

November 12, 1999

TO: Members of the General Assembly

FROM: Judicial Merit Selection Commission

RE: Letters of Recommendation and Support

As part of its 1996 reform of the judicial screening and election process, the General Assembly prohibited judicial candidates from seeking, directly or indirectly, early pledges of support from members of the General Assembly. See S.C. Code Section 2-19-70(c). The purpose of the provision was to insure that the General Assembly had full access to the Screening Committee's report prior to a member being asked by a candidate to pledge his support.

Many complaints brought to the Commission's attention are of alleged breaches of this "no pledge solicitation" provision. The complaints have focused on two types of legislative endorsements: (1) delegation letters of endorsement and (2) individual member letters of reference.

Individual Candidates use of Delegation Letters of Endorsement

Most recently, the Commission has fielded numerous questions regarding the propriety of delegation letters of endorsement being signed by members of the General Assembly prior to the release of the Commission's final report. In considering the traditional and long-standing practice of legislative delegations issuing letters of support prepared and signed prior to the appropriate time, the Commission is faced with either (1) allowing this practice to continue in clear contravention of the provisions of Section 2-19-70 which provides in part that, "[no] member of the General Assembly may offer his pledge until the qualifications of all candidates for that office have been determined by the Judicial Merit Selection Commission and until the Commission has formally released its report as to the qualifications of its nominees to the General Assembly," or (2) applying the plain meaning of the statute and disqualifying candidates acting contrary to the law.

Typically, a letter of support is circulated by a candidate or individual acting on behalf of or for a candidate to members of a particular caucus or delegation prior to the release of the screening report in order to have members of that group sign the letter. This letter is then usually held until pledges may be legally sought and then circulated by the group to members of the General Assembly requesting their support for the candidate. The Commission is of the opinion that this practice constitutes premature pledging of support and is in violation of Section 2-19-70.

Judicial Candidates' use of Legislative Letters of Reference

Similarly, the Commission is concerned about the increasing practice of members of the General Assembly providing letters of recommendations for judicial candidates before the issuance of the final report. The Commission believes that a letter of recommendation carries with it at least the tacit endorsement of the candidate for whom the letter is written. To the recipient of the letter, the Commission believes, the implication is that the letter would not have been written but for the writer's actual support of the candidate. The Commission believes that this announced support is tantamount to a pledge and therefore violates Section 2-19-70.

These letters have typically requested support for the candidate at a future date connotated as "the appropriate time." Notwithstanding the caveat contained within the letter that the request is conditioned on a future date, the Commission is of the opinion that support is requested at the date and time the letter is sent. The fact that the letter is to be sent at a later date does not make it valid ex post facto. Otherwise, a legislator could lobby for candidates with impunity prior to the release of the Commission's report by simply employing a fiction of a future date at which time the solicitation would be valid. The Commission believes that the problem here, as above, is that a recipient of such a request would not be able to divorce in his mind the date on which the request was made and the date at which time a request for support would be permitted. The Commission believes that as soon as a legislator signs a letter of recommendation or support in any form he has clearly attested his support for that candidate. If this is done prior to the issuance of the final report, the request for support would be improper. **The Commission is therefore advising all legislators that it will treat requests for support as being made on the date that the letter is signed.**

The Commission hopes that each candidate, being informed of the issues inherent in the use of letters of recommendation, will abide both by the letter of the law in Section 2-19-70 as well as its intended spirit. **The spirit of the statute is that there will be a complete absence of any activity (except solely for letters of introduction and direct candidate-legislator contact for purposes of introduction) with regards to judicial vacancies until at least 48 hours after the Commission releases its final report of candidate qualifications.** This time period is designed so that legislators will have ample time to read and digest the Commission's report and learn of the qualifications of each candidate prior to receiving any requests for support.

The Commission cautions members of the General Assembly **that the only recourse the Commission has against a candidate who violates the provisions of Section 2-19-10 et seq. is to find that candidate unqualified for judicial office.** The Commission believes that a violation of the screening law is likely a disqualifying offense and must be considered when determining a candidate's fitness for judicial office. The Commission would therefore counsel members to please be careful that the actions undertaken on behalf of a candidate or at his request comport with the requirements of the screening law as set out above.

If you have any questions about this matter or about the permissibility of any activity within the screening process, please contact the Commission's staff at 212-6092 and they will be happy to assist you.

Sincerely,

Glenn F. McConnell