

Rushed Election to Fill a Vacancy

Butler v. City of Columbia

(Cameron McGowan Currie, D.S.C. 3:10-cv-794)

When a city council member resigned, the city had to decide whether to follow the normal schedule for a replacement election or add the replacement election to an earlier city election already scheduled. The state's supreme court determined that the replacement election should be on the earlier date. A retired law professor filed a pro se complaint claiming that the early election had not been precleared pursuant to section 5 of the Voting Rights Act. A three-judge district court enjoined the early election because it had not been precleared.

Subject: Election dates. *Topics:* Section 5 preclearance; three-judge court; enjoining elections; pro se party; intervention.

A member of the city council for Columbia, South Carolina, resigned on March 9, 2010.¹ The city decided to depart from its normal timetable and add an election for the vacancy to a city election scheduled for April 6.² The city was faced with a choice between (1) giving candidates and voters, respectively, enough time to file and register and (2) ensuring that residents of the unrepresented district were not unrepresented during budget deliberations.³ South Carolina's supreme court approved inclusion of an election for the vacated office in the April 6 election.⁴

On March 30, a retired law professor filed a pro se federal complaint alleging that the rushing of the vacancy election had not been precleared pursuant to section 5 of the Voting Rights Act.⁵ She and her coplaintiffs sought a temporary restraining order⁶ and a three-judge district court to hear the complaint.⁷

1. *Denman v. City of Columbia*, 387 S.C. 131, 691 S.E.2d 465, 466 (S.C. 2010); Opinion at 2, *Butler v. City of Columbia*, No. 3:10-cv-794 (D.S.C. Apr. 5, 2010), D.E. 38, 2010 WL 1372299; see Adam Beam, *Columbia Sets District 2 Vote for April 6*, Columbia State, Mar. 10, 2010.

2. *Denman*, 387 S.C. 131, 691 S.E.2d at 466; Opinion, *supra* note 1; see Beam, *supra* note 1.

3. See Adam Beam, *Judge Rules on Columbia Election*, Columbia State, Mar. 19, 2010.

4. *Denman*, 387 S.C. 131, 691 S.E.2d 465; see Adam Beam, *Supreme Court Sets April 6 Election Day*, Columbia State, Mar. 24, 2010.

5. Complaint, *Butler*, No. 3:10-cv-794 (D.S.C. Mar. 30, 2010), D.E. 1; see Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439, *as amended*, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court); see also Adam Beam, *District 2 Election Back in Court*, Columbia State, Mar. 31, 2010; Adam Beam, *Law Prof Asks Judge to Halt Columbia Election*, Columbia State, Mar. 30, 2010.

6. Temporary-Restraining-Order Motion, *Butler*, No. 3:10-cv-794 (D.S.C. Mar. 30, 2010), D.E. 15.

7. Motion, *id.* (Mar. 30, 2010), D.E. 5.

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The pro se plaintiff wished to proceed with three coplaintiffs represented by counsel.⁸ Because court rules required attorneys to file documents electronically and required pro se parties to file documents traditionally, the pro se plaintiff filed her complaint traditionally and sought to join the other plaintiffs with notices of joinder.⁹

The court assigned the case to Judge Cameron McGowan Currie,¹⁰ who authorized the pro se plaintiff—an attorney licensed elsewhere—to appear pro hac vice without payment of fees and to receive service electronically but not to file electronically.¹¹

On the following day, a voter moved to intervene in support of the defendant; he had prevailed in the state court lawsuit.¹² The circuit's chief judge named a three-judge panel,¹³ but amended the panel's composition on the next day because of a schedule conflict.¹⁴

In matters before a three-judge district court, the original judge may issue interim orders.¹⁵ At a proceeding on Wednesday, March 31, Judge Currie granted joinder and intervention, deferred ruling on the temporary restraining order until Monday, and ordered the city to advise the Justice Department of the action.¹⁶

On Friday, after consultation with the other judges on the panel and with the consent of the parties, Judge Currie converted the motion for a temporary restraining order to a motion for a preliminary injunction, which the full panel would hear on Monday.¹⁷

The job of a section 5 three-judge court was clarified by the Supreme Court in *Lopez v. Monterey County*: determine (1) whether section 5 covers a contested change, (2) whether section 5's approval requirements were satisfied, and (3) if the requirements were not satisfied, what temporary remedy, if any, is appropriate.¹⁸ After Monday's evidentiary hearing, the court en-

8. Notices of Joinder, *id.* (Mar. 30, 2010), D.E. 4, 13.

9. *Id.*; see D.S.C. ECF Policies and Procedures ¶¶ 2.1, 3.3 (May 12, 2006).

10. Tim Reagan interviewed Judge Currie for this report by telephone on September 6, 2012.

11. Docket Sheet, *Butler*, No. 3:10-cv-794 (D.S.C. Mar. 30, 2010) (specifying that these decisions were not intended as precedents for future cases).

12. Intervention Motion, *id.* (Mar. 31, 2010), D.E. 19.

13. Order, *id.* (Mar. 31, 2010), D.E. 25.

14. Order, *id.* (Apr. 1, 2010), D.E. 29.

When there was time, it was Judge Currie's practice to have her law clerks prepare a bench memorandum for the other two judges on the panel. Interview with Hon. Cameron McGowan Currie, Sept. 6, 2012.

15. 28 U.S.C. § 2284(b)(3).

16. Docket Sheet, *supra* note 11; see Adam Beam, *Judge to Rule Monday if Election Can Proceed Tuesday*, Columbia State, Apr. 1, 2010.

17. Order, *Butler*, No. 3:10-cv-794 (D.S.C. Apr. 2, 2010), D.E. 33.

Judge Currie advised other judges to seek a complete and accurate record of previous relevant preclearances. Interview with Hon. Cameron McGowan Currie, Sept. 6, 2012.

18. 519 U.S. 9, 23 (1996).

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joined the inclusion of the election for the unexpired city council seat in the scheduled city election, pending preclearance.¹⁹

A special election was held on July 13 following previously precleared procedures.²⁰ A runoff election was held on July 27.²¹

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance.²²

19. Opinion, *supra* note 1; see Adam Beam, *Court: No District 2 Election Without Federal OK*, Columbia State, Apr. 5, 2010.

20. See Adam Beam, *District 2 Election Will Be July 13*, Columbia State, Apr. 7, 2010.

21. See Adam Beam, *Newman Tops Howard in District 2 Race*, Columbia State, July 28, 2010.

22. *Shelby County v. Holder*, 570 U.S. 529 (2013).