

1977 S.C. Op. Att. Gen. 31 (S.C.A.G.), 1977 S.C. Op. Att. Gen. No. 77-23, 1977 WL 24366

Office of the Attorney General

State of South Carolina

Opinion No. 77-23

January 18, 1977

*1 Honorable Joyce Hearn
Member
House of Representatives
State House
Columbia, South Carolina 29211

Dear Mrs. Hearn:

You have requested an opinion of this Office as to the constitutionality of a bill which is about to be filed in the House and which would create a Judicial Nominating Commission to assist the General Assembly in the selection of qualified justices and judges. The Commission would consist of legislators, lawyers who are not legislators and persons who are neither lawyers nor legislators. Its responsibilities would include complete examination of the fitness of candidates for judicial office (with access to information held by any state agency, including the Board of Commissioners on Grievances and Discipline) and the submission to the General Assembly of the names of the three candidates whom the Commission deems best qualified for the judicial office under consideration. Nothing in the bill would prevent additional nominations from the floor of the House or Senate.

Several questions have been raised concerning the constitutionality of this bill. It is contended that the bill would improperly delegate a function of the legislature to private persons, that the background of some of those persons bears no relation to the offices under consideration, and that the bill would establish qualifications for judges over and above those established by Article V of the Constitution of South Carolina. All three contentions lack merit for the same reason: the Commission would not have final authority to make an appointment or even to reduce the field to a particular number of persons. In this respect the present bill differs from other legislation of this sort which has been considered by the courts of this State; in fact, the Supreme Court in [Gould v. Barton](#), 256 SC 175, 201, 181 S.E.2d 662, 674 (1971) recognized a distinction between the absolute power to appoint and the power to merely recommend. The Commission's role can best be characterized as involving detailed investigations, factfindings and recommendations. This procedure takes nothing away from the General Assembly and adds no legal prerequisites to the qualifications established by the Constitution. It is therefore the opinion of this Office that the bill would not be unconstitutional because of any of the contentions listed above.

Nevertheless, a problem may well exist with respect to the Commission's access to the files of the Grievance Commission. Since the discipline of attorneys is a judicial function and is recognized as such by statute (Section 56-96, 1962 Code of Laws), the bill could violate constitutional provisions as to the separation of powers by its requirement that the Grievance Commission provide information to the Judicial Nominating Commission. However, this is a subsidiary feature of the bill which would probably be severable in any event.

Sincerely yours,

Kenneth P. Woodington
*2 Assistant Attorney General

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