

Advisory Opinion 1991-5

Dissenting Opinion

COMMISSIONER THOMAS J. JOSEFIK

I oppose this opinion's conclusion regarding preemption of state law and reaffirm my dissenting opinion in Advisory Opinion 1986-40 on this issue. An exception to the Federal Election Campaign Act's definitions of "contribution" and "expenditure" for political party committee building funds does not "occupy the field" in regulating building funds or give rise to FECA preemption of state law on the subject. As I said in my earlier dissent: "By its very language and statutory context, the building fund provision is an exception and a limit to FECA jurisdiction, not an extension of it."

Under the Act's provision, donations to party building funds are viewed as not for the purpose of influencing Federal elections. The effect of this definitional exception is quite the opposite of preemption: it removes a Federal interest in such funds and takes them out from under Federal jurisdiction. It is flatly contradictory to say that Federal campaign finance law specifically excludes party building funds from its regulation but, by its mere mention of the subject, the exception (without more) preempts state law from regulating such decidedly non-Federal political funds. * Nothing

* The majority opinion's analysis wreaks havoc upon concepts of Federal and state jurisdiction and preemption. Contrary to the opinion's legal argument, the building fund issue does not raise questions of how far Congress meant to assert Federal jurisdiction in the area of party committee building funds. The opinion makes passing reference to possible allocation between Federal and non-Federal interests in party building funds. It suggests the question is open to interpretation, supposedly decided only by a lack of affirmative evidence

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about the building fund exception suggests Congressional intent to preempt state law or to define or limit the parameters of state regulation of this non-Federal activity.

If a state party in Tennessee, or anywhere else, has a problem with a state prohibition upon corporate or labor union contributions for non-Federal political activity (including party building funds), it should complain to its state legislature. The problem is truly not the FEC's business.

5/2/91


Thomas J. Josefiak

(Footnote * continued from previous page)

Congress meant to limit preemption "to some allocable portion" of building fund activity. By the very terms and effect of the building fund exception, however, there is no Federal interest or allocable Federal share in these general building funds.

There is also no basis for the opinion's distinction, for preemption purposes, between state reporting requirements and state limitations upon the source of monies, so as to permit acknowledging only the jurisdiction of state disclosure laws. That bifurcation of the preemption issue may be superficially appealing as a policy matter but is without justification as a matter of law, logic or identifiable Congressional intent. State requirements for the reporting of building fund accounts by state party committees are not preempted by the FECA for the same reason Federal law does not generally preempt state regulation of this or any non-Federal political activity.