(2)

No. 83-1015

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL.,
Appellants,
v.
HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA (THREE-JUDGE COURT)

MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16(1)(c) and (d) of the Supreme Court of the United States, appellees, Hampton County Election Commission and its members, Randolph Murdaugh, III, Richard Sinclair, James Wooten and W. H. Smith, and the Hampton County Treasurer, Wilson P. Tuten, Jr., move the Court to dismiss the appeal herein or, in the alterna-

tive, to affirm the Order of the District Court on the grounds that it is manifest, that the decision below was clearly correct and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

JURISDICTION

For the purpose of this Motion only, these Appellees assume, without conceding, the Court's jurisdiction herein.

STATEMENT OF CASE

Prior to 1982 Hampton County had an appointed six member County Board of Education. The County was also divided into two school districts which were each governed by a six member Board of Trustees who were appointed by the County Board of Education.

On February 18, 1982, Act 547 was enacted by the South Carolina General Assembly. This Act provided that beginning with the general election in 1982, the Hampton County Board of Education would be composed of six members elected at large. On February 24, 1982, this Act was submitted to the Justice Department for Voting Rights Review and on April 28, 1982 the Justice Department entered no objection to the Act.

Following the enactment of Act 547, but before the Justice Department entered no objection to the Act, the General Assembly enacted a new law regarding the Hampton County education system, Act 549, which, when precleared by the Justice Department, would supersede Act 547. This Act provided for a referendum to be held to decide if the

county wanted to abolish the County Board of Education and the Hampton County Superintendent of Education and have their duties devolve upon the trustees for School District One and Two who would be elected. This Act further reduced the number of Trustees in each district from six to five and required that filing for these offices be held between the dates of August 16-31, 1982. This referendum was held and approved by the electorate. Once all the information for the submission was compiled, the Act was submitted to the Justice Department for preclearance on June 22, 1983.

In order to comply with state law requirements which mandated filing to be held during the period of August 16-31 and federal law requirements that

would prevent a state law from being put into effect if the Justice Department objected to the Act, the Hampton County Election Commission opened filing for officers for either election that might be held; i.e., the election of a County Board of Education pursuant to the provisions of Act 547, or the election of two Trustee Boards pursuant to the provisions of Act 549. The Justice Department did not respond until August 23, 1982, which was in the middle of the mandatory filing period for the offices provided for under the provisions of Act 549. On August 23, 1982, a letter was sent to the South Carolina Attorney General's Office stating that the Justice Department objected to Act 549. This letter was not received by the South Carolina Attorney General's

Office until August 26, 1983. It was then forwarded by mail to the members of the General Assembly who had sponsored the bill. By August 31, 1983, a letter had been sent to the Justice Department formally requesting reconsideration of their objection. On November 19, 1983, the objection was withdrawn. By this time elections required by the only Act then approved by the Justice Department, Act 547, had been required to be held. However, approval of Act 549 voided Act 547 as its provisions were superseded by Act 549.

An election was held on March 15, 1983, for the offices provided for by Act 549. All of the elected members of the District Two Board of Trustees are black. One of the five elected

members of the District One Board of Trustees elected is also black.

On March 11, 1983, this action was brought alleging violations of Section 5 and Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution. On March 12, 1983, a Motion for a temporary restraining order was filed by the appellants in this case. This Motion was denied following a March 14, 1983 evidentiary hearing. On September 9, 1983 a three-judge court was convened and dismissed the complaint insofar as it sought to state a claim under Section 5 of the Voting Rights Act.

ARGUMENT

The District Court was manifestly correct in holding that the requirements of Section 5 of the Voting Rights Act

have been met in the instant case in that neither the State nor its political subdivision has sought to enforce a voting change that has not been precleared.

On August 16, 1983 the local officials in the Hampton County had before them an Act that had been precleared by the Justice Department that required a formally appointed County Board of Education to be elected. By the provisions of Act 547 filing for these offices had to be accomplished no later than forty-five days before the November 2 general election. Therefore, sometime in mid-September would be the last day a person could file for this office. On the other hand, there existed another Act, Act 549, which abolished this very Board and required the previously appointed Boards of Trustees to be elec-

ted in a general election. The act further mandated filing for these offices to occur during the designated dates of August 16-31, 1982. This Act had been submitted to the Justice Department in June but no action had at that date been taken on the submission.

In a good faith effort to comply with whatever election would ultimately be held, the Election Commission accepted filings for both offices. By newspaper articles and by communications with each person coming to file for office, they informed persons they should file for both elections because it was not clear which office would be precleared by the Justice Department. (App. 3a-10a). As the court noted in its Order, if filing had not been opened during this time period and

> [i]f Act 549 was precleared, pursuant to State law, it would supersede Act No. 547. But if preclearance came after August 31, Trustee elections could not be held as scheduled, because no candidate would have qualified by filing during the specified statutory filing period. (J.S. 4a-5a)

There is no question but that Act 549 contemplated the elections for the Boards of Trustees to be held in the November general election. If on August 23 the Justice Department had precleared Act 549, rather than initially objecting to the Act, the local officials would have been derelict in their duty if they had not been preceding with the preliminary filing procedures which would have allowed this election to proceed.

Allowing filing for an office does not constitute the enforcement of a change without preclearance. It is simply a preliminary step to an election

that was subsequently approved. If the Act had been disapproved, the filing would have been null and void. However, the Act was approved and, therefore, the filing was properly opened during the dates specified by the Act and those dates only.

The Justice Department has even taken the position in Court that merely preliminary steps to an election should be continued pending preclearance of a submitted change. In Herron v. Koch, 523 F. Supp. 167 (E.D. NY and S.D. NY 1981) at footnote 11 the court notes that the United States Attorney General as amicus curiae had "...urged that... [the court] deny an injunction against the holding of the primary election on September 10, in hopes that pre-

clearance by the Attorney General will be forthcoming prior to the general election of November 3." 1/

The Justice Department has also been on record as retroactively approv-

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1/ In the instant case the Appellants are alleging that the Appellees improperly allowed preliminary filing procedures before preclearance and that this should be found to violate 42 U.S.C. 1973(c). However, there have been many cases in which the courts have found that a questioned change was one that should have been precleared and yet even in the face of this finding authorized an election to proceed. United States v. County Comm'n, Hale Cty, Ala, 425 F. Supp. 433 (S.D. Ala. 1976), judg't aff'd, 430 U.S. 924 (1977); Moore v. Leflore Cty. Bd. of Election Comm'rs, 351 F. Supp. 848 (N.D. Miss. 1971); Wilson v. North Carolina St. Bd. of Elections, 317 F. Supp. 1299 (M.D. N.C. 1970). See also Georgia v. United States, 411 U.S. 526 (1973). As stated in the dissent of Heggins v. City of Dallas, Tex., 469 F. Supp. 739, 745-746 (N.D. Texas 1979):

> [a] reading of the cases reveals that enjoining an election for an indefinite time until preclearance is obtained is the exceptional remedy rather than the normal one. [cites omitted.]

objection from the Justice Department in some counties under plans that had not yet been precleared. All of this was done, as here, with the understanding that all of these procedures, the filing and primaries, were preliminary steps generally governed by statute as to date and if an objection was interposed to the submitted change, the procedural steps would also be void and unenforceable.

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ing changes that have already been implemented. In Crowe v. Lucas, 472 F. Supp. 937 (N.D. Miss. 1979), a suit was brought contesting the validity of registration of voters because the registration was conducted pursuant to laws that were implemented eight months before they were submitted to the United States Department of Justice for preclearance. The Court held that since the Justice Department had subsequently approved the changes and was aware of the fact registration had already occurred under the new laws, the city had satisfied the preclearance requirements of Section 5. Additionally, in United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978), the Town of Sheffield wrote the Justice Department that they wanted to hold a refer-

endum on whether or not the form of government should be changed. The referendum was held before the Justice Department responded. The Attorney General stated in his subsequent letter that he did not object to the referendum, that he was aware the referendum had been held and that since the voters had approved the change, the implementation of that change would also have to be submitted for preclearance.

In the case of Berry v. Doles, 438 U.S. 190 (1978), this Court recognized this principle when the Court upheld a three-judge Court that had allowed an election to stand even though the change had not received preclearance. The Court found that the change should, however be submitted and "[i]f approval is obtained, the matter will be at an end."

Berry, supra at 193.

The Appellees would submit that this same principle of retroactive approval is applicable in the instant case and should be applied to the Appellants' allegations regarding filing while the Act was being considered twice by the Justice Department; and, therefore, the issue is moot. 2/

2/ The appellants further argue that filing was ineffective from August 23, 1982, when the Justice Department entered their original objection to Act 549. Appellees would assert that the letter of objection was not received by the South Carolina Attorney General's Office until August 26, 1982 and was then forwarded by mail to the Representative who introduced the bill. On August 31, the last day of the filing period, a letter was sent officially requesting reconsideration of the objection. The request for reconsideration kept open the possibility that Act 549 might eventually be approved thereby necessitating the continuation of filing. Additionally, the Chairman of the Hampton County Election Commission has testified that he never received official notification that Act 549 had been objected to. (App. 9a-10a).

Likewise, there was no procedure or reason to re-open filing following preclearance from the Justice Department of the Act. The preliminary requirements of the Act to have filing from August 16-31, had been met and only the election date had been postponed while awaiting preclearance from the Justice Department.

Potential candidates had been repeatedly advised in newspaper articles and when coming in to file, to file for both races; i.e. the election that would be held under the provisions of either Act 547 or Act 549. (App. 4a-5a, 7a-9a). There was, of course, also the option of a write-in candidacy for anyone who failed to file during the statutory time period.

When the Justice Department precleared Act 549, they also precleared

the provision in the Act that required filing to be held August 16-31, 1982. If the local officials had suddenly, without authority, re-opened filing that would have been a change requiring pre-clearance. To have reopened filing would not only have been beyond the powers of the local officials, it would have affected the rights of those candidates who had filed during the statutory time limits established by the precleared Act.

Appellees further allege that pre-clearance should have been obtained prior to the change of the date of the elections provided for in Act 549 from November, 1982 to a subsequent time. 3/

3/ The effect of preclearing Act 549 was to moot the provisions of Act 547. These two Acts provided for two completed alternative forms of a governing body for the Hampton County School District. Once Act 547 was superseded by Act 549, its provision establishing a

In Georgia v. United States, 93 S.Ct. 1702 (1973), 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.

The general language in Voting Rights Act cases is to the effect that

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county board of education was null and void. There was no valid governing body for the school district because Act 549 abolished this board and required the trustees to be elected. This election by statute was to have taken place November, 1982. Therefore, the county was without a valid governing body for the school district and an election had to be held as soon as possible.

any future elections are enjoined unless and until the State receives Section 5 preclearance. Georgia, supra, 411 U.S. at 541; Herron, supra, at 176; Heggins v. City of Dallas, Tex., 469 F. Supp. 739, 743 (N.D. Texas, 1979). In Busbee v. Smith, 549 F. Supp. 494, 525 (D.C. D.C. 1982) the Court stated that until preclearance was received on a congressional redistricting plan the election would be postponed "...until the earliest practicable date."

As stated in Georgia, supra, the purpose of providing an alternative procedure of submitting a change to the Justice Department was to provide for a rapid way of making a law enforceable. As many changes submitted for preclearance involve election dates, it would seem inconceivable that the Act envi-

sioned that every submission "freezing" an election date until approval by the Justice Department and which was not precleared until after the election date established by the Act, would require the General Assembly of the State to enact a new law establishing a new election date and submit it all over again for approval. This procedure could continue on ad infinitum if each approval would come after the date established by the law for the election. This procedure in itself would be a way of circumventing the Voting Rights Act and avoiding perhaps unpopular elections. In this case, the Justice Department did not remove their objection until November 19, 1982. Under Plaintiffs' rationale an election could not be held until the General

Assembly reconvened in January, enacted new legislation establishing a new election date for Hampton County, ratified the Act, and submitted it to the Justice Department for approval. If this was done for every Act that established election dates, the elections would be held years out of time with the present office holders holding over years past their term of office.

> As the District Court held: [i]t is not questioned that Act No. 549 constituted a Section 5 'change' that required preclearance, but the administrative actions of accepting filings and conducting an election for Trustees was not a change in South Carolina election law, but rather an effort to conform to it. In this court's view, the preclearance requirement of Section 5 applied to the new statute, Act No. 549, requiring that it be precleared before becoming effective, while the ministerial acts necessary to accomplish the statute's purpose were not 'changes' contemplated by Section 5, and thus did not require preclearance.

Appellants raise the argument of whether or not the district court correctly found that a racially discriminatory purpose or effect was a requirement of a Section 5 case. (J.S. 15). The Court discussed this only in passing and in connection with whether or not an alleged failure of the election commissioner to certify the results of the referendum was a change that should have been precleared. (J.S. 8a). The Appellants have conceded now in their brief, that the results were certified to the Code Commissioner. (J.S. 6, n2). Therefore, having abandoned this part of their appeal, we would submit that Appellants lack standing to now brief the question of whether or not the District Court was correct in its reasoning of this aspect of the case.

As to Appellants' argument regarding the office of Superintendent of Education and their allegation that the Superintendent's Office has been abolished without preclearance, the abolition of this office was a part of Act 549 and was approved when Act 549 was approved. This finding was the extent of the District Court's determination as to this allegation. (J.S. 10a-11a).

CONCLUSION

Wherefore, these Appellees respectfully submit that the decision below was clearly correct and that the questions upon which the cause depend are so unsubstantial as not to need further argument, and these Appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment below without a hearing.

Respectfully submitted,

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ATTORNEYS FOR HAMPTON COUNTY ELECTION COMMISSION
Murdaugh, Sinclair, Wooten, Smith; Hampton County Treasurer, Wilson P. Tuten, Jr.

APPENDIX

These portions of the Transcript of Record of the Hearing before the Honorable Charles E. Simons, Jr. are excerpted from the following pages of that Transcript: pp. 23-24; 26-28; 31-32; 37.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

AIKEN DIVISION Civil Action No. 83-612-6

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ETC., ET AL.,

Plaintiffs,

vs.

HAMPTON COUNTY ELECTION COMMISSION, ETC., ET AL.,

Defendants.

H E A R I N G

BEFORE: The Honorable Charles E. Simons, Jr., Chief District Judge

May 14, 1983
Aiken, South Carolina

Appearances:

John R. Harper, II, Esq.
For the Plaintiffs

Charles H. Gibbs, Esq. and
Marvin Infinger, Esq.
For the defendant School Districts

A. G. Solomons, Jr., Esq.
For the defendant Hampton County Council

R A N D O L P H M U R D A U G H, I I I, called as a witness, and having been duly sworn by the Clerk, in answer to questions propounded, testified as follows,

to wit:

DIRECT EXAMINATION

BY MR. INFINGER:

Q. Mr. Murdaugh, state your name please?

A. Randolph Murdaugh, III.

Q. Are you a member of the Hampton County Election Commission?

A. I am.

Q. In what capacity?

A. I am the chairman of it.

Q. All right, sir. For how long have you been the chairman?

A. I've been the chairman probably for ten years. I've been on the

election commission probably for fourteen. That's guesstimate.

* *

Thereafter, subsequent to the passage of the referendum, and prior to the November election, we began getting word that the Justice Department had interposed an objection to the referendum. And as the election got closer and closer, we got to the point to where we did not know what was happening. The -- I think, I might be wrong about this -- I think that the first word that I got was -- from it was from Mr. Kesler. He told me he had been informed of it. The -- I tried to find out something about it and couldn't. I finally called John Dodge our superintendent of education and he gave me a copy. My recollection is

that he gave me a copy of the first actual notice that I had that the objection had been interposed.

At the same time, they were trying to get Justice to reconsider their objection to it. The election commission was in a quandry as to what election to hold. So we thought that the best thing that we could do would be to have filing for the county -- the newly proposed elected county school board and to accept filing for the two individual district boards in accordance with the referendum. Then we would wait until the election got here and find out which election we could hold. And we did that.

There were at least two articles in the newspaper in which I gave an interview stating that. Everybody

that came into my office to file either under the limited filing of the referendum or under the general filing for the county board, I told them that we did not know which election we would hold, that if Justice kept its objection in, we would elect a county school board, if Justice withdrew their objection, we would elect the various -- the individual district boards.

The Justice did not withdraw their objection. We held a county school board election, certified the results of that. After the election of November the 2nd, I think it was, I'm not sure of the date, we learned again that Justice perhaps had withdrawn their objection. The first notice I got from that, I don't remember where it came

from, I finally got Johnny Linton, who represents one of the school boards to give me a copy of that letter. The election commission, there are five of us on the commission, and I talked with the commissioners, and as to what we should now do. We had a referendum that was not contrary, but limiting insofar as filing is concerned with the general law filing, that being that you had to file between the 16th and 31st of August, for the election.

* * * * * * * * * * * * * * * * * * * *

Q. All right, sir. Mr. Murdaugh, I want to ask you one more question. You had some earlier testimony about filing for both?

A. Yes, sir.

Q. Would you explain that again?

A. Yes sir. As I said, we had no

idea what election, and when I say we, I'm talking about the election commission, we had no idea what election we were going to hold. There was the bill, I think from January of that year, or some other time, the preceding bill enacting a county school board to be elected. We had the referendum that had passed in which Justice -- we had been informed, never been notified but had been informed that Justice was going to object to or had objected to.

So we --

THE COURT: That bill was approved on February 18th, '82.

THE WITNESS: That's the school board.

THE COURT: And this 398 was approved April the 9th, '82.

A. Yes sir. So what we figured

that the best thing we could do is let anybody file for any office that they wanted to of those three. In other words, if a man came in and wanted to file for north district number one, district board, we would tell him, we don't know what election is going to be held, we don't know whether we're going to elect district boards or whether we're going to elect a county board. You have a right to file for both of them. A number of people, in fact, that's most of the people, and I'm saying this without -- without looking it up factually, but I would say that the majority, I will put it that way, of the candidates that ran for county school board, did also file for one of the two district boards, depending on which geographical location they

lived in.

We told them that once we got to the point that we knew what was going to happen, that we would then tell them which office they were running for. And we did that.

* *

A. Let me tell you this way, sir, I knew that I wasn't going to hold, if what you are asking me, I knew I wasn't going to hold district elections unless Justice told me it was all right to do it. And I didn't hold it.

Q. But yet you continued to accept filings?

A. Yes sir, because you have got to bear in mind my testimony, I have never been officially notified of the Justice's objection. There was street talk going around Hampton. I finally

got a copy of the letter that Justice sent out from John Dodge when I called him up and asked him to tell me about it, sir. I have to this day, never been officially notified of it. I got a letter, and that's sufficient. I mean, I got enough sense to understand that if I held an election after reading that letter, that I would be doing something wrong.