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December 30, 1988

The Honorable Herbert U. Fielding
Senator, District No. 42
Post Office Box 994
Charleston, South Carolina 29401

Dear Senator Fielding:

You have asked whether the Supreme Court could issue its writ of mandamus directing the General Assembly to ratify by legislative enactment a referendum altering the Charleston-Berkeley County lines pursuant to the language of § 4-5-220, Code of Laws of South Carolina (1976, as amended). According to your request letter, you advise that you intend to initiate a Concurrent Resolution tolling any legislative activity upon the referendum until judicial challenges related to the referendum have concluded. Your Resolution further references statutory and procedural violations that you believe occurred in the conduct of the referendum and the Resolution seeks General Assembly acknowledgement of these violations. You have also requested whether the procedures that are generally followed by the State Supreme Court in its consideration of a motion or application for writ of mandamus provide an opportunity for the opposite party to be heard upon the question.

I caution at the outset that any advice in this area will of necessity be generalized since the ultimate conclusions would depend essentially upon the factual findings made by either the Court or the General Assembly. Moreover, I caveat that any comments relative to the procedures that may be followed by the State Supreme Court are tentative since the Court has the ultimate authority to prescribe its own procedures in determining cases before it.

I. Mandamus in General

Clearly, the Supreme Court maintains jurisdiction to issue a writ of mandamus in its original jurisdiction. § 14-3-310, Code of Laws of South Carolina (1976, as amended); Art. V, Section 5, Constitution of South Carolina, 1895 as amended. Mandamus is commonly referred to as the highest judicial writ known to the

law, Wiblen v. Long, 262 S.C. 430, 205 S.E.2d 174 (1974). It follows that the requesting party's burden is exacting and before the writ may issue, at least three elements must co-exist:

(1) A clear right in the plaintiff or relator to the relief sought;

(2) The existence of a legal duty on the part of respondent or defendant to do the thing which the relator seeks to compel; and

(3) Absence of another adequate remedy at law.

In the Interest of Lyde, 284 S.C. 419, 327 S.E.2d 70, 71 (1985); 55 C.J.S. Mandamus, § 51. Moreover, mandamus lies solely within the discretion of the court since it is not a writ of right. Linton v. Gaillard, 203 S.C. 19, 25 S.E.2d 806 (1943).

The writ of mandamus can be used to compel a public officer to perform public duties that are ministerial; however, it does not lie to compel action where judgment or discretion is to be exercised by the public officer. State, ex rel. Port Royal Mining Co. v. Hagood, 30 S.C. 519, 9 S.E. 686 (1888). In the mandamus context a ministerial act is one "which a person performs in obedience to a mandate of legal authority without regard to the exercise of his own judgment upon the priority of the act to be done." Sumter Co. v. Hurst, 189 S.C. 316, 1 S.E.2d 242 (1939). Finally, mandamus is unavailable where the legal right is doubtful. Lyde, 327 S.E.2d at 71.

II. Mandamus Directed to Legislative Functions

Section 4-5-220 provides that the General Assembly shall enact legislation to alter county lines only after it has determined that all applicable constitutional requirements have been met. Your question references specifically whether the General Assembly may be directed by mandamus to enact the legislation contemplated at § 4-5-220; thus, examination of the question involves whether mandamus may lie to compel a legislative function.

At common law, mandamus was generally not available to compel a state legislature to exercise its legislative functions. 52 Am.Jur.2d Mandamus § 131; Anno., 136 A.L.R. 677 "Mandamus to Legislature." It has been said that no rule of constitutional law is more firmly settled than the principle that a judicial department is without authority to compel the enactment of legislation. 136 A.L.R., at 679.

Of course, South Carolina adopts the common law as a part of its general law, § 14-1-50, Code of Laws of South Carolina; nonetheless, the South Carolina decisional law does not provide clear precedence upon this principle. Accordingly, I cannot say

with certainty whether the Court would follow the general common law principle in South Carolina.

The Court in Buchanan v. State Treasurer, 68 S.C. 411, 47 S.E. 683 (1903), commented that a writ of mandamus would not issue if the effect would be that the judicial department would coerce the legislative department in legislative affairs. Additionally, in Culbertson v. Blatt, 194 S.C. 105 S.E.2d 218 (1940), the Court observed that it was beyond the power of the Supreme Court to direct the legislature to perform any duty within its legislative province. See also, Chester County Hospital and Nursing Center v. Martin, 281 S.C. 25, 314 S.E.2d 308, 309 (1984), "[g]enerally, a court may not restrain by injunction the exercise of legislative powers...."

On the other hand, I reference two recent cases wherein the Supreme Court issued injunctive relief directed to the conduct of elections by respective legislative delegations in order that they could exercise their appointment authority. Mullinax v. Garrison, S.Ct.Op.No. 22919 (filed 11/2/88); Moore v. Wilson, S.Ct.Op.No. 22903 (filed 8/29/88). However, the power to appoint is not uniquely a legislative function, and thus these cases are probably not controlling upon the pertinent question. Accordingly, it appears that the State Supreme Court would recognize the common law principle that mandamus is generally not available to compel a state legislature to exercise its legislative functions.[1]

III. Judicial Procedure

Your question also concerns the procedures that may be followed by the State Supreme Court if a petition or application for writ of mandamus is filed. Judicial procedures are uniquely within the province of the State Supreme Court, and its administrative control is plenary is this area. Nonetheless, I will identify some court rules and statutes that may govern the procedures likely to be followed by the Court.

Supreme Court Rule 20 generally governs procedures in the Supreme Court's original jurisdiction. The Rule first establishes the qualification that the Supreme Court will ordinarily not hear motions or applications for the issuance of writs in its

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[1] It must be observed, however, that the courts have been willing to issue writs of mandamus to legislative bodies in those extremely limited circumstances in which there is a clear constitutional or statutory mandate that the legislative body take some specified action. See, for example, McMehan v. York County Council, 281 S.C. 249, 315 S.E.2d 127 (1984); see also Duncan v. York County, 267 S.C. 327, 228 S.E.2d 92 (1976) and Article VIII, Section 5 of the State Constitution. Of course, the discretion to issue a writ of mandamus must finally and necessarily remain with the appropriate court.

original jurisdiction whenever such motions can be made before the circuit courts. Procedurally, the Rule requires that the parties requesting original jurisdiction must file verified pleadings in support of their arguments. Section 3 of Rule 20 provides generally that if the Court takes original jurisdiction upon an application for a writ, the case will be heard upon the merits "not sooner than thirty days" after the assumption of jurisdiction unless a special reason exists to shorten the time.

I also reference Supreme Court Rule 16 which requires that all motions made to the Court must be served upon the opposite party and at least four days notice is to be provided unless the notice period is shorten by a Justice. Further, § 14-3-350 provides that a Justice may issue a writ of mandamus at chambers, but an appeal to the full Court is allowed from any such decision.

As a final comment upon the procedures, I refer you to the Supreme Court's established principle that ex parte orders are disfavored and may be in violation of the Code of Judicial Conduct. The Court in Herring v. Retail Credit Co., 266 S.C. 455, 224 S.E.2d 663 (1976) instructs that Canon 3(A)(4) of the Code of Judicial Conduct (Supreme Court Rule 33) requires a judge "to accord every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to the law...." 224 S.E.2d, at 665. Moreover, the Court emphasized that:

> We [the Supreme Court] take this opportunity to advise the Bench and Bar of the disfavor with which we regard ex parte orders and the stringent standards of necessity we demand of their issuance on review. Not only do such orders deprive this Court of adequate records on appeal but they deny to those deprived an opportunity to be heard in matters which affect them. In an adversary system, ex parte orders are reserved for those rare instances where there is no adverse interest or where exigent circumstances clearly require that action be taken before there is time for a full hearing. In the latter instance a full hearing shall take place as soon as possible.

224 S.E.2d, at 666.

IV. Conclusion

In conclusion I advise that it is unlikely that the Supreme Court would issue a writ of mandamus directing the General Assembly to enact legislation approving and implementing the referendum altering the Charleston-Berkeley County line. This conclusion is based primarily upon the common law principle, apparently adopted in the State of South Carolina, that the Judicial Department will not direct the Legislative Department in the conduct of legislative functions. In addition, if an

application or petition for the issuance of a writ of mandamus is filed with the South Carolina Supreme Court it is unlikely that the Court would proceed without providing an opportunity for the party opposing the mandamus to be heard.

Very truly yours,

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Chief Deputy Attorney General

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APPROVED BY:

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