FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**CONCURRING OPINION OF
COMMISSIONER LEE ANN ELLIOTT
TO ADVISORY OPINION 1993-17**

I voted with the majority in Advisory Opinion 1993-17 to pre-empt a Massachusetts state law that is inconsistent with the Commission's allocation regulations for political parties. I write separately to point out one difference I have with the opinion's analysis, and second, to ensure today's opinion is not misunderstood or overstated in any future application.

1. The majority opinion correctly notes 11 C.F.R. § 106.5(d)(1)(ii) states how political parties "shall" calculate their ballot composition ratios. The opinion continues, however, to say the Explanation and Justification's repeated use of the word "may" indicates the Commission's formula is not mandatory under federal law.

While I agree the ballot composition method was designed to set the minimum (not the exclusive) federal percentage, I disagree with using the E&J to give a near-opposite meaning to the plain words of our regulations. In my opinion, if a point of law cannot be clearly stated in the regulations themselves, then it shouldn't be said at all. Using an E&J to give a different meaning to our regulations is a dangerous practice, since the E&J is not widely publicized and is not as thoroughly examined by the Commissioners as the rules, themselves.

In my opinion, the real reason the word "shall" does not create a mandatory federal percentage goes back to why we adopted these regulations. In drafting the allocation regulations, the Commission answered the allegation that party committees were over-stating the non-federal share of joint activities. We corrected this imbalance by saying party committees must count certain offices in determining the non-federal side of the ratio. The regulation's use of the word "shall" (followed by a list of specific offices) really means a party committee may not count any other offices in calculating it's percentage. Accordingly, party committees "shall not" count any more non-federal offices than we recognize.

Further, federal party committees are free to pay more than their federal minimum if they wish, and may pay up to 100% of their joint activity from federal sources. In fact, it is this flexibility that triggers pre-emption in this case: by requiring a party committee to take certain non-federal points, Massachusetts is preventing it from paying up to 100% of its allocable expenses from its federal account.

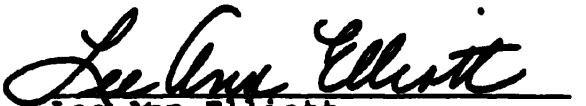
Just as I would pre-empt any state law that takes non-federal points away from a party, I must pre-empt Massachusetts law that requires a committee to take a point it doesn't want. Pre-emption works in either direction, and the Commission must pre-empt any encroachment on the federal regulation of federal expenditures.

2. To ensure today's opinion is not overstated or misunderstood, I think my last point bears repeating: today's opinion only pre-empts the encroachment by a state on the federal regulation of federal expenditures.

By definition, every allocable expense has a federal component: that is what makes them allocable. But today's opinion does not mean the Commission believes allocable activities are, by definition, 100% federal expenditures. In fact, the very regulations that pre-empt state law specifically say how parties may pay much less than 100% of their allocable expenses from federal sources. Also, today's opinion has no effect on purely non-federal expenses, or a state's off-year elections for non-federal offices. Those activities are strictly non-federal and not subject to allocation.

What today's opinion does ensure is that parties retain the flexibility to use federal funds for what they figure is the federal portion of mixed activities, subject to certain minimums. In my opinion, a state cannot add or subtract from a party's flexibility under our rules.

Today's opinion does demonstrate one other thing: our allocation regulations still need work. I think the Commission unanimously agrees in the principle of allocation, but the complexity and detail of our current rules make them break down in application.



October 21, 1993

Lee Ann Elliott
Commissioner