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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

February 11, 2000

The Honorable Hugh K. Leatherman, Sr.
Senator, District No. 31
205 Gressette Senate Office Building
Columbia, South Carolina 29202

Dear Senator Leatherman:

You referenced in your letter the fact that the South Carolina Republican Party is conducting its Presidential Preference Primary on Saturday, February 19, 2000. You note that "[t]he Republican Party has prepared ballots and taken other related steps to conduct and finance a Statewide Presidential Preference Primary under party rules." You further state that "[t]he Republican Party seeks to give voting citizens an opportunity to express their preference on the Republican Candidates running for President of the United States."

Specifically, you reference the following:

> [i]n 1980, the Attorney General's Office issued an opinion addressing a Republican Presidential Primary. That opinion concluded that a separate Presidential Preference Primary financed and conducted by the Republican Party was not a legally recognizable election procedure and was not subject to general state election laws. I would like to request your opinion regarding the application of general state election laws to the upcoming Presidential Preference Primary, which is being conducted and financed by a political party. Specifically, can a political party determine the location and number of voting places without regard to state established voting precincts or other state election law requirements when conducting a Presidential Preference Primary?

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Request Letter.

Law / Analysis

The January 15, 1980 opinion of former Attorney General McLeod was very specific and very clear regarding the nature of presidential preference primaries in South Carolina. Attorney General McLeod stated that, under South Carolina law, the presidential primary "is not a primary in the legal sense, but is more nearly identified as a straw vote or poll being held separate and apart form the laws of the State relating to political parties." The opinion of Mr. McLeod went on further to say that

> [t]he March procedure [1980 Presidential Preference Primary] does not nominate anyone and has no binding force or effect. Under the Election Laws of this State, voters do not cast ballots for Presidential candidates but instead cast ballots for Presidential electors who may be nominated by the various political parties. The March 'primary' is, therefore, not a legally recognizable election procedure and has no more force or effect than the response to a telephone inquiry by a poll taker as to the Presidential choice of individuals.

Accordingly, the 1980 opinion concluded that a voter's participation in the 1980 March Republican Primary had no effect on that voter's "subsequent participation in any regularly scheduled primary conducted in accordance with South Carolina law."

Since the 1980 opinion was rendered, there have been certain changes in South Carolina law, but these have reinforced the validity of the 1980 opinion, rather than undermined it. In two 1979 opinions - dated April 6, 1979 and October 1, 1979 - this Office advised that there existed no statutory authority to conduct presidential preference primaries. In the latter opinion, we concluded that, because there was no such authority, a presidential preference primary was not an "election" pursuant to § 7-3-20(5) which requires the Executive Director of the State Election Commission to furnish each county registration board certain voter registration information.

In 1991, Act No. 47 was enacted and is codified at § 7-11-20. This statute was enacted "to allow a certified political party to hold a presidential primary election ...." See, Title to Act No. 47. Prior to Act No. 47's enactment, § 7-11-20 specified that "party primary elections held by political parties ... to nominate candidates for any of the offices to be filled in a general or special election shall be conducted in accordance with the provisions of this Title and in accordance with party rules not in conflict with the provisions of this Title or of

the Constitution and laws of this State or of the United States." As amended by Act No. 47 of 1991, § 7-11-20 now provides that

> [a] certified political party wishing to hold a presidential primary election may do so in accordance with the provisions of this title and party rules. However, notwithstanding any other provisions of this title, the state committee of the party shall set the date and the hours that the polls will be open for the presidential primary election and the filing requirements. If a presidential party holds a presidential primary election on a Saturday, an absentee ballot must be provided to a person who signs an affirmation stating that for religious reasons he does not wish to take part in the electoral process on a Saturday.

The last sentence of the Section was added by Act No. 489 of 1992, effective July 1, 1992.

In 1992, the State of South Carolina also took over the function of running and financing all primary elections from the political parties. See, §§ 7-13-15 and 7-13-40. The State-run primary system constituted a major change under South Carolina law.

What is particularly striking, however, is that even despite these fundamental changes in the way South Carolina primaries are conducted, the General Assembly made no change whatever in the way presidential preference primaries are held. In the very same Act which established state-run primaries, the Legislature left no doubt that the conduct of a presidential preference primary remained solely in the hands of the political parties and was not a state delegation of authority. Section 7-11-25, which was § 14 of Act No. 253 of 1992, specifically provides that

> [n]othing in this act, nor any other provision of law may be construed as prohibiting the political parties in this State from conducting, according to their own rules and at the party's expense, presidential preference or advisory primaries.

In other words, the political parties - not the State of South Carolina - run presidential preference primaries in South Carolina pursuant to party rules.

It is well recognized that the Legislature is presumed to be aware of opinions of the Attorney General and, absent changes in the law following the issuance thereof, has

acquiesced in the Attorney General's interpretation. See, Op. Atty. Gen., April 22, 1998 (Informal Opinion). As was stated in State v. Son, 432 A.2d 947, 949 (N.J. 1981), "[t]he absence of any amendment to a statute following an Attorney General's formal opinion strongly suggests that the views expressed therein were consistent with legislative intent."

In addition, it is well recognized that "the last act of the Legislature is the law." Garey v. City of Myrtle Beach, 263 S.C. 247, 209 S.E.2d 893 (1974). Moreover, where a law sets forth a specific procedure, that provision is controlling as to that procedure. Anders v. County Council for Richland County, 284 S.C. 142, 325 S.E.2d 538 (1985). In 1992, the General Assembly, in § 7-11-25, made it crystal clear that the law set forth in the 1980 McLeod opinion - that political parties run presidential preference primaries in South Carolina - was still the law. See, Slocumb v. State, 337 S.C. 46, 522 S.E.2d 809 (1999)[1]. In other words, not only has the General Assembly not chosen to change the 1980 opinion, it has embraced and codified that opinion. Accordingly, we reaffirm the 1980 opinion today. As stated then, and as we reiterate now, the presidential preference primary in South Carolina "is not a primary in the legal sense, but is more nearly identified as a straw vote or a poll being held separate and apart from the laws relating to primaries by political parties."[2]

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[1] In Slocumb, the South Carolina Supreme Court recently emphasized that "... the reenactment of a statutory provision does not change the effect of an intermediate act that qualified or limited the earlier enactment. Rather, the intervening statute will be deemed to qualify or modify the new statute in the same manner that it previously modified the earlier enactment." [citations omitted]. Section 7-11-20 was reenacted shortly after §7-11-25, simply to add the requirement providing for absentee ballots for a presidential primary election occurring on a Saturday. However, § 7-11-25 remains the applicable statute with respect to presidential preference primaries. Section 7-11-25 is a specific recognition by the General Assembly that the opinion of former Attorney General McLeod, which had advised that presidential preference primaries in South Carolina were not "elections" but straw polls, was still the case.

[2] It should be stressed again that § 7-11-25 - which is the procedure which relates expressly to presidential preference primaries - does not purport to determine how South Carolina delegates to the national political conventions are chosen. In the case of the Republican Party, that Party presently sends 38 delegates to the Republican National Convention - 19 statewide, chosen by the State Convention months after the Presidential Preference Primary and 18 selected by 6 conventions held at the Congressional District level. In neither instance are delegates selected as a result of the preference primary, but are selected independently pursuant to the party rules.

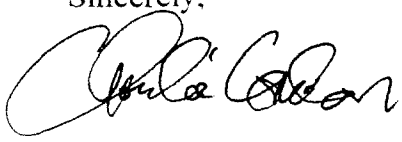
Conclusion

For two decades, the political parties in South Carolina have run presidential preference primaries as straw polls pursuant to their own rules and under their own procedures. This was recognized by the 1980 opinion of former Attorney General McLeod and was recognized and codified into state law by the General Assembly in 1992 in § 7-11-25. We affirm and reiterate that conclusion today.

A political party is brought together by common values, common ideas and common ideology. In South Carolina, the presidential preference primary has thrived and become critical to the presidential selection process because the General Assembly has left the parties free to conduct these primaries without governmental interference. The parties have always run their primaries fairly and even-handedly without major difficulties. This process which works well should be left alone by government. That has been what South Carolina government has done.

Accordingly, pursuant to § 7-11-25 and the Attorney General's opinion of 1980, South Carolina law does not require each and every precinct to be open by the political party conducting a presidential preference primary. The party may open all precincts pursuant to its own rules and processes, but state law does not require it.

Sincerely,



Charlie Condon
Attorney General

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