

1975 S.C. Op. Atty. Gen. 47 (S.C.A.G.), 1975 S.C. Op. Atty. Gen. No. 3976, 1975 WL 22274

Office of the Attorney General

State of South Carolina

Opinion No. 3976

February 21, 1975

*1 The Honorable James B. Edwards
Governor
Columbia, South Carolina

Dear Governor Edwards:

Your letter of February 6, 1975, requests my opinion on the following questions:

1. Is there any provision in the law of South Carolina for an election between the winners of Democratic and Republican preferential primaries?

Only in Spartanburg (effective 1976) and Lexington Counties.

2. If so, are there any provisions in the law for financing such an election or directing who shall conduct and supervise such election? Further, would the general law governing elections apply to such a contest?

Not applicable in view of the answer given to Question 1. However, such a provision of law would undoubtedly be subject to the general law governing elections unless contrary provisions were included in a governing statute.

3. If not, would it be contrary to any provision of law to hold such a preferential election in conjunction with another election, either a special election or a general election?

Yes. See comments set forth in attached memorandum.

4. In the event there are no provisions for such a contest, either a special one or in conjunction with a general election, can the General Assembly provide by statute for such a contest or would it require a constitutional amendment?

A statute could provide for such a contest. No constitutional amendment would be necessary.

5. In the event such procedure can be established by statute, would it be necessary to provide for same on a state-wide basis or could it be handled on a county-by-county basis?

A Statewide statute would be necessary.

6. Can a political party legally include the office of magistrate on its primary ballot and if so, can it lawfully charge a filing fee?

Yes (both questions), provided authority for inclusion of magistrates is provided by law.

I am attaching hereto a more comprehensive statement of the bases for the conclusions expressed.

Very truly yours,

Daniel R. McLeod
Attorney General

ATTACHMENT

1. Is there any provision in the law of South Carolina for an election between the winners of Democratic and Republican preferential primaries?

The position of magistrate is appointive and not elective. Nevertheless, it has been customary in a number of counties to conduct preferential elections in primary races. In Cherokee, Greenwood, Oconee, and Kershaw Counties, provision is made by statute for nomination of magistrates in the primaries, while in Lexington and Spartanburg Counties statutory authority exists for conducting preferential elections or referendums in the General Election (with provision for the placement of names upon the general election ballots in Spartanburg County. The Lexington County statute is ambiguous). The results of such elections are not binding upon the Governor in making an appointment. The futility of conducting such advisory elections was strongly condemned in recent years by Federal Judge Charles Simons. There is no Statewide statute authorizing advisory elections for magistrates Except in specific counties and in the isolated examples referred to, there is no provision of law providing for such procedure.

3. If not, would it be contrary to any provision of law to hold such a preferential election in conjunction with another election, either a special election or a general election?

*2 Nominations in party primaries are governed by Section 23-396 of the Code of Laws which relates to 'party primary elections.' As noted, the contest for magistrate is not an 'election' and, in my opinion, only those offices which are to be filled by an election may be included on the ballots for such a primary election unless statutory authority exists therefor. Such advisory elections were referred to in-[Young v. Sapp, 167 S.C. 364, 166 S.E. 354](#), which states, by way of dicta, that no Constitution violation appears to exist in such a procedure. At the time of that election, however, no public expenditure of monies was involved, so far as I can determine. At the present time, the cost of conducting a primary is borne, to some extent, by the State, which furnishes lists of voters. The cost of these lists is reported to me to be as follows with respect to the counties where advisory elections are presently authorized by statute:

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The mere addition of another name might not involve such expenditure of public funds for an advisory election as would exceed a de minimus amount but if a special primary should be held at which no other names are voted upon, a constitutional issue may be present. Irrespective of any constitutional problem, it is my opinion that inclusion of names on primary ballots must be provided for by statute.

4. In the event there are no provisions for such a contest, either a special one or in conjunction with a general election, can the General Assembly provide by statute for such a contest or would it require a constitutional amendment?

Subject to some constitutional reservation, it is my opinion that the General Assembly can provide for the inclusion of names on primary ballots or upon general election ballots. I base this conclusion upon the dicta contained in [Young v. Sapp](#), but principally upon the holding of the Court in [Fowler v. Town of Fountain Inn, 90 S.C. 352, 73 S.E. 626](#), where the Court upheld the conducting of what was apparently an advisory referendum upon the issuance of bonds, the results of which were not binding upon the Town Council.

While I have concluded that a statute could provide for the conduct of a preferential election for magistrate, I recognize that its mere advisory nature could be a basis for a serious attack upon the validity of such a statute on the grounds that the expenditure of public funds in furtherance of such an election was improper.

5. In the event such procedure can be established by statute, would it be necessary to provide for same on a state-wide basis or could it be handled on a county-by-county basis?

In my opinion, such a statute must be framed upon a Statewide basis. In my opinion, Article VIII, Sections 7 and 8 of the Constitution prohibiting laws for a specific county or for a municipality relates to the structure, organization, powers, duties, functions, and responsibilities of counties and municipalities and does not relate to laws not concerned with those matters. I think that Article III, Section 34 of the Constitution continues in effect, so as to preclude a special law where a general law can be made applicable. The Supreme Court has not yet passed upon the present status of that constitutional provision but has held that it has no effect upon the application of the anti-special law provision of Article VIII. The proposed legislative amendment, which has not yet been submitted to the voters, will probably carry into effect the basic provisions of Article III, Section 34.

6. Can a political party legally include the office of magistrate on its primary ballot and, if so, can it lawfully charge a filing fee?

*3 As already indicated, I do not think that a political party can include the office of magistrate on its primary ballot, except by authorization of law. If so authorized, it may charge a filing fee.

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