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July 31, 1991

N. Bradley Litchfield
Associate General Counsel
999 E Street N.W.
Washington, D.C. 20463

Comment On
AOR 1991-22

Dear Mr. Litchfield:

I am submitting the accompanying article for your consideration in connection with your upcoming ruling on whether federal election law preempts Minnesota s voluntary congressional campaign spending limits. I am a third year law student at the University of Minnesota Law School and what I am sending you is a draft of an article I wrote last year as a staff member of the Minnesota Law Review (it was not published, no doubt because the topic is not very juicy). I chose to write on this subject because I am interested in political campaigning and campaign finance.

The article deals precisely with the preemption issue you have been asked to rule on, therefore, I hope you will find it interesting and helpful.

Sincerely,

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HAS CONGRESS PREEMPTED STATE "VOLUNTARY" CONGRESSIONAL CAMPAIGN SPENDING LIMITS?

Congress first enacted meaningful campaign finance regulations in the early 1970s.[1] The Federal Election Campaign Act (FECA) of 1971[2] opened campaign finance to public scrutiny by requiring greater disclosure of campaign contributions than ever before.[3] In 1974, campaign abuses revealed by the Watergate investigation spurred Congress to strengthen the FECA.[4] The Federal Election Campaign Act Amendments of 1974[5] imposed contribution and spending limits on federal candidates and campaign committees[6] and provided for the public financing of presidential candidates who agreed to spending limits.[7]

Since 1974, however, Congress has not significantly reformed the way congressional candidates finance their election campaigns. Despite repeated calls to extend to congressional candidates the public financing available to presidential candidates,[8] Congress has consistently refused to use public money to run for office.[9] Moreover, the mandatory campaign spending limits the 1974 FECA Amendments imposed were overturned in 1976 by the United States Supreme Court.[10] Therefore, the only significant federal campaign finance regulations congressional candidates now face are limits on the amount individuals and groups may contribute to congressional campaigns and the requirement that candidates publicly report the contributions they receive.[11]

Frustrated by the "disgraceful" level of congressional campaign spending and by Congress s failure to enact "necessary reforms," the Minnesota legislature took matters into its own hands.[12] In 1990, Minnesota joined New Hampshire[13] and Hawaii [14] by setting voluntary spending limits for congressional campaigns.[15] The Minnesota Elections and Ethics Reform Act of 1990[16] conditions a Minnesota congressional candidate s receipt of public financing on the candidate s agreement to abide by campaign spending limits.[17]

The FECA, however, unambiguously states that it preempts any state law relating to federal elections.[18] Moreover, Federal Election Commission[19] (FEC) advisory opinions strongly imply that the FEC would interpret the FECA to preempt state voluntary spending limits.[20] Thus, as the Minnesota legislature was aware when it passed the Elections and Ethics Reform Act,[21] the validity of state-enacted congressional campaign spending limits is in doubt.

Focusing on the Minnesota limits, this Note examines whether courts should hold that the FECA preempts voluntary state congressional campaign spending limits. Part I outlines

Minnesota s spending limits, the FECA preemption provisions and their legislative history, FEC and court opinions interpreting the FECA preemption provisions, and relevant Supreme Court preemption doctrine. Part II argues that Congress did not intend the preemption provisions to apply as broadly as their unequivocal phrasing would imply. The Note concludes that a court addressing the issue should hold that the FECA does not preempt Minnesota s voluntary congressional campaign spending limits.

I. BACKGROUND

A. Minnesota s "Voluntary" Spending Limits

The Minnesota legislature declared in the Elections and Ethics Reform Act of 1990[22] that the current high level of campaign spending jeopardizes and weakens the state s congressional representation as well as the public s confidence in it.[23] The legislature observed that the FECA does not encourage congressional candidates to limit their campaign spending and that Congress has failed for years to enact "necessary reforms."[24] To redress these problems, the legislature found it necessary to encourage congressional candidates to voluntarily limit their campaign spending.[25] Realizing, no doubt, that FECA preemption might be a problem, the legislature explained that it intended the Elections and Ethics Reform Act to work "in concert with" federal law.[26] It stated that it did not intend for the Reform Act to conflict with federal law or to "regulate where specific federal laws have already been enacted."[27]

To encourage limited campaign spending, the legislature offered public financing in exchange for an agreement by candidates to limit spending.[28] If both major party candidates agree to them, the spending limits will apply and neither candidate will receive public financing.[29] A refusal by one of the major party candidates to abide by the spending limits, however, releases the other candidates from the limits.[30] Such a refusal also triggers public financing for the other candidates.[31] Finally, a candidate who violates his or her promise to abide by the spending limits is subject to a civil fine.[32]

B. The FECA Preemption Provisions

The FECA of 1971 preempted state laws only when compliance with the state law would violate the FECA.[33] The 1974 FECA Amendments, however, added two brief provisions which expanded the scope of FECA preemption.[34] The two provisions are essentially identical and both categorically state that the FECA preempts "any provision of State law with respect to election to Federal office."[35] One of the provisions appears in Title I of the 1974 Amendments,[36] the other in Title III.[37]

C. Legislative History of the Preemption Provisions

The legislative history of the 1974 FECA Amendments consists of House and Senate committee reports on the bills that originated in each body, the conference committee report on the bill that was enacted, and each body s debate on its own bill and on the conference bill.[38] The preemption provisions in the Senate and House bills and in the final conference bill were very similar.[39] The reports, however, differed in the way they explained the preemption provisions.[40] In addition to the committee reports, preemption came up in floor debate several times. The House discussed it in connection with a proposal to permit states to set spending limits lower than those decreed by the 1974 Amendments.[41] Each house also mentioned just before final discussion of the conference bill in summaries of the bill by the chief sponsors.[42] Finally, the Senate alluded to preemption in a discussion of whether the FECA preempted state regulations of the political activities of state employees in federal elections.[43]

The conference committee report,[44] despite the categorical language of the preemption provisions in the statute, explains that the Title I provision does not preempt state prohibitions of false registration, voting fraud, ballot theft, or similar offenses.[45] According to the report, however, the Title I provision establishes that the FECA "occupies the field with respect to" criminal sanctions related to spending limits and the sources of campaign funds, limits on the "conduct of Federal campaigns," and "similar offenses."[46]

The Title III provision, according to the conference report, does not preempt state laws regulating candidates qualifications, "little Hatch Acts,"[47] or laws regulating the dates and places of elections.[48] According to the report, the Title III provision establishes that federal law "occupies the field with respect to" the reporting and disclosure of contributions and spending.[49]

D. FEC Regulations and Advisory Opinions

Congress created the Federal Election Commission as part of the 1974 FECA Amendments to administer the implementation of the FECA.[50] One of the powers Congress gave the FEC was the authority to promulgate regulations interpreting the FECA.[51] Under this authority the FEC has issued regulations interpreting the preemption provisions of the FECA.[52] The regulations, however, merely paraphrase the conference report preemption discussion without amplifying upon it or attempting to reconcile the categorical language of the statute with the detailed lists of the conference report.[53]

Congress also gave the FEC the power to issue binding advisory opinions.[54] The FEC ruled in an advisory opinion that the FECA preempts the New Hampshire voluntary spending limits

insofar as they apply to party expenditures that are expressly allowed by the FECA and that might, under the New Hampshire law, be counted toward a candidate s spending limit.[55] The FEC, however, stated that it was not ruling on whether the FECA preempts enforcement of New Hampshire s spending limits against a candidate who agrees to them.[56] No other opinion has addressed voluntary state spending limits.

Where the FECA does not explicitly permit or prohibit a certain activity, FEC opinions have based preemption on whether the conference report lists the activity as meant to be or meant not to be preempted.[57] Where the conference report preemption discussion did not mention the activity, one opinion held that without explicit evidence of Congress s intent to preempt, the FECA does not preempt.[58]

E. Court Opinions

No court has ruled directly on whether the FECA preemption provisions prevent states from enacting voluntary congressional campaign spending limits. Several courts, however, have interpreted the FECA preemption provisions. The Second Circuit Court of Appeals relied on the FECA s silence about the appropriate level of funding for corporate political action committees in holding that the FECA does not preempt state regulation of such funding.[59]

The Tenth Circuit Court of Appeals upheld a Kansas law prohibiting state employees from contributing to federal election campaigns against the claim that the FECA preempted the state statute.[60] The court reasoned that, although the Kansas statute could be considered " a law with respect to Federal office " under the FECA preemption provision, the FECA referred primarily to the behavior of candidates and thus preempted only state regulation of contributions that the FECA expressly forbade.[61]

A federal district court has ruled that the FECA does not categorically preclude a state law cause of action for fraud in political advertising related to a federal election.[62] The court reasoned that because the FECA does not address fraud in political advertising, Congress "obviously" intended not to preclude completely state regulation of this area.[63]

F. The Supreme Court s Preemption Doctrine

The supremacy clause of the United States Constitution declares that federal law supersedes state law.[64] According to the Supreme Court s preemption doctrine, the supremacy clause may dictate that federal law overrides state law in either of three situations.[65] First, federal law preempts state law when they conflict so directly that simultaneous compliance with both is impossible or when compliance with the state law interferes with federal objectives.[66] Second, federal law may oust state power, not because of a specific conflict with a congressional enactment, but because of what Congress could have done, usually

under the "dormant" commerce clause.[67] Third, where a federal statute expressly or implicitly occupies the field, it preempts all state statutes regulating within the field, except those explicitly permitted, regardless of whether they are consistent with the federal scheme.[68]

The Court will afford a statute preemptive effect only if Congress has explicitly or implicitly[69] expressed its intent to supersede state law.[70] The Court has stated that where Congress has unambiguously announced its intent to preempt state law, it will not look beyond the language of the federal statute in determining whether it preempts a particular state statute.[71] Before invalidating a state statute, however, the Court requires persuasive evidence of a congressional intent to preempt.[72]

II. COURTS SHOULD CONSTRUE FECA PREEMPTION NARROWLY

The Minnesota Elections and Ethics Reform Act is likely to face a court challenge on the ground that the FECA preempts the Reform Act s voluntary congressional campaign spending provisions.[73] Although there are several plausible grounds for concluding that the FECA preempts the Minnesota voluntary spending limits,[74] a court considering such a challenge should conclude that it does not.

A. No Direct Conflict

Before interpreting the FECA preemption provisions, a court considering a preemption challenge to the Minnesota spending limits should determine whether such limits conflict with the FECA. If they do, the court must presume that the FECA preempts state spending limits unless Congress explicitly indicated otherwise.[75] Thus the court would not need to decide whether Congress actually intended to preempt state spending limits.

Minnesota s limits, however, do not conflict with the FECA. Although the 1974 FECA Amendments imposed mandatory spending limits on congressional election campaigns,[76] Congress repealed the campaign spending limits in 1976.[77] Thus, even if a court could conclude that voluntary state limits conflict with mandatory federal limits, such a conflict can not now occur.

Moreover, although state spending limits might conceivably interfere with the congressional objectives behind the FECA, Minnesota s voluntary limits do not. The 1974 Congress was concerned that state campaign spending limits lower than those in the 1974 Amendments would be, or would appear to be, "incumbent protection plans."[78] Several members of the 1974 Congress feared that such limits would prevent a challenger from buying enough publicity to overcome such advantages as an incumbent's greater name recognition.[79] Such a concern does not apply to or at least is ameliorated by the Minnesota limits. Under the Minnesota limits, challengers are free to forgo public financing, and thus avoid the spending limit,[80] if they believe it will be to their advantage. In addition, where a challenger cannot raise as much

money as the incumbent, Minnesota s limits likely will reduce the gap by limiting the incumbent s spending, by publicly financing the challenger s campaign, or both.[81]

Moreover, state voluntary spending limits do not conflict with any of the other elements of the current FECA. For example, a candidate s voluntary agreement with to limit his or her spending would not interfere with the FECA contribution limits. A congressional candidate s agreement to restrict campaign spending is also clearly unrelated to the FECA s presidential campaign financing provisions.[82] Moreover, such an agreement would not interfere with the FEC s enforcement of the FECA. Finally, the Minnesota congressional campaign reform provisions do not require financial disclosure or reporting or regulate the organization of congressional campaigns, and thus do not conflict with the FECA campaign disclosure or organization provisions.[83] Therefore, a court hearing a preemption challenge to Minnesota s voluntary campaign spending limits should conclude that the FECA does not preempt such limits due to a direct conflict.

B. The Plain Language of the Preemption Provisions

Having concluded that the Minnesota limits do not directly conflict with the FECA, the court must then turn to the language of the FECA itself.[84] At first glance, the plain meaning of the FECA preemption provisions seems clear. The statute states flatly that it "preempt[s] any provision of State law with respect to election to Federal office."[85] Congress, however, most likely did not intend courts to construe this language literally. Such a reading would, for example, leave states powerless to determine when the polls would be open, and would prevent them from enforcing their own state s laws against voting fraud.

In fact, courts interpreting the FECA preemption provisions uniformly have assumed that Congress did not mean to preempt all state regulations affecting federal elections.[86] The terse wording of the FECA preemption provisions, however, provides no guidance as to what state laws Congress intended to exempt from preemption. Therefore, as previous courts interpreting the FECA preemption provisions have done,[87] a court examining the validity of Minnesota s spending limits must look to the legislative history to determine what Congress intended the FECA to preempt.

C. The Conference Committee Report

A court interpreting the FECA preemption provisions should first turn to the conference committee report on the 1974 FECA Amendments. The conference report is the official explanation of the final bill by the committee that worked out the differences between the House and Senate versions of the bill.[88] This report specifically discusses what effect the conference committee intended the FECA preemption provisions to have.[89]

The conference report confirms that Congress did not intend

to preempt every state law "with respect to" federal election, but it does not settle whether the FECA preempts state voluntary spending limits.[90] The report explains what state statutes Congress did and did not intend the FECA to preempt,[91] but state voluntary spending limits do not fall into either category.

The report declares that the FECA preempts state statutes requiring the disclosure of campaign contributions and spending, as well as those imposing criminal sanctions for the violation of contribution limits, spending limits, standards of conduct, and similar offenses.[92] On a literal reading of this language, Congress intended to preempt only reporting and disclosure requirements and certain criminal sanctions related to voting laws.[93] On such a reading, therefore, the FECA would not preempt voluntary spending limits such as Minnesota s that do not include criminal sanctions.

On the other hand, the report declares that the FECA does not supplant state prohibitions of false registration, voting fraud, ballot theft, or similar offenses.[94] In addition, the report states that the FECA does not displace "little Hatch Acts" or statutes establishing the qualifications for candidacy and the dates and places of elections.[95] This list does not encompass voluntary spending limits. Thus, because neither of the conference report lists describes Minnesota s limits, the conference report discussion of preemption does not on its face settle whether the FECA preempts state limits.[96]

D. Floor Debate on an Amendment to Permit State-Imposed Spending Limits

In addition to examining the committee reports, a court should examine the legislative history for any discussion or material that relates specifically to state campaign spending limits. The only material in the legislative history that relates to state spending limits is a debate in the House on an amendment to the 1974 FECA Amendments.[97] The amendment, which was defeated 250 to 169,[98] would have permitted states to substitute their own lower spending limits for those in the FECA.[99]

The defeat of the amendment, however, does not provide grounds for a court ruling that the FECA preempts Minnesota s spending limits. First, Congress repealed the FECA spending limits in 1976.[100] This repeal obviated the possible objection that the coexistence of state and federal spending limits would defeat the objectives behind the federal limits. Second, the amendment that the House rejected in 1974 would have permitted states to set <u>mandatory</u> limits lower than the FECA s.[101] Minnesota s limits, however, are voluntary. Therefore, the defeat of the state spending limit amendment is inconclusive with respect to Congress s intent to preempt voluntary spending limits.

Moreover, one senator s remarks during debate on the amendment support the view that the FECA does not preempt the

Minnesota limits. In arguing against the amendment, the chair of the committee that reported the House version of the 1974 Amendments endorsed voluntary compliance with state spending limits.[102] Despite the FECA, he said, candidates in a state with lower spending limits than the FECA could still voluntarily abide by them.[103] He went on to comment that if he were in such a state he would try to get his opponent to do so.[104]

E. Occupying the Field

Neither the conference report preemption discussion nor the defeat of the state spending limit amendment settles whether Congress intended to preempt or not to preempt state voluntary spending limits. Therefore, a court faced with the issue should inquire into Congress s broader goals in enacting the FECA and, in particular, the preemption provisions. An especially pertinent inquiry would be whether Congress intended the FECA to occupy the field of federal election regulation. If it did, the FECA preempts all state statutes in the field that it does not specifically permit.[105] Neither the FECA nor its legislative history specifically exempts from preemption state voluntary spending limits, therefore, a court finding that Congress intended the FECA to occupy the field of federal election regulation would have to conclude that the FECA preempts Minnesota s spending limits.

a. Express Intent to Occupy the Field

According to the United States Supreme Court, federal legislation may occupy the field either expressly or implicitly.[106] The 1974 Congress, however, was ambiguous about whether it intended the FECA to occupy the field. The FECA preemption provisions themselves appear unequivocally to reflect an intent to occupy the field. Moreover, the report on the House version of the bill explicitly asserted an intent to occupy the field, explaining that "federal law will be the sole authority under which [federal] elections will be regulated."[107]

The conference report, however, stated only that the FECA occupied the field "with respect to" reporting, disclosure, expenditures;[108] and "with respect to criminal sanctions related to" spending and contribution limits, the conduct of campaigns, and similar offenses.[109] This list seems to demarcate a field of statutes much narrower than the whole field of federal election regulation. Moreover, its elements seem to parallel the substantive provisions of the FECA that regulated congressional elections.[110]

On the other hand, the conference report described a set of state statutes Congress intended not to preempt.[111] The listing of specific statutes exempted from preemption would be consistent with an intent to occupy the field. In fact, Congress has included "savings" provisions in statutes that it undeniably intended to occupy the field.[112] This list, however, appears to

exempt from preemption most existing state statutes that relate to federal elections. Therefore, its existence is also consistent with the explanation that the conference committee intended to leave undisturbed the states regulation of federal elections except where such regulation would intrude into areas that the FECA regulates.

Court interpretations of the FECA preemption provisions reinforce the conclusion that the FECA does not occupy the field.[113] The Second Circuit Court of Appeals recently characterized the wording of the FECA preemption provisions as "narrow,"[114] explaining that this wording restricts the preemptive effect of the FECA to state provisions " with respect to election to Federal office. "[115] The court also observed that even with respect to election-related activities, courts have read the FECA s preemption provision narrowly in light of its legislative history.[116] The Second Circuit then went on to rely on the FECA s silence about the appropriate level of funding for corporate political action committees in holding that the FECA does not preempt state regulation of corporate political action committee funding.[117] The court wrote that a finding that Congress has occupied the entire field of corporate political spending would create a "total absence" of regulation of an important matter of corporate activity.[118] The court declared "[w]e are unwilling to create such a regulatory vacuum without a clear indication of congressional intent."[119]

The Tenth Circuit has also interpreted the FECA preemption provisions narrowly.[120] It wrote that a Kansas law prohibiting state employees from contributing to federal election campaigns could certainly be considered " a law with respect to Federal office. "[121] The court noted, however, that the statute could also be read to refer primarily to the behavior of candidates, and thus supersede state laws on permissible contributions only to the extent that the FECA expressly forbids certain kinds of contributions.[122] The court then consulted the legislative history for further evidence as to whether Congress intended the FECA to preempt the state law in question.[123]

A federal district court has ruled that the FECA does not categorically preclude a state law cause of action for fraud in political advertising related to a federal election.[124] In reaching this conclusion, the court did not rely on the conference report discussion that specifically excludes from preemption state prohibitions of fraud related to federal elections.[125] Rather, the court reasoned that because the FECA does not address fraud in political advertising, Congress "obviously" intended not to preclude completely state regulation of this area.[126] "[T]he only reasonable conclusion," the court explained, is that Congress meant to permit states to regulate this area "except where such regulation conflicts with the Act s specific provisions."[127]

Therefore, the conference report discussion of preemption suggests, and courts have concluded, that Congress did not explicitly intend the FECA to occupy the whole field of federal

election regulation.

b. Implicit Intent to Occupy the Field

In addition to holding that the FECA does not expressly occupy the field, the courts considering FECA preemption went on to suggest that the FECA does not implicitly occupy the field either.[128] However, the conference report explicitly described all of the state statutes these courts saved from FECA preemption as intended not to be preempted.[129] Thus, the courts suggestions that Congress did not implicit intend to occupy the field were not necessary to their holdings. Therefore, because the legislative history nowhere explicitly exempts voluntary state spending limits from preemption, a court considering the issue should consider whether the FECA implicitly occupies the field.[130]

i. Supreme Court Preemption Analysis

In determining whether a federal enactment implicitly occupies the field, the Supreme Court considers several factors.[131] One such factor is the overall purpose of the enactment.[132] The 1974 Amendments did contain a purpose section.[133] This section, however, merely listed the main substantive effects of the Act without explaining the reasons for these provisions.[134] Therefore, a court must surmise Congress s objectives from the overall structure of the 1974 Amendments and from the legislative history as a whole.[135]

One indication the Supreme Court relies on in determining whether Congress s purpose was to occupy the field is the comprehensiveness of the regulatory scheme.[136] Where Congress appears to have provided a complete regulatory scheme which a state regulation might thwart or subvert, the Court will hold that the scheme occupies the field.[137]

Because of its length and complexity, a court could consider the FECA to be a comprehensive scheme. The statute employs several strategies aimed at curbing financial improprieties associated with election campaigns, including contribution limits and the requirement that candidates make public many aspects of campaign finance.[138] The FECA also provides public financing for presidential elections.[139] Finally, Congress created the Federal Election Commission (FEC) to issue interpretive regulations.[140]

A court applying Supreme Court preemption analysis, however, should conclude that the FECA is not comprehensive. The FECA was a piecemeal response to specific problems, not a carefully considered assumption of the sole authority over federal elections. The most sweeping provisions of the FECA that relate to congressional campaigns - the limits on campaign contributions and spending and the creation of the FEC - were part of the 1974 Amendments.[141] The 1974 Amendments can be seen as a reaction to Watergate[142] and thus as an attempt to deal with the public perception that federal election campaigns were corrupt. In

response to Watergate, Congress sought to limit spending and to require public reporting of contributions in order to reassure the public that federal office holders were not "in the pockets" of special interests or buying their way into office with campaign dollars.[143] The creation of the FEC can be attributed to the need to centralize in one body the authority to interpret the FECA because several agencies had previously been issuing interpretive regulations.[144] Moreover, the FECA does not address federal election issues such as the involvement of government employees in election campaigns. The Hatch Act addresses these issues on the federal level,[145] and the conference report on the 1974 FECA Amendments states that the FECA does not preempt state versions of the Hatch Act.[146] Therefore, taken together, these considerations suggest that a court should view the FECA as a piecemeal reaction to various issues confronting Congress, rather than as a comprehensive enactment intended to be the exclusive authority on the field of federal election regulation.

In addition to comprehensiveness, the Court also considers whether a federal statute addresses a peculiarly national concern in deciding whether it preempts state law.[147] The regulation of federal elections, however, is not such a concern. The Constitution expressly contemplates the joint regulation of federal elections by the states and Congress.[148] The Constitution establishes that state regulation of federal elections will be valid unless Congress explicitly overrides it.[149] The 1974 FECA Amendments conference report reserves to the states the right to regulate the administrative details of elections, election-related crimes, and the conduct of state employees vis-à-vis federal elections.[150] Therefore, the 1974 FECA Amendments do not occupy the entire field of federal election regulation.

Thus none of the factors that weigh in favor of occupation of the field under Supreme Court doctrine are present. In addition, the Supreme Court s presumption against preemption bolsters the conclusion that a court should hold that the FECA does not implicitly occupy the field. In a line of cases involving implicit preemption,[151] the Court has expressed an unwillingness to preempt state law in a field traditionally occupied by the states if Congress s intent to preempt is not " clear and manifest. "[152] The Court has explained that the presumption against preemption where congressional intent is unclear insures that the federal-state balance "will not be disturbed unintentionally by Congress or unnecessarily by the courts."[153] Because the Constitution expressly envisions joint regulation of congressional elections by Congress and the states, unless Congress chooses to overrule the states,[154] a federal-state balance exists which a court should not disrupt without clear evidence that Congress intended to supersede state law.[155] As has been demonstrated above, it is, at the very least, unclear that Congress intended to occupy the field of federal election regulation. Although it need not fully delineate FECA preemption, a court considering whether the FECA preempts

Minnesota s voluntary spending limits should hold that it does not; the Minnesota limits do not fall within the conference report list of preempted statutes, nor do they conflict with the current FECA or regulate an aspect of federal elections that it regulates.[156]

ii. Congress s Motives For Preempting State Law are Inconsistent With FECA Occupation of the Field

Comments in the House committee report and remarks made during debate on the bill also support the conclusion that the 1974 Congress did not intend the FECA to occupy the entire field of federal election regulation. The reports suggest that Congress primarily intended the preemption provisions to address specific limited concerns. The House committee report gave as a purpose for the bill facilitating reporting by centralizing it.[157] The report explained that the "multiplicity" of campaign disclosure reports required by state law as well as by the 1971 FECA had become a problem.[158] According to the report, supervisory officers had been "overwhelmed" by the volume of reports filed.[159] The FECA addressed this problem, the report explained, by making federal reporting requirements the sole requirements.[160]

The debate on the House bill also demonstrates that concerns about overlapping state and federal limitations and regulations motivated Congress to preempt state law. At one point, the House considered an amendment that would have allowed states to impose an overall spending limit lower than that which the FECA imposed.[161] The Chair of the House committee that reported the bill and other House members opposed the amendment on the grounds that the primary reason most members wanted the Act to preempt state laws was to eliminate the overlap between state and federal requirements.[162] This suggestion supports the notion that Congress included the preemption provisions in the FECA, not because it believed there were important public policy reasons why federal law should occupy the whole field, but simply because it wanted to reduce the administrative hassles involved in running an election campaign.[163]

Therefore, Congress s primary reason for preempting state regulation was to avoid having to comply with two sets of limits and reporting requirements. Restricting FECA preemption to state statutes that conflict with or could potentially interfere with the specific regulations included in the FECA would serve this aim. Preempting state laws that could not conflict with the FECA would not serve this purpose. Because the Minnesota limits do not regulate in an area the FECA currently regulates, a court ruling on the matter should hold that the FECA does not preempt the Minnesota limits.

CONCLUSION

In the face of longstanding Congressional inaction on

federal campaign reform, some state legislatures are moving to regulate the election campaigns of their representatives in Congress. Minnesota, along with New Hampshire and Hawaii, have set voluntary spending limits and offered candidates incentives to abide by them. The Federal Election Campaign Act (FECA), however, may preempt these state spending limits because it appears on its face to occupy unequivocally the field of federal election regulation. The congressional committee that drafted the preemption language, however, limited the scope of FECA preemption by listing types of state statutes it did and did not intend the FECA to preempt. And, while the legislative history does not settle whether Congress intended to preempt state voluntary spending limits in specific, it does indicate, and courts have assumed, that Congress did not intend to occupy the whole field of federal election regulation. Congress s primary motive for preempting state regulation of federal elections was to avoid duplication between state and federal election regulation. Therefore, courts should conclude that the FECA preempts only statutes that regulate areas already regulated by the FECA. Because the FECA does not address congressional campaign spending limits, a court should conclude that it does not preempt the Minnesota voluntary spending limits.

ENDNOTES

1. See H. Alexander, Financing the 1980 Election 13-19 (1983).

2. Pub. L. No. 92-225, 86 Stat. 3-20 (1972) (codified as amended at 2 U.S.C. §§ 431-56 (1988) and other titles of U.S.C.).

3. H. Alexander & B. Haggerty, The Federal Election Campaign Act: After a Decade of Political Reform 11 (1981).

Congressional power to regulate federal elections springs from two constitutional provisions. U.S. Const. art. I, § 4, cl. 1. grants to both state legislatures and Congress the power to regulate federal elections:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Id. It also, however, grants Congress the power to overrule state regulations. Id. The United States Supreme Court has stated that Congress s authority under this clause is "tremendously" broad and sweeping. Gifford v. Congress, 452 F.Supp. 802, 805 (1978). See also Smiley v. Holm, 285 U.S. 355, 367 (1932) (Congress has " general supervisory power over the whole subject " of congressional elections); United States v. Classic, 313 U.S. 299 (1941) (rejecting a narrow interpretation of congressional authority to regulate elections). In addition, the necessary and proper clause U.S. Const. art. I, § 8, cl. 18. affords Congress the choice of how to exercise its constitutionally granted powers, including the power to legislate to "safeguard the right of choice by the people" of their congressional representatives. United States v. Classic, 313 U.S. 299, 320 (1941) (citing Ex parte Yarbrough, 110 U.S. 651, 657-58 (1884).

The FECA of 1971 also regulated communications between campaigns and the media, criminalized the promise by candidates of employment or other benefit in exchange for political activity, and limited campaign spending from a candidate s personal or family funds. Pub. L. No. 92-225, 86 Stat. 3-20 (1972). A companion to the 1971 FECA, the Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497 (1971), provided tax credits or deductions for political contributions at all levels also a tax checkoff to subsidize presidential campaigns during general elections. H. Alexander, & B. Haggerty, supra note 15, at 21.

4. H. Alexander & B. Haggerty, supra note 15, at 11. During floor debate on the final version of the 1974 FECA Amendments bill, Senator Kennedy said "[i]n the aftermath of Watergate, it was clear that the present Congress would be an election reform Congress; the bill today is the result of our 2-year effort." 120 Cong. Rec. S18528 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 1082 (1977). During the same discussion Senator Clark said Watergate "aroused an unparalleled outcry for overhauling the conduct and financing of American political campaigns." Id. at S18529, FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 1083. The conference bill, he went on, "represents the major congressional response to that demand for reform." Id.

5. Pub. L. No. 93-443, 88 Stat. 1263-1304 (1974) (codified as amended at 2 U.S.C. §§ 431-56 (1988)).

6. Federal Election Campaign Act Amendments of 1974, § 101 Pub. L. No. 93-443, 88 Stat. 1263, 1263-1268 (1974) (§ 101 was partially repealed by the Federal Election Campaign Act Amendments of 1976, § 201, Pub. L. No. 94-283, 90 Stat. 475, 496 (1976)).

7. Federal Election Campaign Act Amendments of 1974, §§ 403-408, Pub. L. No. 93-443, 88 Stat. 1263, 1291-1303 (1974) (these sections are codified as amended in scattered provisions of 26 U.S.C. and elsewhere).

The federal system for funding presidential elections is similar to Minnesota s congressional spending limits in that both provide funds on the condition that candidates not exceed spending limits. Presidential Election Campaign Fund Act, sec. 9004, Pub. L. No. 92-178, 85 Stat. 563 (197x) (referring to spending limits in section 320(b)(1)(B) of the Federal Election Campaign Act of 1971, xx U.S.C. § xx (1988); Elections and Ethics Reform Act of 1990, chapter 608, art. 4, § 4, subd. 2, 1990 Minn. Laws 2784 (to be codified at Minn. Stat. 10A.43 subd. 2).

8.

9.

10. In Buckley v. Valeo, 424 U.S. 1 (1976), the United States Supreme Court upheld three of the four major elements of congressional campaign reform in the FECA - disclosure requirements, public financing, and contribution limits. Id. at 143. The Court also upheld the presidential public finance-voluntary spending limit provisions. Id. at 57 n.65. The Court, however, struck down the mandatory congressional campaign spending limits, ruling that such limits violated the first

amendment by placing "substantial and direct restrictions" on protected political expression. Id. at 58. Congress responded to Buckley v. Valeo by repealing the mandatory congressional spending limits in the 1976 FECA Amendments. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 201, 90 Stat. 475, 496 (1976). The 1976 Act, however, not only left intact, but expanded the contribution limits imposed by the 1974 Amendments. Id. at § 202, 90 Stat. at 496-97.

11.

12. Elections and Ethics Reform Act of 1990, ch. 608, art. 4, § 1, subd. 1, 1990 Minn. Laws 2757, 2781 (to be codified at Minn. Stat. 10A.40, subd. 1).

13. New Hampshire waives filing fees and a notarized signature requirement in exchange for a congressional candidate s agreement to abide by spending limits. N.H. Rev. Stat. Ann. 664:1, 4-b, 5-a,b, 21 (19xx).

14. Haw. Rev. Stat. Div. 1, title 2, ch. 2, part 1 § 12-6 (19xx).

15. Elections and Ethics Reform Act of 1990, ch. 608, 1990 Minn. Laws 2757-93 (to be codified in various locations in Minn. Stat. § 10A and in other sections). Representative Robert Vanasek, speaker of the Minnesota House, expressed the legislature s hope that this Act would "send[] a strong positive message to Congress that the time has come for Congress to mend its ways and enact campaign finance reform." Star Tribune, Apr. 25, 1990, at 20A, col. 3.
See also Berke, "Campaign-Fund Limits: Congress Blushes, States Act," The New York Times, June 24, 1990, at 4E, col. 1.

16. Ch. 608, 1990 Minn. Laws 2757-93 (to be codified in various locations in Minn. Stat. § 10A and in other sections).

17. Id. at art 4, §§ 4-5, 1990 Minn. Laws 2783-86 (to be codified at Minn. Stat. 10A.43-44).

18. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 104, 88 Stat. 1263, 1272 (1974), and 2 U.S.C. § 453 (1988).

19. Congress created the FEC in 1974 to oversee the administration of the FECA.

20.

21. Although only one voted against the bill, many legislators were concerned that a court might hold that the FECA preempts state spending limits. Star Tribune, Apr. 25, 1990, at 20A, col. 3.

22. Ch. 608, 1990 Minn. Laws 2757-93 (to be codified at various locations in Minn. Stat. § 10A and in other sections).

23. Elections and Ethics Reform Act of 1990, ch. 608, art. 4, § 1, subd. 1(5), 1990 Minn. Laws 2781 (to be codified at Minn. Stat. 10A.40 subd. 1(5)). The legislature blamed congressional candidates failure to debate the pressing issues of the day on their need to "aggressively solicit" contributions from special interests and out of state sources. Id. at subd. 1(2), 1990 Minn. Laws 2781 (to be codified at Minn. Stat. 10A.40 subd. 1(2)). Moreover, the high level of spending has resulted, according to the legislature, in the perception by the public that "wealthy special interests" have an undue and corrupting influence on congressional representatives. Id. at subd. 1(3), 1990 Minn. Laws 2781 (to be codified at Minn. Stat. 10A.40 subd. 1(3)).

24. Elections and Ethics Reform Act of 1990, ch. 608, art. 4, § 1, subd. 1(4), 1990 Minn. Laws 2781 (to be codified at Minn. Stat. 10A.40 subd. 1(4)).

25. Elections and Ethics Reform Act of 1990, ch. 608, art. 4, § 1, subd. 2(a), 1990 Minn. Laws 2781 (to be codified at Minn. Stat. 10A.40 subd. 2(a)).

26. Elections and Ethics Reform Act of 1990, ch. 608, art. 4, § 1, subd. 3, 1990 Minn. Laws 2782 (to be codified at Minn. Stat. 10A.40 subd. 3).

27. Id.

28. Elections and Ethics Reform Act of 1990, ch. 608, art. 4, § 4, subd. 1, 1990 Minn. Laws 2783 (to be codified at Minn. Stat. 10A.42 subd. 1). The spending limits will first apply to the 1992 campaign. The Act provides that election year spending limits will be adjusted for inflation, starting with a baseline in 1991 of $3.4 million for Senate candidates and $425,000 for House candidates. Id. at § 5, subd. 1, 1990 Minn. Laws at 2784 (to be codified at Minn. Stat. 10A.44 subd.1). Id. at § 14, 1990 Minn. Laws 2788.

29. Id. at subd. 5(b), 1990 Minn. Laws at 2785 (to be codified at Minn. Stat. 10A.44 subd. 5(b)).

30.

31. This financing will be equal to the amount he or she has raised, up to a ceiling of 25 percent of the limit. Elections and Ethics Reform Act of 1990, chapter 608, art. 4, § 5, subd. 5, 1990 Minn. Laws 2785-86 (to be codified at Minn. Stat. 10A.44 subd. 5); § 4, subd. 1, 1990 Minn. Laws at 2783 (to be codified at Minn. Stat 10A.43 subd. 1).

32. The candidate may be penalized up to four times what she or he spent beyond the limit. Id. at § 8, 1990 Minn. Laws at 2786 (to be codified at Minn. Stat. 10A.47).

33. Federal Election Campaign Act of 1971, § 403, Pub. L. No. 92-225, 86 Stat. 3, 20 (1972) (§ 403 was repealed by the Federal Election Campaign Act Amendments of 1974, § 301, Pub. L. No. 93-443, 88 Stat. 1263, 1269 (1974) (codified at 2 U.S.C. § 453 (1988))). Section 403 of the 1971 FECA provided that

> (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 would result in a violation of a provision of this Act.
>
> (b) Notwithstanding subsection (a), no provision of State law shall be construed to prohibit any person from taking any action authorized by this Act or from making any expenditure (as such term is defined in section 301(f) of this Act) which he could lawfully make under this Act.=ft

Id.

34. Federal Election Campaign Act Amendments of 1974, §§ 104, 301, Pub. L. No. 93-443, 88 Stat. 1263, 1272, 1289 (1974) (§ 104 is not codified; § 301 is codified at 2 U.S.C. § 453 (1988)). These provisions remain unchanged.

35. 2 U.S.C. § 453 (1988).

36. Federal Election Campaign Act Amendments of 1974, § 104, Pub. L. No. 93-443, 88 Stat. 1263, 1272 (1974). The Title I provision appears in the portion of the Act which amends the criminal code and serves merely to clarify that, although portions of the 1974 Amendments were to be codified separately from the 1971 FECA, the whole of the 1974 Amendments preempted

state law. This provision is not codified, but does appear under the heading "Other Provisions" following 18 U.S.C. § 591 (1988) (where the criminal provisions of the 1974 FECA Amendments were codified).

37. The Title III provision appears among the portions of the 1974 Act that directly amended the 1971 FECA. It is the only one of the two preemption provisions codified in the United States Code.

38. FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 V (1977).

39. See S. 3044, 93d Cong., 2d Sess. § 213 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 3, 66-67 (1977); H.R. 16090, 93d Cong., 2d Sess. §§ 104, 301 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 547, 564, 591 (1977); Federal Election Campaign Act Amendments of 1974, §§ 104, 301 Pub. L. No. 93-443, 88 Stat. 1263, 1272, 1289 (1974).

40. See infra note . . . The conference report is the most authoritative because it reflects the understanding of those who drafted the final version of the bill and because it was the description of the bill on which members of Congress relied in voting on the bill. Eskridge & P. Frickey, Cases and Materials on Legislation (198).

41. 120 Cong. Rec. H7892-99 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 866-71 (1977).

42. 120 Cong. Rec. S18525 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 1079 (1977); 120 Cong. Rec. H10329 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 1107 (1977). Both of these allusions are quite terse.

43. Senator Cannon, chair of the committee that drafted the Senate bill and head of the Senate conferees, stated the FECA was not intended to preempt state laws regulating the political activity of state or local employees. 120 Cong. Rec. 18538 (1974), reprinted in #FEC, Legislative History of Federal Election Campaign Act Amendments of 1974# at 1092 (1977). When asked whether "little Hatch Acts" were preempted, Senator Cannon responded that

> It was the intent of the conferees that any State law regulating the political activity of State or local officers or employees is not preempted, but superseded. We did want to make it clear that if a State has not prohibited those kinds of activities, it would be permissible in Federal elections.

Id. (emphasis supplied). From the context it is clear that the Senator meant "is not preempted or superseded." See H.R. Conf. Rep. No. 1438, 93d Cong., 2d Sess. 102 (1974), reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974 at 945, 1046 (1977). See also Pollard v. Board of Police Com rs, 665 S.W.2d 333, 338 n.8 (Mo. 1984) (en banc).

44. Neither the House nor the Senate Committee Reports shed light on the scope of preemption. The Senate bill contained only one preemption provision, which was essentially similar to the Title III provision in the final act (codified at 2 U.S.C. § 453 (1988)). S. 3044 § 213, 93d Cong., 2d Sess., 120 Cong. Rec. 10952, 10960 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 3, 66-67 (1977). The Senate Rules and Administration Committee Report, however, does not discuss this provision.

The two preemption provisions in the House bill were identical to those included in the final act. Secs. 104, 301, H.R. 16090, 93d Cong., 2d Sess. (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 547, 564, 591 (1977). The House Rules and Administration committee report, however, provides little or no more guidance as to Congress s intent than the statute itself. The report explained the title I provision very briefly, stating that "chapter 29 of title 18 of the United States Code, relating to criminal sanctions for political activities in connection with Federal elections, supersedes and preempts provisions of State law." H.R. Rep. No. 1239, 93d Cong., 2d Sess. 21, reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 631, 655 (1977). Similarly, the report described the title III provision as dictating that "the provisions of the Act, and rules prescribed under the Act, supersede and preempt any provision of State law." Id. at 31, FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 665.

45. H.R. Conf. Rep. No. 1438, 93d Cong., 2d Sess. 69 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 945, 1013 (1977). The Report states that

> 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.

Id.

46. Id.

47. H.R. Conf. Rep. No. 1438, 93d Cong., 2d Sess. 102 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 945, 1046 (1977). The Hatch Act, 5 U.S.C. § 7324-xxxx (1988), and state acts modeled on it ("little Hatch Acts") regulate the political activities of government employees.

48. H.R. Conf. Rep. No. 1438, 93d Cong., 2d Sess. 100-01 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 945, 1044-45 (1977). The report s discussion of this preemption provision states that

> It is clear that 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.

49. Id.

50.

51.

52. 11 C.F.R. § 108.7 (1990).

53. The regulations state:

> (b) Federal law supersedes State law concerning the--
>
> (1) Organization and registration of political committees supporting Federal candidates;
>
> (2) Disclosure of receipts and expenditures by Federal candidates and political committees; and
>
> (3) Limitation on contributions and expenditures regarding Federal candidates and political committees.

(c) The Act does not supersede State laws which provide for the--

(1) Manner of qualifying as a candidate or political party organization;

(2) Dates and places of elections;

(3) Voter registration;

(4) Prohibition of false registration, voting fraud, theft of ballots, and similar offenses; or

(5) Candidate s personal financial disclosure.

Id.

54.

55. FEC Advisory Opinion 1989-25.

56. Id.

57.

58.

59. Stern v. General Electric Co., No. 87-7481 (2d Cir. Jan. 28, 1991) (LEXIS, Genfed library, Current file).

60. Reeder v. Kansas City Bd. of Police Comm rs, 733 F.2d 543, 545 (10th Cir. 1984).

61. Id.

62. Friends of Phil Gramm v. Americans for Phil Gramm, 587 F. Supp. 769, 776 (1984).

63. Id.

64. U.S. Const. art. VI, cl. 2. The supremacy clause states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." Id.

65. L. Tribe, American Constitutional Law § 6-25 at 479 (1988).

66. See, e.g., Pacific Gas & Elec. v. State Energy Resources Conservation & Dev. Comm n, 461 U.S. 190, 204 (1983)

> "state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).").

67. L. Tribe, supra note 71, § 6-25 at 479.67.

68. See, e.g., Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941).

69. See, e.g., Pacific Gas & Electric v. State Energy Resources Conservation & Dev. Comm n, 461 U.S. 190, 203-04 (1983).

70. New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 413 (1973), quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952).

71. Aloha Airlines v. Director of Taxation, 464 U.S. 7, 12 (1983).

72. E.g., Malone v. White Motor Corp., 435 U.S. 497 (1978). The Court has stressed that its primary task in inferring preemption is to determine Congress s intent in enacting the statute at issue. E.g., Shaw v. Delta Air Lines, 463 U.S. 85, 95 (1982).

The Court may infer a congressional intent to preempt where the federal scheme is pervasive, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); where there is a need for national uniformity, e.g., Jones v. Rath Packing Co., 430 U.S. 519 (1977); or where there is a danger of conflict between the enforcement of state laws and the administration of federal programs, e.g., Pennsylvania v. Nelson, 350 U.S. 497, 505-10 (1956).

73. See Star Tribune, Apr. 25, 1990, at 20A, col. 3. Herbert Alexander, author of a number of books on campaign law, speculated that the FEC and the Department of Justice would fight the Minnesota spending limits "tooth and nail all the way." Id. "I don t think it has ghost of a chance" of surviving a court

challenge, he said, explaining that the Federal Election Commission has "already spoken" on the issue of preemption. Id. Moreover, the Republican National Committee has vowed to contest the validity of the Minnesota spending limits in court. Roll Call, May 14, 1990, p. 8.

The Minnesota spending limits first went into effect January X, 1991, therefore the first opportunity for a court test of the preemption issue will be during the 1992 Congressional elections.

74. The most obvious reason for concluding that the FECA does preempt the Minnesota limits is that the FECA states flatly that it preempts all state regulation of federal elections. 2 U.S.C. § 453 (1988). On its face this statement indicates that Congress intended the FECA to occupy the field of federal election regulation. Moreover, nothing in the FECA explicitly exempts state voluntary spending limits from preemption.

Furthermore, in addition to containing the preemption provisions, the 1974 FECA Amendments limited congressional campaign spending. cite. A court might conclude, therefore, that regardless of whether it occupies the whole field of federal election regulation, the FECA preempts state spending limits because the 1974 Congress intended to preempt the field of spending limits.

In addition to the plain meaning of the statute itself, a court will find evidence in the legislative history intimating that the FECA occupies the field of federal election regulation. The Conference Report described the preemption provisions as occupying the field. H.R. Conf. Rep. No. 1438, 93d Cong., 2d Sess. 69 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 945, 1013 (1977). Moreover, the Committee Report on the original House bill, which contained preemption provisions identical to those in the current FECA, declared that the FECA was to be the "sole authority" regulating federal elections. H.R. Rep. No. 1239, 93d Cong., 2d Sess. 10-11, reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 631, 644-45 (1977).

Moreover, the FECA might appear to preempt not only Minnesota s congressional campaign spending limits, but also state financing for congressional candidates. The Federal Election Commission, however, has ruled that states may devote public funding to federal election campaigns. This Note, therefore, will only address FECA preemption of Minnesota s voluntary congressional campaign spending limits.

75. See supra

76. Federal Election Campaign Act Amendments of 1974, § 101 Pub. L. No. 93-443, 88 Stat. 1263, 1263-1268 (1974) (§ 101 was partially repealed by the Federal Election Campaign Act

Amendments of 1976, § 201, Pub. L. No. 94-283, 90 Stat. 475, 496 (1976)).

77. Federal Election Campaign Act Amendments of 1976, § 201, Pub. L. No. 94-283, 90 Stat. 475, 496 (1976).

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85. 2 U.S.C. § 453 (1988).

86. See infra notes and accompanying text.

87. See supra note 72.

88.

89.

90. See supra Part II C.

91. See infra notes and accompanying text.

92. H.R. Conf. Rep. No. 1438, 93d Cong., 2d Sess. 69 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 945, 1013 (1977). See also supra note and accompanying text (discussing legislative history).

93. Although the report mentions spending limits, it states only that the FECA preempts criminal sanctions related to spending limits. H.R. Conf. Rep. No. 1438, 93d Cong., 2d Sess. 69 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 945, 1013 (1977). Moreover, the report appears to limit preemption to financial disclosure and criminal sanctions by using the catch-all "and similar offenses" to round out the list of violations for which the FECA preempts criminal sanctions. Id.

94. H.R. Conf. Rep. No. 1438, 93d Cong., 2d Sess. 100-02 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 945, 1044-46 (1977).

95. Id.

96. There are at least four plausible interpretations of the Conference Report s preemption discussion with respect to statutes, such as Minnesota s limits, which are not described as either preempted or not preempted. First, Congress could have meant for the statutes listed as not preempted to be the only ones exempt from preemption. Second, and conversely, Congress could have intended for the statutes listed as preempted to be the only ones the FECA preempts. Third, Congress might have meant for neither list to be exclusive, assuming, perhaps, that the delineation it intended was clear or could be inferred from the two lists. Finally, Congress may simply not have thought about whether to preempt statutes not mentioned in the Conference Report.

A court choosing between these explanations could decide between the first two by determining whether Congress intended the FECA to occupy the whole field of federal election regulations, or whether it meant the FECA s preemptive scope to be narrower. If Congress intended to supplant all state regulation of federal elections, the court should select the first explanation because it effectuates the presumption that in a field occupied by federal law all state statutes not expressly exempted are preempted.

The United States Supreme Court requires persuasive evidence of Congress intent to preempt. Therefore, if the evidence that the 1974 Congress intended the FECA to occupy the field is not convincing, a court should hold that the FECA does not occupy the field. If a court finds that the FECA does not occupy the field, the second explanation would, in the absence of a more convincing narrow delineation of the FECA s preemptive scope, effectuate Congress intent by invalidating only those statutes it specifically singled out for preemption.

If the court concludes, on the other hand, that the third explanation is correct - that Congress did not intend the Conference Report lists to be exclusive - it must comply with the

most persuasive argument as to which side of the preemption line state voluntary spending limits fall. If there are no convincing arguments in favor of preemption that relate specifically to state spending limits, the court must decide the issue based on whether the FECA occupies the field. It must do so because in the absence of specific grounds for preemption, a state statute may only be preempted if it attempts to regulate in a field occupied by federal legislation.

Finally, if the court concludes that Congress had no intent with respect to statutes the Conference Report did not mention, it must try to imagine what Congress would have intended had it considered the issue and it must weigh the effect of either holding on the objectives underlying the FECA. Again, if there are no convincing arguments for either conclusion relevant to state spending limits, the court must rule based on whether the FECA occupies the field.

97.

98. Id. at H7899, FEC at 871.

99. 120 Cong. Rec. H7892-99 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 866-71 (1977).

100.

101.

102. Representative Hays said:

> there is always the possibility that if a State has lower limits, that the candidates themselves can agree to abide by them. Certainly, if I were in a State that had lower limits, I would endeavor to get my opponent to abide by them. That can be a voluntary thing.

120 Cong. Rec. H7895 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 867 (1977).

103. Id.

104. Id.

105. See supra preemption doctrine discussion

106. See supra 51 and accompanying text.

107. H. Rep. No. 1239, 93d Cong., 2d Sess. 10 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 631, 644 (1977).

108. H.R. Conf. Rep. No. 1438, 93d Cong., 2d Sess. 100-101 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 945, 1044-45 (1977).

109. H.R. Conf. Rep. No. 1438, 93d Cong., 2d Sess. 69 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 945, 1013 (1977).

110.

111. Id.

112. E.g., ERISA.

113. See supra note

114. Stern v. General Electric Co., No. 87-7481 (2d Cir. Jan. 28, 1991) (LEXIS, Genfed library, Current file).

115. Id. (citing 2 U.S.C. § 453 (1988)).

116. Id. at n.3 (citing Reeder v. Kansas City Bd. of Police Comm rs, 733 F.2d 543, 545-46 (8th Cir. 1984)).

117. Id.

118. Id.

119. Id. at n.4.

120. Reeder v. Kansas City Bd. of Police Comm rs, 733 F.2d 543, 545 (10th Cir. 1984).

121. Id.

122. Id.

123. Id.

124. Friends of Phil Gramm v. Americans for Phil Gramm, 587 F. Supp. 769, 776 (1984).

125. Id.

126. Id.

127. Id. The Missouri Supreme Court also concluded that the preemption provisions were intended to preempt only the "limited field of statutes imposing restrictions on candidates for federal office and their campaign committees." Pollard v. Board of Police Com rs, 665 S.W.2d 333, 337 (Mo. 1984) (en banc). The court based this conclusion on the fact that the conference report listed specific statutes that Congress did and did not intend to preempt and on the observation that the "overwhelming concern" of the 1974 Congress was the revision of the 1971 FECA. Id.

128. See supra notes and accompanying text.

129. See supra notes and accompanying text.

130. See supra note

131. See supra note

132. See supra note

133. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974). The House Committee Report on the House version of the 1974 Amendments also outlined the objectives behind the proposed legislation. LH 635. The House Committee characterized the bill as addressing problems with the 1971 FECA. LH 636. The problems it discussed, in order, were the multiplicity and poor scheduling of campaign disclosure reports, overlapping authority among agencies to issue interpretive regulations for federal election statutes, and finally, the lack of a check on rising campaign contributions and spending. LH 637. The House Committee blamed the rise in campaign spending for the dependence of candidates on special interest groups and large contributors as well as the impression that candidates can buy elections simply by spending large sums. Id. None of these purposes, individually or taken together,

suggest that the Committee intended to reserve the regulation of federal elections exclusively to Congress.

134. Id.

135. The main elements of the 1974 Amendments were; limits on contributions and spending, the establishment of the FEC, the extension of public financing in presidential elections to primaries and nominating conventions, and changes in the organization of campaigns and in reporting requirements related to contributions and spending. See supra note On the basis of this list it is difficult to conclude much about specific congressional intentions, including whether Congress intended to occupy the field.

136. See supra

137. In such a case, the Court presumes that matters not addressed by Congress were intentionally left unregulated. See, e.g., Arkansas Electric Cooperative Corp. v. Arkansas Public Serv. Comm n, 461 U.S. 375, 384 (1983).

138. See supra

139. See supra

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142. See supra

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147. See supra . . . . Where a peculiarly national concern such as immigration, foreign affairs, or Indian affairs is involved, the party seeking to establish preemption has a lighter

burden of persuasion. See e.g., Hines v. Davidowitz, 312 U.S. 52 (1941) (where a paramount federal interest related to foreign affairs, such as the regulation of immigration, is involved, the Court places a lighter burden on the party seeking to establish preemption). Other examples of peculiarly national concerns where the party seeking to establish preemption faces a lighter burden include migratory bird protection, the regulation of Indian tribal affairs, and the regulation of labor-management relations. See L. Tribe, supra note 71, § 6-27 at 500 n.22 (citing cases).

148. U.S. Const. art. I, § 4, cl. 1.

149.

150. The Court may also find state regulation of commerce preempted by the "dormant commerce clause." See #L. Tribe,# supra note 71, § 6-5, at 408-13 (detailing the preemption of state regulation of commerce under the dormant commerce clause). The dormant commerce clause is not relevant in this case, however, because the congressional power to regulate elections comes from article I, section 4 of the Constitution, not the commerce clause. See supra note 11 and accompanying text.

151. See Aloha Airlines, Inc. v. Director of Taxation of Hawaii, 464 U.S. 7, 12 n.5 (1983), referring to "Rice and its progeny;" Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Jones v. Rath Packing Co., 430 U.S. 519 (1977); Malone v. White Motor Corp., 435 U.S. 497 (1978).

152. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). This applies in a field traditionally occupied by the states.

The Constitution states that

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Thus, the framers of the Constitution granted the states full power to regulate congressional elections subject only to the regulations Congress might choose to enact. Where Congress has not restricted the power of the states to regulate congressional

elections, therefore, it must be presumed that state regulations are valid. And, given the express Constitutional grant of power to the states to regulate, it should not be presumed that Congress has exercised its right to override state regulation unless it has unambiguously expressed its intent to do so.

153. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

The Court has written that the implicit preemption rules "have little application" in the interpretation of a statute that expressly preempts state laws. Aloha Airlines v. Director of Taxation of Hawaii, 464 U.S. 7, 12 n.5 (1983) (dicta). Yet, where Congress has . . . . Thus the principle that preemption is not to be presumed lightly should lead a court to uphold the Minnesota Act against a claim that it is preempted by the FECA. See, e.g., New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 413 (1973) ("The exercise of federal supremacy is not lightly to be presumed").

154. U.S. Const. art. I, sec. 4, cl. 1. See supra note (quoting text of this clause).

155. In interpreting statutes passed by Congress under the commerce clause and which involve an area in which there is a federal-state balance of power, the Court has scrutinized statutory language and legislative history closely. L. Tribe, supra note 71, § 5-8 at 316-17 The Court has required a "clear statement" in a statute or its legislative history that Congress intended to exercise its power in full before the statute will be interpreted that broadly. Id. The clear statement rule can be understood as an attempt by the Court to prevent Congress from resorting to ambiguity to mask its failure to accommodate the competing interests associated with the federal-state balance. Id. at 317. The rule could also be viewed as a simply a policy of not allowing a federal statute to trench on state interests where the Congress seemed unaware that the statute would do so or where it seemed unsure of what it wanted to achieve. Under either interpretation, the conservative approach to statutory interpretation embodied in the clear statement rule is relevant in analyzing whether the FECA preempts the Minnesota Act. Congress s explanation of what it did and did not intend the FECA to preempt does not clearly indicate that the Minnesota Act falls in the class of statutes intended to be preempted. The regulation of how congressional representatives are selected, however, is tremendously important to a state and its residents. Thus, the rationale behind the clear statement doctrine militates against the preemption of the Minnesota Act.

156. According to the market participant doctrine, when states are acting in their proprietary capacity they are exempt from preemption under the dormant commerce clause. Minnesota s congressional campaign reform provision may be viewed as an offer for a contract. In exchange for the promise not to exceed spending limits, candidates are promised by the state that they will receive public funding if an opponent exceeds the limits. See supra note 14 and accompanying text. Moreover, the civil fine levied for violating such an agreement is analogous to a liquidated damages clause in a contract. Elections and Ethics Reform Act of 1990, ch. 608 art. 4 § 8, 1990 Minn. Laws 2757, 2786-87, (to be codified at Minn. Stat. 10A.47). Thus Minnesota is doing no more to limit spending than any candidate or well-endowed private citizen can, and should be considered to be acting in its proprietary capacity. Therefore, because Minnesota is acting in its proprietary capacity and because the basis for the market participant doctrine applies to FECA preemption, the FECA does not preempt the Minnesota spending limits.

157 H.R. Rep. No. 1239, 93d Cong., 2d Sess. 1 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 631, 635 (1977).
The other reasons were:

> (1) To place limitations on campaign contributions and expenditures,
> . .
> (3) To establish a Board of Supervisory Officers to oversee enforcement of and compliance with Federal campaign laws; and
> (4) To strengthen the law for public financing of Presidential general elections, and to authorize the use of the dollar checkoff fund for financing Presidential Nominating Conventions and campaigns for nomination to the office of President.

Id.

158. Id. at 2, FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 636 (1977).

159. Id. The scheduling of reports very shortly before the election aggravated this problem. H.R. Rep. No. 1239, 93d Cong., 2d Sess. 2 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 631, 636 (1977). This schedule, the report stated, impaired the usefulness of the information because there was little time for the media and the public to examine it, and because most spending

had already taken place. Id. at 2-3, FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 636-37.

A second problem with existing law that the report discussed was the lack of a central authority with the power to interpret campaign law and issue regulations. Id. at 3, FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 637.

The report went on to state that "the absence of any limits on overall expenditures has contributed to the alarming rise in the cost of campaigning for Federal office." Id. This rise, the report stated, "has increased the dependence of candidates on special interest groups and large contributors. Id. Under the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign." H.R. Rep. No. 1239, 93d Cong., 2d Sess. 3 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 631, 637 (1977).

160. H.R. Rep. No. 1239, 93d Cong., 2d Sess. 10 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 631, 644 (1977).

161. 120 Cong. Rec. H7892 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 866 (1977).

162. Representative Hays, Chair of the House committee that reported the bill, opposed the amendment, arguing that it would undercut the preemption provision. Id. at H7895, FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 867. He explained 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.

Representative Frenzel confirmed that many members of Congress had asked the committee to preempt state law in order to simplify the requirements with which they had to comply. Id. at H7896, FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 868. Representative Frenzel stated in his "supplemental views" to the House committee report that

> Sections 104 and 301 preempt State law. This is 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. Rep. No. 1239, 93d Cong., 2d Sess. 131 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 631, 765, 789 (1977).

Frenzel argued that those who supported the amendment to allow states to impose lower expenditure limits wanted to "have [their] cake and eat it too." 120 Cong. Rec. H7896 (1974), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 868 (1977). He 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." LH 868 "If we want preemption of reports," he went on, "we certainly ought to have the preemption of the whole election process." Id. Later, stating that the Senate bill did not have a preemption provision, Frenzel suggested that the Senate vote down the amendment in order to preserve room to compromise with the Senate without having to return to the states the right to control reporting. "[I]f we [the house] are to go with this opening wedge in preemption, where can we then compromise with the Senate? Do we then compromise by giving the states the right to control reporting again?" he asked. Id. at 7899, FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 871. Also arguing against the amendment, Representative Thompson contended that "there would be a continual, uncomfortable and unnecessary duplication of reports to state governments and to the federal government." Id. at 7897, FEC, Legislative History of Federal Election Campaign Act Amendments of 1974 at 869. In addition, Representative McCormack said "we are now asked to resubject ourselves to the possibility of unnecessary State reporting regulations, which is one of the things we are trying to correct." Id. at 7898, FEC, Legislative History of Federal Election Campaign Act Amendments of 197 at 879. He added that the goal of the amendment could be achieved voluntarily by any candidate. Id. Finally, Representative Koch stated that preemption was essential because all national legislators should be subject to the same rules; "To do otherwise will put this legislation back in the hands of 50 different state legislatures." Id.

The only other reasons for preemption members of Congress expressed were the desire to avoid having to comply with different state and federal limitations and the desire for national uniformity

163. Later in the debate, Representative McCormack opposed the amendment, arguing that the preemption section was one of the most important sections of the 1974 Amendments. LH 870. He feared that passing the amendment increased the risk that a court might interpret the Act to permit "unnecessary State reporting regulations, . . . one of the things we are trying to correct." Id. He explained that the goal of the amendment could be achieved voluntarily. Id.

The only other reason for preemption articulated in this debate or anywhere else in the legislative history was the assertion by Representative Koch that the FECA should apply

equally to everyone. LH 870 Koch felt that not to preempt state law would "put this legislation and the fight for reform back into the hands of 50 different State legislatures." Id. While permitting states to enact voluntary spending limits would subject members of Congress from different states to different regulations, Koch s statement does not support the argument that courts should interpret the FECA to preempt Minnesota s limits. Although state limits would no doubt differ, each Senator or Representative would be subject to only one state s laws and thus would not have to keep track of a "multiplicity" of laws. Moreover, although a patchwork of different state standards may seem disorderly, the desire for orderliness by itself is not a compelling reason for preempting state law. Therefore, without stronger evidence than the remarks of only one Representative that the desire for orderliness was the basis for Congress s decision to preempt state regulation of federal elections, a court should discount this argument.