

1978 WL 35239 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

November 24, 1978

*1 Honorable Joyce C. Hearn
Member
House of Representatives
1316 Berkelye Road
Columbia, South Carolina 29205

Dear Mrs. Hearn:

Thank you for your letter of November 23 setting forth several questions, the answers to which I am submitting seriatim below:

1. The magistrates' selection is one which has always been vested in the Governor, subject to confirmation by the Senate. There is no selection practice as such which has any legislative significance. Any elective process that may be instituted would be advisory only.

Any method of selecting judges by a popular vote is wrong, in my opinion, and should not be utilized. It has the effect of making political the judicial branch of the government which should be removed from political influence. Until the present constitutional method of selecting magistrates is changed, which I do not think should be undertaken, I would favor a method of submitting names to the Governor for his consideration. The selection should be done by a selecting panel composed of laymen and lawyers which should not only receive applications for consideration but should actively make efforts to find persons who would be proper for appointment as magistrates. A list of names could then be presented to the Governor for his consideration, and from the list, he could submit his designee to the Senate for confirmation. Such a plan can and should be nonpartisan but should be based entirely upon a merit selection basis. This procedure would have no more legal effect than does the present practice of having advisory elections but, in my opinion, it would be far more influential and productive of a high quality of magistrates. The magisterial system will become increasingly important as a part of our judicial system and the selection of magistrates is therefore of greater importance.

2. Nonpartisan elections can probably be held by mutual agreement between the political parties. There is no law which would govern an election and some modification of statutes may be necessary if this system is to be utilized. The Horry election was held under the provisions of the Home Rule Act which authorizes the holding of referenda and I am informed that the candidates for magistrate were also placed on the General Election ballots in that county. I have previously issued opinions stating that magistrates cannot be placed on the General Election ballots because they are not among the elective offices to be voted upon. The counties which have preferential primaries or general election of magistrates are appended hereto or will be submitted to you as soon as sufficient time is afforded to determine the various counties that may be involved.

3. The use of preferential primaries is effective in every county of the State but this is by operation of the Democratic Party custom and practice. It dates back to many years ago. The existence of two parties in the State has led to at least one lawsuit, of which I am aware, plus other confrontations between the Governor and Members of the General Assembly on the matter of appointments. During Governor West's administration, one individual was named by one party in an advisory primary and another individual was named by the other party in a separate primary. The Governor named the Democratic winner, and the Republican winner was not appointed by Governor West. The Republican winner brought action to compel his appointment. In the Federal Court, Judge Simons excoriated the custom of having primaries of

no legal significance but recognized that the Governor could appoint anyone whom he wished to appoint, subject to confirmation by the Senate. That is precisely the situation which exists today. In Richland County, as you well recall, Governor Edwards submitted the name of a Republican primary winner, which was rejected by the Senate; he then submitted the name of a Democratic primary winner, who was confirmed and is now serving.

*2 The upshot of the entire matter which I am attempting to explain is that the appointments are made by the Governor, subject to confirmation by the Senate. A number of counties have elective processes which are advisory only, and this is accomplished by the party. In at least one county, a provision is made by law for inclusion of the magistrates' race on the General Election ballot but none of this is binding on the Governor. A dilemma is sometimes presented where Republican primaries are held.

I think that the best way to select a judge is clearly by some merit selection procedure which I have outlined roughly above. I further think that the process of electing judges is the worst method that could be adopted. Enough of that has happened on the county level in Richland County for me to demonstrate that it is of no value and should be avoided.

We are preparing a proposed piece of legislation for the magisterial system for consideration by you and other Members of the General Assembly and I will forward it to you as soon as possible.

With best wishes,
Very truly yours,

Daniel R. McLeod
Attorney General

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