Agenda Document 91-96-A

FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

For Meeting of: Oct. 3, 1991

SUBMITTED LATE

M E M O R A N D U M

TO: The Commission
FROM: Commissioner Thomas J. Josefiak
DATE: October 1, 1991
SUBJECT: Advisory Opinion 1991-22 (Minnesota expenditure limits)

(I request this memorandum be placed on the agenda for the Commission's open session of October 3, 1991.)

I was the sole dissenter in the Commission's recent approval of Advisory Opinion 1991-14. I concluded State financing of Federal candidates impermissibly intrudes into the jurisdiction of the Federal Election Campaign Act and is preempted, although I acknowledged the general direction of the Commission's prior opinions would seem to permit such State funding. It should come as no surprise that I consider Minnesota's regulatory scheme at issue in Advisory Opinion 1991-22, insofar as it is directed to candidates for Federal office, to be generally preempted by the Act.

That my position is fairly clear in advance does not dissuade me from wanting to comment on this extremely important advisory opinion request, particularly when I believe the Commission should consider some alternative between the preemption position I argued in Advisory Opinion 1991-14 and the position taken by the General Counsel in the present draft for 1991-22. I am also very concerned about the implications of the legal analysis used by the General Counsel's office to reach its conclusion in the draft opinion.

At the outset, I should emphasize that the question presented to the Commission in this request is not whether Minnesota's campaign finance regulation is sound policy, generally "fair" or complementary to the broad objectives of the Federal Election Campaign Act. Rather, the question is whether this State's regulatory scheme imposing expenditure limitations upon Federal candidates intrudes upon the exclusive jurisdiction of the Act with respect to the campaign finance

activity of candidates for Federal office. I think the answer is overwhelmingly yes; the Minnesota law attempts to regulate in an area within the exclusive jurisdiction of the Act. I urge my colleagues to meet our obligation as Commissioners to maintain the supremacy and integrity of the Act's jurisdiction over Federal political activity.

FEDERAL JURISDICTION OVER EXPENDITURE LIMITATIONS

"Federal law supersedes State law concerning any limitation on expenditures regarding Federal candidates and political committees." OGC Draft at p. 17. See 11 CFR 108.7(b)(3). I agree with the General Counsel's analysis that the absence of expenditure limits for House and Senate candidates in the FECA is not a regulatory vacuum into which States may enter. Frankly, the suggestion of some commenters to this AOR that Congress' "failure" to enact spending limits gives the States an opening to regulate is preposterous in the context of preemptive jurisdiction. The continuing debate in Congress on this issue, and its deciding not to act, is itself action within its exclusive jurisdiction, and gives no opening for State regulation. The FECA "occupies the field" regarding expenditure limitations for Federal candidates, whether or not Congress chooses to enact such limits.

RESULT REACHED IN GENERAL COUNSEL'S DRAFT

I strongly disagree, however, with the bifurcated legal result in the outcome of the General Counsel's draft. The draft correctly sets out (at pp. 16-20) the statutory imperative, supported by legislative history, for Federal preemption of State regulatory schemes that would place expenditure limitations upon Federal candidates. The draft then wrongly concludes that FECA jurisdiction only preempts "the enforcement regime that the Minnesota statute purports to impose on Federal candidates who agree to the expenditure limit" -- the imposition of civil fines for exceeding the limitations to which candidates may have "voluntarily" agreed. OGC draft at p.19. The draft does not view Minnesota's entire expenditure limitation regime -- involving payments to candidates to "induce" their compliance with expenditure limits -- to be preempted by the FECA.

For purposes of Federal preemption, no meaningful distinction can be drawn between State laws that explicitly encourage Federal

candidates' adherence to expenditure limits through financial "incentives" and "disincentives" (effectively requiring adherence) -- an approach the draft opinion finds not to be preempted by the FECA -- and State laws that require compliance with spending limits through financial or other penalties. Both impermissibly intrude into the Act's exclusive authority with respect to "limitation on expenditures regarding Federal candidates and political committees."

Whatever qualitative policy difference (a carrot may be nicer than a stick), either regulatory scheme constitutes State legislative interference with Federal election campaign finance regulation. Whatever difference "voluntary" expenditure limits effectuated through "incentives" may mean from a Constitutional standpoint, there is no difference in terms of FECA preemption whatsoever. And, whatever the meaning of the Commission's prior opinions permitting State funds to be provided to Federal candidates, those opinions surely cannot mean that any and all State regulation of Federal candidates is safe from Federal preemption if implemented through State financing programs.

THE LAW AND LEGISLATIVE HISTORY

As noted above, and in the General Counsel's draft opinion, the Commission's regulations specifically provide for Federal preemption of State laws with respect to expenditure limitations upon Federal candidates and committees. 11 CFR 108.7(b)(3). The Act's preemption provision generally provides: "The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office. 2 U.S.C. §453. In Advisory Opinion 1989-25, the Commission observed:

> The report of the House committee that drafted the preemption clause explains its intent in sweeping terms. Federal law is to be "construed to occupy the field with respect to elections to Federal office" and is to be "the sole authority under which such elections will be regulated." H.R. Rep. No. 93- 1239, 93d Cong., 2d Sess. 10 (1974). ... As the legislative history of §453 shows, the central aim of the clause is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing for election to Federal office. ...

In Congressional debate in August of 1974, during consideration of amendments to the FECA that created much of the present Act,

Congressman Obey offered an amendment to permit States to enact spending limits for Congressional candidates lower than the limit then contemplated to be in the Federal law. Congressman Hays reluctantly opposed the amendment, observing:

> ... [I]f there was any one thing that nearly every Member of this body asked us to do, that was to preempt State laws so that all candidates would know where they stood, and live under one set of regulations and have one set of laws to go by.
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> ... [O]n the subject of preemption, it seems to me that it is a little like pregnancy -- you either are or you are not; you cannot be part way. I just think that if we are going to preempt State laws -- and I think it is vital that we do, so that we have some orderly kind of procedure -- that we have one set of standards for all the States all the way through for Federal elections.

120 Cong. Rec. H7895 (daily ed. August 8, 1974)(remarks of Rep. Hays). Congressman Bingham added:

> ... I think the ceiling has to be a national one, taking into account the variations in districts. Moreover, its seems to me simply inappropriate for States to legislate with regard to an election to a Federal office such as the Congress.

Id. at H7897 (remarks of Rep. Bingham). During the same debate on the amendment, Congressman Koch remarked:

> ... I, too, am opposed to the amendment on the ground that preemption is essential. ... [T]he legislation we are passing today should apply equally to everyone. To do otherwise will put this legislation and the fight for reform back into the hands of 50 different State legislatures.

Id. at H7898 (remarks of Rep. Koch).

The force of this Congressional sentiment against State expenditure limitations upon Federal candidates is not diminished by the fact spending limits for U.S. House and Senate candidates were eventually removed from the Act. As the General Counsel's draft acknowledges, the absence of spending limits in the FECA does not create a legislative vacuum for States to fill.

For purposes of Federal preemption of State law, the General Counsel's distinction between State regulation of Federal candidate financial activity through conditioned and qualified funding and State regulation through civil penalties is a false distinction. It would kick the legs out from under the jurisdiction of the Act, and the

Act's preemption provision specifically, by permitting States to regulate Federal candidates through State treasury funded extortion. The Act and its legislative history clearly mandate that a State regulatory scheme providing substantial financial advantages only to those Federal candidates who obey State-determined spending limits, and strong disincentives to those who do not, is preempted by the Federal Election Campaign Act.

ALTERNATIVE BASIS FOR PREEMPTION

I opposed the majority's position in Advisory Opinion 91-14 that permitted Federal political committees to accept State funds. \[1] However, the General Counsel correctly notes in draft AO 91-22:

> Notwithstanding the broad scope of the Act's pre-emptive effect on state statutes that encroach upon the financing of Federal elections, the Commission has previously held that various state tax funded programs that distribute state funds to Federal political committees are permitted by the FECA and Commission regulations.

The Minnesota expenditure limit scheme goes far beyond any State funding program the Commission has previously approved, because it uses elaborately qualified and narrowly conditioned State funding to implement a system of regulating and circumscribing campaign finance activity itself. A line can be drawn to preempt Minnnesota's legislation that is consistent with the Commission's precedent (and without accepting my position in Advisory Opinion 1991-14).

I wish to suggest an alternative basis for recognizing Federal preemption of the Minnesota campaign finance statute that can be reconciled with Commission precedent and would continue to generally allow providing State funds to Federal candidates. The Commission could conclude State treasury payments to Federal candidates and committees are not inherently impermissible or preempted, but the

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1. I continue to consider any funds collected by a State as obligatory tax payments or fees (and not received as fully voluntary donations) as general treasury funds, regardless of "check-off" designations. I view payments to Federal candidates from State funds to conflict with the Act's contribution prohibitions and limitations as a matter of statutory interpretation, and to be generally preempted as a matter of Federal jurisdiction. See my Dissenting Opinion in Advisory Opinion 1991-14.

State may not make those payments conditioned upon complying with expenditure limits (or any other condition constituting significant regulation of or constraints upon the campaign finance activity of Federal candidates). \[2]

State funds may be provided to Federal candidates, but not with regulatory strings attached. Using funding incentives and disincentives to regulate Federal candidates runs afoul of the FECA's preemptive jurisdiction, and conflicts with the Commission's prior advisory opinions dealing with preemption. See, particularly, Advisory Opinions 89-25, 89-12 and 88-21. \[3]

COMMISSION PRECEDENT ON STATE FUNDING

The OGC draft generally ignores the Commission's prior opinions finding Federal preemption of State regulatory schemes, and largely relegates reference to them to footnote 7. The General Counsel's draft instead cites for support, and strongly defends, the Commission's opinions allowing State funding. The draft concedes these opinions fail to directly address potential preemption and contribution consequences of State funding, but seems to find the absence of discussion supportive of its position. (See pp. 8-9, particularly footnote 6). The Commission's early opinions in this area are cryptic and contradictory, however, and the Commission

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2. Another line of analysis for preemption also could be adopted, but it would require the Commission to narrow its precedent somewhat to decide it will not permit State funding of Federal candidates from general treasury funds (as provided under the Minnesota system), but only from funds designated through taxpayer check-offs (AO 91-14) or similar 'pass through' programs (e.g., ballot access fees -- see AO 88-33). That would be a modification of the Commission's prior and broad allowing of State funding, but it would follow from the rather elaborate "trace-back" analysis provided in AO 88-33 and endorsed in AO 91-14. It would represent a statutory interpretation of "permissible funds" under the FECA.

3. Similarly, Minnesota's tax refund program for contributors who give to candidates who comply with the expenditure limits (besides being an administrative nightmare) is also preempted by the FECA because it is directed to effectuating expenditure limitations for Federal candidates.

should be cautious in finding meaning in their lack of analysis.

Nevertheless, the draft places great emphasis on the efficacy of the Commission's State funding opinions. The logic of the General Counsel's argument seems to be that since State funding has been generally allowed by the Commission, a State scheme using qualified and conditioned State funding to implement State limitations upon the campaign spending of Federal candidates is insulated from being preempted by the FECA (except that part of the Minnesota law not implemented through State funding).

However, the Commission's State funding opinions come nowhere near supporting such a blanket protection for State regulation of Federal candidates through funding programs. \4 Those opinions do not articulate a broad exception to the general operation of preemption principles (they do not address preemption at all), and would have been wrong to have excepted from Federal preemption State regulation of Federal candidates through selective funding mechanisms.

STATE AS A "PERSON" UNDER THE ACT

The General Counsel devotes over five pages (pp. 10-15) of the draft to a discussion of whether a State is a "Person" under the Act, and thereby subject to the limits and prohibitions (and other legal consequences) regarding the making of contributions. \5

I believe the Commission should be extremely reluctant to adopt as its legal opinion, in an advisory opinion, a speculative discourse on a major question of statutory application that is unnecessary to

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4. Under the General Counsel's theory, would the Commission be saying any State law disbursing State funds to Federal candidates on a selective and qualified basis is OK? What if a State law provided generous funding to only those Federal candidates who agree to significantly lower contribution limits than provided under the FECA? Or who refuse PAC money? Would not FECA jurisdiction preclude such State meddling in the regulation of Federal campaign finance activity? What is the legal difference as to expenditure limitations?

5. Again, the General Counsel apparently sees this point as crucial to deciding the preemption question, since the draft's rationale suggests a State may impose expenditure limitations upon the campaigns of Federal candidates if implemented under the guise of qualified State funding.

rendering this opinion. [6] This fundamental question of jurisdiction *is too important, and too open to dispute, to be treated in this* manner in an advisory opinion. Frankly, in dealing with such an open question, the proper course for an agency protective of its jurisdiction would be to presume a State is a "Person" and subject to FECA jurisdiction until such time as a court might tell us otherwise. It is startling to see the General Counsel so eager to concede this point against the FEC's jurisdiction.

The General Counsel's discussion of this 'State as a Person' issue is essentially a defense of the Commission's previous opinions permitting State funds to be given to Federal candidates. However, resolution of that question is unnecessary to support those opinions, since the Commission concluded State payments to Federal candidates are not "contributions" under the Act anyway. Resolution of the "Person" question is also unnecessary to reaching the correct result on the preemption issue in this opinion. The Commission should simply consider the allowing of State funding outside the limitations upon "contributions" to be settled by its own precedent, but recognize that the Minnesota regulatory scheme goes far beyond such precedent and intrudes into the exclusive jurisdiction of the FECA.

The Commission should be very cautious before endorsing the General Counsel's position on State exclusion from the provisions of the FECA in this opinion. Approving certain general State funding programs for Federal candidates as they come before the Commission is one thing, but adopting such a broad view on such a fundamental jurisdictional question <u>in an AO</u> is quite another.

PARTIAL PREEMPTION

Preemption issues are often unique and complicated, and demand separate legal determinations in each circumstance of proposed State regulation affecting Federal campaign finance activity.

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6. I should note I disagree with the tentative conclusion reached by the General Counsel on this question, based upon my reading of the legislative history surrounding adoption of 2 U.S.C. §431(11), which specifically excludes the Federal Government from the definition of "Person" under the Act. See my Dissenting Opinion in Advisory Opinion 1991-14.

It is possible for only part of a State law to be directed to or substantially interfere with the regulation of Federal political activity. It makes no sense, however, to find only part of a State statute preempted that, in its entirety, directly and explicitly regulates and constrains the campaigns of Federal candidates. Once a State's entire regulatory scheme is determined to encroach upon Federal jurisdiction, Federal preemption is fairly absolute.

The broadness of the Act's preemption provision not only broadly protects the jurisdiction of the FECA from intrusion, it protects the Commission from having to particularize and parse out varying levels of interference from State regulation. The Commission should not decline to assert preemption because some part of State law, though preempted, seems like good policy, or does not do much harm or interfere much with the FECA's regulatory authority. The Commission must not pick and choose between parts of State laws it will tolerate despite the FECA's clear preemptive jurisdiction. \7

States may regulate non-political or non-Federal activity into which Federal committees may venture, but States are precluded from enacting regulatory schemes directed at regulating Federal candidates as they engage in Federal election campaign finance activity, period. Federal law supersedes State law concerning any limitation on expenditures regarding Federal candidates and political committees. 11 CFR 108.7(b)((3). The Minnesota law at issue in Advisory Opinion 1991-22 impermissibly steps into activity under the exclusive jurisdiction of the Act, and is preempted by the Federal law.

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7. When the ball starts rolling under a State scheme regulating Federal political activity, the inconsistencies, contradictions and conflicts with the FECA simply become intolerable. For example, the Minnesota law effectively prevents persons from contributing to the campaigns of those Federal candidates who have reached the expenditure limitation, despite the FECA's clear permitting of that contributor to make contributions up to the FECA's limits. This result is by intentional operation of the Minnesota statute, through a nominally "voluntary" (but heavy-handed and virtually irresistible) expenditure limitation program which directly interferes with Federal jurisdiction over contributions to Federal candidates.