



California Fair Political Practices Commission

February 7, 1995

VIA FACSIMILE

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

Re: Comments on Draft Advisory
Opinion
Our File No. A-94-405a

Dear Mr. Litchfield:

We would like to submit the following further comments in response to the Federal Election Commission's draft Advisory Opinion No. 1994-38, concerning the Roybal-Allard for Congress Committee's obligation to file a major donor report under California state law because it contributed \$10,000 to oppose a state ballot measure.

The draft advisory opinion concludes that the Federal Election Campaign Act ("FECA") and Commission regulations preempt the committee's obligation to file a major donor report under state law because the donation to Tax Payers Against 187 was an integral part of Congresswoman Roybal-Allard's federal reelection campaign rather than a disbursement of funds for non-federal election purposes. The Commission's assertion that California's major donor statute is preempted in this instance is overreaching and based on flawed analysis. It fails to recognize California's paramount interest in achieving adequate disclosure of state campaign activity.

Under the preemption doctrine, federal law may preempt state statutes (1) if a federal statute or administrative regulation expressly states that it preempts state law, (2) if the scheme of federal regulation is so pervasive that it "occupies the field" and leaves no room for the states to supplement it, or (3) if state law actually conflicts with federal law such that compliance with both would be impossible or that the state law frustrates the purpose of the federal law. When Congress has spoken expressly, however, the preemptive scope of a federal law is governed

entirely by the express language. Weber v. Heaney, 995 F.2d 872, at 875 (8th Cir. 1993).¹

The Federal Election Campaign Act states that its provisions, and the rules prescribed thereunder, "supersede and preempt any provision of State law with respect to election to Federal office." (2 U.S.C. Section 453 (emphasis added).) Commission regulations add that such preemption applies to the organization and registration of political committees supporting federal candidates, disclosure of receipts and expenditures by federal candidates and political committees, and the limitations on contributions and expenditures regarding federal candidates and political committees. (11 CFR 108.7(b).)

While the FECA's preemption provision is broad, it is not all-encompassing and certainly does not extend to state laws regulating the conduct of state elections. In contrast to the Commission's overly broad interpretation of the FECA's preemption statute in this instance, courts have construed its reach more narrowly. In general, courts recognize a strong presumption against preemption. (See Weber v. Heaney, 995 F.2d at 875, citing Cipollone v. Liggett Group, Inc., ___ U.S. ___, 112 S.Ct. 2608, 2621, 120 L.Ed.2d 407 (1992). In Stern v. General Elec. Co., the court emphasized section 453's limited reach:

"The preemption provision of the FECA, however, relates only to state-law provisions 'with respect to election to Federal office.' . . . The narrow wording of this provision suggests that Congress did not intend to preempt state regulation with respect to non-election-related activities." (924 F.2d 472, at 475 (2d Cir. 1991).)

In Stern, the court held that the FECA did not preempt state law governing whether corporate political contributions were actionable as corporate waste. 924 F.2d at 475-76. In Karl Rove & Co. v. Thornburgh, the court held that the FECA did not preempt state law with regard to the issue of whether a candidate for federal office was personally liable for the payment of debts incurred by the candidate's unincorporated principal campaign committee. 824 F. Supp. 662 (W.D. Tex. 1993). In Reeder v. Kansas City Bd. of Police Commissioners, the court found that section 453 did not preempt a state law forbidding police officers from making political contributions to federal campaigns. 733 F.2d 543, 545-46 (8th Cir. 1984). Given the narrower judicial construction of the FECA's preemption provision, it is questionable whether the Commission's asserted preemption of

¹ Where there is an express preemption provision, there is no need to infer congressional intent to preempt from the substantive provisions of the statute. Further, the fact that state law is not in conflict with the FECA does not preclude preemption. Weber v. Heaney, 995 F.2d at 875-876.

California's major donor provision in this case would stand up in court.

In addition, the analysis in the draft opinion equating the reach of the FECA's preemption provision with whatever a candidate or campaign committee may spend funds on under federal law, is flawed. As noted above, the Act preempts state regulation of committees "with respect to election to Federal office." To interpret this phrase, the Commission examined what was meant by federal and non-federal election purposes. The Commission observed that the Act and regulations permit wide discretion for a candidate and her campaign committee to use its funds for any campaign or campaign-related purpose, except as restricted by the personal use regulations.

The Commission contends that merely because the Roybal-Allard Committee was permitted under the FECA to use its funds to support or oppose a state ballot measure, the donation can be construed as "with respect to her election to federal office" for preemption purposes. Under the FECA, the scope of what candidates are permitted to spend campaign funds on is extremely broad. This standard cannot logically be used to set the boundaries for the phrase "with respect to election to Federal office" for preemption purposes. For example, a powerful member of Congress might attempt to strengthen his local political base by contributing \$10,000 to the campaigns of numerous state or local politicians. While under the FECA, this would be a permissible use of campaign funds, would the Commission contend that California's interest in disclosing this activity regarding state elections is preempted?

Indeed, the draft advisory opinion states that the "Commission views the donation as an integral part of Congresswoman Roybal-Allard's reelection campaign, rather than as a disbursement of funds for non-federal election purposes" and thus the Committee's obligation to disclose under state law is preempted. The conclusion reached here is a stretch. This was a simple monetary contribution. Under Buckley v. Valeo, every contribution is some type of political statement. (424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976.)) Surely, the Commission does not intend that such "statements" are shielded from disclosure in the context of a state election, just because the issue is an important one to a federal candidate who happens to be the contributor.

We assume that the Commission would not consider preempting California's major donor reporting requirements if the \$10,000 contribution had been made to a state candidate. While we are aware that limits may not be placed on contributions to ballot measure committees (see Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981)), the draft opinion goes much further and affects the disclosure of the contribution as well. The mere fact that a federal candidate made the contribution is without significance under section 453. There is no support for such a distinction between ballot measure and candidate contributions in the FECA.

The donation to oppose a state ballot measure in this case was a disbursement of funds for state election purposes. Even assuming that the \$10,000 donation to Tax Payers Against 187 can be viewed as having some effect on Ms. Roybal-Allard's federal reelection campaign, it clearly has a much more direct effect on the state ballot measure campaign. The effect of the donation on Congresswoman Roybal-Allard's reelection campaign, of demonstrating her publicly stated opposition to Proposition 187, is merely tangential compared to the effect of a \$10,000 cash infusion on the state ballot measure campaign. Thus the state's interest in having accurate disclosure of major contributors to a state campaign is paramount.

California has a compelling interest in ensuring adequate disclosure of contributions and expenditures for state campaigns, through mechanisms such as the major donor reports. (Socialist Workers 1974 California Campaign Committee v. Brown, 125 Cal.Rptr. 915, 53 Cal.App.3d 879 (1975).) The court found that the purpose of the Political Reform Act is to inform the electorate and prevent the corruption of the political process, and the achievement of these objectives promotes a compelling state interest.

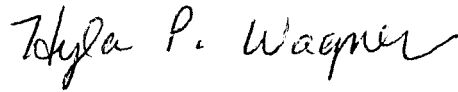
The Commission's assertion of preemption in this instance contradicts statements made in its own advisory opinions recognizing states' authority to regulate non-federal election activity. In Advisory Opinion 1986-27, the Commission stated that "[t]he Act does not ... preempt state law with respect to the reporting of receipts and disbursements of funds used for non-Federal election purposes or the registration and reporting of non-Federal accounts or state committees." (2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5867 (August 21, 1986).) In Advisory Opinion 1993-14, the Commission stated that "the State might not be precluded from imposing some restrictions or conditions on the State Committee if the Federal Account were to engage in non-Federal election activity." (2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6094 (August 13, 1993).) This is just such a situation. The Political Reform Act's major donor provisions do not regulate the Roybal-Allard Committee's activities in connection with a federal election. They simply govern the reporting of substantial contributions made to influence state elections.

With respect to disclosure, we would like to emphasize several points made in our previous comments. The major donor report imposes a minimal burden on the filer who must complete and file a three-page report. The report provides important disclosure about active contributors in state elections which would not otherwise be available to the public and the press.

For the reasons set forth above, we strongly urge the Commission to reexamine the draft advisory opinion's conclusion that the Political Reform Act's major donor provision is preempted by federal law in this case. If you have any further questions concerning this matter, please feel free to contact me at (916) 322-5901.

Sincerely,

Steven G. Churchwell
General Counsel



By: Hyla P. Wagner
Counsel, Legal Division