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September 8, 2004

Honorable W. Hardy McCollum  
Probate Judge of Tuscaloosa County  
Post Office Box 20113  
Tuscaloosa, Alabama 35402-0113

County Commissions – Districts –  
Elections – Voting Rights Act –  
Preclearance

Although the new district lines for the Tuscaloosa County Commission did not receive preclearance under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (2000), in time to be used at the June 2004 primary and primary run-off elections, the new district lines did receive preclearance in time to be implemented at the November 2, 2004, general election. Thus, the new district lines should be used at the November 2, 2004, general election.

Dear Judge McCollum:

This opinion of the Attorney General is issued in response to your request on behalf of the Tuscaloosa County Election Canvassing Board.

QUESTION

Because the “new” district lines for the Tuscaloosa County Commission have now been precleared, but the primary election was held under the “old” district lines, which lines should be used in the general election?

FACTS AND ANALYSIS

According to your letter, your request for an opinion is based on the following facts:

[T]he Tuscaloosa County Commission changed the voting district lines for county commission seats to comport with the figures from the latest census. Although the changes were submitted to the United States Department of Justice in January, preclearance was not received until May 25, 2004. Receiving the preclearance letter at such a late date insured that it was impossible for the voter registrar to notify affected voters of the changes. As a consequence, the primary election on June 2nd was held under the county commission district lines which had been precleared by the Department of Justice in 1984, but did not reflect the changes in population reflected in the 2000 census.

The situation you describe with respect to receiving preclearance of new district lines on the eve of a primary election is similar to a situation this Office addressed two years ago in Baldwin County. The Baldwin County Commission had adopted new district lines in March 2002. The "new" district lines were submitted on March 27, 2002, to the Attorney General of the United States for preclearance as required under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (2000), but preclearance had not been received as of early May 2002.

On May 10, 2002, this Office issued an opinion to the Probate Judge of Baldwin County stating that the June 4, 2002, primary elections in Baldwin County should be conducted under the "old" district lines rather than the "new" lines adopted in March 2002, because the "new" lines had not received preclearance. Opinion to the Honorable Adrian T. Johns, Probate Judge of Baldwin County, A.G. No. 2002-231, dated May 10, 2002, at 1, 3. "Changes subject to the preclearance requirement of Section 5 of the Voting Rights Act are ineffective until precleared by the United States Justice Department," *id.*, or the United States District Court for the District of Columbia. 42 U.S.C. § 1973c; *see* 28 C.F.R. § 51.10 (2003) ("It is unlawful to enforce a change affecting voting without

obtaining preclearance under section 5.”). In other words, “Preclearance is required before actually *administering* a change. . . .” *Lopez v. Monterey County*, 525 U.S. 266, 279 (1999).

Three days later, on May 13, 2002, the “new” Baldwin County Commission district lines received preclearance from the Justice Department — *after* the Probate Judge had published the list of qualified voters and ordered the printing of ballots, including absentee ballots. *See* ALA. CODE § 17-4-129 (Supp. 2003) (Probate Judge must publish list of qualified voters by precinct, district, or subdivision on or before twentieth day before a primary election); ALA. CODE § 17-10-12(a) (Supp. 2003) (absentee ballots must be delivered to the absentee election manager not less than 40 days before the election). The chairman of the Baldwin County Commission then wrote asking which lines should be used at the June 4, 2002, primary election in the light of the recent preclearance of the “new” district lines. This Office concluded:

The election process, up to this point, has been implemented based upon the old precinct lines. The probate judge has informed this Office that over 1000 voters will be affected by the changes adopted by the County Commission. In addition, the ballots have been printed based upon the old precinct lines. Although preclearance was received before the election, it is too late to implement those changes. Even assuming the Board of Registrars had time to make the changes, the voters must be timely notified of the changes, and new ballots must be printed. This process cannot be altered midstream. ***The new precincts should, therefore, be implemented after the primary and primary run-off elections.***

Opinion to Honorable Allen D. Perdue, Chairman, Baldwin County Commission, dated May 21, 2002, at 3–4 (emphasis added); *see also Campbell v. Bennett*, 212 F. Supp. 2d 1339, 1344 (M.D. Ala. 2002) (granting preliminary injunction to place name of independent candidate on ballot after new petition submission deadline was precleared because there was insufficient notice to candidate and “changes in the rules of the game must give those affected a reasonable time to comply”).

As the italicized language quoted above suggests, although the new Tuscaloosa County Commission districts received preclearance too late to be used in the June 2004 primary and primary run-off elections, the new district lines and precincts “should . . . be implemented after the primary and primary run-off elections.” A.G. No. 2002-238 at 4.. Thus, the new district lines and precincts should be used for the November 2, 2004, general election. Unlike the situation with the primary and primary run-off elections, it is not too late to implement the new lines for the general election and provide adequate notice to all voters and candidates. Moreover, now that the new lines have been precleared, a return to the old lines would itself constitute a change affecting voting that would require preclearance. See 28 C.F.R. § 51.12 (2003) (“Any change affecting voting, *even though it . . . returns to a prior practice or procedure . . .* must meet the section 5 preclearance requirement.”) (emphasis added).


#### CONCLUSION

Although the new district lines for the Tuscaloosa County Commission did not receive preclearance under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (2000), in time to be implemented at the June 2004 primary and primary run-off elections, the new district lines did receive preclearance in time to be implemented at the November 2, 2004, general election. Thus, the new district lines should be used at the November 2, 2004, general election.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Charles B. Campbell of my staff.

Sincerely,

TROY KING  
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By:

  
BRENDA F. SMITH  
Chief, Opinions Division

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