradictory, and in any case are intensely fact-related and local in application. It makes most sense to provide countywide elections for judges with countywide jurisdiction, and deal with individual cases as they arise.

The new perspective offered by Mr. Sparks is that it may be useful to preserve existing electoral districts in any county in which preclearance is required but cannot be obtained for countywide elections. The staff draft has the county board of supervisors authorized to negotiate a settlement for preclearance failures, but the existing electoral district fallback suggested by Mr. Sparks may be preferable in that it can work automatically and without disruption pending further reorganization.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

MEMORANDUM

TO: Nat Sterling

FROM: John E. Sparks

DATE: November 10, 1993

SUBJECT: Voting Rights Act

The question you have raised is what impact, if any, the standards of Section 2 of the Voting Rights Act may have on the proposed consolidation of the California Superior and Municipal Courts.

Perspective.

Assuming that the consolidation plan provides that municipal court judges presently elected by municipal district will thereafter be superior court judges with jurisdiction throughout the county and subject to election on a countywide basis, a challenge could be made under Section 2 of the Voting Rights Act (42 U.S.C.§1973) that the plan has the effect of diluting the rights of one or more racial minorities to elect members of its race to be judges. Because municipal judges had theretofore been elected from smaller districts, it might be possible to show on the basis of historical voting patterns within particular districts and counties that one or more minority judges who had been elected from a district or districts with a high racial minority population might not be electable on a county wide basis because of patterns of majority bloc voting within the county. It might also be possible to show that bloc

voting patterns had deprived minorities of the opportunity to be elected superior court judges on a county wide basis. If such a showing were made and all the requisite findings were entered (see below), a possible remedy would be to require that one or more of the judges be elected from smaller, racially concentrated districts within the county in question.

While the consolidation plan might trigger a challenge from one or more judges or constituencies, the present system of countywide election of superior court judges is equally vulnerable or invulnerable to attack under Section 2, depending upon bloc voting patterns, minority concentration and cohesiveness, historical election results and other factors that may pertain to any particular county. The Supreme Court has recognized that the state has a legitimate interest in maintaining a link between the area of jurisdiction of an elected judge and the area of residence of the electorate and that this is a factor in analysis of the totality of circumstances that must be considered in application of the results test under Section 2. Houston Lawyers' Ass'n. v. Attorney General of Texas, 111 S. Ct. 2376, 2380 (1991). It is open and notorious that the reasons for adopting a consolidation plan have everything to do with state finance and efficiency and nothing to do with consideration of minority representation in judicial elections. Hence, there does not appear to be any legal imperative arising from Section 2 of the Act that should prompt California to change its system of countywide election for superior court judges simply because more of them are to be created by elimination of municipal court judges. To provide for district elections in an

attempt to conform with the standards of Section 2 would require an analysis of geographic racial residential patterns, voting patterns and voting results in most of the counties of California, for there certainly could be no assurance that the existing municipal districts conform with Section 2 standards. Such an undertaking would be impossible within the time consraints that presently govern consideration of the consolidation plan. However, retention of the existing municipal court districts for election of the superior court judges newly minted by the consolidation plan could mollify constituencies that might otherwise bring a challenge under Section 2. In addition, this approach could avoid potential problems for the three or four counties that may be required to secure preclearance of changes in election procedures under Sections 3 or 5 of the Act. (The likelihood of obtaining any such county preclearances is beyond the scope of this Memorandum.)

Analysis of Section 2 Standards.

As originally enacted in 1965, Section 2 of the Voting Rights Act provided as follows:

> No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color. 79 Stat. 437.

The intent and purpose of Section 2 were coextensive with the coverage provided by the Fifteenth Amendment. In Whitcomb v.

Chavis, 403 U. S. 124 (1971), The Court held that a violation occurred if the "results" of any qualification or standard were to abridge the right of a minority to vote because of race. In Mobile v. Bolden, 446 U.S. 55, 60,61 (1980), a plurality of the Court held that there was no violation of either the Fifteenth Amendment or Section 2 absent proof of intentional discrimination. Thereafter in 1982, Section 2 was amended to provide, in part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . ."
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subdivision (a). . . . The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. (42 U.S.C. §1973, emphasis ours.)

Under the amended statute, proof of discriminatory intent is no longer required to establish any Section 2 violation. Chisom v. Roemer, Infra at 2363.

In Thornburg v. Gingles, 478 U.S. 30 (1986), the Court addressed a claim by black citizens of North Carolina that a voter redistricting plan for election of members of Congress violated Section 2 because it resulted in the dilution of black citizens' votes in six multimember districts and a seventh single member district. The District Court sustained the claim as to all seven districts, and the State appealed directly to the Supreme Court. In an opinion by Justice Brennan, The Court affirmed in all districts but one and set out the standards to be applied in a dilution challenge to a multimember voting district. As a threshold the plaintiff must establish that a bloc voting majority is usually able to defeat candidates supported by a politically cohesive, geographically insular minority group. Three circumstances are preconditions for such a finding (478 U.S.at 50-51):

(1) The minority group must be sufficiently large and geographically compact to constitute a majority in a single member district.

(2) The minority group must be politically cohesive. (This may be proved by "showing that a significant number of minority group members usually vote for the same candidates" (id. at 56).

(3) The white majority must vote sufficiently as a bloc to cause it usually to defeat the minority's preferred candidate.

("And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' rises to the level of legally significant white bloc voting" (Ibid.).)

The Court elaborated the foregoing standards by suggesting that (1) a pattern of bloc voting over a period of time is more probative than the results of a single election; (2)if elections are usually polarized , the fact that racial polarization is not present in one or a few elections does not negate bloc voting; (3) the success of a minority candidate does not necessarily prove that the district did not experience polarized voting in that election if special circumstances such as incumbency or lack of an opponent explain the result. (Id. at 57.) In rejecting various of the State's contentions, the Court held that it need not be shown that voting patterns are caused by race, as it is sufficient that the patterns may be correlated with race (id. at 63), and that the voting patterns need not be determined primarily by the voters' race, i.e. that the minority is more strongly influenced by other factors such as low incomes, menial jobs, etc. (id. at 64-65).

Because of the use of the word "representatives" in subsection (b), some lower federal courts determined that judicial elections were not covered by Section 2 The Supreme Court (6 to 3 with a dissenting opinion by Justice Scalia, joined by the Chief Justice and Justice Kennedy) laid this contention to rest in Chisom v. Roemer, 111 S. Ct. 2354 (1991), as applied to a system of electing Lousiana Supreme Court Justices from a multi-parish district, comprised of one parish in which more than half

the registered voters are black and three others in which over three fourths of the voters are white. In a companion case, Houston Lawyers' Ass'n. v. Attorney General of Texas, 111 S. Ct. 2376 (1991), the same majority of the Court extended the ruling of Chisom v. Roemer, supra, to apply to the county wide election of trial court judges in certain Texas counties. In that case the District Court had entered judgment in favor of the plaintiffs, and the Court of Appeals for the Fifth Circuit reversed (902 F. 2d 293), holding in part that because a trial judge is a single office holder exercising jurisdiction independently from other judges serving on the same court, the state has a compelling interest in linking jurisdiction and elective base for judges acting alone and that the election of such judges is immune from the voter dilution requirements of Section 2. In rejecting this theory, the Supreme Court held that the state's interest in "maintaining a link between a district judge's jurisdiction and the area of residency of his or her voters" is a "legitimate factor to be considered " among the "totality of circumstances" in determining whether a Section 2 violation has occurred, but that that interest "does not automatically, and in every case, outweigh proof of racial vote dilution." (111 S. Ct. at 2381.)

Two recent Court of Appeals decisions illustrate the inconsitent application of Section 2 standards in the context of judicial elections. In Nipper v. Smith, 1 F. 3d 1173 (11th Cir. 1993), plaintiff black citizens of Duval County, Florida, brought a suit under Section 2 challenging the method of at large circuitwide and countywide election of judges to the circuit

court and county court. The District Court entered judgment for the defendants, holding (a) that plaintiffs failed to establish the existence of polarized voting and (b) that the totality of circumstances did not establish that the voting community is driven by racial bias. The Court of Appeals reversed and remanded for the District Court to adopt appropriate remedies. The Court of Appeals rejected a finding of the District Court that elections involving black candidates were "stale" and its reliance primarily on elections involving white candidates. "[I]t is clear that a consistent showing of polarization involving black and white candidates cannot be rebutted by evidence that black voters' candidates of choice sometimes win when only white candidates are running." (Id. at 1180.) The Court of Appeals also rejected the District Court's analysis that an election in which two black candidates lost could be excluded on the grounds that the opponents were incumbents, concluding that the District Court's analysis had stood the special circumstance language of Gingle on its head. In holding that the District Court had erroneously applied the totality of circumstances test, The Court of Appeals noted that "this circuit remains divided on the issue . . . whether defendants can raise a lack of racial bias defense under the totality of circumstances after plaintiffs have satisfied the threshold Gingles factors." (Id. at 1182.) The Court of Appeals found it unnecessary to resolve that question because the plaintiffs had met the threshold Gingles requirements and the factors relied on by the District Court in finding an absence of racial bias were erroneous. Among the factors rejected: (1) The legislature had

no discriminatory purpose; (2) there are a high number of black judges in comparison with black lawyers; (3)Blacks were registered to vote in the same proportion as whites; (4) an absence of candidate slating processes and racial appeals; and (5) evidence of elected officials' responsiveness to minority needs.

League of United Latin American Citizens V. Clements, 999 F. 2d 831 (5th Cir. 1993) involves a subsequent decision on remand from the Supreme Court's opinion in Houston Lawyers' Ass'n. v. Attorney General of Texas, Supra. A three member panel (986 F. 2d 728) affirmed the District Court' findings of discrimination in eight out of nine counties.. On rehearing en banc, the court in an opinion by Judge Higginbotham, concurred in by five other judges, with four judges dissenting, reversed the District Court and held that the Attorney General does not have authority to settle the case over objections by the Chief Justice of Texas. The Opinion holds: (1) There is no violation if partisan considerations rather than race best explain voting patterns; (2)Texas has a substantial interest in maintaining linkage between the jurisdiction and electoral base of its judges; (3) evidence of the small number of eligible minority group members is relevant; and (4) in the totality of circumstances, the evidence of voter dilution is not sufficiently substantial (because of insubstantiality of proof that minority-preferred candidates lost "on account" of race) to outweigh the State's interest in maintaining linkage.

An article in October-November 1992 Judicature reports that there are several pending suits challenging judicial

selection procedures in several states, including Alabama, Georgia, Indiana, Missouri, New Mexico and New York. Some challenge systems that are based on merit selection, even though it is generally thought that appointive officials are not subject to the Voting Rights Act. The parties to a Section 5 suit in Georgia have agreed to a settlement that would gradually replace an election system with merit selection by a judicial nominating committee, which will have one or more black members. Suits have been settled in Arkansas and Illinois by creation of subdistricts for election of trial judges with county wide jurisdiction.

Conclusion.

Although the standards under Section 2 of the Voting Rights Act are still evolving, it seems likely that under standards enunciated in Thornburg v. Gingles powerful challenges to the existing county wide election of superior court judges could be brought in several counties in California. Given the geographic dispersion of minority populations, a statewide challenge would not seem practicable. In either event , the mounting of a Section 2 case is a considerable undertaking requiring a well-financed private plaintiff or the Government.

Adoption of a consolidation plan that includes countywide election of judges presently elected in districts could trigger one or more Section 2 challenges, but there is no assurance that the existing districts would pass muster under the standards of the Act.

Given the long history of countywide election of superior court judges and the well-recognized principle that linkage of jurisdictional and electoral scopes is a politically

desirable objective, it makes sense to continue that system in the consolidation plan. To undertake the creation of statewide judicial districts immune to Section 2 challenge would be an enormously time consuming and expensive undertaking. If consolidation is to be achieved in a timely fashion, serious consideration of possible problems under the Voting Rights Act arising from the traditional method of electing superior court judges in California should be deferred.

A caveat is the possible effect of preclearance requirements under Sections 3 or 5 of the Act, which have reportedly been imposed on a few California Counties. (For example, there is reportedly pending litigation under the Voting Rights Act against Monterey County in the Federal Court for the Northern District of California, which focuses on Monterey's preclearance requirements.) Preclearance under either section can be achieved if the U.S. Attorney General does not object to a change in procedure within 60 days after submission. If the Attorney General objects, court proceedings must be initiated by the county to obtain clearance. It would presumably be possible to avoid that problem by retaining the existing districts for election of the judges elevated from the superseded municipal courts at least in those counties. An investigation should be conducted to determine the circumstances of any such county preclearance requirements with a view to making an assessment of the impact of elimination of municipal districts upon the possible election of minority judges and its relationship to the circumstances that gave rise to the preclearance requirement.

The Superior Court
LOS ANGELES, CALIFORNIA 90012
CHAMBERS OF
ROBERT M. MALLANO
PRESIDING JUDGE

TELEPHONE
(213) 974-5562

November 4, 1993

Mr. Nathaniel Sterling
Executive Secretary
Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Re: SCA 3 Meeting - November 18-19, 1993

Dear Mr. Sterling:

It is my understanding that the Law Revision Commission is meeting in Los Angeles on November 18 and 19, in order to obtain the input of the Southern California legal community regarding SCA 3. In anticipation of this meeting, I would like to convey to you the position of the Los Angeles Superior Court.

The Los Angeles Superior Court is strongly opposed to SCA 3, because it poses many serious problems including but not limited to:

1) It would significantly impact judicial elections resulting in the turmoil that will be caused by potential violations of the Voting Rights Act; and

2) It would alter the present integrity of the county courts by establishing districts that do not respect county boundaries, thus diminishing the input and influence of the local community in the judicial system.

Although our Court is strongly opposed to SCA 3, we still feel that input from the Los Angeles Superior Court is essential before the Commission makes any evaluations or recommendations on SCA 3.

We look forward to sharing our ideas and concerns with you.

Yours truly,

Robert M. Mallano

Robert M. Mallano
Presiding Judge

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