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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

April 6, 2000

The Honorable Raymond C. Eubanks, Jr.
Judge, Probate Court
County of Spartanburg
Spartanburg County Judicial Center
Spartanburg, South Carolina 29306-2392

RE: Informal Opinion

Dear Judge Eubanks:

Your opinion request has been forwarded to me for reply. You have informed this Office that the Probate Judges Association has approved a bill which provides tiers of qualifications for probate judges based on county population. You ask if such a bill is constitutional. You further ask whether the bill, if it becomes law, must be precleared by the United States Department of Justice.

You have enclosed a copy of the proposed bill. The portion relevant to your question provides as follows:

(A) No person shall be eligible to hold the office of the judge of the probate court unless the person:

(5) Has the following qualifications:

(a) In any county with a population of more than 200,000 residents, as determined by the most recent census:

(1) attained the age of at least thirty-two (32) years;

(2) has been a licensed attorney at law in this State for at least eight (8) years; or, has served as judge or associate judge of probate of this State

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Request Letter

for a period of at least two (2) years prior to filing for election or appointment to the office.

(b) In any county with a population of less than 200,000 residents, but more than 125,000 residents, as determined by the most recent census:

(1) obtained a law degree from an American Bar Association (ABA) accredited law school; or,

(2) served as judge or associate judge of probate in any county of this State for a period of at least two (2) years prior to filing for election of appointment to the office; or,

(3) served as a clerk or deputy clerk of a probate court of this State for a minimum of five (5) years prior to filing or election or appointment to the office;

(c) in any county with a population of less than 125,000 residents, as determined by the most recent census, the person filing for election or appointment to the office shall have:

(1) obtained a four (4) year bachelor's degree from an accredited post-secondary educational institution; or

(2) served as judge or associate judge of probate in any county of this State for a period of at least two (2) years prior to filing for election or appointment to the office; or

(3) served as a clerk or deputy clerk of a probate court of this State for a minimum of five (5) years prior to filing for election or appointment to the office.

(B) All persons holding the office of probate judge as of July 1, 1999, shall, notwithstanding any of the above, remain eligible for election or re-election.

As an initial matter, if the proposed bill is enacted by the General Assembly, it will be presumed to be constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas

v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

In March of 1990, this Office was asked whether a statute which required probate judges to have a college education or have worked in a probate court office for a specified period of time was constitutional. We concluded that the General Assembly may permissibly impose qualifications for the office of probate judge. Op. Atty. Gen. dated March 23, 1990. What must now be determined is whether the General Assembly may impose varying qualifications on probate judges based on the population of the counties in which they serve.

Often times, when a court reviews an act which establishes population classifications, it will examine Article III, Section 34 (IX) of the State Constitution which provides "where a general law can be made applicable, no special law may be enacted." A law general in form, but special in its operation, violates a constitutional inhibition of special legislation as much as one special in form. Elliott v. Sligh, 233 S.C. 161, 103 S.E.2d 923 (1958). The question must be decided not by the letter, but by the spirit and practical operation of the law. Town of Forest Acres v. Town of Forest Lake, 226 S.C. 349, 85 S.E.2d 192 (1954).

The mere fact that a statute contains classifications does not itself make it special legislation. Elliott v. Sligh, supra. There may be classification of counties provided it is based on a rational difference of situation or condition found in the counties placed in a different class. Id. The basis of classification must have some reasonable relation to the purposes and objects to be obtained by the legislation. Thomas v. Macklen, supra.

The justifications for the population based classifications are not set forth in the proposed bill. However, courts in other jurisdictions have found a requirement that judges be attorneys in more populous areas is a reasonable one. For example, in In Re Bartz, 287 P.2d. 119 (Wash. 1955), the court found a classification based on population is not an arbitrary one. The court stated "[R]ural areas produce comparatively little litigation and often cannot support an attorney. Where the exact line between larger and smaller populations should be drawn is necessarily a matter of legislative discretion." In addition, the United States Supreme Court has found "[T]hat population and area factors may justify classification within a court system has long been recognized." North v. Russell, 427 U.S. 328 (1976). Therefore, if the justifications for the proposed bill are similar to those cited above, it is likely that a court would find the proposed bill constitutional.

Courts have also been called upon to review population based classifications under the equal protection clause. For example, in North v. Russell, supra, appellant argued that classifying cities by population and permitting lay judges to preside in some cities while requiring law-trained judges in others denied him the equal protection guaranteed by the Fourteenth Amendment. The court found that all people within a given city and within cities of the same size were treated equally and, therefore, concluded that the equal protection guarantees of the Constitution were not violated. The Supreme Court of Florida reached a similar conclusion in Treiman v. State, 343 So.2d 819 (Fla. 1977). There, appellees argued the 40,000 population provision denied equal protection to those who lived in smaller counties whose county courts may be presided over by non-lawyer judges. The court rejected this argument citing North v. Russell. Thus, it would appear that the population based classifications found in the proposed bill may withstand an equal protection challenge as well.

In regards to your preclearance question, it would appear that these changes would require Justice Department approval prior to being implemented.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With best personal regards, I am

Sincerely yours,

Paul M. Koch

Paul M. Koch
Assistant Attorney General