FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

# FEDERAL ELECTION COMMISSION
# ADVISORY OPINION 2000-24

Commissioner David M. Mason, dissenting.

I disagree with the majority's conclusion that the Act and Commission regulations preempt "*any* requirement imposed by APOC that would limit the amount of Federal account funds that ADP uses to pay for administrative and generic voter drive expenses." (Emphasis added.) I do so because I do not believe that the Act occupies the field with respect to all party committee allocable activity. In addition, I do not believe we have enough facts in this advisory opinion request to conclude that the Requestor faces an actual conflict between APOC's requirements and our regulations governing party allocable activity.

My conclusion proceeds from the "strong presumption against preemption." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992). The "'purpose of Congress is the ultimate touchstone' of pre-emption analysis." *Id.* at 516 (internal citations omitted). "Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.' In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Id.* (internal citations omitted). The FECA neither implicitly indicates an intention to occupy *any and all* state regulation of mixed federal/state activity nor pervasively crowds the states from this area.

The FECA (§ 453) explicitly preempts "any provision of state law with respect to election to *Federal* office." (Emphasis added.) Since the activities involved here relate, by definition, to both Federal and non-federal office, the plain terms of the preemption provision do not cover the field. The legislative history is focused solely on Federal election activity. H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. (1974) p.10; H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 10 (1974), p.69; H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974), p.101.

In addition, the legislative history of the 1979 amendments bears directly on the scope of the Act concerning party allocable activity. The costs borne by state and local parties with respect to printed slate cards of three or more candidates as well as for campaign materials distributed by volunteers are considered exempt activity, i.e., they are neither "contributions" nor "expenditures" under the Act. 2 U.S.C. § 431(8)(B)(v) and (x), (9)(B)(iv) and (viii) (These are the only statutory provisions referring to "joint" activity.) Mentioned in the same paragraph cited by the Requestor with respect to the permissive nature of allocation is the unequivocal statement that "[m]oney used to pay the costs attributable to State candidates is subject to the prohibitions and limitations of State law." H.R. Rep. No. 96-422 (1979), p.8 (slate cards); *see also id.* at p.9 (volunteer activities). In light of these statements, I do not see how a field preemption can be considered expressed or implied. Even if a party committee chooses to pay for all mixed activity out of its federal account (as permitted by 11 CFR 106.5(a)), I do not believe the Commission should bar a state from insisting that parties demonstrate that a reasonable percentage of this mixed activity is paid for with state-permissible funds, at least by means of a reasonable accounting method.

In light of the statute and legislative history, I believe 11 CFR 106.5 is better described not as occupying the field with respect to mixed or allocable activity but as drawing the line between the federal and non-federal portions of the field. The fact that we permit, on the federal side, states to use federal funds for state election activity does not, thereby, extend federal jurisdiction to those state activities.

A field preemption analysis raises untenable tension with our own regulations. For instance, 11 CFR 102.6 permits unlimited transfers of federal and non-federal funds between national, state and local party committees. A conclusion that this permissive regulation supersedes a state's effort to regulate contributions to state political committees is a necessary outcome of a field preemption analysis. Thus, under the analytical rule adopted by my colleagues, states are powerless to prohibit the transfer of non-federal corporate or union funds to a state or local political party committee as long as those funds are transferred through a party committee in another state. We have also permitted parties to allocate candidate-specific issue ads, at least in some instances, pursuant to 11 CFR 106.5(a)(2)(i) and (iv) (administrative or generic voter drives) as understood by Advisory Opinion 1995-25. Field preemption would eviscerate any state attempt to regulate non-express advocacy advertising featuring state candidates, a result a majority of the Commission likely did not contemplate.

Like Commissioner Wold, I believe only an actual conflict analysis is helpful with respect to mixed activity. In this case, however, there were not enough facts for the Commission to determine whether compliance with both Federal and Alaska party allocation regulations is a "physical impossibility" or whether Alaska law "stands as an obstacle to the accomplishment of execution of the full purposes and objectives of Congress." *Cuesta*, 458 U.S. at 153. APOC has told ADP that only some indeterminate portion of its administrative and generic voter drive activity need be paid for with funds subject to Alaska's limits and prohibitions. APOC has told the Commission that it will accept an allocation percentage that ADP determines, in good faith, to represent non-Federal funds for use in support of non-Federal activity and Federal funds in support of Federal activity.

APOC also will allow ADP to pay for the expenses allocable to non-Federal activity out of its federal account so long as the funds used are in compliance with Alaska's state restrictions. While it is surely a theoretical possibility that Alaska's more restrictive contribution limits[1] coupled with restrictive state allocation requirements could pose a problem for state party committees, APOC's present deference and flexibility with ADP indicates that there is no immediate conflict.

ADP's reports on file with the Commission and APOC at the time we considered ADP's advisory opinion request confirm this conclusion. From January 1 through November 27, 2000, ADP had approximately $107,000 in federal receipts, including only $4,780 in transfers from its non-federal account for joint activity. During a comparable period of time, from January 1 through November 14, 2000, ADP had approximately $159,000 in state committee income. These figures indicate that ADP was under little stress last year in meeting the allocation requirements of federal and state law.

I note with interest that state party committees from both major parties joined in a supplicating chorus seeking the comforting cover of federal regulation. *See* Comments. That warm blanket may all too easily become a suffocating shroud. If the Commission has the authority to prohibit state regulation of "mixed" activity, it necessarily has the authority to regulate that activity directly and thus, for instance, to require 100 percent of mixed activity to be paid for with Federal funds. Thus, the state party committees have asked for something Congress may ultimately give them – a virtually complete federalization of state party activity (*see* S. 27 (McCain-Feingold), passed by the Senate).

I remain of the opinion that the *Federal* Election Campaign Act need not, should not and cannot be stretched to prohibit reasonable state regulation of state election activity.

October 9, 2001

David M. Mason, Vice Chairman

[1] Alaska's contribution limits/prohibitions to political parties are more restrictive than the FECA in so far that (1) "group[s]" (essentially Alaskan political committees) may contribute only $1,000 per year to political parties, AS § 15.13.070(c)(2), (in contrast with $5,000 per year under the FECA, 2 U.S.C. § 441a(a)(1)(C), (2)(C)); (2) a corporation, company, partnership, firm, association, organization, business trust or surety, labor union, or publicly funded entity that is not a "group" may not contribute to political parties, AS § 15.13.074(f) (in contrast with only corporations, labor unions and government contractors under the FECA, 2 U.S.C. §§ 441b, 441c); and (3) a political party may not accept more than ten percent of its total contributions during the calendar year from non-Alaskan residents. AS § 15.13.072(f).