Texas Senate
Select Committee on Legislative Redistricting

Senator Bob Glasgow
Chairman

November 29, 1990

Mr. Hector Garcia
American GI Forum of the U. S.
1315 Bright
Corpus Christi, Texas 78405

Dear Mr. Garcia:

On October 26, 1990, Texas Legislative Council staff and their consultants met with representatives of the Department of Justice to discuss redistricting and preclearance. The Council graciously allowed me to send Laura McElroy, my committee general counsel, to participate in the meeting. I found her memo describing the issues discussed to be quite informative, and thought that you would want to read it.

Please feel free to contact my redistricting staff with any questions or comments pertaining to this memo or to any redistricting items of interest.

Very truly yours,

Bob

Bob Glasgow

BG/CR/db
Enclosure

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Date: **November 8, 1990**

To: **Senator Glasgow**

From: **Laura McElroy**

Re: **Legislative Council and Consultants Meet With Justice Department in Washington, October 26, 1990**

On Friday, October 26, I attended a meeting set up by the Legislative Council with the Department of Justice ("Justice") to discuss submission of Texas' redistricting plan to Justice under the preclearance provisions in Section 5 of the Voting Rights Act.

Those present:

Justice Department Attorneys: Sandra Coleman, Deputy Chief, Voting Section; **Jerry Hebert**, Acting Section Chief, Voting Section; and Voting Section Attorneys **Bob Berman** and **Gaye Hume**.

Senate: Laura McElroy, General Counsel, Senate Redistricting Committee

Legislative Council: Jeff Archer and Steve Smith, Attorneys; Debbie Irvine and Karen White, Technical staff; David Richards, consultant on litigation matters; and Mike Rogers and Mike Morrison, consultants on legal issues.

Morning Session: Section 5 Submission and Preclearance Issues.

Debbie Irvine asked most of the questions. Bob Berman represented the Justice Department. Main points discussed:

- **What exactly is a "plan?" which should be kept and possibly submitted to Justice?**

This question was discussed during both meetings. The answer seems to be as follows: Don't ignore any plan, however unsophisticated, as long as it is seriously proposed, unless it is obvious that the plan would not preclear Justice. Do not limit recordkeeping to plans presented before the committees.

The Legislative Council and Committee staff must have an organized system of recording the plans and of maintaining communication with the Senators on any plans informally submitted to them.

The question was not addressed as to whether there should be a line drawn between plans offered by oral testimony only and plans submitted in writing. There could be detailed oral testimony which might constitute a plan, with ideas as to which precincts would be in a certain district, while some written suggestions might not be a plan. However, it is clear that, for instance, an opinion expressed during a hearing that a certain county should not be split, without more detail, is not a plan.

Bob Berman during the morning meeting suggested that the plans be put into categories, even if they number 10,000. Certain well organized plans could be sent to Justice and others could be requested as needed. One suggestion is to categorize the plans by geographical area, much as the plans were grouped which were presented during the legislative redistricting hearings.

- **Is it realistic to expect Texas to be able to satisfy Justice in one 60-day submission period? How much material should Texas send to the Justice Department ("Justice") for the original submission?**

No. Under current regulations, Justice has 60 days after original submission to ask for more information. Many stories abound regarding such a request on day 58 or 59 because the files have not been touched. Sandra Coleman confirmed that it is not realistic to expect Justice to complete the process in one 60-day period; therefore, it would be better to submit only the material which the legislature thinks will be needed and be quick to respond to the requests which will surely come for more information.

Coleman indicated that sending too much material ("50 boxes") would be counterproductive, because the Justice Department staff would not have time during the first 60 days to process the material. Coleman cited the case of New York City as a model, saying that New York assigned the "entire staff" to the job of answering promptly Justice inquiries for more material.

- **Who from Justice will be working with Texas?**

Justice intends in the next couple of weeks to assign a staff person (no assurance that this person will be a lawyer) to be in charge of Texas. While encouraging open communication with this staff person from the time of the assignment, Justice seemed to discourage any sending of material intended to educate the Justice staffer assigned to Texas because it might constitute a "submission" and begin the time periods.

- **What kind of input from the interest groups is required in order for a plan to be precleared?**

Justice indicated that <u>any</u> plan submitted may have problems in the preclearance process if the minority groups have not had input into the process and went further to suggest that minority groups need to have signed off on the plan. Coleman said that "if the minority group representatives complain, listen to them." Of course, Justice will entertain comments from all who want to provide them.

- **Is Justice going to form its own computer system in order to analyze plans?**

Yes. Bob Berman acknowledged that Justice is off to a late start and will make a choice on software soon.

Afternoon Meeting: Legal Issues

Jeff Archer and the the legal consultants posed a series of questions:

- **In light of the recent *LULAC v. Clements* decision by the full Fifth Circuit Court of Appeals, what will be the policy of Justice on reviewing recently created district courts?**

That policy has already had a direct effect on Texas. On November 5, Justice issued an objection letter and refused to preclear district judgeships created by the Texas Legislature during the 71st Regular Session. Thirteen judgeships across the state are affected; eleven created last session, and two Travis County courts created prior to Texas' inclusion under Section 5. Justice gave no details as to how the submission might have fallen short, but relied on the multi-member characteristic of the at-large system of electing judges in Texas.

The Texas Secretary of State submitted and then withdrew the judgeships, but resubmitted the bill immediately after the Fifth Circuit Court of Appeals ruled in *LULAC v. Clements* on whether judicial elections are covered by Section 2 of the Voting Rights Act. The Fifth Circuit held that such elections are not covered but stated that Section 5 does apply (Section 5 requires preclearance).

Following the LULAC decision, the Secretary of State resubmitted the judgeships, probably under the impression that Justice would follow the *LULAC* decision. However, Justice has made it clear that, until the issue is settled, they will continue to apply Section 5 standards to submissions of judgeships. In applying Section 5, they will object to any submission which does not also comply with Section 2. The result: Any multimember setup will be suspect.

How is it that Justice can act totally independent of any court decisions on Section 2? As a result of the 1982 amendment of Section 2 by Congress, courts now look at the "results" of any election change to decide whether the change has deprived minority groups of the opportunity to elect a representative of their choice. Justice relies on a footnote in the legislative intent report and reasons that Congress did not intend for a submitting body to circumvent Section 2 by the use of Section 5 procedures. Therefore, Justice will refuse to preclear a plan if they find a "clear violation" of Section 2.

Before issuing its Texas letter, Justice had already refused to preclear judgeships in two other states. In late October, Justice objected to judgeships for the City Court in Monroe, Louisiana. Georgia also had preclearance problems. In October, the U.S. Supreme Court summarily affirmed a three-judge federal panel decision striking down many of Georgia's district judgeships created over the twenty three years since Georgia was brought in under Section 5. Georgia had never submitted these judges for preclearance, and Justice had objected to these changes in June of 1989.

- **Would it be wise as Justice lawyers suggest for Texas to concede racially polarized voting state-wide to cut down the bulk of the submission?**

No. The last findings of racially polarized voting in Texas were made several years ago. Demographics and attitudes have changed in some areas. It is plaintiffs' burden of proof to show racial polarization in any Section 2 lawsuit. In Section 5 issues, the burden of proof is on the submitting authority (the state). A prior admission by the Texas to Justice during the preclearance process could and would be used as an admission on the racial polarization issue in a later Section 2 lawsuit.

- **What is the minority population population necessary for an effective minority district?**

Coleman confirmed that there is no magic percentage. Justice looks at each district. Coleman made it clear that DOJ will pay attention to the minority groups on this point and urged Texas to listen to the minority viewpoint. DOJ also want to look at election returns in deciding the question. DOJ will also be paying attention to population trends to watch for packing in advance.

• **Is Justice going to require Texas to provide election return information along with its submission of a plan? How much?**

Yes. Debbie Irvine and the Justice attorneys discussed this issue. The federal guidelines require that election data be included with the submission. Debbie says that they will collect data from the years 1984 through 1990 on statewide races down through the state house level. In addition, they will collect some selected local election data where minority candidates are involved.

• **What suggestions does Justice have for increased minority participation in the redistricting process?**

Jeff Archer spoke about the joint legislative redistricting hearings which have been held across the state and asked for input on future hearings. Justice seems to recognize the difficulty in having another full set of meetings after the final publication of the census, but they said that any future hearings could be held in areas of the state where there is extreme controversy.

Justice made it clear that it will be looking at more than just the hearings process but at the access of the minorities to the process itself. They were curious as to the method the legislature will use to make sure everyone is heard.

• **What is the significance of state policies such as contiguity, compactness, equal population, incumbency, and maintaining county lines during the Section 5 preclearance process?**

Our legal consultants say that articulated policies may help in U.S. District Court. Justice, while recognizing the legitimacy of such policies, maintains that they remain subordinate to federal requirements. Justice will look with suspicion upon any deviation from stated policies if the result is an adverse impact on minorities.

• **What is an "influence" district? In districts where minorities obviously comprise less than the population which would provide a "safe" district, what percentage of population does it take to trigger the "influence district" analysis?**

The case law defining an "influence" district is very new and controversial. At least one panel opinion on the subject has been withdrawn (*Armour v. Ohio*)--and the full 6th Circuit Court of Appeals will hear oral arguments on the case in December. The issue in *Armour* was whether two state house districts of 11 percent and 25 percent Black population should be redrawn so that the Black population in one district could total 36 percent in one state house district. The three-judge panel of the 6th Circuit had held that the case law does not require a minority group to comprise a majority of a district in order to prove that their voting strength has been minimized or cancelled out, and the panel had remanded the case to the district court to rehear the evidence.

In *Garza v. Los Angeles Board of Supervisors,* which involved a challenge to the makeup of the five-member Los Angeles Board of Supervisors, a California federal district court found that it was possible to draw at least one of the districts with current population data which would have a majority of Hispanic citizen voting age. Further, the court said that, using 1980 Census data, the best districts which could be drawn were in the 44-46 percent range, the court's holding would be the same. The court held that the Board of Supervisors knowingly chose to fragment the Hispanic core in the County in order to minimize voting strength. The Ninth Circuit Court of Appeals affirmed this case earlier in the month.

Some indications from the meeting with Justice: If a cohesive minority group comprises 35 or 40 percent of the population and is split in half and placed in two non-minority districts, there will be a problem with preclearance by Justice. A different question is presented if that 35 percent minority group is placed into a district with voters in a different community of interest.

Mike Rogers (consultant) pointed to a 1982 objection letter which had attached significance to 25 percent minority population. He asked whether this objection letter could indicate a trend toward defining an "influence" district as "over 25 percent." The Justice attorneys were quick to point out that every submitted plan is judged on its own facts, and that there were additional negative facts in the particular case. However, Justice indicated that 25 percent might be a significant cutoff point, pointing out that no objections have been filed where the minority population is less than 25 percent.

- **What should the legislature do with existing minority districts which have lost population or not grown at the ideal rate since 1980?**

Justice acknowledged that this problem is shared in many places, such as L.A. and Chicago. They offered no concrete answers and will most likely look with suspicion on any solution which would dilute minority strength of the district.

- **What is the effect of a disagreement between two state officials as to which one should submit the state's plan for preclearance, as happened in 1980?**

In 1980, the Texas Attorney General submitted the house and senate plans to Justice for preclearance. One week later, the Texas Secretary of State submitted the same plans with the opinion that the minorities were correct in their claims that there was a retrogression problem. Coleman said that they have not seen this problem anywhere but in Texas and indicated it would up to Texas to resolve any such problem. Justice said that they would treat such a statement as a comment like any other and indicated that, should the problem recur, Justice would be open to opinions on the matter from other state officials.

- **What is the relevance of Section 5 annexation cases to statewide redistricting cases, particularly the courts' references to examining whether a plan "fairly reflects the strength of (minority) voting power as it exists?"**

If Justice finds discriminatory results or intent under Section 2, they will object under Section 5. Justice made it clear that they will compare the old districts with the newly drawn districts, using 1990 population figures. Jerry Hebert said that an increase in the number of minority districts created will not protect a plan against a retrogression objection. One example given was a submission by a local government unit which changed a multimember system to one which carved out a single-member district and left the

remaining seats at large. Justice objected to the multi-member aspect of the proposed plan, even though the plan was clearly an improvement over the earlier setup.

John Dunne, the new Assistant A.G. over the Civil Rights Division, has given examples in his speeches of retrogressive changes, including reducing the percentage of minority population in any district which has come close to or has been barely able to elect minority representatives. Justice will look at whether the minority voting strength could have been increased in those areas.

- **May the state justify a plan which appears to dilute minority voting strength by demonstrating the existence of crossover voting for minority-preferred candidates in the proposed districts?**

The state will have the burden under Section 5 to prove to Justice that there is not racially polarized voting in the district. There would have to be strong proof of crossover voting for minority candidates. Justice has already suggested that Texas could cut down on the paperwork involved in the submission by conceding that racially polarized voting exists in Texas.

- **What is the relevance, if any, of political bloc voting and other factors besides race or ethnicity in analyzing racially polarized voting?**

The question is: how much weight will be given to evidence that a minority candidate was defeated not because of racially motivated bloc voting but because of party politics? Justice was vague on this point but the thinking is that such reasoning would have to be backed up with solid data and even then would be viewed with suspicion.

- **What effect would a return to the use of "qualified electors" (i.e., eligible voters) to redistrict the Texas Senate (as literally required by the Texas Constitution) might have on the preclearance of a senate redistricting plan?**

Although the Texas Constitution requires the use of "qualified electors" (i.e., eligible voters), this method has never been used because there was not sufficient reliable data on hand. The issue could come up again because for the first time the Census Bureau's figures will have "voting age population" which conceiveably might be a basis for determining "qualified electors."

Justice did not seem too concerned and indicated that they would look at the impact on minorities if Texas uses an alternative population base for redistricting. They would look at whether packing of Hispanics might result from the use of qualified electors. The burden would be on the submitting authority to prove that the use of qualified electors has no minority impact.

- **What is the effect of existing Texas election law provisions such as the majority vote requirement in party primaries on preclearance of a redistricting plan that consists entirely of single-member districts?**

Neither Justice nor the minority groups have expressed interest in this issue where majority vote requirements are combined with single-member districts. However, a majority vote requirement imposed in a multimember context will draw objection.

- **What about situations in which maintaining or increasing the voting strength of a racial or language minority group appears to dilute the voting strength of other minority groups?**

Justice made clear that they realize this is a tough call, but they are interested in minority voters, not incumbents. However, they indicated that they would be suspicious if a "safe" minority incumbent loses as a result of the creation of two districts where the voters might not have the opportunity to elect a minority. An important issue here will be whether the minority groups are a true coalition or whether one minority group is subsumed into another larger minority group. Justice will require proof on this issue, including election returns.

- **What is the effect of the state's reliance on U.S. census minority population figures if substantial evidence of an undercount exists?**

Sandra Coleman in late June at a Baltimore reapportionment meeting said that Justice will consider adjusted numbers if they are available. She seemed to imply that Justice will consider numbers from other sources besides the Census Bureau. There was nothing said in the Washington meeting to contradict this statement. Bob Berman at one point in the morning meeting said to rely on the census "unless better numbers are available."