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SUPPLEMENT

DOUGLAS A. KELLEY
ATTORNEY AT LAW
SUITE 500
701 FOURTH AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55415

TELEPHONE 612 337 9594
TELECOPIER 612 338 0359

DATE: 9-6-91 TIME: 5

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NAME: Brad Litchfield

ADDRESS: _____

PHONE #: 202-219-3690 FAX #: 202-219-3923

FACSIMILE SENT BY:

NAME: Douglas A. Kelley

PHONE #: (612)-337-9594 FAX (612)338-0359

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PLEASE NOTE:

DOUGLAS A. KELLEY
ATTORNEY AT LAW
SUITE 500
701 FOURTH AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55415

TELEPHONE 612 337 9584
TELECOPIER 612 338-0368

September 6, 1991

Attn: N.B. Litchfield
Federal Election Commission
Office of General Counsel
999 E Street, N.W.
Washington, D.C. 20463

Dear Commissioners:

INTRODUCTION

Subsequent to our original submission, the Commission has received a number of comments in support of the Minnesota Congressional Campaign Reform Act. Some of the comments have advanced novel interpretations of the legislative history to the Federal Election Campaign Act (hereinafter the "Act" or "FECA") and the case law interpreting it. Others have advanced public policy arguments against preemption. We appreciate the opportunity to respond to these comments.

It is our position that the Minnesota law conflicts with the FECA and that it upsets the delicate framework crafted by Congress and the Commission governing federal elections. It is also our position that Congress clearly and unequivocally intended to occupy the field in this core area of federal elections. Finally, if the Commission finds the expenditure limitations are preempted the entire statute must fall.

DISCUSSION

I. THE MINNESOTA LAW IS PREEMPTED BY THE FEDERAL ELECTION CAMPAIGN ACT.

A. A state statute need not conflict with a federal law to be preempted.

Minnesota State Senator Luther argues that the Commission must find that the state law conflicts with federal law in order to find preemption. Luther comment, at 2. This is wrong as a matter of law.

There are three tests under which a state statute can be preempted by federal law. First, state law is preempted if there is a direct conflict between the state statute and a federal statute with regard to a specific action. That is, if compliance with the state statute and the federal statute is impossible or if compliance with the state statute would interfere with an important federal interest, then the federal statute prevails under the supremacy clause of the United States Constitution. L. Tribe, American Constitutional Law, §6-25 at 479 (2d ed. 1988).

Second, state law is preempted if Congress has manifested an intent to "occupy the field" with respect to a particular area of law. This test does not require a direct conflict between a state law and a federal law. If Congress has either expressly or impliedly occupied a field of law then states are deemed powerless to regulate in that area. Any state or local action, however consistent in detail with relevant federal statutes, is held invalid unless Congress specifically exempts the action from preemption. Id. See generally Note, "Preemption as a Preferential Ground: A New Canon of Construction," 12 Stan. L. Rev. 208 (1959).

The third test generally arises under commerce clause litigation and thus is inapplicable to the case at bar.

B. The Minnesota law directly conflicts with the FECA and is therefore preempted.

Senator Luther claims there is no conflict between the Minnesota law and the FECA and that the Minnesota law "complements and harmonizes" with federal law. Luther comment, at 4. This is not true. If a candidate complies in all respects with the FECA but exceeds the state limitations his opponent would undoubtedly collect public funds. In other words, if a candidate exercises his federal right to accept contributions under the FECA he will be penalized by the state. It is wrong to allow a state to penalize a candidate for exercising his federal rights. Congress clearly did not envision such an outcome.

In addition, the Minnesota law's most pernicious effect is to upset a delicately crafted system of regulating federal elections. At present it consists of contribution limitations and reporting and disclosure requirements that determine the relative financial power of various categories of groups. At the present time Congress has chosen not to impose expenditure limitations or public financing on Congressional elections. If you tinker with one aspect of this fabric it may change the entire scheme.

While it may appear that expenditure limitations and public financing are entirely separate components from contribution limitations, they are not. They are interrelated. For example, political action committees can contribute $10,000 under the present system of regulation. If a candidate raises $1,000,000, a PAC's contribution would amount to 1% of the total. Assume, for argument's sake, a state limitation of $100,000. A PAC's influence would rise from 1% to 10%. Perhaps Congress would want to alter the contribution limitation under those circumstances. If public financing is added to the expenditure limitation, the result is even more pronounced. Expenditure limitations alter the relative power of various groups under the present contribution limitation scheme.

Clearly this result interferes with the FECA goal of limiting the influence of PACs and special interest groups. In fact, the Minnesota statute has the opposite effect; it increases the relative influence of wealthy individuals and special interests. Thus, because the Minnesota scheme conflicts with the accomplishment of a federal purpose, the Minnesota statute should be preempted.

Furthermore, Mr. Humphrey claims that the Minnesota public financing scheme is not preempted by the FECA. The advisory opinions he cites in support of his argument, however, are clearly distinguishable. All of the public financing systems approved by the Commission thus far are sourced to voters. That is, the funds are derived either from voter tax check-offs or from licensing fees specifically earmarked for election financing. Advisory Opinion 1991-14 (a state central committee may combine state funds derived from an income tax check-off with its federal accounts); Advisory Opinion 1983-15 (contributions derived from tax check-off funds may be reported as unitemized contributions); Advisory Opinion 1982-17 (state central committee may use state funds derived from license plate fees); Advisory Opinion 1980-103 (distribution of state tax check-off monies by state political parties is subject to statutory contribution limitations); Advisory Opinion 1978-9 (distribution of money from state income tax check-off fund). In all of these

situations the state is merely a conduit for individual contributions. Under the Minnesota scheme, however, the state would be the sole contributor.

C. The Minnesota law is preempted because the FECA "occupies the field" with respect to federal election law.

Senator Luther and Attorney General Humphrey advance novel interpretations of the legislative history, FEC advisory opinions and case law to argue no preemption should occur. To not preempt would require overturning years of precedent. If there was ever an area in which Congress has expressed its clear intent to preempt, it is in this core area of federal elections. The legislative history of the FECA demonstrates unequivocally that Congress intended to occupy the field with respect to federal elections.

The language of the 1971 Act regarding preemption was much narrower than the current language of 2 U.S.C §453. The original preemption clause sought only to preempt direct conflicts between state laws and the FECA.[1] Congress did not intend to occupy the field at that time.

The 1974 Amendments, however, clearly expanded the scope of federal preemption. The preemption clause provides: "The provisions of [the FECA] and of rules prescribed under [the FECA] supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. § 453 (1980)(emphasis added). This sweeping language was repeated in the preemption clause concerning criminal sanctions in Title 18. "The provisions of Chapter 29 of title 18, United States Code, relating to elections and political activities, supersede and preempt any provision of State law with respect to election to Federal office." Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-

1. "(a) Nothing in this Act shall be deemed to invalidate or make inapplicable any provision of any State law, except where compliance with such provision of law would result in a violation of a provision of this Act." Federal Election Campaign Act of 1971, §403, Pub. L. No. 92-225, 86 Stat. 20 (1972)(§403 was repealed by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §301, 88 Stat. 1289 (1974) (codified at 2 U.S.C §453 (1988))) (emphasis added).

1438, §104, 93d Cong. (2d Sess.) (1974) (repealed by Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976))(emphasis added). Congress intentionally expanded the scope of preemption and clearly intended to preempt more than just direct conflicts.

The report of the House committee that drafted the 1974 preemption clause supports this interpretation:

> It is the intent of the committee to make certain that the Federal law is construed to occupy the field with respect to elections to federal office and that the Federal law will be the sole authority under which such elections will be regulated. . . . The Committee also feels that there can be no question with respect to preemption of local laws since the Committee has provided that the Federal laws supersede and preempt any law enacted by a State, the Federal law will also supersede and preempt any law enacted by a political subdivision of the State.

H.R. Rep. No. 1239, 93d Cong., 2d Sess., 69 (1974).

The Conference Report further elaborates on the scope of federal preemption:

> It is clear that the Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect State laws as to the manner of qualifying as a candidate, or the dates and places of elections.

Id. (relating to general provisions).

> The provisions of the conference substitute make it clear that the Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights to prohibit false registration, voting fraud, theft of ballots, and similar offenses under State law.

H.R. Conf. Rep. No. 1438, 93d Cong., 2d Sess. (1974) (relating to contribution and expenditure limitations) (emphasis added).

Attorney General Humphrey argues that since the reports specifically mention reporting and disclosure requirements Congress intended to preempt only state laws relating to reporting and disclosure requirements. Humphrey comment, at 10-11. This argument, however, ignores the plain language of the statute itself. A more logical reading of the Conference Report would be that Congress was enumerating those areas that were not preempted by federal law rather than limiting the language of the newly adopted clause. If Congress had intended to preempt only reporting and disclosure requirements, they most certainly would have worded the 1974 amendment more narrowly.

Further support for broad federal preemption is found in the legislative debates. Representative Frenzel characterized the federal preemption clause as "a welcome change which will insure that election laws are consistent and uniform and that candidates for Federal office do not bear the burden of complying with several different sets of laws and regulations." H.R. Conf. Rep. No. 1438, 93d Cong., 2d Sess. (1974).

Representative Frenzel further explained that when the committee was considering preemption, the issue of overlapping state and federal requirements "was considered the most important single matter" by the "greatest number of Members of Congress" and that "nearly every Representative had asked that the FECA preempt state laws so that candidates would have to comply with only one set of regulations." 120 Cong. Rec. H7895, 96 (1974).[2] If the Commission allows individual states to promulgate federal spending limitations, the uniformity sought by Congress will be lost.

During the 1974 debate, an amendment was advanced that would have allowed states to set expenditure limits lower than the federal system. Representative Hays, Chair of the House committee that reported the bill, argued that to allow the states to impose lower limits "would undercut the preemption provision." Id. He went on to explain that nearly every Representative had asked that the FECA preempt state laws so that candidates would have to comply with only one set of regulations. Id.

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[2] See also Representative Koch's statements: Preemption is essential because all national legislators should be subject to the same rules; to do otherwise would put federal elections back "in the hands of 50 different state legislatures." H.R. Conf. Rep. No. 1438, 93d Cong., 2d Sess. (1974).

The regulations promulgated by the FEC clearly show that the Minnesota law is preempted by the FECA. The FEC regulations state:

> (a) The provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to elections to Federal office.
>
> (b) Federal law supersedes State law concerning the --
> . . . .
> (3) Limitation on contributions and expenditures regarding Federal candidates and political committees.

11 C.F.R. 108.7 (1991).

Mr. Humphrey argues that this language is inapplicable because it was promulgated at a time when there were mandatory federal spending limits. He concludes that because the federal spending limits were repealed, the regulations are not effective. Humphrey comment, at 13. This argument must fail. In 1976, the year of the repeal, Congress was well aware of the preemption clauses and the regulations promulgated thereunder. They could have chosen to narrow the scope of preemption. That they did not is further indication that they intended to continue to occupy the field in federal elections.

Finally, Attorney General Humphrey cites several cases for the proposition that the preemption clauses should be interpreted narrowly. All of these cases are readily distinguishable from this case. In Reeder v. Kansas City Bd. of Police Comm'rs, 733 F.2d 543 (1984) and Pollard v. Board of Police Comm'rs, 665 S.W.2d 333, 338 (Mo. en banc 1984), the courts relied on express Congressional intent to allow states to regulate the activities of state employees. In Gifford v. Congress, 453 F.Supp. 802, 812 (E.D. Cal. 1978), the court held that state laws dealing with candidate qualifications are expressly exempted from preemption. There is no such exemption for the Minnesota spending limit. Finally, Mr. Humphrey cites Stern v. General Elec. Co., 924 F.2d 472 (2d Cir. 1991) for the proposition that the Commission should "construe section 453 narrowly." Humphrey comment, at 13. The court in Stern found that the preemption provision of the FECA did not apply to non-election-related activities and thus was inapplicable to corporate political activity. Id. at 475. The Minnesota statute, however, is intimately related to election to federal office because it directly affects the expenditures of federal candidates.

Thus, Stern, like the other cases cited by Mr. Humphrey, is inapplicable to the present situation.

II. IF EXPENDITURE LIMITATIONS ARE PREEMPTED, THE ENTIRE STATUTE MUST FAIL.

If the Commission finds that only a portion of the Minnesota statute is preempted, a question may arise with respect to how this affects the entire statute. The rules of statutory construction provide the framework for analysis. The inescapable conclusion is that the public financing aspects of the statute are so inextricably intertwined with the expenditure limitations that the entire statute must fail.

Under the general rules of statutory construction the invalid portions of an act may be separated from the valid portions and the valid portions given statutory effect. There are two basic steps for determining separability. First, the court determines whether the legislature intended for the act in question to be separable; that is, did the legislature intend to deal with the valid portion of the act irrespective of the validity of the remainder. INS v. Chada, 462 U.S. 919, 932 (1983); Accord Williams v. Standard Oil Co. of Louisiana, 278 U.S. 235 (1929). Second, the court must determine whether the act is, in fact, capable of separation. Id. at 934.

Minnesota has a general statute governing severability which provides:

> Unless there is a provision in the law that the provisions shall not be severable, the provision of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Minn. Stat. §645.20 (1990) (emphasis added).

Courts view this type of general separability statute as a codification of the general rules governing statutory construction. Rash v. Louisville & Jefferson County Metro. Sewer Dist., 309 Ky. 442, 217 S.W.2d 232 (1949).

Often, legislatures provide some indication of their intent with regard to severability by including a specific severability clause in the act itself. A severability clause is included in the Minnesota act. It provides: "If a provision of this article is found to be unconstitutional and void, the remaining provisions of the article remain valid." 1990 Minn. Sess. Laws c. 608, art. 4 §13. This type of clause, however, "has come to be regarded as little more than a formality of legislative draftsmanship" and is thus inconclusive with regard to legislative intent. Sutherland, Statutes and Statutory Construction, §44.10 (1973). See also Great Atlantic & Pacific Tea Co. v. Ervin, 23 F.Supp. 70, 83 (D. Minn. 1938).

Since the legislative intent is inconclusive, the next step is to determine if the statute is severable in fact.

> To be capable of separate enforcement, the valid portion of an enactment must be independent of the invalid portion and must form a complete act within itself. The law enforced after separation must be reasonable in light of the act as originally drafted. . . .
>
> Conversely, where the valid parts of an act are not independent, and may not be said to form a complete act separate from the invalid part, the act must fall as a whole.

Sutherland, Statutes and Statutory Construction, §44.04 (1973).

The Minnesota law requires candidates to agree to expenditure limitations in order to receive public financing. The actual steps a candidate must complete to receive public funding are:

1. signing an agreement to be bound by the limitations, (§10A.43),
2. signing an agreement to be subject to civil penalties if the limitations are exceeded, (§10A.47),
3. matching state funds with contributions from other sources, (§10A.48), and
4. verification that the opponent has not agreed to the limitations. (§10A.43 Subd.5(d)).

In short, financing is totally triggered by the spending limitation. Without the expenditure limitation, there is no criteria for determining which candidates should receive public financing or how much money each candidate should receive.

Minn. Stat. §§10A.44 and 10A.47 set forth the expenditure limitations and the penalties for exceeding the limitations, respectively, and should be preempted by federal law. The certification and distribution section, §10A.49, must be struck down as well because it uses the expenditure limitations and the limitation agreements as the criteria upon which to determine candidate eligibility.

The only sections that are not linked to the expenditure limitations are the legislative findings of fact (§10A.40), definitions (§10A.41), limitation on application (§10A.42), the contribution loan limits (§10A.45), the multicandidate political party expenditures(§10A.46), return of financial incentive (§10A.50) and the general fund appropriation (§10A.49 subd.4). None of these sections, standing alone, could be operative as law.

Where the main purpose of a statue is defeated by the invalidity of part of the act, the entire act is void. Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935); Scheinberg v. Smith, 659 F.2d 476 (11th Cir. 1981); Meyer v. Berlandi, 39 Minn. 438, 40 N.W. 513 (1888). The stated intent of the Minnesota Congressional Campaign Reform Act is "to provide a system to encourage voluntary campaign expenditure limits." Minn. Stat. §10A.40, subd. 3 (1990). The public financing aspects of the act are simply not severable from the expenditure limitations.

Even if, the Commission were to find that the public financing scheme could stand alone, the statute must fall as a whole. When a provision of a statute acts as a limitation upon another provision of the statute, the entire statute may be void on the theory that by striking out the invalid limitations, the scope of the act has been widened and therefore cannot properly represent the legislative intent. McCue v. Sheriff of Ramsey County, 48 Minn. 236, 240, 51 N.W. 112, 113 (1892). Under the Minnesota scheme, agreeing to an expenditure ceiling acts as a limitation on the receipt of public financing. Without the spending limitation, it would be impossible to disburse public funds. If any funds were disbursed it would be beyond the scope of the legislative intent. Thus, if the expenditure limitations are found invalid, the entire act must fall.

III. PUBLIC POLICY WEIGHS IN FAVOR OF PREEMPTION OF THE MINNESOTA LAW.

When one reads the comments submitted in support of the Minnesota law one is left with the impression that the Commission should not find preemption because the law is a voluntary expenditure limitation which constitutes sound campaign reform and received unanimous support in the legislature. This is a misleading impression.

First, the Campaign Reform Act did not have unanimous support. While it is true it passed unanimously as part of a huge omnibus bill, a motion to delete the spending limitations was supported by 42 members of the House. H.R.J. 11607 76th Legis. (1989)

Second, the limitations are not voluntary. This is clear from the legislative history. Senator Marty, in debate, stated:

> In other words, what I'm trying to do with this bill, the number one thing, is force the limit on somebody.
>
> * * *
>
> . . . I was using [public financing] as a real heavy club to make somebody abide by the limit.
>
> * * *
>
> . . . So, what it did is exactly what we intended to - it made a club so that people will abide by the spending limit.

Minnesota Congressional Campaign Reform Act, 1990: Hearings on S.577 Before the Subcommittee on Elections and Ethics, 76th Legis. (March 1, 1989) (Statement of Senator Marty). It is clear this is public financing as a threat. It is not voluntary at all.

Third, the law has major defects as a reform proposal. Most commentators state that important goals of finance reform would be to reduce the influence of special interest money and to make federal elections more competitive. This act does neither. In fact, as discussed previously, it actually enhances the influence of special interest money rather than reducing it. Furthermore, it will make Congressional races less competitive by increasing an incumbent's advantages over a challenger. It takes more money for a challenger to overcome the advantages of incumbency. By enacting expenditure limitations and providing only limited financing to

challengers, it will be viewed as the last brick in the wall by challengers.

Finally, those who support the act are not willing to acknowledge that uniformity in federal elections is a legitimate public policy goal. The legislative history of the preemption provisions of the FECA demonstrate overwhelming, bi-partisan support for the conduct of federal elections. It was the main concern of most members. To allow 50 different sets of complicated expenditure limitation provisions with complicated public financing mechanisms would have been anathema to the members who drafted the 1974 preemption clauses. That is why Congress expressed its intent to occupy the field clearly and unequivocally in this core area of federal elections.

For the foregoing reasons, we ask that the Commission find that the Minnesota Congressional Campaign Reform Act is preempted in its entirety by the Federal Election Campaign Act.

Sincerely yours,

Douglas A. Kelley

Douglas A. Kelley