ALAN WILSON
ATTORNEY GENERAL

July 2, 2013

The Honorable Larry A. Martin
Senator, District No. 2
P. O. Box 247
Pickens, South Carolina 29671

Dear Senator Martin:

You seek an opinion "on an issue that has arisen in response to the United States Supreme Court's Ruling in *Shelby County v. Holder*." By way of background, you provide the following:

> I am writing you to ask for a formal opinion on an issue that has arisen in response to the United States Supreme Court's Ruling in Shelby County v. Holder. As you are aware, in that opinion the Supreme Court struck down as unconstitutional Section 4 of the Voting Rights Act. That section provided in pertinent part the method of determining what jurisdictions were subject to preclearance of election law changes pursuant to Section 5 of the Voting Rights Act. Since Section 4 was struck, it seems that South Carolina would no longer be required to submit election law changes for preclearance under Section 5 of the Voting Rights Act.
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> However, prior to the Supreme Court ruling in Shelby County, S. 2 (The Equal Access to the Ballot Act) was passed by the General Assembly and signed into law by the Governor on June 13 2013. That Act contains an effective date section that provides that "this act takes effect upon preclearance approval by the United States Department of Justice or approval by a declaratory judgment issued by the United States District Court for the District of Columbia, whichever occurs first." That Section of the Act is why I am writing to you.
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> Since South Carolina is no longer required to submit election law changes like those contained in S. 2 to the US Department of Justice for preclearance after the Shelby County decision, it calls into question the effective date of the S. 2. Section 2-7-10 of the South Carolina Code is the general effective date provision for legislative enactments and it provides that "no act or joint resolution passed by

> the General Assembly shall take effect or become of force until the twentieth day after the day of its approval by the executive, unless some other day be specially named in the body of the act or joint resolution as the day upon which it shall take effect." However, S.2 does provide an effective date "specially named in the body of the act," but that date is based upon a requirement that no longer exists for our State.
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> Because of the need for some certainty in the implementation of the law for the groups impacted by enactment of S. 2, I would respectfully ask for your opinion as to what is the effective date of S. 2 based upon the effective date section contained in the act, the Supreme Court decision on June 25, 2013, in Shelby County, and the provisions contained in §2-7-10.

Law/Analysis

As your letter indicates, on June 25, the Supreme Court decided *Shelby County*, ___ U.S. ___ (2013). While the Court did not declare Section 5 of the Voting Rights Act unconstitutional, it did conclude that the coverage formula, contained in Section 4, and upon which Section 5 is based, to be invalid. As the Court stated, Congress'

> failure to act [to update the VRA coverage formula] leaves us today with no choice but declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance … . We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions … . Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

Thus, in light of *Shelby County*, there is no further requirement to obtain preclearance of applicable legislation pursuant to Section 5 of the Voting Rights Act.

Your question, however, is not so much one regarding *Shelby County's* ruling itself, but the impact of such ruling upon S.2. As you indicate, S.2 is entitled "The Equal Access to the Ballot Act." The Legislation was enacted by the General Assembly and signed into law by the Governor on June 13, 2013. The problem arises because of the Act's effective date which states that "this act takes effect upon preclearance approval by the United States Department of Justice or approval by a declaratory judgment issued by the United States District Court for the District of Columbia, whichever occurs first." As stated above, *Shelby County* has declared that there is no current preclearance approval pursuant to the VRA, § 4(b) having been declared null and void.

We note also that Section 13 of the Act contains a "severability clause." Such Section provides as follows:

> [t]he provisions of this act are severable. If any section, subsection, paragraph, subparagraph, item, subitem, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of the act, the General Assembly hereby declaring that it would have passed each and every section, subsection, paragraph, subparagraph, item, subitem, sentence, clause, phrase, and word thereof irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, items, subitems, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Thus, even though preclearance is no longer operative as a result of *Shelby County*, and Section 14 of S.2 is thereby effectively removed, the remainder of S.2 is severable and is valid.

We now consider the question of when S.2 would become effective? We note that S.C. Code Ann. Section 2-7-10 provides as follows:

> [n]o act or joint resolution passed by the General Assembly shall take effect or become of force until the twentieth day after the day of its approval by the executive, unless some other day be specially named in the body of the act or joint resolution as the day upon which shall take effect.

Moreover, other well recognized principles are applicable here. For example, as we noted in an opinion dated March 31, 2006 (2006 WL 981690),

> [g]enerally, our courts have held "the General Assembly may enact a law to become effective on the happening of a certain contingency." *Moffatt v. Traxler,* 247 S.C. 298, 308, 147 S.E.2d 255, 260 (1966). In *Beaufort County v. Jasper County*, 220 S.C. 469, 68 S.E.2d 421, 430 (1951), the Supreme Court determined: "The fact that the Legislature saw fit to make the Act effective only on the happening of a certain contingency does not affect the validity of the Act." "Moreover, in general it makes no essential difference what is the nature of the contingency if it is essentially just and legal." *Id.*

And, in an opinion dated February 24, 2004 (2004WL 439322), we recognized:

> ... it is not unusual that the effective date of a particular provision of a statute may be postponed until some future time or some future event. See, *U.S. v. Thompson*, 687 F.2d 1279 (10th Cir. 1979). In this regard, courts have stated that "while most

> laws are 'complete when passed, they sleep until the contingency contemplated sets them in motion.'" *State of N.Y. v. Strong Oil Co.*, 105 Misc.2d 803, 493 N.Y.S. 345 (1980). See also, *City of Schenectady v. State of N.Y.*, 80 Misc.2d 223, 363 N.Y.S.2d 76 (1975).

As has been consistently recognized, "[a] statute has no force until its effective date ... ." 82 C.J.S. *Statutes* § 548.

While generally it is understood that the Legislature may postpone an effective date of a statute to the occurrence of some future contingency, there are occasions where such contingency is either declared invalid or is simply impossible to occur. In those instances, it is the usual rule that a court will deem such ineffective contingent date severable from the rest of the statute and attempt to determine the actual date when the statute commences to operate. For example, in *Harbert v. County Court of Harrison Co.*, 39 S.E.2d 177, 189 (W.Va. 1946), the West Virginia Supreme Court of Appeals stated that "[a]n invalid provision that an act shall take effect at a specified time does not impair the validity of the remainder of the statute, if it is otherwise unobjectionable, or prevent it from taking effect at a future date which is not interdicted by any constitutional limitation."

And, in *Thompson v. State*, 47 So. 816 (Fla. 1908) a statute had provided that the law was to take effect upon approval by the Governor. In that instance, the Governor did not approve the legislation, but allowed it to take effect without his signature. The Court concluded that the provision of the State Constitution providing that all laws take effect 60 days after final adjournment unless otherwise specified in the particular statute. Thus, the Court concluded this provision was controlling. The court stated as follows:

> It is therefore evident that this statute did not go into effect immediately upon approval by the Governor, for he did not approve it. The time of its taking effect is therefore fixed by the provision of Section 18 of article 3 of the Constitution to the effect that no law shall take effect until 60 days from the final adjournment of the Legislature at which it may have been enacted.

47 So. at 817.

Instructive particularly is the South Carolina decision of *State v. Jacques*, 65 S.C. 178, 43 S.E. 515 (1903). There, the Court had before it a case involving misconduct in office by a county supervisor. As part of its decision, the Court had to address the effective date of Act No. 163 of 1900. Such Act did not specify when it became effective, but only stated that it had been approved the 19th of February 1900. The decision of the Court is pertinent here because what is now § 2-7-10 was deemed applicable to determine the effective date of Act No. 163. The *Jacques* Court stated:

> [w]e think this act [no. 163] is applicable to the case under consideration. Under section 36 of the Civil Code [now § 2-7-10], *if went into effect in 20 days after its approval by the Governor*. No change was made in the election or term of office of the supervisor. Therefore, it was not necessary to wait until another election before entering upon his duties as one of the board of county commissioners. It appears from the allegations in the indictment that the defendant did enter upon the discharge of the duties as a member of said board. The act [Act No. 163] provides that one of the commissioners should be present when repairs on bridges were to be inspected and received, if the contract price exceeded $10. The indictment alleges that the contract price for the repairs on the bridges exceeded, respectively, $10, and that the repairs were not respected and received as required by law. Therefore, with knowledge of these facts, and with the intention alleged in the indictment, it was an act of official misconduct on the part of the defendant to order payment of said claims. It was likewise an act of official misconduct on the part of the defendant when the board failed to inspect and receive the repairs with the alleged intention of cheating and defrauding the county.

43 S.E. at 518. Thus, the Court reversed the circuit court's quashing of the indictment for official misconduct, and the determination of the effective date of Act No. 163 played a key role in that determination.

Conclusion

It is our opinion that the Supreme Court's recent decision in *Shelby County* renders ineffective or nugatory S.2's effective date – that the legislation becomes effective upon preclearance by the Department of Justice or by the District Court of the District of Columbia. Thus, in our opinion, S.2 becomes effective pursuant to § 2-7-10, i.e. 20 days following the Governor's signature, which occurred on June 13, 2013. While § 2-7-10's applicability is conditioned upon there being no other date "specially named in the body of the act," S.2's contingency that the Act becomes effective upon preclearance is no longer possible in light of the *Shelby County* decision. Thus, we deem § 2-7-10 applicable here. Moreover, we believe S.2 was intended to be applied prospectively only.

Sincerely,

Robert D. Cook
Solicitor General

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