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June 29, 1987

The Honorable Peden McLeod
Member, South Carolina Senate
501 Gressette Building
Columbia, South Carolina 29202

Dear Senator McLeod:

I have been advised that you have requested advice as to the effective date of the annexation of a portion of Charleston County to Colleton County. A somewhat similar question was recently asked by James L. Bridges, Charleston Deputy County Attorney. A copy of this letter was forwarded to you. However, your question raises a separate issue; i.e., not if an act is effective or can be enforced before preclearance but instead once it has been precleared if the effective date is the date the Justice Department preclears it or if it is approved retroactive to the date the Governor signed the Act. Since the date of the letter to Mr. Bridges, this Office has been notified by the Justice Department of their preclearance of the Act, which ratified the annexation of this area to Colleton County.

The annexation election was held on April 22, 1986, and resulted in a favorable vote for annexation of this area to Colleton County. South Carolina Code of Laws, 1976, Section 4-5-220 requires the General Assembly to ratify the results of the referendum before the change in lines is considered complete. Therefore, under State law the annexation could not be effective before at least that date. The question then presented is if the Act is effective when the Governor signs it or when the Justice Department preclears it.

As the ratification Act was necessary to accomplish the change of boundaries it would appear to have been the actual act that caused the change and, therefore, would require preclearance

before it was effective.[1] The Justice Department rules and regulations regarding what needs to be submitted specifically states that "any change in the constituency of an official or the boundaries of a voting unit..." must be submitted. 28 CFR 51.12(c).

Research has disclosed only two cases that specifically address the question you have raised. In the case of Libertarian Party of Georgia v. Harris, 644 F. Supp. 602 (N.D. Ga. 1986) the court found that an act that was passed and became effective on April 3, 1986 and received Justice Department preclearance on June 9, 1986, was deemed to be effective as of April 3, 1986. In Ladner v. Fisher, 269 So. 2d 633 (Miss. 1972), the Court stated that an Act passed April 9, 1971 and precleared on September 14, 1971, was effective as of April 9, 1971. See also, Frances v. Cothran, 280 S.C. 516, 313 S.E.2d 332 (Ct. App., 1984). The Courts were apparently applying the legal theory of nunc pro tunc. However, this legal theory did not appear to be the holding of the U.S. Supreme Court in the case of NAACP v. Hampton County, ___U.S.___, 105, S. Ct. 1128, 84 L.ED 2d 124 (1985) which found that once an Act received preclearance, and the dates specified therein for a certain event to occur had passed, new dates would have to be enacted. The Court, therefore, prohibited enforcement of any provision of an Act pending preclearance including just filing for office under dates specified by an Act. This holding is, of course, different from the Harris case because filing for an office pending preclearance with the understanding that if the Act was not precleared the election would not be held was found to be enforcing the Act before preclearance. However, if you apply the logic of the Hampton case it would appear impossible to interpret preclearance as being retroactive as this would actually amount to enforcing the Act prior to preclearance. Additionally, as a practical matter if the preclearance comes significantly later than an event required to be performed can actually be performed, it may be impossible to comply with the provisions of the Act.

In general the Supreme Court has variously interpreted Section 5 review of election changes as having the effect of "suspending", "freezing", "delaying", or "postponing" the enforcement of the Act. In the first test case of the constitutionality of the Voting Rights Act, South Carolina v. Katzenbach, 383, U.S. 301, 315-316, the Court stated that:

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[1] Although it was equally necessary for the election itself and its results to receive Justice Department preclearance.

> Section 5 prescribes a ...remedy, the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetrate voting discrimination. (Emphasis added.)

See also South Carolina v. Katzenbach, supra, p. 334. This same language of a submitted Act being "suspended" was also used in Allen v. Board of Elections, 393 U.S. 544, 562; Perkins v. Matthews, 400 U.S. 379, 406 (Black, J., dissenting); Beer v. United States, 425 U.S. 130, 148, n. 3 (Marshall, J., dissenting). In Georgia v. United States, 411 U.S. 526, the Supreme Court stated that:

> ...it is important to focus on the entire scheme of §5. That portion of the Voting Rights Act essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia holding that a proposed change is without discriminatory purpose or effect. The alternative procedure of submission to the Attorney General 'merely gives the governed State a rapid method of rendering a new State election law enforceable.' [Cite omitted.] (Emphasis added.) Georgia, supra, 411 U.S. at 538.

See also Beer v. United States, 425 U.S. 130, 140 quoting from H. R. Regs. No. 94-196, pp. 57-58; and page 152, n. 9 (Marshall, J., dissenting); United States v. Sheffield Board of Commissioner, 435 U.S. 110, 121.

In Morris v. Gressette, 432 U.S. 491, 501 the Court stated that:

> Section 5 requires covered jurisdictions to delay implementation of validly enacted state legislation until federal authorities have had an opportunity to determine whether that legislation conforms to the Constitution and to the provisions of the Voting Rights Act. (Emphasis added.)

In Morris v. Gressette, supra, at 504, the Court further stated that Section 5 "postponed" the implementation of state legislation.

The courts have also held that pending Section 5 preclearance, any future elections are enjoined unless and until the State receives Section 5 preclearance. Georgia, supra, at 541;

Connor v. Waller, 421 U.S. 656, 657 (Marshall, J., conc. op. quoting Georgia, supra); Beer v. United States, supra, at 140; Herron, supra, at 175-176; Heggins v. City of Dallas, Tex., supra, at 743. This language is especially important as the Court does not just state the law will not be effective unless preclearance is received but adds on the word "until" preclearance is received thus providing a date for effective use. See also N.A.A.C.P. vs. Hampton County, supra, p. 132, n. 19. In Busbee v. Smith, 549 F. Supp. 494, 525 (D.C. D.C. 1982), a court with equal authority with the Justice Department to preclear Section 5 submissions, the Court stated that until preclearance was received on a congressional redistricting plan the election would be postponed "...until the earliest practicable date."

Conclusion

The U.S. Supreme Court has never squarely addressed this question; however, it has stated that an act is ineffective as a law until it is precleared. While two lower cases in dicta have stated contrary language, we would advise that based upon the language of the Supreme Court the most likely effective date would be the date of preclearance which in this case would be June 5, 1987.

Sincerely yours,

Treva G. Ashworth
Senior Assistant Attorney General

TGA/fg

cc: James L. Bridges

REVIEWED AND APPROVED BY

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